**OFFICE OF THE INFORMATION COMMISSIONER (QLD)** ) S 77 of 1993
) (Decision No. 94004)

Participants:

"T"
Applicant

- and -

QUEENSLAND HEALTH
Respondent

## DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access to documents and parts of documents created by the Drugs of Dependence Unit of Queensland Health - whether exempt matter under s.42(1)(e) of the *Freedom of Information Act 1992 Qld* - explanation of the requirements of s.42(1)(e) of the *Freedom of Information Act 1992 Qld* - explanation of the meaning of "lawful method or procedure" and "contravention or possible contravention of the law (including revenue law)".

*Freedom of Information Act 1992 Qld* s. 5(1)(c), s.5(2), s.6, s.42, s.44(1), s.45(1)(c), s.76(1), s.80, s.81, s.87(2)(a)
*Freedom of Information Act 1982 Cth* s.37(2)(b), s.37(3)
*Freedom of Information Act 1982 Vic* s.31(1)(d)
*Fair Trading Act 1989 Qld* s.38, s.39
*Anti-Discrimination Act 1991 Qld*
*Health Act 1937 Qld* s.152
*Poisons Regulation 1973 Qld* s.A2.03(b), s.H5, s.M1, s.N1, s.N2, s.N3, s.Q2.01

*Anderson and Australian Federal Police, Re (1986)* 4 AAR 414
*Arnold Bloch Leibler and Co and Australian Taxation Office (No.2), Re (1985)* 9 ALD 7
*"B" and Brisbane North Regional Health Authority, Re* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported)
*Conte and Australian Federal Police, Re (1985)* 7 ALN N71
*Lapidos and Auditor-General of Victoria, Re (1989)* 3 VAR 343
*Lawless and Secretary to Law Department and Ors, Re (1985)* 1 VAR 42
*McEniery and the Medical Board of Queensland, Re* (Information Commissioner Qld, Decision No. 940002, 28 February 1994, unreported)
*Mickelberg and Australian Federal Police, Re (1984)* 6 ALN N176
*Reithmuller and Australian Federal Police, Re (1985)* 8 ALN N92
*Ward and Australian Federal Police, Re (*No. V85/414, 20 February 1987, unreported)

## DECISION

I affirm that part of the internal review decision of Dr D Lange of Queensland Health made on 14 April 1993 by which it was decided that folios 3, 11, 20, 22, 25, 50, 51, 74, 75, 78 and 84, and portions of folios 12, 19, 21, 31 and 73, are exempt from disclosure under s.42 (1)(e) of the *Freedom of Information Act 1992 Qld.*

Date of Decision: 11 March 1994

.....

F N ALBIETZ
**INFORMATION COMMISSIONER**

## TABLE OF CONTENTS

**Page**

**OFFICE OF THE INFORMATION COMMISSIONER (QLD)** ) ) S 77 of 1993 (Decision No. 94004)

Participants:

"T"
Applicant

- and -

QUEENSLAND HEALTH
Respondent

## REASONS FOR DECISION

### Background

1. The applicant seeks review of a decision of the respondent, Queensland Health, to refuse him access to certain documents and parts of documents claimed by the respondent to comprise exempt matter under s.42(1)(e) of the *Freedom of Information Act 1992 Qld* (hereinafter referred to as the FOI Act or the Queensland FOI Act). These documents and portions of documents constitute the matter remaining in issue after the number of documents initially in issue has been gradually whittled down, through concessions made by both participants and two third parties, during an extended mediation process undertaken in accordance with my powers under s.80 of the FOI Act.

2. The applicant's FOI access request was for *"all information held by Queensland Health where I am named or referred to, regardless of origin"*.

3. By a decision dated 11 February 1993 of Ms S Harris (Manager, FOI and Administrative Law Section) of Queensland Health, the applicant was granted full access to 64 folios and partial access to 24 folios, and he was refused access to 24 folios in their entirety. In refusing the applicant access to those documents and parts of documents, Ms Harris relied on s.42(1)(b), s.42(1)(e), s.44(1) and s.45(1)(c) of the FOI Act. At the applicant's request, an internal review of Ms Harris' decision was undertaken by Dr D Lange, Executive Director (Public Health Services) and Chief Health Officer, of Queensland Health. By decision dated 14 April 1993, Dr Lange affirmed the initial decision of Ms Harris. On 29 April 1993, the applicant applied to the Information Commissioner for external review of Dr Lange's decision of 11 February 1993.

### The External Review Process

4. Following examination of the documents in issue and a preliminary conference with representatives of Queensland Health, concessions were made by Queensland Health resulting in some additional matter being released to the applicant. Following further consultations with two third parties who were concerned with several of the documents in issue, those third parties advised that they did not object to the release to the applicant of the matter which concerned them, and as a result, Queensland Health agreed to its release to the applicant. These concessions meant that matter originally claimed to be exempt under s.42(1)(b) and s.45(1)(c) of the FOI Act no longer remained in issue.

5. I then wrote to the applicant setting out my preliminary views concerning the documents remaining in issue. The applicant was asked to indicate whether he accepted or contested my preliminary views. If the latter, the applicant was afforded the opportunity to provide me with a written submission addressing the issues for determination in the review under Part 5 of the FOI Act.

