OFFICE OF THE INFORMATION COMMISSIONER (QLD))) S 4 of 1993 (Decision No. 94001)

Participants:

"B"
Applicant

- and -

BRISBANE NORTH REGIONAL HEALTH AUTHORITY
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - entry in applicant's hospital records - information supplied by third party after seeking express assurance of confidentiality - construction of s.46(1)(a) of the *Freedom of Information Act 1992 Qld* - whether disclosure would found an action for breach of confidence - explanation of the criteria which must be satisfied for protection in equity of allegedly confidential information - construction of s.46(1)(b) of the *Freedom of Information Act 1992 Qld* - explanation of the requirements of s.46(1)(b) of the *Freedom of Information Act 1992 Qld* - words and phrases: "could reasonably be expected to prejudice"; "communicated in confidence"; "merely".

FREEDOM OF INFORMATION - refusal of access - information concerning the personal affairs of the applicant inextricably interwoven with information concerning the personal affairs of a third party - application of s.44(1), s.44(2) and s.6 of the *Freedom of Information Act 1992 Qld* in such circumstances explained - application of countervailing public interest test in s.44(1) of the FOI Act.

Freedom of Information Act 1992 Qld s.5(1)(c), s.6, s.14(b), s.21, s.25, s.28(1), s.33, s.38, s.39, s.40, s.42(1), s.44, s.45(1), s.46, s.47, s.49, s.51, s.53, s.72(1)(c), s.76(1) and (2), s.78(2), s.81, s.87, s.88(2), s.102(2), Part 3 Division 2, Part 5
Freedom of Information Act 1982 Vic s.35
Freedom of Information Act 1992 Cth s.43(1)(c)(ii), s.45(1)
Freedom of Information Amendment Act 1991 Cth
Trade Practices Act 1974
Freedom of Information Act 1989 NSW Item 13(b), Schedule 1
Freedom of Information Act 1991 SA Item 13(b), Schedule 1
Freedom of Information Act 1991 Tas s.33(1)
Freedom of Information Amendment Act 1993 Qld

DECISION

The matter in issue is exempt under s.44(1) and s.46(1)(a) of the *Freedom of Information Act 1992 Qld*, and accordingly the decision under review is affirmed.

Date of Decision: 31 January 1994.

.....
F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

BACKGROUND

1 By application dated 20 January 1993, B applied to the Information Commissioner for review of a decision dated 21 December 1992, made by Dr C B Campbell, Regional Director, Brisbane North Regional Health Authority (the Authority), which affirmed the decision dated 8 December 1992 made by Mr Bill Evans, Regional FOI Decision-Maker, to refuse to grant B access to one entry in B's medical records held by the Authority.

2 In his decision letter, Dr Campbell advised B that he had conducted an internal review of Mr Evans' decision of 8 December 1992, and that Mr Evans' decision was upheld on the basis of ss.44(1) and 46(1)(b) of the *Freedom of Information Act 1992 Qld* (hereinafter referred to as the FOI Act or the Queensland FOI Act). Dr Campbell concurred with the reasons for decision set out in Mr Evans' original decision; namely that access was not granted to the entry in question because it referred to the personal affairs of a third party, and included information which was provided by that third party in confidence, thus attracting exemptions from disclosure on the basis of ss 44(1) and 46(1)(b) of the FOI Act.

External Review Process

3 Pursuant to s.81 of the FOI Act, the respondent agency bears the onus of establishing that the internal review decision which is the subject of the present review proceedings was justified.

4 In accordance with the power vested in me by s.76(1) of the FOI Act, I requested that the Authority produce for my inspection the document containing the entry which is in issue in these proceedings, for the purpose of determining whether that entry comprised exempt matter. The relevant document was provided to me for inspection.

5 On the basis of my review of that document, the third party who had provided the information in question was contacted by a member of my staff, to determine whether the third party had any objection to the information in question being disclosed to B.

6 I note that, although s.51 of the FOI Act provides for consultation with third parties by the agency determining an access application, such consultation for the purpose of ascertaining a third party's views on disclosure is required only where the agency intends to grant access to the information in question. It is apparent that in this case, the Authority determined that the document was, on its face, clearly exempt, and that accordingly there was no necessity to consult with the third party in the course of its decision-making process.

7 As discussed in more detail below, in paragraph 19, the third party concerned confirmed to a member of my staff that the information to which access was refused by the Authority was provided in circumstances in which both the third party and the recipient of the information had agreed that the information (including the identity of the third party) would be kept completely confidential by the recipient, and not disclosed to anyone, including the applicant. The third party subsequently provided me with a signed written statement confirming the third party's understanding in this regard, and the facts underlying that understanding.

8 In addition to contacting the third party who had provided the information in issue in these proceedings, a member of my staff also contacted the particular employee of the Authority who had received and recorded the information in question. That person confirmed the third party's position with respect to the understanding of confidentiality of the information in question, and subsequently executed a statutory declaration to that effect.

9 In conjunction with the application for external review, B lodged a written submission in support of the application, in which B set out arguments in support of the claimed entitlement to have access to the information in question. After receiving the views of the third party who had provided that information, I wrote to B to advise of the status of my review, and to review the submissions which I had received to date.

10 At that time, I advised B that in addition to the exemption provisions in the FOI Act which had been relied upon by the Authority, I considered that s.46(1)(a) was also a relevant provision in the context of this matter. I further advised B that while the s.46(1)(a) exemption in the FOI Act is not subject to a "public interest balancing test", both s.44(1) and s.46(1)(b) are subject to a "public interest balancing test", and I referred to the statement made by Dr Campbell in his internal review decision letter, to the effect that he could see nothing in the notation in question, the disclosure of which would be in the public interest.

11 In light of the issues discussed in my advice to B, I invited B to make additional submissions in support of B's case for access to the information claimed by the Authority to be exempt matter. I note that as both the identity of the third party, and the information provided by the third party, are claimed by the Authority to be exempt matter, I am precluded by s.76(2) and s.87 of the FOI Act from disclosing that information to the applicant in the course of my review. Accordingly, my communications with B in this regard could not provide any information which would identify either the source, or substance, of the information in issue. I appreciate that the circumstances of this case (with no information being available to the applicant as to the nature of the document in issue) make it difficult for the applicant to fully canvass the issue of whether or not a document in dispute is exempt under the FOI Act. However, in a situation where both the identity of a third party and the information communicated by that third party are claimed to be exempt matter, that is a result compelled by the terms of the FOI Act, in particular s.76(2) and s.87.

12 In any event, B subsequently lodged a further written submission setting out at some length arguments on the issues which I had identified as being relevant to the present review.

Submissions of Applicant

13 In a submission accompanying the application for external review, B set out the basis on which Dr Campbell's internal review decision was disputed, and made the following statement concerning the factors claimed to weigh in favour of disclosure of the information in question:

> *"I believe that any information written into a patient's medical record should be made available to the patient it relates to. A medical record bears witness to all medical treatment of the patient.*
>
> *From a moral viewpoint, to deny one access to that knowledge may be compared to the withholding of a material witness at a trial. Denying access because it may disclose the confidences of a third party could justify denial to all or any part of relevant medical treatment of which the patient requires knowledge. As such, if the medical staff of a hospital wish any part of a patient's treatment to be withheld, they may do so under this guise.*
>
> *Surely, though it may be in the interests of the medical staff to do this, it is not in the interests of the public.*
>
> *The deleted entry in my medical report on 18/6/'92 is especially relevant as a part of my medical history since the report by Dr A Sheehan (19/6/'92), indicates that I was over-sedated on that day.*
>
> *I therefore appeal to you with a request that all withheld matter in my personal medical record be made available to me."*

14 Throughout those submissions, B made repeated references to issues of a medical nature, using phrases such as "medical treatment", "medical record" and "medical history". This suggested that B's real concern was to obtain the withheld information if it related to B's medical treatment in the Prince Charles Hospital, and in particular the administration of medications. Accordingly, a member of my investigative staff contacted B to obtain clarification of this point.

15 At that time, B made the following points in support of the application for access to the deleted entry in B's file:

- the drug treatment issue was only part of B's concern, and B wished to see the entire medical record, including the withheld portion (regardless of what the nature of that withheld portion was);
- B's view was that an individual's medical record should belong to the individual, and B was concerned that there were things recorded in the medical record which B felt were untrue, and which B might seek to have corrected or amended under the provisions of Part 4 of the FOI Act. However, since one cannot challenge what one does not know, B would be unable to pursue all issues in this respect without access to everything in B's medical file; and
- refusing to grant individuals total access to their medical records was an extension of, or analogous to, the paternalistic attitude of hospital staff toward patients in their care, with the staff feeling that patients were unable to handle their own affairs or make important decisions, and that the staff knew what was best for them.

16 In a supplementary submission, lodged on 20 August 1993, B reiterated many of the points

previously made:

> *"It is my belief that it is in the interests of the public, of which every individual is a part, that the Freedom of Information Act must be implemented to the fullest extent, allowing patients complete access to their files.*
>
> *To deny a patient this right by withholding essential information, thereby negating the benefit of access under the Act, amounts to a withdrawal of rights originally given.*
>
> *Would a court of law be satisfied with this type of selectivity? Of course not! Evidence must be made available as a whole. Information cannot be suppressed because of the disinclination of the witness. This insuperable limitation would never occur in any court of law.*
>
> *One may question the motives of those concerned in desiring information to remain hidden. No information should be considered valid unless able to be put to the test of debate.*
>
> *Patients should not be required to give account of their reasons in order to gain access to their files. If account is required, it should be that of those who would suppress information which is considered sufficiently relevant to be included in the patient's medical report.*
>
> *In my opinion, it should be mandatory for 'confidants' to be forewarned by medical staff that information given may become available, on request, to patients under the FOI Act. If this were so, the current problems which relate to this situation would never arise.*
>
> *In my requesting that the information withheld be made available to me (having noted the reluctance of the confidant to be identified) I request only that the information and the employment status of this person be made available. (Their occupation and whether or not they were medical personnel is relevant, but I do not require their name.) By submitting to this half-way mark, I have proposed an arrangement of mutual concession without compromising my requirements.*
>
> *As a result of the release of my medical file, I discovered the numerous misinterpretations and inaccurate data this document contained in relation to my state of mental well-being. On every page were errors and half-truths, which previous to my knowledge, I could have no opportunity to explain. Why would anyone wish to deny me the benefit of clarifying aspects of my medical report which cast doubt on my ability to use reasoned logic at that time? Should anyone be denied this right? Only by complete access to my file, am I given the opportunity to correct mistaken views, held in relation to my mental health. I believe no-one should ever be denied access to any information which is contained in their medical report. Every patient has a moral right to full access to their personal medical records.*
>
> *...*
>
> *In conclusion, I wish to state that though it is valid for the law to protect the privacy of the individual to whom the medical report refers; the privacy of an individual whose information is recorded on a file which is not their own is not entitled to the same privilege. ..."*

Submissions of Third Party

17 In notifying the third party of the review proceedings, I also advised the third party of the provisions of s.78(2) of the FOI Act which states:

> *"(2) Any person affected by the decision the subject of the review ... may apply to the Commissioner to participate in the review."*

18 I requested that, if the third party wished to be an applicant in the review, a brief letter to that effect be forwarded to me. I further advised that even if the third party did not wish to make formal application for "participant" status, it was my view that if the matter could not be settled, the third party would be required to give evidence to establish the Authority's claim that the document in issue was exempt under s.46(1) of the FOI Act on the basis that it consisted of information of a confidential nature that was communicated by the third party in confidence.

19 The third party did not take up the invitation to apply for participant status, but in the course of several conversations with a member of my investigative staff, advised that at the time the information recorded in the document in issue was provided, there had been a preliminary discussion between the third party and the recipient of the information in which the issue of confidentiality was specifically addressed. A statutory declaration was prepared for execution by the third party on the basis of the information stated in the third party's conversations with a member of my investigative staff. Despite repeated promises over a period of several months to execute and return the statutory declaration, the third party finally advised that the statutory declaration would not be executed. The third party did, however, forward to me a signed statement, witnessed by a Justice of the Peace, in which the third party stated that the information recorded in the document in issue had been provided on the basis of a mutual understanding between the third party and recipient that the information be kept completely confidential, and not disclosed to anyone, including the present applicant, B, and that the third party's expectation of confidentiality remained unchanged.

20 I note that s.72(1)(c) of the FOI Act specifically provides that:

> *"72(1) On a review under this Part -*
>
> ...
>
> *(c) the Commissioner is not bound by the rules of evidence and may inform himself or herself on any matter in any way the Commissioner considers appropriate."*

21 While the third party conveyed no sensible reason for being unwilling to execute the statutory declaration that was drafted on the third party's instructions, the signed statement which the third party forwarded was consistent with the account which the third party gave orally to my investigative staff, and was also consistent with a contemporaneous note made by the employee of the Authority who received and recorded the information in issue, and I am satisfied that it is proper for me to take into account the material provided by the third party for the purposes of this review.

The Relevant Provisions of the FOI Act

22 Insofar as relevant to the present proceedings, sections 44 and 46 of the FOI Act provide as follows:

> *"**Matter Affecting Personal Affairs***

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.*

(2) *Matter is not exempt under subsection (1) merely because it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to a document containing the matter is being made.*

...

Matter communicated in confidence

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."

ANALYSIS OF S.46 - EXEMPTION FOR "MATTER COMMUNICATED IN CONFIDENCE"

23 Section 46 of the FOI Act poses a number of difficulties, some of interpretation, but more substantially in its application. As to the former, an issue which strikes one immediately is: what purpose did the legislature have in enacting (in s.46(1)(a) and s.46(1)(b)) two distinct and alternative grounds of exemption which, though their respective spheres of operation do not precisely coincide, must overlap to a significant extent? As to difficulties in application, the ground of exemption under s.46(1)(a) operates by calling for the application of legal tests to be derived from the general law relating to actions for breach of confidence. This is a fairly complex area of law. Its complexity is compounded by the fact that uncertainty still attends some aspects of its modern development such that not only leading academic writers but also many judges seem to disagree on some points of principle or on methods of approach to some issues.

24 No assistance in the interpretation of s.46 can be gathered from a study of the legislative history of the FOI Act. Although s.46 of the FOI Act reproduces almost precisely clause 38 of the draft Freedom of Information Bill recommended by the Electoral and Administrative Review Commission (EARC) in its Report on Freedom of Information (December 1990, Serial No 90/R6),

the EARC Report itself contained no analysis or commentary of any significance on clause 38 of its recommended draft Bill. Neither the second reading speech on the Freedom of Information Bill 1991, or the Explanatory Notes which accompanied it, contain any useful explanatory material in respect of s.46 of the FOI Act.

25 The assistance to be gained from decided cases interpreting corresponding exemption provisions in the freedom of information legislation of other Australian jurisdictions is comparatively scarce. While the freedom of information statutes of other Australian jurisdictions include a "matter communicated in confidence" exemption, no two Australian jurisdictions use precisely the same formulation for the exemption. As a result, there are some significant differences between the structure and scope of the "matter communicated in confidence" exemption in s.46 of the Queensland FOI Act and the corresponding provisions contained in the freedom of information statutes of other Australian jurisdictions. This means that care must be taken in determining what assistance is appropriate to be gathered from approaches to the interpretation and application of those differently formulated provisions. In particular, caution is necessary when seeking guidance in the extensive case law generated by the Victorian Administrative Appeals Tribunal (the Victorian AAT) and Victorian Courts on s.35 of the *Freedom of Information Act 1982 Vic* (the Victorian FOI Act), and by the Commonwealth Administrative Appeals Tribunal (the Commonwealth AAT) and the Federal Court of Australia on the former s.45(1) of the *Freedom of Information Act 1982 Cth* (the Commonwealth FOI Act) as it stood prior to its amendment by the *Freedom of Information Amendment Act 1991 Cth*.

26 Section 46(1)(a) of the Qld FOI Act, however, corresponds fairly closely to the current s.45(1) of the Commonwealth FOI Act (as amended in 1991). Cases decided under s.45 of the Commonwealth FOI Act following its 1991 amendment are likely therefore to provide assistance in the interpretation and application of s.46(1)(a) of the Qld FOI Act, and indeed the legislative history relating to the 1991 amendments to s.45(1) of the Commonwealth FOI Act is of assistance in comprehending s.46(1) of the Qld FOI Act.

27 Prior to its 1991 amendment, s.45(1) of the Commonwealth FOI Act had provided that: *"A document is an exempt document if its disclosure under this Act would constitute a breach of confidence."* A series of cases in the Commonwealth AAT and the Federal Court of Australia (see, for example, *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180; *Baueris v Commonwealth of Australia* (1987) 13 ALD 470; *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) and Another* (1987) 74 ALR 428) held that the former s.45(1) of the Commonwealth FOI Act extended to both actionable and non-actionable breaches of confidence, i.e. that the provision was wide enough to afford protection from disclosure in circumstances where a legal action for breach of confidence may not succeed.

