

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 96001
Applications S 68/94 and S 72/94

Participants:

S 68/94 XXXX
Applicant

THE PUBLIC TRUSTEE OF QUEENSLAND
Respondent

GPR70F
Third Party

S 72/94 XXXX
Applicant

THE PUBLIC TRUSTEE OF QUEENSLAND
Respondent

GPR70F
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents in issue comprising two letters provided by the third party to the respondent - whether documents comprise information of a confidential nature communicated in confidence - whether disclosure could reasonably be expected to prejudice the future supply of like information - whether disclosure of documents would, on balance, be in the public interest - application of s.46(1)(b) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.5(1)(c), s.6, s.41(1)(a), s.42(1)(a), s.42(1)(b),
s.46(1)(a), s.46(1)(b), s.46(2), s.53, s.74, s.78
Property Law Act 1974 Qld s.175F

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Doelle and Legal Aid Office (Queensland), Re (1993) 1 QAR 207

McEniery and Medical Board of Queensland, Re (1994) 1 QAR 349

McMahon and Department of Consumer Affairs, Re (1994) 1 QAR 377

DECISION

In both applications for review, the decision under review is affirmed.

Date of decision: 23 February 1996

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicants seek review of the respondent's decisions refusing them access under the *Freedom of Information Act 1992 Qld* (the FOI Act) to two documents forwarded by the third party (who is the applicant's son, in S 68/94) to the respondent. Their respective applications for review involve identical documents and common issues, and they can conveniently be dealt with together.
2. At some time prior to 15 December 1993, the applicant in S 72/94 obtained from the Queensland Police Service (the QPS), under the FOI Act, a QPS record of a complaint by the third party that he (the third party) had been threatened on the telephone, allegedly by the applicant in S 72/94. I will reproduce only that part of the QPS record which assists in explaining the background to this case:

The background to the complaint [about the alleged threatening telephone call] according to [the third party] is that in 1980 his father died leaving his mother to raise 8 children and in this period she met [the applicant in s 72/94] who became her companion and exerted influence over her ... [the third party] ... is displeased with his mother's relationship with [the applicant in s 72/94]. [The third party] claims he has investigated [the applicant in s 72/94] and has a suspicion regarding his motives towards his mother as he claims [the applicant in s 72/94] had been in a relationship with an elderly woman prior to his mother, this woman died and [the applicant in s 72/94] apparently inherited her property. [The third party] has reported his suspicions in a lengthy report to the Public Trust Office and he claims the Public Trust Office is about to take action against [the applicant in s 72/94].

3. On 15 December 1993, the applicants attended at the respondent's office, presented a copy of the document quoted above, and requested a copy of the "lengthy report" referred to therein. They were advised to put their request in writing, and both the applicants lodged written FOI access applications dated 15 December 1993.
4. The only material which the third party had, in fact, forwarded to the respondent comprised a one page letter addressed to the respondent (hereinafter referred to as document 1), to which was attached a copy of a five page letter which the third party had previously forwarded to another government agency (hereinafter referred to as document 2).
5. On 24 March 1994, the Official Solicitor to the Public Trustee of Queensland, Mr Bruce Nickel, decided to refuse both applicants access to documents 1 and 2. Following consultation with the government agency to which document 2 was addressed, Mr Nickel claimed that document 2 was exempt under s.42(1)(a) and s.42(1)(b) of the FOI Act. Mr Nickel also decided that document 1 was exempt under s.46(1)(b) of the FOI Act, saying:

It is a function of the Public Trustee to investigate possible abuses of the Enduring Power of Attorney system. The Public Trustee is only able to carry out these investigations if he is supplied with information from members of the public, in some cases on a confidential basis. It is considered that the public interest in protecting the identity of persons reporting possible abuses of the Enduring Power of Attorney system outweighs the interest you would have in confirming the identity of the author or the contents of this letter.

6. I note, however, that the identity of the author of the documents in issue (although not their contents) had been effectively confirmed to the applicants, not only by the disclosure to the applicant in S 72/94 of the QPS document quoted above, but also by the respondent's acknowledgment, in answer to FOI access applications specifically seeking a report lodged by the third party, that the respondent held two documents responsive to the terms of the FOI access applications.
7. On 2 April 1994, the applicants applied for internal review of Mr Nickel's decision. The internal review was undertaken by the Public Trustee of Queensland, Mr Kevin Martin, who decided on 13 April 1994 to affirm the initial decisions. By letters dated 14 and 20 April 1994, respectively, the applicants applied to me for review, under Part 5 of the FOI Act, of the respondent's internal review decisions.