6. In a letter received on 24 November 1993, the applicant advised that he accepted my preliminary view that the matter claimed to be exempt by Queensland Health in reliance on s.44(1) of the FOI Act was exempt matter under that section. The applicant accordingly no longer seeks review under Part 5 of the FOI Act in respect of that part of the internal review decision which held that certain matter was exempt under s.44(1) of the FOI Act. My preliminary views in relation to the documents claimed to be exempt pursuant to s.42(1)(e) of the FOI Act were not accepted by the applicant. The applicant provided a written submission concerning the documents remaining in issue. His submissions may be summarised as follows:

> The applicant was concerned that the matter claimed to be exempt by Queensland Health pursuant to s.42(1)(e) of the FOI Act could contain "errors and distortions" and, accordingly, he wanted the accuracy of the matter contained therein verified. The applicant submitted that the person best able to verify the accuracy of the relevant matter was the applicant himself. Essentially the applicant's submission was that he should be afforded access to the documents to enable him to verify or dispute the accuracy of the matter recorded therein.
>
> The applicant submitted that the matter contained in the documents in issue may reveal that, in respect of the applicant, there had been a breach of any number of State and Federal laws or international conventions relating to privacy, human rights and civil rights. The applicant did not identify any particular laws or international conventions which he alleged may have been breached.

7. Queensland Health was afforded the opportunity to make a submission to me in relation to the issues arising for determination under s.42(1)(e) of the FOI Act. By letter dated 13 January 1994, Dr Lange provided me with a written submission which is discussed further below.

**The Applicable Legislative Provisions**

8. Section 42(1)(e) of the FOI Act provides as follows:

> *"**42.(1)** Matter is exempt matter if its disclosure could reasonably be expected to-*
>
> *...*
>
> *(e) prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law)."*

9. The other relevant provisions of s.42 are as follows:

> *"**(2)** Matter is not exempt under subsection (1) if -*
>
> *(a) it consists of -*
>
> *(i) matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law; ...*
>
> *... and*

> *(b) its disclosure would, on balance, be in the public interest.*
>
> *...*
>
> ***(4)*** *A reference in this section to a contravention or possible contravention of the law includes a reference to misconduct or official misconduct, or possible misconduct or official misconduct, within the meaning of the* Criminal Justice Act 1989.
>
> ***(5)*** *In this section -*
>
> ***"law"*** *includes law of the Commonwealth, another State, a Territory or a foreign country."*

**Analysis of Section 42(1)(e) of the FOI Act**

**Lawful Methods or Procedures**

10. The object of s.42(1)(e) is to provide a ground for refusing access to information, which ground may be invoked in circumstances where disclosure of the information could reasonably be expected to prejudice the effectiveness of methods and procedures adopted by government agencies undertaking law enforcement activities. However, s.42(1)(e) does not provide a blanket protection for every method and procedure adopted by government agencies. The methods and procedures used by an agency must be "lawful" to be afforded protection under this exemption.

11. In considering the meaning of "lawful" for the purposes of s.42(1)(e) of the Queensland FOI Act, it is of assistance to examine the legislative history of the corresponding provision of the *Freedom of Information Act 1982 Cth* (the Commonwealth FOI Act), s.37(2)(b), which provides as follows:

> *"A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to ...*
>
> *(b) disclose lawful methods or procedures for preventing, detecting, investigating or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures."*

12. The word "lawful" was not included in the original draft of the Commonwealth Bill but was inserted on the recommendation of the Senate Standing Committee on Constitutional and Legal Affairs. In its 1979 Report on the Draft Commonwealth Freedom of Information Bill, the Committee discussed the issue of disclosure of unlawful law enforcement practices (at p.228; paragraph 20.7):

> *"Most of the evidence submitted to the Committee on clause 27* [s.37] *concentrates on the need to ensure the disclosure of documents revealing the use of illegal law enforcement techniques or that an investigation has exceeded the limits imposed by law. The University of Queensland Public Interest Research Group referred to such illegal law enforcement practices as unauthorised 'bugging' (telephone tapping and other electronic surveillance), 'verballing' (fabrication of confessions) and 'entrapment' (solving crime by assisting or encouraging it to take place). These and other unlawful practices are extensively documented in the Australian Law Reform Commission's report* Criminal Investigation. *Given the growing criticism of police practices in recent years, we would favour any measure which would enable the*

> *exposure of unlawfulness and which would, in due course, help to enhance public confidence in law enforcement processes. We therefore propose that paragraph 27(d) be amended to enable disclosure of documents which would reveal unlawfulness in law enforcement procedure. This can best be achieved by inserting the word 'lawful' in paragraph (d) before the words 'methods or procedures'. Unlawful methods and procedures of law enforcement would thereby be excluded from the exemption."*

13. In Queensland, the Electoral & Administrative Review Commission's Report on Freedom of Information (December 1990, No.90/R6) (the EARC Report) recommended the enactment of its draft Freedom of Information Bill, clause 24(1)(e) of which is identical to s.42(1)(e) of the FOI Act, as ultimately enacted by the Queensland Parliament. Paragraph 7.139 of the EARC Report stated:

> *"The Commission is conscious of the tension between the need to properly protect law enforcement procedures and the public safety on the one hand, and the need to satisfy the public interest in the disclosure of unsatisfactory law enforcement practices. ... The Commission considers that clause 34 of the draft Bill properly gives effect to the tension in relation to this exemption. Clause 34 is consistent with provisions in the FOI legislation of other Australian jurisdictions."*

14. The presence of the word 'lawful' in s.42(1)(e) produces the effect that matter the disclosure of which could only prejudice the effectiveness of an unlawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law, does not qualify for exemption under s.42(1)(e). This complements the legislature's intention evident in s.42(2)(a)(i) of the FOI Act which provides in effect that matter which might qualify for exemption under any of the exemption categories in s.42(1)(a) to (j) inclusive, is not exempt if it consists of "matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law", provided also that its disclosure would, on balance, be in the public interest (as stipulated by s.42(2)(b)).

