



## Decision and Reasons for Decision

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**Application Number:** F7/04-05 – IC2005/56

**Complainant:** Dr Jean Collie

**Respondent:** Office of the Commissioner for Public Employment

**Date of Decision:** 25 March 2008

**Hearing Number:** 1 of 2008

**Catchwords:** **FREEDOM OF INFORMATION – refusal of access – applicant seeking access to the investigation report of her formal grievance – meaning of a tribunal in relation to its decision-making functions (section 5(5)(b)) – judicial and quasi-judicial decision-making functions – whether the Commissioner for Public Employment is a tribunal when conducting grievance reviews – whether the report is exempt under sections 52, 53(c) or 55(3).**

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## Reasons for Decision

### Background

1. On 4 February 2005, Dr Jean Collie made an application to the Office of the Commissioner for Public Employment (“OCPE”) for information pursuant to section 18 of the *Information Act* (“the Act”). She sought a copy of the complete report prepared by Professor Bill Adam relating to his investigation and review of her grievance lodged under section 59 of the *Public Sector Employment and Management Act* (“PSEMA”). Dr Collie’s request was refused by the OCPE on 1 April 2005 on the grounds that the information was exempt under sections 52(1) and (5) and 55(3) of the Act. On 1 April 2005, Dr Collie wrote to the OCPE requesting a review of the initial decision. The OCPE requested an extension of time of a few days to deal with her complaint, and she agreed. No decision was provided to her and on 17 June 2005 she lodged a complaint with the Office of the Information Commissioner. Her complaint was formally accepted by this Office on 6 July 2005.
2. A copy of the document in issue was obtained and examined. By letter dated 15 December 2006, Ms Caroline Heske, a former Policy and Complaints Officer with this Office, wrote to the OCPE expressing her preliminary view that further evidence would be needed to make out the exemptions set out in sections 52 and 55 of the Act. On 19 January 2007, the OCPE asserted that all information covered by Dr Collie’s request was exempt by virtue of section 5(5)(b) of the Act. In addition, the OCPE claimed that the information requested by Dr Collie was exempt from disclosure under sections 52, 55(3), and for the first time, section 53(c) of the Act.
3. Ms Caroline Heske issued her prima facie decision pursuant to section 110(3) of the Act on 4 May 2007. She found that there was sufficient prima facie evidence to substantiate the complaint and found that the complainant was entitled to receive a copy of the document she requested entitled: *Grievances of Dr Jean Collie – Review by Bill Adam. Feb 1, 2005* pursuant to section 18 of the *Information Act*. At that time, Ms Heske held a delegation under section 89 of the Act to exercise the powers and functions of the Information Commissioner, including the function of deciding whether there is prima facie evidence to substantiate the matter complained of. When a delegate of the Information Commissioner prepares a prima facie decision, the decision expresses the views of the delegate, not the views of the Information Commissioner. Section 128 of the Act prohibits the Information Commissioner from conducting a hearing if the Commissioner has personally conducted an inquiry or investigation, or been involved in discussions or negotiations about a complaint. I have not conducted an inquiry or investigation, or been involved in discussions or negotiations about Dr Collie’s complaint prior to the hearing of the complaint.
4. By letter dated 31 May 2007, the Commissioner for Public Employment (“the Commissioner”) advised this Office that he remained of the view that the Act does not apply in relation to the decision-making functions of the Promotions Appeal Board or the Commissioner when determining grievances pursuant to section 59 of PSEMA.
5. The Information Commissioner must not hold a hearing in relation to a complaint unless there has been an attempt to resolve the matter complained of by mediation. A mediation took place on 3 August 2007 at which time the parties were unable to resolve the matter and they agreed that the matter would proceed to hearing.

I issued my Directions for Hearing on 24 August 2007. On 21 September 2007, Mr Craig Smyth, Legal Practitioner, Solicitor for the Northern Territory, who is acting for the OCPE, provided submissions and further evidence on behalf of the Respondent in this matter. On 2 October 2007, Dr Collie indicated that she did not wish to make any further submissions but elected to rely on the prima facie decision of Ms Heske.

6. The procedure for hearings by the Information Commissioner is set out in Part 7, Division 2 of the Act. Section 125 of the Act provides that where the matter complained of is a decision by the Respondent to refuse access to information, the Act gives the Complainant a right to obtain access to the information sought, except to the extent that it is exempt. The Respondent bears the onus at hearing of proving on the balance of probabilities that the information is exempt or that the Complainant is not entitled to access.

### **Documents considered**

7. For the purposes of this hearing, I have considered the following documents:
  1. Letter from Mr Michael Leonard, Director of Corporate Management, OCPE, dated 1 April 2005 to Dr Jean Collie.
  2. Letter from Dr Jean Collie to Mr Michael Leonard, Director of Corporate Management, OCPE, dated 18 April 2005 titled: *Re: Review of decision to deny access to government information.*
  3. Legal advice from Ms Lucia Ku, Solicitor for the Northern Territory, Department of Justice, to Mr John Kirwan, Commissioner for Public Employment, dated 25 November 2003 titled *Access to Promotions Appeal Board and Grievance Review Files under the Information Act.*
  4. Document titled: *Grievance Reviews – A Guide for Employees* located at [http://www.nt.gov.au/ocpe/appeals\\_grievances/grievances.shtml](http://www.nt.gov.au/ocpe/appeals_grievances/grievances.shtml) dated 7 December 2006.
  5. Document entitled: *PSEM Employment Instruction No. 8 – Management of grievances* located at [http://www.nt.gov.au/ocpe/public\\_sector/employment\\_](http://www.nt.gov.au/ocpe/public_sector/employment_instructions/ei08.shtml)
  6. [instructions/ei08.shtml](http://www.nt.gov.au/ocpe/public_sector/employment_instructions/ei08.shtml) dated 7 December 2006.
  7. File note of a telephone conversation between Ms Caroline Heske and Dr Jean Collie dated 20 March 2007.
  8. Letter from the Commissioner for Public Employment, Mr Ken Simpson, to Mr Peter Shoyer, Information Commissioner dated 19 January 2007 titled *Re: Preliminary view on Freedom of Information Complaint – Dr Jean Collie.*
  9. Letter from Mr Peter Boyce, Acting Assistant Secretary People and Services, Department of Health and Community Services, to Mr Ken Simpson, Commissioner for Public Employment, dated 2 February 2007 titled *FOI Application – Dr Jean Joyce.*
  10. Letter from Mr Ken Simpson, Commissioner for Public Employment, to Mr Peter Shoyer, Information Commissioner, dated 9 March 2007.
  11. Prima facie decision of Ms Caroline Heske dated 4 May 2007.
  12. Letter from Mr Ken Simpson, Commissioner for Public Employment, to Ms Melissa Purdy, Complaints Officer/Mediator, Office of the Information Commissioner dated 31 May 2007.
  13. Document titled: *Scope of the work to be undertaken by Professor Bill Adam.*
  14. Document titled: *Grievances of Dr Jean Collie- Review by Bill Adam. Feb 1, 2005.*

15. Letter from Mr John Kirwan, Commissioner for Public Employment, to Dr Jean Collie dated 4 February 2005 titled: *Re: Section 59 – Review of Treatment of Employment*.
16. Affidavit of Mr Craig Smyth, Legal Practitioner, Solicitor for the Northern Territory, Department of Justice, acting on behalf of the Respondent with the following annexures:
  - “A” - Document from Dr Jean Collie to the Commissioner for Public Employment undated titled *Grievance under Section 59 of the Public Sector Employment and Management Act*.
  - “B” - Document from Dr Jean Collie to the Commissioner for Public Employment undated titled *Grievance under Section 59 of the Public Sector Employment and Management Act*.
  - “C” – Letter from Ms Fiona Roche, for the Commissioner for Public Employment to Dr Jean Collie dated 16 August 2004.
  - “D” – Letter from Ms Fiona Roche, for the Commissioner for Public Employment to Mr Robert Griew, Chief Executive, Department of Health and Community Services dated 17 August 2004 titled *Re: Section 59 Grievances – Dr Jean Collie*.
  - “E” – Letter from Ms Fiona Roche, for the Commissioner for Public Employment to Dr Jean Collie dated 15 October 2004.
  - “F” – Letter from Dr Jean Collie to Mr Kirwan, Commissioner for Public Employment, dated 15 November 2004 plus enclosures.
  - “G” - Letter from Mr John Kirwan, Commissioner for Public Employment, to Mr Bill Adam, Professor of Medicine and Deputy Head, University of Melbourne, dated 19 November 2004 titled *Review of treatment in employment – Dr Jean Collie*.
  - “H” – Document titled *Scope of work to be undertaken by Professor Bill Adam*.
  - “I” – Letter from Mr John Kirwan, Commissioner for Public Employment, to Dr Jean Collie dated 4 February 2005.
  - “J” – Letter from Mr John Kirwan, Commissioner for Public Employment, to Mr Robert Griew, Department of Health and Community Services, dated 4 February 2005.
17. Affidavit of Ms Lee Berryman, Director of Promotions Appeal and Review, Office of the Commissioner for Public Employment, dated 21 September 2007 with the following annexures:
  - “A” – Flow diagram titled *OCPE Review of treatment in employment process*.
  - “B” – Document titled *Guidelines for Grievance Review Process*.
  - “C” - Copy of *Public Sector Employment and Management Regulations 2, 3 and 4*, and Employment Instructions 3 and 8.
18. Affidavit of Mr Craig Smyth, Legal Practitioner, Solicitor for the Northern Territory, Department of Justice, containing the Respondent’s submissions.

## **The document in issue**

8. The document in issue is a 5-page report (“the Report”) created by Professor Bill Adam dated 1 February 2005. Professor Adam was engaged as a consultant by the OCPE to investigate the grievance lodged by Dr Collie. Dr Collie’s grievance arose out of her employment as a doctor at the Alice Springs Hospital and involved the following six main points:
  - disagreements with decisions made by managers at the Alice Springs Hospital;

- not being short listed for the position of General Manager;
- issues about performance management at the Alice Springs Hospital;
- her excessive workload;
- an allegation that she had been verbally denigrated by another staff member; and
- allegations that she had been intimidated and bullied by various staff members.

The Report is a summary of Professor Adam's investigation and his opinions on the merits of Dr Collie's grievance. On completing the Report, Professor Adam passed the Report to Commissioner Kirwan.

### **The exemption for a "tribunal" under the *Information Act*:**

9. The Act creates a general right of access to information held by public sector organisations. Section 5(1) of the Act provides that a public sector organisation includes the OCPE and a tribunal of the Territory.

