

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 96004
Application S 49/94

Participants:

TRUSTEES OF THE DE LA SALLE BROTHERS
Applicants

QUEENSLAND CORRECTIVE SERVICES COMMISSION
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - legal advice given to the respondent by an employee solicitor of the respondent - whether subject to legal professional privilege - whether employee solicitor had the requisite degree of independence in giving legal advice - whether matter in issue is otherwise subject to legal professional privilege: whether confidential communications; application of 'sole purpose' test; whether privilege waived in respect of part of the matter in issue - application of s.43(1) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - briefing papers prepared for senior officers of the respondent's executive, for the Commissioners of the respondent, and for the responsible Minister - whether deliberative process matter falling within the terms of s.41(1)(a) of the *Freedom of Information Act 1992* Qld - whether disclosure would, on balance, be contrary to the public interest - whether part of the matter in issue is merely factual matter, not eligible for exemption under s.41(1) by virtue of s.41(2)(b) - application of s.41 of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.41(1), s.41(1)(a), s.41(1)(b), s.41(2)(b), s.43(1), s.79
Corrective Services Act 1988 Qld s.12
Corrective Services (Administration) Act 1988 Qld s.18(2)(b), s.19(1), s.19(2)(f), s.19(3),
s.19(4)

Attorney-General (NT) v Maurice (1986) 161 CLR 475; 61 ALJR 92; 69 ALR 31
Brambles Holdings v Trade Practices Commission (No. 3) (1981) 58 FLR 452
Clarkson and Attorney-General's Department, Re (1990) 4 VAR 197

Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (1993) 1 QAR 60
Dalleagles Pty Ltd v Australian Securities Commission (1991) 4 WAR 325; 6 ACSR 498
Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade Development, Re (1993) 1 QAR 123
Komacha v Orange City Council (Supreme Court of New South Wales, Rath J, 30 August 1979, unreported)
Lapidos and Office of Corrections, Re (1989) 4 VAR 31
Pemberton and The University of Queensland, Re (Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported)
Potter and Brisbane City Council, Re (Information Commissioner Qld, Decision No. 94018, 19 August 1994, unreported)
Smith and Administrative Services Department, Re (1993) 1 QAR 22

DECISION

I set aside that part of the decision under review (being the respondent's deemed refusal of access to documents falling within the terms of the applicants' FOI access application dated 2 April 1993) which concerns the documents described at paragraphs 11, 12 and 26 of my reasons for decision. In substitution for it, I decide that:

- (a) the respondent is entitled to refuse access to -
 - (i) pages 297-298 of File 6, described in paragraph 11, and documents 15, 18 and 25, described in paragraph 12, of my reasons for decision, on the basis that they are exempt matter under s.43(1) of the *Freedom of Information Act 1992 Qld*; and
 - (ii) document 6, described in paragraph 12 of my reasons for decision, which is also exempt matter under s.43(1), except for the first sentence of the fourth paragraph of document 6, which is not exempt matter, and to which the respondent is not entitled to refuse access; and
- (b) the applicants have a right to be given access under the *Freedom of Information Act 1992 Qld* to -
 - (i) page 317 of File 5, described in paragraph 11 of my reasons for decision;
 - (ii) the first sentence of the fourth paragraph of document 6, described in paragraph 12 of my reasons for decision; and
 - (iii) the matter listed in paragraph 26 of my reasons for decision (except for any segments of matter which I have noted in the list as not being in issue in this review);

which I find are not exempt matter under the *Freedom of Information Act 1992 Qld*.