15. If an agency asserts that disclosure of particular matter would prejudice the effectiveness of the methods or procedures adopted in an investigation, but it is established that those methods or procedures are unlawful, then the matter cannot be exempt under s.42(1)(e) and it is unnecessary to have recourse to s.42(2)(a)(i) and s.42(2)(b). If, however, the same matter were claimed to be exempt under another exemption category in s.42(1) (e.g. s.42(1)(a) which is not expressly confined to prejudice to a lawful investigation of a contravention or possible contravention of the law), then it would be necessary to consider whether the matter fell within the exception provided by for s.42(2)(a)(i), which must be read cumulatively with s.42(2)(b).

**Contravention or Possible Contravention of the Law (including revenue law)**

16. Although the words "contravention of the law" tend immediately to bring to mind the criminal law (including statutory provisions of a regulatory nature which provide for an offence punishable by a fine or imprisonment or both), contraventions or possible contraventions of the law need not be confined to the criminal law. There are clear enough indications to this effect in the words in parentheses in s.42(1)(a), s.42(1)(e) and s.42(2)(a)(iv) of the FOI Act; and see paragraph 43 of my reasons for decision *Re McEniery and the Medical Board of Queensland*, (Information Commissioner Qld, Decision No. 94002, 28 February 1994, unreported). There is no reason why the words of s.42(1)(e) should not be read as extending to any law which imposes an enforceable legal duty to do or refrain from doing some thing. I note in this regard that s.36 of the *Acts Interpretation Act 1954 Qld* provides that in an Act:

*"'**contravene**' includes:*

*(a) breach; and*
*(b) fail to comply with;"*

A law may be contravened in circumstances where the breach does not attract a sanction of a penal nature. There are many instances of a statute imposing a legal duty of general or specific application but imposing no criminal penalty for a breach of the duty, usually because enforcement of the duty is intended to be achieved by other means, which are often specifically provided for in the statute itself. This can be illustrated by examples drawn from the *Fair Trading Act 1989 Qld* and the *Anti-Discrimination Act 1991 Qld.*

17. Sections 38 and 39 of the *Fair Trading Act* prohibit misleading or deceptive conduct, and unconscionable conduct, respectively, on the part of persons engaged in trade or commerce; but a contravention of those provisions does not constitute a criminal offence (see s.92 of the *Fair Trading Act).* The *Fair Trading Act* contemplates that those legal duties may be enforced by a civil action for damages (in the case of s.38) or a civil action for an injunction to restrain the illegal conduct (in the case of both of s.38 and s.39): see s.98 and s.99 of the *Fair Trading Act.*

18. The *Anti-Discrimination Act* prohibits discrimination on the basis of a number of attributes specified in s.7 of the Act (e.g. sex, marital status, race, religion) in certain designated activities (e.g. work, education, accommodation). The Anti-Discrimination Commission has the power to investigate allegations of discrimination which, if proven, would contravene the provisions of the *Anti-Discrimination Act.* However, the powers of the Anti-Discrimination Commission in dealing with a contravention or possible contravention of the Act are limited to resolving the complaint by conciliation or by referring the complaint to the Anti-Discrimination Tribunal, which (following a formal hearing) has the power to make orders binding on the parties to the complaint.

19. Using these two instances simply by way of illustration, a lawful method or procedure used by officers of the Department of Consumer Affairs for preventing, detecting, investigating or dealing with a contravention or possible contravention of s.38 or s.39 of the *Fair Trading Act* could fall within the scope of s.42(1)(e) of the FOI Act if its effectiveness could reasonably be expected to be prejudiced by the disclosure of particular information; and likewise for lawful methods or procedures used by the Anti-Discrimination Commission for preventing, detecting, investigating or dealing with a contravention or possible contravention of the *Anti-Discrimination Act.*

20. The word "law" is given an inclusive definition in s.42(5) of the FOI Act, which stipulates that for the purposes of s.42, the "law" includes the law of the Commonwealth, another State, a Territory or a foreign country. The inclusion of a foreign country in the s.42(5) definition avoids the possibility of a result in Queensland similar to that in the decision of the Commonwealth Administrative Appeals Tribunal (AAT) in *Re Conte and Australian Federal Police* (1985) 7 ALN N71 (*Re Conte*). In *Re Conte,* documents concerning the applicant were claimed to be exempt by the Australian Federal Police (the AFP) under s.37(2)(b) of the Commonwealth FOI Act. Section 37(3) of the Commonwealth FOI Act defines the "law" for the purposes of that section to mean the "law of the Commonwealth or of a State or Territory". The documents in issue concerned proceedings brought in the Western Australian Magistrates' Court for the extradition of the applicant to Italy for offences under Italian bankruptcy law. The evidence before the Tribunal was that no allegation had been made against the applicant for the breach of any law other than that of Italy. The Tribunal held that the relevant documents were not exempt pursuant to the provisions of s.37(2)(b) of the Commonwealth FOI Act as there had been no breach or evasion of a Commonwealth or State law pursuant to the definition of "law" in s.37(3) of the Commonwealth FOI Act.

