

ESSAYS BY AUSTRALIAN LAW DEANS

CONFIDENTIALITY, SHADOW BOXING, AND PROPER PROCESSES—THE FOI CHALLENGE IN RECRUITMENT AND PROMOTION PROCESSES IN AUSTRALIAN UNIVERSITIES

*Rosalind F. Croucher**

“[T]he cloak of confidentiality may be used as a device to conceal improper practices as well as to advance proper ones.”¹

“[C]onfidentiality kept merely to maintain secrecy is a form of paranoia in power.”²

I. INTRODUCTION

GENERALLY speaking, people don't like failure: failure to get a job; failure to get promoted. Sometimes people are not prepared to accept that the failure had anything to do with the fact that they were not good enough against the required standard. They want to blame someone—their boss; their referees; the committee—anyone who had a role to play in the process of assessing them against whatever standard found them wanting. Sometimes this is referable to a lack of process; sometimes, to a manipulation of it; and often, just because the person failed to meet the required standard, objectively assessed. How do we determine the balance between these possibilities?

Law has intruded in a number of ways into this kind of decision-making. In the Australian context, administrative law, in one way or another, has made a huge impact. “Natural justice” requirements have impinged on a vast array of decisions—requiring the accuser and the reasons for the accusation to be fully before the accused to enable the person to have a chance to respond. Freedom of

* Professor and Dean of Law, Macquarie University, New South Wales, Australia. Since the time of writing I have taken up an appointment as Commissioner of the Australian Law Reform Commission (from Feb. 2007).

1. *Re Hill & Univ. of Western Austl.* [1995] WAICmr 60, at para. 39 (Information Commissioner, WA, 11 Dec. 1995), available at http://www.foi.wa.gov.au/PDF_Decs/d06095.pdf.

2. *Pemberton & Univ. of Queensland* [1994] QICmr 32, at para. 53, available at <http://www.oic.qld.gov.au/indexed/decisions/pdf/94032.pdf> (quoting Head of Department of Parasitology response to a university survey).

Information legislation has opened the door to public access into decision-making on a vast scale. Anti-discrimination legislation has also opened up a specific avenue of attack on decision-making in the employment arena.

So, when is the balance right between confidentiality to enhance the deliberative process of consultation leading to an informed decision about things like appointment, tenure, and promotion, and a person's—or the public's—"right to know" about why a decision was reached, particularly in a case where the decision was adverse to an individual. (Generally speaking, people are not concerned about a beneficial decision except when it is beneficial to someone else and they want to know why the other person "got the job" rather than them.)

This essay focuses upon a key aspect of decision-making in a university context in the processes of appointment and promotion of staff, namely, the obtaining of reports on individuals who are the applicants for appointment or promotion. The specific issue to be examined concerns the right of a disappointed applicant to obtain access to reports that were considered by the relevant person or committee in making the decision about appointment or promotion.

I consider the concept and function of confidentiality in such processes and its role in the context of legislated access to information expressed in Freedom of Information ("FOI") legislation. In the arena of publicly-funded universities, what we see is an interplay between equitable notions of confidence in relation to information, administrative law as applicable to government agencies, and gut instincts of fair play (to the extent that they are expressed in law). It is a fascinating testing ground for those who are engaged on a daily basis in academic administration in universities.

II. APPOINTMENT AND PROMOTION PROCESSES IN AUSTRALIAN UNIVERSITIES

In the Australian university system, candidates for appointment and promotion are assessed in a variety of ways. The framework for appointments and promotions may be set out in an Enterprise Agreement or in other policy and procedures documents. The process will include provision for a variety of references and reports by individuals and by committees. There are several levels of progression: from Lecturer, Level A, to Level E, Professor. Not all universities include promotion to Level E, some only permit elevation to the status of professor by way of "personal chair" or external appointment. In former days, assessment of tenure was also critical; now the key points are appointment and satisfaction of probation.

Each candidate will nominate his or her own referees, usually three—sometimes more for more senior positions. In my experience, referees' reports from a person's nominated referees are not usually negative. If a person is asked to be a referee and considers that they are unable to write a supportive reference of a candidate, then the usual practice is simply to decline. In promotions processes, typically one of the three referees is an internal referee who is called upon to comment on the applicant's teaching.

The process will involve a committee, quite often a reasonably large one, with representatives from other parts of the university as well as the particular

department or faculty in which the appointment or promotion is being sought. Sometimes the committees include academics from other universities or people with particular knowledge of the candidate's area. The process will involve reports—commonly from a head of department or dean—each usually based upon consultation among the candidate's peers. Each committee will make a report. There may be both a faculty and a university committee for promotions; or there may just be a university committee.

At some stage in various processes, other assessors' reports may be called, as is the case, for example, in the professorial or personal chair promotional processes, where external evaluations may be made by people not nominated as referees by the relevant candidate. External evaluations may be called for at different levels depending on the particular practice of the university in question. So, there are lots of opportunities to say things about the candidate, and other candidates as well. Unsuccessful candidates often feel that those things are unfair to them while being unduly favourable to others. They may wish to use their sense of being aggrieved to find out just who, in their minds, condemned them.