Date of decision: 4 April 1996

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicants seek review of the respondent's refusal to allow them access to several documents relating to Goodspell Park, a community corrections centre operated by the applicants under arrangements made with the respondent.
2. The applicants are engaged in endeavours to rehabilitate young persons convicted of criminal offences. The applicants conduct some of these activities under an umbrella organisation known as Link-Up. The activities of the applicants are probably best known to Queenslanders through their management of Boystown, near Beaudesert. Of particular relevance to this case is the management by Link-Up of Goodspell Park, a 'half-way house' in which young male offenders may serve a sentence of imprisonment, and which emphasises participation in rehabilitation programs. Documents released to the applicants during the course of this external review disclose that Goodspell Park encountered difficulties in 1992 when neighbouring residents succeeded in establishing, in proceedings before the Planning and Environment Court, that the operation of Goodspell Park as a community corrections facility required the town planning consent of the Beaudesert Shire Council, which had not been obtained.
3. Goodspell Park was operated by Link-Up as a community corrections centre under contract with the Queensland Corrective Services Commission (the QCSC) pursuant to s.19(1), s.19(2)(f), s.19(3) and s.19(4) of the *Corrective Services (Administration) Act 1988* Qld, which provide:

Powers of Commission

19.(1) The Commission has and may exercise such powers as are necessary or desirable to allow the proper discharge by it of its functions or any of them whether under this or any other Act.

(2) Without limiting the generality of subsection (1) or the powers had by the Commission in its corporate capacity the Commission may—

...

(f) engage a person (other than a commissioner, or an officer or employee of the Commission) or a body of persons to conduct on the Commission's behalf any part of its operations whether under this Act or the Corrective Services Act 1988;

...

(3) The Commission may authorise a person or body of persons engaged under subsection (2)(f) to exercise the powers (other than the power of delegation) and perform the functions conferred on—

(a) the Commission; or

(b) an officer or employee of the Commission;

under this or another Act.

(4) An authorisation under subsection (3) may be given subject to any condition or limitation that is specified in the authorisation.

4. Community corrections centres (such as Goodspell Park) are established by the QCSC under s.12 of the *Corrective Services Act 1988* Qld, which provides:

Establishment of community corrections centres

12. The Commission may (by notification published in the Gazette) with the approval of the Minister—

(a) declare any premises or place to be or to no longer be a community corrections centre;

(b) assign a name to any community corrections centre or alter the name of any community corrections centre;

(c) define the limits of any community corrections centre in such manner as it thinks fit.

5. The documents remaining in issue in this external review represent a small fraction of the documents that were in issue at the commencement of the review. This case has illustrated the considerable practical problems that can be encountered when the terms of an FOI access application cover nearly two thousand pages of documents.
6. By letter dated 2 April 1993, the legal firm of Gilshenan and Luton, acting as agents for the applicants, applied to the QCSC under the *Freedom of Information Act 1992* Qld (the FOI Act) for access to:

... all documentation, memoranda and other records of whatever nature in respect of dealings with [the QCSC] in relation to the arrangements entered into in respect of Link-Up and the Queensland Corrective Services Commission relating to the operation of Goodspell Park and Tarragindi Lodge.

7. The applicants appear to have appreciated the difficulties posed by the volume of documents covered by the terms of their FOI access application, and demonstrated considerable patience (as they have done again in the course of this external review) in the face of a substantial delay in processing their FOI access application. Eventually, their patience wore thin, and, having received no formal notice of decision in response to their FOI access application, the applicants applied to me, by letter dated 21 March 1994, for review of the respondent's deemed refusal of access to documents, relying upon s.79 of the FOI Act.
8. I directed the respondent to provide me with copies of all documents covered by the terms of the applicants' FOI access application, as well as a schedule identifying all matter claimed to be exempt and stating the basis of the claims for exemption. Nine files, comprising almost 2,000 folios, were produced to me. I subsequently received a 13 page schedule listing folios claimed to be exempt. (Claims for exemption were made in respect of documents relating to Goodspell Park, but not in respect of documents relating to Tarragindi Lodge.) I authorised the giving of access to those documents not listed in the schedule, which amounted to a majority of the documents initially in issue.
9. Both participants have made further concessions during the course of this review. Examination of the schedule allowed the applicants to identify matter to which they did not wish to obtain access, and which accordingly is no longer in issue. Many exemption claims initially raised by the QCSC have been tested in negotiation and discussion, and eventually abandoned by the QCSC. I appreciate the reasonable approach demonstrated by the participants, which has considerably reduced the number of documents remaining in dispute, and lightened the burden on the participants in preparing submissions in support of their respective cases. Relevant parts of the written submissions lodged by the participants are referred to below.

