

# OFFICE OF THE INFORMATION COMMISSIONER (QLD)

**Decision No. 02/2005**  
**Application 629/04**

## **Participants:**

"DML"  
**Applicant**

HEALTH RIGHTS COMMISSION  
**Respondent**

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – identity of medical practitioner who provided opinion to Health Rights Commission during assessment of complaint - information supplied by third party in expectation of confidentiality as to the source of the information - whether disclosure would found an action for breach of confidence – application of s.46(1)(a) of the FOI Act

*Freedom of Information Act 1992 Qld s.46(1)(a), s.46(1)(b)*

*"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279*

*Chand and Medical Board of Queensland; Cannon (Third Party), Re (2001) 6 QAR 159*

*G v Day (1982) 1 NSWLR 24*

*McCann and Queensland Police, Re (1997) 4 QAR 30*

*Pemberton and The University of Queensland, Re (1994) 2 QAR 293*

**DECISION**

I affirm the decision under review (being the decision dated 19 August 2004 by Mr David Kerslake of the HRC) that the matter in issue is exempt from disclosure under s.46(1)(a) of the FOI Act.

.....  
CATHI TAYLOR  
**INFORMATION COMMISSIONER**

Date: 17 March 2005

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## **REASONS FOR DECISION**

### **Background**

1. The applicant made a complaint to the Health Rights Commission (the HRC) in relation to health services provided to his son whilst his son was an involuntary patient at the Royal Brisbane Hospital. The applicant seeks review of a decision of the HRC to refuse him access, under the *Freedom of Information Act 1992 Qld* (the FOI Act), to parts of a document that comprise the name of a psychiatrist whom the HRC contacted in relation to the applicant's complaint.
2. The HRC assessed the applicant's complaint and, as I understand it, decided not to take action on the complaint. This is confirmed to some extent in a letter dated 22 March 2004 from Mr David Kerslake, the Health Rights Commissioner, to the applicant, which relevantly states:

*As you know the Commission has been making enquiries regarding your complaint about the care your son, [name] received from Royal Brisbane Hospital and his subsequent care by the mental health service. I understand Annette Anning, Investigator recently spoke to you about the Commission's enquiries and our findings, which I understand you did not accept.*

...

*... While you remain unhappy about the care [your son] received while in Queensland, I am of the view that further inquiry will not provide any new information for you to resolve your concerns.*

3. By letter dated 1 June 2004 the applicant sought access, under the FOI Act, to documents held by the HRC in relation to his complaint about the treatment provided to his son.

4. By letter dated 13 July 2004, Ms Helen Adcock of the HRC informed the applicant that she had identified 301 folios falling within the terms of his FOI access application. Ms Adcock decided to give the applicant full access to 300 folios and partial access to one folio, relying on the grounds for exemption in s.46(1)(a) and s.46(1)(b) of the FOI Act to refuse access to the name of a medical practitioner.
5. By letter dated 2 August 2004, the applicant sought internal review of Ms Adcock's decision. The internal review was conducted by Mr Kerslake. By letter dated 19 August 2004, Mr Kerslake informed the applicant that he had decided to affirm Ms Adcock's decision.
6. By letter dated 27 September 2004 the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Mr Kerslake's decision.

**Steps taken in the external review process**

7. A copy of the document containing the matter in issue was obtained and examined. It is a record of a telephone conversation, dated 12 March 2004, between a psychiatrist whom the HRC contacted for an independent opinion (I shall refer to that person as "the third party") and a member of staff of the HRC's staff.
8. On 10 November 2004, a member of my staff spoke to the third party and advised him of the review. During that conversation, the third party advised that he objected to the disclosure of his name to the applicant. Assistant Information Commissioner (AC) Barker subsequently wrote to the third party, confirming his conversation with this office. At the same time, and in accordance with s.78 of the FOI Act, AC Barker invited the third party to apply to be a participant in the review. The third party did not apply to be a participant in the review.
9. By letter dated 10 November 2004, AC Barker conveyed to the applicant her preliminary view that the matter in issue qualified for exemption from disclosure under s.46(1)(a) of the FOI Act. By letter dated 23 November 2004, the applicant advised my office that he did not accept that preliminary view.
10. A copy of the applicant's submission dated 23 November 2004 was sent to the HRC on 10 February 2005, with an invitation to provide any additional material on which the HRC wished to rely in support of its position. The HRC provided additional background material concerning the applicant's complaint, and the treatment of the applicant's son, but did not make any further submissions.
11. In making my decision, I have taken into account the following material:
  - the matter in issue;
  - the applicant's FOI access application dated 1 June 2004, application for internal review dated 2 August 2004, and application for external review dated 27 September 2004;
  - the HRC's initial and internal review decisions, dated 13 July 2004 and 19 August 2004 respectively;
  - a record of a telephone conversation between the third party and a member of my staff on 10 November 2004; and
  - the applicant's letter dated 23 November 2004.

**Matter in issue**

12. The matter in issue in this review comprises the name of the third party, as it appears in two places in a record of a telephone conversation dated 12 March 2004 between the third party and a member of the staff of the HRC.

**Section 46(1)(a) of the FOI Act**

13. (The HRC contends that the matter in issue qualifies for exemption under s.46(1)(a) and s.46(1)(b) of the FOI Act. I have not found it necessary in this review to consider the application of s.46(1)(b) to the matter in issue, as I have formed the view that it is exempt from disclosure under s.46(1)(a) of the FOI Act.)
14. Section 46(1)(a) of the FOI Act provides:

*46.(1) Matter is exempt if—*

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

15. In *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, Commissioner Albietz explained in some detail the correct approach to the interpretation and application of s.46(1)(a) of the FOI Act. The test for exemption under s.46(1)(a) must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind the agency not to disclose the information in issue. I am satisfied that there is an identifiable plaintiff (the third party) who would have standing to bring such an action for breach of confidence.