III. FREEDOM OF INFORMATION LEGISLATION

The era of "freedom of information" legislation began in Australia in 1982 with the enactment of the Freedom of Information Act 1982 (Commonwealth) ("FOI Act (Cth)"). The legislation granted members of the public access to information about government decision-making as well as access to personal records held by government agencies.³

The impetus towards FOI legislation in Australia began in the late 1960s and early 1970s.⁴ The federal election of 1972 saw it become an electoral issue. The 1972 visit of the U.S. consumer rights advocate, Ralph Nader, also helped to bring FOI into prominence.⁵ The federal Labor government elected that year moved to introduce legislation based on the United States' Freedom of Information Act of 1966.⁶ Each state followed suit, introducing legislation based on the federal Act.⁷

3. Freedom of Information Act 1982, pt. I.3(a) (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/foia1982222/.

4. AUSTRALIAN LAW REFORM COMM., OPEN GOVERNMENT: A REVIEW OF THE FREEDOM OF INFORMATION ACT 1982 (1995) [hereinafter "ALRC Report 77"], available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/77/> (citing, in para. 3.2, a number of articles, speeches, and editorials urging the introduction of legislation in Australia at this time).

5. Nader was known for his pro-FOI stance. See, e.g., Ralph Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L. L. REV. 1 (1970).

6. The passage of the Australian FOI legislation, after much committee work, is considered in ALRC Report 77, *supra* note 4, at paras. 3.3–3.7. The introduction of the New South Wales legislation is described in ANNE COSSINS, ANNOTATED FREEDOM OF INFORMATION ACT NEW SOUTH WALES: HISTORY AND ANALYSIS ch. 1 (1997).

7. Freedom of Information Act 1989 (AUSTL. CAP. TERR. LAWS) [hereinafter "FOIA 1989 (ACT)"]; Information Act 2003 (N. Terr. Austl. Laws); Freedom of Information Act 1989 (N.S.W. ACTS) [hereinafter "FOIA (NSW)"]; Freedom of Information Act 1992 (QUEENSL. PUB. ACTS);

The aims of FOI legislation are to ensure open and accountable government, to increase the level of public participation in the processes of policy-making, and to enable individuals to participate more fully in government action which indirectly affects them. The idea is to get decision-making out of the “shadow-boxing” zone and onto a plane governed by new, agreed Marquess of Queensberry Rules⁸ in the domain of access to information in decision-making processes.

A. *The Scheme of FOI*

There is FOI legislation in each of the states and territories and the Commonwealth of Australia. They affect government agencies and public authorities. Universities which are publicly funded are caught within the ambit of this legislation as public authorities.⁹ Hence, nearly all universities in Australia are public authorities. The basic premise is the principle of accessibility. The qualifications which set the perimeters to this accessibility are the exemptions spelled out in the legislation. I will use the New South Wales (“NSW”) legislation to illustrate.

Part 3 of the FOI Act (NSW) covers “Access to Documents.” If you want to obtain access to, say, particular documents held by a university, then you apply in writing indicating to what you want to gain access.¹⁰ The university has to assess whether access will be given and has an obligation to respond within twenty-one days.¹¹ The university may refuse access (in whole or in part) on the grounds that the document is an exempt document.¹²

If you are unhappy with the university’s ruling, then you may request an internal review.¹³ If unhappy with the internal review, for example, and the claim to exemption is continued despite your wish to see the document(s), then you may apply for external review of the decision through the Ombudsman¹⁴ or the Administrative Decisions Tribunal.¹⁵

Freedom of Information Act 1991 (S. AUSTL. STAT.); Freedom of Information Act 1991 (TAS. STAT.); Freedom of Information Act 1982 (VICT. STAT.); Freedom of Information Act 1992 (W. AUSTL. RPTR. ACTS) [hereinafter “FOIA (WA)”].

8. As my wonderfully useful *Brewer’s Dictionary of Phrase and Fable* advises, Queensberry Rules were “[t]he regulations governing boxing matches in which gloves were worn, formulated by John Sholto Douglas, eighth Marquess of Queensberry, (1844-1900) and John G. Chambers (1843-1883) in 1867. They were first fully used at a London tournament in 1872.” BREWER’S DICTIONARY OF PHRASE & FABLE 903 (14th ed. 1989).

9. FOIA (NSW), at sec. 7.

10. *Id.* at sec. 17.

11. *Id.* at sec. 18(3).

12. *Id.* at sec. 25(1)(a).

13. *Id.* at sec. 34.

14. *Id.* at secs. 52-52A.

15. *Id.* at secs. 52B-58.