Matter claimed to be exempt under s.43(1) of the FOI Act

10. Section 43(1) of the FOI Act provides:

43.(1) Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.

11. The documents claimed to be exempt under s.43(1) in the QCSC's final submission dated 21 April 1995 were described (at p.5) as follows:

- File 5: Goodspell Park - Boystown (Part 1) - 352 pages

Page 317 Memorandum by Mr R Bleakley dated 14 April 1992 regarding Minutes of Executive Meeting dated 13 April 1992 which contains information obtained from the Legal Officer

- File 6: Goodspell Park - Boystown Proposal (Part 2) - 397 pages

Pages 297-298 Memorandum by QCSC's solicitor dated 25 May 1993 regarding variation to contract

12. I initiated further inquiries which revealed the existence of an additional folder of loose papers, held in the office of the QCSC Solicitor, which fell within the terms of the applicants' FOI access application. Most of the loose papers were copies of documents already dealt with in the course of the review, or documents that the QCSC was prepared to release to the applicants. However, the following additional documents have been claimed by the QCSC to be exempt under s.43(1) of the FOI Act:
- Document 6 - memorandum, QCSC Solicitor to Director, Operations Support, Community Corrections, dated 10 April 1992.
 - Document 15 - memorandum, QCSC Solicitor to Deputy Director-General, dated 2 June 1992.
 - Document 18 - draft letter, prepared by the QCSC Solicitor for use by the QCSC, together with a covering note.
 - Document 25 - draft of a letter, prepared by the QCSC Solicitor, to be sent by the QCSC to the Chairman of Boystown.
13. The QCSC claims that the documents identified in the preceding two paragraphs contain instructions given to, and/or legal advice or professional legal assistance given by, Ms Kathryn Mahoney, who at all relevant times was an employee of the respondent, appointed to an office with the designated title of QCSC Solicitor.
14. In *Re Smith and Administrative Services Department* (1993) 1 QAR 22, I discussed (at pp.51-57; paragraphs 82-98) the requirements for exemption under s.43(1) of the FOI Act. At paragraph 82 of my decision, I referred to the useful summary of principles set out in the decision of Mr K Howie, a member of the Victorian Administrative Appeals Tribunal, in *Re Clarkson and Attorney-General's Department* (1990) 4 VAR 197, at p.199, of which the following extracts are relevant in the present case:
- (1) *To determine whether a document attracts legal professional privilege consideration must be given to the circumstances of its creation. It is necessary to look at the reason why it was brought into existence. The purpose why it was brought into existence is a question of fact.*
 - (2) *To attract legal professional privilege the document must be brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings. Submission to legal advisers for advice means professional legal advice. It includes the seeking or giving of advice. Use in legal proceedings includes anticipated or pending litigation.*
- ...
- (4) *Legal professional privilege attaches to confidential professional communications between salaried legal officers and government agencies. It must be a professional relationship which secures to the advice an independent character. The reason for the privilege is the public interest in those in government who bear the responsibility of making decisions having free and ready confidential access to their legal advisers. Whether or not the relationship exists is a question of fact.*

...

