"HNS" and Queensland Health

(S 102/00, 25 March 2002, Deputy Information Commissioner)

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

1.- 3. These paragraphs deleted.

REASONS FOR DECISION

Background

4. The applicant, "HNS", was the District Manager of a Health Service District (the District) for several years in the 1990's. Written complaints were made to the Minister for Health and to Queensland Health about the applicant and other staff of the District. Written complaints were also made to the local Member of Parliament, who passed them on to the Minister for Health. The Director-General of Queensland Health and Dr J G Youngman, Deputy Director-General (Health Services) met with the local Community Consultative Committee. A number of concerns about the conduct and performance of the applicant were raised at that meeting. Dr Youngman then notified the applicant that he was placing her and the executive managers of the local hospital on a three month performance assessment. At the conclusion of the performance assessment, Dr Youngman commended the leadership and management of the applicant and the executive management in addressing the issues raised during the performance assessment.

5. Queensland Health received further expressions of concern about the performance of the applicant. Following discussions with Queensland Health management, the applicant accepted a transfer to the Corporate Office of Queensland Health in Brisbane in the role of Principal Policy Officer. The applicant initially viewed the offer of this transfer by Queensland Health as *"an offer of support following the various unfounded allegations etc. that had been made against me since becoming District Manager …"*. However, she was subsequently notified of a grievance that had been lodged against her before the offer of a transfer was made, and became dissatisfied with the way that Queensland Health had handled the grievance and other complaints relating to her.

6. By letter dated 24 January 2000, the applicant sought access under the FOI Act to correspondence received or sent by the Minister for Health concerning her. The application was transferred to Queensland Health (pursuant to s.26 of the FOI Act) as the Minister's Office held no relevant documents. By e-mail dated 4 April 2000, the applicant extended the scope of her FOI access application to include correspondence to and from Queensland Health's Corporate Office.

7. By letter dated 20 April 2000, Ms S Heal of Queensland Health informed the applicant that she had located 114 pages that were responsive to the terms of the applicant's amended FOI access application. Ms Heal decided to disclose 67 pages to the applicant in full, and to disclose a further 6 pages subject to the deletion of some segments of matter. Ms Heal decided that the remaining 41 pages were exempt from disclosure.

8. The applicant applied for internal review of Ms Heal's decision by letter dated 4 May 2000. As no reply was received from Queensland Health within the 14 day time limit prescribed by s.52(6) of the FOI Act, the applicant applied to the Information Commissioner (by letter dated 19 May 2000) for review, under Part 5 of the FOI Act, of Queensland Health's deemed affirmation of Ms Heal's decision.

External review process

9. Copies of the documents in issue were obtained and examined. They are largely letters of complaint, or letters which contain adverse comments, about the applicant (and about other staff), and replies.

10. In her application for internal review, the applicant raised the possible application of s.15 of the *Public Service Regulation 1997* Qld, which confers on public service employees certain rights of access to information about the performance of their duties. Queensland Health was asked about this issue, but indicated that at all relevant times the applicant was employed under the *Health Services Act 1991* Qld, not as a public service employee under the *Public Service Act 1996* Qld, so that the *Public Service Regulation* did not apply to her. On the material before me, I accept that that was the case. However, Queensland Health also advised that it had in place an administrative policy (a copy of which was provided to this office) which said, in effect, that employees under the *Health Services Act* would be accorded entitlements to access information about themselves and their performance similar to those provided for in the *Public Service Regulation*. Queensland Health contended, however, that disclosure under its administrative policy was discretionary, and that there were circumstances in which it would exercise that discretion in favour of the non-disclosure of information adverse to an employee, if such disclosure could have negative consequences.

11. Queensland Health also provided copies of consultation letters sent to third parties (in accordance with s.51 of the FOI Act), and of the responses from the third parties, objecting to the disclosure to the applicant of matter in issue.

12. I sought and obtained further information about the administration of Queensland Health's access policy and about the particular circumstances of this case. I also wrote to seven third parties to ascertain whether or not they still objected to disclosure to the applicant of the documents in issue which concerned them. Five objected to disclosure. Two indicated that they no longer objected to disclosure of letters they had written, subject to the deletion of a small amount of matter which

identified other third parties. Queensland Health withdrew its objection to disclosure of those letters with deletions, and they have been made available for access by the applicant.

