"DSH" and Queensland Treasury

(S 240/00 and S 241/00, 30 June 2003, Assistant Information Commissioner Moss)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

REASONS FOR DECISION

Background

1.1 These two applications for review relate to a number of job selection processes conducted by Queensland Treasury ("Treasury") in which the applicant was an unsuccessful candidate. The applicant sought access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to documents relating to those selection processes and documents relating to several of the successful candidates, including referee reports. The similarity of issues makes it convenient to deal with both applications for review together in this decision.

1.2 By letter dated 26 May 1999 (it is apparent that the year should have been 2000, since the application was lodged with Treasury on 26 May 2000), the applicant sought access under the FOI Act to numerous documents. He subsequently refined the terms of this access application by way of letter to Treasury dated 5 June 2000, clarifying that he sought access to the following documents (as summarised in Treasury's letter to the applicant dated 7 August 2000):

> *The following documents for myself and the successful applicants of the TY205/99, TY209/99, TY95/1999, TY96/1999, TY233/98 selection processes:*
>
> > *- referee comments, interview notes, selection panel reports, a copy of one of the written applications of each successful candidate (many candidates will have three copies of the same application) and any documentation which records comments;*
> > *- directions given to a selection panel from the Under Treasurer, Deputy Under Treasurer or AUT.*
>
> *Unadjusted (pre-mediation) interview and written application panel scores for the TY205/99 and TY209/99 selection process.*
>
> *The complete selection panel's (Chairman's) report, selection grids, referee comments, interview and written application individual*

unadjusted panel scores, one copy of a written application for successful applicants in the TY73/00 and TY74/00 selection processes. Also requested are the above listed documents that refer to me;

Copy of (one of) [Officer 1's] *written applications for the TY2000 selection process (SO2 process);*

The documents contained in my Treasury personal file;

Copy of email from Jan Sturgess to [Officer 1] *entitled AO5 outcomes (refer Attachment A) and its attachment entitled "AO5 combined scores" (refer also IR26 – JAD224); and*

The Treasury EMG meeting minutes from meetings held between 01-10-99 and 25-05-00.

1.3 This FOI access application is the subject of review no. S 241/00.

1.4 By letter dated 7 August 2000, Mr Lucas Clarke of Treasury informed the applicant that he had decided to give the applicant access to a number of documents or parts of documents, but that he had decided to refuse the applicant access to some matter on the basis that it was exempt from disclosure under s.40(a), s.44(1) and s.46(1)(a) of the FOI Act.

1.5 By letter dated 4 September 2000, the applicant applied for internal review of Mr Clarke's decision, insofar as it related to certain documents (mainly those containing matter claimed to be exempt under s.44(1) of the FOI Act). The internal review was conducted by Mr Darrin Bond of Treasury. By letter dated 19 September 2000, Mr Bond advised the applicant that he had decided to affirm Mr Clarke's decision in relation to the relevant documents or parts of documents. Mr Bond also granted the applicant partial access to two additional documents which fell within the terms of the applicant's FOI access application, and which had been located by Treasury during the internal review process.

1.6 By letter dated 6 July 2000, the applicant applied to Treasury for access under the FOI Act to:

1. *All referee reports regarding* [Candidate A] *in the TY94/99 AO6 selection process;*
2. *A copy of <u>all</u> of* [Candidate A's] *written applications in the TY94/99 AO6 selection process;*
3. *A copy of all written comments arising from* [Candidate A's] *AO6 TY94/99 interview;*
4. *All referee reports regarding* [Candidate B], [Candidate C] *and* [Candidate D] *in the TY93/99 AO5 selection process and*

5. *All referee reports regarding* [Candidate E] *in her successful TY2000 application to the position of Director.*

1.7 This FOI access application is the subject of review no. S 240/00.

1.8 By letter dated 24 August 2000, Mr Clarke informed the applicant that he had decided to give the applicant access to parts of several documents, but to refuse the applicant access to the balance of the requested matter on the basis that it qualified for exemption under s.44(1) of the FOI Act.

1.9 By letter dated 6 September 2000, the applicant requested internal review of Mr Clarke's decision. As with review S 241/00, the internal review was conducted by Mr Bond of Treasury. By letter to the applicant dated 19 September 2000, Mr Bond affirmed Mr Clarke's decision.

1.10 By letter dated 19 October 2000, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of both of Mr Bond's decisions.

2. Steps taken in the external review process

2.1 Copies of the documents in issue in both reviews were obtained and examined.

2.2 When making his FOI access applications, the applicant requested that Treasury not disclose to any third parties (such as the successful candidates, referees, *et cetera*) his identity as the applicant. Treasury acceded to that request, and, during the processing of the applications, it did not disclose the applicant's identity. Upon making his applications for external review to my office, the applicant again requested that his identity be kept confidential by my office. He stated that he was a whistleblower as defined in the *Whistleblowers Protection Act 1994* Qld and that disclosure to third parties of his identity, in the context of the FOI access applications he had made, would result in him being identified as a whistleblower engaged in a Public Interest Disclosure against Treasury.

2.3 In my letter to the applicant dated 21 December 2001, I advised the applicant that the name of an FOI access applicant is not usually kept confidential from other participants in a review before the Information Commissioner, unless there are valid reasons for doing so. I disputed the grounds upon which the applicant had argued that his identity should be kept confidential. The applicant then lodged a lengthy submission in support of his position that his identity should be kept confidential. Rather than allow the resolution of these reviews to become significantly delayed by an argument about this issue, my office took the view that the reviews would be processed without revealing the identity of the applicant, unless and until that became necessary. It has not, in fact, become necessary to disclose the applicant's identity to any third party, or otherwise confirm a third party's suspicions about the identity of the applicant.

2.4 There was some initial confusion regarding the matter in issue in review S 241/00. At first, Treasury provided my office with copies of two referee reports as part of the matter in issue. However, a review of the applicant's internal review application revealed that he had not sought review of Mr Clarke's initial decision as it related to those referee reports. I wrote to the applicant on 7 November 2001, advising him of that fact and informing him that, as a consequence, the Information Commissioner had no jurisdiction to deal with those two reports (see s.73(3) of the FOI Act). Accordingly, those two reports are not in issue in this review.

2.5 The applicant also queried why Treasury had apparently not dealt with two different referee reports to which he had requested access. It was eventually clarified that those reports had been disregarded by Treasury for the purposes of processing the applicant's FOI access application, based on Treasury's understanding that they fell within the terms of a general concession made by the applicant at the outset, namely, that he did not wish to pursue access to "external" referee reports (i.e., reports prepared by referees not employed by Treasury). The two reports in question were prepared by persons seconded to Treasury from other agencies/departments, but who were nevertheless employed by Treasury at the time they gave the reports. On that basis, the applicant confirmed that he wished to pursue access to the reports. Assistant Information Commissioner (AC) Shoyer advised Treasury that he considered that the reports fell within the terms of the applicant's FOI access application, and that they therefore should be dealt with in the course of review S 241/00, on the basis of a deemed refusal of access by Treasury. (Those reports in fact now comprise the only matter remaining in issue in review S 241/00.)