However, section 5(5) of the Act provides:

*(5) This Act does not apply to –*

- a) a court in relation to its judicial functions;
- b) a tribunal in relation to its decision-making functions;
- c) a coroner within the meaning of the *Coroners Act* in relation to an inquest or inquiry under that Act; or
- d) a magistrate or justice in relation to a preliminary examination under Part V of the *Justices Act*.

The word "tribunal" is defined by section 4 of the Act:

"tribunal" means a body (other than a court) established by or under an Act that has judicial or quasi-judicial functions;

10. The Act therefore does not apply to a body (other than a court) established by or under an Act that has judicial or quasi-judicial functions in relation to its decision-making functions. The meaning of "a body" is not defined in the Act. No person or body of relevance to this matter could be considered to be a court. Neither the term "judicial or quasi-judicial" or "decision-making functions" is defined in the Act. Section 5(1)(f) of the Act provides that "a person appointed, or body established, by or under an Act ..." is a public sector organisation. The Commissioner is therefore a public sector organisation. Section 5(8) provides that a reference to a tribunal includes the staff of the tribunal.
11. Although, the term "judicial" has received extensive interpretation by the High Court because of the separation of powers in the Australian Constitution, the term "quasi-judicial" has received less attention, and the term "decision-making functions" does not appear to have any accepted legal meaning.

The third edition of the *Butterworths Concise Australian Legal Dictionary* defines “judicial” as:

A description of that which emanates from a judge or judges when exercising the power to determine liability or otherwise affect the legal rights of subjects through the application of law to particular facts and circumstances.

and “quasi-judicial” as:

The actions of non-judicial bodies, such as administrative agencies and tribunals, when they exercise their functions and powers in a judicial manner.

The Act only commenced on 1 July 2003 and there are no authorities which have considered the meaning of section 5(5)(b) of the Act.

### **The Complainant’s arguments about the meaning of “tribunal”**

12. The Complainant submits that the following established principles of statutory interpretation are relevant:
- general words should be given their accepted legal meaning;
  - the Act should be read as a whole and the words should be read in context;
  - a construction that promotes the purpose or object underlying the Act is to be preferred to one that does not; and
  - extrinsic materials may be used to assist in ascertaining the meaning of a provision of an Act.

The Complainant notes that the context of section 5(5)(b) is that it appears in a section which defines “public sector organisations”. The importance of this definition is that it sets the jurisdictional boundaries for the operation of the Act, as the Act only applies to public sector organisations.

13. The Complainant draws my attention to the objects of the *Information Act* which are set out in section 3 of the Act:
- (1) The objects of this Act are –
    - (a) to provide the Territory community with access to government information by –
      - (i) making available to the public information about the operations of public sector organisations and, in particular, ensuring that rules and practices affecting members of the public in their dealings with public sector organisations are readily available to persons affected by those rules and practices; and
      - (ii) creating a general right of access to information held by public sector organisations limited only in those circumstances where the disclosure of particular information would be contrary to the public interest because its disclosure would have a prejudicial effect on essential public interests or on the private and business interests of

persons in respect of whom information is held by public sector organisations;

- (b) to protect the privacy of personal information held by public sector organisations by –
  - (i) providing individuals with a right of access to, and a right to request correction of, their personal information held by public sector organisations;
  - (ii) establishing a regime for the responsible collection and handling of personal information by public sector organisations; and
  - (iii) providing remedies for interference with the privacy of an individual's personal information;
- (c) to establish an independent officeholder, the Information Commissioner, to oversee the freedom of information and privacy provisions of this Act; and
- (d) to promote efficient and accountable government through appropriate records and archives management by public sector organisations.

(2) This Act is intended to strike a balance between competing interests by giving members of the Territory community a right of access to government information with limited exceptions and exemptions for the purpose of preventing a prejudicial effect on the public interest as described in subsection (1)(a)(ii).

14. The second reading speech and the explanatory memorandum do not specifically address section 5(5) of the Act but the second reading speech does clarify the motivations behind the objectives stated by section 3 of the Act:

Good government requires openness and accountability. ... It requires that the public has continuing confidence in the operation of government; confidence which is supported by the ability to scrutinize and participate in decision-making. This Information Bill ... is just one part of a broader strategy that will ensure accurate accounting and financial management standards, reasoned decision-making and access to justice and information.

...

An open government represents the people and is accountable to them. An open attitude and processes maintain this accountability. However, court processes to enforce access and pursue accountability are lengthy, expensive and frustrating. FOI legislation was developed to provide the public with meaningful access rights. Our new statutory scheme will finally allow Territorians the same, or even better, access rights as the rest of the country.

15. Although these comments are general, the Complainant notes that they do raise the following relevant aims of the legislation:
- to facilitate confidence in government decision-making;
  - to allow members of the public to scrutinise and participate in government decision-making;
  - to ensure reasoned decision-making; and
  - to address the issue that court processes to enforce access and pursue accountability in relation to government decisions may be lengthy, expensive and frustrating.
16. In constructing the meaning of section 5(5)(b), the Complainant submits it is of assistance to consider the rationale for exempting court-like bodies from the

*Information Act.* It is apparent that the Northern Territory *Information Act* has its historical origins in the freedom of information and privacy legislation enacted in many other jurisdictions. A Commonwealth Standing Committee reviewed the proposed Commonwealth Freedom of Information legislation in 1978 and provided some comments on the rationale of excluding courts and tribunals from the operation of the legislation:

We have reservations about a total exclusion for the courts. There is obviously very good reason for governments not imposing requirements which would interfere with the independence of the judiciary and the proper administration of justice. It would not be appropriate for freedom of information legislation to be the vehicle for obtaining access, where this was otherwise unavailable, to court documents filed by parties to litigation. Nor would it be appropriate for this legislation to operate in any way as a substitute or supplement for discovery procedures presently administered by the courts. However, there are other documents of a more clearly administrative character associated with the functioning of registries and collection of statistics on a host of matters associated with judicial administration which, equally clearly, should be opened up to the public gaze. These would include such matters as the number of sitting days, the number of cases determined, the number of cases withdrawn, the cases which were subsequently appealed and the occasions on which bail was awarded. ... We therefore propose that the exemption in paragraph (a) and (b) of clause 4 should be limited to the non-administrative functions of the courts.

17. The Committee went on to consider the extent to which a similar exemption should apply to bodies involved in industrial relations. The Committee took the view that conciliatory bodies that conduct arbitration and mediation may need those kind of procedures sheltered from the operation of the proposed Bill, although more for the reasons that it may be beneficial for pre-trial negotiations to be held without prejudice. The Committee rejected the suggestion that quasi-judicial tribunals ought to qualify for the exemption under clause 4. The present *Freedom of Information Act 1982 (Cth)* exempts only three specified tribunals, and a similar limited approach is taken by most Australian jurisdictions.
18. The Complainant notes that although the comments of the Committee are not extrinsic materials to which she can have regard for the purposes of interpreting section 5(5)(b), she believes that they provide some insight into the potential public policy reasons why such an exemption should exist at all.
19. The Complainant suggests that while an exemption for courts and court-like bodies does place these bodies beyond the public scrutiny provided by the Act, such an exemption is in the public interest for several reasons. It is these policy considerations that need to be borne in mind when deciding whether a body has court-like characteristics and is therefore quasi-judicial for the purposes of the *Information Act*:
  - *Court proceedings are open to the public already, except where very strong public interest concerns require that proceedings be conducted in camera:* Most court proceedings, including those which are personal and traumatic for the persons involved, are held in public. The public is only excluded in certain particularly sensitive matters such as those concerning guardianship and sexual offences;
  - *The Information Act scheme would be doubling-up:* Courts already have a finely balanced scheme of determining when information should and should not be disclosed to various parties in a proceeding. When a court makes a

decision whether to disclose information it does so based on rules and precedents, not as an ad hoc policy decision;

- *Courts already strongly promote accountable and reasoned decision-making:* The decision-making processes of courts are highly transparent, with parties privy to all the evidence, and able to hear and answer the arguments made against them. Parties are able to test the evidence. The court states how it assessed the evidence and interpreted the law. It is apparent if the court has made any errors of law and the parties may appeal to a superior court.
  - *Courts need to remain free of Executive influence:* If their judicial matters were subject to scrutiny under the *Information Act*, judicial decisions would become subject to the decisions of the Office of the Information Commissioner.
20. The Complainant concludes that in her view, the words “decision-making functions” in section 5(5)(b) must be interpreted to mean “judicial or quasi-judicial decision-making functions”. She submits that it is intended to exempt information related to a tribunal’s court-like processes, not decisions to—for example—create new government policies, or to purchase paperclips. If this construction were not adopted, it would lead to the absurd result that any administrative body that had the capacity to undertake quasi-judicial proceedings would be almost entirely exempt, whereas all non-judicial processes of the courts and the coroner would be open to public scrutiny.

### **The Respondent’s arguments about the meaning of “tribunal”**

21. The Respondent submits that the Complainant’s interpretation confuses the proper approach to the construction of the Act. Had Parliament intended section 5(5)(b) of the Act to read “a tribunal in relation to its judicial or quasi-judicial decision making functions” it would have so provided and notes that section 5(5)(a) refers to “a court in relation to its judicial functions”. The respondent submits that the proper interpretation of section 5(5)(b) is that the Act does not apply to:
- a body (not being a court);
  - established by or under an Act;
  - that has judicial or quasi-judicial functions; and
  - only in relation to its decision-making functions.

The Respondent submits that the decision-making functions are the formal decision-making functions assigned to the tribunal by or through the Act establishing it. The Respondent draws parallels with section 5(5)(c) which refers to the functions of the Coroner under the *Coroners Act*, or with section 5(5)(d) which refers to the functions of the Magistrate under the *Justices Act*.

22. The Respondent concedes that the phrase “judicial or quasi-judicial decision-making functions” may equate on first appearance to the phrase “decision-making functions assigned to a judicial or quasi-judicial body by an Act”, but submits that there are important differences. The latter phrase represents the true construction and language of the Act, the former phrase represents an imputed construction of the Act contrary to the context in which the words of the Act are used. The Respondent submits that, on the preferred construction, in determining whether section 5(5)(b) of the Act applies, the first step is to determine whether a body is a tribunal as defined in section 4 of the Act. If a body falls within that definition, then it is a public sector

organisation by virtue of section 5(1) of the Act and is amenable to the Act. The second step in determining whether section 5(5)(b) of the Act applies, assuming the body is a tribunal, is to identify the formal decision-making functions of that tribunal. Once that specific function is identified, the Act will not apply.