13. The further information provided by Queensland Health in support of its claim for exemption was provided to the applicant for comment, and she responded by a written submission dated 22 December 2000. Queensland Health's response to that submission, along with edited copies of submissions made by third parties, were provided to the applicant, who lodged a final submission dated 3 August 2001.

14. In reaching my decision, I have taken into account the following material:

1. the contents of the documents in issue;
2. Ms Heal's initial decision, dated 20 April 2000;
3. Queensland Health's submissions dated 7 November 2000 and 1 June 2001;
4. the applicant's submissions dated 22 December 2000 and 3 August 2001;
5. [the local Member of Parliament's] statement in Parliament on …;
6. submissions from third parties dated 9, 12, 19 and 21 March 2001.

Matter remaining in issue

15. The matter remaining in issue is described in the attached Schedule. It can be divided into two categories:

(a) letters to the Minister, to [the local Member of Parliament], or to Queensland Health, from staff of the District (I will refer to the staff as persons A, B and C respectively); and

(b) letters to the Premier or the Minister, from members of the public in the District area, a letter from a member of the public to the local Member of Parliament which was forwarded to Queensland Health, and the names of the authors of those letters where they appear in other documents (I will refer to the members of the public as persons D and E respectively).

16. Queensland Health contends that the matter remaining in issue is exempt from disclosure under s.40(c), s.44(1) and/or s.46(1)(b) of the FOI Act.

Application of s.46(1)(b) of the FOI Act

17. Each of persons A to E has been consulted by my office. Each objected to disclosure of the information that they provided. Each contended that they had provided the information on the basis of an understanding that it would be treated in confidence. Persons A, B, D and E also contended that their identities as sources of information should remain confidential. (The majority of the letter from person C, including the signature block, was disclosed to the applicant as a result of the initial decision.

The applicant is therefore aware of the identity of person C. The only matter in issue in that letter is two paragraphs which refer to the applicant.)

18. Section 46(1)(b) and s.46(2) of the FOI Act provide:

> ***46.(1)*** *Matter is exempt if—*
>
> ...
>
> *(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—*
>
> *1. a person in the capacity of—*
>
> *1. a Minister; or*
> *2. a member of the staff of, or a consultant to, a Minister; or*
> *3. an officer of an agency; or*
>
> *(b) the State or an agency.*

19. Matter will be exempt under s.46(1)(b) if:

(a) it consists of information of a confidential nature;

(b) it was communicated in confidence;

(c) its disclosure could reasonably be expected to prejudice the future supply of such information; and

(d) the weight of the public interest considerations favouring non-disclosure at least equals that of the public interest considerations favouring disclosure.
(See *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.337-341; paragraphs 144-161.)

20. From my examination of the matter in issue, I am satisfied that none of it is excluded from eligibility for exemption under s.46(1), by the operation of s.46(2). The members of the local community (persons D and E) do not fall into any of the categories specified in s.46(2)(a). On the other hand, persons A, B and C did communicate information in their capacities as officers of an agency. The letters in

issue consist of segments of factual matter (which is not excluded from eligibility for exemption under s.46(1) of the FOI Act), and segments of opinion, which would be excluded from eligibility for exemption under s.46(1) if the opinion had been obtained, prepared or recorded in the course of, or for the purposes of, the deliberative processes involved in the functions of government. However, I am satisfied that those segments of opinion were not obtained, prepared or recorded in such circumstances. When the letters in issue were written, there was no relevant deliberative process under way or in contemplation, whether by Queensland Health, the Minister for Health or the District (*cf. Re Mentink and Queensland Corrective Services Commission* (1997) 4 QAR 545 at p.555, paragraphs 32-33). The authors of the letters were endeavouring to draw attention to matters of concern so that some action might be initiated by Brisbane-based senior management of Queensland Health. None of the matter in issue, therefore, is matter of a kind mentioned in s.41(1)(a) of the FOI Act, and hence the matter in issue is eligible for exemption under s.46(1)(b) of the FOI Act.

