**OFFICE OF THE INFORMATION COMMISSIONER (QLD)** ) S 86 of 1994
) S 112 of 1994
(Decision No. 94027)

Participants:

S 86 of 1994

QUEENSLAND GRIDIRON FOOTBALL LEAGUE INCORPORATED
Applicant

- and -

DEPARTMENT OF TOURISM, SPORT AND RACING
Respondent

- and -

PAUL REILLY
Third Party

S 112 of 1994

QUEENSLAND GRIDIRON FOOTBALL LEAGUE INCORPORATED
Applicant

- and -

DEPARTMENT OF TOURISM, SPORT AND RACING
Respondent

- and -

PAUL HOLIDAY
Third Party

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - "reverse FOI" application - documents in issue comprising report of an audit of the applicant, being an organisation funded under the Queensland Sports Development Scheme, and associated documents - whether documents in issue exempt under s.45(1)(b) or s.45(1)(c) of the *Freedom of Information Act 1992 Qld* - whether documents in issue contain information of commercial value - whether documents in issue concern the business, professional, financial or commercial affairs of the applicant - substance of documents in the public domain - whether disclosure could reasonably be expected to have an adverse affect on the applicant's business, commercial or financial affairs - whether disclosure could reasonably be expected to prejudice the future supply of such information to government - application of the public interest balancing test in s.45(1)(c) of the *Freedom of Information Act 1992 Qld*.

FREEDOM OF INFORMATION - whether matter in issue exempt under s.46(1)(a) of the *Freedom of Information Act 1992 Qld* - whether information communicated in such circumstances as to import an equitable obligation of confidence - whether matter in issue exempt under s.46(1)(b) of the *Freedom of Information Act 1992 Qld* - whether disclosure could reasonably be expected to prejudice the future supply of such information to government - application of the public interest balancing test in s.46(1)(b) of the *Freedom of Information Act 1992 Qld*.

*Associations Incorporation Act 1981 Qld*
*Freedom of Information Act 1992 Qld* s.39, s.45(1)(b), s.45(1)(c), s.46(1)(a), s.46(1)(b), s.51, s.51(2)(e), s.52, s.78, s.81, s.83(3).

*"B" and Brisbane North Regional Health Authority, Re* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported)
*Cannon and Australian Quality Egg Farms Limited, Re* (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported)

## DECISION

1. In respect of application for review no. S 86 of 1994, the decision under review (being the decision made on behalf of the respondent by Mr David Williams, on 6 April 1994 that the matter in issue is not exempt matter under the *Freedom of Information Act 1992 Qld*) is affirmed.

2. In respect of application for review no. S 112 of 1994, the decision under review (being the decision made on behalf of the respondent by Mr David Williams on 20 May 1994, that the matter in issue is not exempt matter under the *Freedom of Information Act 1992 Qld*) is affirmed.

Date of Decision: 12 October 1994

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**INFORMATION COMMISSIONER**

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## REASONS FOR DECISION

### Background

1. This matter involves two "reverse FOI" applications by the Queensland Gridiron Football League Incorporated (the QGFL), which objects to the respondent's decisions to give access under the *Freedom of Information Act 1992 Qld* (the FOI Act) to the following documents (which relate to an audit of the QGFL undertaken by staff of the respondent during 1993):

(a) preliminary audit findings dated 11 October 1993;
(b) response from the QGFL to the preliminary audit findings - letter dated 20 October 1993;
(c) final audit report dated 15 November 1993; and
(d) minutes of meeting held on 19 November 1993 between representatives of the QGFL and the respondent.

2. In application for review no. S 86/94, the third party is Mr Paul Reilly who, on 1 December 1993, lodged an application under the FOI Act for access to the final audit report (document (c) above). In application for review no. S 112/94, the third party is Mr Paul Holiday who, on 10 January 1994, lodged an application under the FOI Act for access to all of the documents identified above. Both Mr Reilly and Mr Holiday are former members of the QGFL, and Mr Reilly is associated with a group described as a "breakaway league". The audit of the affairs of the QGFL by the respondent was prompted by allegations made by former members of the QGFL regarding its accountability and management practices.

3. Prior to making decisions in relation to the applications of Mr Reilly and Mr Holiday, the respondent consulted with the QGFL pursuant to s.51 of the FOI Act. The QGFL objected to access being granted to any of the documents identified above, claiming that the documents were exempt from disclosure under s.45(1)(b) or (c), and s.46(1)(a) and (b), of the FOI Act. The QGFL also contended that the final audit report contained "discrepancies", and should not be released on that basis.

4. On 18 February 1994, Mr P V Jones made a decision, on behalf of the respondent, to grant Mr Reilly access to document (c) (as identified above) subject to the deletion of certain matter on 4 folios. Mr Reilly did not apply for review of the decision to delete matter from those 4 folios, and hence the making of those deletions is not in issue in this review.