(6) *A client may waive legal professional privilege: see in particular [Attorney-General (NT) v Maurice (1986) 161 CLR 475].*

15. The applicants have raised as an issue (at p.6 of their written submission) whether information claimed to be exempt under s.43(1) was provided by the QCSC's legal adviser as an employee, and not pursuant to a solicitor/client relationship having the attributes to enable legal professional privilege to attach to the information.
16. In *Re Potter and Brisbane City Council* (Information Commissioner Qld, Decision No. 94018, 19 August 1994, unreported) at paragraphs 19-27, I gave more detailed consideration to the leading Australian authorities on the principle succinctly stated at point 4 of the extract from *Re Clarkson* quoted above. In summary, the authorities establish that legal professional privilege may apply with respect to employee legal advisers of a government Department or statutory authority, provided there is a professional relationship of solicitor (or barrister) and client, which secures to the advice an independent character notwithstanding the employment. Important indicia are whether the legal adviser has been admitted to practice as a barrister or solicitor, and remains subject to the duty to observe professional standards and the liability to professional discipline. Possession of a current practising certificate is not necessary for establishing the requisite degree of independence, but will carry some weight in assisting to establish the requisite degree of independence.
17. Inquiries made of Ms Mahoney, the QCSC Solicitor, during the course of the review (the results of which were provided, by letter dated 31 July 1995, to the applicants for comment) have satisfied me that the QCSC Solicitor discharges the functions of an employee legal adviser with the requisite degree of independence from the employer to attract the application of the principles of legal professional privilege. I have examined the position description for the position of QCSC Solicitor. Admission as a Solicitor or Barrister of the Supreme Court of Queensland is a prerequisite for appointment. Ms Mahoney is admitted as a Solicitor of the Supreme Court of Queensland, is a member of the Queensland Law Society, and holds a current practising certificate. Ms Mahoney has informed me, and I accept, that she is solely responsible for legal advice given by the QCSC Solicitor and is not subject to correction or interference by any other officers of the QCSC in terms of the content of legal advice that is given.
18. I turn now to the question of whether the six documents identified in paragraphs 11 and 12 above otherwise satisfy the common law requirements for legal professional privilege.
19. Page 317 of file 5 is a memorandum from Mr Bleakley to the Deputy Director-General of the QCSC, in which Mr Bleakley reported on the substance of legal advice that he had received from Ms Mahoney concerning a particular issue which had arisen in the aftermath of the litigation in the Planning and Environment Court commenced by the neighbouring residents of Goodspell Park. Part of the memorandum is, in my opinion, *prima facie* subject to legal professional privilege since it repeated the substance of legal advice communicated by Ms Mahoney, which advice would itself attract legal professional privilege: see *Brambles Holdings v Trade Practices Commission (No. 3)* (1981) 58 FLR 452 at pp.458-459; *Komacha v Orange City Council* (Supreme Court of New South Wales, Rath J, 30 August 1979, unreported).
20. However, the third paragraph of the memorandum discloses that the substance of Ms Mahoney's legal advice has been conveyed by Mr Bleakley to the solicitors (Morris Fletcher and Cross) then acting for the residents who had commenced the proceedings in the Planning

and Environment Court. The QCSC has provided me with copies of the letter dated 30 March 1992 from Morris Fletcher and Cross which prompted the request for legal advice from Ms Mahoney, and Mr Bleakley's letter in response to Morris Fletcher and Cross, dated 13 April 1992, which discloses the substance of Ms Mahoney's legal advice in terms virtually identical to those in which it was recorded on page 317 of file 5. There is no suggestion in the letter from Mr Bleakley to Morris Fletcher and Cross that the letter was forwarded in confidence, or subject to any restriction on its further use or dissemination.

21. Legal professional privilege exists to secure confidentiality in communications between a legal adviser and client: *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, per Dawson J at p.496. The nature of the disclosure which has occurred in this instance is, in my opinion, incompatible with any continued claim for confidentiality in respect of the substance of Ms Mahoney's legal advice that was conveyed to Morris Fletcher and Cross, and its clients. It amounts, in effect, to a waiver of privilege in respect of the substance of Ms Mahoney's legal advice. In *Attorney-General (NT) v Maurice*, Mason J said at p.487:

The limiting effect of legal professional privilege on the availability of evidence otherwise relevant is confined, inter alia, by the doctrine of waiver. A litigant can of course waive his privilege directly through intentionally disclosing protected material. He can also lose that protection through a waiver by implication. An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege.