Information of a confidential nature

21. At an early stage in this review, the applicant contended that she had previously been provided with a number of complaints, in order to allow her to respond. This claim was put to Queensland Health and, by letter dated 7 November 2000, Ms D Bowman responded:

> *A review of the relevant files discloses that, in relation to each of the letters received by Queensland Health which are in issue, the replies were prepared by staff in Corporate Office, Queensland Health. There is no record of any of the letters in question having been referred to the* [District] *for* [the applicant's] *comment, or for any other reason.*

22. The applicant has not subsequently sought to contend that she was given access to any of the particular letters in issue, although I acknowledge that, in the circumstances, it would not be possible for the applicant to identify specific letters beyond giving a general description of their content as she recalls it. Nevertheless, there is insufficient evidence before me to support a finding that the applicant has been given access to any of the particular letters that are in issue in this external review (other than the letter from person C, parts of which have been disclosed under the FOI Act).

23. I therefore find that the information recorded in the matter in issue, including the identities of persons A, B, D and E, is information of a confidential nature.

Communicated in confidence

24. The following is a summary of relevant principles with respect to requirement (b) above, taken from the Information Commissioner's decisions in *Re "B"* at pp.338-339 (paragraphs 149-153) and *Re McCann and Queensland Police Service* (1997) 4 QAR 30 at paragraphs 21-24, 33-34 and 57-58:

(a) The phrase "communicated in confidence" is used in the context of s.46(1)(b) to convey a requirement that there be mutual expectations that the relevant information is to be treated in confidence.

(b) The first question is whether there is reliable evidence of an express consensus (for example, the seeking and giving of an express assurance, written or oral, that the relevant information would be treated in confidence) between the supplier and the recipient as to confidential treatment of the information supplied.

(c) If there is no evidence of an express consensus, the relevant circumstances attending the communication of the information in issue must be examined to ascertain whether they evidence a need, desire or requirement, on the part of the supplier of the information, for confidential treatment, which, in all the relevant circumstances, the supplier could reasonably expect of the recipient, and which was understood and accepted by the recipient, thereby giving rise to an implicit mutual understanding that confidentiality would be observed.

(d) If there was an express or implicit mutual understanding that information would be treated in confidence, it may also be necessary to construe the true scope of the confidential treatment required in the circumstances, e.g., whether it was or must have been the intention of the parties that the recipient should be at liberty to disclose the information to a limited class of persons, or to disclose it in particular circumstances; see, for example, the usual implicit exceptions to an understanding that confidential treatment would be accorded to information conveyed for the purposes of a law enforcement investigation, that are identified in *Re McCann* (see paragraph 28 below).

(e) An obligation or understanding of confidence is ordinarily owed by the recipient of the information for the benefit of the supplier of the information. This means that the supplier may waive the benefit of the obligation or understanding of confidence, including waiver by conduct of the supplier that is inconsistent with a continued expectation of confidential treatment on the part of the recipient.

25. In *Re Holt and Education Queensland* (1998) 4 QAR 310 and *Re Chambers and Department of Families, Youth and Community Care; Gribaudo (Third Party)* (1999) 5 QAR 16, the Information Commissioner discussed the possibility that sections 15 and 16 of the *Public Service Regulation* (or their equivalents) may override any understanding of confidentiality in respect of information that is subject to the disclosure requirements stipulated in those provisions. Although those provisions did not apply to the applicant, a Queensland Health policy stated:

> *Generally, access to any documents by a current employee of Queensland Health, which relates to their interest as an employee, will be provided*

under an administrative access scheme provided by this policy. This policy provides for employees of District Health Services similar provisions to those prescribed by sections 15 and 16 of the Public Service Regulation.

26. Queensland Health addressed the relevance of this policy at some length in its letter dated 7 November 2000. I accept Queensland Health's contention that a policy does not have the same binding legal force as a legislative requirement (which, to the extent necessary to comply with the legislative requirement, will override an obligation or an understanding of confidence). Nevertheless, the existence of the policy is a factor to be considered in deciding in each case whether or not a mutual understanding of confidence existed. In that regard, Queensland Health submitted:

Queensland Health regularly receives information, submitted by health consumers and other community members, who wish to express concerns about the provision and standard of public sector health services, as well as from officers of the Department expressing views about the conduct or performance of other officers. Particularly in smaller communities, it is considered that individuals may well have a valid concern about the negative ramifications for their future health care at the hands of health service District staff, if it becomes known that they have previously lodged complaints about health service employees with whom they have had dealings.

