

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 44 of 1993
(Decision No. 94006)

Participants:

N V BURTON
Applicant

- and -

DEPARTMENT OF HOUSING, LOCAL GOVERNMENT & PLANNING
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - Refusal of access - matter in issue comprising information obtained from a third party for the purposes of the respondent's investigation of the applicant's complaint about a residential tenant of the respondent - whether exempt matter under s.46(1) of the *Freedom of Information Act 1992 Qld.*

FREEDOM OF INFORMATION - refusal of access - information concerning the personal affairs of a residential tenant of the respondent - whether exempt matter under s.44(1) of the *Freedom of Information Act 1992 Qld.*

Freedom of Information Act 1992 Qld s.5(1)(a), s.5(1)(b), s.5(1)(c), s.6, s.25, s.44(1), s.46(1)(a), s.46(1)(b), s.46(2), s.78

"B" and Brisbane North Regional Health Authority, Re (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported)

Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (Information Commissioner Qld, Decision No. 93002, 30 June 1993, unreported)

G v Day [1982] 1 NSWLR 24

R K & C D Stewart and Department of Transport, Re (Information Commissioner Qld, Decision No. 93006, 9 December 1993, unreported)

(ii)

DECISION

1. I affirm that part of the decision under review (being the decision of the Director-General of the Department of Housing, Local Government & Planning dated 2 February 1993) by which it was determined that folio 51 of the respondent's "Rockhampton Rental File 162" is exempt from disclosure under s.46(1)(b) of the *Freedom of Information Act 1992 Qld.*
2. I also find that folio 51 is an exempt document under s.46(1)(a) of the *Freedom of Information Act 1992 Qld.*
3. I find that the first passage deleted from folio 56 (being part of the sentence which comprises the second paragraph of that document) is exempt matter under s.44(1) of the *Freedom of Information Act 1992 Qld.*
4. I find that the second passage deleted from folio 56 (being the final paragraph of that document) is exempt matter under both s.46(1)(a) and s.46(1)(b) of the *Freedom of Information Act 1992 Qld.*

Date of Decision: 18 April 1994

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F N ALBIETZ
INFORMATION COMMISSIONER

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DEPARTMENT OF HOUSING, LOCAL GOVERNMENT & PLANNING
 Respondent

REASONS FOR DECISION

Background

1. The applicant, Mrs N V Burton, seeks review of a decision by the respondent, the Department of Housing, Local Government & Planning (the Department), to refuse her access to two of a number of documents claimed by the respondent to be exempt under the provisions of the *Freedom of Information Act 1992 Qld* (the FOI Act). The applicant's initial FOI access request was for her file held by the Department and also for "the reasons for failure to repair damage to side fence (between 7 and 9 Welsh Street) as instructed by then Acting Minister Mackenroth in 1991". The second limb of the applicant's FOI access request was interpreted by the Department as being a request for those documents relating to the applicant's complaint to the Department concerning damage which the applicant contended had been sustained to the dividing fence between 9 Welsh Street, Rockhampton (a property owned by the applicant) and 7 Welsh Street, Rockhampton (a property which the Department leases to tenants).
2. By decision of 6 January 1993, Mr V Tumath, Manager of the Department's Administrative Review Unit, granted the applicant partial access to the documents held by the Department which fell within the terms of the applicant's FOI access request. The applicant was refused access to a number of documents in reliance on s.44(1) and s.46(1) of the FOI Act. The applicant requested an internal review of Mr Tumath's decision only with respect to folios 51 and 56 of the Department's "Rockhampton Rental File 162" which had been claimed to be exempt pursuant to s.46(1) of the FOI Act. By decision of 2 February 1993, Mr Persson, the Director-General of the Department, determined to refuse the applicant access to folios 51 and 56 on the basis that they were exempt documents under s.46(1)(b) of the FOI Act.
3. On 29 March 1993, the applicant applied to the Information Commissioner for external review of Mr Persson's decision of 2 February 1993.

The Documents in Issue

4. Folios 51 and 56 relate to an investigation by the Department into a complaint made by the applicant in a letter dated 1 October 1990 to the Minister for Housing and Local Government concerning the tenants of the Department residing at 7 Welsh Street, Rockhampton. The complaint related primarily to damage which the applicant alleged the tenants of 7 Welsh Street had caused to the dividing fence between the Department's property and the applicant's property.