### **Findings about the meaning of “tribunal”**

23. In interpreting section 5(5)(b) of the Northern Territory Act, I found it useful to compare the Freedom of Information legislation to be found in the other States. The Commonwealth *Freedom of Information Act 1982* provides that the Act does not apply to requests for access to documents of tribunals unless the document relates to matters of an administrative nature. Only three tribunals are exempt in respect of non-administrative matters. Similarly, the ACT *Freedom of Information Act 1989* and the Queensland *Freedom of Information Act 1992* each contain a prescribed list of bodies that are tribunals for the purposes of their respective Acts. The tribunals listed have very formal procedures and act in a manner similar to a court. The New South Wales *Freedom of Information Act 1989* does not apply to the judicial functions of tribunals. “Judicial functions” are defined to mean “such functions of the tribunal as relate to the hearing or determination of proceedings before it”. NSW and Victoria only exempt their “major tribunals: the Administrative Appeals Tribunal in NSW and the Victorian Civil and Administrative Tribunal in Victoria. In Tasmania, the *Freedom of Information Act 1991* provides that the Act does not apply to information contained in a record in the possession of a court unless the information relates to the administration of the court. The Queensland Act does not apply to a tribunal, a tribunal member or holder of an office connected with a tribunal, in relation to the tribunal’s judicial or quasi-judicial functions. The term “judicial or quasi-judicial functions” is not defined. The South Australian *Freedom of Information Act 1991* does not apply to a tribunal with power to determine questions raised in proceedings before a tribunal. The word “tribunal” means “any body (other than a court) invested by a law of the State with judicial or quasi-judicial powers”. Again these terms are not defined.
24. Although there are variations, there is clearly a distinction drawn between access to information or documents of a court or tribunal when exercising judicial or quasi-judicial functions as distinct from a court or tribunal when exercising administrative functions. The third edition of the *Butterworths Concise Australian Legal Dictionary* defines “administrative” as:

The performance of the executive function of government, as opposed to the judicial and legislative functions of government.
25. Section 62B(2) of the *Interpretation Act* permits me to consider the explanatory memorandum and second reading speech of the Bill when considering the meaning of section 5(5)(b). As stated by the Complainant, the comments, although general, clearly provide the rationale behind the legislation. There are good reasons for not imposing requirements that might interfere with the independence of the judiciary and the proper administration of justice. The Complainant has clearly set out four such reasons.
26. The purpose of all freedom of information legislation is to provide the public with a general right of access to information held by government subject to certain exemptions. In the Northern Territory, this is clearly stated in the objects of the Act which were cited previously. Section 15 further provides:

Every person has a right, enforceable under this Act, to access government information other than personal information.

Section 16 provides:

Every person has a right, enforceable under this Act –

(a) to access his or her personal information.

27. The Respondent argues that the first step is to determine whether a body is a tribunal as defined in section 4 of the Act and, assuming it is, to then identify the formal decision-making function of that tribunal. Once that specific function is identified, the Act will not apply. If I were to adopt the interpretation favoured by the Respondent, it would mean that if a tribunal had the capacity to undertake just one formal decision-making function, the tribunal would be exempt from the Act. This would result in large sections of the public sector being exempt from the provisions of the Act. I do not believe that this would further the objects of the legislation.
28. I accept the Respondent's argument that Parliament could have used the words "a tribunal in relation to its judicial or quasi-judicial functions". But I am required to interpret the words in section 5(5)(b) in accordance with their ordinary and current meaning. Commonsense, experience of the world and local knowledge should guide my interpretation of this provision. Similarly, the Act must be read in its entirety. I must read every passage not as if it were entirely divorced from its context, but as part of the whole instrument.
29. Freedom of Information legislation has been recognised by the courts as beneficial or remedial legislation. If the legislation is ambiguous, it should be interpreted in a way that would further, rather than hinder, free access to information. However, it does not justify an interpretation leaning in favour of disclosure if the meaning of the legislation is clear: *Victorian Public Service Board v Wright* (1986) 160 CLR 145.
30. The decision-making functions of tribunals are located with certain functions of three other bodies which are unquestionably court-like, namely:
  - a court in relation to their judicial functions;
  - a coroner in relation to an inquiry or inquest; and
  - a magistrate in relation to conducting a committal.

When read in context, it is clear to me that Parliament intended to draw a distinction between court-like functions, and judicial or quasi-judicial decision-making functions as distinct from the administrative functions of these bodies.

31. Having considered both arguments, I conclude that the term "decision-making functions" means "judicial or quasi-judicial decision-making functions". It is intended to differentiate between the judicial or quasi-judicial decision-making functions of a tribunal as distinct from the administrative functions of a tribunal. The next stage is to examine the types of judicial or quasi-judicial decision-making functions that have been indicative to findings that a decision-making body is a tribunal.

## Judicial and quasi-judicial decision-making functions

32. The Complainant does not suggest that the Commissioner has judicial decision-making functions but submits that it is valuable to summarise those characteristics of judicial decisions because they shed light on the following discussion about quasi-judicial decision-making functions. Quasi-judicial, as previously indicated, means the actions of non-judicial bodies, such as tribunals, when they exercise their powers and functions in a judicial manner.

33. The Complainant cites the definition of *judicial power* provided by Griffith CJ in *Huddart Parker and Co v Moorehead* (1909) 8 CLR at 357:

...the power which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

34. There are a number of generally accepted indicators which help to characterise a power as judicial or non-judicial. Judicial decisions tend to be:

- enforceable;
- binding and conclusive determinations of fact and law;
- based on law and legal precedent rather than policy and political considerations;
- decisions by an impartial decision-maker about a matter brought to them by two or more parties; and
- declarations of existing rights and obligations arising from past conduct, rather than the creation of new rights.

35. The Complainant submits that in addition, judicial decision-making is characterised by principles of natural justice which are fundamental to the common law, and are expressed through such statutory mechanisms as the *Supreme Court Rules*, the *Justices Act*, and the *Local Court Act*. Such principles are upheld by:

- admitting and assessing the weight of evidence according to law;
- fixed procedures for the form and order of the proceedings;
- proceedings being held in the presence of the parties;
- proceedings being open to the public;
- procedures for parties to adduce and test evidence; and
- procedures for parties to respond to each other's arguments.

36. Both the Complainant and the Respondent have referred me to the cases of *Mann v O'Neill* and *Trapp v Mackie*. In *Mann v O'Neill* 191 CLR 204 the High Court, per Brennan CJ, Dawson, Toohey and Gaudron JJ, defined *quasi-judicial proceedings* as follows:

...proceedings of tribunals recognised by law and which act 'in a manner similar to that in which a Court of justice acts'. Various considerations are relevant to the question whether

proceedings are quasi-judicial. However, the overriding consideration is 'whether there will emerge from the proceedings a determination the truth and justice of which is a matter of public concern'.

37. The High Court referred with approval to *Trapp v Mackie* [1979] 1 WLR 377. It is clear from *Trapp v Mackie* that the question of whether a body is quasi-judicial concerns an examination of similarities between the conduct of that body and the conduct of a court of justice. In that case, the following points of similarity arose:
- the inquiry was set up under statutory authority;
  - the inquiry was into a dispute between adverse parties of the kind that commonly would be decided by a court of justice;
  - the inquiry was held in public;
  - decisions as to the evidence to be called and arguments to be raised were left to the contending parties;
  - witnesses were called by the parties and compellable to give evidence;
  - oral evidence was given on oath;
  - witnesses were subject to cross-examination by the adverse party;
  - parties were entitled to be represented by solicitors;
  - the decision of the tribunal was not final, but as a matter of practice, was simply approved by another body in making a final decision; and
  - parties could be ordered to pay costs.

Lord Diplock in *Trapp v Mackie* stressed that no one characteristic is decisive, but rather the effect of the similarities is cumulative. The line between quasi-judicial and purely administrative bodies is therefore one of degree.

38. Both the Complainant and the Respondent acknowledge that *Mann v O'Neill* and *Trapp v Mackie* are cases that determine whether absolute immunity from legal consequences, other than perjury, should attach to comments arguably made in the course of quasi-judicial proceedings. They were not cases determining the applicability of freedom of information legislation. The Respondent submits that they are not authorities which establish whether the Commissioner in these circumstances is a tribunal for the purposes of the Act.
39. The Respondent draws my attention to the case of *N (No.2) v Director General, Attorney-General's Department* [2002] NSWADT 33 in which the NSW Administrative Decisions Tribunal was called upon to determine whether the Victims Compensation Tribunal was exempt from the *Freedom of Information Act 1989* (NSW). Section 10 of that Act provides that the Act does not apply to judicial functions of courts and tribunals. "Judicial functions" is defined to include "such of the functions of the court or tribunal as relate to the hearing or determination of proceedings before it".

At paragraph 13-15 of *N (No.2)*, President O'Conner stated:

"...in approaching the question of what functions are judicial functions, it is not necessary to have regard to the distinction that has developed in Commonwealth constitutional law, that has resulted in many federal tribunals being found not to be engaged in the exercise of judicial functions within the meaning of the Commonwealth Constitution. ... This is a

State Act applying to the State constitutional environment, one not affected by the strict demarcation of power found in the Commonwealth Constitution...

The present case involves a public authority that Parliament has chosen to call a 'Tribunal'. It is possible of course that a body might be called a 'Tribunal' but on closer examination of its statutory framework and mode of operation be found not to be a tribunal in the sense in which the term is normally used; and conversely, a body might not have the name 'Tribunal' or 'Court' but be found on closer examination to be capable of being so described. For instance, bodies with names such as 'Board' or 'Commission' often are given 'quasi-judicial' functions; and would for the purposes of the FOI Act, constitute a— court' or tribunal"

President O'Conner set out some of the basic characteristics that a tribunal would be expected to possess (at paragraph 16):

- (i) Be impartial and detached from the ordinary processes of executive government;
- (ii) Have a defined jurisdiction;
- (iii) Receive claims or applications;
- (iv) Determine claims following a process of examining submissions, receiving evidence and assessing that evidence by reference to standards of proof;
- (v) Use a process of assessment that gives rise to the making of a reasoned decision applying the relevant law;
- (vi) Make a final order that is binding.

The Respondent submits that the characteristics adopted by President O'Connor are apt in determining the interpretation of "tribunal" for the purposes of the Act.