**Disclosure Could Reasonably Be Expected to Prejudice the Effectiveness of the Methods or Procedures**

21. The phrase "could reasonably be expected to" in s.42(1) of the FOI Act bears the same meaning as it does in s.46(1)(b) of the FOI Act, which meaning was explained in *Re "B" and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported) at paragraphs 154-161. In particular, I stated at paragraph 160:

> *"... The words call for the decision-maker applying s.46(1)(b) to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural 'expectations') and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist."*

23. There is a diverse group of government agencies in Queensland performing law enforcement functions directed towards preventing, detecting, investigating or dealing with contraventions or possible contraventions of the law. Each agency will have developed (and will probably continue to develop and refine) methods and procedures to assist in the performance of its particular law enforcement responsibilities. Some methods and procedures may depend for their effectiveness on secrecy being preserved as to their existence, or their nature, or the personnel who carry them out, or the results they produce in particular cases. It is not possible to list the types of methods or procedures which may qualify for protection under s.42(1)(e) of the FOI Act. Each case must be judged on its own merits. The question of whether or not the effectiveness of a method or procedure could reasonably be expected to be prejudiced by the disclosure of particular matter sought in an FOI access application, is the crucial judgment to be made in any case in which reliance of s.42(1)(e) is invoked.

24. There may be cases where the disclosure of particular matter will so obviously prejudice the effectiveness of law enforcement methods or procedures that the case for exemption is self-evident, but ordinarily in a review under Part 5 of the FOI Act it will be incumbent on an agency to explain the precise nature of the prejudice to the effectiveness of a law enforcement method or procedure that it expects to be occasioned by disclosure, and to satisfy me that the expectation of prejudice is reasonably based. I will ordinarily not be able to refer in my reasons for decision to the precise nature of the prejudice, nor in many cases to the nature of the relevant methods or procedures (where that would subvert the reasons for claiming an exemption in the first place) but I will, in any event, need to be satisfied that the agency has discharged its onus under s.81 of the FOI Act of establishing all requisite elements of the test for exemption under s.42(1)(e) of the FOI Act.

25. For the reason just referred to, the case law from other jurisdictions involving exemption provisions which correspond to s.42(1)(e) of the Queensland FOI Act does not contain much detail as to the kinds of prejudice and the kinds of law enforcement methods and procedures that were involved in cases where the claim for exemption was upheld. Often it is the disclosure of the nature of the methods or procedures themselves which will prejudice their effectiveness. Several ways in which methods and procedures may be disclosed were identified by Deputy President Hall of the Commonwealth AAT in *Re Anderson and Australian Federal Police* (1986) 4 AAR 414 (*Re Anderson*) at p.424:

> *"A document may disclose methods or procedures either by specifically referring to or describing them or by providing information from the nature of which the methods or procedures employed may be capable of being inferred."*

26. The information "from the nature of which the methods or procedures employed may be capable of being inferred" can include the results produced by the methods or procedures in a particular case, which is the position with respect to the folios claimed to be entirely exempt in the present case.

27. Decisions from other Australian jurisdictions with freedom of information legislation have been more forthcoming in identifying when the lawful methods or procedures adopted by law enforcement agencies will not be afforded protection under provisions which correspond to s.42(1)(e) of the Queensland FOI Act. In *Re Anderson* Deputy President Hall said (at p.425):

> *"Questions of prejudice are, I think, more likely to arise where the disclosure of a document would disclose covert, as opposed to overt or routine methods of procedures."*

28. In *Re Lapidos and Auditor-General of Victoria* (1989) 3 VAR 343 (*Re Lapidos*), the Auditor-General claimed the corresponding exemption under s.31(1)(d) of the Victorian *Freedom of Information Act 1982* (the Victorian FOI Act) in relation to one of the documents in issue. Deputy President Galvin of the Victorian AAT held that the document was not exempt under the provisions of s.31(1)(d). At p.352, Deputy President Galvin stated:

> *"Document No. 14 identifies certain methods and procedures but of so patently an ordinary and fundamental kind as to preclude the conclusion that disclosure of them would or would be reasonably likely to prejudice their effectiveness."*

29. While no details were provided in *Re Lapidos* of the methods and procedures in issue, an obvious example of such overt, or ordinary and fundamental, methods or procedures was identified in the decision of the Commonwealth AAT in *Re Ward and Australian Federal Police* (No. V85/414, 20 February 1987, unreported). In that case, one of the documents in issue was claimed to be exempt pursuant to the provisions of s.37(2)(b) of the Commonwealth FOI Act. The Commonwealth AAT found that the exemption had not been made out in the circumstances, as the disclosure of the document could not reasonably be expected to prejudice the effectiveness of the method identified in the document. The nature of the method disclosed by the document was discussed in the Tribunal's decision at paragraph 16 as follows:

> *"Undoubtedly, disclosure of the document would disclose a lawful method for investigating or dealing with matters arising out of breaches or evasions of the law, that is to say information is sought from as many persons as possible who may be able to give relevant information and that information is then evaluated and placed on record. But that is precisely what would be expected."*

30. Obviously, the method used by law enforcement agencies of gathering information in relation to an investigation from as many sources as possible, the evaluation of that information and the placement of it on the agencies' records is a fundamental and overt method, the disclosure of which would not prejudice its effectiveness in the future.