5. The task of investigating the applicant's complaint was assigned to Mr A B Miers, who at that time was relieving in the position of Administration Officer at the Department's office in Rockhampton, and to Ms M Moore, a Field Officer employed by the Department at Rockhampton.
6. During the course of their investigations, Mr Miers and Ms Moore had a conversation with an individual (hereinafter referred to as the third party) with respect to the applicant's complaint. Folio 51 consists of a signed statement obtained by Mr Miers from the third party on 11 October 1990. Folio 56 consists of a handwritten memorandum dated 11 October 1990 from Mr Miers to Mr T Moss, who was the Manager of the Department's Rental Division. Folio 56 records the details of the investigation undertaken by Mr Miers and Ms Moore on 11 October 1990, including their conversations with the applicant and the third party.

The External Review Process

7. Following examination of folios 51 and 56, I communicated my preliminary view to the Department that most of the matter recorded on folio 56 was not exempt under the provisions of the FOI Act. The Department accepted my preliminary view in this regard and, as a result, folio 56 was released to the applicant with the exception of two passages, one being part of the sentence which comprises the second paragraph of that document and the second being the final paragraph of folio 56. The passage deleted from the second paragraph of folio 56 records the details of a communication left by Mr Miers for the tenants of 7 Welsh Street after his attendance at that property on 11 October 1990. The final paragraph of folio 56 records the substance of Mr Miers' conversation with the third party on the same day.
8. During the review process evidence was obtained by way of statutory declaration from Mr Miers (executed on 2 August 1993) in relation to the circumstances surrounding his communications with the third party on 11 October 1990. A member of my investigative staff then consulted with the third party and was advised that the third party objected to the release to the applicant of folio 51 and the final paragraph of folio 56. The third party was invited to apply, in accordance with s.78 of the FOI Act, to be a participant in the review proceedings, but did not take up that opportunity. Nevertheless, evidence was obtained from the third party by way of statutory declaration (executed on 23 August 1993) in relation to the facts and circumstances surrounding the obtaining by Mr Miers of the signed statement (folio 51) from the third party on 11 October 1990.
9. After obtaining evidence from Mr Miers and the third party, I wrote to the applicant setting out my preliminary view that folio 51 was exempt under s.46(1)(b) of the FOI Act and that the matter deleted from folio 56 was exempt under s.44(1) and s.46(1)(b) of the FOI Act, together with arguments in support of those views. In this case, the text of the evidence obtained from Mr Miers and the third party was not capable of being disclosed to the applicant without disclosing matter claimed to be exempt. Nevertheless, the substance and effect of that evidence was conveyed to the applicant in the letter setting out my preliminary views. The applicant was asked to indicate whether or not she accepted or contested my preliminary views. In that letter I extended to the applicant the opportunity to provide me with a written submission addressing the issue of whether or not folio 51, and the matter deleted from folio 56, comprised exempt matter under the provisions of the FOI Act.
10. By letter dated 8 November 1993, the applicant advised me that she did not accept my preliminary views as previously communicated. The submissions made by the applicant in support of her case centred on an allegation that the Department had mismanaged its property at 7 Welsh Street for approximately 44 years. The submissions also dealt with the applicant's dissatisfaction over the way in which the complaint regarding the damage to the dividing fence had been dealt with by the Department. Further, the applicant submitted that she should be allowed to obtain full access to folios 51 and 56 so that she could seek correction of what she believes to be "fabrications" contained

in folio 51 and the matter deleted from folio 56.

The Applicable Legislative Provisions

11. In his decision of 2 February 1993, Mr Persson relied on s.46(1)(b) of the FOI Act in determining that folios 51 and 56 were exempt documents. In my opinion s.46(1)(a) and s.44(1) of the FOI Act are also relevant.

12. Section 44(1) of the FOI Act provides as follows:

"44.(1) Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest."