40. The Respondent also refers me to the case in the Local Court of the Northern Territory of *Ricardo Homes Pty Ltd v NT Building Practitioners Board* [2007] NTMC 011. A question which arose in *Ricardo* was whether the Building Practitioners Board was a tribunal for the purposes of an appeal. After reviewing the statutory framework, Lowndes SM concluded that the Board was a tribunal for reasons which included:

- (i) The Board had been established in a way such as to leave no doubt about its independence and impartiality;
- (ii) The Board exercised a defined and specialised jurisdiction;
- (iii) One member of the Board was a legal practitioner;
- (iv) The Board received and determines applications for registrations and renewals;
- (v) The Board received evidence in support of an application and examines and assesses the evidence by reference to a standard of proof — that of "satisfaction";
- (vi) The Board appears to be bound by the principles of natural justice and procedural fairness, which is one of the hallmarks of a tribunal exercising quasi judicial functions. Indeed the Board appears to have been extremely fair in giving the appellants ample opportunity to present material to the Board in support of their applications;

- (vii) In coming to a conclusion in relation to an application for registration the Board must come to a reasoned decision applying the relevant provisions of the Act;
- (viii) The Board's decision is binding subject to a right of appeal;
- (ix) Although it does not conduct a hearing in the curial sense, or in an adversarial context, the Board conducts a "hearing on the papers". Although lacking formality and technicality, the Board's hearings are analogous to those conducted by some criminal injuries compensation tribunals in Australia. Such tribunals clearly perform quasi-judicial functions;
- (x) The fact that the Board does not engage in an adversarial process does not derogate from its characteristics as a tribunal;
- (xi) The Board's decisions create rights or privileges connected with a grant of registration. Conversely, its decisions may have the effect of denying rights or privileges.

Lowndes SM concluded, at paragraph 80:

"In my opinion, the Board does not perform a purely executive or administrative function. It performs an important regulatory role to which there are attached significant adjudicative functions, and hence quasi-judicial functions".

41. Similarly in the case of *Moore v The Registrar of the Medical Board of South Australia* (2001) 215 LSJS 133, Judge Smith of the District Court, examined the powers and functions of the Medical Board in order to determine whether it was a tribunal. At page 144, after examining the statutory framework of the Medical Board, Judge Smith stated:

The cumulative effect of the above particularises trappings of power demonstrate that the Board, in exercising the functions leading up to the hearing of 3 December 1996, was exercising judicial or quasi-judicial power. It matters not that only some of the powers alluded to above were exercised in this case. The Board was engaged in resolving a complaint about rights and obligations, arising from past events and conduct, and it adjudicated upon it by the application of existing legal principles."

42. In *Rakich v Guardianship and Administration Board* [2000] WAICmr 3, the Western Australian Information Commissioner considered whether the Guardianship Board of WA was a tribunal for the purposes of the *Freedom of Information Act 1982* (WA). In *Rakich*, Commissioner Keighley-Gerardy stated at paragraphs 13 and 16:

"The NSW Ombudsman has set out a number of tests that are relevant to determining whether a body is a "tribunal" for the purposes of clause 10 of the NSW FOI Act. I consider that those tests are a useful guide as to whether the agency in this case is a tribunal. Those tests are as follows:

- (a) "that the body has formal and procedural attributes that are similar to that of a court", including initiation of proceedings by parties, public proceedings, the power to compel attendance or witnesses who may be examined on oath or affirmation, a requirement to follow the rules of evidence (although it should be noted many tribunals are not bound by the rules of evidence) and the power to enforce compliance with orders given;
- (b) that the body "makes a conclusive determination ... resolving disputed questions of fact or law"; and

- (c) that the orders of the body have the force of law without the need for confirmation or adoption by a court or any other body” (NSW Ombudsman, FOI Policies and Guidelines (1994) at p.65).

With respect to the agency’s formal and procedural attributes, s.40 of the *Guardianship Act* provides that proceedings are initiated by interested parties. In the performance of its functions, the agency may require any person to attend and to be examined on oath or affirmation (Schedule I clause 7). Section 15 of that Act provides that the agency is not bound by the rules of evidence. Except in specified circumstances, all hearings before the agency are open to the public (Schedule 1 clause 11). In my opinion, these formal and procedural attributes are similar to those of a court.

Where the agency has not vested plenary functions in an administrator, it may authorise the administrator to perform any specified function and may make any order that it thinks is necessary or expedient for the proper administration of the estate of the represented person (sections 71(3) and 72(2)). An appeal from a determination of the agency lies, by leave, to the Supreme Court but otherwise there is no appeal from a determination of the agency. An application for leave to appeal may be made on the ground that the agency made an error of law or fact or acted without, or in excess of, jurisdiction, or because there is some other reason that is sufficient to justify a review (sections 19 and 21). In my view, it is evident from the legislation that the agency’s determinations are conclusive determinations and that its orders have the force of law without the need for confirmation or adoption by a court or any other body.

Accordingly, I consider that the agency is an adjudicative body or tribunal and therefore “a court” for the purposes of the FOI Act.

43. The above authorities are of assistance in examining the indicia of quasi-judicial powers and functions. The next question is to consider whether the Commissioner, when exercising his powers under section 59 of PSEMA, is exercising quasi-judicial powers and functions and thus may be considered to be a tribunal for the purposes of the Act.

### **Powers and functions of the Commissioner**

44. The Commissioner’s functions are set out in section 13 of the PSEMA. I note that the 13 matters listed in this section are purely administrative in nature with the exception of part of sub-section 13(k) which provides that one of the functions of the Commissioner is:

“to conduct or cause to be conducted inquiries and investigations into, and reviews of, the management practices of Agencies.”

The function “to conduct or cause to be conducted inquiries” is the only function that might potentially be considered quasi-judicial in nature.

45. The Commissioner’s powers are set out in section 14(1):

The Commissioner has power to do all things necessary or convenient to be done for or in connection with or incidental to the performance of his or her functions and the exercising of his or her powers.

Section 59 of PSEMA, titled “Review of Grievances”, is an example of a specific function that is imposed on the Commissioner. Section 59 provides that an employee, aggrieved by an intention of a Chief Executive Officer to terminate their employment, or by their treatment in employment, may request the Commissioner

review the action or decision complained of. Within a fixed period, unless referred back to the Chief Executive Officer in certain circumstances, the Commissioner is to review the matter as requested by the aggrieved employee. On dealing with a request for review the Commissioner has the powers necessary and convenient to deal with a request, including the same powers and obligations in relation to a review as the Appeal Board under section 58 of PSEMA. Following the review the Commissioner may confirm the action, intended action or decision, or direct the Chief Executive Officer of the Agency concerned to take or refrain from taking, as the case requires, a specified action. The Commissioner is also empowered to conduct a review where a request is made by a former employee, where their treatment has led to resignation or termination.

46. Using the above authorities as a guide, the Respondent argues that there are sufficient trappings of power (using the phrase used in *Moore*) to find that the Commissioner when performing functions under section 59 is a quasi-judicial body. He summarises those functions as follows:

(i) The Commissioner is impartial and separate from the Chief Executive Officer, as such the Commissioner is detached and independent.

(ii) The Commissioner has a defined jurisdiction. An aggrieved employee may apply specifically to the Commissioner for a review of his or her treatment in employment.

(iii) The Commissioner receives a claim or application. There is a well defined process for employees to lodge requests for review and a time frame in which the review will be conducted.

(iv) The Commissioner determines claims following a process of examining submissions, receiving evidence and assessing that evidence to a relevant standard. The standard is on the balance of probabilities and the Chief Executive Officer's actions are judged according to whether they are reasonable in the circumstances. Each party is requested to make submissions on issues and the Agency's report is provided to the applicant for comment.

(v) The Commissioner makes a reasoned decision in accordance with the law regulating the public service namely the PSEMA, PSEM Regulations (see for example Regulation 3), By-laws and Employment Instructions.

(vi) The final decision of the Commissioner is binding. Section 59(5) of PSEMA gives the Commissioner the statutory power to direct a Chief Executive Officer to take certain action. That section contrasts with the provisions listed in section 13 of PSEMA which speak simply of assistance given and consultations between the Commissioner and Chief Executive Officers. Section 59(5) specifically empowers the Commissioner to lawfully direct a Chief Executive Officer to take or not take an action. The Chief Executive Officer is required, by virtue of section 23(2) of PSEMA, to comply with all directions given under the Act by the Commissioner. A failure to comply would not only be unlawful pursuant to the Act but result in a breach of discipline and no doubt a breach of the Chief Executive Officer's contract.

(vii) The Commissioner is bound to follow natural justice. Employment Instruction 2, entitled natural justice, applies to all persons exercising powers under PSEMA. That Instruction ensures that all people are provided with a fair hearing and an impartial decision maker.

(viii) The Commissioner has the capability to conduct hearings, but his practice is to conduct hearings, or reviews, on the papers. Each party is given an opportunity to provide information to be taken into consideration by the Commissioner. The Commissioner has the ability to summons witnesses and to take evidence on oath but it is practice not to utilise those powers.

(ix) The Commissioner does not encourage an active adversarial process but parties are welcomed to be represented by legal practitioners who are able to make submissions on their client's behalf.

(x) The Commissioner's decisions create rights in employment and his orders have the force of law without the need for confirmation or adoption by a court or any other body. The Commissioner is even able to consider a request for review by a former employee and, it is envisaged, would be able to order the re-instatement of that employee.

47. In considering the quasi-judicial powers which are set out in the authorities above and the powers and functions of the Commissioner, I am not persuaded that the powers and functions are inherently quasi-judicial. They could be defined as inherently quasi-judicial if the Commissioner were obliged to adopt a quasi-judicial process when conducting a section 59 review. They could be defined as quasi-judicial if the Commissioner elects to adopt a quasi-judicial process. There is however no duty or responsibility upon the Commissioner to act in a quasi-judicial manner. The Complainant notes that while the Commissioner has the power to conduct a quasi-judicial grievance review, there is no duty or responsibility that compels the Commissioner to act in a quasi-judicial manner. There is no requirement that the Commissioner reach a decision based on legal considerations as opposed to policy considerations. I do not consider that this view contradicts the legal advice provided to the OCPE by Ms Lucia Ku on 25 November 2003. I note that *Employment Instruction No. 8* does not compel the Commissioner to provide reasons for his decision but "may give reasons in writing to the parties for the decision reached".
48. In the cases above, the powers and functions of the Boards are set out in the relevant legislation and clearly defined formal procedures must be followed. This contrasts with the Commissioner who has far greater freedom about the manner in which he conducts grievance reviews.
49. Ms Lee Berryman, who has had held the position of the Director of Promotions Appeal and Review in the OCPE for the last 10 years, provided evidence in her Affidavit dated 21 September 2007 about the processes adopted by the Commissioner when conducting a grievance review. The procedures set out in her Affidavit suggest that the Commissioner has in fact in great deal of latitude as to the manner in which he conducts a section 59 review. Annexure A of her Affidavit is an instruction sheet: *OCPE Review of Treatment in Employment Process*. Ms Berryman states in paragraph 6 of her Affidavit that Annexure A is "a basic flow diagram indicating the general processes involved in a grievance process." It shows various options including that the grievance may be resolved by mediation. She also states that Annexure B *Guidance for Grievance Review Process* contains "the guidelines for the grievance review process which are generally adopted." Again they are flexible and permit various options presumably depending on the circumstances of each case.
50. Incidentally, I have been unable to find either of these documents on the website of the OCPE which suggests that they are not available to provide guidance for those

undergoing a section 59 grievance review. It is interesting that neither of these documents refer to *Employment Instruction No. 8 Management of Grievances* which is the main instruction sheet for a section 59 grievance review and this instruction sheet is readily available on the internet.