31. In *Re Lawless and Secretary to Law Department and Ors* (1985) 1 VAR 42, the documents in issue included a tape recording of a conversation between the Victorian Police and a third party, and a signed statement prepared during the course of that conversation. The Victorian AAT found the document not to be exempt pursuant to the provisions of s.31(1)(d) of the Victorian FOI Act. At p.50 of his decision, Rowlands J. (President) of the Victorian AAT, stated as follows:

> *"The methods or procedures employed by the police in regard to this matter amounted to an interview by police officers which involved taping of proceedings*

> *and taking of a statement which was reduced to type. These practices are widespread and evidence of them is given daily in the courts."*

32. Disclosure of methods and procedures adopted by law enforcement agencies which are obvious and well known to the community (e.g. interviewing and taking statements from witnesses to a crime) is not likely to prejudice their effectiveness, for the purposes of s.42(1)(e) of the Queensland FOI Act. In respect, however, of methods and procedures that are neither obvious nor a matter of public notoriety, the mere fact that evidence of a particular method or procedure has been given in a proceeding before the courts would not preclude an agency from asserting, in the appropriate case, that disclosure under the FOI Act could reasonably be expected to prejudice the effectiveness of that method or procedure in the future. The courts may compel the disclosure of a particular law enforcement method or procedure where the interests of justice require it in a particular case, but s.42(1)(e) affords a self-contained ground of exemption, which is not subject to a countervailing public interest test of the kind to be found in s.44(1), s.46(1)(b) and several other exemption provisions. (Section 42(1)(e) is of course subject to the exceptions provided for in s.42(2) as noted earlier.) If, however, the revelation of a law enforcement method or procedure in open court in a particular case has been so widely reported as to become a matter of public notoriety, there may be a real question as to whether its disclosure under the FOI Act could be capable of prejudicing its effectiveness.

33. In respect of methods and procedures that are not obvious and widely known, but which might be reasonably suspected, tribunals in other jurisdictions have adopted a cautious approach. In *Re Mickelberg and Australian Federal Police* (1984) 6 ALN N176, the Commonwealth AAT said:

> *"... it is one thing for observers to deduce, with varying success from everyday experience media reports and other informal sources, what appear to be the methods and procedures employed by such agencies to achieve their objects, but it is quite another thing to have spelt out publicly from the agncies' own documents or in the proceedings of a Tribunal such as this what those methods and procedures are. The risk that they may be less effective would seem to be increased if a person endeavouring to combat or evade them has authoritative knowledge of them."*

34. To like effect is the Commonwealth AAT's decision in *Re Arnold Bloch Leibler and Co and Australian Taxation Office (No. 2)* (1985) 9 ALD 7 where the issue considered was whether or not a document of the Australian Taxation Office (the ATO), being its *Investigation Training and Reference Text* (the Text), was exempt under s.37(2)(b) of the Commonwealth FOI Act. The Text contained information relating to the methods and procedures adopted by the ATO in conducting investigations and contained information concerning methods, procedures, techniques and guidelines to be employed by officers of the ATO in the performance of their duties. It also contained material relating to the methods and procedures adopted by individuals to avoid income tax or to prevent detection of breaches of taxation law, and material relating to sources of information which could assist in detecting evasions or breaches of the law. There were restrictions on the availability of the Text within the ATO. Officers to whom copies of the Text were issued were responsible for its safe custody and they were not permitted to remove their copy from the office without express approval of the Director. On leaving the service of the ATO an officer's copy of the Text was to be returned to his or her supervisor. In its decision, the Commonwealth AAT stated as follows (at p.13):

> *"As counsel for the respondent observed, much of what is in the Text is probably known to, or is suspected by, many persons, who might be familiar with the techniques that are elaborated in the documents. But it is not to be assumed that every person who might be minded to offend against the taxation laws is so sophisticated. To the extent that persons are not aware of the techniques used, then*

*investigations will be that much more effective and the rearrangement of affairs, or the reshaping in advance of answers to questions that may be asked, that much less effective."*

35. As is suggested by the foregoing passage, the test of whether prejudice to the effectiveness of lawful methods or procedures could reasonably be expected, is generally to be approached without regard to the identity of the particular applicant for access under the FOI Act, nor to that applicant's motive for seeking the information. There is an exception to this general principle when s.6 of the FOI Act applies, since it expressly requires that the fact that a document contains matter relating to the personal affairs of the applicant for access is an element to be taken into account in deciding the effect that the disclosure of the matter might have.

36. The test of a reasonable expectation of prejudice has to be applied according to an evaluation of the relevant circumstances prevailing at the time when a decision whether or not to claim the exemption is required to be given. There may well be cases where the giving of access to information at a particular stage in the process of using a law enforcement method or procedure will prejudice its effectiveness, but with the passage of time the threat of prejudice is removed.

37. As already noted s.42(1)(e) of the FOI Act, in common with the other exemption categories in s.42(1), does not contain a countervailing public interest test requiring consideration of whether or not the disclosure of the matter in issue would, on balance, be in the public interest.

**Application of Section 42(1)(e) of the FOI Act to the Documents in Issue**

**The Documents in Issue**

38. The documents remaining in issue are:

> folios 3, 11, 20, 22, 25, 50, 51, 74, 75, 78 and 84, which are claimed by Queensland Health to be entirely exempt under s.42(1)(e) of the FOI Act; and
>
> folios 12, 19, 21, 31 and 73, from which certain matter has been deleted by Queensland Health on the basis that it is exempt matter under s.42(1)(e) of the FOI Act.

39. The documents in issue were created between October 1990 and August 1992 and concern the applicant's receipt of methadone by way of prescription from his treating psychiatrist. The documents in issue form part of a number of documents held by Queensland Health relating to the monitoring by the Drugs of Dependence Unit (the DDU) of Queensland Health of the applicant's receipt of methadone by prescription.