2.6 Given the volume of documentation in issue, and the numerous third parties referred to in that documentation, a lengthy period of time was devoted by staff of my office to attempting to resolve, informally, as many issues as possible, in order to reduce the volume of matter in issue. Discussions between my office, the applicant, Treasury, and a number of third parties, were successful in achieving those aims. Either Treasury agreed to give the applicant access to additional matter, or the applicant agreed to withdraw his application for access to certain matter. In addition, both AC Shoyer and myself took the opportunity, at appropriate stages of the review process, to express a preliminary view regarding whether or not certain matter in issue qualified for exemption under the FOI Act. Those preliminary views were also successful in persuading the participants to make concessions which resulted in simplifying the issues for determination, and/or reducing the volume of the matter in issue.

2.7 Eventually, after the informal resolution process had concluded, the matter which was left in issue comprised various referee reports which had been provided to Treasury in respect of the successful job candidates. Treasury claims that those reports are exempt under s.40(c) of the FOI Act. Both Treasury and the applicant have lodged written submissions and/or evidence addressing the application of s.40(c) to the referee reports, and each has been given the opportunity to respond to the other's submissions/evidence. I will discuss that material in detail below.

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2.8 In making my decision in this matter, I have taken into account the following:

6. the contents of the matter in issue;
7. the applicant's FOI access applications dated 26 May 2000 and 6 July 2000;
8. Treasury's initial decisions dated 7 August 2000 and 24 August 2000;
9. the applicant's applications for internal review dated 4 September 2000 and 6 September 2000;
10. Treasury's internal review decisions, both dated 19 September 2000;
11. the applicant's application for external review dated 19 October 2000 (and enclosures);
12. letters from the applicant dated 20 January 2002, 28 April 2002, 14 May 2002, 3 January 2003 and 5 May 2003 (and enclosures); and
13. letters from Treasury dated 14 March 2002 and 15 November 2002, and statutory declarations from the following persons:
    1. Jody Montgomery, dated 22 January 2003;
    2. Keith Millman, dated 4 March 2003;
    3. Ian Munro, dated 4 March 2003; and
    4. Glen Poole, dated 7 March 2003.

3. Matter in issue

3.1 The matter in issue consists of the following referee reports:

1. report by [Officer 1] in respect of [Candidate A];
2. report by Glenn Poole in respect of [Candidate A];
3. report by [Officer 2] in respect of [Candidate B];
4. report by Ian Munro in respect of [Candidate B];
5. report by [Officer 3] in respect of [Candidate C];
6. report by Keith Millman in respect of [Candidate C];
7. report by [Officer 4] in respect of [Candidate D];
8. report by [Officer 5] in respect of [Candidate D];
9. report by [Officer 6] in respect of [Candidate F]; and
10. report by [Officer 7] in respect of [Candidate F].

3.2 The reports were obtained in the course of three relevant selection processes, being the TY93/1999, TY94/1999 and TY205/1999 selection processes. All of the reports in issue follow the same general format and required the referees to comment upon the candidate's abilities in relation to the relevant selection criteria. There is also a "General Comments" section in each report. Some of the reports were prepared by the referees themselves. Other referees provided their reports during the course of a telephone conference with a representative of the relevant selection panel on the basis that their comments/responses would subsequently be reduced to writing.

3.3 It is important to note, in the context of the application of s.40(c) of the FOI Act, that all job candidates referred to above were "internal" applicants, that is, they were already employed within the Treasury portfolio in some capacity at the time they

applied for the relevant job, and that all the referees were Treasury employees at the time they provided their reports (and, in most cases, were the then current supervisors of the relevant job applicants, or the head of the relevant organisational unit within Treasury in which the job applicant worked).

4. Section 40(c) of the FOI Act

4.1 Section 40(c) of the FOI Act provides:

> ***40.*** *Matter is exempt matter if its disclosure could reasonably be expected to—*
>
> ...
>
> *(c) have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; ...*
>
> *unless its disclosure would, on balance, be in the public interest.*

(a) Requirements for exemption

4.2 In considering the application of s.40(c), I must determine:

(i) whether any adverse effects on the management or assessment by an agency of its personnel could reasonably be expected to follow from disclosure of the matter in issue (as to the test imported by the phrase "could reasonably be expected to", see *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, at pp.339-341 (paragraphs 154-160)); and

(ii) if so, whether the adverse effects amount to a substantial adverse effect on the management or assessment by an agency of its personnel. The adjective "substantial" in the phrase "substantial adverse effect" means grave, weighty, significant or serious effects (see *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663, at pp.724-725, paragraphs 148-150).

4.3 If I am satisfied that disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel, I must then consider whether disclosure of the matter in issue would nevertheless, on balance, be in the public interest. I will discuss in section 4(d) below, the public interest balancing test, and the participants' submissions in respect of the application of that test to the matter in issue.

1. Submissions of the participants

1. Treasury's submissions

4.4 In short, Treasury relies upon findings made by the Information Commissioner in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293. In that decision, the Information Commissioner examined in detail issues relating to disclosure of referee reports and performance appraisal material. However, there is a significant point of distinction between *Re Pemberton* and the present case, in that Dr Pemberton was the subject of the referee reports to which he sought access, whereas the applicant in the present case is not the subject of the referee reports in issue. Treasury relies on the Information Commissioner's finding in *Re Pemberton* that disclosure of referee reports/performance appraisals by a Head of Department, to persons other than the subject of the reports, could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of its personnel (see paragraph 4.12 below). (The Information Commissioner went on to find that disclosure to Dr Pemberton of some of the reports in issue in that case would, on balance, be in the public interest. But the particular considerations which led to that finding in *Re Pemberton* do not apply to the applicant in this case.)

4.5 Treasury argued that referee reports play a significant role in the assessment by Treasury of the suitability of its personnel for job selection and promotion purposes. Treasury claimed that the disclosure of referee reports to third parties under the FOI Act could reasonably be expected to adversely affect job selection processes, and therefore staff management and assessment, by leading to referees providing bland, tempered reports, and to general disruption and disharmony within the workplace:

> *I consider that senior staff within Queensland Treasury would be reticent to record adverse comments in referee reports if they were aware that such reports could be released to a person other than the subject candidate. It is possible that adverse comments made by senior staff regarding the candidate could be obtained by the candidate's rival for promotion or their subordinates.*
>
> *Information which details the shortcomings or deficiencies in a candidate's work performance could be injurious to their chance of future promotion if the documents were released to the candidate's rivals. Moreover, unscrupulous persons could misuse such information and damage the career prospects of the candidates. These comments are noted generally. I am certainly not suggesting that* [the applicant] *would use the referee reports for any mischievous purpose.*
>
> *Referee reports play a key role in the assessment of the department's personnel in relation to the recruitment and selection process. Selection panels must rely on internal and/or external referee reports as part of this process. It is generally accepted , within the department, that referee reports will be treated with confidentiality. In order for referees to provide full and frank assessments as part of the recruitment and selection process, a selection panel may give this undertaking of confidentiality. The release*

of referee reports under FOI may adversely affect the recruitment and selection process and the disruption to effective management would not be in the interest of Treasury.
[Treasury letter dated 15 November 2002]

4.6 Most of the referees who provided the reports in issue were consulted during the review process regarding disclosure of their reports (two referees are no longer employed by Treasury, and Treasury had no current contact details for them). Most of the referees objected to the disclosure of their reports, and three referees (Keith Millman, Glenn Poole and Ian Munro) provided statutory declarations in support of their objections to disclosure. The substance of each of those statutory declarations is that the respective deponents would be hesitant to provide referee reports in future, or would be circumspect in the detail contained in any report given, were referee reports to be amenable to access under the FOI Act by persons other than the subject of the report.