28 The Senate Standing Committee on Legal and Constitutional Affairs (in its 5 year review of the operation of the Commonwealth FOI Act) considered that this approach gave the s.45 exemption too broad a sphere of operation. In its 1987 Report on the Operation and Administration of the Freedom of Information Legislation (the 1987 Senate Committee Report), the Senate Committee said (at pp. 208-209):

> *"14.30 The uncertainty said to surround the scope of section 45 was criticised in submissions. The uncertainty arises in part because section 45 operates by reference to the difficult and developing general law relating to the protection of confidential information. More significantly, interpretations by the Tribunal have expanded the ambit of section 45 so as to protect some confidences that the general law does not protect. The extent of the expansion is uncertain, and the question whether the Act permits such expansion is not beyond doubt. [Footnote: Compare for example both the comment of Beaumont J in* Baueris v Commonwealth of

> Australia *(9 June 1987) p. 4, and the decision of the majority in* Corrs Pavey Whiting & Byrne v Collector of Customs *(13 August 1987) pp. 2-3 (Sweeney J) and p. 6 (Jenkinson J), with the cogent dissent in the latter case, pp. 25-29 (Gummow J)]. Further uncertainty has arisen on whether it is permissible to apply public interest considerations so as to deny, on the facts of a particular case, the protection which would otherwise be conferred by the expanded interpretation given to section 45.*
>
> *14.31 In its 1979 Report, the Committee recommended that what has since become section 45 should be deleted. This recommendation was rejected. The then Government considered that it would not be proper for an agency to be required to disclose a document under the FOI Act where that disclosure would breach a confidence protected by the general law. [Footnote: Senate, Hansard, 11 September 1980, p. 804].*
>
> *14.32 The Committee accepts this view. The Committee recognises that the general law is undergoing judicial development, and is, in some respects, uncertain. Therefore the only practical way to ensure that FOI Act protection is at least as wide as the protection given by the general law is by means of an exemption provision that operates by incorporating that general law.*
>
> *14.33 The Committee does not consider, however, that any wider protection should be conferred by section 45. [Footnote: Cf.* Corrs Pavey Whiting & Byrne v Collector of Customs *(13 August 1987) p. 24 (Gummow J): general law is adequate to protect confidences reposed by citizens in government.]*
>
> *14.34 Accordingly, the Committee recommends that sub-section 45(1) be amended to make clear that it provides exemption where, and only where, the person who provided the confidential information would be able to prevent disclosure under the general law relating to breach of confidence."*

29 The purpose of the 1991 amendment to s.45(1) of the Commonwealth FOI Act was set out in the Explanatory Memorandum which accompanied the introduction of the *Freedom of Information Amendment Act 1991 Cth*, in the following terms:

> *"Clause 32 - documents containing material obtained in confidence*
>
> *61. Clause 32 implements a Senate Committee recommendation that the breach of confidence exemption in the Act be amended to make clear that it provides exemption where, and only where, the person who provided the confidential information would be able to prevent disclosure under the general law relating to breach of confidence. The amendment overcomes decisions by the Administrative Appeals Tribunal which have created uncertainty as to the scope of section 45 and which have expanded the exemption to protect some confidences that the general law does not protect, such as information about a crime or fraud. Clause 32 amends sub-section 45(1) to provide that a document is an exempt document if its disclosure under the Act would found an action by a person, other than the Commonwealth, for a breach of confidence."*

30 The employment in s.46(1)(a) of the Queensland FOI Act of the same key phrase to define the scope of the exemption (i.e. "would found an action for breach of confidence") as is used in the amended s.45(1) of the Commonwealth FOI Act, in my view indicates that the Queensland Parliament intended that s.46(1)(a) should afford exemption where the provider of confidential

information now in the possession or control of a Minister or agency subject to the Queensland FOI Act, would be able, in a legal action, to prevent disclosure of that information, under the general law relating to breach of confidence.

31 Whereas the Commonwealth Parliament clearly intended that its s.45 exemption provision should provide no greater protection from disclosure than would be afforded by the general law in an action for breach of confidence, the Queensland Parliament, in enacting s.46(1)(b) appears to have intended that some confidential information communicated in confidence to an agency or Minister, which might not be afforded protection from disclosure by the general law in an action for breach of confidence, should nevertheless be capable of being protected from disclosure under the Queensland FOI Act, provided two further conditions are satisfied, i.e.:

(a) its disclosure could reasonably be expected to prejudice the future supply of such information; and

(b) its disclosure would not, on balance, be in the public interest. (This is the same "countervailing public interest test" which is incorporated into many of the exemption provisions in Part 3 Division 2 of the FOI Act, and the operation of which I endeavoured to explain in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs*, Information Commissioner Qld, Decision No. 93002, 30 June 1993, at paragraph 19.)

32 This poses a reasonably stringent test. The first of these conditions is not an element that a plaintiff would have to establish to found an action for breach of confidence (though it may be a factor relevant to the satisfaction of an additional test imposed by the law when a government, as plaintiff, brings an action for breach of confidence, see paragraphs 113 to 118 below) thus making the test for exemption under s.46(1)(b) potentially more difficult to satisfy than the test for exemption under s.46(1)(a).

33 Moreover, the "countervailing public interest test" which is incorporated into s.46(1)(b), but not s.46(1)(a), leaves at large the public interest considerations which may be found to justify the disclosure of information that otherwise satisfies the first three elements of s.46(1)(b). This is in contrast to the comparatively restricted grounds of public interest which have been accepted by English courts and some Australian judges as providing a just cause or excuse in law, for a person's disclosure of confidential information in breach of an obligation of confidence (see paragraphs 121 to 131 below).

34 Given that the first two elements of s.46(1)(b) correspond almost precisely with two of a number of elements that must be established to obtain protection from disclosure under the general law, it appears that there is bound to be a significant overlap in the coverage of s.46(1)(a) and s.46(1)(b), that is confidential information will frequently qualify for exemption under both s.46(1)(a) and s.46(1)(b). Some confidential information, however, may be eligible for protection under one only of s.46(1)(a) or s.46(1)(b). There are likely to be many instances where s.46(1)(a) will be an easier test to satisfy than s.46(1)(b): some confidences that would be protected by the general law in an action for breach of confidence may not be able to satisfy the third and fourth elements of s.46(1)(b). It appears from cases received in my office to date that many FOI decision-makers prefer to invoke reliance on the four elements clearly set out in s.46(1)(b) to claim exemption, rather than grapple with the intricacies of the general law relating to breach of confidence. This is not surprising since most FOI administrators are not legally trained, and the general law relating to breach of confidence is reasonably complex. These reasons for decision are intended to afford some guidance in this area.

Effect of s.46(2)

35 FOI administrators who approach the application of s.46 should direct their attention at the outset to s.46(2) which has the effect of excluding a substantial amount of information generated within government from the potential sphere of operation of the s.46(1)(a) and s.46(1)(b) exemptions. Subsection 46(2) provides in effect that the grounds of exemption in s.46(1)(a) and s.46(1)(b) are not available in respect of matter of a kind mentioned in s.41(1)(a) (which deals with matter relating to the deliberative processes of government) unless the disclosure of matter of a kind mentioned in s.41(1)(a) would found an action for breach of confidence owed to a person or body outside of the State of Queensland, an agency (as defined for the purposes of the FOI Act), or any official thereof, in his or her capacity as such an official. Section 46(2) refers not to matter of a kind that would be exempt under s.41(1), but to matter of a kind mentioned in s.41(1)(a). The material that could fall within the terms of s.41(1)(a) is quite extensive (see *Re Eccleston* at paragraphs 27-31) and can include for instance, material of a kind that is mentioned in s.41(2) (a provision which prescribes that certain kinds of matter likely to fall within s.41(1)(a) are not eligible for exemption under s.41(1) itself).

36 The terms of s.46(2) actually render s.46(1)(b) redundant, for practical purposes, in respect of matter of a kind mentioned in s.41(1)(a). Even where matter of that kind was provided by a person or body outside the categories referred to in s.46(2)(a) and (b), s.46(2) stipulates that disclosure of the matter must found an action for breach of confidence owed to such a person or body. If that requirement can be satisfied, then s.46(1)(a) will apply, and the issue of whether s.46(1)(b) also applies is of academic interest only.

Issues in the Interpretation and Application of s.46(1)(a)

What is covered by "an action for breach of confidence"?

37 In *Re Kamminga and Australian National University* (1992) 15 AAR 297, the Commonwealth AAT chaired by O'Connor J (President) had occasion to consider and apply s.45 of the Commonwealth FOI Act (following its 1991 amendment). The Tribunal said at (p.300):

> *"Section 45 of the FOI Act, as amended, which is discussed below, provides protection for documents to which the equitable doctrine of confidentiality applies."*

38 The Tribunal did not explain the basis for its suggestion that s.45 of the Commonwealth FOI Act incorporated only the equitable doctrine of confidentiality. Further on in the same decision, the Tribunal said (at p.304):

> *"Prior to the amendment of the Act, s.45 was not limited in its application to situations where disclosure would be actionable at general law: see* Corrs Pavey Whiting and Byrne v Collector of Customs (Vic) *(1987) 14 FCR 434; 7 AAR 187. The words 'found an action' in the amended section establish that that is no longer the case. ...*
>
> *The question for the Tribunal then is whether disclosure could found an action for 'breach of confidence'. The dissenting judgment of Gummow J in* Corrs Pavey *(supra at 449; 203-204) expressed the view that 'the term "breach of confidence" is used in s.45 in the sense well known to the law as the description of a particular class of legal proceeding: see, for example, F Gurry,* Breach of Confidence *(1984), p.25; "The English Law Reform Commission's Report on Breach of Confidence" (Law Com No. 110), 1981, Pt. III'. The Tribunal notes that there may be some ambiguity in the term 'breach of confidence'; in particular, it is not clear whether it covers the situation where there is a contractual right of confidence. It may be that*

it does so in all situations, or it may be that it does so in only those situations where a plaintiff could invoke the auxiliary jurisdiction of equity in relation to a breach of confidence."

39 The Tribunal did not attempt to explore this possible ambiguity, since an action for breach of confidence in the case before it could only have been based on the independent jurisdiction in equity. However, I have difficulty in accepting that contractual obligations of confidence may not be covered by the words which are common to both s.45(1) of the Commonwealth FOI Act and s.46(1)(a) of the Queensland FOI Act. The only possible ambiguity I can perceive is if the term "action for breach of confidence" is not ordinarily understood to extend to an action for breach of a contractual obligation of confidence (being an action for breach of contract), but is ordinarily understood to refer only to an action for breach of confidence in the exclusive jurisdiction of equity. A check of the references cited by Gummow J as referred to in the passage above would tend to the conclusion, however, that the "particular class of legal proceeding" to which Gummow J referred should be taken to include a cause of action based on breach of a contractual obligation of confidence as well as an action for breach of confidence arising solely in the jurisdiction of equity (for example, see the English Law Reform Commission's Report on Breach of Confidence at p.18). Gummow J referred to Gurry's treatise on Breach of Confidence (Oxford University Press, 1984; references hereinafter to "Gurry" are references to this text) where it is stated (at pp. 25-27):

"The jurisdictional basis of the action for breach of confidence has been a cause of lingering uncertainty and controversy. Contract, equity, and property have at different times each provided the basis on which the courts have granted relief. In some cases, a mixture of these bases has been relied on.

...

Most commentators have regarded this situation as unsatisfactory and as evidence of conceptual confusion on the part of the courts. In Argyll v Argyll *[1967] 1 Ch 302, however, Ungoed-Thomas J pointed the way to an alternative interpretation by saying that it is the* policy *of the law which is 'the basis of the courts' jurisdiction. This policy, it has been observed, is to enforce confidences created by the communication of confidential information. Underlying all of the cases in which the courts have granted relief is a broad notion of confidence reposed by one party in another which the courts will enforce. Once this policy is brought to mind, it is possible to regard the jurisdictional sources on which the courts rely as merely secondary mechanisms which provide the means by which the courts can enforce a confidence.*

The courts' attitude to jurisdictional sources has thus been a pragmatic one. Their principal concern has been, not to classify the breach of confidence action into an existing conceptual category, but to use existing categories to enforce the more fundamental notion of confidence. Thus, Turner V.-C., after a survey of the various sources on which the courts have relied, concluded in Morrison v Moat *that 'upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it'.*

The action should properly be regarded, therefore, as sui generis, *and attempts to confine it exclusively within one conventional jurisdictional category should be resisted. The present approach has the advantage of flexibility, giving the courts freedom to respond to the different social circumstances in which a confidence may arise, and it would be unwise to sacrifice this for conceptual neatness.*

Within the context of a given case, however, it may become important to identify the particular jurisdiction on which the court relies. The jurisdictional basis determines what remedies are available to the litigant."

40 Further on, after reviewing cases in which the courts have relied on express or implied contractual terms to protect confidential information, Gurry makes the following points:

- *"The contractual jurisdiction must be considered an important basis of the action for breach of confidence."* (at p.35)

- *"Equity has two distinct roles in the breach of confidence action. The first of these is auxiliary to the legal jurisdiction which the courts have in contract. ... Where an injunction is granted in aid of a legal right the court is still, by history, exercising an equitable jurisdiction. Thus, where an obligation of confidence is founded in contract, and the court grants an injunction to restrain the confidant from misusing confidential information in breach of that obligation, the injunction is granted upon an exercise of the equitable jurisdiction. This auxiliary jurisdiction in equity has been frequently used by the courts in cases involving a breach of confidence and, in appropriate circumstances, an injunction will be granted to enforce either an express or an implied contractual obligation of confidence.*

  The second role of equity is to provide a jurisdiction by which the courts will restrain a breach of confidence <u>independently</u> of any right at law." (at p.36).

- *"The independent equitable jurisdiction is an important basis for the protection of confidential information, for it enables the court to grant relief in two situations where there would be no remedy at law. First, where the parties to confidential disclosure are not in a contractual relationship, equity provides the only basis for the court's intervention. ...*

  Secondly, where a third party receives confidential information from a confidant in breach of the confidant's obligation of confidence, equity will restrain the third party from misusing that information." (at p.37-38)

- *"It is possible that the same facts could give rise to a contractual or an equitable obligation of confidence. The cases in which such a situation has arisen establish two propositions:*

  (a) a confidant can be held liable in respect of the same conduct for breach of both of an equitable and a contractual obligation of confidence;
  (b) the courts will sometimes proceed on the equitable basis alone, even though an obligation of confidence might exist in contract." (at p.39)

- *"... a plaintiff pleading 'breach of confidence' would leave open the options of either a breach in contract or in equity. The conclusion which seems reasonable in this respect is that the courts will make available to a confider the full scope of the duty of confidence as it exists in the law ... and, in so doing, will use its multiple jurisdictions to grant whatever remedies seem appropriate for breach of that duty."* (at p.46)

41 Another leading text writer in this field, Robert Dean in <u>The Law of Trade Secrets</u>, (Law Book Company, 1990; references hereinafter to "Dean" are references to this text) after reviewing the decided cases endorsed (at p.42) the views expressed by Fullagar J of the Supreme Court of Victoria

in *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* [1979] VR 167 at p.190:

> *"Despite some articles of one kind or another overseas some of which in my respectful opinion border upon obscurantism, I am of the opinion that all the cases on 'breach of confidence' in relation to information fall into two broad and quite clear classes ... whether relating to trade secrets or not. The first ... is ... contract. The second is composed of ... intervention on purely equitable grounds."*

42 Dean concluded his chapter on the jurisdictional base of actions for the protection of trade secrets with the following summary:

> *"(5) apart from statutory monopoly, secret information is protected;*
>
> *(a) directly, by the use of three causes of action:*
>
> *(i) breach of fiduciary duty of confidence and fidelity;*
> *(ii) breach of an equitable duty of confidence;*
> *(iii) breach of contract;*
>
> *and that the causes of action in (i) and (ii) predominate.*
>
> *(b) indirectly, by a number of causes of action including interference with contractual relations, conspiracy, trespass, conversion and interference with trade.*
>
> *(6) the courts rely in the main on 5(a)(i) and (ii) above but may in specific situations rely on 5(a)(iii) above and have relied alternatively and at the same time on combinations of 5(a)(i), (ii) and (iii), creating a multi-jurisdictional basis to effect the most suitable remedy;*
>
> *(7) the courts often deliberately refrain from specifying the cause of action upon which they rely;*
>
> *(8) the apparent willingness of the courts to enjoin the industrial spy from disclosing or using information not impressed with a confidential obligation is best explained by a duty of confidence implied from the circumstances surrounding the obtaining of the information knowledge of which is implied from the surreptitious conduct of the defendant;*
>
> *(9) third parties will be enjoined by equity to protect the original in personam obligation where it is equitable to do so."* (at p.98)

43 As in *Kamminga*, the circumstances of the present case are such that an action for breach of confidence to restrain disclosure of the information in issue could only be founded in the independent jurisdiction of equity (since the parties to the communication of the information in issue did not stand in a contractual relationship) and the words "found an action for breach of confidence" in s.46(1)(a) of the Queensland FOI Act undoubtedly cover the equitable action for breach of confidence. It is therefore not essential that I decide whether s.46(1)(a) extends to a cause of action for breach of a contractual obligation of confidence. If the Commonwealth AAT or the Federal Court should in a future case advance an explanation as to why the words "found an action for breach of confidence" in s.45(1) of the Commonwealth FOI Act should be construed as being confined to an action in equity for breach of confidence, I would be prepared to revisit this issue. However, on the basis of the material set out above, I consider that the better view is that the words "found an action for breach of confidence" in s.46(1)(a) of the Queensland FOI Act should be taken to refer to a legal action brought in respect of an alleged obligation of confidence in which reliance is placed on one or more of the following causes of action:

(a) a cause of action for breach of a contractual obligation of confidence;
(b) a cause of action for breach of an equitable duty of confidence;
(c) a cause of action for breach of a fiduciary (the meaning of "fiduciary" is explained at paragraph 53 below) duty of confidence and fidelity.