40. The folios claimed by Queensland Health to be entirely exempt are all of the same nature and contain a similar type of information, with each of those documents having been created on a different date. Further, the matter deleted from folio 21 consists of a partial copy of the matter recorded on folio 22.

41. Folio 31 consists of a typed copy of a handwritten file note, being folio 12, which makes reference to the type of information and the nature of the documents which have been claimed to be entirely exempt. The matter deleted from folios 19 and 73 consists of references of the same type as in folios 12 and 31.

**Submissions by Queensland Health**

42. In her decision of 14 April 1993, Dr Lange stated as follows:

*"The original decision-maker also considered the following facts in exempting 18 documents and deleting matter from 8 pages.*

*1. The documents contain a variety of methods and procedures used to ensure the effective administration of the Poisons Regulation 1973.*

*2. Disclosure of these methods would prejudice the effectiveness of lawful methods or procedures used to detect, investigate or deal with contravention or possible contravention of the law.*

*In considering the above facts in relation to section 42(1), the decision-maker decided that the matter was exempt under section 42(1)(e). The decision was made on the grounds that release of the documents would reasonably be expected to prejudice the effectiveness of current methods and procedures used in the administration of the Poisons Regulation 1973.*

*I have examined the documents in question. I have decided to uphold the original decision to exempt documents and delete matter under section 42(1)(e) of the Freedom of Information Act. I am of the opinion that current methods and procedures for information gathering and investigation of offences and possible breaches of the Poisons Regulation must be protected if they are to remain effective. Sources of information and the methods of collation of relevant data are of prime importance in ensuring the efficient and effective administration of this law and should therefore remain exempt. ..."*

43. Queensland Health's written submission dated 13 January 1994 addressed more expansively the methods and procedures adopted by Queensland Health to prevent, detect, investigate and deal with contraventions or possible contraventions of the law, as well as the relevant law in issue and the prejudicial effect disclosure of the documents in issue would have on the methods and procedures identified. I am constrained from reproducing much of Queensland Health's written submission by s.87(2)(a) of the FOI Act, as the very matter claimed to be exempt would thereby be revealed.

44. Queensland Health's submission in relation to the relevant "law" (for the purposes of s.42(1)(e)) in this case was as follows:

*"The law which is relevant to the documents to which section 42(1)(e) has been applied is the* Health Act 1937*, and under section 152 of that Act, the* Poisons Regulation 1973*.*

*The* Poisons Regulation *contains a number of provisions relating to the prescription, dispensing, sale, supply, manufacture and possession of drugs of dependence. Drugs of dependence are those listed in schedule 8 of the Standard for the Uniform Scheduling of Drugs and Poisons referred to in the Regulation. These drugs are dangerous drugs for the purpose of the Regulation.*

*Particularly, the* Poisons Regulation *may be contravened by persons forging and altering prescriptions (section N1), making false representations to obtain drugs of dependence (section N2) and failing to disclose to medical practitioners and dentists details of drugs obtained in the previous two months (section N3).*

[The applicant] *would have been monitored by the Drugs of Dependence Unit (DDU) (which was established to enforce the Act and the Regulation) in respect of these particular provisions."*

45. Reference was made by Queensland Health to two sections of the *Poisons Regulation 1973* by virtue of which information is collected by the DDU as part of its system of enforcing the *Poisons Regulation*. Those sections provide as follows:

***"H5. Endorsing and Disposal of Prescriptions***

***H5.01.*** *(a) A person who dispenses a dangerous drug or a restricted drug upon a prescription shall, on the day he dispenses such dangerous drug or restricted drug, endorse in ink on the face of such prescription -*

*(i) in his own handwriting, the date of such dispensing;*

*(ii) his usual signature;*

*(iii) the name and address of the dispensary;*

*(iv) the repeat number, if it is a repeat dispensing; and*

*(v) the word "cancelled":*

*Provided that in the case of a prescription bearing a valid direction to repeat, the provisions of subclause (v) shall apply only to the last occasion of dispensing upon such prescription as determined by the prescriber's direction thereon.*

*(b) A person who dispenses a dangerous drug or a substance to which the provisions of subregulations A6.01, A6.03 or A6.04 apply upon a prescription shall, within fourteen days of such dispensing, forward such prescription to the Director-General:*

*Provided that in the case of a prescription bearing a valid direction to repeat, the provisions of this clause (b) shall apply only to the last occasion of dispensing upon such prescription as determined by the prescriber's direction thereon.*

*(c) In respect of a prescription prescribing a dangerous drug or a substance to which the provisions of subregulations A6.01, A6.03 or A6.04 apply issued under the* National Health Act 1953-1972 *of the Commonwealth of Australia or the* Repatriation Act 1920-1973 *of the Commonwealth of Australia the duplicate of such prescription shall be and be deemed to be a prescription for the purposes of this subregulation only:*

*Provided that it shall not be necessary to endorse on such duplicate the word 'cancelled'."*

***"M1. Director-General to be Notified of Lengthy Treatment***

***M1.01.*** *A medical practitioner who, in the course of his medical practice, supplies,*

> *dispenses, prescribes or administers a dangerous drug in the treatment of a patient for a period which will extend or which has extended for a period greater than two calendar months, shall forthwith report the circumstances of the case in writing to the Director-General. Such report shall contain the name and address of the patient, the name of the dangerous drug involved and the medical condition for which he considers the use of such dangerous drug necessary, together with all such other particulars as the Director-General may from time to time require."*