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

"46.(1) Matter is exempt if -

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

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

- (a) a person in the capacity of -*
 - (i) a Minister; or*
 - (ii) a member of the staff of, or a consultant to, a Minister; or*
 - (iii) an officer of an agency; or*
- (b) the State or an agency."*

Folio 51 - Application of s.46(1) of the FOI Act

Application of Section 46(1)(a)

14. In my recent decision in *Re "B" and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported), I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(a) of the FOI Act. The test of exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency or Minister faced with an application for access, under s.25 of the FOI Act, to the information in issue (see paragraph 44 in *Re "B"*). Where the hypothetical legal action by which the test of exemption is to be evaluated must, in the circumstances of a particular

case, be an action in equity for breach of confidence, there are five criteria which must be established:

- (a) it must be possible to specifically identify the information in issue, in order to establish that it is secret, rather than generally available information (see paragraphs 60-63 in *Re "B"*);
- (b) the information in issue must possess the "necessary quality of confidence"; i.e. the information must not be trivial or useless information, and it must possess a degree of secrecy sufficient for it to be the subject of an obligation of conscience, arising from the circumstances in or through which the information was communicated or obtained (see paragraphs 64-75 in *Re "B"*);
- (c) the information in issue must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see paragraphs 76-102 in *Re "B"*);
- (d) it must be established that disclosure to the applicant for access under the FOI Act would constitute a misuse, or unauthorised use, of the confidential information in issue (see paragraphs 103-106 in *Re "B"*); and
- (e) it must be established that detriment is likely to be occasioned to the original confider of the confidential information in issue if that information were to be disclosed (see paragraphs 107-118 in *Re "B"*).

- 15. There is no suggestion in the present case of a contractual obligation of confidence between the third party and the respondent concerning the communication of the information in issue to Mr Miers, on behalf of the Department. Therefore, the test for exemption under s.46(1)(a) must be evaluated in terms of the requirements for an action in equity for breach of confidence.
- 16. I am satisfied that there is an identifiable plaintiff (the third party) who would have standing to bring an action for breach of confidence, and that the information claimed to be confidential information (as recorded on folio 51) can be identified with specificity.
- 17. The information recorded on folio 51 was obtained by Mr Miers from the third party in the course of his investigation into the complaint made by the applicant. That information was relevant to Mr Miers' investigation of the complaint and cannot be considered trivial. Further, the information recorded on folio 51 has the requisite degree of secrecy to invest it with the "necessary quality of confidence", so as to satisfy the second criterion referred to in paragraph 14 above. The information recorded on folio 51 includes the third party's identity, which is also in my opinion eligible for protection as confidential information under s.46(1)(a) of the FOI Act in the circumstances of this case. The decision of Yeldham J of the Supreme Court of New South Wales in *G v Day* [1982] 1 NSWLR 24 is authority for the proposition that although a person's identity is ordinarily not information which is confidential in quality, the connection of a person's identity with the imparting of confidential information can itself be secret information capable of protection in equity (see paragraph 137 of my decision in *Re "B"*).
- 18. As I stated at paragraph 84 of my decision in *Re "B"*, the determination of whether information was communicated in circumstances importing an obligation of confidence on the recipient of such information requires, in any particular case, an evaluation of the whole of the relevant circumstances. In undertaking this evaluation in the present case, I have had regard to the evidence obtained from Mr Miers and the third party.
- 19. In a statutory declaration executed on 2 August 1993, Mr Miers provided evidence in relation to his

conversation with the third party on 11 October 1990 and the circumstances surrounding the creation of folio 51. Mr Miers had no independent recollection of his conversation with the third party. In providing his evidence in relation to that conversation, Mr Miers refreshed his memory from the details of that conversation as recorded in folios 51 and 56. The matter recorded in those documents, which related to his conversation with the third party, did not include a record of whether or not Mr Miers provided the third party with an assurance that the third party's identity, and the information communicated by the third party to Mr Miers, would be treated as confidential. However, Mr Miers provided evidence as to the procedure which he routinely adopted when investigating complaints about the Department's tenants. Mr Miers' evidence in this regard was as follows:

"Whilst I have no specific recollection, I believe that I would have told [the third party] that anything that [the third party] told me in relation to the complaint would be put on the Department's file. I believe I also would have advised [the third party] in words to the effect that 'anything you say will be treated in confidence'. This is the procedure I adopt in each instance, but I have no specific recollection of my conversation with [the third party]."