Many written complaints about health service employees (including some of the documents in issue in the present case) are directed to the Office of the Minister for Health, or the Office of the Director-General. There is no mechanism in place, either in the Central Correspondence Unit, or in the Corporate Office Human Resource Unit, to require that letters of complaint are brought to the attention of the employee(s) concerned before being placed on departmental files.

While it may well be appropriate to put to an employee the substance of complaints (from members of the public or other employees), where the complaints are considered valid and are to be pursued further, it will not always be necessary, or appropriate, to reveal the complainant's identity. In such circumstances, the complainant's legitimate expectation of confidentiality can be respected, while still affording natural justice to the employee who is the subject of complaint.

Staff in the Employment Relations and Strategies Unit advise that even in the context of formal investigations of matters such as workplace bullying/discrimination or suspected misconduct, information provided to investigators is not always released to the subject of the investigation.

…

For reasons including the matters set out above, Queensland Health views the Policy as a statement of general intent only, which is administered in practice in the manner which is considered to strike the appropriate balance between the interests and legitimate expectations of all parties concerned in a particular case.

27. The purpose of the policy referred to in paragraph 25 above, was clearly to provide for disclosure to staff of Queensland Health (whose employment was not governed by the *Public Service Act* and *Public Service Regulation*) of adverse comments about their performance of their duties. In light of the submissions by Queensland Health, those employees might feel entitled to ask why such a policy was put in place, if Queensland Health does not follow procedures designed to ensure that the policy is ordinarily complied with. Nevertheless, I accept, as a matter of law, that an agency policy statement does not have binding force, and may be departed from in an appropriate case. Hence the policy referred to in paragraph 25 above cannot be relied upon as having an effect of overriding, or forestalling the recognition of, an obligation or understanding of confidence.

28. Even if an understanding of confidentiality is established, it will frequently be subject to conditions or exceptions permitting limited disclosure. In *Re McCann*, at pp.53-54, paragraph 58, the Information Commissioner said:

> *58. I consider that there are three main kinds of limited disclosure which, in the ordinary case, ought reasonably to be in the contemplation of parties to the communication of information for the purposes of an investigation relating to law enforcement. Unless excluded, or modified in their application, by express agreement or an implicit understanding based on circumstances similar to those referred to in the preceding paragraph, I consider that the following should ordinarily be regarded as implicitly authorised exceptions to any express or implicit mutual understanding that the identity of a source of information, and/or the information provided by the source, are to be treated in confidence so far as practicable (consistent with their use for the purpose for which the information was provided) -*
>
> *(a) where selective disclosure is considered necessary for the more effective conduct of relevant investigations …*
>
> *(b) where the investigation results in the laying of charges, which are defended, and, in accordance with applicable rules of law or practice … the prosecutor must disclose to the person charged the evidence relied upon to support the charges; and*
>
> *(c) where selective disclosure is considered necessary -*

> *(i) for keeping a complainant … informed of the progress of the investigation; and*
>
> *(ii) where the investigation results in no formal action being taken, for giving an account of the investigation, and the reasons for its outcome, to a complainant …*

29. The language of exception (b) above contemplated a criminal investigation. The comparable exception in a disciplinary/grievance investigation would be where disclosure is necessary to accord procedural fairness to a person whose rights or interests would be adversely affected by the findings/outcome of the investigation, including a person who is subsequently charged with a breach of discipline.

30. In the present case, no disciplinary/grievance investigation was initiated against the applicant.
It might have been open to senior management of Queensland Health to initiate an investigation into some of the allegations, if it considered them to have any substance. However, it was decided to address the perceived problems in the District in a more generalised way, through a performance assessment of the senior managers.

31. Issues of the kind raised in the documents in issue pose difficult problems for senior managers of a Department, who are physically distant from the relevant workplace. The competing interests of a number of stakeholders must be taken into account, with priority always given to striving to ensure the optimum workplace conditions to facilitate delivery of the best possible medical and associated services to the local community.

32. It is important that senior Departmental managers, who are remote from Districts where services are delivered to citizens, have mechanisms that enable them to be alerted to serious difficulties or potential difficulties that could impact on efficient and effective service delivery in remote Districts, so that they have the opportunity to take remedial or preventative action. It is important that they be able to provide channels for communication, by citizens or staff in remote Districts, about perceived serious difficulties or potential difficulties, and important too that citizens or staff not be unduly inhibited from seeking to communicate serious concerns.