(See, for example, *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd [No. 2]* (1988) 62 ALJR 3

44 Furthermore, I consider that the terms of s.46(1)(a) require the test of exemption 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. It appears that the courts, in an action for breach of confidence, apply a fairly stringent test of whether the plaintiff has standing to enforce an obligation of confidence. Thus Gurry says (at p.121):

> *"A breach of confidence is actionable only by the person to whom the obligation is owed:*
>
> ... the party complaining must be the person who is entitled to the confidence and to have it respected. He must be a person to whom the duty of good faith is owed *(*Fraser v Evans *[1969] 1 QB 349, 361 per Lord Denning MR).*
>
> *Where the obligation of confidence is a contractual one, this proposition represents a self-evident application of the doctrine of privity - only a party to a contract can sue on it."* (As to the standing of the plaintiff, see also Meagher, Gummow, Lehane, Equity: Doctrines and Remedies, 3rd ed, Butterworths, 1992, at p.876, para 4114.)

Contractual obligations of confidence

45 In the context of s.46(1)(a) the word "confidence" must be taken to be used in its technical, legal sense, thus:

> *"A confidence is formed whenever one party ('the confider') imparts to another ('the confidant') private or secret matters on the express or implied understanding that the communication is for a restricted purpose."* (F Gurry "Breach of Confidence" in P Finn (Ed.) Essays in Equity; Law Book Company, 1985, p.111.)

My references to a cause of action for breach of a contractual obligation of confidence must be understood in this sense. A contractual term requiring that certain information be kept secret will not

necessarily equate to a contractual obligation of confidence: an issue may arise as to whether an action for breach of the contractual term would satisfy the description of "an action for breach of confidence" (so as to fall within the scope of s.46(1)(a) of the FOI Act). An express contractual obligation of confidence ordinarily arises in circumstances where the parties to a disclosure of confidential information wish to define clearly their respective rights and obligations with respect to the use of the confidential information, thereby enabling the parties to anticipate their obligations with certainty. A mere promise to keep certain information secret, unsupported by consideration, is incapable of amounting to a contractual obligation of confidence, and its effectiveness as a binding obligation would depend on the application of the equitable principles discussed in more detail below.

46 In the absence of express contractual terms imposing an obligation of confidence, a contractual obligation of confidence may be founded on an implied term in an existing contractual relationship. In *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, Lord Greene MR said (at p.211):

> *"If two parties make a contract, under which one of them obtains for the purpose of the contract or in connection with it, some confidential matter, even though the contract is silent on the matter of confidence, the law will imply an obligation to treat that confidential matter in a confidential way, as one of the implied terms of the contract; but the obligation to respect confidence is not limited to cases where the parties are in a contractual relationship.*
>
> *The plaintiff can clearly, therefore, rely upon the wider principle of equity and I do not think it makes much difference which of the causes of action pleaded is considered because the same necessity arises of it being shown that the information was in fact confidential and imparted as such and that the defendant is seeking to use for his own purposes information which he obtained only on such a basis."*

47 The basis upon which a term of confidentiality will be implied in an existing contract was referred to in *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* by Fullagar J who said (at p.190):

> *"The circumstances in which the law will imply a term in a contract are well known and clear ... For the most part the cases where the law implies a contractual obligation not to divulge or use information are confined to those cases where the implication or importation is 'necessary to give efficacy to the contract' ... such an implication will be made when it is necessary in order to give the transaction that efficacy which both parties must have intended it to have."*

48 In other cases the courts have managed to construct an implied contract around a confidential disclosure between parties who did not stand in a subsisting contractual relationship. In *Mechanical and General Inventions Co Ltd and Lehwess v Austin & Austin Motor Co Ltd* [1935] AC 346, the plaintiff disclosed confidential information to the defendant with a view to a future business arrangement, but the parties subsequently failed to come to any agreement. The defendant later used the information which had been imparted by the plaintiff. The plaintiff recovered damages for breach of an implied contract constituted by the plaintiff's disclosure of confidential information, and the defendant's implied promise not to use the information for a purpose other than considering whether to take a licence of it. (See also *Nichrotherm Electrical Co Ltd v Percy* [1957] RPC 207 at p.214-215.)

Flexible approach of the courts to jurisdiction

49 Both Dean (at p.50-53) and Gurry (at p.30-35) have commented upon a willingness evident in

decided cases in this field for the courts to overlook the orthodox contractual principle that a written contract is exhaustive of its terms. Where the terms are too limited, an implied obligation of confidence can be imported to fill the gap. Again, both Dean (at p.44-46) and Gurry (at p.39-46) have noted the flexibility and pragmatism of the courts to jurisdiction in the inter-relationship between express and implied contract, and equity. Dean notes (at p.44) that equitable protection has been used in preference to an existing contractual obligation, or alongside a contractual obligation. Dean also notes (at p.47) that there are cases in which the judiciary has indicated that whether implied contract or equity is chosen is irrelevant because they are interchangeable, and the extent of the obligations under each is identical (citing, *inter alia*, the Australian cases *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37 at p.41; *Mense v Milenkovic* [1973] VR 784; *Es-me Pty Ltd v Parker* [1972] WAR 52; and this is implicit in the approach of Lord Greene MR in the passage set out at paragraph 46 above); and in *Collins (Engineers) Ltd v Roberts and Co Ltd* [1965] RPC 429 at p.431 the court used the recognised test for determining the existence of an equitable obligation of confidence as a test for establishing the existence of an implied contractual obligation of confidence (the parties already being in a subsisting contractual relationship).

50 Those who regard it as important to preserve the purity of equitable doctrine view these trends with concern. McLelland J in *United States Surgical Corp v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766 at p.779 correctively observed that:

> *"Contractual obligations and fiduciary duties have different conceptual origins, the former represents express or implied common intentions ... and the latter being descriptive of circumstances in which equity will regard conduct of a particular kind as unconscionable and consequently attract equitable remedies."*

51 The learned authors of Meagher, Gummow, Lehane, Equity: Doctrines and Remedies, (Butterworths, 3rd Ed., 1992) have commented in their chapter on confidential information as follows (at p.865-6):

> *"Most simply, the rights of the plaintiff may rest in express contract. Further, in many contracts terms will be implied to control use by the defendant of information valuable or otherwise important to the plaintiff. Thus, the law implies into his contracts terms whereby a professional man (an expression which certainly includes medical practitioners, solicitors, accountants, bankers) is to keep his client's affairs secret and not to disclose them to anyone without just cause:* Parry-Johns v Law Society *[1969] 1 Ch 1. The law of master and servant is replete with illustrations.* ...
>
> *The subject of this chapter is the jurisdiction in equity to restrain breaches of confidence, not in the auxiliary jurisdiction as an aid to contractual rights but in the exclusive jurisdiction where the plaintiff has no legal rights. Where there is a contract then it is to the contract that the court should look to see from express words or necessary implication what the obligations of the parties are, and the introduction of equitable concepts should be resisted:* Vokes v Heather *(1945) 62 RPC 135 at 142;* Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd *[1979] VR 167 at 191. The* [English] *Court of Appeal has affirmed that where the parties are or have been linked by contract their rights and obligations in respect of trade secrets are to be found in the terms (express and implied) in the contract:* Faccenda Chicken Limited v Fowler *[1987] Ch 117 at 135-8. Yet in a number of cases where there has been a contractual nexus the judges have nevertheless treated equitable principles at length as if they overlapped or were concurrent with the common law: for example,* Peter Pan Manufacturing Corp v Corsets Silhouette Ltd *[1963] 3 All ER 402;* Surveys and Mining Ltd v Morison *[1969] Qd R 470;* Mense v Milenkovic

[1973] VR 784; Conveyor Co of Australia Pty Ltd v Cameron Brothers Engineering Co Ltd *[1973] 2 NZLR 38;* Thomas Marshall Ltd v Guinle *[1979] Ch 227*; G D Searle and Co Ltd v Celltech Ltd *[1982] FSR 92. The apparent confusion of thought is not without significance. It has for example encouraged the infiltration into equity of the 'reasonable man' as the exemplar of equitable standards of conduct (*Coco v A N Clark (Engineers) Ltd *[1969] RPC 41 at 48;* Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd *[1979] VR 167 at 190-1) whereas the merest perusal of what has been said in Chapter 5 of this work in dealing with fiduciaries, would show that the standards required by equity can be quite above those of the commonality of mankind."*

52 Nevertheless, as is acknowledged in the preceding passage, there is abundant precedent for the flexible, and less doctrinally pure approach described by Dean and Gurry at paragraph 49 above. Gurry summarised the way in which the courts have used particular jurisdictional sources to enforce obligations of confidence, as follows (at p.61-62):

"1. Where the defendant has received confidential information pursuant to a contractual relationship with the plaintiff:

(a) If there is an express term *of confidence in the contract:*

(i) the courts may proceed on the basis of that term alone;
(ii) the courts may supplement it with a term implied from the contract;
(iii) the courts may choose to ignore the term and proceed on the basis of the independent jurisdiction in equity.

(b) If there is no express term *of confidence in the contract:*

(i) the courts may proceed on the basis of implied terms of the bargain;
(ii) the courts may disregard the contract and proceed on the basis of the independent jurisdiction in equity;
(iii) the courts may proceed on the basis of both the implied terms of the contract and the independent jurisdiction in equity.

In each of these situations, the choice of jurisdiction seems to be conditioned by a desire to give the confider the benefit of the full duty of confidence as it exists in the law. Thus, where an express term falls short of this full duty, implied contract or equity may provide an additional or alternative basis for relief. Furthermore, it seems that, where appropriate, the confider should be given access to the full range of remedies available for a breach of confidence. Thus, implied contract may allow access to damages where the equitable jurisdiction has been used to grant an injunction.

2. Where the defendant has received confidential information from the plaintiff but there is no contract between the parties:

Here, there is an independent jurisdiction in equity on which the courts may proceed to grant relief.

3. Where the defendant is a third party who has acquired confidential information other than through a disclosure to him by the plaintiff:

> *(a) If the defendant acquires the information as the result of a breach of either a contractual or an equitable obligation of confidence on the part of a confidant, the courts may grant relief on the basis of an independent jurisdiction in equity.*
>
> *(b) If the defendant acquires the information by reprehensible means, the courts may proceed on the basis of property in the confidential information.* [Dean disagrees with Gurry on this last point. Dean prefers the view expressed at point (8) of the passage set out in paragraph 42 above.] *"* (Footnotes omitted)

53 Fortunately, it appears to be the case that at least for the purposes of the application of s.46(1)(a) of the FOI Act, there is no need to differentiate between a cause of action for breach of an equitable duty of confidence and a cause of action for breach of a fiduciary duty of confidence and fidelity. (The word "fiduciary" comes from the Latin "fiducia" meaning "trust", so the adjective "fiduciary" means of or pertaining to a trustee or trusteeship. Thus McLelland J explained in *United States Surgical Corp v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766 at p.810: *"... the paradigm of the fiduciary relationship is the trust. A trust imposes obligations relating to property vested in the trustee, but an analogy is recognised in the position of a person who is obliged, or undertakes, to act in relation to a particular matter in the interests of another ... and is entrusted with the power to affect those interests in a legal or practical sense. ... the special degree of vulnerability of those whose interests are entrusted to the power of another, to abuse of that power, justifies a special protective rule."* The fiduciary is subject to obligations of good faith and of loyalty to the interests of the principal, e.g. not to pursue self-interest in conflict with the principal's best interests.) Gurry argues forcefully (at p.158-162) that:

> *"It becomes meaningless to speak of fiduciaries as a separate category of confidants amongst those who are generally bound by an obligation of confidence. ... The correct view here seems to be that recognition of a position as carrying certain fiduciary obligations serves only to establish the existence of an obligation of confidence 'with particular force'* [citing *Baker v Gibbons* [1972] 1 WLR 693, 700 per Pennycuick V.C.]. *In other respects, the principles which determine whether there is an actionable cause for breach of confidence remain unaffected."*

Gurry's approach was explicitly endorsed by McHugh J A in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* 1987) 75 ALR 353 at p.456, and was impliedly endorsed in the approach adopted by Kirby P in the same case (at p.414).

54 For the purposes of the general law (especially with respect to the protection of trade secrets), Dean regards the distinction between the inter-related equitable doctrines of breach of confidence and breach of fiduciary duty as important (see Dean p.101-103). For the purposes of the application of s.46(1)(a) of the FOI Act, however, the fact that the doctrine of breach of fiduciary duty gives a greater depth of protection to confidential information is not of particular significance. The only misuse of allegedly confidential information that is contemplated in an FOI context is unauthorised disclosure of the confidential information. Any more extensive aspects of an equitable obligation of confidence or of a duty of fidelity (i.e. those which bind the confidant to refrain from other kinds of misuse of the confidential information) are not directly relevant for the purposes of the application of s.46(1)(a). The views of Gurry expressed at paragraph 53 above can safely be applied in this context, that is, the fact that a confidant is in a position which is traditionally regarded as fiduciary can be treated as relevant to determining whether confidential information received by the confidant (in the confidant's capacity as a fiduciary) was received in circumstances importing an obligation of confidence, and there is no need to embark upon a detailed examination of the scope of any relevant fiduciary duty. Confidential information imparted within the boundaries of a fiduciary relationship will almost invariably give rise to an obligation owed by the fiduciary to respect the confidence. Examples of relationships in which the courts have imported fiduciary obligations of confidence are those between partners, principal and agent, employer and employee, husband and wife, guardian and ward, director and shareholder, promoters and the companies they promote, and professionals such as doctors, psychologists, social workers, accountants, solicitors, bankers, barristers etc. and their clients.

55 There can be no suggestion on the facts of the present case that the information in issue was imparted by the third party to the Authority pursuant to a contractual relationship, and no express or implied contractual obligation of confidence could be relied upon. It is also clear that no fiduciary relationship existed between the third party and the Authority, or between the third party and the employee of the Authority who received and recorded (on behalf of the Authority) the information conveyed by the third party. If the information is to be exempt from disclosure under s.46(1)(a) of the FOI Act, then the elements of an action in equity for breach of confidence must be established.

The Criteria which must be Satisfied for Protection in Equity of Allegedly Confidential Information

56 In *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No. 2)* (1984) 156 CLR 414 at 438, Deane J, delivering the judgment of the High Court of Australia said:

> *"It is unnecessary, for the purposes of the present appeal, to attempt to define the precise scope of the equitable jurisdiction to grant relief against an actual or threatened abuse of confidential information not involving any tort or any breach of some express or implied contractual provision, some wider fiduciary duty or some copyright or trade mark right. A general equitable jurisdiction to grant such relief has long been asserted and should, in my view, now be accepted: see* The Commonwealth v John Fairfax & Sons Ltd *(1980) 147 CLR 39 at 50-52. Like most heads of exclusive equitable jurisdiction, its rational basis does not lie in proprietary right. It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained. Relief under the jurisdiction is not available, however, unless it appears that the information in question has 'the necessary quality of confidence about it' (per Lord Greene MR,* Saltman *at 215) and that it is significant, not necessarily in the sense of commercially valuable (see* Argyle v Argyle *[1967] Ch. 302 at 329) but in the sense that the preservation of its confidentiality or secrecy is of substantial concern to the plaintiff. That being so, the starting point of the alternative argument must be the identification of the relevant confidential information."*

57 Drawing on the leading authorities, Gummow J in *Corrs Pavey* conveniently distilled the constituent elements of the equitable action for breach of confidence (at ALR p.437):

> *"It is now 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:* Saltman Engineering Co Ltd v Campbell Engineering Co (1948) 65 RPC 203 at 215; *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 50-1; 32 ALR 485 at 491-2; *O'Brien v Komesaroff* (1982) 150 CLR 310 at 326-8; 41 ALR 255 at 266-8. *It may also be necessary, as Megarry J thought probably was the case* (Coco v Clark (AN) (Engineers) Ltd [1969] RPC 41 at 48), *and as Mason J (as he then was) accepted in the* Fairfax *decision was the case (at least for confidences reposed within government), that unauthorised use would be to the detriment of the plaintiff.*"

58 This formulation was subsequently reproduced (without variation to the first four criteria, but with an expanded consideration of the possible fifth criterion, see paragraph 108 below) in a later decision of Gummow J, in the case of *Smith Kline & French Laboratories (Aust) Limited and Others v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 at p.87 (affirmed on appeal by a Full Court of the Federal Court at (1991) 28 FCR 291), and has been adopted in a number of decisions of the Commonwealth AAT dealing with s.45 of the Commonwealth FOI Act: see *Re Kamminga; Re Gold and Department of Prime Minister and Cabinet* (Unreported decision, Deputy President I R Thompson, Messrs R C Gillham and C G Woodard, Members, No. V92/632, 26 April 1993); *Re Caruth and Department of Health, Housing, Local Government and Community Services* (Unreported decision, Mr P W Johnston, Deputy President; Maj Gen K J Taylor and Mr S D Hotop, Members, No. W90/215, 18 June 1993).

59 It will be convenient to record some observations on each of the elements of the equitable action for breach of confidence and on the defences to such an action, before turning to consider the application of those elements to the facts of the present case.