The external review process

8. Copies of the documents in issue were obtained and examined. I consulted with the other government agency referred to in the respondent's initial decision, and was ultimately advised that it did not wish to participate in this review. I note that no case has been put to me that the documents in issue are exempt under s.42(1)(a) of the FOI Act because their disclosure could reasonably be expected to prejudice any investigation, by that other government agency, of a contravention or possible contravention of the law.
9. When the third party was informed of these reviews (as required by s.74 of the FOI Act), he strongly objected to the disclosure to the applicants of either document 1 or document 2, and applied under s.78 of the FOI Act to be a participant in these reviews. That application was granted.
10. The respondent and the third party were invited to lodge evidence and/or written submissions in support of their contentions that documents 1 and 2 comprise exempt matter under the FOI Act. I advised the respondent and the third party that the latter's existence and identity as a source of information provided to the respondent was no longer confidential, having been disclosed by the respondent's answer to the applicants' FOI access applications, and having earlier been disclosed in the document released to the applicant in S 72/94 by the QPS. On this basis, I expressed the view that it did not appear that s.42(1)(b) of the FOI Act could be applicable. The respondent subsequently lodged a submission contending that documents 1 and 2 were exempt under s.46(1)(a) and s.46(1)(b) of the FOI Act, but making no further submission in relation to the application of s.42(1). The third party submitted a statutory declaration executed on 10 January 1995 and a written submission. He too relied only on s.46(1)(a) and s.46(1)(b) of the FOI Act.
11. The applicants were supplied with copies of the material lodged by the respondent and the third party, subject to the deletion of references to matter claimed to be exempt. Both applicants lodged detailed submissions in response, supported by a number of affidavits.

The application of s.46(1)

12. Section 46 of the FOI Act provides:

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.

13. Section 46(2) describes matter which is ineligible for exemption under s.46(1): see *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (*Re "B"*) at p.292; paragraphs 35-36. Having examined the documents in issue, I am satisfied that they do not comprise matter of a kind mentioned in s.41(1)(a) of the FOI Act, but comprise information of a factual nature, coupled with a request that the respondent investigate certain matters. (In using the description "information of a factual nature", I do not mean to be taken as conveying any view that the information is accurate). Moreover, in providing the information, the third party was not acting in any of the capacities mentioned in s.46(2)(a). Therefore, s.46(2) does not apply so as to exclude documents 1 and 2 from eligibility for exemption under s.46(1) of the FOI Act.
14. Having carefully considered the evidence and submissions of each of the participants, in the light of my own examination of the documents in issue, I am satisfied that documents 1 and 2 are exempt under s.46(1)(b) of the FOI Act. In *Re "B"*, I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(b) of the FOI Act (at pp.337-341, paragraphs 144-161). The elements which must be established to satisfy the test for *prima facie* exemption under s.46(1)(b) are:
- (a) the matter in issue must consist of information of a confidential nature (i.e., which has the requisite degree of relative secrecy or inaccessibility: see *Re "B"* at pp.337-338, paragraph 148; and at pp.304-310, paragraphs 64-73);
 - (b) that information must have been communicated in confidence (which means that there must have been a mutual understanding, express or implied, between the supplier and the recipient of the information that the information was to be treated in confidence: see *Re "B"* at pp.338-9, paragraphs 149-152); and
 - (c) it must be the case that disclosure of the information could reasonably be expected to prejudice the future supply of such information. (As to the meaning of the phrase "could reasonably be expected to", see *Re "B"* at pp.339-344, paragraphs 154-160. The test for this element is not to be applied by reference to whether the particular confider, whose confidential information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of sources available, or likely to be available, to an agency: see *Re "B"* at p.341, paragraph 161).

If these three elements are satisfied, the application of the public interest balancing test incorporated in s.46(1)(b) must then be considered.

15. Both applicants contend that the contents of document 1 and 2 are not confidential, or at least not confidential *vis-à-vis* the applicants. Their contentions in this regard are, however, largely based on their surmise as to the likely contents of documents 1 and 2, in light of the second paragraph quoted from the QPS document which the applicants have obtained (see

paragraph 2 above) and brief indications obtained from the respondent as to the general nature of the topic of concern raised by document 1. I am satisfied that the contents of documents 1 and 2 are not in the public domain, are inaccessible to the general public, and are not known to the applicants. Hence the matter in issue is information of a confidential nature, within the terms of s.46(1)(b) of the FOI Act.