B. *The Claim to Exemption*

The claim to exemption is at the heart of FOI litigation.¹⁶ (All the cases on FOI matters concerning referees' and analogous reports involve challenges to claims to exemption.) There are several key grounds that arise in the appointment and promotion context: the claim to confidentiality based on breach of confidence;¹⁷ the claim based on confidentiality plus public interest;¹⁸ and the claim based on internal working documents and public interest.¹⁹

1. *Confidentiality*

The main section that concerns a claim to exemption in relation to referees' (and similar) reports is clause 13 of Schedule 1 to the Act:

13. Documents containing confidential material

A document is an exempt document:

- (a) if it contains matter the disclosure of which would found an action for breach of confidence, or
- (b) if it contains matter the disclosure of which:
 - (i) would otherwise disclose information obtained in confidence, and
 - (ii) could reasonably be expected to prejudice the future supply of such information to the Government or to an agency, and
 - (iii) would, on balance, be contrary to the public interest.²⁰

The exemption provisions are similar in each of the FOI statutes, although with slightly different configurations of elements. There are two thresholds of confidentiality covered by clause 13. Paragraph (a) defines an exemption based upon exposure to an action for breach of confidence. Paragraph (b) describes a different threshold of confidentiality—information obtained “in confidence” but not covered by paragraph (a). Under paragraph (b), confidentiality can be broken if two other elements are demonstrated: disclosure could reasonably be expected to prejudice the future supply of such information to the university, and disclosure would, on balance, be contrary to the public interest.

i. Breach of confidence action

The federal Administrative Appeals Tribunal (“AAT”) considered an exemption claim under the Commonwealth legislation in the context of referees’

16. As Peter Bayne remarked, “[d]ispute between applicants and agencies at the external review stage most often concerns a question (or a number of questions) about whether a document is exempt.” Peter Bayne, *Recurring Themes in the Interpretation of the Commonwealth Freedom of Information Act*, 24 FED. L. REV. 287, 287 (1996).

17. FOIA (NSW), at Sched. 1, cl. 13(a).

18. *Id.* at Sched. 1, cl. 13(b).

19. *Id.* at Sched. 1, cl. 9.

20. *Id.* at Sched. 1, cl. 13.

reports and similar documents when Dr. Johan Kamminga was denied access to them by the Australian National University.²¹

Kamminga wanted to see his referees' reports in relation to two applications for positions as a research fellow and a senior research fellow at the university. The university claimed that they were exempt documents. The provisions of the federal FOI Act are similar to the NSW provisions. Section 45(1), like clause 13(a) of the FOI Act (NSW), exempts documents if their disclosure would found an action for breach of confidence.

The Tribunal referred to *Corrs Pavey Whiting & Byrne v. Collector of Customs*,²² where Justice Gummow identified the relevant criteria to be satisfied:

It is now well settled that in order to make out a case for protection in equity of allegedly confidential information, a plaintiff must satisfy certain criteria. The plaintiff: (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question; and must also be able to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge); (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence; and (iv) there is actual or threatened misuse of that information. . . . It may also be necessary . . . that unauthorised use would be to the detriment of the plaintiff.²³

In considering whether the giving of the referees' reports satisfied (iii), the AAT heard evidence from the Assistant Vice-Chancellor of the university and the director of the relevant academic unit in which Kamminga was interested. They identified the existence of a "convention" that referees' reports are given and received in confidence. Indeed, it was said that "the convention of confidentiality of reports is so strong that the notation 'confidential' is often regarded as unnecessary by the referee."²⁴

The AAT accepted that the reports from the referees—all of whom worked in Australian universities—were received in circumstances importing an obligation of confidence. The Tribunal also considered that the disclosure of the reports would be a misuse of information, satisfying (iv) above. The ANU's claim to exemption was upheld.

One issue left unanswered in the *Kamminga* case was whether the expression "breach of confidence" covered not only the equitable action but also a contractual breach. In *Re B and Brisbane North Regional Health Authority*,²⁵ the Queensland Information Commissioner had occasion to consider this issue and concluded that breach of confidence should include both kinds of action.

21. *Re Kamminga & Austl. Nat'l Univ.* (1992) 26 A.L.D. 585.

22. (1987) 14 F.C.R. 434 (Vict. Austl.).

23. *Id.* at 443. See also *Kamminga*, (1992) 26 A.L.D. 585, at para. 24.

24. *Kamminga*, (1992) 26 A.L.D. 585, at para. 8.

25. [1994] QICmr 1, [1994] 1 Q.A.R. 279 (Queensl. Austl.).

ii. *Breach of confidence not available*

If the confidentiality argument cannot be sustained on the basis of susceptibility to a breach of confidence action, then the claim to exemption has to be based upon further grounds.²⁶ Universities left themselves exposed to having to argue under a provision like paragraph (b) of clause 13 of the FOI Act (NSW) when, in a somewhat overcautious or uncertain response to FOI legislation, some routinely included in their letters to referees seeking reports the disclaimer that, because of FOI legislation, strict confidentiality could not be guaranteed. Such a statement seems to undermine the assertion that the information was indeed invested with the necessary quality of confidence to attract a breach of confidence action.

Clause 13(b) of the FOI Act (NSW) enables the release of confidential documents, not covered by the breach of confidence provision, if the following additional limbs are satisfied.