The First Criterion - Specific Identification of the Confidential Information for which Protection is Sought

60 It is necessary to specifically identify the information in issue in order to establish that it is secret, rather than generally available, information. Thus, in *Independent Management Resources Pty Ltd v Brown* (1986) 9 IPR 1 at p.6, Marks J expressed concern at the absence of clear identification of the information said to be confidential and stated:

> *"... the more general the description of the information which a plaintiff seeks to protect, the more difficult it is for the court to satisfy itself that information so described was imparted or received or retained by a defendant in circumstances which give rise to an obligation of confidence."*

61 In *O'Brien v Komesaroff* (1982) 150 CLR 310 at 327-28, it was an explicit basis of the High Court's rejection of the respondent/plaintiff's action for breach of confidence that he was unable to identify some particular pieces of information and show that they were confidential or that an obligation of confidence had arisen with respect to them. After finding that the contents of the documents

claimed to be confidential generally comprised common knowledge, and observing that only those improvements evolved by the respondent could give rise to a claim for relief for breach of confidence, Mason J observed:

> *"It is at this point that the respondent has consistently failed to identify the particular contents of the documents which he asserts constitute information the confidentiality of which he is entitled to protect. The consequence is that he has failed to formulate a basis on which the Court could grant him relief on the assumption that some part or parts of the documents constitute confidential information ...*
>
> *To simply say that the information is as to the effect and practical operation of discretionary trusts and private unit trust [tax minimisation] schemes does not identify the information and enable the Court to formulate an order. One needs to know not only what was the information conveyed but also what part of that information was not common knowledge ... See also* Deta Nominees *at pp. 189-190. There Fullagar J said (at p.190) 'I do not think that equity will exert itself to protect allegedly confidential information so widely expressed'."*

62 An explicit description of the information in issue is also essential to the framing of appropriate injunctive relief. On these two points, Gurry states (at p.83-84):

> *"It is implicit in the notion of confidentiality that a secret must be distinguishable from the range of information which is generally available ...*
>
> *This requirement has been frequently enforced by the courts in cases where a confider has sought an injunction to restrain the use of a generalised body of information. Here, the courts have firmly applied the principle that a defendant's use of information cannot be restricted by injunction unless the injunction can be drafted in terms which are specific enough to enable the defendant to know with certainty what he can and what he cannot do."*

63 This principle also has utility for the purposes of the FOI Act, requiring that matter in a document which is claimed to be exempt under s.46(1)(a) be clearly specified, and differentiated from other matter which is available for access pursuant to the general right of access conferred by s.21 of the FOI Act.

The Second Criterion - The "Necessary Quality of Confidence"

64 As is evident in the passage from *Moorgate Tobacco* set out at paragraph 56 above, the equitable action for breach of confidence is at least in theory not primarily an action for the protection of confidential information, but for the prevention of unconscionable conduct. The basis for the court's intervention is not the information *per se* but the threatened or actual breach of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained. Thus what makes information potentially confidential is that it has about it a degree of secrecy sufficient for it to be the subject of an obligation of conscience. If the information is common knowledge or publicly available, the confider cannot be said to have placed any special faith in the confidant in making the communication.

65 In *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, Lord Greene MR said (at p.215):

> *"The information, to be confidential, must ... have the necessary quality of*

confidence about it, namely, it must not be something which is public property and public knowledge."

66 Dean has expressed the view (at p.106) that:

"There are no legal prerequisites or parameters defining the type or nature of the information that the courts will protect because the courts are not, theoretically at least, protecting information. They are protecting a confidence ...

All information not commonly known, or in the case of personal information, all information not 'notorious' may [potentially] be confidential information."

67 There is also, however, a second aspect evident in the case law with respect to the qualities which information must possess to be eligible for protection in an action for breach of confidence, as observed by Lord Goff in the House of Lords proceedings in *Attorney-General v Guardian Newspapers (No. 2)* [1990] 1 AC 109 at p.282:

"... the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it. ...

The second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia."

68 There are several reported cases in which the courts have simply adjudged that information said to have been imparted in confidence was not information of a kind which ought appropriately to be made the subject of an equitable obligation of confidence. Thus Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 said (at p.48):

"... I doubt whether equity would intervene unless the circumstances are of sufficient gravity; equity ought not to be invoked merely to protect trivial tittle-tattle, however confidential."

69 In similar vein, courts have declined to protect a dubious system of picking winners at horse races (described as "perfectly useless" information in *McNichol v Sportsman's Book Stores* (1930) MacG Cop Cas. (1928-30) 116 at 125) and details of the teaching and practice of Scientology (*Church of Scientology v Kaufman* [1973] RPC 635; Goff J said at p.658 that: *"the passages sought to be protected are pernicious nonsense"* and *"at best utterly absurd"*).

70 An extension of this line of authority has been advocated by Gummow J, who is critical of the course of development by English courts of the so-called "public interest defence" to an action for breach of confidence, and has argued (in *Corrs Pavey* at ALR p.450) for a principle which better preserves the purity of equitable doctrine:

"That principle, in my view, is no wider than one that information will lack the necessary attribute of confidence if the subject matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed.

*I have earlier in these reasons described the various requirements for equitable protection of confidential information. The second of these requirements was that the information have the necessary quality of confidentiality. Authority already establishes that not all confidences will be suitable subject matter for equitable protection. First, the information must be secret, or substantially secret (*G v Day *[1982] 1 NSWLR 24;* Department of Health V Jephcott *(1985) 62 ALR 421;* Speed Seal Products Ltd v Paddington *[1986] 1 All ER 91) and, further, it must not be merely trivial in character (*Coco v Clark (AN) (Engineers) Ltd *[1969] RPC 41 at 48). It is no great step to say that information as to crimes, wrongs and misdeeds, in the sense I have described, lacks what Lord Greene MR called 'the necessary quality of confidence':* Saltman Engineering Co Ltd v Campbell Engineering Co Ltd *(1948) 65 RPC 203 at 215."*

71 This issue is further discussed at paragraphs 119 to 131 below. The main focus, however, of the court's inquiry in respect of this element of the equitable action for breach of confidence is whether the subject information possesses a sufficient degree of secrecy for it to be the subject of a confidence. An extended analysis of the principles to be derived from reported case law on this issue can be found in Gurry at pages 65-88, and in Dean at pages 111-137. Since this requirement of the equitable action for breach of confidence also equates to the first element which must be established under s.46(1)(b) of the FOI Act, a number of points made in the two leading texts are worth recording:

<u>The basic requirement is inaccessibility</u>

(a) *"The basic attribute which information must possess before it can be considered confidential is inaccessibility ... This attribute is fundamental to the action for breach of confidence for it is only through the communication of inaccessible information that a confidence is reposed by the confider in the confidant."* (Gurry, page 70)

<u>It is not necessary to demonstrate absolute secrecy or inaccessibility</u>

(b) *"The law does not require information to be absolutely inaccessible before it can be characterised as confidential. This is obvious from the nature of the breach of confidence action itself, which arises out of a limited disclosure by the confider to a confidant. ... It is clear that the publication of information to a limited number of persons will not of itself destroy the confidential nature of information ... On the other hand, it is equally clear that the disclosure of information to the public at large will destroy the confidentiality of the information. ... Whether the publication which information has received is sufficient to destroy confidentiality is 'a question of degree depending on the particular case' (citing* Franchi v Franchi *[1967] RPC 149, at 153 per Cross J)".* (Gurry, pages 73-4)

(c) *"It is quite possible that information which is given to a limited group on a confidential basis will not be held to have entered the public domain so long as that group maintains the confidentiality and the group is small enough."* (Dean, page 112)

(d) *"... Communication of a secret for limited business purposes will not destroy its*

confidentiality. Thus an employer can give his employees access to his secrets without impairing their confidentiality where this is necessary for the purposes of his business (footnote: provided that the employer, in so doing does not himself display a complete disregard for the confidentiality of the information). Similarly, the licensing or sale of confidential information under conditions of confidence will not remove its confidentiality." (Gurry, page 76)

Secrecy may attach to a way in which public information has been utilised (this is particularly relevant to trade secrets)

(e) *"All information required to produce a product or required result may be in the public domain or even obvious, but what remains a secret is how the plaintiff combined that public information to produce that result or product. The information is present in the public domain but remains inaccessible and unavailable without effort and labour ... The secret could exist purely in the way that public knowledge had been utilised."* (Dean, page 113)

(f) *"... Most information is composed of particular elements which are already generally known. A customer list, for example, may be composed of names which are all available in a number of trade directories, but the list as a discrete entity will nevertheless be confidential if it assembles those names in a way which are not otherwise available."* (Gurry, page 71)

(g) *"While the general rule is that information must be inaccessible in order to be confidential, in certain cases information which is generally available may be considered as confidential between two parties because of the context in which it occurs. In these cases, confidentiality inheres not so much in the information itself, but in the association of the information with a particular context which the parties know attaches a special significance to the information (citing* Cranleigh Precision Engineering Ltd v Bryant *[1966] RPC 81,* Schering Chemicals Ltd v Falkman Ltd *[1981] 2 All ER 321, and* G v Day *[1982] 1 NSWLR 24)."* (Gurry, page 78)

A question of substance not form

(h) *"The question of confidentiality is to be determined by reference to the substance of the information for which protection is sought. An express marking of 'confidential' on a physical record of information will not confer confidentiality on the information if it has been made generally available ... Confidentiality depends on the availability of the information in question and, at most, a 'confidential' marking will be useful only in helping to establish that the recipient of a document is affected by an obligation of confidence."* (Gurry, page 85)

The same principle will apply to any purported promise by the recipient of information to the effect that the information will be received in confidence. The 'necessary quality of confidence' is not the recipient's gift to bestow.

Confidentiality may be lost with the passage of time

(i) *"... the passing of time alone may be sufficient to reduce the secrecy of the information ... This is particularly relevant to government secrets. What is confidential today may be simply harmless historical facts tomorrow. Further, it may be reduced to trivia. The same consideration will apply to some personal information."* (Dean, pages 115, 164)

The confider's own attitude and conduct toward preserving the secrecy of allegedly confidential

information may be relevant to whether it should properly be characterised as confidential information

(j) *"The principle that the conduct of a confider may negative any implication of confidentiality upon which to base a confidential obligation is undoubtedly sound. The further principle that the courts of equity will not protect those who through their own actions cause their otherwise confidential material to enter the public domain is also worthy of support."* (Dean, page 132)

In the interests of privacy protection, a more relaxed standard may apply in respect of personal information

(k) *"The requirement that information be confidential or inaccessible has been differently applied by the courts according to whether the information in question is commercial (or technical), personal or governmental. In relation to commercial or technical information, the courts have usually determined confidentiality by an assessment of whether any special labours would be necessary for a member of the public to reproduce the information ... It is thus the expense, time, and effort required to reproduce commercial or technical information which determines its confidentiality. In emphasising these factors, the courts have been aware that the chief significance of commercial or technical confidences is economic.*

In contrast, a standard which determines confidentiality by reference to economic effort is hardly appropriate for personal confidences. In consequence, the requirement of confidentiality has been more sensitively measured in relation to personal information by reference to the degree of control which the confider is able to exercise over the information. If the confider retains some capacity to control the dissemination of the information in question, so that the information is not freely available to all, it may be considered confidential even it is not generally unknown." (Gurry, "Breach of Confidence" in P Finn (Ed) Essays in Equity, Law Book Company, 1985, at pages 116-7)

The meaning of "the public domain"

(l) *"Information which is public property because it has become common knowledge is referred to as 'information in the public domain' or 'public knowledge'. It may be in the public domain either because it is so obvious or accessible that it would be generally known (an objective analysis) or because it has, in fact, become known to a sufficient number of people for it to be no longer a secret (a subjective analysis). The former is simpler than the latter - there is no need to investigate the number of people who have the knowledge; it is either in the public domain or it is not. The public domain is defined in accordance with the type of information in concern. ... The information will be in the public domain 'when it can be learnt without a great deal of labour and calculation' (citing* Saltman Engineering Co Ltd *at page 215)."* (Dean, pages 112-4)

(m) *"There are a number of recent cases in which the term public domain is used. When will information enter the public domain? What is the public domain? The courts refer to information 'entering the public domain' when it has received such publicity amongst those in the relevant groups in the community to effectively destroy the usefulness of its secrecy to its 'owner'; to destroy any usefulness in enforcing the original confidential obligation."* (Dean, page 123)

(n) *"The public domain in trade secret cases is not the world at large but the trade in which the plaintiff competes ... Hence information may be characterised as public knowledge even though only notorious in a particular industry."* (Dean, page 129)

72 A useful illustration of the approach of courts to determining whether information has the necessary quality of confidence can be found in *O'Brien v Komesaroff*, where the information sought to be protected was described by Mason J as follows (at ALJR p.681, 687):

> *"The action for breach of confidence is founded upon an alleged confidential communication to the appellant of, and consequential misuse of, certain information relating to first, the form of a unit trust deed drafted by the respondent which expressed a concept to minimise taxation and estate duty for the beneficiaries of the trust and, secondly, a scheme designed to minimise taxation by using an overseas trust in a suitable 'tax haven' country in conjunction with an Australian trusts entity.*
>
> *...*
>
> *Generally speaking the contents of the unit trust deeds and the articles of association were matters of common knowledge. Information may be characterised as public knowledge though only notorious in a particular industry or profession: see Finn,* Fiduciary Obligations *(1977) at p.146. Only those improvements evolved by the respondent could give rise to a claim for relief for breach of confidence. ...*
>
> *It is a fundamental problem with the information which the respondent seeks to protect that it is information which, by way of advice to others, he regularly publishes to the world at large, albeit for a limited purpose. The nature of such information ill accords with the accepted conception of confidentiality, which in substance involves the person seeking to protect the information largely keeping it to himself. See* Ansell Rubber Co Pty Ltd v Allied Rubber Industries *[1967] VR 37 at p.49. ...*
>
> *The description of the information ... consists of:*
>
> *(a) advice (unspecified) as to the effect of three sections of the* Income Tax Assessment Act *and the* Banking (Foreign Exchange) Regulation*;*
>
> *(b) the form of resolutions for the issue of, and investment in, special units;*
>
> *(c) the provisions of the trust deeds; and*
>
> *(d) minutes and resolutions giving effect to the proposal.*
>
> *... I have some difficulty in perceiving how advice as to the general legal effect of statutory provisions can constitute confidential information. And the form of minutes, resolutions and the provisions of a trust deed seem unlikely repositories of confidential information. ... In some respects the information which the respondent seeks to protect in this case resembles know-how. The information represents his accumulated knowledge, skill and experience in a particular field. He asserts that it is all confidential information. Obviously this cannot be right. Much of it is common knowledge, as the findings of fact made by the primary judge indicate. As to the problems associated with the classification of know-how as confidential information, see* Amway Corporation v Eurway International Limited *[1974] RPC 82 at pp.85-86;* Stephenson Jordan & Harrison Ltd v McDonald & Evans *(1951) 69*

RPC 10 at p.15."

73 As is evident from Lord Goff's observation in the passage set out at paragraph 67 above, any information which has been published, or stored, in a form that is generally available to the public, is regarded as being in the public domain. Some illustrations of routes by which it is generally accepted that information enters the public domain, or becomes a matter of public record, are:

(a) by tabling in Parliament (assuming there is no restriction, by order of Parliament itself, on further publication or reporting of the information) or being read out in the course of proceedings in Parliament so as to become part of the Hansard record of Parliament's proceedings.

(b) *"When the proceedings of a court, tribunal or commission created by statute or an exercise of the prerogative are open to the public and a fair report of the proceedings can lawfully be published generally, it is not possible to regard information published in those proceedings as outside the public domain. Information published in those circumstances enters the public domain by a lawful gate. Once in the public domain, it can be freely used or disseminated."* (Per Brennan J in *Johns v Australian Securities Commission* (1993) 67 ALJR 850 at p.860.)

(c) collection of information by government agencies, including through disclosure under compulsion of law, for the purposes of a scheme (usually prescribed or authorised by statute or subordinate legislation) allowing public access to the information or certain parts of the information so acquired (whether or not a fee is payable for access) e.g. certain kinds of information required to be lodged by corporations with the Australian Securities Commission.

74 There is clear authority to the effect that for information to be the subject of an implied contractual obligation of confidence, it must possess the requisite degree of secrecy or inaccessibility that would be required in equity (see the cases mentioned in paragraph 49 above). Likewise, Dean has noted (at p.50) that:

> *"Implied contractual terms will mirror equitable obligations. Where the court finds a contractual relationship in which a term of confidentiality is implied, it will also find implied terms releasing the contractor from obligations of confidentiality when the information has entered the public domain.* [Citing *Flamingo Park Pty Ltd v Dolly Creation Pty Ltd* (1986) 65 ALR 500 at 518.]"]

75 In respect of express contractual terms, Gurry has expressed the view (at pp.65-66):

> *"Theoretically, it is possible to have an express contractual obligation not to use or disclose information which is common knowledge, but, in practice, it is difficult to see how any meaning or effect could be given to such an obligation by the courts. The confider could not establish a right to damages for the confidant's use of something which was freely available to everyone. Similarly, insuperable obstacles would stand in the way of the grant of an injunction. There would be evidentiary problems in proving which information the confidant had acquired by virtue of the contractual relationship rather than from a public source, and it would be difficult to frame an injunction in terms which were sufficiently certain to be enforceable. For these reasons, most expressed obligations of confidence limit the operation of the obligation to 'secret' or 'confidential' information imparted pursuant to the contractual relationship."*

A M Tettenborn has also argued that a purported express contractual obligation of confidence should not and could not be enforced by the courts in respect of information that is in the public domain (see A M Tettenborn, "Breach of Confidence, Secrecy and the Public Domain" in (1982) Anglo-American Law Review 273 at p.281-2).

The Third Criterion - Receipt of the Information in Such Circumstances as to Import an Obligation of Confidence

76 This is the key criterion, and usually the most difficult to apply. The application of s.46(1)(a) of the FOI Act will require FOI administrators to make judgments of the kind made by courts of equity as to when the circumstances of communication of confidential information are such that the recipient should be fixed with an enforceable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it.

77 The most recent authoritative exploration of this issue is to be found in the judgments of Gummow J, and on appeal of the Full Court of the Federal Court of Australia (Sheppard, Wilcox and Pincus JJ) in *Smith Kline & French Laboratories (Aust) Ltd & Others v Secretary, Department of Community Services & Health* reported at (1990) 22 FCR 73 and (1991) 28 FCR 291 respectively. These judgments post-date the leading texts in the field (Gurry and Dean).