4.7 In addition, Ms Jody Montgomery, a Treasury Human Resources manager who was involved in the conduct of the relevant job selection processes, provided a statutory declaration in support of Treasury's objection to disclosure of the referee reports. Ms Montgomery relevantly stated:

At the time the TY93/1999, TY94/1999, TY98/1999 and TY205/1999 selection processes were conducted, Queensland Treasury did not provide potential referees with express assurances of confidentiality. However, it was the general practice of Queensland Treasury to treat all documents — including referee reports — generated during the selection processes as highly confidential, and the circumstances surrounding selection processes at that time were such as to indicate that selection documents, including referee reports, were to be treated as confidential. I refer particularly to two Queensland Treasury documents in force at the time the above-mentioned selection processes took place:

(i) The 1999 version of Guidelines for Applicants, which relevantly advised job applicants as follows:

CONFIDENTIALITY

All of the information accumulated about applicants in the selection process is regarded as confidential. This includes Equal Employment Opportunity information collected from the Application Cover Sheet which is used to monitor and evaluate the effectiveness of the department's recruitment and selection strategies.

(ii) The April 1999 version of Queensland Treasury's Recruitment and Selection Procedures Handbook, which

canvassed the disclosure of referee reports only to those applicants who were the subject of the reports:

Documentation

… 21.4 Committee members should be aware that applicants are entitled to gain access to their own interview and referee reports. Only information that is directly relevant to the selection criteria and process of selection should appear in the selection report. The selection committee's assessments may be provided within the context of an appeal hearing, and within the context of post selection feedback in the form of comparative analysis.

At the time the above-mentioned selection processes took place, I consider that it would never have been contemplated by referees that the reports they provided could be disclosed to a third party, whether under the Freedom of Information Act 1992 *Qld or otherwise.*

Queensland Treasury has at all times endeavoured to provide information, feedback and relevant documentation to job applicants as regards their own applications. It is, however, my strong belief that the provision of documents such as referee reports to a third party would represent a breach of trust, and would undermine Queensland Treasury's recruitment and selection processes by discouraging potential referees from providing reports, or at least result in referees providing less candid and open reports.

2.Applicant's submissions

4.8 The applicant provided, at various stages during the external review process, lengthy submissions in support of his case for disclosure, and supplemented those submissions with extensive excerpts from various cases and decisions, reference to detailed assessments and calculations which he has carried out in relation to the various selection processes, and a range of attachments including scoring matrices, most of which are documents which he has obtained as the result of various FOI access applications he has made to Treasury. The applicant's submissions are, in parts, difficult to understand, and make extensive reference to precedents, authorities and principles which are not relevant to the issues arising for determination in these reviews. I will attempt below, to summarise the thrust of the applicant's substantive submissions which are relevant to his case that the referee reports in issue do not qualify for exemption under s.40(c) of the FOI Act.

4.9 In his first substantial submission (contained in his letter dated 28 April 2002), the applicant made extensive reference to a range of statutory and policy instruments, including the *Public Sector Ethics Act 1994* Qld, the Second Reading speech for the Public Sector Ethics Bill 1994, the Guidelines for Development of Codes of

Conduct under the *Public Sector Ethics Act*, Treasury's Code of Conduct, Treasury's Recruitment and Selection Procedures Handbook 1999, the Senior Executive Service Handbook, the *Public Service Act 1996* Qld, and the Information Commissioner's decisions in *Re "B"* and *Re Pemberton*. The thrust of the applicant's submission was to argue that, in providing referee reports, public servants are discharging their employment duties, that is, the giving of referee reports is part of the official functions of a public servant. It is therefore not open to a public servant to refuse to give a referee report. Moreover, for a referee to knowingly give a "dishonest" referee report, or to temper their report in such a way as to potentially render a selection process ineffective, would be in breach of a public servant's duty to undertake his or her employment duties in a diligent, efficient and honest manner, and would render the officer liable to disciplinary action. This contention by the applicant is summarised in the following extract from his submission dated 5 May 2003:

1. *In correspondence dated 28 April 2002 to your office I demonstrated that the provision of referee reports by public servants for public servants is part of the official duties of a public servant…*
2. *Treasury employees have also stated in their statutory declarations that they provided the references in question as part of their official duties.*
3. *In both my correspondence of 28 April 2002 and, more significantly, in other previous correspondence to the Commissioner, I further highlighted that as part of a public servant's official duties a referee must provide honest, succinct references. Demonstrating this I quoted from the Guidelines f*
4. *or the Development of Codes of Conduct Public Sector Ethics Act 1994, the Second reading speech for the Ethics Bill and the Queensland Treasury Code of Conduct.*
5. *For a Treasury employee to do other than to provide an honest reference (as part of an Officer's official duties) would be a breach of the Queensland Treasury Code of Conduct and its associated legislation. In my previous submissions to the Commissioner I have gone to some lengths to highlight an officer's responsibilities under the relevant code of conduct.*
6. *Disciplinary action (even demotion or dismissal) can be taken where a Treasury employee has breached the Code of Conduct (the Code).*
7. *To intentionally provide a reference that is so flawed that it contributes to the creation of "a substantial adverse effect on the management or assessment by an agency of its personnel" would be a breach of the Code.*
8. *A breach of the Code such as making a decision not to fulfil the official duties in relation to the provision of references would be a disciplinary offence…*
9. *…Many courts throughout Australia have demonstrated that where a law contains an exemption (or requirement) the object of the law is*

not applicable where the claimed exemption (or requirement) only arises as a result of a breach of an existing law….