5. On 11 March 1994, Mr P V Jones made a decision, on behalf of the respondent, to grant Mr Holiday access to documents (a), (b), (c) and (d) (as identified above) subject to the deletion of the same matter from document (c) as was deleted in respect of Mr Reilly's application, and subject also to the deletion of a small amount of information (on 5 other folios) relating to commercial sponsorship arrangements entered into by the QGFL. Mr Holiday did not apply for review of the decision to delete matter from 9 folios, and hence the making of those deletions is not in issue in this review.

6. The QGFL applied under s.52 of the FOI Act for internal review of each of Mr Jones' decisions. In each instance, the decision was affirmed on internal review by Mr David Williams, the Director-General of the Department of Tourism, Sport and Racing (the Department).

7. The QGFL has applied for external review under Part 5 of the FOI Act, in respect of each of Mr Williams' decisions. The result of those applications is that, by virtue of s.51(2)(e) of the FOI Act, the respondent has been obliged to defer giving access to the documents in issue pending the outcome of the QGFL's applications for review.

8. The QGFL is a body incorporated under the *Associations Incorporation Act 1981 Qld*. It has applied for, and been granted, funding from the Department under the Queensland Sports Development Scheme. It receives funding for the purposes of administration, management, coaching and development. In 1993, the QGFL received $79,405 under the scheme, which was introduced by the Department in 1992, acting upon the recommendations contained in the Report of the Ministerial Inquiry into Sports Funding in Queensland which was delivered in September 1990 (the Welford Report).

9. The audit which is the subject of the documents in issue was undertaken by the Department's "Performance Evaluation and Review Unit". It was not an audit by the Auditor-General (so there is no possibility of s.39 of the FOI Act being applicable). As will be outlined further below, in order to receive funding from the Department under the Queensland Sports Development Scheme, organisations must enter into a "Resource Agreement" with the Department. It is a standard term of such Resource Agreements that the Department's auditors are to be given access to the organisation's books of account.

**The External Review Process**

10. Both Mr Reilly and Mr Holiday applied under s.78 of the FOI Act to be participants in the reviews which respectively affected them, and their applications were granted.

11. Copies of the documents in issue, as identified in paragraph 1 above, were obtained and examined. In respect of application for review no. S 86/94, the Deputy Information Commissioner wrote to the applicant on 21 June 1994 advising that it was his preliminary assessment that the respondent had correctly applied the provisions of the FOI Act to the final audit report, and setting out reasons in support of that view. He further advised that if, notwithstanding that preliminary assessment, the applicant wished to contest the respondent's decision, the applicant was invited to lodge a written submission and/or evidence in support of its case that the final audit report is an exempt document under the FOI Act.

12. A letter dated 20 July 1994 was received from the QGFL advising that "the QGFL ... will not be writing a detailed report in relation to the reasons why the document in issue should not be made available to the general public". The QGFL placed reliance on its letter of 9 February 1994 to the Department which set out the QGFL's concern that the audit report contained a number of discrepancies. The QGFL informed me that it objects to the release of the audit report, because it is not fair or just that it be released when the Department has not considered or addressed the issues raised in the QGFL's letter of 9 February 1994.

13. In respect of application for review no. S 112/94, I wrote to the QGFL on 5 August 1994 setting out my preliminary view that the Department had correctly applied the provisions of the FOI Act to the documents in issue. The QGFL was given a further opportunity to lodge evidence and/or a written submission in support of its contentions that the documents in issue were exempt documents under the FOI Act. The QGFL has not replied to that letter and has not lodged a submission in support of its external review application.

14. Section 83(3) of the FOI Act provides as follows:

> ***(3)*** *In conducting a review, the Commissioner must -*
>
> *(a) adopt procedures that are fair, having regard to the obligations of the Commissioner under this Act; and*
>
> *(b) ensure that each participant has an opportunity to present the participant's views to the Commissioner;*
>
> *but, subject to paragraph (a), it is not necessary for a participant to be given an opportunity to appear before the Commissioner.*

15. In this instance, I am satisfied that the QGFL has been provided with ample opportunity to provide me with its views as to why it considers that the documents in issue are exempt documents under the FOI Act. The QGFL informed me in external review no. S 86/94 that it did

not wish to provide me with a submission, and in review no. S 112/94 it has not responded to my invitation to provide a submission and/or evidence in support of its case. The QGFL has indicated that it is content to rely upon previous submissions to the Department in relation to the matter in issue. These comprise a letter to the Department dated 9 February 1994, in which the QGFL expressed its concerns at alleged discrepancies in the final audit report, and a letter to the Department dated 15 February 1994 which sets out some rather brief arguments as to why the final audit report is exempt under s.45(1)(b) or (c), and s.46(1)(a) and (b), of the FOI Act.