78 The proceedings arose in the equitable jurisdiction of the Federal Court of Australia and did not involve consideration of the Commonwealth FOI Act. The facts were complicated, but for present purposes can be summarised as involving whether the first applicant (a pharmaceutical company), which had imparted certain confidential information to the first respondent for the purpose of obtaining certain approvals in relation to therapeutic substances, could restrain the first respondent from using that confidential information for its own internal purposes in the evaluation of applications by the first applicant's competitors for certain approvals and authorisations of therapeutic substances. The action for breach of confidence therefore was in respect of an alleged misuse of the confidential information other than disclosure. The first respondent conceded (and Gummow J found) that when the first applicant furnished the confidential data to it, the first applicant did so on the implicit understanding that it would be: *"... kept confidential in the sense that it would not be disclosed to any other pharmaceutical company lest use be made of it to the commercial disadvantage of the company which had supplied the information."* The basis of the first applicant's case was that the law required the first respondent to use the confidential information for no purpose other than that for which it was submitted by the first applicant. The case therefore turned on the extent of the obligation of confidence owed by the first respondent to the first applicant.

79 Gummow J set out his general approach at pages 86-87:

> *"Equity will only intervene if the information has been communicated in circumstances importing an obligation of confidence. That was how Megarry J put it in* Coco v A N Clark (Engineers) Ltd *[1969] RPC 41 at 47-48, thereby directing attention to the issue of what* <u>*in the whole of the relevant circumstances*</u> *would suffice to impose upon the defendant an equitable obligation of confidence. The Supreme Court of Canada recently approached the matter in a similar fashion:* Lac Minerals Ltd v International Corona Resources Ltd *(1989) 16 IPR 27 at 33, 74-77."* (my underlining)

His Honour had no difficulty in finding (at p.87) that the relevant information had the necessary quality of confidence:

> *"It is the product of detailed and costly work, is inherently valuable and has been kept secret."*

80 As to the first applicant's case that the respondent knew or ought to have known that the confidential information was communicated for the sole purpose of evaluating the first applicant's own applications for approvals under the relevant Regulations, Gummow J made the following observations (at pp.94-99):

> *"In many situations, where a plaintiff establishes a case of disclosure of confidential information for a sole purpose, then any use of it for any other purpose including disclosure to any other party will be a breach of confidence; F Gurry, Breach of Confidence (1984), pp 113-114. ...*
>
> *The considerations relied upon by the applicants in the SK & F proceedings do not make good their submission that the Department ought to have had the alleged 'knowledge'. Further, one would be cautious in attributing to one party a belief as to the purposes of another when that other party could not show that it had turned its mind to the crucial element in those alleged purposes, here, use as against disclosure.*
>
> *Moreover, and this is a significant point, in assessing whether the Department ought to have had the 'knowledge' alleged, one should have regard to the effect of the legal framework within which the parties were dealing. One would be slow to attribute to a regulatory authority knowledge that a party dealing with it expected it to act in a manner which would inhibit it in the exercise of its legal powers and obligations. One would be slow also to attribute to that party a purpose which if fulfilled would inhibit the regulatory authority in this way. Such conduct would not readily be regarded in accord with equity and good conscience. ...*
>
> ***'Knew or ought to have known' - the law***
>
> *The [first respondent] submits, in my view correctly, that the circumstance that the person who imparted the information in question intended to do so for a limited purpose, will not necessarily of itself be sufficient to bind the conscience of the party to whom the information was imparted. The [first respondent] submits that the conscience of the other party will be bound if, by the combined effect of the confidential nature of the relevant information and the circumstances in which it was communicated, there appears an equity which answers the description of an obligation of confidence: see* Moorgate Tobacco Co Ltd v Phillip Morris Ltd *(No 2) (1984) 156 CLR 414 at 437-438, per Deane J.*
>
> *No doubt it is not necessary that the defendant have known of the limited purpose of the disclosure to him. However, where the defendant neither knew nor ought to have known of the alleged limited purpose of the disclosure, it is difficult to see on what footing equity should intervene to bind his conscience.*
>
> *Counsel for the applicants ... relied upon the well known decision of Bowen C J in Eq in* Interfirm Comparison (Aust) Pty Ltd v Law Society of New South Wales *[1975] 2 NSWLR 104, as authority for the propositions that the test of whether the defendant can use confidential information is the consent of the plaintiff, express or implied, and that what is crucial is the purpose of the plaintiff rather than the purpose of the defendant or any common purpose ...* [His Honour then set out passages from that case to demonstrate that the case did not bear out the propositions of law contended for by the applicant] ...

What is said in these passages indicates that His Honour accepted that there had been a common implicit understanding involving, in the particular circumstances, mutual obligations of confidence; this decision does not support the propositions for which it was relied upon by the applicants.

In his paper 'Breach of Confidence' reprinted in Finn, Essays in Equity *(1985), p 110 at p 118, Mr Gurry says (omitting footnotes):*

> 'While the test for determining the existence of an obligation is clear, it is less clear whether the Court constructs from the circumstances an objective inference that the disclosure between the parties was for a limited purpose or whether it requires evidence that the confidant actually knew that the purpose of the disclosure was limited. There is relatively little direct authority on the point, largely because in most cases it has been clear from the circumstances that the confidant did know of the limited purpose of the disclosure. Despite the paucity of authority, it would seem beyond doubt that an obligation should be imposed on a confidant where the circumstances are such as to indicate that the confidant either knew or ought to have known that information was being imparted for a limited purpose. If it were otherwise, there would be little room for any jurisdiction to enforce confidences outside express contract or express non-contractual understanding.'

...

... I accept the general thesis of the learned author that equity may impose an obligation of confidence upon a defendant having regard not only to what the defendant knew, but to what he ought to have known in all the relevant circumstances.

...

In the present dispute, the Court looks at the objective circumstances to ascertain whether the [first respondent] ought to have known that the ... data was imparted on the restricted basis alleged by the applicants ... The Court further must ask whether one would attribute to the [first respondent] knowledge that [the first applicant] was imparting the ... data on those terms, if they clashed or might clash with the performance of the [first respondent's] functions under the Regulations.

...

The [first respondent] submits that in exercising the relevant discretions under the Regulations, he is obliged to have regard to issues concerning the quality, safety and efficacy of the therapeutic substance in question ...

...

The [first respondent] stresses, and I accept, that (a) his functions under the Regulations are concerned with a matter of high government interest, public health and safety, not with commercial dealings of the type conducted in general by citizens rather than governments, and (b) there was no express assurance given [the first applicant] as to the use to which the ... data would not be put within the department, nor was there any consensus upon that subject.

The [respondents] submit that in such a setting, and in the absence of express words, the Court should not impute an undertaking that would restrict or inhibit the exercise of discretionary powers."

81 Gummow J expressed his conclusions on this issue at p.110, holding that equity would not attribute to the first respondent any obligation to the applicants not to use the applicants' confidential data for the purpose of evaluating competitors' products for approvals:

"There was an implicit understanding common to [the first applicant] and [the first respondent] concerning non-disclosure to third parties ... . But that understanding would not interfere with the proper exercise of the functions of the [first respondent] under the Regulations. A court of equity would not impute to any relevant party the placing or acceptance of an obligation whereby in the subsequent discharge of his functions under the Regulations [the first respondent] was restricted in the way the applicants ... contend."

82 The appeal from Gummow J's decision was dismissed by the Full Court, which made the following relevant observations (at pp.302-4):

"... the appellants say that all that counts is the confider's purpose and that could not have gone beyond Departmental consideration of its [the confider's] own applications.

There is indeed some authority which, at least superficially, supports that view. One learned commentator has remarked:

> 'The test which has found widespread acceptance is whether or not the information was disclosed for a limited purpose. If the information was disclosed for a limited purpose, the confidence crystallises around that limited purpose. The confidant will be bound by an obligation the content of which is not to use or disclose the information for any purpose other than the limited one for which the information was imparted.'*: see F Gurry in Finn,* Essays in Equity *(1985), p.118.*

In many circumstances, that suggested test will produce a proper result, but the circumstances in which confidential information is supplied may vary widely. To determine the existence of confidentiality and its scope, it may be relevant to consider whether the information was supplied gratuitously or for a consideration; whether there is any past practice of such a kind as to give rise to an understanding; how sensitive the information is; whether the confider has any interest in the purpose for which the information is to be used; whether the confider expressly warned the confidee against a particular disclosure or use of the information - and, no doubt, many other matters. Confidential information is commonly supplied without payment: for example, by a prospective employee (or his referee) to support an application for employment. The understanding ordinarily would be that

the prospective employer would not disclose the information to any third party; but it would hardly be expected that its use would necessarily be confined to the employment application itself. If that application were successful, the employee would not act on the assumption that material in the relevant file would be destroyed. He would surely be inclined to assume that it might be resorted to later to assist the employer in making decisions relevant to the employee - for example, as to whether the employee (rather than another) should be promoted, or dismissed.

The test of confider's purpose will not ordinarily be appropriate where each party's interest is quite different, and known to be so. Here, the confider's purpose is simple and narrow, the confidee's much broader. SK & F had only the purpose of having its applications approved. A person supplying confidential information to the government for the purpose of obtaining a licence (or a permission or concession) would ordinarily assume that the government would not destroy the application file after the confider had attained his purpose. The confider would probably expect that the information would be kept against the day when it might be needed to serve the government's legitimate interests: for example, to provide a record in case the decision is challenged as improper; to enable statistical information to be collected; or, acting directly against the interests of the confider, to compare the information supplied with the confider's subsequent performance, in determining whether to cancel the licence ...

...

Megarry J has suggested a broad test to determine whether an obligation of confidence exists. In Coco v A N Clark (Engineers) Ltd *[1969] RPC 41 at 48, Megarry J said:*

> 'It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence.'

However, this test does not give guidance as to the scope of an obligation of confidentiality, where one exists. Sometimes the obligation imposes no restriction on use of the information, as long as the confidee does not reveal it to third parties. In other circumstances, the confidee may not be entitled to use it except for some limited purpose. In considering these problems, and indeed the whole question, it is necessary not to lose sight of the basis of the obligation to respect confidences:

> 'It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained.'

This is quoted from Moorgate Tobacco Co Ltd v Phillip Morris Ltd *(No 2) (1984) 156 CLR 414 at 438, per Deane J, with whom the other members of the court agreed ...*

...

Similar expressions recur in other cases: see Seager v Copydex Ltd [1967] RPC 349 at 368:

> 'The law on this subject ... depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it.'
>
> *To avoid taking unfair advantage of information does not necessarily mean that the confidee must not use it except for the confider's limited purpose. Whether one adopts the 'reasonable man' test suggested by Megarry J or some other, there can be no breach of the equitable obligation unless the court concludes that a confidence reposed has been abused, that unconscientious use had been made of the information ...*
>
> *...*
>
> *We would add that, in our opinion, courts exercising equitable jurisdiction should not be too ready to import an equitable obligation of confidence in a marginal case. There is the distinction between use of confidential information in a way of which many people might disapprove, on the one hand, and illegal use on the other. Not only the administration of business and government, but ordinary communication between people, might be unduly obstructed by use of too narrow a test, such as that which the appellants put forward here ..."*

83 I have dealt with the two judgments in *Smith Kline & French* at length because they seem to me to have particular significance for the application of s.46(1)(a) of the FOI Act. Not only do they draw attention to some shortcomings in the orthodox tests for determining whether information has been received in such circumstances as to import an obligation of confidence (i.e. Megarry J's "reasonable man" test and Gurry's "limited purpose" test), they also draw attention to important considerations that arise in, and may be peculiar to, the situation where persons outside government seek to repose confidences in a government agency - which are the kind of confidences to whose protection s.46(1) of the FOI Act is primarily directed. (By contrast, the vast majority of reported cases involving the misuse of confidential information is concerned with trade secret information passing between parties in the private sector, with the great majority of those cases in turn involving the misuse of confidential information within the fiduciary employer-employee relationship.) In *Attorney-General (UK) v Heinemann Publishers* (1987) 75 ALR 353, McHugh JA also suggested that special considerations apply where persons outside government seek to repose confidences in a government agency, but did not explore the issue further because it did not arise on the facts of the particular case before him. McHugh JA said (at p.455):

> *"... when ... a question arises as to whether a government or one of its departments or agencies owes an obligation of confidentiality to a citizen or employee, the equitable rules worked out in cases concerned with private relationships must be used with caution. ...*
>
> *... governments act, or at all events are constitutionally required to act, in the public interest. Information is held, received and imparted by governments, their departments and agencies to further the public interest."*

Fundamental nature of the inquiry

84 What the judgments in *Smith Kline & French* primarily emphasise is that the fundamental inquiry is aimed at determining, on an evaluation of the whole of the relevant circumstances in which confidential information was imparted to the defendant, whether the defendant's conscience ought to be bound with an equitable obligation of confidence. The relevant circumstances will include (but are not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and circumstances relating to its communication of the kind referred to in the third paragraph in the passage from the judgment of the Full Court in *Smith Kline & French* which is set out at paragraph 82 above.

Tests which may assist

85 Since FOI administrators will not frequently be experienced equity lawyers, resort to tests which can assist in determining whether an obligation of confidence arises is only to be expected. Two are referred to in the judgments in *Smith Kline & French* with qualified approval. Megarry J's "reasonable man" test seems to me to be too broad to be particularly helpful - it seems to amount to little more than a recognition that someone (presumably in an FOI context, the primary decision-maker, internal reviewer, or external review authority, as the case may be) must make a reasonable and objective evaluation of all the relevant circumstances surrounding the receipt of the confidential information in issue in order to determine whether the recipient of the information should have realised upon reasonable grounds, that the information was being given to the recipient in confidence. It should be noted that Lord Denning M R in *Dunford & Elliott Ltd v Johnson & Firth Brown Ltd* [1978] FSR 143 at 148 emphasised another aspect of reasonableness, perhaps implicit in Megarry J's statement of the "reasonable man" test, i.e. that the confider's expectations of confidentiality ought to be based on "reasonable grounds":

> *"Megarry J drew attention to circumstances in which it would be unjust to enforce the stipulation for confidence, even though all three requisites are fulfilled. ... His instances lead me to think there is a further principle applicable in these cases. If the stipulation for confidence was unreasonable at the time of making it; or if it was reasonable at the beginning, but afterwards, in the course of subsequent happenings, it becomes unreasonable that it should be enforced; then the courts will decline to enforce it; just as in the case of a covenant in restraint of trade."*

Despite the different wording, this dictum probably equates in substance, and in practical effect, to the emphasis in the judgments in *Smith Kline & French* that the whole of the relevant circumstances must be taken into account before a court determines that a defendant should be fixed with an enforceable obligation of confidence.

86 The reservation about the "reasonable man" test expressed by Meagher, Gummow and Lehane in the passage quoted at paragraph 51 should also be borne in mind, i.e. that equity may expect and enforce standards higher than those of the reasonable man. Dean, while he appears to accept the "reasonable man" test, adds (at p.153) the qualification that the reasonable man should be "*one of ordinary intelligence who is part of the domain in which the information is alleged to be secret. Hence in commercial confidences, the reasonable man is familiar with the trade and is therefore required to take into account all the circumstances, 'inter alia the relationship of the parties and the nature of the information and the circumstances of its communication' (citing* Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd *[1979] VR 167 at 193)*".

87 The more useful test, and the one more frequently used by the courts, is Gurry's "limited purpose" test (see the second paragraph of the passage quoted at paragraph 82 above) which according to both Gummow J and the Full Court in *Smith Kline and French* will frequently produce a proper result. It should always be used, however, with appropriate regard to the qualifications expressed in *Smith Kline and French*, i.e. that the test cannot be applied without regard to other relevant circumstances which bear on the fundamental inquiry identified in paragraph 84 above. Gurry also notes (at p.114-5) that the "limited purpose" test provides the touchstone for the identification of an obligation of confidence as an implied contractual obligation, as well as in equity, citing *Ackroyd's (London) v Islington Plastics Ltd* [1962] RPC 97, and stating that the use of the test to determine the existence of an implied contractual obligation would seem to be perfectly consistent with orthodox contractual principles for the implication of terms into a contract. Gurry states that in assessing whether a confidant ought to have known that a disclosure was made for a limited purpose, the courts will take into account the confider's own attitude and conduct with respect to preserving the secrecy of the allegedly confidential information (see Gurry p.116-119).

88 As noted at paragraphs 53 and 54 above, if the parties to a disclosure of confidential information stand in a fiduciary relationship and if information is obtained by the fiduciary in the capacity of fiduciary, this will be relevant to determining the existence of an obligation of confidence. Thus, medical practitioners employed by government authorities will come under an obligation of confidence in respect of information imparted by a patient, and apparently also in respect of information concerning the patient which the doctor learns from other sources (thus the obligation of secrecy would extend to reports received by a doctor about a patient from other medical specialists or from paramedical services). The obligation can be released with the express or implied consent of the patient. (See Gurry, p.148-9; Australian Law Reform Commission, Report No. 22, Privacy, Volume 1 at pp.414-419.)

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.

91 Conversely, the confider's conduct cannot unilaterally and conclusively impose an obligation of confidence. It has already been noted above (at paragraph 71(h)) that merely labelling information as "confidential" will not confer it with the necessary quality of confidence, if it in fact lacks the requisite degree of secrecy or inaccessibility. In respect of the third element of the equitable action for breach of confidence, labelling of this kind (assuming it reflects the confider's genuine consideration of the nature of the information and of the need for restrictions on its use by the confidant, and is not simply routine rubber-stamping without genuine consideration) will ordinarily

constitute a relevant factor to be evaluated, in the light of all the relevant circumstances, in determining whether an enforceable obligation of confidence is imposed, but it will not frequently, of itself, be conclusive of the issue. Indeed, properly construed according to its context, a "confidential" marking on a letter or other document may not have been intended at all by the author to relate to the imposition of enforceable obligations of confidence: it may merely indicate, as was found by the Commonwealth AAT to be the case in *Re Wolsley and Department of Immigration* (1985) 7 ALD 270 at 274, that the author of the document wished it to reach its addressee without being opened by an intermediary.