10. *…To some extent this legal principle appears to be reflected in relation to the Information Commissioner's legal comments in Paragraph 42* [of Re Pemberton] *where he writes in relation to* [defamation]:

> "Authors of referee reports have little to fear in terms of an action for defamation unless they have acted in bad faith (e.g. out of malice towards the subject of the report), in which case it is difficult to justify protecting them with the cloak of confidentiality"

11. *The Commissioner is stating that unless referees have acted in bad faith and therefore illegally, they have nothing to fear. And if they have acted illegally,* ***it is difficult to justify using their illegal action as a justification for protection under legislation providing exemptions****.*
12. *… Therefore, the fact that certain officers of Queensland Treasury appear to have advised through statutory declarations that they will act illegally unless s.40(c) of the Act is applied is not a defence under that provision of the Act any more than if they say that they will kill Treasury selection process applicants unless that part of the Act is applied. The killing of applicants would certainly have "a substantial adverse effect on the management or assessment by an agency of its personnel".*
13. *Threatening to do something illegal is not sufficient for the Commissioner to invoke s.40(c) of the FOI Act. On the contrary, Mr Poole, Keith Millman and Mr Ian Munro have provided the exact reason that it is important to release these references. Public servants do not always act within the law (as effectively admitted by these public servants).*
14. *…For your reference I have highlighted below that page 22 of the Guidelines for…the Development of Codes of Conduct under the Public Sector Ethics Act 1994 states:*

> "**7.12 Testimonials, Referee Reports Selection Reports and Performance Reports**
>
> …When providing testimonials or references officers should take care not to make false or **misleading** statements about an individual, or assessment which cannot be substantiated. Similarly, referees should take care not to **exaggerate** the substance of a person's competence, qualifications or experience"

and that the Queensland Treasury Code of Conduct, which exists by virtue of the provisions of the Ethics Act, specifically states that:

> "Treasury Officers should:
>
> .....
>
> 1. act honestly (as required under section 8(1) of the *Public Sector Ethics Act 1994*)
>
> .....
>
> Those who manage staff have a **particular responsibility** to ensure that **a good example is set** for other staff, treat staff fairly and equitably.....
>
> "Treasury Officers should:
>
> .....
>
> *2.* Exercise due care when providing advice to other members of the Queensland Government and in particular the public." *(I consider that this would reasonably apply to a reference)*
>
> ".....
>
> **Example of conduct which does NOT satisfy the obligation (of diligence)**
>
> *3.* An employee knowingly provides incorrect information to an individual making a request for information"
>
> *4. In addition to the above the Treasury Code requires that Treasury Officers act diligently and honestly in the performance of their duties.*
>
> [applicant's emphasis and underlining]

4.10 The applicant made a number of further submissions in support of his argument that disclosure of the referee reports in issue would be unlikely to have a substantial adverse effect on the management or assessment by Treasury of its personnel. These can be summarised as follows:

> 5. referee reports can be subject to disclosure during an appeals process conducted by the Office of the Public Service Commissioner ("OPSC") under the provisions of the *Public Service Act*, proceedings at which an appellant may bring a friend (both of whom may have access to selection documents such as referee reports) and that *'even with public servants being aware of this, there has been no suggestion that in this practical 'real world' example public servants have not continued to provide reasonable references, not*

tempering them in case they are made known to other parties' (see the applicant's 28 April 2002 submission);

6. referee reports are not the sole instrument used in reaching a selection decision, and public servants generally enjoy the protection of appeal mechanisms (particularly through promotions and unfair treatment appeals to the OPSC), such that *"this system would mean that the release of referee reports through FOI should not have a substantial adverse effect on the running of the personnel of an agency as the selection panel would take a holistic approach in making its selection decision"*. (see the applicant's 28 April 2002 submission);

7. aside from the applicant's own access applications, "*in most cases there would not reasonably be expected to be an FOI application for (referee reports)*", and "*that most selection processes in the Queensland public service do not result in the release of a significant number of referee reports being sought under FOI*". (see the applicant's 14 May 2002 submission);

8. in most cases, *"many referees actually consider the person for whom they are providing a reference is satisfactorily proficient at their job…Where comments do not adversely affect someone's chances of obtaining employment there is no reason for a referee to care if that reference is made public…In summary, in the real world if the references in question are released under FOI, public servants will continue to supply references in exactly the same manner as they currently do"* (see the applicant's 28 April 2002 submission); and

9. in the *"unlikely event"* that public service officers refused to provide referee reports for fear of disclosure under the FOI Act, *"a chief executive could introduce a requirement that personnel be required to provide references as part of their duties if nominated by a colleague … That is, the CEO can require the continued supply of honest references if this is considered desirable"* (see the applicant's 28 April 2002 submission).

4.11 I also note that, in his submissions, the applicant has made numerous references to whether disclosure of the referee reports in issue could reasonably be expected to prejudice the future supply of referee reports from a substantial number of persons, and has argued that such a test is difficult to meet where persons are required to provide reports as part of their employment or official duties as public servants. The test to which the applicant is referring is a requirement for exemption under s.46(1)(b) of the FOI Act. It is not a requirement for exemption under s.40(c), which is the only exemption provision with which I am concerned in this decision.

(c) Analysis - application of s.40(c) to the matter in issue

4.12 As I noted above, the Information Commissioner discussed referee reports, and the application to them of s.40(c) of the FOI Act, in *Re Pemberton* at paragraphs 111-204. The matter in issue in that case comprised referee reports, and reports by the applicant's Head of Department, regarding the applicant's suitability for promotion. The Information Commissioner decided that disclosure of information of that kind (including performance appraisal material) could reasonably be expected to have a substantial adverse effect on the management or assessment by the University of its personnel. At paragraphs 152-153, the Information Commissioner said:

> *152. However, the prospect of disclosure of reports of this kind to any person who applies for them under the FOI Act (there being no requirement under the FOI Act to show a special interest in obtaining particular information - see the discussion at paragraphs 165-168 below) raises additional factors which lend greater credence to the University's claims, and could well inhibit a substantial number of responsible senior academics from recording in written reports their honest assessments of candidates for promotion. While I have emphasised the view that Heads of Department and Pro-Vice-Chancellors who responsibly perform their management role (including the requirements of the staff appraisal scheme) should not have occasion to convey to a selection committee any substantial adverse comment on the performance of a candidate for promotion which has not been conveyed directly to the candidate (in the interests of constructively addressing the need for improvements in performance), I nevertheless consider that it is reasonable to expect that even responsible managers would baulk at recording in writing such adverse comment if it were to be available for access under the FOI Act to any person who applied for it, including, for instance, the candidate's rivals for promotion, or students in the candidate's Department. The task of constructively addressing shortcomings in staff performance has greater prospects of success through co-operative effort if details of the perceived shortcomings in performance, and the action plan to address them, remain confidential to the relevant managers and the staff member concerned.*
>
> 1. *If reports of the kind under consideration were to be available under the FOI Act to any person who applied for them, I think it is reasonable to expect that a great many Heads of Department, Deans of Faculty and Pro-Vice-Chancellors would resort to the preparation of bland written reports, that were not particularly helpful to selection committees, and seek to convey orally to selection committees any adverse comments that they felt must be drawn to attention. I accept that this would carry with it most of the*

> *adverse effects identified in the University's submission …. In one sense, the fact that criticisms are conveyed orally may not substantially prejudice the University's goal of ensuring that the most worthy candidates for promotion are successful. (In many organisations, oral rather than written references are the norm, though few organisations have the elaborate system of selection committees which operate within the University.) However, I accept that it introduces significant inefficiencies into the system of assessment, and makes it less likely that opinions on a candidate will be supported by particulars of the evidence considered to justify the opinion, thereby making it harder for selection committees to make fully informed assessments and denying the candidate for promotion the benefit of meaningful feedback on weaknesses in performance that need to be addressed in order to further future claims for promotion. I think it is reasonable to expect that the reaction I have described would occur in the case of a significant proportion of Heads of Department, Deans of Faculty and Pro-Vice-Chancellors, and I consider that it would have a substantial adverse effect on the management or assessment of the University's personnel for the purposes of s.40(c) of the FOI Act.*
>
> [my underlining]