**Relevant Provisions of the FOI Act**

16. Section 81 of the FOI Act provides that in a review under Part 5 of the FOI Act, the agency which made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant. While the formal onus in this case remains on the Department to justify its decision that the documents in issue are not exempt documents under the FOI Act, it can discharge this onus by demonstrating that any one of the necessary elements which must be established to attract the application of each of the exemption provisions relied on by the QGFL, cannot be made out. Consequently, the QGFL's application must fail if I am satisfied that an element necessary to found the application of each exemption provision which the QGFL relies upon, cannot be established.

17. The exemption provisions claimed by the QGFL (in its correspondence with the Department) to be applicable to the documents in issue are s.45(1)(b) or s.45(1)(c), and s.46(1)(a) and (b), of the FOI Act. Section 45(1)(b) and (c) provide as follows:

> ***45.(1)*** *Matter is exempt matter if -*
>
> *...*
>
> *(b) its disclosure -*
>
> *(i) would disclose information (other than trade secrets) that has a commercial value to an agency or another person; and*
>
> *(ii) could reasonably be expected to destroy or diminish the commercial value of the information; or*
>
> *(c) its disclosure -*
>
> *(i) would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and*
>
> *(ii) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;*
>
> *unless its disclosure would, on balance, be in the public interest.*

18. Section 46 of the FOI Act provides as follows:

> ***46.(1)*** *Matter is exempt if -*

*(a) its disclosure would found an action for breach of confidence; or*

*(b) it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*

***(2)** Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless its disclosure would found an action for breach of confidence owed to a person or body other than -*

*(a) a person in the capacity of -*

*(i) a Minister; or*

*(ii) a member of the staff of, or a consultant to, a Minister; or*

*(iii) an officer of an agency; or*

*(b) the State or an agency.*

**Application of s.45(1)(b) to the Matter in Issue**

19. The requirements of s.45(1)(b) of the FOI Act are analysed at paragraphs 50-65 of my reasons for decision in *Re Cannon and Australian Quality Egg Farms Limited* (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported). At paragraphs 54-56 of *Re Cannon*, I made the following observations on the meaning of the phrase "commercial value" in s.45(1)(b):

> *54. It seems to me that there are two possible interpretations of the phrase "commercial value" which are not only supportable on the plain meaning of those words, but also apposite in the context of s.45(1)(b) of the FOI Act. The first (and what I think is the meaning that was primarily intended) is that information has commercial value to an agency or another person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged. The information may be valuable because it is important or essential to the profitability or viability of a continuing business operation, or a pending, "one-off" commercial transaction. According to the Collins English Dictionary (Aust. Ed.) the word "commercial" means* "of, connected with or engaged in commerce; mercantile", *and the word "commerce" means* "the activity embracing all forms of the purchase and sale of goods and services".
>
> *55. The second interpretation of "commercial value" which is reasonably open is that information has commercial value to an agency or another person if a genuine, arms-length buyer is prepared to pay to obtain that information from that agency or person. It would follow that the market value of that information would be destroyed or diminished if it could be obtained from a government agency that has come into possession of it, through disclosure under the FOI Act. The fact that there is a genuine market for information used by an agency or another person in carrying on*

*commercial activity could also be regarded as a strong indication that the information is valuable for the purpose of carrying on that commercial activity; i.e. that the primary meaning referred to above is satisfied. I do consider, however, that information can be capable of having a commercial value to an agency or another person even though it could not be demonstrated that an arms-length buyer would be prepared to pay to obtain that information. The difficulties of proof of the material facts which would bring information within the ambit of the second meaning of "commercial value" to which I have referred will probably mean that it is not relied upon on many occasions.*

*56. The information in issue must have commercial value to an agency or another person at the time that an FOI decision-maker comes to apply s.45(1)(b) to the information in issue. This proposition is illustrated by observations in reported cases of the Commonwealth AAT to the effect that:*

- *information which is aged or out-of-date has no remaining commercial value (see for example* Re Brown and Minister for Administrative Services *(1990) 21 ALD 526 at p.533, paragraph 22); and it may be that the value of information relating to a major, "one-off" commercial transaction, such as the sale of a government property, is spent once the transaction is consummated: for the American approach in these circumstances see* Tennessean Newspaper Inc v Federal Housing Administration, *464 F.2d 657 (6th Cir 1972);* Benson v General Service Administration, *289 F.Supp 590 (WD Wash 1968)); and*

- *information which is publicly available has no commercial value which can be destroyed or diminished by disclosure under freedom of information legislation (see* Re Public Interest Advocacy Centre and Department of Community Services and Health and Schering Pty Ltd *(1991) 23 ALD 714 at p.724, paragraphs 44 and 46).*

20. In my opinion, the only information contained in the documents in issue which could even arguably be characterised as having a commercial value, according to the principles explained above, is the small amount of information relating to the QGFL's sponsorship arrangements. The Department has decided that this information is exempt, and its decision in that regard has not been challenged and is not in issue before me (see paragraphs 4 and 5 above). The balance of the documents in issue concern the financial management practices in place at the QGFL, and the QGFL's relationship with the Department. I am not satisfied that the matter in issue has any intrinsic commercial value to the QGFL (or any other person) for the purposes of carrying on the commercial activity in which the QGFL (or any other person) is engaged; nor am I satisfied that the matter in issue has a commercial value in the sense explained at paragraph 55 of *Re Cannon.* On this basis, I find that the matter in issue is not exempt matter under s.45(1)(b) of the FOI Act.