46. It would not be appropriate to reproduce all of Queensland Health's submission in relation to what prejudicial effect the disclosure of the matter in issue would have, but the following passages indicate the general nature of the concerns held by Queensland Health:

> *"It must be recognised that some of the DDU's clients are often quite ingenious in developing strategies to avoid detection in their pursuit of drugs of dependence. A number of individuals are also quite volatile and at times even dangerous. If the methodology were to become accessible to the public, drug dependent persons would be able to assess the efficacy of their own methods for obtaining dangerous drugs without being detected ... .*
>
> *Many persons who are addicted to dangerous drugs have criminal tendencies, are on probation or in the corrective services system. If the methods are rendered ineffective by wide public knowledge, then it is reasonable to assume that easier access may be gained by such persons to dangerous drugs. This consequence, and the fact that such persons would not fear detection, could ultimately have a deleterious effect on the safety of the public."*

**The Relevant Statutory Provisions**

47. Section 152 of the *Health Act 1937 Qld* gives the Director-General of Queensland Health the power to make regulations in respect of the matters enumerated therein. Section 152(1)(xvii) is relevant for present purposes and provides as follows:

> *"**152. Regulations**. (1) The Director-General may from time to time make regulations with respect to all or any of the following matters, namely:-*
>
> *...*
>
> *(xvii) Regulating and controlling and, as deemed necessary, prohibiting or restricting the ownership, possession, manufacture, cultivation, sale, distribution, supply, use, lending, dispensing, prescribing, or giving away of, or forging and uttering of prescriptions for or any other dealings with poisons, restricted drugs, dangerous dugs, biological preparations or goods for therapeutic use under and within the meaning of the* Therapeutic Goods Act 1966 *of the Commonwealth or any Act amending the same or in substitution therefor; ... regulating the supply of drugs to drug dependent persons ... ."*

48. The *Poisons Regulation*, made pursuant to s.152 of the *Health Act*, regulates the manufacture, packaging and labelling, storage, possession, sale, prescription and use of poisons, restricted drugs and dangerous drugs.

49. Pursuant to sub-section A2.03(b), "dangerous drugs" are taken to be those substances listed in Schedule 8 of the Standard for the Uniform Scheduling of Drugs and Poisons (the Standard). Methadone is a substance listed in Schedule 8 of the Standard and is, accordingly, a "dangerous drug" for the purposes of the *Poisons Regulation*. Those drugs listed in Schedule 8 of the Standard are commonly accepted as falling within the category of "drugs of dependence".

50. Part N of the *Poisons Regulation* contains specific offences in respect of matters relating to dangerous drugs. In its written submission, Queensland Health made specific reference to the offences contained in sections N1, N2 and N3 of Part N, which provide as follows:

> *"**N1. Forging and Uttering Prescriptions***
>
> ***N1.01**. A person shall not utter or attempt to utter a prescription prescribing a dangerous drug or a restricted drug if the prescription -*
>
> *(a) has been written by a person not authorised so to do under these regulations; or*
>
> *(b) falsely states the name or current residential address of the person for whom the drug has been prescribed.*
>
> ***N1.02**. A person, other than the person who wrote a prescription, shall not alter nor obliterate nor make an endorsement on such prescription.*
>
> ***N1.03**. A person shall not utter nor attempt to utter a prescription prescribing a dangerous drug or a restricted drug if such prescription has thereto, therein or thereon an alteration, obliteration or endorsement made by a person other than the person who wrote such prescription.*
>
> ***N1.04**. The provisions of this Regulation shall not relate nor be deemed to relate to an endorsement made as prescribed by these Regulations by an authorised person.*
>
> ***N2. False Representations***
>
> ***N2.01**. A person shall not, by a false representation, obtain nor attempt to obtain -*
>
> *(a) a dangerous drug or a restricted drug from a person authorised by these Regulations to sell, supply, dispense or administer a dangerous drug or a restricted drug; or*
>
> *(b) a prescription for a dangerous drug or a restricted drug from a person authorised by these Regulations to prescribe a dangerous drug or a restricted drug.*
>
> ***N2.02**. A person shall not make a false representation whatsoever concerning an order or prescription for a dangerous drug or a restricted drug given by a person authorised by these Regulations to give such order or prescription.*

***N2.03***. *A person shall not falsely state his name or current residential address to a person authorised by these regulations to sell, supply, dispense, prescribe or administer a dangerous drug or a restricted drug or to an employee or agent of such authorised person acting within the course of his employment or agency.*

***N3. Failure to Disclose Information to Practitioners***

***N3.01***. *A person shall not by representation made to a medical practitioner or a dentist obtain or attempt to obtain -*

*(a) a dangerous drug; or*

*(b) a restricted drug; or*

*(c) a prescription for a dangerous drug; or*

*(d) a prescription for a restricted drug,*

*without first informing such medical practitioner or dentist of the details, including the quantity, of all dangerous drugs and restricted drugs or prescriptions in relation thereto which he has obtained from another medical practitioner or dentist within the period of two months prior to such representation."*

51. Penalties for the offences contained in Part N of the *Poisons Regulation* are provided for in Part Q - Offences and Penalties. Sub-section Q2.01 provides as follows:

*"**Q2.01***. *A person who is guilty of an offence against any of the provisions of Regulation D1 or of Part N so far as such Regulations or Part relate to any of the matters prescribed pursuant to the provisions of sub-paragraphs (a), (b), (c), (d). or (e) of paragraph (xxviii) of subsection (1) of Section 152 of the Act shall be liable for a first offence to a penalty not exceeding one thousand dollars ($1000) and for a second or subsequent offence, whether or not of the same nature or against the same provision, to a penalty not exceeding two thousand dollars ($2000)."*