4.13 In his submissions, the applicant argued that the circumstances in the present case differ from those in *Re Pemberton*, such that a different finding is warranted. In his letter dated 3 January 2003, the applicant stated:

> *…in* Pemberton *argument was not presented or considered as to whether the university lecturers would be acting illegally in intentionally providing references of little use. I note that much of the legislation requiring effective administration by public servants and honesty and diligence in carrying out their official duties came into effect after* Pemberton. *For example, while the Ethics Act was passed towards the end of 1994 it wasn't until 1999 that Queensland Treasury completed their Code of Conduct and emailed it to all staff with an instruction that they are to be aware of its obligations.*

4.14 Treasury's Code of Conduct, implemented in 1999, was developed in a personnel management environment with two characteristics which were well-established (dating from at least 1991, when the *Public Sector Management Standard for Performance Planning and Review*, and the *Public Sector Management Standard for Recruitment and Selection* came into force, with binding effect on Treasury) and which are relevant for present purposes:

(a) a system of annual performance appraisals by supervisors of their staff, the cornerstone of which is that the appraisal process remain confidential to the participants and a reviewing officer; and

(b) a system for selection processes in which persons asked to provide referee reports on a candidate for an advertised vacancy would understand that the report provided for the selection panel might be disclosed to the subject of the report, but would otherwise be treated in confidence.

4.15 These are sensible safeguards which those who prepared Treasury's Code of Conduct would have had no reason to believe were likely to be dismantled. With the benefit of these safeguards, Treasury officers are expected, when providing testimonials, referee reports, selection reports and performance reports, not to make false or misleading statements about an individual, nor provide assessments which cannot be substantiated, nor exaggerate the substance of a person's competence, qualifications or experience.

4.16 I think that it is arguable, on a technical basis, that for a referee to offer a bland report, that refrains from negative comment, does not necessarily involve making a false or misleading statement. It is not necessarily the case that innocuous or diffidently worded reports will be inaccurate or misleading. However, the real point is that the applicant is arguing that sensible safeguards, which facilitate the provision of frank and candid appraisals of an individual's work performance by a supervisor/referee, and hence optimise the prospects of improved work performance, and of the selection of the most meritorious candidates for appointment/promotion, should be overridden. This is to ignore decades of practical experience with performance appraisal schemes in both the public and private sectors which have demonstrated that the optimum conditions for encouraging supervisors and supervisees to overcome a common reluctance to raise, confront and address concerns over shortcomings in an officer's performance, in a way that assists in maintaining satisfactory working relationships, is to guarantee that the process is confidential to the participants and a reviewing officer.

4.17 Similarly, with referee reports, a supervisor in Treasury would be aware that his or her comments in a referee report may be disclosed to the subject of the report (as Treasury's Recruitment and Selection Guidelines caution), and the same degree of honest appraisal that would be expected in an annual performance review would be expected in a referee report. However, the prospect of disclosure of a referee report to persons other than the subject of the report and those directly involved in the selection process, would give rise to understandable concerns on the part of many referees regarding the implications of critical comments about the subject of the reference being disclosed any more widely (for example, to persons under the supervision of the subject of the referee report, or to rivals for promotion) and the possible resulting damage to harmonious working relationships.

4.18 As in *Re Pemberton*, I accept that even responsible supervisors would baulk at recording (or having recorded) in writing (whether in the form of a referee report, or a

performance appraisal document, *et cetera*), such adverse comment if it were to be available for access by anyone under the FOI Act, such as rivals for promotion, junior staff members, *et cetera*. I accept that a great many supervisors would resort to the preparation of bland or guarded reports (three senior Treasury officers have attested to that fact in this review, and I accept their evidence in that regard), which would not be particularly helpful to selection panels. Some supervisors may seek to convey orally to a selection panel (on the understanding that no written record of their comments be made), any adverse comments that they consider should be drawn to the panel's attention. As the Information Commissioner noted in *Re Pemberton*, in one sense, the fact that criticisms are conveyed purely on an oral basis may not substantially prejudice the selection of the best candidate for the relevant job. However, I accept that it introduces significant inefficiencies into the job selection process, and makes it less likely that opinions on a candidate will be supported by full particulars of the evidence considered to justify the opinion, thereby making it harder for selection panels to make fully informed assessments and denying the candidate the benefit of meaningful feedback on any perceived weaknesses in performance.

4.19 In short, I can see no basis for distinguishing the Information Commissioner's findings in the passages from *Re Pemberton* quoted at paragraph 4.12 above. I am satisfied that disclosure under the FOI Act of the referee reports in issue in these reviews could reasonably be expected to inhibit a substantial number of supervisors from recording adverse comment in their referee reports. I consider that the provision of bland, tempered referee reports to selection panels would prejudice the panels' ability to fully and effectively assess the relevant candidates' abilities and suitability for appointment, which, in turn, could reasonably be expected to have a substantial adverse effect on the management or assessment by Treasury of its personnel. I do not accept the applicant's contention that the provision of a bland or guarded referee report would necessarily amount to illegal or unethical conduct by a public servant.

4.20 Given my finding in the preceding paragraph, I will deal only briefly with the remainder of the applicant's contentions. Firstly, as regards the applicant's submission referred to in the third bullet point of paragraph 4.10 above, whether or not it is "reasonable" to expect that many FOI applications seeking access to referee reports or any other selection documentation are likely to be made, is irrelevant to the issues for determination under s.40(c). I would simply note that my office has received numerous applications for review involving unsuccessful job applicants seeking access to the relevant selection process documents.

4.21 As to the first bullet point in paragraph 4.10 above, I do not consider that the possibility of disclosure of materials through the OPSC appeals process can be regarded as analogous to the system of access established by the FOI Act. The right of appeal under the OPSC system, which <u>may</u> lead to the disclosure of a referee report, is strictly limited and is available only to a narrow class of persons (i.e., persons who applied for the relevant vacancy and are officers of the public service at the time announcement of a selection decision is made), with an appeal to be lodged within 21

days of such decision. In addition, appeals may not be made against appointments and promotions of persons to certain positions, including Senior Executive Service and Senior Officer positions (see the Office of Public Service Merit and Equity Promotional Appeals Guidelines). Conversely, any person may make an application for access to documents under the FOI Act, there being no requirement for the access applicant to show any special interest in obtaining the relevant documentation, and nor is the right to lodge an FOI access application subject to any time limit.