21. Even if it could be established that the information has a commercial value to the QGFL, in order for the matter in issue to be exempt under s.45(1)(b) it must be demonstrated that disclosure of the information in issue could reasonably be expected to destroy or diminish its commercial value. As explained at paragraph 27 below, the substance of the matter in issue has been disclosed in the forum of the Queensland Parliament and is now a matter of public record. In such circumstances, I do not see how disclosure under the FOI Act could diminish any commercial value in the documents in issue.

**Application of s.45(1)(c) to the Matter in Issue**

22. According to the principles which I explained at paragraphs 66-88 of my reasons for decision in *Re Cannon*, matter will be exempt from disclosure, by virtue of s.45(1)(c) of the FOI Act, if I am satisfied that:

(a) the matter in issue is properly to be characterised as information concerning the business, professional, commercial or financial affairs of an agency or another person (s.45(1)(c)(i)); and

(b) disclosure of the matter in issue could reasonably be expected to have either of the prejudicial effects contemplated by s.45(1)(c)(ii), namely:

(i) an adverse effect on the business, professional, commercial or financial affairs of the agency or other person, which the information in issue concerns; or

(ii) prejudice to the future supply of such information to government;

unless I am also satisfied that disclosure of the matter in issue would, on balance, be in the public interest.

23. It is apparent from an examination of the documents in issue that they contain information concerning the financial affairs of the QGFL. The audit report, and its preparatory documents, contain information concerning the QGFL's recording of income and expenditure, wages, and funding arrangements. Minutes of the meeting of 19 November 1993 record discussions between officers of the Department and representatives of the QGFL in relation to the funding of the organisation and findings contained in the audit report. In my opinion, s.45(1)(c)(i) is clearly satisfied.

24. As noted in paragraph 16 above, the respondent can discharge its onus of justifying the decision under review by negating any one of the elements which must cumulatively be established to attract the application of the exemption provisions relied upon by the QGFL. In respect of s.45(1)(c), the respondent has justified its decision solely on the application of the public interest balancing test. In his internal review decision dated 20 May 1994, dealing with the QGFL's objections to Mr Holiday obtaining access to the documents in issue, Mr Williams made the following findings in respect of the application of s.45(1)(c) of the FOI Act:

> *The information will be exempt under s.45(1)(c) if it concerns the "business, commercial or financial affairs" of your organisation, and its disclosure could reasonably be expected to have an adverse impact on those affairs, unless the disclosure of the information would be in the public interest.*
>
> *There seems to be little doubt that the substance of the Audit Report and some of the other documents concerns matter which is caught by these provisions. I am of this opinion, and believe that the release of the information would be prejudicial to the business, commercial and financial affairs of your organisation. The question which must be answered then, is whether, on balance, it is in the public interest for the information to be released.*
>
> *What must be decided is whether the greater weight should be attached to the public interest in protecting the commercial and business interests of the club, or to the public interest in having access to information which provides details of*

*the way public funds are being dealt with.*

*In deciding to accord greater weight to the interests of the public in the release of the information in this case, I have had particular regard to the following things:*

- *the fact that the organisation is funded to a large extent by taxpayers' money;*
- *the purposes for which audits of this kind are carried out, which is to ensure that publicly funded organisations are accountable in the public arena, in order to promote responsible financial management practices;*
- *the fact that the matter has been raised in the public forum of State Parliament; and*
- *the community's general expectation that all government activity be open to public scrutiny.*

*It is possible to perceive that there is a degree of public interest in withholding the release of the information in order to avoid any impediment to the development of the sport in Queensland. However, it is my opinion that the interests of the community would more adequately be served by the release of the information in question. Therefore, the material is not exempt by virtue of the operation of s.45(1)(c) of the Act.*

Mr Williams' decision of 6 April 1994 (dealing with the QGFL's objections to Mr Reilly obtaining access to the final Audit report) is in similar terms.

25. I consider that the approach taken by the Department to the application of the public interest balancing test (see also the detailed consideration given by the initial decision-maker, Mr P Jones, as set out at paragraph 40) is fundamentally correct. I am satisfied that disclosure of the documents in issue would, on balance, be in the public interest for the reasons explained at paragraphs 33-41 below. Since I also consider that the requirements of s.45(1)(c)(ii) are not satisfied in the circumstances of this case, I will record my observations on that issue, before returning to the public interest balancing test.

26. In correspondence to the Department (principally its letter dated 15 February 1994) the QGFL has asserted that disclosure of the documents in issue could reasonably be expected to have an adverse effect on its business, commercial or financial affairs, in particular, the QGFL's ability to obtain funding from sponsorship agreements and marketing opportunities. The QGFL has argued that disclosure of the documents in issue could cause concern to present or potential sponsors about mismanagement or misappropriation of funds, even though there was no evidence to support this.