20. In a statutory declaration executed on 23 August 1993, the third party provided evidence of the conversation the third party had with Mr Miers on 11 October 1990, together with the circumstances surrounding the creation of folio 51. The third party was able to recall having spoken with two officers of the Department in relation to the applicant's complaint concerning the Department's tenants at 7 Welsh Street. The third party's memory in relation to that visit was refreshed from the matter recorded on folio 51 and the final paragraph of folio 56. In relation to folio 51, the third party gave evidence that the contents of that document were written out by Mr Miers during his conversation with the third party. The third party identified the signature which appeared on folio 51 as being the third party's own signature.
21. In relation to the issue of whether or not the information recorded in folio 51 was communicated to Mr Miers in confidence, the third party provided the following evidence:

"I have no recollection of the male Department officer telling me to what use the information I gave him would be put. I do not recall saying anything to the male Department officer in relation to the use to which he could put the information I told him. However, I believe that the information that I provided the male Department officer was provided in the course of his investigation of Mrs N V Burton's complaint about [the names of the Department's tenants at 7 Welsh Street appeared here] and would only be used by the Department for that purpose. I had an expectation that the information I gave the Department Officers would be used for their purposes and would go no further. By this I mean that I had an expectation that the information that I gave to the officer at the Department would not be communicated to anyone outside the Department and, in particular, would not be communicated to Mrs N V Burton or Mr N W Burton."

22. As discussed in my decision in *Re "B"*, it is not necessary for there to have been an express undertaking by Mr Miers on behalf of the Department not to disclose the information communicated to him by the third party as such an obligation may be inferred from the circumstances. In particular, paragraphs 89 and 90 of my decision in *Re "B"* are relevant:

"89. The Federal Court in Smith Kline & French accepted that equity may impose an obligation of confidence upon a defendant having regard not only to what the defendant actually knew, but to what the defendant ought to have known in all the relevant circumstances. In cases decided under s.45(1) of

the Commonwealth FOI Act (prior to its 1991 amendment) the Federal Court had consistently held that the determination of whether information was provided in circumstances importing an obligation of confidence is essentially a question of fact, which depends upon an analysis of all the relevant circumstances, and it is not necessary for there to have been an express undertaking not to disclose information; such an obligation can be inferred from the circumstances: see Department of Health v Jephcott (1985) 9 ALD 35; 62 ALR 421 at 425; Wiseman v Commonwealth of Australia (Unreported decision, Sheppard, Beaumont and Pincus JJ, No. G167 of 1989, 24 October 1989); Joint Coal Board v Cameron (1989) 19 ALD 329, at p.339.

90. *It is not necessary therefore that there be any express consensus between confider and confidant as to preserving the confidentiality of the information imparted. In fact, though one looks to determine whether there must or ought to have been a common implicit understanding, actual consensus is not necessary: a confidant who honestly believes that no confidence was intended may still be fixed with an enforceable obligation of confidence if that is what equity requires following an objective evaluation of all the circumstances relevant to the receipt by the confidant of the confidential information".*

On the basis of the evidence obtained, I am satisfied that both Mr Miers (on behalf of the Department) and the third party clearly contemplated and understood that the information supplied by the third party (including the third party's identity) was supplied for the limited purpose of assisting the Department's investigation, and would be used by the Department only for that purpose. This is an occasion where the "limited purpose" test referred to with qualified approval in *Re "B"* (see paragraphs 82 and 87 thereof) produces a proper result, there being no other relevant circumstances which tell against its application. I think that the third party implicitly authorised any limited disclosure that might be necessary for the purposes of the proper conduct of the Department's investigation. However, the nature of the information conveyed by the third party was such that it was always unlikely that any necessity for disclosure would arise. Certainly it was not necessary for the third party's information or identity to be disclosed to the applicant. The third party was not the subject of the applicant's complaint and was not involved in the issues directly raised by the applicant's complaint. Information was obtained from the third party by Mr Miers to assist the Department in evaluating the substance of the applicant's complaint. The nature of the information was not such that procedural fairness required that it be put to the applicant for a response, nor even to the subjects of the applicant's complaint for a response.

24. I am satisfied that the information contained in folio 51 was communicated in circumstances such as to import an equitable obligation of confidence binding on the Department.
25. I find that disclosure of folio 51 under the FOI Act would constitute an unauthorised use of that information. The third party had an expectation that the information provided to Mr Miers on behalf of the Department would not be conveyed to the applicant. The third party has also advised my Office that the third party continues to object to the release to the applicant of the information recorded on folio 51. In the circumstances, I find that disclosure to the applicant of the information recorded on folio 51 would constitute an unauthorised use of that information.
26. I am also satisfied that disclosure to the applicant of the information recorded on folio 51 would cause detriment to the third party. At paragraph 111 of my decision in *Re "B"*, I stated that it was not necessary to establish that a threatened disclosure of the matter in issue would cause detriment in a financial sense but that detriment could also include embarrassment, a loss of privacy, fear or an

indirect detriment, for example, disclosure of the information may injure some relation or friend. I am satisfied that disclosure to the applicant of the information recorded on folio 51 (including the third party's identity) would cause detriment to the third party of one or more of the kinds mentioned above.