4.22 Furthermore, although the applicant claims that participants in an OPSC appeal are not required to sign confidentiality agreements and are thus theoretically unrestricted in the use to which they might put information obtained during that process, I note that the OPSC's information bulletin regarding the appeals process (entitled "Promotion Appeals") states:

> *All documents produced for the appeal <u>are confidential and may only be shown to persons with a relevant interest</u>, such as a union official or human resource officer advising a party…*
>
> (my underlining)

4.23 In contrast, the FOI Act imposes no restrictions on the further use or dissemination of information which a person obtains under the FOI Act (although there may be restrictions under the general law, as contemplated by s.102(2) of the FOI Act). I do not consider that the possibility of disclosure through an OPSC appeals process, and the scheme of access provided for by the FOI Act, can be meaningfully compared. I do not consider that potential referees would view in the same way, in terms of the type of frank and candid information they might include in a referee report, the limited possibility of disclosure of such information to interested parties on restricted terms under the OPSC process, as opposed to the possibility of disclosure of the information to any person under the FOI Act.

4.24 Nor can I accept the applicant's unsubstantiated contention extracted at the fourth bullet point of paragraph 4.10 above. None of the referee reports in issue in this case contains any particularly negative or adverse comments. They are, on the whole, a positive appraisal of the relevant candidates. Nevertheless, most of the referees in question object to disclosure of their reports. While referee reports are frequently favourable, there are obviously occasions where a referee will feel obliged to submit a negative or unfavourable report in respect of one or more of the key selection criteria. I have explained above my view that it is reasonable to expect that a significant number of referees would feel inhibited in providing that type of adverse comment, were their reports to be available to persons other than the subject of the referee report and those involved in the relevant selection process. That would, in turn, lessen the effectiveness of the reports in assisting an agency to recruit or promote the most meritorious candidates for advertised vacancies.

4.25 The applicant's final submission referred to in the fifth bullet point in paragraph 4.10 above, is an unrealistic argument. It is impractical to compel a referee to provide more than he or she is willing to provide, and the point of the exercise is to provide the optimum conditions to encourage the provision of frank and candid referee reports.

4.26 For the reasons explained above, I find that disclosure to the applicant of the referee reports in issue in these reviews could reasonably be expected to have a substantial adverse effect on the management or assessment by Treasury of its personnel.

(d) Public interest balancing test

4.27 The satisfaction of the test for *prima facie* exemption under s.40(c) of the FOI Act gives rise to a public interest consideration favouring non-disclosure of the referee reports. It is then necessary to weigh against that public interest in non-disclosure, the public interest considerations which favour disclosure of the reports, in order to determine whether disclosure would, on balance, be in the public interest.

(i) Submissions of the participants

4.28 In its submissions on the public interest balancing test, Treasury, in the main, repeated and relied upon the public interest considerations discussed by the Information Commissioner in *Re Pemberton*. It emphasised the public interest in protecting the provision of frank and candid referee reports, so as to facilitate an expeditious and efficient job selection and staff appraisal process. In its letter dated 14 March 2002, Treasury stated:

> *Although it is generally accepted that the public interest is served by access to information held by government, it is considered that this particular argument is limited to the disclosure of referee reports only and not all documentation that arises from the recruitment and selection process generally.*
>
> *There may be some public interest consideration to be weighed if the applicant, in this case, was the subject of the referee report. However, the applicant is not the subject of the referee report, and the public interest is not served generally by releasing this type of information to a third party.*
>
> *Considering the possible adverse affects relating to the disclosure of referee reports, the public interest is not served by the release of this matter.*

4.29 The applicant's main submissions in respect of the public interest balancing test were contained in his letter dated 3 January 2003. That document is 28 pages in length, and discusses, in detail, several of the job selection processes which were referred to in the applicant's FOI access applications (see paragraphs 1.2 and 1.6

above). In short, the applicant contends that each of the selection processes was flawed in some way. He has attempted to demonstrate that there were scoring and other irregularities in a number of the selection processes in which he was an applicant. In support of those contentions, the applicant has provided detailed scoring grids and explanations of weighting and scoring errors, supported by reference to selection documentation obtained by him in the course of his various FOI access applications to Treasury. In essence, the applicant contends that he was unfairly denied selection in each of the relevant selection processes, or that those selection processes were in some way "unsafe", unfair, or conducted "contrary to law", due to a variety of discrepancies and irregularities, such as missing selection documentation, scoring errors or inconsistencies, inconsistent weighting between selection panel members, lack of "moderation" and intra-panel discussion, failure to take into account relevant information, unfair emphasis on certain material, *et cetera*. He argues that, as an unsuccessful candidate, he has a justifiable "need to know" in respect of the referee reports in issue which is more compelling than for other members of the public (*cf*. paragraphs 164-193 of *Re Pemberton*), which, together with the general public interest considerations favouring disclosure of the reports (such as the public interest in the accountability of Treasury and in the transparency of its job selection processes), are of sufficient weight to warrant a finding that disclosure to him of the referee reports would, on balance, be in the public interest.

4.30 In his letter dated 3 January 2003, the applicant stated:

> *In some cases I have highlighted specific problems or contradictions specifically in relation to the referee reports that I am seeking. In others, many aspects of the specific selection processes are contrary to required selection procedures to a substantive level, and the referee reports are required so that the selection process can be properly tested. Where reasonable suspicion of substantive irregularities in processes are demonstrated by me, there is considerable public interest in these specific processes being publicly tested.*
>
> *In such cases, referee reports are necessary to properly test the selections. This is due to the requirements of the Treasury selection rules that were in operation at the time that the selections in question were held, due to Office of the Public Service (OPS) precedent and as a result of a recent Supreme Court ruling. The Queensland Treasury Recruitment and Selection Procedures Handbook specifically states:*
>
> *12.1* ***Referee comments are to be used to supplement the selection decision.*** *.....*
>
> *12.3 Committee is to ensure that the technique proposed complies with the Public Sector Management Standard for Recruitment and Selection.....*

***18.1 Referee comments are to <u>form an integral component</u> of the selection process and are to be used to supplement the final selection decision."..... ***

20.1 ....The (selection) assessment is to consider ***all information*** *that was obtained* ***through the written application, the interview, referee reports*** *and any additional selection techniques which are adopted.*

This means that while referee reports certainly aren't necessarily the main matter in a selection, every selection technique is a part of the final selection determination and, therefore, required to review a selection decision. … Due to the necessity to review referee reports to test a selection, where irregularities in selection procedures are identified it is in the public interest that the referee reports be released so that the process is reviewable…

…

[applicant's emphasis and underlining]

4.31 The applicant also referred to the fact that he had not been shortlisted for interview for some positions, and alleged that the failure to shortlist him was, in effect, a "reprisal" for his having made a Public Interest Disclosure under the *Whistleblowers Protection Act* (see paragraph 2.2 above). However, the positions for which the applicant was not shortlisted for interview relate to the TY73/1999 and TY74/1999 selection processes. None of the referee reports in issue relate to either of those selection processes. While I accept the applicant's evidence that the Public Service Commissioner examined the TY74/1999 process and found it to be flawed, that is irrelevant to my consideration of whether the referee reports in issue (which relate to the TY93/1999, TY94/1999 and TY205/1999 selection processes) qualify for exemption under s.40(c) of the FOI Act.