92 Another principle of importance for government agencies was the Federal Court's acceptance in *Smith Kline & French* that it is a relevant factor in determining whether a duty of confidence should be imposed that the imposition of a duty of confidence would inhibit or interfere with a government agency's discharge of functions carried on for the benefit of the public. The Full Court in effect held that the restraint sought by the applicants on the Department's use of the applicant's confidential information would go well beyond any obligation which ought to be imposed on the Department, because it would amount to a substantial interference with vital functions of government in protecting the health and safety of the community. (This finding could also have followed from an application of Lord Denning's statement of principle set out at paragraph 85 above).

93 Thus, when a confider purports to impart confidential information to a government agency, account must be taken of the uses to which the government agency must reasonably be expected to put that information, in order to discharge its functions. Information conveyed to a regulatory authority for instance may require an investigation to be commenced in which particulars of the confidential information must be put to relevant witnesses, and in which the confidential information may ultimately have to be exposed in a public report or perhaps in court proceedings.

94 Information may be confidential and imparted in circumstances where the confider intends that the information be treated confidentially, but it is already known by the recipient. Where the information is already known to the recipient through other means, no obligation of confidence can arise (see Dean, p.171-2). A practical issue may arise for some government agencies where an outside party proposes to provide information to it in confidence, but the government agency is able to obtain the information through other sources, or perhaps through the use of coercive powers to compel disclosure. A government agency should consider whether it wishes to avoid the possibility of subjecting itself to restrictions on the use that can be made of the information by accepting a voluntary supply of information on a confidential footing (*cf.* the restrictions placed on the Trade Practices Commission when it adopted this course of action in the circumstances described in *Castrol Australia Pty Ltd v EmTech Associates Pty Ltd & Ors* (1981) 33 ALR 31). Unwanted confidences may be rejected at the time of receipt, or the recipient can make clear that it would accept some kinds of restrictions on the use of the confidential information but not others (*cf. Fractionated Cane Technology Limited v Ruiz-Avila* [1988] 1 Qd.R 51 at p.63, p.67; as to the recipient of supposedly confidential information having the opportunity to reject the attempted disclosure if the conditions as to confidentiality are unacceptable).

95 Also worth noting in this context are the comments by Gummow J in *Corrs Pavey* to the effect that the disclosure of information to a government agency pursuant to the exercise of statutory powers to compel the disclosure of such information cannot give rise to any obligation of confidence under the general law:

> *"If the documents for which exemption is claimed under s.45 [of the Commonwealth FOI Act] in these proceedings had been supplied by Alphapharm only pursuant to direct requirement of the [Australian Customs] Service under its statutory powers (e.g. Customs Act 1901 s.38B) I would have some difficulty in seeing how from these circumstances any obligation of confidence could arise under the general law. The*

> *question in such a case would rather be one of finding a statutory restriction (if there be one) upon use by the [Australian Customs] Service of the information in the documents, and then of measuring the terms of that statutory restriction against the terms of the exemption in s.38 of the FOI Act [the corresponding exemption provision in the Qld FOI Act is s.48] :* Newscorp Ltd v NCSC *(1984) 52 ALR 277;* Kavvadias v Commonwealth Ombudsman *(1984) 52 ALR 728."*

96 Finally, it is worth repeating the caution given by the Full Federal Court in *Smith Kline and French* (in the last paragraph of the passage set out at paragraph 82 above) against being "too ready to import an equitable obligation of confidence in a marginal case".

Circumstances in which an obligation of confidence may be imposed on a defendant who did not acquire the confidential information directly from the plaintiff

97 The foregoing observations relate to circumstances in which a confidant is given access to information with the knowledge and consent of the confider, whether by direct communication of information, or by tacit consent to a situation which exposes the confidant to confidential information. Another possibility should be briefly mentioned. An obligation of confidence may also attach to a third party (i.e. one who is not privy to a disclosure by a confider) who derives confidential information as a result of a breach of duty on the part of a direct confidant. It is possible that a government agency could become fixed with an obligation of confidence if it receives information through a person who, by communicating it, was breaching a duty of confidence which that person owed to the original confider of the information. The relevant principles in this regard are conveniently summarised in Gurry, "Breach of Confidence" in P Finn (Ed) Essays in Equity at p.121-2:

> *"It is clear that, in the exercise of this equitable jurisdiction, liability will be imposed on any third party who knowingly participates in the confidant's breach of duty which results in the acquisition of the information by the third party. Such liability will run from the date of the knowing participation. Knowing participation in this context means actual knowledge of the breach, imputed knowledge (for example, the knowledge imputed to a company which an aberrant confidant establishes to exploit confidential information) and constructive knowledge. ... Since a direct confidant will be affixed with liability if he ought to have known that information was communicated for a limited purpose, it would be consistent to impose liability also on the third party who ought to have known that he was deriving information through an impropriety. ...*
>
> *To be contrasted with the third party who receives confidential information with knowledge, whether actual, imputed or constructive, is the third party who is innocent of all knowledge of the impropriety at the time he receives the information. There is now a considerable body of authority to support the proposition that such a third party, even if innocent at the time of acquisition of the confidential information, will be liable to be restrained from using or disclosing the information after receiving notice of the impropriety. On this basis, his position is differentiated from the knowing third party recipient of confidential information only in respect of the time at which liability commences. In the case of the "innocent" third party, liability dates from receipt of knowledge of the impropriety through which he derived the information, while the liability of the knowing third party dates from the time of the impropriety in which he has participated with knowledge."*

Confidential information improperly obtained

98 It is also established as a matter of principle that a court of equity will "restrain the publication of confidential information improperly or surreptitiously obtained" (*Commonwealth of Australia v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at p.50). The examples considered in reported cases have involved eavesdropping or theft. One hopes that information in the possession of government agencies would not be obtained by reprehensible means. It may be possible, however, that a law enforcement agency or regulatory authority could be found to have obtained confidential information improperly, e.g. through an invalid search warrant, or an invalid exercise of a coercive power to compel the disclosure of information. Any confidential information thus obtained which did not relate to actual or threatened crimes, frauds or misdeeds (see paragraphs 121 to 131 below) may qualify for protection in equity in an action for breach of confidence.

Relationship of the FOI Act to the general law

99 It appears that a government agency cannot by agreement or conduct bind itself so as to guarantee that confidential information imparted to it will not be disclosed under the FOI Act. Thus, a Full Court of the Federal Court of Australia in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163 at p.180 was prepared to say:

> *"Prior to the coming into operation of the FOI Act, most communications to Commonwealth Departments were understood to be confidential because access to the material could be obtained only at the discretion of an appropriate officer. With the commencement of the FOI Act on 1 December 1982, not only could there be no understanding of absolute confidentiality, access became enforceable, subject to the provisions of the FOI Act. No officer could avoid the provisions of the FOI Act simply by agreeing to keep documents confidential. The FOI Act provided otherwise."*

100 This statement is correct also in respect of the Queensland FOI Act, but it perhaps requires some further explanation. A government agency may become subject to an obligation of confidence under the general law, enforceable at the suit of the confider. It is well recognised, however, that an obligation of confidence, whether equitable or contractual, can be overridden by compulsion of law, in particular by a statutory provision compelling disclosure of information -see for example Gurry at p.359; *Smorgon and Australia & NZ Banking Group Limited & Ors; Commissioner of Taxation & Ors and Smorgon & Ors* (1976) 134 CLR 475 at 486-90. Section 21 of the FOI Act is a provision of this kind. It confers a legally enforceable right to be given access "under this Act" to documents of an agency and official documents of a Minister. An obligation of confidence may continue to bind the government undisturbed, until such time as an application is made under s.25 of the FOI Act for access to the relevant confidential information, whereupon the obligation of confidence may potentially be overridden. The right conferred by s.21 of the FOI Act, however, is expressed to be "subject to this Act". The FOI Act itself sets out a scheme whereby an agency or Minister dealing with an application for access to documents made under s.25, is conferred by s.28(1) with a discretion to refuse access to exempt matter or an exempt document. This means that, notwithstanding that a document satisfies all of the criteria for exemption under one of the exemption provisions in Part 3 Division 2, an agency or Minister nevertheless has a discretion to disclose the document to an applicant for access under the FOI Act with the benefit of the protections conferred by Part 6 of the FOI Act in respect of that disclosure (in particular s.102 provides in effect that no action for breach of confidence will lie in respect of the authorising or giving of access where the access was required or permitted by the Act to be given). On the other hand, if a document meets the criteria set out in one of the exemption provisions in Part 3, Division 2 of the FOI Act, an agency or Minister is entitled to exercise the discretion conferred by s.28(1) to refuse access to the exempt matter or exempt document. Thus, the fact that disclosure of a particular document would found an action for breach of confidence under the general law is a test which, if satisfied, will permit an agency or Minister to exercise its discretion under s.28(1) to refuse

access to the particular document.

101 An agency or official cannot, however, by a contractual or other undertaking fetter the exercise of a discretionary power conferred by statute by binding the agency or official to exercise the discretion in a particular way (see *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth of Australia* (1977) 139 CLR 54 per Mason J at p.74-75: *"To hold otherwise would enable the executive by contract in an anticipatory way to restrict and stultify the ambit of a statutory discretion which is to be exercised at some time in the future in the public interest or for the public good"*). Thus, information held by a government agency subject to an enforceable obligation of confidence can be disclosed to an applicant for access under the FOI Act, through a lawful exercise of the s.28(1) discretion by an officer authorised to make such a decision in accordance with s.33 of the FOI Act. (In theory, the obligation of confidence would remain enforceable under the general law, apart from the occasions when it was overridden by a lawful disclosure made under the FOI Act. However, an obligation of confidence may itself be rendered unenforceable if the confidential information subsequently passes into the public domain. Section 102(2) of the FOI Act may be of significance in this regard.)

102 This explains the Full Federal Court's comment in *Searle Australia Pty Ltd v PIAC* that there could be no understanding of absolutely confidentiality, and that no officer could avoid the provisions of the Commonwealth FOI Act simply by agreeing to keep documents confidential. I should add that when reviewing a decision under Part 5 of the Queensland FOI Act, the Information Commissioner does not have the discretionary power possessed by Ministers or agencies to permit access to exempt matter: see s.88(2) of the FOI Act.

The Fourth Criterion - Actual or Threatened Misuse of the Confidential Information

103 In the application of s.46(1)(a) of the FOI Act, one is assessing whether a threatened disclosure (to an applicant for access under s.25 of the FOI Act) would found an action for breach of confidence. The relevant inquiry is as to whether such a disclosure would involve a misuse of the confidential information, (i.e. a use which is not permitted having regard to the scope of the obligation of confidence). In this regard what was said by Beaumont and Pincus JJ sitting as members of a Full Court of the Federal Court of Australia in *Joint Coal Board v Cameron* (1989) 19 ALD 329 (an appeal from a decision of the Commonwealth AAT applying the former s.45 of the Commonwealth FOI Act) at p.339, is significant:

> *"... was the confidentiality intended to be absolute or limited only? That is to say, would there be a breach of the confidentiality if the information were now to be disclosed by the Board to the respondent, being the person who supplied the very information in question?*
>
> *In our view, no error of law was made by the Tribunal in rejecting the claim for exemption.*

> *The question is essentially one of fact. Whether, and if so, to what extent, the information in question was provided under an express or implied pledge of confidentiality, and if so, the scope or extent of that confidentiality, will depend upon an analysis of all the relevant circumstances: see* Department of Health v Jephcott *(1985) 9 ALD 35; 62 ALR 421 at 425. It is impossible to imagine that the respondent intended to exclude himself from later access to the material. It is difficult to conceive that Clutha, the employer, would wish to do so. It is, in essence, a question of fact whether, in the circumstances, it was the intention of the parties at the time of the communication of the information that the recipient should be at liberty, consistently with the confidence reposed, to divulge the information to a limited class of persons: see* A-G's Department and Australia Iron and Steel Pty Ltd v Cockcroft*, supra, at FCR 191-2. That is, it is well established that the fact that it is contemplated that disclosure will be made to a restricted class of persons will not destroy the confidential character of the material for other purposes and vis-a-vis other persons.*
>
> *The Tribunal concluded that even if some degree of confidentiality in the material were contemplated at the time the respondent handed over the claim forms, it should be inferred, or implied, from all the circumstances of the case that there would be no breach of any confidentiality if the information were later to be disclosed* to the respondent. *In our opinion, such a conclusion was not only open to the Tribunal, it was also clearly correct."*

104 Thus, disclosure to a particular applicant for access under the FOI Act may not be an unauthorised use of the confidential information.

105 Even where disclosure to a particular applicant would appear to constitute an unauthorised use (having regard to the scope of the obligation of confidence that was understood at the time of receipt of the confidential information) it is worth emphasising that an obligation of confidence may effectively be waived by the express or implied consent of the confider, as explained by Gurry (at p.241-4):

> *"The courts have acknowledged on a number of occasions that an obligation of confidence may be released by the express or implied consent of the confider. In order to constitute an effective release, the consent must be given by the person to whom the duty of confidence is owed. ...*
>
> *Where an obligation is released by the* express *consent of a confider, few difficulties are likely to arise between the parties to the confidence. ...*
>
> *It will be a question of fact in each case whether a particular event or action amounts to the implied consent of a confider to the release of an obligation. ... Mere knowledge on the part of the confider that the confidant has placed himself in a position which endangers the confidentiality of information which has been imparted to him will not constitute implied consent by the confider to the release of the obligation.*
>
> *...*
>
> *It would seem, therefore, that implied consent to release can only be constituted by some* positive *action on the part of the confider. Where the confider does take some positive action, however, it will be sufficient to release the confidant from his duty if the circumstances are such that the confidant is justified in believing that his obligation has been released. ...*

> *Finally, it should be noted that a confider's consent to the release of an obligation of confidence may be either absolute or qualified. Thus, a confider may partially release the confidant from his duty by authorising him to disclose confidential information to a particular third party only. A common example of such a partial release is the patient's agreement to allow his doctor to make a report on his medical condition to an insurance company for the purposes of an insurance policy. In each case, the extent to which the confider's consent operates to release the confidant's duty 'must be a question to be determined on the facts'."*

106 I note that my office has dealt with several applications for review under Part 5 of the FOI Act in which an agency has claimed that matter is exempt under s.46(1), without inquiring of the original confider of the information as to whether that person was prepared to consent to the disclosure of the information requested. (Consultation is not required under s.51 of the FOI Act where an agency is satisfied that the matter in issue is exempt and does not intend to disclose it.) In several of these cases, the original confider was in fact prepared to authorise disclosure of the information in issue, when contacted by my office for the purposes of the review under Part 5 of the FOI Act. This suggests that agencies should be prepared to evaluate information which appears to be eligible for exemption, (through having at one time been communicated in confidence, and not appearing to have lost its status as confidential information, e.g. through passing into the public domain), but whose age or character is such that it would appear to have lost the sensitivity or value to the confider which made it worthy of protection as confidential information in the first place. In those circumstances, it would be a worthwhile exercise to seek to contact the original confider and determine whether that person has any continuing objection to the disclosure of the information. The original confider may be prepared to waive any obligation of confidence generally, thus making it available to any applicant for access under the FOI Act. Alternatively, the original confider may be prepared to consent to a disclosure only to a particular applicant for access. (If that disclosure is intended to fix the particular applicant with a continuing obligation to respect the original confidence, the position should be made clear so that the applicant has an opportunity to accept or reject a disclosure on that basis; *cf.* s.102(2) of the FOI Act).

Is Detriment to the Plaintiff a Necessary (Fifth) Criterion?