27. As I noted in paragraph 84 of my decision in *Re Cannon*, the question of whether the disclosure of information could reasonably be expected to have an adverse effect, for the purpose of s.45(1)(c)(ii) of the FOI Act, will (in most instances) turn on whether the information is capable of causing competitive harm to the relevant agency, corporation or person. In this case, a key factor relevant to whether the "adverse effect" requirement in s.45(1)(c)(ii) is satisfied is the fact that the substance of the audit report and ancillary documents has been discussed in the Queensland Parliament and has become a matter of public record. It is referred to in *Hansard* of 8 December 1993 at pp.6531-2 where it is the subject of a response by the Minister for Tourism, Sport and Racing to a Question upon Notice. The relevant portion of *Hansard* reads as follows:

*QUESTIONS UPON NOTICE*

*1. Queensland Gridiron Football League*

*Mr BEANLAND asked the Minister for Tourism, Sport and Racing -*

*"With reference to the Queensland Gridiron Football League -*

*(1) What were the findings of the independent audit and general investigation in the League?*

*(2) Will his department take action to obtain a refund of Government funds allocated by his department for coaching but not yet spent?*

*(3) What amount did his department pay to the league for coaching?*

*(4) What will be the amount of the refund, if any?"*

*Mr GIBBS: The reply to this question is somewhat lengthy. I therefore seek to have it incorporated in* Hansard.

*Leave granted.*

*1. An audit of the QGFL for the period 1st January 1993 to 30th June, 1993 was conducted as part of a program of audits designed to examine State sporting bodies in receipt of Government funding under the State-Wide Sports Development Program.*

*The findings of the audit highlighted certain problems:-*

*inability to match Department funding during the first six months*

*general standard of administration was less than satisfactory*

*number of deficiencies were detected in the League's accounting/ management procedures.*

*Discussions were held with representatives of the QGFL including its newly appointed treasurer, who is a public accountant. The QGFL acknowledged its errors and undertook to immediately implement procedures which would rectify the matters raised as a result of the audit.*

*2. At a subsequent meeting of the QGFL and Departmental officers to discuss the payment of the balance of approved funds for the second half of 1993, the QGFL submitted satisfactory financial documentation concerning expenditure on certain funding items since 30th June, 1993.*

*The QGFL also provided satisfactory evidence concerning a claim for the payment for an approved subsidy for the employment of a part time administrator and part time coach in 1992. The amount of*

*subsidy to which the QGFL was entitled was $5 328.*

*On the basis of the documentation provided by the QGFL at this meeting, and taking into account monies owed to and by the QGFL, the Department decided that it was obligated to provide an interim payment of $20 000 to the QGFL for certain funding areas e.g. travel by junior state team to national championships. However, outstanding funds for the employment of coaching staff in 1993 will not be provided until the QGFL furnishes additional financial details of expenditure. It is envisaged that a final assessment will be made on this matter by the end of the week.*

*3. Under the State-Wide Sports Development Program in 1993 a total coaching grant of $37 500 was approved to the QGFL for the employment of two coaching positions (State and Regional Coaches). This amount comprised $29 000 for salaries, $6 000 for travel costs and $2 500 for professional development.*

*The payment for coaching for the first half of 1993 of $18 750 was made on 4th February, 1993 which comprised a subsidy of $14 500 for the employment of both State and Regional Directors of Coaching, $3 000 towards the travel costs of these coaches and $1 250 toward their professional development.*

*In addition, following the assessment of 1992 financial details, the QGFL was paid $5 328 recently for the part time administrator and part time coach for 1992.*

*4. As previously mentioned, the QGFL has yet to provide satisfactory financial evidence concerning the payment of funds towards the employment of its coaching staff. Based on the findings of the recent audit, the QGFL has failed to acquit a certain amount for coaching in relation to what it received for the first half of 1993. Until the QGFL furnishes the requested information, my Department is not in a position to state what level of outstanding funds will be provided or whether a refund will be sought from the QGFL for the employment of these coaches.*

28. The meaning of the phrase "could reasonably be expected to", which appears in both s.45(1)(b) and s.45(1)(c) of the FOI Act, is explained in paragraphs 62-64 of *Re Cannon*. Applying those principles, and having particular regard to the fact that the substance of the documents in issue is already in the public domain, I am not satisfied that disclosure of the documents in issue under the FOI Act could reasonably be expected to have the adverse effect claimed by the QGFL.