51. The Respondent submits that the definition of tribunal in section 4 of the Act does not require evidence that the Commissioner in any particular case has exercised all or some of those powers in performing in a quasi-judicial function. The Act does not say “a tribunal means a body which exercises quasi-judicial functions in any particular case”. It says “a tribunal means a body that has quasi-judicial functions”. He argues that the plain and ordinary language of the Act does not require a tribunal to exercise all of the powers incidental to such a function in any or all particular cases. Once it can be established that a body has a quasi-judicial function, it is then a tribunal for the purposes of the Act.

52. I agree that the word “has” is the third person singular of the verb “to have” and means to possess, to own or to use but I cannot agree with the argument that a body only needs to have or possess one quasi-judicial function and it will be characterised as a tribunal and thus exempt for the purposes of the Act. This view would exempt large sections of many public sector organisations from the Act. The qualities listed in the authorities above would mean that any body that had the power to do one or any of the following would be a tribunal:

- makes a conclusive determination ... resolving disputed questions of fact or law;
- makes a decision that is binding subject to a right of appeal;
- be required to act in accordance with the rules of natural justice;
- be impartial and detached from executive government;
- have a defined jurisdiction;
- receive claims or applications;
- determine claims following a process of examining submissions, receiving evidence and assessing that evidence by reference to standards of proof;
- use a process of assessment that gives rise to the making of a reasoned decision applying the relevant law; or
- make a final order that is binding.

53. If I accept the Respondent’s argument, the Commissioner, when conducting a grievance review would be totally exempt for the purposes of the Act. The Northern Territory Public Sector employs approximately 17.5% of the Northern Territory labour force. Section 12 of PSEMA provides that the Commissioner shall be deemed to be the employer of all employees on behalf of the Territory or an Agency. Section 13 of PSEMA provides that the functions of the Commissioner include:

- ...
- (b) subject to this Act, to promote, uphold and ensure adherence to the merit principle in the selection of persons as, and the promotion and transfer of, employees;
  - (c) to determine practices and procedures relating to the recruitment and appointment of persons as employees, the promotion of employees and the employment, transfer, secondment, redeployment, discipline and termination of employment of employees and any other matters relating to human resource management;
- ...

54. All government departments are required to have a grievance review process to ensure that the concerns of employees are dealt with promptly and fairly. The

Commissioner handles approximately 87 requests each year for a review of treatment in employment. The Commissioner is required to conduct the formal grievance proceedings in accordance with the principles of natural justice and procedural fairness. It is important that this process is transparent and the public can understand how the Commissioner conducts these reviews in order to have confidence in public sector employment. I cannot accept that adopting an interpretation that totally excludes the Commissioner, when conducting a grievance review, from the access provisions of the Act would further the objects of the Act. It would not allow members of the public to scrutinise and participate in government decision-making and ensure reasoned decision-making. It would not facilitate confidence in government decision-making.

55. In my mind, an exemption for courts and court-like proceedings does further the objects of the Act, but exempting an inquiry merely because the body that conducted it has the capacity to act in a quasi-judicial manner does not further the objects of the Act. It does not promote accountable decision-making, and it does not reflect a right of access that is limited *only* when there are strong public interest factors against disclosure.
56. In the alternative the Respondent argues that if his view is incorrect, it is submitted that in the case of Dr Collie's grievance review the Commissioner exercised sufficient trappings of power indicative of a tribunal.
57. I conclude that whether the document requested by the Complainant is exempt by virtue of section 5(5) of the Act turns on whether a quasi-judicial decision-making process was adopted in this case or whether there were sufficient trappings of power indicative of a tribunal.

### **Practice adopted in the case of Dr Collie's grievance review**

58. On the evidence before me it appears that the following process was adopted:
  - The Complainant lodged her first grievance on 29 July 2004 in which she complained about her treatment by her supervisors in the DHCS.
  - The Complainant lodged her second grievance on 13 August 2004 in which she complained about the selection process for a position at the Alice Springs Hospital.
  - On 16 August 2004, the Commissioner sent a letter to the Complainant informing her that the DHSC would be requested to respond to the issues that she had raised and that she would be provided with a copy of the report to comment on.
  - By letter dated 17 August 2004, the Chief Executive Officer of the DHCS was asked by the Commissioner to report on the circumstances giving rise to these grievances.
  - On 15 October 2004, the Commissioner sent a copy of the DHCS report to Dr Collie seeking her comments by 2 November 2004. He also informed the Complainant that he was seeking an external person to review her treatment in employment.
  - On 15 November 2004, the Complainant wrote to the Commissioner in response to the report.

Up to this point in time, no actions taken by, or on behalf of, the Commissioner could be characterised as quasi-judicial.

59. On 19 November 2004, the Commissioner wrote to Professor Bill Adams thanking him for agreeing in principle to undertake a review of Dr Collie's treatment. The evidence does not adequately explain why an outside person was employed to prepare the report for the Commissioner. Some guidance is provided in the Commissioner's letter to Mr Griew dated 4 February 2005:

It was decided that given the nature of the complaint on this occasion the matter would not be referred back to the DHCS to resolve. It was considered that the DHCS did not have the relevant skills to deal with this matter.

Similar reasons are provided by Ms Berryman. It is hard to imagine that the DHCS did not have one person who had the relevant skills to deal with this matter. Although the Commissioner may deal with the matter as he thinks fit, the affidavit of Ms Berryman and annexures thereto make no reference to the possibility of employing the skills of an outside person to review a decision of a Department. Ms Berryman provides her evidence on the basis of her experience over her 10 years in the position. I am not sure if this implies that this is the only occasion during her 10 years when an outside contractor has been employed for this purpose.

60. It is also unclear if Professor Adam was employed to conduct a section 59 grievance review or whether he was employed to conduct an investigation in lieu of the usual internal review procedures at the DHCS. The letter from the Commissioner to the DHCS only states that in view of the nature of the complaint it would not, on this occasion, be referred to the DHCS.

However, Professor Adam was employed as a consultant to conduct the review. Section 5(7)(c) of the Act provides a public sector organisation includes a contract service provider to the extent of the services it provides under its service contract. A reference to a tribunal includes a reference to any other staff of the tribunal.

61. Attached to the Commissioner's letter dated 19 November 2004 was a single page titled *Scope of work to be undertaken by Professor Bill Adam* which contained the following terms:

Purpose of consultancy: Undertake a review of the employee's claims of unfair treatment in employment. View all the paperwork, review the actions, intended action or decision of the Agency and prepare a report for the Commissioner for Public Employment. The review may include conducting interviews, seeking information from other sources and inspecting records.

The report should outline the steps followed in conducting the review and the findings of the reviewing officer and make recommendations for the Commissioner for Public Employment to be able to determine the matter.

62. It is difficult to know how much information or guidance Professor Adam received as to the manner in which he should conduct his review. The letter from the Commissioner to the Professor 2004 states:

I have provided some relevant documentation regarding the section 59 review process and includes:

- An extract from the Public Sector Employment and Management Act and

- A Guide for Employees brochure.

I do not have in evidence before me a copy of “A Guide for Employees” brochure and I have been unable to locate one. There would not however appear to be any instructions from the Commissioner informing the Professor that he must undertake his investigations in a quasi-judicial manner, or indeed any particular manner. He is merely asked to conduct interviews, seek information from other sources and inspect records. He is asked to “make recommendations for the Commissioner to be able to determine the matter”. It does not ask the Professor to prepare a report for the Commissioner’s consideration. It would seem that the Commissioner himself had no role in determining the procedure that would be used to conduct the inquiry, or testing the strength and credibility of the evidence.

63. In evidence before me is a file note of a telephone conversation that took place on 20 March 2007 between Ms Heske and Dr Collie in which Ms Heske sought information about the process adopted by Professor Adam. The Respondent submits that I should not take the content of that conversation into consideration because it would be unsafe and unsatisfactory to accept at face value such hearsay material. Section 121 of the Act provides that I may determine the procedures for conducting a hearing as I see fit and I am not bound by the rules of evidence.
64. I accept that Professor Adam was not contacted by Ms Heske to confirm the contents of the alleged conversation. However, the Respondent could have contacted Professor Adam to refute the contents of the conversation. I note that the name of Professor Adam still appears in two Melbourne University handbooks in 2007 which suggests that it is still possible to contact him. Further the Respondent has not provided me with any evidence from officers in the DHCS as to the process adopted by Professor Adam. In the absence of evidence to the contrary, I believe I can take into account Dr Collie’s version of events.
65. Professor Adam did not have a delegation from the Commissioner. Without a delegation, Professor Adam did not have the legal authority to make a decision pursuant to section 59 of PSEMA, nor did he have the procedural powers and obligations of the Commissioner in undertaking the review. The Complainant notes that any decision made in relation to Dr Collie’s grievance would not seem to involve the determination of existing legal rights. The review could not have concluded, for example, that Dr Collie had a legal right to a constructive work environment. The only possible result of a review is that the Commissioner may refer it back to the Chief Executive Officer and direct him or her to take or refrain from taking a specified action. The Commissioner’s decision is final. There is no right of appeal.
66. It is agreed that Professor Adam based his Report on reading written materials provided, a visit to Darwin on 10 and 11 January 2005 and some subsequent telephone conversations. The Respondent concedes that the investigations were not conducted in public. The Complainant states that she went to Darwin to present her evidence to Professor Adam. She submits that at no time was she made aware of the arguments against her or the procedure of the investigation. She was not told how the investigation would be conducted or who Professor Adam had spoken to. In fact there appears to have been an element of secrecy about these matters. They were kept confidential from Dr Collie and apparently from others who might have been considered a party to the proceedings. The Commissioner acknowledges in his letter to this Office dated 22 January 2007 that:

“Dr Collie is not aware of the “interpretative opinion” offered by Professor Adam in his restatement of the information provided to him. ...The report has been kept confidential to

OCPE and not made available to Dr Collie. ... Dr Collie can have no knowledge of the manner in which Professor Adam has set out and /or restated the underlying information provided to him”.