33. If the serious concerns relate to the performance of District managers, then junior staff seeking to raise concerns may feel vulnerable to recrimination, subtle forms of retaliation, *et cetera*, from District managers. In my view, the Brisbane-based senior managers of Queensland Health who received the letters in issue from concerned staff of the District would have understood and accepted the desire of staff for confidentiality (and I note again that specific requests for confidentiality were made by the relevant staff), and would also have appreciated that the best chance of preserving satisfactory working relationships in the District (in the

interests of effective service delivery to the local community) lay with according confidentiality so far as possible.

34. The last qualification is significant, however. While I am satisfied (having regard to the circumstances indicated above) that there was a mutual understanding (between the authors of the letters and Queensland Health) that the letters were communicated in confidence, that understanding was necessarily conditional, in that it must have been implicitly understood that Queensland Health was authorised to make any disclosure considered necessary (including disclosure to comply with requirements of procedural fairness) for the purpose of taking action in respect of the matters of concern raised in the letters.

35. This condition or exception is significant, since staff or citizens lodging complaints must appreciate that they cannot rely on a blanket protection of confidentiality to impugn managers at will, with mischievous or ill-considered complaints. Nevertheless, a wide discretion is properly reserved to the senior Departmental managers receiving such complaints to assess the most effective method of substantiating and addressing them. In many instances (as contemplated by the policy referred to in paragraph 25 above), the most appropriate and efficient response by management will be to provide the relevant officer with a copy of the complaint, hear their response, and explore a co-operative approach to any improvements in performance, or modification of behaviour, that is considered necessary. However, where complaints are received from junior staff against a senior manager in a relatively small workplace, considerations of the kind adverted to in paragraphs 32-33 above may mean that a more circumspect approach to addressing the matters of complaint is warranted.

36. As to the letters in issue from Persons D and E, I accept Queensland Health's contention (see the passage quoted at paragraph 26 above) that, particularly in smaller communities, individuals may well have a valid concern about potential adverse/discriminatory treatment in their future health care needs if it were known that they had lodged complaints about health service employees. I am satisfied that the same conditional understanding of confidentiality existed in respect of the letters received by Queensland Health from Persons D and E.

37. It would certainly have been open to Queensland Health management, in response to the information supplied by Persons A, B and E, to provide at least the substance of each individual allegation to the applicant, and to allow her to respond to each in turn. That is what the applicant sought when she had her solicitors contact Queensland Health to obtain particulars of the concerns raised. However, this was not the only management option open to Queensland Health in dealing with the concerns raised about the applicant.

38. For the most part, Queensland Health chose not to address individual allegations by way of separate investigation. Rather, the concerns raised prompted the Director-General and Dr Youngman to meet with the local Community Consultative

Committee. Following on from concerns raised at that meeting, Dr Youngman sent a letter notifying the applicant that she was to be placed on a three month performance assessment, and advising her in general terms of areas for improvement. Queensland Health therefore did not find it necessary to disclose to the applicant the identity of, or any of the information provided by, persons A, B or E. Given that approach, the condition (in the conditional understanding of confidentiality) that would have permitted disclosure if Queensland Health considered it necessary for the purpose of dealing appropriately with any issues of substance raised in the documents in issue, was never triggered. I find that there is a continuing mutual understanding of confidence between Queensland Health and each of persons A, B and E, that neither the matter in issue, nor the identity of the suppliers of that information, should be disclosed to the applicant.

39. The only matter in issue authored by person C is a segment of a letter written by person C as a representative of staff at the District. The letter was not written in order to have any action taken against the applicant. Rather, it was written to seek intervention from the Minister in the restructuring of the District. The references to the applicant in that letter are incidental to that purpose. The letter is not marked "Confidential" but the concern of its author about attribution of comments to her is made clear when, in the final paragraph, the author asks that her name be kept confidential. As I noted above, the bulk of the letter, including matter that identifies the author, has been disclosed to the applicant. The only matter remaining in issue is two paragraphs which refer specifically to the applicant.

40. While the comments were written on behalf of staff, I accept that attribution of the particular comments in issue to person C would give rise to the same concerns referred to in paragraph 33 above. I can see no reason why the management functions of the Minister, or Queensland Health, would have required that the references in issue be put to the applicant for response. I find that there is a continuing mutual understanding between person C and the Minister (which extends to Queensland Health) that the information in question be kept confidential.