(a) *Prejudicing supply of information?*

The central point argued in relation to asserting an exemption for referees' reports is the "frankness and candour argument"; namely, that unless the confidentiality of such reports were maintained, they would be of little value. Confidentiality is asserted as the protection of such frankness and candour.²⁷

In considering the application of this element, the cases have distinguished two types of reports obtained in the application and promotion processes. On the one hand, there are the reports sought from referees; on the other, there are the institutional reports, for example, by the head of department or dean, for processes such as promotion.

In the event that referees' reports were not considered as having been provided in confidence, would disclosure prejudice the supply of such reports in future? In *Kamminga* and another significant case concerning universities and peer review processes, *Re Rindos and University of Western Australia*,²⁸ the frankness and candour argument was pressed in relation to this point.²⁹ In both, it was argued that the system of confidentiality was crucial to obtaining high quality reports.

In support of such an argument, a comparison was made with referees' reports from American academics. In *Rindos*, for example, it was claimed by the

26. It has been suggested that because of the complexity of the action of breach of confidence, "most agencies will rely on cl 13(b) rather than having to grapple with that law." COSSINS, *supra* note 6, at 400.

27. *Re Kamminga & Austl. Nat'l Univ.* (1992) 26 A.L.D. 585, at paras.10, 14, 18.

28. [1995] WAICmr 20 (W. Austl.).

29. In *Kamminga*, the issue arose in relation to a claim for exemption under section 40(1)(c), namely that disclosure "would, or could reasonably be expected to ... have a substantial adverse effect on the management or assessment of personnel." *Kamminga*, (1992) 26 A.L.D. 585, at para. 18. In *Rindos*, one limb of exemption is that disclosure "could reasonably be expected to prejudice the future supply of information of that kind." [1995] WAICmr 20, at para. 27 (quoting FOIA (WA), sec. 114, Sched. 1, cl. 8(2)(b)).

University of Western Australia that because confidentiality could not be assured for references given in the United States,

The result . . . is that little value is placed on such reports because not all referees or supervisors are prepared to make negative comments about other staff without a guarantee of confidentiality . . . [and] in universities in the United States, comments are increasingly being sought by telephone and that this results in a less open system.³⁰

In *Kamminga*, a senior academic giving evidence said that reports from American referees “tended to be bland and less helpful” than references where frankness and candour were protected through confidentiality.³¹ The evidence of the Assistant Vice-Chancellor in that case was that the system of confidentiality was “crucial to obtaining high quality reports, thereby ensuring that the University recruits the highest possible quality staff.”³²

While the conviction of the senior university staff with respect to the frankness and candour argument was accepted, the Tribunal in *Kamminga* was not able “to find as a fact that disclosure would have the effect contended for by the University.”³³ In the absence of appropriate evidence in support of the conviction, it was not able to hold that disclosure would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of personnel by the university. In other words, the claim to exemption under section 40(1)(c) failed.³⁴

While a claim to exemption under this provision may fail, a claim to exemption on other grounds may succeed. It is also worth noting that while access may be given to referees’ reports in relation to the particular applicant (if all other exemption claims also fail), in *Re Barkhordar and Australian Capital Territory Schools Authority*,³⁵ the applicant was not permitted access to documents relating to *other* candidates for promotion: it was considered that such access could reasonably be expected to have a substantial adverse effect on the management or assessment of personnel. Where a candidate has been successful for the particular position in issue, however, access to that person’s application may be permitted, with relevant personal details omitted.³⁶

30. *Rindos*, [1995] WAICmr 20, at para. 34. See also *Kamminga*, (1992) 26 A.L.D. 585, at para. 9.

31. *Kamminga*, (1992) 26 A.L.D. 585, at para. 10 (evidence of Professor Neuze).

32. *Id.* at para. 9.

33. *Id.* at para. 16.

34. *Id.* at para. 18. In contrast, the earlier decision of *Re Allan M. Healy & the Australian National University*, N84/445 FOI (Commonwealth Admin. Appeals Tribunal, 23 May 1985, unreported), the Administrative Appeals Tribunal was satisfied that the disclosure of the confidential referees reports “could reasonably be expected to have a substantial adverse affect on the proper and efficient conduct of the University’s operations by causing a breakdown of the reference system on which it, together with other universities throughout the world, now relies.” *Id.* at para. 64 (upholding the claim to exemption under section 40 of the FOIA (Cth)).

35. (1987) 12 A.L.D. 332, at paras. 9-10.

36. *Love v. Univ. of Melbourne* [2000] VCAT 1646.

As the matter of adverse effect may, in the future, turn on the provision of appropriate evidence to support the “frankness and candour” argument, a distinction needs to be drawn between reports of referees in general and reports of those in academic management roles. Where a person is obliged as an incident of their employment to continue to supply such information—namely, to write such reports—then the argument that the future supply of information will be diminished if exemption is not maintained cannot be sustained.