**(a) Requirements for exemption**

16. There are five requirements, all of which must be established, to obtain protection in equity of allegedly confidential information:
- (a) it must be possible to specifically identify the information, in order to establish that it is secret, rather than generally available information (see *Re "B"* at pp.303-304, paragraphs 60-63);
  - (b) the information in issue must have "the necessary quality of confidence"; i.e., the information must not be trivial or useless information, and it must have a degree of secrecy sufficient for it to be the subject of an obligation of conscience (see *Re "B"* at pp.304-310, paragraphs 64-75);
  - (c) the information 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 *Re "B"* at pp.311-322, paragraphs 76-102);
  - (d) disclosure to the applicant for access would constitute an unauthorised use of the confidential information (see *Re "B"* at pp.322-324, paragraphs 103-106); and
  - (e) disclosure would be likely to cause detriment to the confider of the confidential information (see *Re "B"* at pp.325-330, paragraphs 107-118).

**(b) Application of s.46(1)(a) to the matter in issue****(i) Specifically identifiable information**

17. I am satisfied that the matter in issue, which is claimed to be confidential information, can be identified with specificity: see paragraph 12 above.

**(ii) Necessary quality of confidence**

18. I am satisfied that the matter in issue is not trivial, and has the requisite degree of secrecy to invest it with the "necessary quality of confidence", so as to satisfy the second criterion for exemption under s.46(1)(a). The connection of a person's identity with the imparting of information can itself be secret information capable of protection from disclosure: see *G v Day* (1982) 1 NSWLR 24; *Re "B"* at pp.335-336 (paragraph 137); *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp.344-345 (paragraphs 108-110); *Re McCann and Queensland Police Service* (1997) 4 QAR 30, at paragraph 28.

**(iii) Communicated in confidence**

19. The third criterion requires an evaluation of the whole of the relevant circumstances surrounding the imparting of the information in issue, including (but not limited to) the nature of the relationship between the parties, and the nature and sensitivity of the information in question: see *Re "B"* at page 316 and pages 314-316; at paragraphs 82 and 84.

20. In his internal review decision, dated 19 August 2004, Mr Kerslake stated:

...

*It is not unusual for independent advisors to agree to provide their opinion on the undertaking that the information is given and received in confidence. They wish to be able to provide frank advice free of the risk of being drawn into a dispute between the parties. In your case, the independent advisor requested that his name not be released, which is clearly evident on the record of the telephone conversation between the [HRC] officer and the independent advisor... .*

21. I find that there was an implicit mutual understanding between the third party and the HRC that the third party's name would be treated in confidence by the HRC. This is supported by the third party's comment to a member of my staff on 10 November 2004; the third party stated that, when contacted by the HRC, he understood his conversation was private and that his name would not be released.

22. In his submissions to my office dated 23 November 2004, the applicant stated:

*A medical practitioner is well aware that their professional opinion and action may be subject to legal or other action.*

*Your decision would take away my legal rights as well as personal complaint.*

*The [HRC] is of course, a "complaint disposal unit".*

*Leaving aside the term of "independent" which is often quite farcical, the [HRC] if it wished should have proceeded by written request, and written opinion, not verbal, and forwarded for my comment. The issue was Incompetent/Inhuman patient treatment where those guilty self condemn. All on the record. The [HRC] try to make it appear as they are the only body in the world who can't buy the required medical opinion that suits.*

*Those involved have all acted improperly, at least, and should not be sheltered because of these actions.*

23. What is required to accord procedural fairness in any given case may vary according to the circumstances of the particular case (see the discussion about procedural fairness at paragraphs 33-36 of *Re Chand and Medical Board of Queensland; Dr Adam Cannon (Third Party)* (2001) 6 QAR 159). Whilst I do not consider that it would have been reasonable for the third party to expect that the opinion he gave would be kept confidential, in circumstances where the HRC relied upon that opinion in deciding what action to take in respect of the applicant's complaint, I also do not consider that procedural fairness would override the mutual understanding of confidence that existed between the third party and the HRC regarding the third party's identity, or require that the applicant be given access to the third party's identity in the particular circumstances of this case. If the applicant considers that there are grounds for challenging the third party's opinion, he is able to do so without knowing the identity of the third party.

**(iv) Unauthorised use**

24. In view of the third party's objection to the disclosure to the applicant of his identity, I am satisfied that disclosure to the applicant of that information would constitute an unauthorised use of that information.

**(v) Detriment**

25. I am satisfied that disclosure to the applicant of the matter in issue would cause detriment to the third party of one or more of the kinds referred to in paragraph 111 of Commissioner Albietz's decision in *Re "B"*.

**(c) Conclusion**

26. I find the matter in issue qualifies for exemption from disclosure under s.46(1)(a) of the FOI Act.

<b>DECISION</b>
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27. For the foregoing reasons, I affirm the decision under review (being the decision dated 19 August 2004 by Mr David Kerslake of the HRC) that the matter in issue is exempt from disclosure under s.46(1)(a) of the FOI Act.

.....  
 CATHI TAYLOR  
**INFORMATION COMMISSIONER**

Date: 17 March 2005