16. On the evidence before me, I am satisfied that the matter in issue was communicated in confidence, in that there was clearly a mutual understanding between the third party and the respondent that the matter in issue was to be treated in confidence. (I think that, at the time of the relevant communication, the understanding of confidentiality also extended to the third party's identity as the source of the information, but it became futile for the respondent to attempt to treat the third party as a confidential source once the applicants were able to produce to the respondent the document quoted at paragraph 2 above). Both documents 1 and 2 are clearly marked "CONFIDENTIAL". In his statutory declaration dated 10 January 1995, the third party stated:

... I consider that, in providing the information, I had a legitimate concern to raise with the Public Trustee in relation to a possible breach of a power of attorney.

I provided Documents 1 and 2 to the Public Trustee on a confidential basis, and expected that they would be received by the Public Trustee in confidence. I had an expectation that, upon receiving Documents 1 and 2, the Public Trustee would investigate the matters raised.

...

I believe that a breach of confidentiality of the details of my complaint/letter to the Public Trustee of Queensland will act as a deterrent to other would-be complainants, a situation against the public interest. Had I believed, at the time of writing Documents 1 and 2, that the information would be released to [the applicants], I would not have written them.

17. The respondent's submission confirms that the respondent understood and accepted the third party's request for confidentiality. That mutual expectations of confidence were reasonably held is borne out by the nature of the matter in issue (which I have examined). Significantly, in contrast to the situation of the complainant to the relevant regulatory authority in *Re McMahon and Department of Consumer Affairs* (1994) 1 QAR 377 (see especially pp.383-384; paragraphs 22-23), the third party had no personal involvement in the events (described in document 1) which he requested the respondent to investigate. His position in that regard was more akin to the position of the complainant to the relevant regulatory authority in *Re McEnery and Medical Board of Queensland* (1994) 1 QAR 349: see p.372, paragraph 51 of that case. Any investigation undertaken by the Public Trustee would have needed to tap sources directly involved in the events referred to in document 1. If any material adverse to the applicants had been independently obtained through an investigation by the respondent, it could have been put to the applicants without any need to refer to document 1 or its source. (The evidence before me is to the effect that, after some preliminary inquiries, the respondent determined that it had no jurisdiction, under the powers conferred by s.175F of the *Property Law Act 1974* Qld, to investigate the matters referred to in document 1, so no investigation was undertaken.)

18. Moreover, it is clear that the respondent was not being asked to investigate matters raised in document 2 (which had previously been forwarded by the third party to another government agency); rather the respondent was being invited to draw on any of the information contained in document 2 which the respondent might consider useful for the purpose of investigating the events referred to in document 1. It is clear from its contents, and the purpose for which the third party had forwarded it to another government agency, that the respondent must have understood that the respondent was to treat document 2 in confidence.
19. Although, in this instance, the respondent ultimately determined that it did not technically have the statutory authority to investigate the particular matters raised by the third party, it was reasonable for the third party to regard the respondent as an appropriate regulatory authority to investigate a possible abuse of a power of attorney. A person who supplies confidential information to an apparently appropriate regulatory authority, under an express or implied understanding of confidence, should not be denied protection against disclosure merely because it transpires that the regulatory authority technically lacks jurisdiction to investigate the confidential information conveyed. Such an approach would not serve the public interest which s.46(1)(b) seeks to protect.
20. As to the third element of s.46(1)(b), the respondent has made the following submission:

The documents were provided for the express purpose of the Public Trustee exercising his statutory authority to investigate possible abuses of an Enduring Power of Attorney.

Carrying out these investigations is one of the more onerous duties of the Public Trustee and it is not unusual for these investigations to be carried out against a background of hostility.

If the Public Trustee is to be able effectively to carry out these investigations, he must be able to assure providers of information that any information which they do provide will be kept confidential if they so require. If the Public Trustee is not able to provide this assurance, then many people may be encouraged not to report abuses of the system, in the interests of protecting themselves against harassment and even possible threats to physical safety.

The present situation can be distinguished from your decision in Re McMahon and Department of Consumer Affairs where you held that the body of a complaint was not exempt under s.46. In that situation, it was necessary for the investigating department to reveal substantive facts of the complaint to the person against whom the complaint was made, in order that the matter could be investigated. Such revelations are not necessary where the Public Trustee investigates a possible abuse of an Enduring Power of Attorney.