In *Pemberton and the University of Queensland*,³⁷ the applicant sought disclosure of, *inter alia*, reports obtained by the university in the context of his application for promotion. The Information Commissioner, F.N. Albietz, considered that such reports are distinct from referees’ reports for at least two reasons: it is a stated part of the process that the head or other relevant person will write a report and the person’s identity is known to the applicant; and heads and others in such offices have particular responsibility for performance management.³⁸ Hence, the Commissioner concluded:

I consider that people who have manifested the sense of responsibility and achievement orientation to progress to such positions as Head of Department, Dean of Faculty, and Pro-Vice-Chancellor will continue to appreciate the need to ensure that the most worthy candidates for promotion progress through the system in preference to the unworthy or the less worthy. No doubt many will continue to write honest assessments of candidates for promotion without regard to any consequences of disclosure.... I consider that reports in future are more likely to be written in temperate and reasoned language, being careful to emphasise the strengths of an applicant for promotion, while drawing attention to any perceived weaknesses in a way which provides justification and substantiation for the points that are made. That is not only likely to benefit the selection process, but to benefit the management of personnel generally by providing considered ‘feedback’ on individual performance. Leading academics are no strangers to the professional discipline of having to marshal evidence to support opinions and conclusions expressed in formal written work. More effort may have to go into the process of preparing reports, but given the importance which the University attaches to ensuring promotion on merit, that effort appears to be warranted, and would certainly greatly assist the tasks of selection committees.³⁹

If the “supply of information” argument is qualified in this fashion, does it mean that the reports should therefore be disclosed? The Information Commissioner then considered the significance of the particular status of the applicant. Does the answer to the supply of information argument in relation to academic managers’ reports depend upon who is the applicant? What if the subject of the report was not the applicant but someone else, including, for example, other applicants for promotion? The Commissioner considered it “reasonable to expect that even responsible managers would balk at recording in

37. [1994] QICmr 32.

38. *Id.* at para. 139.

39. *Id.* at para. 142.

writing such adverse comment if it were to be available for access under the FOI Act to any person who applied for it, including, for instance, the candidate's rivals for promotion, or students in the candidate's Department."⁴⁰

The Commissioner was applying here the "orthodox approach" to assessing the effects of disclosure, namely, as though disclosure were to any person.⁴¹ He was, however, able to apply a more nuanced approach through the public interest limb. Further, once a decision in favour of disclosure is made, material may still be excluded on the basis that it is covered by the personal affairs exemption.

In *Rindos*, the Western Australian Information Commissioner considered an application for documents relating to the review of tenure of the applicant. The Commissioner considered that the supply of documents written by those who had managerial responsibility for the applicant would not be prejudiced by the disclosure of such documents to the applicant in this case.⁴²

If the supply of reports of academic managers is considered, on balance, not to be affected by disclosure, then it is necessary for the university to argue another ground of exemption. In *Rindos*, the argument turned to whether the documents could be said to be part of the deliberative processes of the agency. This argument is considered further below.

(b) *Public interest*

As Clause 13(b) of the NSW legislation lists the public interest element as an additional element, it is necessary to show not only that disclosure could reasonably be expected to prejudice the future supply of such information to the university, but also that disclosure would, on balance, be contrary to the public interest. In the federal legislation this is inverted in the comparable provision, namely that disclosure "would, on balance, be in the public interest."⁴³

The public interest concept is a delimiting factor in relation to the maintenance of confidentiality. As Anne Cossins remarked:

[The public interest concept] marks the boundaries of openness and secrecy under the FOI Act, with those boundaries primarily (but not solely) being drawn by the application and scope of the exemption provisions. In general, the concept of the public interest under FOI legislation attempts to balance the administrative and legal tradition of preserving government secrecy and public service anonymity against a new regime of open government represented by a legally enforceable right of access to government information and agency obligations to publish material concerning their operations, functions and decision-making powers. In other words, the public interest in open government is the democratic rationale for the existence of FOI

40. *Id.* at para. 152.

41. *Id.* at para. 167 (citing *Corrs Pavey Whiting & Byrne v Collector of Customs (Vict.) & Anor* (1987) 74 A.L.R. 428, at para. 4).

42. *Re Rindos & Univ. of W. Austl.*, [1995] WAICmr 20, at para. 47.

43. FOIA (Austl.) sec. 40(2).

legislation, although FOI legislation balances that public interest against the public interest in maintaining government secrecy in certain circumstances.⁴⁴

In the case of universities, the public interest includes the maintenance of a high standard of scholarship. “[I]t is possible . . . to recognise a legitimate public interest which favours disclosure of particular documents to a particular applicant for access, even though no such public interest consideration would be present when disclosure to other applicants was in contemplation.”⁴⁵ The orthodox approach “requires that the motives of a particular applicant for seeking the documents in issue are to be disregarded, and the effects of disclosure were to be evaluated as if disclosure was to any person entitled to apply for the documents.”⁴⁶ The Information Commissioner considered that rigid adherence to the orthodox approach was not appropriate: he considered that “[a] public interest in the disclosure of particular documents to a particular applicant, is capable of being a public interest consideration of determinative weight.”⁴⁷ What if other people seek access to the same documents, assuming that the exemption is not upheld? The Information Commissioner considered that the applicant may exercise control over any use or wider dissemination of information relating to the applicant’s personal affairs which may be obtained through FOI:

The public interest in the fair treatment of persons and corporations in accordance with the law in their dealings with government agencies is, in my opinion, a legitimate category of public interest. It is an interest common to all members of the community, and for their benefit. In an appropriate case, it means that a particular applicant’s interest in obtaining access to particular documents is capable of being recognised as a facet of the public interest, which may justify giving a particular applicant access to documents that will enable the applicant to assess whether or not fair treatment has been received and, if not, to pursue any available means of redress, including any available legal remedy.⁴⁸

Disclosure of material about the applicant may be sustained under such an approach, but not disclosure of documents relating to other applicants.⁴⁹ A concern in failure to attain promotion of itself was not sufficient to elevate a personal interest into a legitimate public interest.⁵⁰ This involves consideration of the interested applicant.⁵¹ It was not necessary to find that disclosure was in

44. COSSINS, *supra* note 6, at 41-42.

45. Pemberton & Univ. of Queensland, [1994] QICmr 32, at para. 164.

46. *Id.* at para. 165 (citing *Searle Austl. Pty Ltd v Public Interest Advocacy Centre & Anor* (1992) 108 A.L.R. 163, para. 179).

47. *Id.* at para. 172.

48. *Id.* at para. 190.

49. *Id.* at para. 194.

50. *Id.* at para. 196.

51. Bayne, *supra* note 16, at 305.

the public interest; rather, it was necessary to find that it was not contrary to the public interest.⁵²

2. *Internal Working Documents/Deliberative Processes*

In the case of reports provided by academic managers, another ground of exemption that may be asserted is contained in the FOI Act (NSW):

9. Internal working documents

- (1) A document is an exempt document if it contains matter the disclosure of which:
 - (a) would disclose:
 - (i) any opinion, advice or recommendation that has been obtained, prepared or recorded, or
 - (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency, and
 - (b) would, on balance, be contrary to the public interest.⁵³

In *Rindos*, the University of Western Australia claimed that some of the documents in issue comprised part of the deliberative processes of the University and were exempt on that ground. The FOI Act of Western Australia (WA) included in its list of exemptions documents that might reveal “any opinion, advice or recommendation”⁵⁴ or “any consultation or deliberation that has taken place, in the course of, or for the purpose of, the deliberative processes of the . . . agency.”⁵⁵ This provision is similar to provisions that refer to internal working documents, like section 36 of the FOI Act (Cth) and the New South Wales provision quoted above. If a document falls into this category, then an additional hurdle is to establish that disclosure would, “on balance, be contrary to the public interest.”

i. Internal working documents

In *Re Waterford and Department of the Treasury (No 2)*, the AAT stated that deliberative processes involved in the functions of an agency were its “thinking processes,” the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision, or a course of action.⁵⁶ They are documents that record steps in the process prior to a final decision having been made.

In the case of a promotion process, the report of, for example, the head of department or dean, is part of the material considered by the relevant committee in making its decision as to the promotion of applicants under review. As such,

52. *Re Kamminga & Austl. Nat'l Univ.* (1992) 26 A.L.D. 585, at para. 12.

53. FOIA (NSW), at Sched. 1, cl. 9.

54. FOIA (WA), at Sched. 1, cl. 6(1)(a)(i).

55. *Id.* at Sched. 1, cl. 6(1)(a)(ii).

56. (1984) 5 A.L.D. 588, at paras. 19-20.

the reports are part of the pre-decisional material upon which the final decision is to be made.⁵⁷ So, too, are minutes of the committee making the decision in question.⁵⁸

A blanket exemption of such matter, however, would be directly antithetical to the idea of open government upon which FOI legislation is premised.⁵⁹ Hence, the inclusion of a public interest qualification on the exemption claim application, as Spencer Zifcak concluded, requires that the relevant authority “state with precision the manner in which its decision-making processes will be affected adversely if the particular documents requested are released.”⁶⁰

ii. *Public interest*

Documents that fall within the rubric “internal working documents” will only be exempt if disclosure of them, in whole or in part, would be contrary to the public interest. This requires a weighing up of competing public interests, for and against disclosure, in each particular case.

In *Rindos*, the WA Information Commissioner, B. Keighley-Gerardy, identified three aspects of the public interest that need to be considered and weighed in processes like promotions and appointments:

Firstly, there is a public interest in maintaining the integrity of the decision-making processes by ensuring that agencies have access to the full range of relevant information for informed decision-making. Secondly, there is a public interest in ensuring that agencies follow and apply fair and equitable procedures, especially in the areas governing the employment and dismissal of staff, and that they are seen to do so. Thirdly, there is a public interest in officers of agencies, such as the complainant, being informed of unfavourable comments about their performance and being given an opportunity to refute, where necessary, unsubstantiated comments, or to otherwise improve their performance.⁶¹

In weighing the competing public interest elements in *Rindos*, the Information Commissioner placed weight upon “the means employed by agencies to inform the individual of its processes and the bases for its decisions.”⁶² If the report was provided and staff were given an opportunity to respond in writing, then the public interest in ensuring the accountability of agencies with respect to selection, promotion, and dismissal procedures would be satisfied.⁶³

On the information presented in *Rindos*, the Information Commissioner was not satisfied that the applicant was provided counselling as to his failure to

57. *Re Rindos & Univ. of W. Austl.*, [1995] WAICmr 20, at para. 71.