107 Detriment to the plaintiff can be a significant factor with respect to establishing the third criterion, even if it is not in itself an essential fifth criterion; for instance, the fact that significant detriment would be caused to the plaintiff by disclosure of the plaintiff's confidential information must be a factor which is relevant, along with other factors, to the determination of whether the defendant ought to be bound by an obligation of conscience to respect the plaintiff's confidence. The question now under consideration, however, is whether detriment to the plaintiff must always be established or whether a binding obligation of confidence may be found without any detriment to the plaintiff being shown. At the end of the passage set out at paragraph 57 dealing with the elements of the equitable action for breach of confidence, Gummow J referred to this issue (at ALR p.437):

> *"It may also be necessary, as Megarry J thought probably was the case (*Coco v Clark (AN) (Engineers) Ltd *[1969] RPC 41 at 48), and as Mason J (as he then was) accepted in the* Fairfax *decision was the case (at least for confidences reposed within government), that unauthorised use would be to the detriment of the plaintiff."*

108 Gummow J did not deal with the issue at any length, because it was clear in the matter before him that detriment could be established, if it was necessary, in any event. Gummow J revisited the issue in *Smith Kline &French* (at p.111-2):

> *"I accept what was said in* Commonwealth v John Fairfax & Sons Ltd *(supra) at 52, as authority that where a government seeks in equity to protect its secrets something more, which may be described as detriment to the public interest, is required of it than of other plaintiffs in these cases. As to other cases in equity, I note that in* Coco v AN Clark (Engineers) Ltd *(supra) at 48, Megarry J in fact left open the question of 'detriment'. Differing views were expressed in the House of Lords in* Attorney-General v Guardian Newspapers Ltd (No. 2) *[1990] 1 AC 109 at 255-256, 270, 281-282, 293.*
>
> *The authorities have been recently assembled and discussed by Mr R Dean in his work* The Law of Trade Secrets *(1990) pp.177-178. They disclose that the question remains an open one in this country. I share the view of this learned author, and of Professor Birks in his note 'A Lifelong Obligation of Confidence' (1989) 105 LQR 501, that equity intervenes to uphold an obligation and not necessarily to prevent or to recover loss: see also F Gurry,* Breach of Confidence *(1984), pp.407-408. The cases dealing with recovery from errant fiduciaries of profits which their principles could not have made illustrate a similar point. The basis of the equitable jurisdiction to protect obligations of confidence lies, as the present case illustrates, in an obligation of conscience arising from the circumstances in or through which the information, the subject of the obligation, was communicated or obtained:* Moorgate Tobacco Co Limited v Philip Morris Ltd (No. 2) *at 438. The obligation of conscience is to respect the confidence, not merely to refrain from causing detriment to the plaintiff. The plaintiff comes to equity to vindicate his right to observance of the obligation, not necessarily to recover loss or to restrain infliction of apprehended loss. To look into a related field, when has equity said that the only breaches of trust to be restrained are those which would prove detrimental to the beneficiaries?"*

109 Gummow J nevertheless considered it prudent to make a finding (at p.112) that detriment could be established if that were necessary, and the Full Court did not deal with the issue. It appears that in particular situations, detriment can be a necessary element (see *Carindale Country Club Estate Ltd v Astill* (1993) 115 ALR 112 at p.118-9; though the context there is far removed from disclosure of government documents). Clarification of this issue may come through future court decisions. For the time being, however, the issue is probably foreclosed for tribunals such as the Information Commissioner by *Commonwealth of Australia v John Fairfax & Sons Limited and Others* (1981) 55 ALJR 45, where Mason J, sitting as a single judge of the High Court of Australia, appears to have accepted, without reservation, that detriment is a necessary element of the action for breach of confidence. The relevant passage (at p.49) is as follows:

> *"However, the plaintiff must show, not only that the information is confidential in quality and that it was imparted so as to import an obligation of confidence, but also that there will be an 'unauthorised use of that information to the detriment of the party communicating it'. (*Coco v AN Clark (Engineers) Ltd *[1969] RPC 41, at p.47). The question then, when the executive Government seeks the protection given by Equity, is: What detriment does it need to show?"*

110 The *Fairfax* case is authority for a legal principle (i.e. that where a government is the plaintiff in an equitable action for breach of confidence seeking to protect government information, it must establish as an additional element that disclosure of the allegedly confidential information would be detrimental to the public interest) that has been widely approved both in Australia, (e.g. per Gummow J above, and per McHugh JA in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd and Anor* (1987) 75 ALR 353 at p.455) and in England (*Attorney-General v Guardian Newspapers (No. 2)* [1990] 1 AC 109 at 283). The relevant question is whether Mason J's statement to the effect that detriment is a necessary element of the equitable action for breach of confidence forms part of the *ratio decidendi* (i.e. a proposition of law which is essential to the court's decision) of the *Fairfax* case. The passage set out above rather suggests that it does: Mason J commenced from the proposition that detriment to the plaintiff must be shown, and then considered what detriment a government as plaintiff must show. If so, as a decision of a single judge of the High Court of Australia, it would be binding on a tribunal such as the Information Commissioner, and on FOI administrators, until this element of the decision is distinguished or explained. (In *Moorgate Tobacco*, Deane J, with whom the other four judges of the High Court agreed, did not expressly refer to "detriment" as a requirement in equity for protection of confidential information. Deane J did, however, refer to a requirement that the information be not only confidential, but *"... significant, not necessarily in the sense of commercially valuable ... but in the sense that the preservation of its confidentiality or secrecy is of substantial concern to the plaintiff"*. This could be interpreted as another means of expressing the requirement that the information must not be trivial or useless, but it is arguably implicit in that requirement that disclosure of trivial or useless information will occasion no detriment sufficient to warrant equity's intervention. Deane J's statement is at least consistent with the notion that some detriment to the plaintiff must be shown.)

111 In the meantime, it is probably necessary, and certainly prudent, to apply s.46(1)(a) of the FOI Act on the basis that it must be established that detriment is likely to be occasioned to the original confider of the confidential information if it were to be disclosed. It appears, however, that detriment is fairly easily established. In particular, it is not necessary to establish that threatened disclosure will cause detriment in a pecuniary sense: *"detriment can be as ephemeral as embarrassment ... a loss of privacy or fear ... and indirect detriment, for example, the confidential information may gravely injure some relation or friend."* (see Dean, p.177-8 and the cases there cited for these propositions). Moreover, in *Attorney-General v Guardian Newspapers (No.2)* [1990] 1 AC 109, Lord Keith of Kinkel (with whom Lord Jauncey agreed) said (at p.256):

> *"I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons to whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way."*

Lord Griffiths (at p.270) appeared to treat detriment as sufficiently established without economic loss and by loss of social amenities.

112 Where contractual obligations of confidence are concerned, detriment would ordinarily be a relevant element in the sense that the normal elements of the action in contract require proof of the existence of a contractual obligation, breach of the obligation, and damage. The application of s.46(1)(a) of the FOI Act, however, calls for an assessment, before the fact, of whether a threatened disclosure would found an action for breach of confidence. As to this issue, Gummow J said in Smith Kline and French at p.111:

> *"If a claim rests in contract and an injunction is sought to restrain breach of a negative stipulation to respect a confidence, then no question of the inadequacy of damages should arise. ..."*

In the Case of a Government Plaintiff, Detriment to the Public Interest Must be

Demonstrated

113 As the cases discussed in the preceding section make clear, the principle is now well established that where a government as plaintiff brings an action in equity to restrain the disclosure of confidential information, it must demonstrate that disclosure of the information would cause detriment to the public interest. Section 46(1)(a) of the FOI Act is primarily directed to the protection of information communicated to government agencies in confidence by persons outside government. It is arguable, however, that its wording (particularly in contrast to s.45(1) of the Commonwealth FOI Act where the words "would found an action, by a person other than the Commonwealth" appear) leaves open the possibility that a disclosure which would found an action for breach of confidence brought by the State of Queensland (or by an independent statutory authority or a local authority) as plaintiff, could fall within its terms. Such a possibility also seems to be assumed in the wording and tenor of s.46(2).

114 The likelihood of such an occasion arising is severely diminished in any event by s.46(2), (whose effect is explained at paragraph 35 above). But, in respect of matter of a kind that is not caught by s.46(2) because it falls outside the terms of s.41(1)(a) of the FOI Act, is s.46(1)(a) capable of applying by reference to a hypothetical action for breach of confidence brought by the State of Queensland (or an independent statutory authority, or local authority) as plaintiff? In *Commonwealth of Australia v John Fairfax & Sons Limited*, Mason J accepted that the Commonwealth government was entitled to seek the protection of the equitable principle which he described as follows (at p.48-49):

> *"... Employees who had access to confidential information in the possession of their employers had been restrained from divulging information to third parties in breach of duty and, if they have already divulged the information, the third parties themselves have been restrained from making disclosure or from making use of the information ...*
>
> *The plaintiff had within its possession confidential information comprised in the documents published in the book. The probability is that a public servant having access to the documents, in breach of his duty and contrary to the security classifications made copies of the documents available to [the defendants]."*

115 As in the *Fairfax* case, all reported cases (of which I am aware) in which an action for breach of confidence has been brought by a government as plaintiff, have involved allegations of misuse of confidential government information by current or former government officials, or by publishers who have acquired the information through an unauthorised disclosure by a current or former government official. The confidential information was communicated to or obtained by the official as an incident of the employment relationship, and an obligation of confidence could be readily founded in the employee's duty of fidelity to the employer. All government employees owe a duty of fidelity to their employer not to disclose confidential information without authority.

116 The possibility of s.46(1)(a) being applied by reference to a hypothetical action for breach of confidence brought by the State of Queensland (or a statutory authority or local authority) does not, in my opinion, sit easily with the scheme of the FOI Act, where the disclosure being contemplated is to be made by an officer who is authorised under s.33 of the FOI Act to disclose information in response to applications for access made under s.25 of the FOI Act. Where an obligation of confidence is owed by a Minister or government agency to a person outside government, an authorised FOI decision-maker can determine whether disclosure to an applicant for access under the FOI Act would be an unauthorised use in breach of the obligation of confidence. But in an Act with an avowed object to "extend as far as possible the right of the community to have access to information held by Queensland government" (see s.4 of the FOI Act), I doubt that, in respect of information generated within government, s.46(1)(a) is capable of operating, or can have been intended to operate, by reference to a hypothetical action for breach of confidence brought by the

State of Queensland (or a statutory authority or local authority) on the basis of a notional unauthorised disclosure by an officer of the plaintiff in breach of an obligation of confidence owed to the plaintiff as employer. In any event, the original confider of confidential information who is entitled to sue to enforce an obligation of confidence is ordinarily at liberty to disclose the confidential information to other parties (unless restrained by a valid contractual undertaking not to do so). A further disclosure of confidential information by the original confider of it could not give rise to an action which answers the description of "an action for breach of confidence". Thus, a disclosure by a government agency of confidential information generated within that government agency, or within the legal entity of which it is a part (i.e. the legal entity which is the State of Queensland includes all Ministerial Departments, but independent statutory authorities, such as Suncorp Insurance and Finance, or local authorities such as the Brisbane City Council, are separate legal entities) would not in my opinion "found an action for breach of confidence" within the meaning of s.46(1)(a) of the FOI Act.

117 There would appear to be room for s.46(1)(a) to operate by reference to a hypothetical action for breach of confidence brought by the State of Queensland, or a statutory authority or local authority, as plaintiff, in respect of confidential information passing between such entities in circumstances which import an obligation of confidence, e.g. a hypothetical action for breach of confidence by the Brisbane City Council against the State of Queensland might have to be evaluated. (Specific provision is made in s.38(b) for confidential information communicated between the State of Queensland and the Commonwealth government, or another state or territory government, or an overseas government).

118 If I am wrong in the views expressed at paragraph 116 above, it is certainly clear that if s.46(1)(a) is to be applied by reference to a hypothetical action for breach of confidence brought by the State of Queensland (or a statutory authority or local authority) as plaintiff (including in the circumstances contemplated in paragraph 117) the plaintiff must establish that disclosure of the information in issue is likely to injure the public interest. Following the passage set out at paragraph 109 above, Mason J went on to state the following principles (which, as noted above, have since been endorsed by McHugh J A in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 75 ALR 353 at p.455):

> *"The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive Government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that Equity will not protect information in the hands of the Government, but it is to say that when Equity protects Government information it will look at the matter through different spectacles.*
>
> *It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the Government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise Government action.*
>
> *Accordingly, the Court will determine the Government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.*

The Court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality.

Support for this approach is to be found in Attorney-General v Jonathan Cape Ltd *[1976] QB 752, where the Court refused to grant an injunction to restrain publication of the diaries of Richard Crossman. Widgery LCJ said (at pp. 770-771):*

> 'The Attorney-General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facets of the public interest contradictory of and more compelling than that relied upon. Moreover, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need.'"

(It should be noted for completeness that Professor Finn argues in Official Information at p.135-6 that some governmental activities may have such a non-governmental or commercial character as would warrant information generated in the conduct of those activities being accorded the same protection as would be given to private enterprises, i.e. the injury to public interest should not apply. It is unlikely that reliance on s.46 of the FOI Act would be needed for such information, given the strong protection afforded by s.45(1)(a) and (b) for trade secrets or other commercially valuable information held by government agencies.)

Defences to an Action for Breach of Confidence

119 There may be a threshold issue of statutory construction as to whether the words "would found an action" in s.46(1)(a) direct attention only to the elements which a plaintiff must establish in order to set up a cause of action for breach of confidence, without regard to any defences that may apply to defeat the cause of action, or whether the words require the existence of defences which would defeat an action for breach of confidence to be taken into account. Since the recognised defences to an action for breach of confidence generally reflect public interest considerations for refusing to enforce an obligation of confidence, I consider that it is consistent with the general scheme of the Act (in which public interest considerations, and the balancing of competing public interest considerations are predominant, as explained in my decision in *Re Eccleston*) that s.46(1)(a) should be interpreted as requiring defences to an action for breach of confidence to be taken into account. This certainly appears to have been the intention of the Commonwealth Parliament when employing the like words in the amended s.45 of the Commonwealth FOI Act - see the penultimate sentence in the relevant paragraph from the Explanatory Memorandum set out at paragraph 29 above. I am also encouraged in this view by the fact that Gummow J in *Corrs Pavey*, after holding that the term "breach of confidence" was used in the former s.45 of the Commonwealth FOI Act in the sense well known to the law as the description of a particular class of legal proceeding, went on to consider and apply the defences to an equitable action for breach of confidence (at ALR p.451 ff).

120 In that case, Gummow J also explained his view that the English authorities which had constructed a

"public interest defence" to the action for breach of confidence were wrong in principle, views which he summarised in *Smith Kline & French* (at p.111) as follows:

> *"... (i) an examination of the recent English decisions shows that the so-called 'public interest' defence is not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence; and*
>
> *(ii) equitable principles are best developed by reference to what conscionable behaviour demands of the defendant not by 'balancing' and then overriding those demands by reference to matters of social or political opinion."*

121 These views led Gummow J to hold in *Corrs Pavey* in the passage set out at paragraph 70 above that crimes, civil wrongs and serious misdeeds of public importance lack the necessary quality of confidence to be the subject of protection pursuant to an equitable obligation of confidence. If that view is correct, it means that such matters must be considered in determining whether the elements of an equitable action for breach of confidence are established, even if the proper construction of s.46(1)(a) would not permit the existence of recognised defences to an action of breach of confidence to be taken into account.

122 It remains to be seen whether Gummow J's views take root in Australian law. They have in turn been subject to criticism. Leo Tsaknis in "The Jurisdictional Basis, Elements and Remedies in the Action for Breach of Confidence - Uncertainty Abounds" (1993) 5 Bond Law Review 18 at p.27 writes:

> *"The approach of Gummow J focuses on 'what conscionable behaviour demands'. However it is difficult to divorce the question of what conscionable behaviour demands from the public interest sought to be promoted by making the disclosure. Only by assessing the public interest sought to be promoted by the making of the disclosure can it be determined whether conscionable behaviour demands that the disclosure be made."*

And D A Butler in "Is There a Public Interest Defence to a Breach of Confidence?", Queensland Law Society Journal, October 1990, 363 at p.367 submits that:

> *"... notwithstanding the analysis of Gummow J in the* Corrs Pavey *case, there is, or at least should be, in Australian law a public interest defence to a breach of confidence. It would seem that the doctrine that imposes duties of confidence is best explained as being based on notions of public interest that in appropriate circumstances operate to 'transform confidentiality from a private expectation or from a matter of ethics, into a legal obligation'. To admit an exception that permits disclosure where there are other overriding public interests would seem to be a logical concomitant."*

123 There is no doubt that it is well established in English law that there is a defence to an action for breach of confidence of "just cause or excuse" for using or disclosing the confidential information, where it is in the public interest to use or disclose the information in that way. (See *Lion Laboratories v Evans* [1985] QB 526; *Attorney-General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109; Gurry at p.325-346, Dean at p.273-292, and the cases there cited.) The defence of just cause or excuse has in England been held to apply to breaches of both equitable and contractual obligations of confidence (see Gurry, p.328.)

124 Australian case law on the issue is sparse. In *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1981) 33 ALR 31, Rath J, while making it clear that he would confine the scope of any such defence considerably more tightly than was apparent in the approach of some of the English judges, appeared to accept the existence of a defence of just cause or excuse for breaking confidence. The existence of the defence was accepted by Samuels JA of the New South Wales Court of Appeal in *David Syme and Co Ltd v General Motors Holden Limited* [1984] 2 NSWLR 294, and by Kirby P of the New South Wales Court of Appeal in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 75 ALR 353 at pp.430-5, p.446. In *Allied Mills Industries Pty Ltd v Trade Practices Commission* (1981) 55 FLR 125, Sheppard J in the Federal Court of Australia held that the public interest in the disclosure of an iniquity or a crime would always outweigh the public interest in confidentiality; and that iniquity included a civil wrong or a breach of statute, which statute was "of the upmost importance in the public interest" (at p.167). The case concerned an attempt by Allied Mills to prevent the Trade Practices Commission using documents supplied to it by an ex-manager of Allied Mills for the purposes of supporting proceedings for breaches of the *Trade Practices Act 1974*. However, in *A v Hayden and Others (No. 2)* (1984) 59 ALJR 6, Gibbs C J said (at p.9) of Sheppard J's statement that "... the public interest in the disclosure ... of iniquity will always outweigh the public interest in the preservation of private and confidential information":

> *"That is too broad a statement, unless 'iniquity' is confined to mean serious crime. The public interest does not, in every case, require the disclosure of the fact that a criminal offence, however trivial, has been committed."*

125 It appears that the "public interest defence" has been recognised in Australian law, but that it is confined to disclosures which evidence a crime or serious wrongdoing, or matters injurious to public health (see Tsaknis, cited in paragraph 122 above, at p.25; Finn, Official Information (Integrity in Government Project: Interim Report One, ANU, 1991) at p.147 and p.229).