21. I am persuaded that disclosure of the matter in issue could reasonably be expected to prejudice the future supply of such information. Where confidential information has been—
- (a) voluntarily communicated by a member of the public to an appropriate regulatory authority, with the aim of prompting or assisting an investigation; and

- (b) communicated under a clear mutual understanding, which was reasonably held in all the circumstances of the case (especially having regard to the practicalities of investigating the particular information in issue and any requirements on the regulatory authority to accord procedural fairness to any subject of the investigation: *cf. Re McEniery* at pp.361-364, paragraphs 26-33; p.372, paragraph 52), that the information was to be treated in confidence by the regulatory authority;

then I consider that disclosure of the information to the subject of the investigation or proposed investigation, at a time when it still remains confidential (i.e., it has not, for instance, been disclosed in a court or tribunal, or by other legal requirement) 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 the regulatory authority.

22. Turning to the public interest balancing test incorporated in s.46(1)(b), the applicants have argued that disclosure to them of the matter in issue would, on balance, be in the public interest. A good deal of evidence has been put before me with a view to establishing that the allegations, which the applicants surmise are contained in documents 1 and 2, are false and malicious. From this basis, the applicants argue that they should have the opportunity to correct false information about them that is held on files of a government agency, this being one of the major objects of the FOI Act (as evidenced by s.5(1)(c) and Part 4 of the FOI Act).
23. It is certainly true that a major object of the FOI Act is to enable citizens to seek correction or amendment of government-held information relating to their personal affairs, if the information is inaccurate, incomplete, out-of-date or misleading. However, a precondition to an applicant's right to seek correction or amendment (conferred by s.53 of the FOI Act) is that the applicant must have obtained access (whether under the FOI Act or otherwise) to a document containing the information sought to be corrected or amended. If a citizen is reliant on first obtaining access under the FOI Act to information believed to require correction, the citizen has to face the fact that Parliament has seen fit (for the purpose of avoiding prejudice to certain essential public interests) to provide that access may be refused under the FOI Act to information which is exempt matter under the FOI Act. One of those essential public interests lies in ensuring that law enforcement and regulatory authorities do not suffer any unwarranted hindrance to their ability to perform their important functions for the benefit of the wider Queensland community, as a result of any unwarranted inhibition on the supply of information from citizens, on whose co-operation and assistance law enforcement and regulatory authorities frequently depend. The importance which English and Australian law attaches to safeguarding the flow of information needed by law enforcement and regulatory authorities for the effective performance of their functions is discussed in *Re McEniery* at paragraphs 56-64.
24. In this instance, no action has been or is proposed to be taken by the respondent, as a result of the information supplied by the third party. Thus, there is no detriment or threat of detriment to the applicants' interests which might justify a finding that the public interest in the fair treatment of individuals according to law, warranted disclosure to the applicants of the matter in issue.
25. There is a general public interest in the accountability of government agencies (including law enforcement and regulatory authorities) for the performance of their functions. In this instance, however, the respondent has explained to the applicant precisely what it did with the information in issue and why (i.e., declined to investigate it for want of jurisdiction). No interest in accountability of the respondent would be served by disclosure of the matter in

issue. Disclosure could only serve to fan the flames of a family dispute, and would not appear to me to serve any of the broader public interest objects for which the FOI Act was enacted.

26. I have some sympathy for the applicants' concern that information relating to them, which they believe to be false and malicious, should remain on file at a government agency which has no intention (nor, apparently, statutory authority) to investigate the information. It may be that the interests of both the respondent and the applicants would be best served by the respondent destroying the documents in issue. (I note that the respondent may need to seek the authorisation of the State Archivist in this regard, if existing arrangements approved by the State Archivist for the retention/disposal of the respondent's records do not already permit destruction of the documents in issue which are now more than 2½ years old.) I should state that my suggestion in this regard has nothing to do with the application of the FOI Act. (I note that I have previously held that destruction of a document is not a method of amendment or correction contemplated by Part 4 of the FOI Act: see *Re Doelle and Legal Aid Office (Queensland)* (1993) 1 QAR 207 at pp.217-220; paragraphs 49-63.) It is entirely a matter for the respondent to consider and pursue, if thought appropriate.
27. However, the applicants' expressed desire to obtain the matter in issue for the purpose of seeking to correct it under the FOI Act, allied with such assistance as the applicants are able to obtain from s.6 of the FOI Act, and other arguments raised in the applicants' written submissions as to why disclosure to them of the matter in issue would be in the public interest, have not persuaded me of the existence of public interest considerations favouring disclosure which are of sufficient weight to overcome the public interest in non-disclosure of the matter in issue which is inherent in the satisfaction of the test for *prima facie* exemption under s.46(1)(b) of the FOI Act.
28. I am satisfied that documents 1 and 2 comprise exempt matter under s.46(1)(b) of the FOI Act.

Conclusion

29. For the foregoing reasons, I affirm both of the decisions under review.

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 F N ALBIETZ
INFORMATION COMMISSIONER