22. I therefore find that the passage I referred to in paragraph 19 above, does not, in fact, qualify for the protection of legal professional privilege. Moreover, I am satisfied that the balance of Mr Bleakley's memorandum dated 14 April 1992 does not satisfy any of the legal tests that attract the application of legal professional privilege. I find that page 317 of file 5 is not exempt matter under s.43(1) of the FOI Act, and I note that it has not been claimed to be exempt on any other basis.
23. Document 6 described in paragraph 12 above is a memorandum from Ms Mahoney to Mr Bleakley giving legal advice on several issues (and clearly prepared for that sole purpose). However, Ms Mahoney's advice on one issue was repeated in Mr Bleakley's memorandum comprising page 317 of file 5, and in Mr Bleakley's letter to Morris Fletcher and Cross dated 13 April 1992. Consistently with my preceding finding, I consider that the first sentence of the fourth paragraph of Ms Mahoney's memorandum of advice does not qualify for the protection of legal professional privilege and is not exempt matter under s.43(1) of the FOI Act. The balance of the memorandum containing Ms Mahoney's legal advice on other distinct issues has remained confidential to her client (the QCSC) and, in my opinion, remains subject to legal professional privilege. I find that the balance of document 6 is exempt matter under s.43(1) of the FOI Act.
24. Pages 297-298 of file 6 (the second document identified in paragraph 11 above) comprise a memorandum from Ms Mahoney to the Acting Director-General of the QCSC. I am satisfied from my examination of the document that it was prepared for the sole purpose of giving legal advice, and I find that it is exempt matter under s.43(1) of the FOI Act.
25. I am also satisfied, from my examination of them, that documents 15, 18 and 25 (identified in paragraph 12 above) were prepared by Ms Mahoney for the sole purpose of giving legal advice or professional legal assistance, including the provision of draft documents in the context of furnishing legal advice (as to which see *Dalleagles Pty Ltd v Australian Securities Commission* (1991) 4 WAR 325). I find that documents 15, 18 and 25 are also exempt matter under s.43(1) of the FOI Act.

Matter claimed to be exempt under s.41(1) of the FOI Act

26. The matter remaining in issue which has been claimed by the QCSC to be exempt under s.41(1) of the FOI Act can be described (by modifying the descriptions in the QCSC's final written submission, so as to exclude references to matter claimed to be exempt) as follows:

Page No.	Description
<u>File 3: Link-Up Boystown General (Part 1)</u>	
Pages 272-278	Briefing notes containing a chronological sequence of events concerning Goodspell Park between June 1991 and May 1992 and some observations on the relationship between those responsible for the administration of Goodspell Park and the QCSC.
Pages 203-205A	Briefing notes for the then Minister containing comments on the history of dealings between Goodspell Park and the QCSC. [Note: there is some matter on page 273 and on page 205A which is claimed by the QCSC to be exempt under s.45(1)(c) of the FOI Act. The solicitors for the applicants have indicated that the applicants do not wish to pursue access to this matter, which is therefore not in issue in this review.]
Page 184	Memorandum from Director, Operations Support (Community Corrections) to Regional Manager (Southern).
Pages 102 and 82	Matter relating to the decision to establish Goodspell Park, consisting of a letter from the Director-General dated 16 September 1991 to the Minister regarding the resolution by the QCSC to declare Goodspell Park a community corrections centre.
<u>File 4 Link-Up Boystown General (Part 2)</u>	
Page 256	Memorandum dated 22 February 1993 from the Secretary of the QCSC to the Acting Director-General, being a document recording a decision of the Commissioners of the QCSC, sitting as a Board, concerning Goodspell Park.
Pages 254-255	The QCSC Board Paper which preceded the decision recorded in page 256.
Page 101	Memorandum dated 20 August 1992 from Mr Ken Bradshaw, Regional Manager (Metropolitan) to the Deputy Director-General, regarding a complaint by Link-

Up concerning information provided to a Town Planner engaged by the Beaudesert Shire Council.