**The Methods and Procedures used by the DDU**

52. It is the function of the DDU to enforce, *inter alia*, the provisions of the *Health Act* and the *Poisons Regulation* which are referred to above. In doing so, the DDU has developed a system of monitoring the prescribing of dangerous drugs to assist it in preventing, detecting and investigating contraventions or possible contraventions of Part N of the *Poisons Regulation.*

53. The written submission of Queensland Health addressed a number of methods and procedures adopted by the DDU in the performance of its functions under the *Poisons Regulation*. As a result of the implementation of a number of the methods and procedures used by the DDU in preventing or detecting a contravention or possible contravention of the provisions contained in Part N of the *Poisons Regulation*, folios 3, 11, 20, 22, 25, 50, 51, 74, 75, 78 and 84 were created. The information collated in those documents assists the DDU in detecting whether or not there has been a contravention of the provisions of Part N of the *Poisons Regulation*.

54. Disclosure of folios 3, 11, 20, 22, 25, 50, 51, 74, 75, 78 and 84, together with the matter deleted from folio 21, would disclose methods and procedures adopted by the DDU in detecting a contravention or possible contravention of the *Poisons Regulation.* Disclosure of the matter deleted from folios 12, 19, 31 and 73 would reveal information by means of which the methods and procedures used by the DDU could be identified. Those methods and procedures involve the collation of data lawfully obtained by the DDU in performance of its functions under the provisions of the *Poisons Regulation*.

55. I find that the methods and procedures adopted by the DDU are lawful within the meaning of s.42(1)(e) of the FOI Act. I also find that s.42(2) can have no application in this case, since none of the matter remaining in issue falls within any of the categories specified in s.42(2)(a) of the FOI Act.

**Prejudice to the Effectiveness of the Methods and Procedures used by the DDU**

56. The written submission of Queensland Health addressed the issue of what prejudice could reasonably be expected to be caused to the effectiveness of the methods and procedures used by the DDU in disclosing matter of the kind recorded on folios 3, 11, 20, 22, 25, 50, 51, 74, 75, 78 and 84. I am satisfied from my examination of all the folios in issue that the expectation of prejudice identified by Queensland Health is reasonably based in view of the nature of the information involved and the prospects for its use in evading the provisions of Part N of the *Poisons Regulation*. In accordance with s.6 of the FOI Act, I have taken into account the fact that the matter in issue relates to the personal affairs of the applicant, and the applicant's concern to ensure that the information is accurate (see paragraph 6 above), but I am nevertheless satisfied that disclosure of the matter in issue could reasonably be expected to have a prejudicial effect which would satisfy the test for exemption under s.42(1)(e) of the FOI Act.

57. I find that disclosure of the folios claimed to be entirely exempt, together with the matter deleted from folios 12, 19, 21, 31 and 73, could reasonably be expected to prejudice the effectiveness of the lawful methods and procedures (for preventing, detecting, investigating or dealing with a contravention or possible contravention of the statutory provisions referred to above) by which those folios were produced or to which reference is made therein.

**The Applicant's Submissions**

58. The written submissions made by the applicant in the present external review are summarised above at paragraph 6.

59. His first submission was to the effect that he should be afforded access to the documents in issue to

enable him to verify or dispute the accuracy of the matter recorded therein. The applicant's stated aim is consistent with one of the objects of the FOI Act specifically recognised in s.5(1)(c). However, s.5(2) of the FOI Act also recognises that where disclosure of information would have a prejudicial effect on essential public interests, there should be a capability to refuse access to that information. Section 42(1)(e) embodies one such essential public interest. The accuracy of matter recorded in a document in issue is not a relevant element in establishing the test for exemption provided by s.42(1)(e) of the FOI Act. Accordingly, whether the matter contained in the documents in issue is correct or incorrect, or contains what the applicant refers to as "distortions", has no bearing on whether the test for exemption (which has to do with prejudicing the effectiveness of law enforcement methods or procedures) is made out, except so far as s.6 of the FOI Act requires it to be taken into account on the basis that the matter in issue relates to the applicant's personal affairs. I have already found (at paragraph 56 above) that the application of s.6 to the matter in issue in this case still results in the test for exemption under s.42(1)(e) being satisfied.

60. The applicant's second concern was that the matter recorded in the documents in issue may reveal that Queensland Health breached any number of State or Federal laws or International Conventions relating to privacy, human rights and civil rights. However, as discussed above at paragraphs 52 to 55 , I have found that the matter recorded in the documents in issue concerns methods and procedures adopted by the DDU in the performance of its function of administering and enforcing the provisions of the *Health Act* and the *Poisons Regulation***,** and that the methods and procedures adopted by the DDU were lawful.

**Conclusion**

61. As explained at paragraph 4 above, Queensland Health agreed during the course of the review process to give the applicant access to a number of folios which had initially been claimed to be exempt, and I have previously authorised Queensland Health to give the applicant access to those folios. The folios remaining in issue were identified at paragraph 38 above. For the foregoing reasons, I find that the matter remaining in issue is exempt matter under s.42(1)(e) of the FOI Act. Accordingly, I affirm that part of the decision under review which held that the folios and parts of folios identified at paragraph 38 comprise exempt matter under s.42(1)(e) of the FOI Act.

.....

F N ALBIETZ
**INFORMATION COMMISSIONER**