29. The QGFL has also argued that disclosure of one small segment of the final audit report, dealing with transactions with an overseas group relating to the supply of football equipment, could have an adverse effect on the QGFL's relationship with the overseas group (which would also have a direct effect on the marketing and growth of the sport of gridiron under the QGFL). I have examined that particular segment of the final audit report, which focuses merely on the inadequacy of the QGFL's financial records for the purpose of properly recording payments made in respect of the transactions. It is consistent with the general thrust of the final audit report which highlights shortcomings in the QGFL's financial record-keeping. There is no

finding, or suggestion, of impropriety on the part of any person or organisation in respect of the transactions. I am not satisfied that the adverse effect stated by the QGFL could reasonably be expected to follow from disclosure of this matter.

30. The other prejudicial effect, which is capable of satisfying s.45(1)(c)(ii) of the FOI Act, is whether the disclosure of the information in issue could reasonably be expected to prejudice the future supply of such information to government. The words "prejudice the future supply of such information" also appear in s.46(1)(b) of the FOI Act, and what I said about the meaning of those words in my decision in *Re "B" and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported) (at paragraph 161) is also apposite in the context of s.45(1)(c)(ii) of the FOI Act:

> *161. Where persons are under an obligation to continue to supply such ... information (e.g. for government employees, as an incident of their employment; or where there is a statutory power to compel the disclosure of the information) or persons must disclose information if they wish to obtain some benefit from the government (or they would otherwise be disadvantaged by withholding information) then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information. In my opinion, the test is not to be applied by reference to whether the particular* [supplier] *whose ... information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of the sources available or likely to be available to an agency.*

31. It is a standard term of the Resource Agreements between the Department and funded organisations that the Department's auditors, or any person nominated by the Director-General of the Department, must be given access to the organisation's books of account and such other documentation deemed necessary to:

> • *ensure compliance with all reporting and accountability requirements and to conduct audits of any programs for which the organisation has received government assistance;*
>
> • *undertake reviews into the organisational management and structure of organisations to ensure the maintenance of sound management practices, accountability mechanisms and organisational democracy.*

32. It is apparent that the failure of organisations to provide this information to the Department would result in funding being withdrawn by the Department. Accordingly, there is no basis upon which it could reasonably be expected that disclosure of the information in issue would prejudice the future supply of such information to government.

33. The nature of the public interest balancing test incorporated within s.45(1)(c) of the FOI Act, and the correct approach to its application, are explained at paragraph 87 of my reasons for decision in *Re Cannon*.

34. In its letter to the Department dated 15 February 1994, the QGFL said that it does not see the release of the information in issue as being in the public interest but as a way for individuals to misuse the information to further disrupt the administration and growth of a legitimate sport. The public interest considerations identified by the QGFL (in correspondence to the Department and to my office) as favouring non-disclosure of the documents in issue, can be summarised as follows:

(a) disclosure of the documents in issue could be financially damaging to the QGFL, particularly in respect of its ability to obtain funding from sponsorship agreements and marketing opportunities, and thereby hinder the QGFL's ability to foster the growth of the sport of gridiron in Queensland; and

(b) the audit report should not be available to the public when it contains the discrepancies alleged in the QGFL's letter dated 9 February 1994 to the Department, which the Department has not considered or addressed.

35. The first of these largely duplicates the adverse effect claimed for the purposes of s.45(1)(c)(ii). I do not consider that any substantial weight can be accorded to it, given that the substance of the documents in issue is already a matter of public record, as explained above. As to the second, it is possible to envisage circumstances in which it would be contrary to the public interest in the fair treatment of persons or organisations in their dealings with government, to disclose a document containing demonstrable errors which were unfair or unjust to a person or an organisation. Each case must be judged according to its particular circumstances (e.g. there may be instances where disclosure would assist to redress any unfairness or injustice, or where accountability of an agency for its unfair or unjust treatment of an individual or organisation was the paramount consideration) and there may be questions of degree involved. I have examined the 6 points raised in the QGFL's letter of 9 February 1994 to the Department in light of the purpose and general significance of the audit report. I do not think it is necessary for me to set out details of those six points, but I will briefly record my response to them, for the benefit of the applicant. The first two points made in the QGFL's letter seem to me to be of no substance. The fact that the authors of the final audit report chose to make no mention of two matters, which were within the scope of the audit, does not amount to a discrepancy; rather it leads to the logical inference that the auditors found nothing unsatisfactory or worthy of comment in respect of those two matters. Points 3, 4, 5 and 6 (the last three of which I consider to be trivial at best) do not, in my opinion, detract from the overall significance of the audit report, nor from the predominant weight of the public interest considerations which favour its disclosure.