58. COSSINS, *supra* note 6, at 351.

59. Spencer Zifcak, *Freedom of Information: Torchlight but Not Searchlight*, 66 CANBERRA BULL. PUB. ADMIN. 162, 164 (1991).

60. *Id.* at 165.

61. *Rindos*, [1995] WAICmr 20, at para. 73.

62. *Id.* at para. 71.

63. *Id.*

satisfy the relevant standards. Hence, the Commissioner concluded that “the public interest in a member of the staff of an agency being fully informed of the nature of adverse comments against that person, and being given the opportunity to answer them, outweighs the public interest in ensuring the integrity of the deliberative processes of the agency in this instance.”⁶⁴ In *Pemberton*, the Information Commissioner commented similarly that a legitimate public interest in the disclosure of the reports of academic managers “may be reduced in weight if the unsuccessful candidate has received sufficiently detailed feedback through counselling following the selection process.”⁶⁵ In *Pemberton*, like *Rindos*, the exemption claim to academic managers’ reports failed essentially because of the system’s inadequacy to provide feedback to candidates.

If adequate feedback is seen as the key in assessing the public interest in this context, how does this work in the academic environment?

IV. MY EXPERIENCE OF REPORTING ON AND PROVIDING FEEDBACK TO UNSUCCESSFUL CANDIDATES

I have held positions as head of department or dean for ten years. Each year I have been involved in promotions rounds. I have provided much advice in a performance-management role, both formally and informally, mostly formative. Most times when I have been required to write a report about my staff, I have had an active role in the development of the application itself. Sometimes not. Sometimes the staff member will just decide that he or she wishes to seek promotion and gives me his or her application on the due date, without any formative consultation with me or anyone else. (These are usually the unsuccessful ones.) In all of these cases, I have had to write a report of some kind, especially in my years as dean, in which I have been involved in seven promotions rounds so far. At this point, the report I have been required to write is of a summative kind, providing judgment on the applicant’s case in my role as manager within the applicant’s discipline.

I am thorough in my report writing. I undertake the required consultation. I have even adopted the practice of asking the candidates whom they consider could provide the most informed judgment on their contributions, often regardless of seniority (i.e., not relying solely on consultation with senior staff who may not have had any hands-on experience of working with the relevant person). When I write my reports, I offer the candidates an opportunity to see the reports before I finalise them. I give them a chance to draw my attention to any factual errors and also, if they disagree in my judgment, to provide a response which I will append to my report.

All of this I consider to be scrupulously fair to candidates and to my job as the manager of my area of responsibility. It is wearing the decanal “hat” in a way I consider proper. But in writing my report, I am acutely aware that it is to be read by the candidate. Does this make me less frank and candid in my writing?

64. *Id.* at para. 79.

65. *Pemberton & Univ. of Queensland*, [1994] QICmr 32, at para. 197.

Somewhat. What it does ensure is that where I am negative or critical of the candidate, I explain why. My judgment must be supported, not just left in the air as an assertion. It does affect my frankness and candour; it also makes me careful. It does not alter the judgments I make; but does require me to provide justification for them. None of this necessarily makes it easier on the receiving end.

I have also chaired promotion appeals—when people have been knocked back for promotion. I cannot chair appeals from my own faculty, so I have the added advantage of being detached from the individuals involved. The appeals have involved appeals on both process and merit. It really does not matter what they are called, from the unsuccessful candidate's point of view, they are all appeals on merit—even if the only grounds technically available are procedural. People who miss out want to blame. Whether the blame is dressed up through the avenue of procedural grounds or not, it is, or they want to believe, because someone else judged them wrongly. What aggravates the hurt is when they see others at the level to which they aspire performing at a level they perceive is less than they are performing: they compare themselves not to the objective standards against which they must be judged but the relative merits of their peers. Or they blame someone: it must be their referees; it must be the head of department; it must be the dean. Because it cannot be that they have simply been found wanting. No *mea culpa* in this. As one of the senior academics commented in evidence presented in *Pemberton v. University of Queensland*, “By and large, we’re a lot who find criticism hard to take.”⁶⁶

There is no accounting for the level of hurt and preciousness of egos in the academic world. In my experience, the less than fulsome assessment, let alone a negative judgment, even couched in terminology that is larded throughout with fairness of process, is perceived as damning. The wounded ego figures large in the community of academicians.

So, while one can meet the criticism in *Rindos* and *Pemberton* by instituting more thorough feedback, it does not mean that the outcome will be any less unwelcome.

V. CONCLUDING COMMENTS

Proper process is, in my view, the keystone of good governance. Transparency of decision-making provides stability. It is the embodiment of fair play. My experience in university governance has underscored my own sense of the absolutely fundamental role that this fair play means on a day-to-day basis in the lives of academic staff.