41. The information provided by person D chiefly concerned the administration of a health facility in the District, but did include some adverse references to the applicant. The complaints were made some time before the transfer of the applicant to Brisbane. While they may have formed a small part of the background of complaints which were referred to by Queensland Health management prior to the agreed transfer of the applicant, I am not satisfied that there was any legal requirement of procedural fairness which would have required Queensland Health to disclose the complaints, or the identity of the complainant, to the applicant. I find that there is a continuing mutual understanding of confidence between Queensland Health and person D with respect to the information recorded in the letters in issue.

Prejudice to the future supply of information

42. There is a real question as to whether this requirement can be satisfied with respect to information provided by the complainants who were staff of the District: persons A, B and C. In *Re "B"* at page 341, paragraph 161, the Information Commissioner said:

> *161 Where persons are under an obligation to continue to supply such confidential 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 confider whose confidential 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.*

43. Staff at the District owed duties of good faith and fidelity to their employer, which would encompass an obligation to disclose to their employer any information, acquired in the capacity of employee, which the employer might reasonably require for the better management of its operations: see *Re Shaw and The University of Queensland* (1995) 3 QAR 107 at paragraphs 55-56, and the cases there cited. If the information in the letters from persons A, B and C had been provided in response to a request from their employer (including, for example, a requirement that they provide information to a grievance or disciplinary investigation), I think it is clear this third requirement for exemption under s.46(1)(b) could not be satisfied. There may be an argument that there is a valid distinction to be made in the case of information that is volunteered, rather than requested, especially where the information draws attention to matters of serious concern, which the agency may not learn about if staff were inhibited from volunteering the information. However, since there is some doubt about the issue (in particular, whether the words "such information" in s.46(1)(b), permit reliance on the voluntary supply of information as part of the characterisation of the information in issue, when an employer could require the supply of the same information), I propose to deal with the letters communicated by staff members under s.40(c) of the FOI Act.

44. Queensland Health, and persons D and E, contend that disclosure of their identities or information supplied by them would discourage members of the public from bringing similar concerns to the attention of Queensland Health in future. At paragraph 73 of *Re McCann,* the Information Commissioner stated:

> *… Co-operation by members of the community with investigators involved in law enforcement, through the supply of relevant information, is essential to successful enforcement of the law, but there is no doubt that it can impose burdens on members of the community who co-operate (e.g., ranging from inconvenience and imposition on their time, to anxiety at possible harassment or retributive action). While many quite properly regard it as their civic duty (and something which is ultimately for the benefit of the community) to co-operate with agencies engaged in law enforcement, there are many others who prefer not to get involved. Preserving goodwill and co-operation with members of the community can be a delicate balancing act for law enforcement agencies. While their sources of information will generally accept that disclosure of information they supply, which is adverse to a subject of investigation, may become necessary for reasons referred to in paragraphs 57-61 above, disclosure which is not necessary for those reasons could, in my opinion, be reasonably expected to prejudice the future supply of such information from a substantial number of sources available, or likely to be available, to law enforcement agencies.*

45. While those comments were made in the context of law enforcement investigations, I consider that they are also relevant, *mutatis mutandis*, to obtaining information from members of the public about alleged faults or failings in government administration or service delivery, in circumstances where there are significant adverse comments about an individual public sector officer. The matters referred to in paragraph 36 above are also relevant in this regard.

46. I consider that disclosure of the information supplied by, or the identities of, persons D and E, contrary to understandings of confidentiality held by them, could reasonably be expected to prejudice the future supply of like information to the Minister or to Queensland Health.

Public interest balancing test

47. The applicant contended that Queensland Health failed to accord her natural justice in a number of ways. She referred to the High Court decision of *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564. While that case discusses the general principles which give rise to a legal requirement of procedural fairness, I should note that there is no suggestion in the present case that any adverse information about the applicant is to be published, as was the case in *Ainsworth*. The applicant contended:

> *I believe that in the position of District Manager …, I had a legitimate expectation to be informed of complaints, so that I could take any remedial action that was necessary to ensure that I was fulfilling my obligations under my conditions of employment. Failure on the part of Queensland Health to supply such information to me, I believe affected*

my reputation and ultimately my employment status with Queensland Health, as well as impacting upon the way I was perceived as a District Manager by various staff, community members and my supervisors.