27. In the circumstances of the present case, no occasion arises to consider the application of any of the defences to an equitable action for breach of confidence discussed in my decision in *Re "B"* at paragraphs 119 to 134. Further, s.46(2) of the FOI Act does not apply to the matter recorded on folio 51 (so as to render s.46(1) inapplicable) because its disclosure would found an action for breach of confidence owed to a person or body other than those mentioned in s.46(2)(a) and (b).
28. I am satisfied that disclosure of the matter recorded on folio 51 would found an action for breach of confidence and that it is therefore exempt matter under s.46(1)(a) of the FOI Act.

Application of Section 46(1)(b)

29. As I wrote to the applicant setting out my preliminary views in terms of s.46(1)(b) and invited her to address her case to me on that basis (see paragraph 9 above) it is necessary that I also address s.46(1)(b) of the FOI Act.
30. As discussed at paragraph 146 of my decision in *Re "B"*, in order to establish the *prima facie* ground of exemption under s.46(1)(b) of the FOI Act three cumulative requirements must be satisfied:
- (a) the matter in issue must consist of information of a confidential nature;
 - (b) that was communicated in confidence; and
 - (c) the disclosure of which could reasonably be expected to prejudice the future supply of such information.
31. The requirement that the information must be of a confidential nature calls for a consideration of the same matters that would be taken into account by a court (in an action in equity for breach of confidence) in determining whether, for the purpose of the second criterion identified at paragraph 14 of this decision, the information in issue has the requisite degree of relative secrecy or inaccessibility (see paragraph 148 of *Re "B"*).
32. In relation to the second element, I discussed the meaning of the phrase "communicated in confidence" at paragraph 152 of my decision in *Re "B"* as follows:

"I consider that the phrase 'communicated in confidence' is used in this context to convey a requirement that there be mutual expectations that the information is to be treated in confidence. One is looking then for evidence of any express consensus between the confider and confidant as to preserving the confidentiality of the information imparted; or alternatively for evidence to be found in an analysis of all the relevant circumstances that would justify a finding that there was a common implicit understanding as to preserving the confidentiality of the information imparted."

33. I have already made findings at paragraphs 17 to 24 above that the information recorded on folio 51 is confidential in nature, and that it was received by Mr Miers on behalf of the Department in circumstances importing an equitable obligation of confidence. I am satisfied that there was a common understanding between the third party and the Department (through its agent Mr Miers) as to preserving the confidentiality of the information imparted. I think that the third party implicitly authorised any limited disclosure that might be necessary for the purposes of the proper conduct of

the Department's investigation, but the nature of the information conveyed by the third party was such that it was unlikely that any necessity for disclosure would arise, and this has proven to be the case. Thus, the first two criteria for the application of s.46(1)(b) of the FOI Act are satisfied.

34. The nature of the inquiry in relation to the third requirement of s.46(1)(b), i.e. that the disclosure of folio 51 could reasonably be expected to prejudice the future supply of such information, was discussed at paragraphs 154-161 of my decision in *Re "B"*. The test is not to be applied by reference to whether the particular confider whose confidential information is being considered for disclosure could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice the future supply of such information from a substantial number of sources available or likely to be available to an agency. The meaning of the phrase "could reasonably be expected to" was explained at paragraphs 154 to 160 of my reasons for decision in *Re "B"*. Where an expectation is asserted of prejudice to the future supply of information of a like character to the information in issue, it must be determined whether the expectation claimed is reasonably based. The words "could reasonably be expected to" call for the decision-maker applying s.46(1)(b) to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.
35. In the present case, the nature of the inquiry concerns the expected effects of disclosure of folio 51 to the applicant, who resides next door to 7 Welsh Street, being a property which continues to be owned and tenanted by the Department (albeit to different tenants from those who resided in the property at the time of the applicant's complaint). The Department has a continuing interest in being able to obtain information from the sources available to the Department in relation to its management of the tenanted premises at 7 Welsh Street, and indeed in relation to its management of other tenanted premises. The signed statement of the third party contained in folio 51 is comprised of two paragraphs. The information contained in the first paragraph of folio 51 is not in itself of such a nature that its disclosure would inhibit any reasonable person from supplying information of a like character in the future. Its disclosure would, however, by reason of contextual factors extraneous to the information itself, enable the identification of the third party: a result which the third party is anxious to avoid. The situation is not likely to arise frequently, but where the identity of a supplier of confidential information is itself "information of a confidential nature", breach of an understanding that the identity of the supplier of confidential information would remain confidential could, in certain circumstances, reasonably be expected to prejudice the future supply of information of a like character (i.e. information the disclosure of which would, from the surrounding context, inevitably identify the supplier of the information). The present case is one of that kind. Moreover, the nature of the information contained in the second paragraph of folio 51 is such that there can be little doubt that its disclosure could reasonably be expected to prejudice the future supply of such information. In view of the nature of the information in issue, I am satisfied that disclosure of folio 51 to the applicant could reasonably be expected to prejudice the future supply of information of a like character.
36. In the circumstances, I am satisfied that a *prima facie* case is established that folio 51 is exempt under s.46(1)(b) of the FOI Act. It remains to be considered whether disclosure of folio 51 to the applicant would, on balance, be in the public interest.
37. The meaning of the phrase "public interest" was discussed in detail in my decision in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (Information Commissioner Qld, Decision No. 93002, 30 June 1993, unreported) at paragraphs 35-57, of which the following are presently relevant:

"54. Likewise, under freedom of information legislation, the task of determining, after weighing competing interests, where the balance of public interest lies, will depend on the nature and relative weight of the conflicting interests

which are identifiable as relevant in any given case.

55. *While in general terms, a matter of public interest must be a matter that concerns the interests of the community generally, the courts have recognised that: 'the public interest necessarily comprehends an element of justice to the individual' (per Mason CJ in Attorney-General (NSW) v Quin (1990) 64 ALJR 627). Thus, there is a public interest in individuals receiving fair treatment in accordance with the law in their dealings with government, as this is an interest common to all members of the community. Similarly, the fact that individuals and corporations have, and are entitled to pursue, legitimate private rights and interests can be given recognition as a public interest consideration worthy of protection, depending on the circumstances of any particular case."*

38. Section 6 of the FOI Act is also relevant in this regard. It provides that:

"6. If an application for access to a document is made under this Act, the fact that the document contains matter relating to the personal affairs of the applicant is an element to be taken into account in deciding -

(a) whether it is in the public interest to grant access to the applicant; and

(b) the effect that the disclosure of the matter might have."

39. As discussed at paragraph 19 of *Re Eccleston* and paragraph 179 of *Re "B"*, s.46(1)(b) of the FOI Act is framed so as to require an initial judgment as to whether disclosure of the document in issue would have certain specified effects, which if established would constitute a *prima facie* ground of justification in the public interest for non-disclosure of the matter, unless the further judgment is made that the *prima facie* ground is outweighed by other public interest considerations, such that disclosure of the document in issue "would, on balance, be in the public interest".

40. I accept that there is a public interest in a person who complains to a government agency having access to documents relevant to his or her complaint. This public interest consideration is consistent with the notion of the accountability of government, which has been given express recognition by Parliament in s.5(1)(a) and (b) of the FOI Act. I discussed the public interest in the accountability of government in my decision in *Re Eccleston* at paragraphs 58 to 75. In particular, at paragraph 58, I stated that one of the intentions of the FOI Act is to:

"... enable interested members of the public to discover what the government has done and why something was done, so that the public can make more informed judgments of the performance of the government, and if need be bring the government to account through the democratic process"

41. In accordance with s.6 of the FOI Act, I have also taken into account the fact that some of the matter recorded on folio 51 (i.e. the second paragraph thereof) relates to the personal affairs of the applicant (although the first paragraph of folio 51 clearly does not).

42. In her submission, the applicant states as follows:

"The basic tenet of freedom of information is that private citizens have the right to view files and correct any information on file. If you do not allow us full access to folios 51 and 56 and we do not have an opportunity to correct files, then these

fabrications will automatically become truth."