4.32 I consider that paragraphs 4.29 and 4.30 above adequately summarise the substance of the applicant's submissions regarding the public interest balancing test. I do not intend to set out and discuss in detail, the applicant's submissions about each particular selection process and the various irregularities and errors which he contends were involved in each process, although I will refer, in the analysis below, to some of his specific contentions in that regard.

(ii) Analysis

4.33 I accept that there is a strong public interest in preserving the ability of Treasury to assess and manage its staff effectively, by ensuring the continued supply, from internal and external referees, of frank and candid appraisals of candidates for employment or promotion.

4.34 Equally, I accept that there is a significant public interest in the accountability of Treasury for the way in which it conducts its job selection processes, so as to ensure that such processes are conducted fairly, in accordance with relevant merit and equity principles. I acknowledge that referee reports can play an important part in public sector job selection processes.

4.35 I accept that, as an unsuccessful candidate in the relevant job selection processes, the applicant has an interest which is greater than that of any member of the general public (see *Re Pemberton* at paragraphs 164*ff*). I also accept the applicant's evidence that there were some anomalies and errors involved in a number of the job selection processes. (I note that Treasury has not attempted to dispute the applicant's submissions in that regard). I do consider, however, that the applicant at times takes an unrealistic view of the practicalities involved in public service job selection processes, and has an overly critical and suspicious attitude towards Treasury.

4.36 The issue for my determination, however, is whether the disclosure of the particular referee reports in issue, would serve to enhance the public interest in the accountability of Treasury, in respect of the relevant job selection processes, to an extent that, when weighed against the public interest in non-disclosure which is inherent in my finding at paragraph 4.26 above, warrants a finding that disclosure would, on balance, be in the public interest.

4.37 The applicant spent a great deal of time in his submissions discussing the referee reports relating to [Candidate D] (documents (vii) and (viii)), and what he contends are conflicting summaries of the relevant referees' comments. I note that the applicant has been given access to a "comparative comments" form and a selection panel report, which contain brief references to comments made by the referees. The applicant argues that those references suggest that [Candidate D] was not a suitable applicant for the TY93/1999 vacancy, and that the applicant should be given access to the relevant referee reports in order to clarify this issue. In his letter dated 3 January 2003, the applicant stated:

> *10. The Attached document…was written by Jan Sturgess, a non Treasury independent member of the TY93/99 selection panel. Jan Sturgess worked for a company called Merit Solutions, which assisted Treasury with the TY2000 selection process and was, therefore, an <u>independent</u> member of the selection panel. As I understand it Jan Sturgess obtained all references in this process from referees. Her signature at the bottom of Attachment I demonstrates this. Jan Sturgess wrote (refer Attachment B):*
>
> **<u>[Candidate D]</u>** AO3 - **1 referee advises <u>needs more</u> to reach AO5 issues** re application and closing off - needs direction

However, I note that in contradiction to the independent panel member's notes (the panel member that finalised referee reports) the TY93/1999 selection committee wrote in the official selection report (refer Attachment C):

[Candidate D]	**Referees valued his contributions in financial analysis market design and competition issues and regard him as suitable for the AO5 level**

11. *The above is contradictory and of some concern to me as an applicant. The two statements are irreconcilable.* [Candidate D] *received a very bad referee comment and yet he was appointed to a position. The referee clearly stated that* [Candidate D] *was not good enough at the AO5 level. Yet he was appointed. This was very different treatment to that which I received. The selection documentation indicates that I was not granted a position due to certain comments made by one of my referees. These comments were in stark contrast to my second referee and my score on written application. While one of my referees made certain criticisms, it is unlikely that he was stating that I should not be appointed. My referees were treated differently to* [Candidate D] *…to my detriment. Examination of selection documentation demonstrates that* [Candidate D's] 'interview scores' *were not adjusted in any way due to this negative referee comment.*

12. *The selection report contradicts Jan Sturgess' (the independent panel member) notes. I am specifically seeking the references relating* to [Candidate D] *due to this discrepancy which may support a claim that the selection panel was corrupted. I believe that given there is public interest in both justice being done and, as outlined earlier in this submission, being seen to be done, this discrepancy raises various questions in the public interest. This is especially true in light of the fact that scoring errors also occurred in relation to this process. If the references under question have this comment then the question would reasonably be asked as to why the selection report stated the opposite. If the selection reports do not have the comments the question would arise as to* ***what occurred to the original referee report.***

4.38 The comment by Ms Sturgess that "1 referee advises needs more to reach AO5" does not correspond to anything recorded in reports (vii) and (viii) (it appears that one report was prepared by Ms Sturgess following a telephone conversation between Ms Sturgess and the relevant referee, while the other report was prepared by the referee himself), whereas the other quoted comments by Ms Sturgess do correspond to matter recorded in one of the reports. One of the reports was

generally favourable to the candidate, while expressing reservations about some aspects of the selection criteria. The other was entirely favourable. The reports justify the comment from the official selection-panel report quoted at paragraph 4.37 above, but there is nothing recorded in the reports that would justify the comment "1 referee advises needs more to reach AO5", if it was intended as an overall assessment.

4.39 That comment was probably intended to relate to one aspect only of the selection criteria. Reference to the reports indicates that the other comments recorded by Ms Sturgess, as quoted at paragraph 4.37 above, related to particular aspects of the selection criteria. (If it was intended as a more general comment, which the referee did not want recorded in a referee report that might be made available to the candidate, it would tend to demonstrate that some referees are reluctant to convey adverse comments that could be available to the candidate, let alone to third parties.)

4.40 During the course of the review, the applicant informally raised a 'sufficiency of search' issue about the existence of any other referee reports about [Candidate D]. He argued that if reports (vii) and (viii) did not contain comments upon which Ms Sturgess had based her summary, then perhaps there were other relevant reports in existence. However, I am satisfied that reports (vii) and (viii) are the only referee reports relating to [Candidate D]. There is no material before me which gives rise to reasonable grounds for believing that any other referee report exists.

4.41 The interpretations which the applicant has put on Ms Sturgess' comment, i.e., *"*[Candidate D] *received a very bad comment"* …and *"The referee clearly stated that* [Candidate D] *was not good enough at the AO5 level…",* are not accurate or fair. The two comments to which the applicant has referred as irreconcilable are not necessarily contradictory or irreconcilable. The first comment probably relates to a particular aspect of [Candidate D's] work, while the comment from the official selection panel report represents a summary of the referees' overall views about [Candidate D's] suitability for appointment to the relevant position. A job candidate may be assessed as being somewhat inexperienced in a particular area or attribute, but nevertheless be considered to be suitable for appointment overall.

4.42 The applicant's involvement in this selection process tends to tell in favour of giving him access to reports (vii) and (viii) so as to enable him to satisfy himself that there is no inconsistency between those reports and the comment in the selection panel report, and that neither referee gave the opinion that [Candidate D] was too inexperienced to be appointed at AO5 level. However, the reports contain a significant amount of information which has not been referred to in the brief summaries to which the applicant has obtained access. I do not consider that disclosure of any of that information would assist in clarifying the issues which the applicant has raised.