67. The process adopted was not an oral adversarial hearing process. Professor Adam elected to speak to certain people but not others. He put the questions to those selected persons. The Parties were not asked to provide a statement containing their version of events prior to the interviews. Both parties agree that they were provided with an opportunity to respond to the issues raised but the Complainant claims that she was told by Professor Adam that many of her arguments were “just hearsay”. There was no cross-examination of the evidence by the parties. The Complainant said that she indicated to Professor Adam that she could have called witnesses to give direct evidence but she was never given the opportunity. She said that Professor Adam only spoke to her on one other occasion after her first interview and that was to clarify certain points made in her submission.
68. Information was not provided under oath. There do not appear to be any provisions that would penalise a person for giving false evidence in a grievance investigation. Sanctions that would apply for giving false evidence are those which apply to all public sector employees ie employees are expected to cooperate. Parties had the opportunity to obtain legal representation but did not exercise this option.
69. The Commissioner submits that:

Parties did have the opportunity to address the Commissioner about Professor Adam’s report to the Commissioner. Parties had formal opportunities to provide information to the Commissioner during the review process, informal opportunities (ie submissions of ad hoc, additional information) exist throughout the review process.

In contradiction to the Commissioner, the Complainant stated that at no point was she made aware of the content or procedure of the investigation of Professor Adam, or any of the arguments or evidence he had before him other than the documents she had provided. She also noted that when she presented her submissions, which she admitted had been lengthy, Professor Adam told her that he “would not have time to consider them all”.

70. I am required to weigh these conflicting views. The Complainant’s comments about the process adopted by Professor Adam and the Commissioner’s comments about the process were set out in the prima facie decision. I note that the Respondent chose not to adduce any evidence in support of the Commissioner’s claims. Again the Respondent did not attempt to seek the comments of Professor Adam to support the Commissioner’s claims. Ms Berryman states in her affidavit that she was not the reviewing officer in the Collie matter and had no knowledge of how the matter was conducted. Ms Fiona Roach was the officer who handled the Collie matter in the OCPE. Ms Roach remains an employee at the OCPE today but her views were not sought. In light of all the aforementioned factors, I am unable to find any evidence to suggest that the investigation to date could be characterised as a quasi-judicial process. I find that it was a routine administrative investigation.
71. At the completion of his investigations, Professor Adam prepared his report and forwarded it to the Commissioner. The Commissioner states:

Professor Adam’s report formed part of the Commissioner’s deliberative process prior to the Commissioner making his decision.

The Complainant states that she has some trouble reconciling the assertion that the Commissioner engaged in a deliberative process. She states that it is not apparent that the Commissioner had any personal knowledge of the procedures adopted by Professor Adam and the Commissioner has not explained the basis for his assertions. In his letter to Professor Adam, the Commissioner asked him to “make recommendations for the Commissioner to be able to determine the matter”. These words do not suggest a process whereby the Commissioner himself anticipates being actively involved in the decision-making process. It does not ask the Professor to prepare a report for the Commissioner’s consideration.

72. A comparison between the report of Professor Adam and the letter from the Commissioner to the Complainant dated 4 February 2005 is informative. This letter is titled *Section 59 - Review of Treatment of Employment*. The Commissioner commences with certain historical details providing background about the complaint. He then states:

One of the main guiding factors in such Reviews is the question of whether or not the action(s) or inaction(s) were reasonable, and whether the principles of human resource management were applied ie employees shall be treated fairly and shall not be subject to arbitrary or capricious administrative acts.

I assume this to be a standard paragraph that is included in all such correspondence. The Commissioner then addresses the six main issues of the complaint. I have carefully compared the wording in both documents. The Commissioner has selected certain sentences from the Report and reproduced them exactly with the exception of obviously necessary minor grammatical changes. The letter is written in the third person with frequent references to “the review found ...”. The only time that the Commissioner uses the first person singular and departs from the wording used by Professor Adam is in the last sentence of his letter when he extends best wishes for the future to Dr Collie.

73. It is my view that the decision-making function exercised by Commissioner Kirwan in this case lacks almost any characteristics which could mark it as being quasi-judicial. Consequently, I find that the report of Professor Adam is not exempt by virtue of section 5(5)(b) of the Act.

### **Absence of final copies of documents.**

74. Before proceeding to consider the other possible exemptions under the Act, I wish to raise my concern about certain crucial documents which have been provided in evidence. Mr Smyth’s Affidavit dated 21 September 2007 affirms:

On 15 November 2004, the Complainant wrote to the Commissioner for Public Employment in response to the Department’s report. Attached hereto and marked F is a true copy of that document. Also included in annexure F is a copy of the Department’s report.

Annexure F is so confusing that it is difficult to comprehend the status of many documents. Included is a rough working copy of a report titled *Departmental Report* (folios 140 to 146) which examines the complaints of Dr Collie but it is clearly not the Department’s final report. The paragraphs are roughly numbered on the left hand side, there are hand written notations in the margins, it is impossible to know who prepared the report because it does not contain the name of the author, it is not

signed and it is not dated. I would have expected the final report to be in evidence in this matter.

There is a second document titled *Departmental Report* (folios 122 to 123) (incorrectly numbered) which appears to examine the complaints of Dr Collie but it is clearly not a final report. Again it does not contain the name of the author, it is unsigned and undated.

Further, it is clear that the Complainant provided materials in support of her grievance in three volumes to the Commissioner. They must have been substantial in length. By letter dated 15 November 2004, Dr Collie asks the Commissioner to “closely scrutinise the material ...”. Mr Smyth affirms that the OCPE was not able to locate any of the three volumes.

75. Mr Smyth also refers in his Affidavit to Professor Adam’s report dated 1 February 2005. Mr Smyth does not include that report in his evidence because “it already forms part of the documentation in the possession of the Information Commissioner”. The only report in my possession is a rough working document (folios 164 to 168) titled *Grievance of Dr Jean Collie – Review by Bill Adam. Feb 1, 2005*. The document is not signed and it is not dated. A person has marked the typographical errors in paragraph 10 but not in the remainder of the document. It is hard to believe that the document in its current form would be the final report presented by a contracted Professor to a Northern Territory Government Department.
76. I assume that the content of the report by the DHCS and the report by Professor Adam that I have before me does not depart from the content of the final reports, except to correct typographical errors. I also assume that I would have been provided with the final reports had they been available. It is regrettable that the OCPE cannot locate these reports or the three volumes of submissions from Dr Collie. One of the objects of the Act is the promotion of efficient and accountable government through appropriate records and archives management by public sector organisations. Section 131 of the Act provides that the Chief Executive Officer of the OCPE, like all Chief Executive Officers, has a duty to ensure that his or her organisation complies with the record keeping provisions contained in the *Information Act*.

### **Other exemptions claimed under the Act**

77. The Respondent relies on the previous submissions made in relation to the other exemptions and elects to make no further submissions. The Complainant relies upon the detailed arguments about the other exemptions contained in Ms Heske’s prima facie decision. In relation to the exemptions contained in sections 52, 53(c), and 55(3), I am persuaded that the Complainant’s arguments are sound and I therefore adopt and reproduce them with some minor changes.

### **Section 52 – Deliberative processes**

78. Section 52 of the Act provides:

(1) Information may be exempt under section 50 if disclosure of the information would disclose:

an opinion, advice or recommendation brought into existence by or on behalf of a public sector organisation in the course of, or for the purposes of, the deliberative processes that are part of the functions of the organisation.

Professor Adam's report clearly contains opinions and recommendations concerning the appropriate resolution of the grievance procedure. In my view, the entire report is potentially material which is exempt from disclosure by section 52.

Section 52 must be read in conjunction with section 50(1), which states:

Government information referred to in this Division is exempt only if it can be shown that, in the particular case, it is not in the public interest to disclose the information.

#### Section 52 public interest test

79. A number of factors are identified by the legislation as relevant to the question of whether disclosure would be in the public interest at section 52(5):

(5) To show that, in a particular case, it is not in the public interest to disclose government information referred to in subsection (1), a public sector organisation may have regard to the following factors:

- (a) the more senior the person who created, annotated or considered the information and the more sensitive the information, the more likely it will be that the information should not be disclosed (but the seniority of the person is not by itself a sufficient reason not to disclose the information);
- (b) the disclosure of information that was brought into existence in the course of the development and subsequent promulgation of policy tends not to be in the public interest;
- (c) the disclosure of information that will inhibit frankness and candour in future pre-decisional considerations is likely not to be in the public interest;
- (d) the disclosure of information that has the potential to inhibit the independence of the decision-maker because of the possibility that the disclosure could result in the decision-maker being unduly pressured or harassed is likely not to be in the public interest;
- (e) the disclosure of information where there is a risk that the disclosure will result in a mischievous interpretation of the information is likely not to be in the public interest;
- (f) the disclosure of information that will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered tends not to be in the public interest (but a tentative or optional quality of the information is not by itself a sufficient reason not to disclose the information);
- (g) the disclosure of information that does not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process.

80. The OCPE relies particularly upon s52(5)(c), which concerns frankness and candour in future pre-decisional considerations. In Ms Heske's preliminary view dated 15 December 2006, she indicated that she had no evidence to suggest that the OCPE's grievance review officers would have their frankness and candour inhibited by the prospect that their reports may be released under the Act. In response, the Commissioner submitted:

The letter from Ms Heske appears to focus on officers of OCPE. However, frankness and candour in pre-decisional considerations extends also to the officers of the agency from which the complaint arises. ... In these circumstances, I submit that disclosure will lead to inhibition in frankness and candour of material being provided to OCPE by staff within an agency whose conduct is called into question by a grievance complaint.

81. The OCPE referred me to *TW v TX* [2005] NSWADT 262 in support of their submission. I have consulted that decision but found it unhelpful. The tribunal in that case did not consider an equivalent provision to section 52 of the *Information Act* but considered the equivalent of the *Information Act* exemptions contained in sections 53(c) and 56(1)(a).

Nevertheless, the point raised by the OCPE is an interesting one. Section 52(1)(b) does indeed provide that matter which is potentially exempt under section 52 includes:

...a record of consultations ...of a public sector organisation in the course of, or for the purposes of, such deliberative processes.