- Pages 31-37 These are identical to pages 272-278 of file 3 (see above).
- Pages 29-30 Briefing note for the Minister regarding contract arrangements between the QCSC and Link-Up.
- File 5 Goodspell Park - Boystown (Part 1)
- Pages 344-345 Board Paper of the QCSC.
- Pages 321-324 Draft Briefing Note to the Minister (this document is a draft of pages 203-205A on file 3).
- Pages 193-194 Notes by Mr R Bleakley dated 10 February 1992 concerning a number of issues which pertain to Link-Up. [Note: page 194 contains the name of a prisoner. The applicants' solicitors have indicated that the applicants do not wish to obtain the name of that prisoner, so that the respondent's entitlement to delete the name is not in issue before me.]
- Page 24 Memorandum dated 3 June 1991 from the Director, Community Corrections, to the Director-General, regarding the contract for the Link-Up proposal which became Goodspell Park.
- File 8 Goodspell Park - Boystown Proposal (Part 4)
- Page 86 Memorandum dated 14 May 1993 from the Secretary of the QCSC to the Director-General, which conveys the decision of the QCSC Board on a matter which concerns Goodspell Park.
- Pages 2, 14, and 44 These are copies of page 86
- Pages 84 and 85 The QCSC Board Paper relating to the decision the terms of which are set out in page 86.
[Note: One paragraph of page 85 refers to assistance and grants given by the QCSC to other community corrections centres. The solicitors for the applicants have indicated that the applicants do not wish to obtain this information, which is therefore not in issue in this review.]
- Pages 12-13, 42-43 These are copies of pages 84-85.

27. In respect of those documents listed above as being copies of a previously listed document, I should state that I propose to refer in the balance of these reasons for decision only to the first-listed

document. My findings in respect of the first-listed document should be taken as applying also to documents listed above as being copies of the first-listed document.

28. Section 41(1) and s.41(2) of the FOI Act provide:

41.(1) Matter is exempt matter if its disclosure—

(a) would disclose -

(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or

(ii) a consultation or deliberation that has taken place;

in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and

(b) would on balance, be contrary to the public interest.

(2) Matter is not exempt under subsection (1) if it merely consists of—

(a) matter that appears in an agency's policy document; or

(b) factual or statistical matter; or

(c) expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.

29. Under s.41(2)(b) of the FOI Act, matter is not exempt under s.41(1) if it merely consists of factual or statistical matter: see *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at p.71, paragraphs 31-32. Applying the principles referred to there, and explained more fully in *Re Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 at pp.144-147 (paragraphs 49-58), I find that the following segments of the matter in issue comprise merely factual matter which is not eligible for exemption under s.41(1) of the FOI Act by virtue of s.41(2)(b):

File 3

Pages 278, 277, 276, the second last bullet point paragraph on page 275, page 274 (except for the first sentence on that page), and the first three sentences on page 273.

Page 205A, and page 205 (except for the third paragraph on page 205).

Pages 102 and 82.

File 4

Page 256.

Page 101 (except for the last two paragraphs on that page).

Page 30 (except for the third paragraph and the final sentence on that page) and page 29 (except for the last paragraph on that page).

File 5

Page 324, page 323, and page 322 (except for the first sentence, and all material below the last full paragraph, on page 322).

Page 194 (except for the fourth and sixth paragraphs on that page).

File 8

Page 86.

The first four paragraphs on page 85.