4.43 In short, I do not consider that the applicant's interest in seeing reports (vii) and (viii) is sufficient as to outweigh the strong public interest in protecting the flow to selection panels of frank and candid referee reports. There is nothing in the reports to suggest, for example, that [Candidate D] was considered unsuitable for appointment to the relevant position, but that he was appointed nevertheless. Accordingly, after considering their contents in light of the applicant's submissions, and weighing the competing public interest considerations, I am not satisfied that disclosure to the applicant of reports (vii) and (viii) would, on balance, be in the public interest. I therefore find that reports (vii) and (viii) are exempt matter under s.40(c) of the FOI Act.

4.44 Similarly, I am not satisfied that other notations containing apparently negative comments about other successful candidates are sufficient to cast doubt on whether or not the particular candidate was the most meritorious applicant, much less amount to evidence that the relevant appointment was somehow tainted, biased or "unsafe". Such notations are simply brief impressions as to the specific attributes of a particular candidate, written prior to an overall assessment of the relative merits of that candidate. Nor do I consider that allegations of workplace intemperance levelled by the applicant against one of the successful candidates amounts to behaviour which somehow disqualified the candidate from being appointed to the relevant position. There is nothing in the referee reports in question (reports (i) and (ii)) to suggest that the referees considered the candidate unsuitable for appointment to the relevant position. Neither I nor the applicant are in any position to judge whether the relevant reports contain anything but honest and accurate assessments of the candidate's skills, attributes, strengths and weaknesses, as perceived by the referees.

4.45 As the Information Commissioner remarked in *Re Pemberton* (in the third dot sub-paragraph of paragraph 136), the evaluation of candidates for an advertised vacancy is an art rather than a science, and one inevitably attended by a substantial element of subjective judgment. While bound to observe guidelines and obligations laid down in documents such as Recruitment and Selection Guidelines, selection panel members nevertheless ultimately form their own views as to the strengths and weaknesses of particular candidates, based upon, as the applicant himself emphasises, all relevant material, including written applications, performance at interview, and referee reports. Apparently negative comments about successful candidates have been seized upon by the applicant as evidence of inconsistency, irreconcilable findings and, in some cases, possible bias and corruption. But there is nothing in the material before me to support such assertions, which appear generally to be the product of speculation by the applicant, based upon an overly suspicious and critical interpretation of the material, often taken out of context.

4.46 In respect of the TY93/1999 and TY205/1999 selection processes, the applicant has argued that the referee reports relating to both himself and the successful candidates were used selectively and unfairly, either to elevate the scores of successful candidates, or to reduce his own scores. However, such variations in scoring

cannot, of themselves, be regarded as suspicious. It is clear that the selection process entitles panels to consider referee reports, and to adjust a particular candidate's score upon such consideration, which might obviously result in an elevated (or diminished) score for that candidate (this process was explained to the applicant by Treasury during the course of an earlier external review application). Each of the reports in issue (reports (iii) to (viii) regarding the TY93/1999 selection process, and reports (ix) and (x) regarding the TY205/1999 selection process) is supportive overall of the relevant successful candidate's suitability for appointment. While there is an aspect of the public interest that favours the applicant having access to such reports, so as to satisfy himself of this fact and to scrutinise and assess specific score weightings, I do not consider that the applicant's interest in that regard is sufficient to outweigh the public interest in non-disclosure that is inherent in my finding at paragraph 4.26 above.

4.47 Moreover, I am unable to see how disclosure of the various referee reports in issue would, in fact, assist the applicant to establish his various claims of bias, prejudice, corruption or maladministration. As I noted at paragraph 4.44 above, referees essentially give their subjective opinions when compiling a referee report. It would therefore be difficult to challenge the accuracy of opinions conveyed in a referee report about an officer's aptitudes, skills, diligence and other attributes. Similarly, as noted at paragraph 4.45 above, the overall process of job selection involves an element of subjective judgment.

4.48 It is difficult to see, for example, how allegations of technical deficiencies such as incorrect calculation of the applicant's scores, discrepancies in the assessment of his written application (the applicant made this contention specifically in relation to the TY94/1999 selection process), failure by a panel to moderate or to assign correct weightings to particular responses, or failure to interpret properly the applicant's own referees' comments, could be further addressed or explored by the disclosure of referee reports relating to the successful candidates.

4.49 The applicant has, through the course of these and other FOI access applications, been given access to a considerable volume of material relevant to the various selection processes in which he was involved, including the job applications of successful candidates and selection panel notes of their interviews, together with numerous anonymised scoring tabulations and matrices, suitably coded so as to enable him to assess the relative performance of himself, successful candidates, and anonymised unsuccessful candidates. The applicant has used this material to analyse the relevant selection processes conducted by Treasury, and he has compiled an extensive list of perceived errors and irregularities. While I recognise the applicant's particular interest, as an unsuccessful candidate, in the various selection processes conducted by Treasury, I am not satisfied on the material before me that disclosure of the referee reports would serve to clarify any further, the errors and irregularities alleged by the applicant, nor advance his arguments regarding bias, corruption or maladministration.

4.50 As I noted at paragraph 4.27 above, the satisfaction of the test for *prima facie* exemption under s.40(c) of the FOI Act gives rise to a public interest consideration favouring non-disclosure of the referee reports. After giving detailed consideration to the referee reports in issue, and the submissions of Treasury and the applicant, I am not satisfied that the public interest considerations raised by the applicant in favour of disclosure of the referee reports in issue outweigh the significant public interest in avoiding a reasonably apprehended substantial adverse effect on the management or assessment by Treasury of its personnel.

(e) Conclusion

5.1 I am satisfied that disclosure of the referee reports in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by Treasury of its personnel, and that disclosure to the applicant would not, on balance, be in the public interest. I therefore find that the referee reports comprise exempt matter under s.40(c) of the FOI Act.

DECISION

6.1 In respect of review S 240/00, I decide to vary the decision under review (being the decision dated 19 September 2000 by Mr Darrin Bond of Treasury) by finding that referee reports (i)-(viii) (as identified in paragraph 3.1 above) comprise exempt matter under s.40(c) of the FOI Act.

6.2 In respect of review S 241/00, I decide to vary the decision under review (being Treasury's deemed refusal of access – see paragraph 2.5 above) by finding that referee reports (ix) and (x) (as identified at paragraph 3.1 above) comprise exempt matter under s.40(c) of the FOI Act.

6.3 I have made this decision as a delegate of the Information Commissioner's powers, under s.90 of the FOI Act.

EDITOR'S NOTE:

In assessing the precedent value of this decision in respect of referee reports provided for selection processes in agencies that are subject to the *Public Service Act 1996* Qld, regard should be paid to the changes to the principles governing these selection processes effected by OPSME Directive No. 01/03. (Those changes were not in force at the time of the relevant selection processes dealt with in the above decision.) OPSME Directive No. 01/03 came into force on 2 June 2003, and applies to those agencies/officers governed by the provisions of the *Public Service Act 1996*. Clause 6.7(c) of this Directive states that referees are obliged to disclose all information known to them about the subject of a referee report that is relevant to the duties and responsibilities of the advertised vacancy.