48. I have referred above (see paragraph 38) to the circumstances in which Dr Youngman informed the applicant that she was to be placed on a performance assessment. I am not satisfied that considerations of procedural fairness required Queensland Health to give the applicant the opportunity to respond to individual complaints before she was placed on a three month performance assessment. It was certainly necessary for Queensland Health to provide the applicant with sufficient information as to the requirements of the performance assessment in order to allow her to take appropriate action. However, in the circumstances of the case, I am satisfied that Dr Youngman's letter dated … 1998 provided sufficient information in that regard.

49. Nor do I consider that disclosure of all complaints against the applicant was a legal requirement of procedural fairness prior to offering her the transfer. The applicant argued that comments by Ms Robson of Queensland Health support a contention that the offer of a transfer can be seen as a criticism by Queensland Health of her performance, or as a disciplinary measure (see page 3 of the submission dated 22 December 2000). I am not satisfied that that is the case. I am satisfied that the transfer was a consensual arrangement. The applicant was an officer of considerable standing in Queensland Health as a District Manager, and could reasonably be expected to be capable of assessing her situation and making a considered decision as to what option best suited her. I am not satisfied that disclosure of all complaints or allegations made against the applicant by third parties was a necessary step prior to offering a transfer.

50. The applicant suggested that the medical concept of "informed consent" of a patient was somehow applicable or adaptable to her circumstances in a way which would require Queensland Health to notify her of all complaints against her before offering her a transfer. Clearly, her knowledge of complaints previously made against her was sufficient to induce the applicant to accept the transfer. It is difficult to see how the disclosure of the existence of further complaints, or the details of those complaints, could have been expected to have influenced the applicant to make a different decision.

51. I do not consider that there is a general requirement to accord procedural fairness in respect of adverse information about a person held on agency files, in the absence of some proposal to take action adverse to the rights or interests of that person based on the particular information. I do recognise a general public interest consideration favouring disclosure of adverse matter about an identifiable individual held on agency files, but that does not arise from any legal requirement of procedural fairness. The applicant contended that officers of Queensland Health who are in a position to make decisions affecting the applicant are, or will become aware of, the adverse comments by the third parties, and that any further dealings with, or

relevant to, the applicant are likely to be influenced by that knowledge, with adverse consequences for the applicant's career. The applicant also contended that some complaints had been investigated by the CJC and found to be unsubstantiated. She said it was detrimental to her reputation and interests for similar allegations not to be disclosed to her, so that they remain unanswered. I consider that both these points are aspects of the public interest in the subject of adverse information on agency files having access to that information. I acknowledge that the likelihood of continuing contact by the applicant with Queensland Health (as she seeks to obtain, or undertakes, employment with Queensland Health in the future) adds weight to that public interest consideration. In most instances, it is preferable that at least the substance of complaints is disclosed to the relevant officer, so that he/she has the opportunity to address it. This serves the public interests in fair treatment of the individual, and in taking steps to remedy any shortcomings in the performance of individual officers (with a view to improving their service to the public). However, in this instance, it would not be possible to disclose the substance of particular complaints without identifying the complainants.

52. The applicant has been given information about the general nature of the complaints made against her, through Dr Youngman's letter to her dated …. I also note that one of the third parties made the following submissions, which the applicant did not seek to contradict by way of reply:

> *The complaints or facts presented to the Minister were well known to* [the applicant], *some for many years, through the many representations made by her staff, individuals, committees, public meetings, community meetings with the Director and Deputy Director of Health, other Department of Health staff, the two Unions, the AWU and the Queensland Nurses Union. The Deputy Director of Health was regularly in contact with* [the applicant]. *Several departmental people were sent out to investigate and report back to the department.*

53. Dr Youngman's letter to the applicant describes in general terms the areas where improvements in performance were sought. I accept that disclosure of individual instances referred to in the letters would have been useful to the applicant in allowing her to assess, and improve, her management and leadership of the District. However, I also acknowledge that to disclose the individual complaints made may well have led to heightened tensions within the District. Bearing that in mind, it appears that Dr Youngman attempted to give the applicant general information which would allow her to take steps to address perceived deficiencies, while not disclosing the identities of, or information provided by, individual complainants. While I consider that there is a public interest in disclosure of adverse comments about the applicant, and in particular of comments which would allow her to consider and improve her management and leadership, I find that the weight of that public interest has been significantly reduced by the general information which has been provided to the applicant.