36. The recommendations of the Welford Report, which have been adopted as government policy, require the Department to audit sporting bodies which are granted assistance from public funds. The Welford Report contains the following comments in relation to accountability of organisations funded by the Department under the Queensland Sports Development Scheme:

> *It will be vital to the success of the scheme that all sporting bodies, and State sporting bodies particularly, achieve greater accountability and efficiency. The committee has already foreshadowed that primary responsibility for the accountable expenditure of State government grants will rest with State sporting bodies. This will impose a significant responsibility as well as a burden on some State sporting bodies. Those sports which fail to satisfy the requirements of the new scheme will inevitably suffer a reduction or the withdrawal of State government financial assistance.*

37. Included in its recommendations were the following:

> *All sporting bodies in receipt of funds must submit a financial report accounting for all income and expenditure at the completion of each funding period.*
>
> *The Division of Sport and Recreation establish an audit unit consisting of two officers who will liaise with sporting bodies to ensure compliance with all reporting and accountability requirements and conduct random audits of any programs for which sporting bodies have received government financial assistance.*

38. The published guidelines, for the program under which the QGFL received funding, provide:

> *All grants are subject to organisations agreeing to the terms and conditions outlined in the resource agreement. These include providing audit certification of quarterly reports on positions/programs/projects which are supported and complying with targets negotiated in the sports performance contract.*

39. Included in the criteria for determining the allocation of funds between sporting bodies who are competing for funding is the standard of administration, including effectiveness of programs undertaken, and efficiency in reporting on and acquitting previous grants.

40. It is apparent from the foregoing that there is a strong public interest in ensuring that taxpayers' funds, which are expended by way of the provision of the payment of subsidies for the administration and coaching expenses of organisations such as the QGFL, are properly accounted for. There are other public interest considerations favouring disclosure which, in my opinion, were correctly identified and weighed in the initial decision made on behalf of the Department by Mr P V Jones, and communicated in a letter to the QGFL dated 25 February 1994:

> ***Arguments in favour of disclosure are:***
>
> *(1)* *It is public knowledge that this Department was conducting an audit of the affairs of QGFL in response to allegations made by a breakaway Gridiron group. The release of the audit investigations into the public domain would enable the community to make a determination as to whether a fair, efficient and proper investigation had been undertaken into the affairs of the QGFL.*
>
> *(2)* *The release of the report will detail the Department's response to the allegations raised by the rival group and reaffirm the legitimacy of the audit process.*
>
> *(3)* *The QGFL is a publicly funded organisation. The purpose of departmental audits is to ensure Government funds are expended in a correct and accountable manner, and to provide guidance and assistance where necessary. The release of the Audit Report would reinforce this notion.*
>
> *(4)* *Disclosure would assist in aiding the community's assessment of the true situation with respect to the QGFL and the adequacy of the audit investigations conducted. Both are matters of public*

*concern in which all members of the community have a vested interest through the use of public funds.*

*(5) The Audit Report demonstrates the co-operative and responsive manner in which QGFL addressed concerns raised in the audit process.*

*(6) The release of the report would demonstrate to the community that the QGFL has taken remedial action to address perceived inadequacies in the financial and operational management of the association.*

***Arguments against disclosure:***

*(1) Increased public concern could reasonably be expected to adversely impact upon the business and commercial affairs of the QGFL.*

*(2) The disclosure may affect future sponsorship and marketing opportunities for the association.*

*(3) The release of the information may benefit the QGFL's competitors.*

*(4) The release of the report may harm the potential growth of the sport of Gridiron in Queensland.*

*I have balanced the public interest arguments. I have given some weight to the public interest which lies in protecting the commercial and business affairs of the QGFL. I have also taken account of the fact that the QGFL willingly co-operated with the Department in its audit investigation. I also acknowledge that the release of the report may have an adverse effect on the commercial operations of the QGFL. However, I have given greater weight to the fact that the QGFL is a publicly funded organisation. There is an on-going expectation within the community that not only should public money be well spent, but that it should be seen to be well spent. The Department's on-going audit program of publicly funded organisations serves to reinforce this expectation.*

*I have also given weight to the fact that issues surrounding the financial and operational accountability of the QGFL have been raised in the public forum of Parliament.*

*I consider it of paramount importance that it be demonstrably shown to the community at large that a thorough and comprehensive assessment had been undertaken into the affairs of QGFL.*

41. I am satisfied that disclosure of the documents in issue would, on balance, be in the public interest.

**Application of s.46(1) to the Matter in Issue**

42. In the decisions under review, Mr Williams made findings that no undertakings were given by Departmental officers that any of the information provided by the QGFL was received on a

confidential basis, and that no enforceable relationship of confidence existed, hence s.46(1)(a) of the FOI Act did not apply. In respect of s.46(1)(b), Mr Williams found that the third requirement of that exemption (i.e., that disclosure of the information in issue could reasonably be expected to prejudice the future supply of such information) was not established, since organisations like the QGFL are obliged to supply the Department with information of the kind in issue if they wish to continue to obtain government funding. Mr Williams also found that disclosure of the information in issue would, on balance, be in the public interest, for the same reasons as are set out at paragraph 24 above.

43. I am satisfied that Mr Williams' decisions are correct in these respects, and that the matter in issue is not exempt under s.46(1)(a) or s.46(1)(b). It appears from the terms of the QGFL's letter to the Department dated 15 February 1994, that the QGFL's claim for exemption under s.46(1) was made only in respect of the same small portion of the audit report which is referred to in paragraph 29 above. Since the substance of the audit report, if not all the fine detail, is now in the public domain (as explained at paragraph 27 above), the QGFL cannot, in my opinion, establish that most of the information in issue is confidential in nature, this being the primary requirement for exemption under both s.46(1)(a) and s.46(1)(b).