30. In respect of File 4, page 256, and File 8, page 86, I note that each of these folios merely records a formal decision of the Commissioners of the QCSC, i.e., the formal outcome of a deliberative process, rather than any of the deliberation (or opinion, advice, etcetera, contributed to the deliberative process) which preceded the making of the formal decision.
31. I am satisfied that the balance of the matter in issue (i.e., that which is not dealt with in paragraph 29 above) is deliberative process matter falling within the terms of s.41(1)(a) of the FOI Act (as to the meaning of the term "deliberative processes", see *Re Eccleston* at pp.70-71, paragraphs 27-30). The deliberative processes which can be identified are those relating to the approval of Goodspell Park as a community corrections centre, and to continuing dealings with Link-Up in respect of the operation of a community corrections centre, under s.12 of the *Corrective Services Act*, and s.18(2)(b) and s.19(2)(f) of the *Corrective Services (Administration) Act*.
32. Whether the balance of the matter which falls within s.41(1)(a) is exempt depends on whether its disclosure would be contrary to the public interest, in terms of s.41(1)(b). The only submission of the QCSC in relation to the application of that public interest balancing test is contained in the following extract from p.7 of its final submission dated 21 April 1995:

The Briefing Notes and Board Papers are clearly documents which relate to deliberative processes of government. It is essential for the good working of government that deliberations such as contained in the documents are not disclosed. To do so would impede the proper flow of information between public servants and the Minister.

It is further submitted that the balance of the public interest lies in not releasing the documents claimed to be exempt. The Applicants have a personal interest in accessing the documents concerned, but it could not be said that there is an overriding public interest in releasing information concerning the deliberations of the QCSC in relation to the Link-Up proposal and Goodspell Park. Rather, it is submitted that the public interest lies in favour of non-disclosure of such documents, as such deliberations are made as part of the effective operation of government.

33. The last sentence of the first paragraph quoted above suggests that all of the deliberative process documents in issue are communications between public servants and the Minister. This is not the case. The documents in issue which are clearly briefing notes or letters to the Minister are File 3, pages 203-205A, page 102 and page 82; File 4, pages 29-30; and File 5, pages 320-324. The other documents in issue have been prepared for briefing senior officers of the executive of the QCSC, or for briefing the Commissioners of the QCSC, meeting as a Board (i.e., the documents described as "Board Papers"), or for conveying decisions of the Commissioners to the executive of the QCSC.
34. The correct approach to the application of s.41(1)(b) of the FOI Act was analysed at length in my reasons for decision in *Re Eccleston*, where I indicated (see p.110; paragraph 140) that an agency or Minister seeking to rely on s.41(1) needs to establish that specific and tangible harm to an identifiable public interest (or interests) would result from disclosure of the particular deliberative process matter in issue. It must further be established that the harm is of sufficient gravity that, when weighed against competing public interest considerations which favour disclosure of the matter in issue, it would nevertheless be proper to find that disclosure of the matter in issue would, on balance, be contrary to the public interest.
35. The QCSC's case, however, is vague and unsubstantiated by evidence. While there is certainly a public interest in the effective working of government, the QCSC has not explained precisely how disclosure of the matter in issue would harm that public interest. The vague suggestion that disclosure "would impede the proper flow of information between public servants and the Minister" appears to be an attempt to restate the 'candour and frankness argument', in respect of which I made the following comments in *Re Eccleston* at pp.106-107 (paragraphs 132-134):

132. *I consider that the approach which should be adopted in Queensland to claims for exemption under s.41 based on the third Howard criterion (i.e. that the public interest would be injured by the disclosure of particular documents because candour and frankness would be inhibited in future communications of a similar kind) should accord with that stated by Deputy President Todd of the Commonwealth AAT in the second Fewster case (see paragraph 129 above): they should be disregarded unless a very particular factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative process communications of a like kind, and that tangible harm to the public interest will result from that inhibition.*

133. *I respectfully agree with the opinion expressed by Mason J in Sankey v Whitlam that the possibility of future publicity would act as a deterrent against advice which is specious or expedient or otherwise inappropriate. It could be argued in fact that the possibility of disclosure under the FOI Act is, in that respect, just as likely to favour the public interest.*

134. *Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest. If the diminution in previous candour and frankness merely means that unnecessarily brusque, colourful or even defamatory remarks are removed from the expression of deliberative process advice, the public interest will not suffer. Advice which is written in temperate and reasoned language and provides justification and substantiation for the points it seeks to make is more likely to benefit the deliberative processes of government. In the absence of clear, specific*

and credible evidence, I would not be prepared to accept that the substance or quality of advice prepared by professional public servants could be materially altered for the worse, by the threat of disclosure under the FOI Act.