In the context of promotion or tenure decision-making, one step in the right direction, in my view, is to create greater openness in the process. The assessments of those in a position where the duty includes the making of such assessments should be open to applicants and an opportunity given to comment upon them prior to the determining deliberations. I have some sympathy for

66. *Id.* at para. 6 (quoting para. 11 of Professor Rigby's statutory declaration).

those in roles that have a more limited tenure, such as a person elected to a short-term position with the expectation of returning to the rank-and-file at its conclusion. As the Vice-Chancellor of the University of Queensland commented in his long statutory declaration in *Pemberton*, “The relationship between an academic referee and a staff member of a university is significantly different from a normal supervisor/subordinate relationship.”⁶⁷ He emphasised the importance of the collegial nature of the academic environment and, in that context, preservation of confidentiality became more significant than perhaps in other workplaces. While this argument may be used for maintaining confidentiality, and therefore non-disclosure of the reports of heads of department, this is less compelling in the case of reports by appointed staff members. Universities in Australia are increasingly appointing their deans by external advertisement and, increasingly, heads of department are being appointed against advertised criteria. As universities become more managerial in their hiring of senior academic staff to leadership roles, the argument about collegiality requiring non-disclosure of reports is less compelling.

Once the deliberations have concluded, the unsuccessful applicant should be provided a meaningful summary explaining the assessment criteria and improvements the applicant can make toward achieving them. Designating an officer with the responsibility for providing counselling is also necessary to provide specific and discipline-relevant advice. If a substantial report is given to the unsuccessful candidate, “[t]his largely obviates problems and disruptions associated with the subject correctly or incorrectly assigning blame to unnamed referees.”⁶⁸

Providing feedback to unsuccessful candidates is, however, only the endpoint in a process. An important aspect of decision-making occurs much earlier; namely, the effective performance management of staff.⁶⁹ If staff have been provided appropriate and constructive performance management reviews, then a failure to achieve a particular promotion or to be granted tenure should not come as a huge and unexpected shock. Unwelcome still, but not as a bolt from the blue. As one head of department commented in *Pemberton*: “The business of management and assessment is about reducing conflict and promoting harmony. Full disclosure together with appropriate counselling goes a long way to eliminating recrimination and acrimony.”⁷⁰ Not all heads who provided evidence in *Pemberton* were as optimistic, explained perhaps by the above-quoted head’s admission that his department comprised “a very harmonious group of people” and that it was his “privilege” to lead such a group.⁷¹

67. *Id.* at para. 63 (quoting para. 13 of Professor Wilson’s statutory declaration).

68. *Id.* at para. 57 (quoting the Dean, Faculty of Agricultural Sciences).

69. See, e.g., Rosalind Croucher, *Encouraging and Monitoring Performance—Responsibilities and Techniques* European College Teaching & Learning Conference Presentation, Athens, Greece (June 2005) (copy on file with author).

70. *Pemberton*, [1994] QICmr 32, at para. 54 (quoting Head of the Department of Parasitology).

71. *Id.*

It has been said that it is the fear or suspicion of what the person does not know that drives most FOI applications. Another head of department in *Pemberton* captured a more open process:

While it is true that an adverse report might create a ‘disruption,’ it is my experience that a hidden agenda would be worse. When people are aware of the facts or opinions of others, there may be an initial disruption based on emotion or the like. Despite this, when staff know that they will always receive an honest appraisal from the Head of Department or supervisor, they are less likely to conjure up things that are far worse. In fact, when there is no perceived ‘hidden agenda,’ staff are better equipped to make decisions than if they are told only the ‘good side’ of the story.⁷²

When it comes to referees’ and assessors’ reports—and perhaps the differences in the roles and basis of the holding of the particular offices in issue—the argument as to confidentiality and a desire for non-disclosure is more likely to withstand attack if the overall integrity of the decision-making process is made more open.

The balance between a person’s right to know and maintaining the integrity of the appointment and promotion processes may be achieved by supporting the confidentiality of referees’ reports while providing full feedback to the disappointed candidate.

It does not surprise me to read about the American experience of access to tenure and promotion files through anti-discrimination laws and freedom of information suits, that performance evaluations are less than candid when they are rendered in writing that may be read by the candidate. In an ideal world, that should not be so. But it is. So, the matter is finding the right balance.

The question is one of balance. To me, that balance includes regular performance management reviews of staff, which are frank, candid, and encouraging. Even here, given the collegial nature of the academic workplace, performance management advisers may still shy away from the hard advice that is involved in identifying under-performance. But it is a step in the right direction and, steadily, may reduce the paranoia on both sides of the performance assessment equation alluded to in the opening quotes to this essay—the paranoia of the disgruntled that hidden reports may conceal improper practices; and the “paranoia in power” that seeks to deny staff access to the material upon which decisions are based out of a fear that the edifices of that power will crumble if confidentiality at all costs is not maintained.

I believe that balance ensures confidentiality where confidentiality is promised; provides access where access is constructive and informative; and encourages a greater robustness in the giving and receiving of hard assessments. The last is the greatest challenge of all.

72. *Id.* at para. 55 (quoting Head of Department of Physiology and Pharmacology).