82. The Act does not specify what kind of consultations are included, so presumably “consultations” includes any discussion with a person or body external to the organisation, which is in the course of or for the purposes of the deliberative process in question. On the other hand, section 52(5)(c) refers to:

the disclosure of information that will inhibit frankness and candour in future pre-decisional considerations is likely not to be in the public interest;

83. Two potentially relevant definitions for “consideration” are given by the Australian Concise Oxford Dictionary as:

the act of considering; careful thought ...3. a fact or a thing taken into account in deciding or judging something.

If “considerations” has the first meaning, then the effect of s52(5)(c) is to refer to the thoughts of the decision-maker(s), and I must think about whether any future *decision-makers* would be less frank and candid in expressing their preliminary thoughts about a potential decision. On the other hand, if “considerations” means facts or things taken into account, then it is the frankness and candour of future *sources of information* which is relevant to s52(5)(c).

In my view, these two definitions are not mere shades of the same meaning. They are completely different and mutually exclusive meanings. The section must mean one or the other. It cannot mean both.

84. Given that the purpose of the section is to provide protection for the deliberative or “thinking” processes of public sector organisations, I think that the term “considerations” in section 52(5)(c) refers to the thinking processes of the decision-maker(s) within the organisation in question. I gain support for this view from the fact that the relevant considerations for sources of information are dealt with in detail by three other sections of the Act, namely sections 55 (confidential sources), 56 (information affecting personal or cultural privacy), and 57 (confidential business information). In light of sections 55, 56, and 57, it would be completely unnecessary for section 52(5)(c) to provide additional protection for frank and candid sources of information.

85. I am also supported in this view by *Re: Booker and Department of Social Security* No. Q89/193 AAT No. 6189 Freedom of Information where the equivalent Commonwealth exemption was considered in relation to a public sector employment investigation, at paragraph 25 per Deputy President Forgie:

...it seems to me that, in order for there to be a consultation, there must be something of a two way exchange between at least two parties. The documents which I am presently considering are in the nature of notes of interview or statements of witnesses. As such, I do not consider that they can be regarded as 'consultations' within the meaning of section 36.

86. From the above analysis, it seems that the correct approach for the purposes of section 52(5)(c) is to consider only the potential frankness and candour of the officers conducting future grievance reviews, and not the frankness and candour of the individuals whom they may interview to obtain evidence. There is no evidence before me to suggest that professional grievance review officers or consultants, such as Professor Adam, would have their frankness and candour inhibited. I would be surprised if such evidence existed. Grievance review officers are supposed to be independent and impartial investigators who express reasoned opinions. Some of these opinions may be less than favourable to the government agency or staff under investigation, but if the reviewer is truly impartial then such considerations are irrelevant. I cannot see any reason why the reviewer would shirk their duty to accurately report their findings when faced with the prospect of the information being released pursuant to the Act. To the extent the reviewer needs to discuss another person's sensitive confidential or private information, that information is protected from disclosure by other exemptions in the Act.
87. The situation might be different if the document in question were Professor Adam's working draft, but it is his final Report to Commissioner Kirwan about the content and outcomes of his investigation. I note that the Commissioner has the powers to compel a person to attend and give evidence in the conduct of a section 59 grievance review, so there are other means of ensuring that the frankness and candour of future sources is not diminished.

#### Factors in favour of disclosure

88. Ensuring government transparency and accountability are factors in favour of disclosure. The OCEPE is the key mechanism which ensures public confidence in relation to public sector employment. A large proportion of the Northern Territory public is employed by the Northern Territory public sector, and consequently there is a significant public interest in the public understanding how the OCEPE operates in practice. This is not just because public sector employees themselves are affected, but because public sector employment issues require significant expenditure of public money.

If the OCEPE ensures that every single one of its decisions is the result of careful and reasoned decision-making, disclosure of OCEPE processes will have the effect of increasing confidence in the public sector as a whole, because employees can be confident that the OCEPE will ensure agency accountability for employment decisions.

Likewise, if the OCEPE makes decisions which are hurried, arbitrary, biased, poorly investigated or otherwise flawed, this too is in the public interest to know. The public cannot address these issues if they do not know the extent to which they may exist.

I stress that I am not suggesting that the OCPE makes flawed decisions. I am speaking hypothetically in order to make the point that it is in the public interest to know how effectively the OCPE functions.

89. Although the information reveals deliberative processes, I find that its disclosure would be in the public interest. I am not satisfied that the Report qualifies for an exemption under section 52 of the Act.

### **Section 53(c) – Effective operations of public sector organisations**

90. The OCPE relies upon section 53(c) of the Act, which provides:

#### **53. Effective operations of public sector organisations**

Information may be exempt under section 50 if disclosure of the information is reasonably likely to –

...

(c) have a substantial, adverse effect on the management by a public sector organisation of the officers or employees of the organisation;

It would seem that an adverse effect cannot be reasonably likely if it is unlikely to occur, or if it is likely to occur but the potential consequences are unlikely to be adverse.

To successfully argue that information is exempt under section 53(c), the OCPE needs to adduce evidence to show:

- one or more identifiable effects or consequences;
- which impact adversely on PSO management of officers and employees;
- that are reasonably likely to occur; and
- whose cumulative effects are reasonably likely to be substantially adverse.

#### Adverse effects identified by the OCPE

91. The adverse effects identified by the Commissioner are that:

Disclosure will lead to inhibition in frankness and candour of material being provided to OCPE by staff within an agency whose conduct is called into question by a grievance complaint.

Assurances of confidentiality with respect to grievance reviews are given on the OCPE website to the world at large. Any breach of such assurances would have ramifications across the whole public sector, not just a single department. Any disclosure beyond that required to comply with the rules of natural justice would have a most serious effect on management within agencies. Part of the management function is obviously to seek to maintain harmonious working relationships and to seek to obtain co-operation with my Office's grievance reviews. That function is reasonably likely to be adversely affected in the manner identified in *HNS and in Re Pemberton* (1994) 2 QAR 293.

92. The OCPE referred particularly to the "breach of trust" effect identified at paragraph 59 of *HNS and Queensland Health*, S 102/00, 25 March 2002, which reads as follows:

I decided 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.

I understand this paragraph to identify that breaching a mutual understanding of confidentiality would not only have the adverse effect of diminishing candour, but of disrupting currently accepted procedures which form the “ground rules” of relations between management and staff.

93. The OCPE did not specify what it was it was seeking to identify in *Re Pemberton*. The decision is some 80 pages long and includes reference to numerous factors which cannot apply in the present case. Some of the factors do not apply because Dr Collie no longer works at the hospital, so there is no prospect that she could disrupt management of employees by retaliating against present staff for their comments. Other factors do not apply because they were factors particular to the university setting and the nature and purpose of the information in question in that case. I cannot see a directly applicable adverse effect identified in *Re Pemberton* other than the aforementioned “frankness and candour” factor.
94. For clarification, the two potential adverse effects of disclosure that I understand the OCPE to have identified in the present case are:
- Staff across the public sector would be reluctant to frankly and candidly respond to allegations about them raised by a fellow employee; and
  - Disclosure would be contrary to present OCPE practice for investigating and resolving staff grievances, and a change in practice would lead to disruption and uncertainty for staff across the public sector.

#### Adverse effect on management of public sector staff

95. The *Australian Concise Oxford Dictionary* defines adverse as “contrary, hostile, hurtful, or injurious. The thing to be injured for the purposes of the exemption is the management of public sector staff. It is not enough to show that the effect would merely result in a change to management procedures. The change must be adverse.

#### Meaning of “substantial”

96. For the identified adverse effects to support the s53(c) exemption, their potential effect must be *substantial*. In relation to a similar Commonwealth exemption, the Federal Court of Australia in *Harris v Australian Broadcasting Corporation and Ors* 50 ALR 551 at 564 per Beaumont J said:

In my view, the insertion of a requirement that the adverse effect be ‘substantial’ is an indication of the degree of gravity that must exist before this exemption can be made out.

In numerous Queensland cases, the word “substantial” has been held to mean “grave, weighty, significant or serious”.

Meaning of “is reasonably likely to”

97. In my view, this phrase makes it necessary that the substantial adverse effect be both reasonable and likely. The equivalent Commonwealth and Queensland provisions use the phrase “could reasonably be expected”. In *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor* (1992) 108 ALR 163 at pp 175-178 the phrase has been defined to mean what it says, namely that the decision-maker must evaluate whether the material before it supports an expectation that a particular outcome would occur, and then determine whether that expectation was reasonably held. It seems then that “is reasonably likely to” involves the decision-maker looking at the material before it to see if it supports the proposition that a particular outcome is likely to occur. It then looks at whether the proposition of likelihood is reasonable.

“Reasonably” requires that the judgment that an adverse effect occur is one that is based on reason. That is to say it must be “reasonable, as distinct from irrational, absurd or ridiculous.”

“Likely” is defined by the Australian Concise Oxford Dictionary as:

probable; such as well might happen or be true ... 2. to be reasonably expected.

In view of this definition, and the fact that Parliament did not simply adopt the interstate definition, it seems that the meaning of the phrase in the *Information Act* is intended to be stronger than “could reasonably be expected”. It suggests that the expected event not only be something that *could* occur, but the occurrence *is* reasonably expected and probable in the sense of being more probable than not.

Evidence of the identified adverse effects:

98. In support of its submissions, the OCPE states in its letter to this Office dated 19 January 2007:

These inferences may properly be drawn without further evidence and it is difficult to see how this Office would provide evidence about the effects across the public sector as a whole.

An almost identical provision to section 53(c) was considered at length by the Queensland Information Commissioner in *Pemberton v The University of Queensland* (1994) 2 QAR 293, and by the Federal Court of Australia in the previously cited *Harris v Australian Broadcasting Corporation and Ors*. The approach taken in both cases was to view the exemption as a question of fact that must be established by evidence from the Respondent organisation. Evidence of the sentiments of staff from the organisation was tendered. In *Re Pemberton*, where the evidence was held to be sufficient to satisfy the exemption, the University presented the results of a detailed survey of senior staff to support its argument that staff would be unlikely to provide frank and candid referee reports in the future if existing reports were disclosed under freedom of information laws.

99. The OCPE subsequently provided a letter from Mr Peter Boyce dated 2 February 2007 written in his role as Acting Assistant Secretary People and Services, DHCS, and prepared for the purposes of this matter. In that letter, Mr Boyce states:

It is the department's view that disclosure under FOI of information provided by employees within the context of the grievance process has the potential to seriously erode the

effectiveness of and confidence in the process, as it currently is established. It is believed that employees would withhold information that is personally sensitive or embarrassing if they were of the belief that it would ultimately be disclosed through the FOI process.

There are many instances where employees have been asked to provide information in regard to a grievance and have done so only when reassured the information will be treated in confidence and will not be disclosed or used for a purpose other than to address the grievance. The disclosure of information provided has the potential in some cases to cause harm to relationships and individuals and as a consequence impact harmfully on the employment relationship.