36. Having examined the matter remaining in issue, I consider that it contains no information of particular sensitivity, or information the disclosure of which could harm the public interest. There are isolated instances where comments on individuals in the Link-Up organisation might have been more delicately expressed if the author had realised they might be disclosed, but there is nothing in the matter remaining in issue that could justify a finding that the substance or quality of deliberative process matter prepared by public servants in the QCSC (or any other agency) would be materially altered for the worse, if the matter remaining in issue were to be disclosed.
37. As to the second paragraph of the QCSC's submission quoted at paragraph 32 above, I consider that the QCSC has attempted to set up a false dichotomy between the applicants' special interest in the matter in issue and an alleged general public interest favouring non-disclosure. The punishment and rehabilitation of criminal offenders, the effectiveness of the administration of systems established for that purpose, and their cost to the public, are matters of real public interest (and, incidentally, of increasing community concern): see *Re Lapidos and Office of Corrections* (1989) 4 VAR 31 at p.44, per Jones J. In my opinion, there are genuine public interest considerations favouring disclosure of the matter in issue to any citizen interested enough to ask for it, for the purpose of enhancing the accountability of the QCSC and organisations which conduct community corrections centres on behalf of, and by arrangement with, the QCSC, and for the purpose of informing the public generally about the operations of systems established in this State for the punishment and rehabilitation of offenders. The applicants in this case may well have a special interest in the matter in issue that could be taken into account in applying s.41(1)(b) (in accordance with the principles explained in *Re Pemberton and The University of Queensland* (Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported) at paragraphs 164-193), but it is unnecessary to consider that question because the respondent has not satisfied me of the existence of any public interest considerations favouring non-disclosure that would justify a finding that disclosure of the deliberative process matter remaining in issue would, on balance, be contrary to the public interest.
38. I find that none of the matter claimed by the QCSC to be exempt under s.41(1) of the FOI Act is exempt matter under that provision.

Conclusion

39. For the foregoing reasons, I set aside that part of the decision under review (being the respondent's deemed refusal of access to documents falling within the terms of the applicants' FOI access application dated 2 April 1993) which concerns the documents described at paragraphs 11, 12 and 26 of my reasons for decision (being the only documents to which the applicants still wish to pursue access in this review). In substitution for it, I decide that:
- (a) the respondent is entitled to refuse access to -
 - (i) pages 297-298 of File 6, described in paragraph 11, and documents 15, 18 and 25, described in paragraph 12, of my reasons for decision, on the basis that they are exempt matter under s.43(1) of the FOI Act; and
 - (ii) document 6, described in paragraph 12 of my reasons for decision, which is also exempt matter under s.43(1), except for the first sentence of the fourth paragraph

of document 6, which is not exempt matter, and to which the respondent is not entitled to refuse access; and

- (b) the applicants have a right to be given access under the *Freedom of Information Act 1992* Qld to -
- (i) page 317 of File 5, described in paragraph 11 of my reasons for decision;
 - (ii) the first sentence of the fourth paragraph of document 6, described in paragraph 12 of my reasons for decision; and
 - (iii) the matter listed in paragraph 26 of my reasons for decision (except for any segments of matter which I have noted in the list as not being in issue in this review);

which I find are not exempt matter under the *Freedom of Information Act 1992* Qld.

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F N ALBIETZ
INFORMATION COMMISSIONER