44. As previously explained, the QGFL has executed funding agreements with the Department which in effect oblige the QGFL to provide the Department with any information required for the purpose of undertaking compliance audits of the QGFL to ensure that proper financial and operational management practices have been adhered to. The relevant agreements contain fairly detailed terms and conditions, but do not include any clauses purporting to impose obligations of confidence. For any of the matter in issue to be exempt under s.46(1)(a) of the FOI Act, the requirements for an action in equity for breach of confidence must be established, namely:

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

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

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

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

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

45. Mr Williams based his decisions, essentially, on his finding that criterion (c) above was not satisfied in the circumstances of this case. If I agree with Mr Williams' finding in that regard, that will be sufficient to dispose of s.46(1)(a) as a possible ground of exemption, making it

unnecessary to consider the other criteria.

46. An extended analysis of the correct approach to the application of criterion (c) can be found at paragraphs 76-96 of my reasons for decision in *Re "B"*. Criterion (c) calls for a determination, based on an evaluation of the whole of the relevant circumstances in which confidential information was imparted to a person, whether the recipient's conscience ought to be bound with an equitable obligation of confidence. Having regard to all of the relevant circumstances and, in particular, the nature of the relationship between the QGFL and the respondent, the nature and alleged sensitivity of the information in issue, and the purposes for which it was sought and given, I am satisfied that none of the information in issue was communicated in such circumstances as to fix the Department with an equitable obligation of confidence. The Department in effect acts as an agent of the public in ensuring that public funds advanced to a private sector organisation to further purposes considered to be in the public interest (i.e. fostering the development of opportunities for participation in sporting activities through enhancing the efficiency of sports administration and management) are expended in a proper manner and properly accounted for. In my opinion, these general circumstances tell against the imposition of enforceable equitable obligations of confidence. It is always possible that particular items of information could attract such an obligation, depending on the circumstances of a particular case, but criterion (c) is not, in my opinion, satisfied in respect of any of the information in issue in this case, including the particular portion of the audit report singled out by the QGFL in its letter to the Department dated 15 February 1994 (see paragraph 29 above).

47. As to the last-mentioned segment of information, the QGFL has not taken advantage of the opportunity it was offered to lodge evidence, but as I understand its case, that segment of the final audit report makes passing reference to information provided by QGFL representatives to the Department's auditors "off the record". It appears that a tape recording was being made of the relevant meeting (on 30 September 1993) and shortly after the auditors commenced to ask questions on this topic, a QGFL representative asked for the tape recorder to be turned off. Turning off a tape recorder in such circumstances may not be sufficient, in itself, to give rise to an understanding that information was then being supplied in confidence. Certainly, Mr Williams, in the decisions under review, found that no undertakings were given by Departmental officers that any of the information provided was received on a confidential basis. It is unnecessary for me to consider the legal position with respect to all of the information provided during the time the QGFL representatives believed they were speaking "off the record", since I am concerned only with the passing references that have found their way into the final audit report. As observed in paragraph 29, that segment of the final audit report focuses merely on the inadequacy of the QGFL's financial records for the purpose of properly recording payments made in respect of certain transactions. There is no finding, or suggestion, of impropriety on the part of any person or organisation in respect of the transactions. I am satisfied that equitable obligations of confidence would not apply to the information, claimed by the QGFL to have been supplied in confidence, which is recorded in that segment of the final audit report.

48. In respect of s.46(1)(b), I am satisfied that Mr Williams' decision is clearly correct. As discussed at paragraph 146 of my decision in *Re "B"*, in order to establish the *prima facie* ground of exemption under s.46(1)(b) of the FOI Act three cumulative requirements must be satisfied:

(a) the matter in issue must consist of information of a confidential nature;

(b) that was communicated in confidence; and

(c) the disclosure of which could reasonably be expected to prejudice the future supply of such information.

If the *prima facie* ground of exemption is established, it must then be determined whether the *prima facie* ground is displaced by the weight of identifiable public interest considerations which favour the disclosure of the particular information in issue.

49. For the reasons given at paragraphs 30-32 above, I am satisfied that disclosure of the information in issue could not reasonably be expected to prejudice the future supply of such information. Furthermore, for the reasons outlined in paragraph 34-40 above, the same public interest considerations discussed in relation to s.45(1)(c) satisfy me that disclosure of the information in issue would, on balance, be in the public interest.

**Conclusion**

50. The decisions under review (being the decisions made on behalf of the respondent by Mr David Williams, on 6 April 1994 and 20 May 1994, that the documents in issue are not exempt documents under the *Freedom of Information Act 1992 Qld*) are affirmed.

.....
F N ALBIETZ
**INFORMATION COMMISSIONER**