54. Turning to the individual complaints, the information supplied by person D largely concerned the administration of the health care facility in the District, and sought improvement in relation to the administration of that facility rather than any specific action against the applicant. The information supplied by person E was calculated to lead investigators to a particular line of inquiry, but one which would not have required the disclosure of the identity of, or the information supplied by, person E. I am satisfied that no legal requirement of procedural fairness required disclosure to the applicant of the identities of persons D and E, or of the information they supplied.

55. I recognise a public interest in upholding the continuing understanding of confidentiality with persons in the position of persons D and E, in order to maintain good faith with the public of Queensland and to promote the continued supply of information to the Minister for Health and to Queensland Health about matters relevant to their functions. The applicant has already been advised of the general nature of various complaints and expressions of concern made in relation to the applicant as District Manager of the District. In the circumstances of this case, I find that the public interest considerations favouring disclosure to the applicant of the matter in issue concerning persons D and E are insufficient to outweigh the public interest considerations favouring non-disclosure. I therefore find that the matter in issue communicated by persons D and E is exempt matter under s.46(1)(b) of the FOI Act.

Application of s.40(c) of the FOI Act

56. Section 40(c) of the FOI Act provides:

> ***40.*** *Matter is exempt if its disclosure could reasonably be expected to—*
>
> …
>
> *1. have a substantial adverse effect on the management or assessment by an agency of the agency's personnel;*
>
> …
>
> *unless its disclosure would, on balance, be in the public interest.*

57. The Information Commissioner explained and illustrated the correct approach to the interpretation and application of s.40(c) of the FOI Act in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293, *Re Murphy and Queensland Treasury* (1995) 2 QAR 744, *Re Shaw*, and *Re McCann.* In applying s.40(c) of the FOI Act, I must determine:

1. whether any adverse effects on the management or assessment by Queensland Health of its personnel could reasonably be expected to follow from disclosure of the matter in issue; and

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

If the above requirements are satisfied, I must then consider whether the disclosure of the matter in issue would nevertheless, on balance, be in the public interest.

58. The phrase "*could reasonably be expected to*" requires a reasonably based expectation, that is, an expectation for which real and substantial grounds exist. A mere possibility, speculation or conjecture is not enough. In this context "*expect*" means to regard as likely to happen. (See *Re "B"*, at pp.339-341, paragraphs 154-160, and the Federal Court decisions referred to there.)

Substantial adverse effect

59. I decided above that there are continuing mutual understandings of confidentiality between Queensland Health on the one hand, and each of persons A, B and C on the other. In the circumstances of this case, I am satisfied that any unwarranted breach of the understandings of confidential treatment held by person A, B or C, a considerable time after Queensland Health has taken steps to address the issues raised, could reasonably be expected to have a substantial adverse effect on the management or assessment by Queensland Health of its personnel, through the apparent breach of trust involved, and by inhibiting members of staff from raising serious concerns about the performance of District managers with senior management of the Department.

Public interest balancing test

60. The discussion of the public interest considerations undertaken in respect of s.46(1)(b) at paragraphs 47-55 above is also relevant when considering the application of the public interest balancing test in s.40(c). The considerations discussed in paragraphs 32-33 above are also relevant in weighing against disclosure of the letters received from members of staff of the District. I am not satisfied that there was any legal requirement of procedural fairness that required Queensland Health to disclose to the applicant the information provided by persons A, B or C or the identities of persons A or B. As I noted above, there is a public interest in disclosure to a person of adverse information about the person held on agency records. However, I find that the public interest considerations favouring disclosure of this matter do not outweigh the public interest consideration raised by satisfaction of the other elements of s.40(c), and the public interest in maintaining the continued supply of information to the Minister and Queensland Health. I find that matter in issue sent by persons A, B and C is exempt matter under s.40(c) of the FOI Act.

DECISION

61. I decide to vary the decision under review (identified at paragraphs 7-8 above) by finding that:

    1. the matter in issue specified at paragraph 15(a) above is exempt matter under s.40(c) of the FOI Act; and

    2. the matter in issue specified at paragraph 15(b) above is exempt matter under s.46(1)(b) of the FOI Act.