43. The applicant's submission is essentially that she should be afforded access to folio 51 so as to enable her to seek correction of what she believes to be fabrications contained in that document. The applicant's stated aim is consistent with one of the objects of the FOI Act specifically recognised in s.5(1)(c). The applicant's right to seek correction under Part 4 of the FOI Act would be confined to matter which relates to the applicant's personal affairs (i.e. to the second paragraph of folio 51). On the other hand, there is nothing to prevent a request being made for correction of documents outside the terms of the FOI Act, though a government agency would ordinarily be under no legal obligation to deal with such a request.
44. I accept that there is a public interest in the applicant having access to the matter recorded in folio 51 so as to afford her the opportunity to verify the accuracy of matter recorded therein which concerns her personal affairs. However, based on my examination of that information, I consider that its disclosure would not have any positive or beneficial consequences for the applicant and certainly none of sufficient substance to outweigh the detriment that would be occasioned to the third party, nor the potential detriment referred to in paragraph 35 above. I am unable therefore, in the circumstances of this case, to accord any substantial weight to this public interest consideration, nor to the public interest consideration given recognition in s.6 of the FOI Act, with which it is very closely allied in any event.
45. The public interest in the accountability of government must ordinarily carry substantial weight, and I do accord it substantial weight in this context, even though disclosure of folio 51 is not likely to enhance the accountability of government in any significant way. Nevertheless, I am not satisfied in the circumstances of this case that, collectively, the public interest considerations favouring disclosure of folio 51 are of sufficient weight to displace the public interest favouring non-disclosure which is evident in the satisfaction of the *prima facie* test for exemption under s.46(1)(b) of the FOI Act. I find that folio 51 is an exempt document under s.46(1)(b) of the FOI Act.

Folio 56 - Application of s.44(1) and s.46(1) of the FOI Act

The first passage deleted from folio 56 - application of s.44(1)

46. As discussed above at paragraph 7, the first passage deleted from folio 56 (to enable its partial release to the applicant during the external review process) consists of part of the sentence which comprises the second paragraph of that document. The passage records details of a communication left by Mr Miers for the tenants of 7 Welsh Street after his attendance at that property on 11 October 1990.
47. In my reasons for decision in the case of *Re Stewart and Department of Transport* (Information Commissioner Qld, Decision No. 93006, 9 December 1993, unreported), I identified the various provisions of the FOI Act which employ the term "personal affairs" and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act (see paragraphs 79 to 114 of *Re Stewart*). In particular, I there said that information concerns the "personal affairs of a person" if it relates to the private aspects of a person's life; and that while there may be a substantial grey area in the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes affairs relating to -
- family and marital relationships;
 - health or ill-health;
 - relationships with and emotional ties with other people; and
 - domestic responsibilities or financial obligations.
48. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, based on a proper characterisation of the matter in

question. The first passage deleted from folio 56 comprises information relating to the tenants of the Department who resided at 7 Welsh Street in October 1990 pursuant to a residential tenancy agreement. The information recorded in the first passage deleted from folio 56 concerns the domestic circumstances and domestic responsibilities of those tenants and is clearly information concerning their personal affairs for the purposes of s.44(1) of the FOI Act. The information in this passage has no connection with the Department's investigation of the applicant's complaint, nor with the applicant's personal affairs in any respect. I find that this passage comprises exempt matter under s.44(1) of the FOI Act, there being no public interest consideration of any weight that would favour its disclosure.

The second passage deleted from folio 56 - application of s.46(1)

49. As discussed at paragraphs 6 and 7 above, the second passage deleted from folio 56 comprises the final paragraph of Mr Miers' memorandum to Mr Moss dated 11 October 1990. That passage sets out details of Mr Miers' and Ms Moore's contact with the third party. Its disclosure would disclose the identity of the third party. It also repeats the substance of the information recorded in folio 51, which I have already found to be confidential information that is exempt from disclosure under s.46(1)(a) and s.46(1)(b) of the FOI Act.
50. I find that the second passage deleted from folio 56 is exempt matter under s.46(1)(a) and under s.46(1)(b) of the FOI Act for the same reasons as are explained at paragraphs 14 to 45 of this decision.

Conclusion

51. For the foregoing reasons:
- (a) I affirm that part of Mr Persson's decision of 2 February 1993 by which it was determined that folio 51 is exempt from disclosure under s.46(1)(b) of the FOI Act;
 - (b) I also find that folio 51 is an exempt document under s.46(1)(a) of the FOI Act;
 - (c) I find that the first passage deleted from folio 56 (being part of the sentence which comprises the second paragraph of that document) constitutes exempt matter under s.44(1) of the FOI Act; and
 - (d) I find that the second passage deleted from folio 56 (being the final paragraph of that document) is exempt matter under both s.46(1)(a) and s.46(1)(b) of the FOI Act.

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 F N ALBIETZ
INFORMATION COMMISSIONER