The department would not support the argument that each case can be addressed on its individual merits and an assessment of the nature of any specific harm that might occur as envisaged by FOI. It is the integrity and confidential nature of the process as a whole that makes it effective and generates the confidence to disclose fully and frankly. Once this confidentiality is perceived by employees to be an illusion and open to attack it is likely that employees will perceive the risk of disclosure as outweighing the willingness to fully disclose.

Is there evidence to apply the exemption in this case?

100. I have some difficulty accepting that the arguments of Mr Boyce and Mr Simpson apply in this case. Firstly, it is important to identify that, with the exception of a few sentences, most of the material in the Report does not disclose information communicated confidentially to Professor Adam by staff members. Most of the Report concerns information provided by Dr Collie or Professor Adam's own generalised opinions.
101. The OCOPE argues that persons responding to a grievance allegation made against them would not give frank and candid responses if there was a prospect that those responses would be released pursuant to the Act. I cannot see why such persons would not vigorously and truthfully defend themselves from untrue allegations. I cannot see why they would be any more likely to reveal inappropriate conduct to an OCOPE investigator with the power to recommend that they be disciplined or dismissed as opposed to the world at large, as it would presumably be detrimental to their interests either way. Furthermore, the Commissioner has the power to compel witnesses to attend, provide evidence, and answer questions on oath. There are sanctions for persons who refuse to do so if requested.
102. The situation is not analogous to *HNS*. In that case, what the organisation sought to protect with the exemption was the initial informal complaints by some staff members to management concerning their difficulties with the behaviour of other staff. There was a clear interest in management receiving such information in order to take steps to create a productive working environment, and to ensure patients were treated with sufficient care and skill. Furthermore, if the complaints were disclosed, staff would be unlikely to approach management in the future to address their concerns.
103. In the present case, the distinction to be made is that it was Dr Collie herself who raised the complaints. Far from observing "confidentiality", it is apparent from the Report that the substance, if not the exact wording of her complaints, was disclosed for comment to the staff members she complained about. It was an apparent failure on the part of management to resolve the situation or address her concerns which caused her to complain in the first place. Release of the Report is hardly likely to deter future complainants because there is a prospect they may obtain information about the grievance review that they themselves initiated.

104. Even if the situation were reversed and it was the staff members who were seeking information about Dr Collie's grievance, it is important to recognise that this was not an informal raising of the matter with management. The OCPE claims on its website that the formal grievance proceedings will be conducted in accordance with principles of natural justice and procedural fairness. In the circumstances arising in the present matter, Dr Collie could hardly expect that her allegations could be investigated without them being disclosed to the staff members complained about. Any understanding of confidentiality must therefore be qualified to the extent necessary to ensure procedural fairness.

105. The comments of Queensland Information Commissioner Albietz in *Re Chambers* at paragraph 17 concerning public sector grievance matters are instructive:

In my view, it is not ordinarily a wise practice for an investigator to give witnesses a blanket promise of confidentiality, since the common law requirements of procedural fairness may dictate that the crucial evidence (and, apart from exceptional circumstances, the identity of its provider(s)) on which a finding adverse to a party to the grievance may turn, be disclosed to that party in order to afford that party an effective opportunity to respond. I do not see how it could ordinarily be practicable to promise confidential treatment for relevant information supplied by the parties to a grievance procedure (i.e., the complainant(s) and the subject(s) of complaint) who should ordinarily expect their respective accounts to be disclosed to the opposite party (and perhaps also to relevant third party witnesses) for response. Sometimes investigators may be tempted to promise confidentiality to secure the co-operation of third party witnesses, in the hope of obtaining an independent, unbiased account of relevant events. Even then, however, procedural fairness may require disclosure in the circumstances adverted to in the opening sentence of this paragraph.

I do not believe that any diminution in frankness and candour within the public sector could be caused by the release of the report in this case. The risk is not likely and it is not reasonable.

106. The other potential adverse interest identified is that a change in practice would lead to disruption and uncertainty for staff across the public sector. The most cogent evidence for this is Mr Boyce's statement that:

There are many instances where employees have been asked to provide information in regard to a grievance and have done so only when reassured the information will be treated in confidence and will not be disclosed or used for a purpose other than to address the grievance.

It is not wise for the OCPE, or any other public sector organisation, to give employees blanket assurances of confidentiality, over and above that which they can legally promise. I am unable to see how strict confidentiality can be observed if the principles of procedural fairness and natural justice are being observed.

It is my view that disclosure of the report in this case may lead to a change in grievance investigation practices in terms of the assurances that are given about confidentiality. However, I cannot see how such a consequence would be adverse. On the contrary, it would cause employees to be accurately informed of their rights and liabilities, and it would facilitate application of the principles of natural justice.

107. I do not see how this exemption can be made out in this case on the information presently before me.

## Section 55(3) – Confidential sources

108. The OCPE relies on section 55(3)(a) in conjunction with section 55(3)(b)(ii) of the Act which provides that information may be exempt from disclosure in the following circumstances:

### 55. Confidentiality obligations, confidential sources

...

(3) Information may be exempt under section 50 if –

(a) the information was communicated in confidence to a public sector organisation;  
and

...

(b)

...

(ii) disclosure of the information would be reasonably likely to impair the ability of a public sector organisation to obtain similar information in the future and it is in the public interest that such similar information continues to be so obtained.

...

Information can only be exempt under this section if it is communicated to a public sector organisation by an outside source, such as a private individual or business. The organisation cannot claim the exemption if one of its employees generates information and communicates it “in confidence” to another employee within the organisation.

109. The OCPE submits in this case:

What was said to Professor Adam was confidential and his interpretation of what was said to him, which he communicated to OCPE, was also confidential. Ms. Heske does not recognise that the report itself is information communicated in confidence to a public sector organisation, the OCPE, and is itself within section 55(3)(a).

I do not agree. Insofar as the report represents Professor Adam’s views and not information communicated confidentially by persons external to the OCPE, it is not exempt under section 55(3)(a). Professor Adam has produced the report in his capacity as a contract service provider to the OCPE. As outlined earlier in this decision, pursuant to section 5(7)(c), he is part of the public sector organisation of the OCPE for the purposes of the Act.

110. Ms Heske, in her preliminary view, noted that some information in the report reveals information communicated to Professor Adam by persons external to the OCPE:

- the 7<sup>th</sup> sentence of Paragraph 7, which begins “Mr Campos”;
- the 9<sup>th</sup> and 10<sup>th</sup> sentences of Paragraph 10, which begin “I regard”;
- the last sentence of Paragraph 11.

I note that these sentences are not quotes given verbatim, but Professor Adam’s paraphrasing of what he was told. I do not think this has any effect on the exemption, which applies to the extent that the confidential information would be

disclosed, regardless of the fact that it is disclosed in the form of inferences that can be drawn from Professor Adam's "interpretative opinion".

#### Communicated in confidence

111. In order to establish that the information was communicated in confidence, the OCPE directs me to their website page entitled "OCPE Grievance Reviews", which contains the following statements:

Upon receipt of the grievance, the agency is requested to provide a report on the issues identified within the grievance and you are asked to sign an undertaking to maintain confidentiality in relation to information provided to you by the Commissioner. Once the report and your undertaking has been received, you will be provided with a copy and the opportunity to comment on its contents.

...

The Commissioner ensures that the Rules of Natural Justice are observed throughout the review process.

...

Confidentiality is observed at all times. The reviewing officer is required to conduct the investigation in a discreet and professional manner. All documents and information relating to grievances are kept on confidential files. Grievances are not discussed outside the PAB&R [Promotions Appeal Board and Review area], except to seek information from the agency or other relevant sources.

For the same reasons identified previously, this is not and cannot legally be a blanket assurance of confidentiality, particularly from the other persons involved in the grievance review, such as Dr Collie. I also note that the "undertaking to maintain confidentiality" referred to would be signed by the complainant, namely Dr Collie. The website does not identify whether other persons involved in a grievance proceeding usually sign similar undertakings.

112. In order to establish this exemption, the OCPE would need to provide evidence that there was an understanding of confidentiality with the relevant persons in this case. Even if standard OCPE procedures were that undertakings were obtained from everyone, I have no particular reason to believe that Professor Adam followed standard OCPE procedures. For future reference, such evidence might take the form of statements from the persons spoken to about their understanding of how the information provided by those persons might be used or disclosed. It also might be evident from notes taken by Professor Adam at the time, or undertakings of confidentiality which are on the grievance file.

The report provides no conclusive information one way or the other. The first sentence of the second paragraph of the Report, which begins "All participants...". I cannot give this much weight as it may merely be Professor Adam's assessment of demeanour, but on the face of it, it does not support the OCPE's contention that the information was communicated in confidence.

113. On the material presently before me, I am not satisfied that the report qualifies for an exemption under section 55(3).

#### **Section 56 – Unreasonable interference with privacy**

114. Section 56 of the *Information Act* provides:

(1) Information may be exempt under section 50 if disclosure of the information would –

(a) be an unreasonable interference with a person's privacy.

...

(2) Disclosure of information may be an unreasonable interference with a person's privacy even though the information arises from or out of the performance of a public duty.

Ms Heske, in her prima facie decision, noted that the OCPE has not sought to raise the exemption provided for by section 56(1)(a), although in her view it seemed relevant. The same information that she identified as possibly having been communicated in confidence in paragraph 109, is the information that she thought might fall within the scope of this exemption.

I have examined those sentences in the report which were raised by Ms Heske and I do not find that disclosure of the information would be an unreasonable interference with the privacy of the persons named. I have the benefit of the reports from the DHCS and Dr Collie's responses which were not available when Ms Heske prepared her prima facie decision. I am not required to comment further on this exemption as it was not raised by the Respondent.

## Conclusion

115. I am not convinced by the arguments that have been put forward in favour of non-disclosure. I do not find that the Respondent has proved on the balance of probabilities that the information is exempt or that the Complainant is not entitled to a copy of the Report.

For the foregoing reasons, I find that:

- none of the information is exempt by virtue of section 5(5)(b);
- the document reveals deliberative processes but disclosure would be in the public interest, therefore none of the information is exempt by virtue of section 52; and
- none of the information is exempt by virtue of sections 53(c) or 55(3).

I revoke the decision of Mr Michael Leonard made on 1 April 2005 in whole and order that the OCPE provide a copy of the Report prepared by Professor Adam dated 1 February 2004 to Dr Collie.

.....

Zoe Marcham  
**A/Information Commissioner**

25 March 2008