126 I consider that the application of a defence of just cause or excuse for breaching confidence where disclosure is in the public interest, will not for practical purposes be a significant problem area in the application of s.46(1)(a) of the FOI Act. This is because of a limitation on the availability of the defence which will be of particular practical significance in the context of dealing with applications for access to documents under the FOI Act. The limitation is that it will not be a defence to claim that disclosure of confidential information to the public is in the public interest, where the public interest could have been served by disclosure in confidence to a proper authority. Thus, in *Initial Services Ltd v Putterill* [1968] 1 QB 396, Denning L J said (at p.405-6):

> *"The disclosure must, I should think, be to one who has a proper interest to receive the information. Thus, it will be proper to disclose a crime to the police; or a breach of the Restrictive Trade Practices Act to the Registrar. There may be cases where the misdeed is of such a character that public interest may demand, or at least excuse, publication on a broader field, even to the press."*

127 This reflects the recognition by the courts that (as Professor Finn observes in Official Information, cited above, at p.230):

> *"It is one thing to make an allegation of misconduct, another properly to substantiate it, and that the interests of the person owed a secrecy obligation, or else of the person the subject of the disclosure, can require protection from disclosures which, on full inquiry, may be found to be baseless or at least insufficient to justify unlimited disclosure in the circumstances."*

Thus, it was said in the House of Lords in *Attorney-General v Guardian Newspapers (No. 2)* [1990] 1 AC 109 at 269 (per Lord Griffiths):

> *"In certain circumstances the public interest may be better served by a limited form of publication perhaps to the police or some other authority who can follow up a suspicion that wrongdoing may lurk beneath the cloak of confidence. Those authorities will be under a duty not to abuse the confidential information and to use it only for the purpose of their inquiry. If it turns out that the suspicions are without foundation, the confidence can then still be protected: see* Francome v Mirror Group Newspapers Ltd *[1984] 1 WLR 892. On the other hand, the circumstances may be such that the balance will come down in favour of allowing publication by the media, see* Lion Laboratories Ltd v Evans *[1985] QB 526."*

128 In *Francome v Mirror Group Newspapers Ltd*, it was held that if the public interest in the disclosure of information allegedly showing breaches of the rules of racing could be vindicated by disclosure to the Jockey Club or the police, disclosure to the public (through the press) would not amount to a valid defence.

129 Gurry has commented as follows (at p.345):

> *"This element of the defence can operate as an important control device to ensure that attempts are not made to justify capricious disclosures. It seems settled that the proper authority to whom information relating to crime should be disclosed is the police or the Director of Public Prosecutions. Where the misdeed is a breach of statutory duty, the statutory authority charged with administering the relevant legislation would have a 'proper interest' to receive the information. Where it is a civil wrong, the individual against whom the tort has been, or is intended to be, committed is presumably the proper person to whom disclosure should be made. Thus, in* Gartside v Outram *(1857) 26 LJ Ch (NS) 43 Wood V-C considered that disclosure of fraudulent business practices to the defrauded customers was justified.*
>
> *If the event or practice affects the community as a whole, then there are grounds for justifying a general disclosure through, for example, the media or by the publication of a book. In* Church of Scientology v Kaufman *[1973] RPC 635, Goff J considered that the publication of a book exposing the malpractices of Scientology, which affected, or had a potential effect on, the general public, was legitimate. ... In* Initial Services Limited v Putterill, *the court seemed to consider that the press was not an inappropriate place in which to reveal a misleading business practice which affected the public at large.* [For a further illustration of this principle, see *Lion Laboratories v Evans* [1985] QB 526.]*"*

130 If the defence is ordinarily only available to excuse a breach of confidence where disclosure is to a proper authority, there is little scope for its practical application to a contemplated disclosure to an applicant for access under the FOI Act. With some potential exceptions, the kinds of proper authority to whom a disclosure must be made in the public interest are government agencies such as the police, regulatory authorities, authorities concerned with public health or safety, and the like. The FOI Act is generally used by persons outside government to obtain access to documents in the possession of government agencies, so the contemplated disclosure will rarely, if ever, be to a "proper authority" (though there is no restriction in theory on a government agency using the FOI Act to obtain access to documents in the possession of another government agency subject to the FOI Act, such that, for instance, the prospect of the Queensland Police Service or the Criminal Justice Commission making an FOI application for access to documents held by a local authority is a permitted, if unlikely, use of the FOI legislation). Even in respect of Gummow J's preferred alternative approach to the treatment of crimes, civil wrongs or serious misdeeds of public importance, His Honour made it clear (in the passage set out at paragraph 70 above) that equity

would not enforce the confidence if *"the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed"*.

131 There may be some scope on the authorities, however, for a "public interest defence" to operate so as to allow the disclosure under the FOI Act of otherwise confidential information:

(a) to any applicant, if the confidential information concerns a misdeed or danger to public health or safety that affects the community as a whole (so that a court under the general law would not insist on disclosure to a proper authority); or

(b) to the person(s) wronged, if the confidential information concerns a civil wrong.

Other Defences

132 As s.46(1)(a) requires that a claim for exemption be tested by reference to a hypothetical action for breach of confidence, other defences which may apply to defeat the cause of action are to be taken into account. In respect of an equitable action for breach of confidence, the defence of unclean hands may apply:

> *"The maximum of equity that 'He who comes into Equity must come with Clean Hands' can operate as a defence to an action for breach of confidence. The defence is a discretionary one and will operate when the court considers that a plaintiff's conduct in a transaction has been so improper that he should be refused equitable relief.*
>
> *This equitable defence is to be distinguished from the defence of just cause or excuse on the ground that the latter is concerned with the* public *interest, whereas the defence of unclean hands is concerned with the propriety of a plaintiff's* personal *conduct in a particular transaction. In many cases, therefore, it may provide a broader ground of defence, since it is not necessary to show that the defendant's disclosure of information was in the public interest. Of course, there may be cases where the same set of facts would give rise to a good defence on the basis of both principles ... .*
>
> ...
>
> *... if the defence is to be successful in a breach of confidence action, there must be some impropriety relating to the confider's conduct with the confidant, the information for which protection is sought, or the confider's own treatment of that information."* (Gurry at p.352, p.356)

133 In *Corrs Pavey*, Gummow J said (at page 451):

> *"In most cases the conduct of the plaintiff upon which a defendant relies for a defence of unclean hands will be conduct adversely affecting the interests of the defendant personally, not another party or the public at large or a section of the public ... .*
>
> *There is authority which indicates that this defence is not so confined and it extends to cases where the plaintiff's misconduct has operated to the prejudice of third parties, especially where some general public interest is involved ... the court acts in this way ... to encourage fair dealing with the public."*

For an example of how this defence may be applied, see *Corrs Pavey* at p.451-2.

134 Where a contractual obligation of confidence is relied upon, there may be other kinds of defences which require investigation where some impropriety attends the subject of the confidence or the stipulation for confidence - an express contractual term may be illegal or unenforceable on public policy grounds (see *A v Hayden and Others (No 2)* (1984) 59 ALJR 6).

Application of s.46(1)(a) to the Matter in Issue

135 In the circumstances of this case, s.46(1)(a) is to be applied by reference to a hypothetical action for breach of confidence brought by the third party, in respect of an obligation of confidence said to be owed by the Authority through its employee who received and recorded the information communicated by the third party. I am satisfied that there is an identifiable plaintiff (the third party) who has standing to sue in respect of the matter in issue (see paragraph 44 above) and that the information in issue can be identified with specificity.

136 The information has the requisite degree of secrecy in that it is not common knowledge and is inaccessible to the general public. I have given some consideration to whether the information might be characterised as "trivial tittle-tattle" (*cf.* paragraph 68 above), since it appears with the benefit of hindsight that the concerns about B's welfare conveyed by the third party have turned out to be without substance. I am satisfied, however, that the third party's concerns were genuine, and that if the information had been well-founded it certainly must have been characterised as more than trivial. The nature of the information, and the fact that it would disclose that the third party held those concerns at one time, satisfies me that the information in issue is appropriate to be the subject of protection in equity. I therefore find that the information has the necessary quality of confidence, so as to satisfy the second element of the equitable action for breach of confidence.

137 The third party's identity is also eligible for protection as confidential information in the circumstances of this case. The decision of Yeldham J of the New South Wales Supreme Court 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. Yeldham J said (at p.35-6):

> *"... passages in the speeches of their Lordships [in* D v National Society for the Prevention of Cruelty to Children *[1978] AC 171] support the view that the principles of equity which protect confidentiality should extend not only to the information imparted but also, where appropriate, to the identity of the person imparting it where the disclosure of that identity (as in the present case) would be a matter of substantial concern to the informant - see especially pp.218, per Lord Diplock; 228, 229, per Lord Hailsham of St Marylebone and 232, per Lord Simon of Glaisdale.*
>
> *... if a person is likely to suffer prejudice from the disclosure of his name, if no sound reasons of public interest or public policy exist why such disclosure should take place, and if he has obtained assurances of confidence in relation to his identity before imparting his information, I find no reason in principle why his identity should not be treated as confidential information in the same way as the material which he provides to the authorities. The fact that it was the plaintiff whose information set in train the application for a new inquest and the events which followed is not at present (subject to the disclosures on television, to which I will return) public property; the plaintiff imparted such information to the authorities only upon receiving assurances that his anonymity would be preserved; he*

> *genuinely believes that publication of his identity to the community at large may result in damage to him and his family and hence its non-publication was a matter of substantial concern to him; and it may also well result in ridicule of him by those whose standards of conduct are different from his. Certainly unauthorised disclosure of his name will work to his detriment in a not insubstantial way."*

I am satisfied that this is an appropriate case for application of the above principles to the third party's identity, and that disclosure of the third party's identity would work to the third party's detriment in a not insubstantial way.

138 As to whether the information was received in circumstances importing an obligation of confidence, I have had regard to the evidence (described at paragraphs 7, 8, 19 and 21 above) obtained from the third party and from the Authority's employee who received and recorded the information from the third party. Their respective accounts of the relevant events are consistent, and are corroborated by a contemporaneous note made by the Authority's employee at the time the information in issue was received and recorded. That evidence discloses that the third party sought an express assurance from the Authority's employee that the information imparted by the third party and the third party's identity, would remain strictly confidential including from B. The Authority's employee gave the third party the assurance which the third party sought.

139 There will be cases where the seeking and giving of an express assurance as to confidentiality will not be sufficient to constitute a binding obligation, for example if the stipulation for confidentiality is unreasonable in the circumstances, or, having regard to all of the circumstances equity would not bind the recipient's conscience with an enforceable obligation of confidence (see paragraphs 84 and 85 above). However, no such circumstances are present in this case. (As it turned out, the Authority had no use for the information, as it was no part of the Authority's functions to deal with concerns of the kind conveyed by the third party. The information simply remains recorded, but unacted upon.) In my opinion, the circumstances of the Authority's receipt of the information in issue are such as to bind the Authority with an equitable obligation to respect the third party's confidence.

140 As to the fourth element of the equitable action for breach of confidence, I am satisfied that at the time the information in issue was communicated to the Authority's employee, the third party expressly stipulated that the information was not to be conveyed to B. In the course of these proceedings, it has been made clear to me that the third party continues to be vehemently opposed to the disclosure of that information to B. I find that disclosure of the matter in issue to B would constitute an unauthorised use of the information.

141 I am also satisfied that disclosure of the information in issue to B would cause detriment to the third party of one or more of the kinds recognised in paragraph 111 above.

142 In the circumstances of this case, no occasion arises to consider the application of any of the defences to an equitable action for breach of confidence discussed earlier in these reasons for decision. I should also note that s.46(2) does not apply to the matter in issue, so as to render s.46(1) inapplicable. The matter in issue probably does not answer the description of "matter of a kind mentioned in s.41(1)(a)" (though it may have done so if the Authority had been prepared to act on the information), but even if it does answer the relevant description 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).

143 I am satisfied that disclosure of the information in issue would found an action for breach of confidence, and that it therefore constitutes exempt matter under s.46(1)(a) of the FOI Act.

Issues in the Interpretation and Application of s.46(1)(b)

144 My remarks at paragraphs 31 to 34 are also relevant here. The focus of s.46(1)(a) is on ensuring that confidences that would be protected under the general law in an action for breach of confidence are capable of protection from disclosure under the FOI Act. To the extent that s.46(1)(b) has a different focus, it is that of minimising any prejudice to the future supply to government agencies of needed confidential information, that might be occasioned by the threat of disclosure of the confidential information under the FOI Act. Even then, if disclosure of the confidential information would on balance be in the public interest, the public interest in disclosure must prevail.

145 Section 46(1)(b) of the Queensland FOI Act has no counterpart in the Commonwealth FOI Act. The FOI statutes of Victoria (s.35(1)), New South Wales (Item 13(b), Schedule 1), South Australia (Item 13(b), Schedule 1) and Tasmania (s.33(1)) all contain somewhat similar provisions, although none of those provisions explicitly requires that the information communicated in confidence be information of a "confidential nature", as is required by s.46(1)(b) of the Queensland FOI Act.

146 In order to establish the *prima facie* ground of exemption under s.46(1)(b) 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;

(c) the disclosure of which could reasonably be expected to prejudice the future supply of such information.

147 If the *prima facie* ground of exemption is established, it must then be determined whether the *prima facie* ground is displaced by the weight of identifiable public interest considerations which favour the disclosure of the particular information in issue.

Information of a Confidential Nature

148 In my opinion, this criterion calls for a consideration of the same matters that would be taken into account by a court in determining whether, for the purpose of satisfying the second element of the equitable action for breach of confidence, the information in issue has the requisite degree of relative secrecy or inaccessibility. The matters referred to in paragraphs 71 to 72 above will also therefore be relevant to the question of whether this first criterion for the application of s.46(1)(b) is satisfied. It follows that, although it is not a specific statutory requirement, it will for practical purposes be necessary to specifically identify the information claimed to be of a confidential nature, in order to establish that it is secret, rather than generally available, information. The question of whether the information in issue is of a confidential nature is to be judged as at the time the

application of s.46(1)(b) is considered. Thus if information was confidential when first communicated to a government agency, but has since lost the requisite degree of secrecy or inaccessibility, it will not satisfy the test for exemption under s.46(1)(b).

Communicated in Confidence

149 This criterion will obviously be satisfied where a (valid) contractual obligation of confidence governs the communication, or the circumstances of the communication are such as to import an equitable obligation of confidence. But these are instances where resort to s.46(1)(b) is unnecessary, as s.46(1)(a) will protect from disclosure. I think the words "communicated in confidence" set up their own criterion which is to be satisfied without any necessity to consider whether legal obligations of confidence would attend the communication in issue. There will obviously, however, be a substantial degree of overlap with the kinds of considerations dealt with at paragraphs 76 to 96 above.

150 The words "communicated in confidence" in s.35(1) of the Victorian FOI Act were briefly considered by two members of a Full Court of the Supreme Court of Victoria in *Ryder v Booth* [1985] VR 869. Gray J (at p.878) looked at the terms of the document in issue, the nature of the information, the purpose for which the information was provided and the circumstances in which it was provided before concluding that the communication in question fell within the ordinary meaning of a communication made in confidence. King J (at p.883) said that whether information is communicated in confidence is a question of fact and it is not necessary to consider whether legal obligations of confidence are set up by the communications in question. King J held that undisputed evidence that the information in question was regarded and treated as confidential as between the supplier and the recipient agency suffices to prove that the information was communicated in confidence within the meaning of s.35(1) of the Victorian FOI Act.

151 I consider that s.46(1)(b) contemplates the situation described by the Commonwealth AAT (Davies J presiding) in *Re Low and Department of Defence* (1984) 2 AAR 142, where the Tribunal said of the former s.45 of the Commonwealth FOI Act (at p.48):

> *"... [it] is concerned with information which would not have been disclosed but for the existence of a confidential relationship. Such a situation is readily seen when a person dealing with an agency conveys to the agency information that the person is not bound to disclose and does so on the understanding on both sides that such information will be kept confidential."*

152 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.

153 The matters discussed at paragraphs 103 and 104 above concerning the scope or extent of an obligation of confidence will also be relevant to the extent of the mutual understanding as to confidence for the purposes of s.46(1)(b), i.e. it is a question of fact whether in the circumstances it was or must have been the intention of the parties that the recipient should be at liberty to divulge the information to a limited class of persons which may include a particular applicant for access under the FOI Act. Likewise the matters discussed at paragraphs 105 and 106 above concerning the confider authorising the disclosure of information previously communicated in confidence are also relevant here.

Could Reasonably be Expected to Prejudice the Future Supply of Such Information

154 The phrase "could reasonably be expected to" appears in several of the exemption provisions contained in Part 3 Division 2 of the FOI Act: (sections 38, 39, 40, 42(1), 45(1)(b)(ii), 45(1)(c)(ii), 45(3)(b), 46(1)(b), 47(1) and 49). In each case, the phrase appears in conjunction with some prejudicial effect which may result from the disclosure of matter. Where it is established that disclosure of the matter in issue "could reasonably be expected to" lead to the specifically described prejudicial consequence, then the matter is *prima facie* exempt. In all cases but s.42(1), 45(1)(b), and 45(3)(b), this *prima facie* exemption is then subject to a countervailing public interest test.

155 In interpreting the meaning of the specific phrase "could reasonably be expected to prejudice", it is helpful to refer to cases decided under the Commonwealth FOI Act, since the same phrase appears in a number of comparable contexts in that statute, and has been the subject of judicial scrutiny in the Federal Court on several occasions: *News Corporation Ltd v National Companies and Securities Commission* (1984) 5 FCR 88, per Fox J and Woodward J; *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, at pp. 189-190 per Bowen CJ and Beaumont J, and at pp. 193-196 per Sheppard J); *Arnold v Queensland and Australian National Parks and Wildlife Service* (1987) 13 ALD 195, at p.204 per Wilcox J, and at p.215 per Burchett J; *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Another* (1992) 108 ALR 163, at pp.175-178.

156 In *Attorney-General v Cockcroft*, which dealt with the proper interpretation of the phrase "could reasonably be expected to prejudice the future supply of information" in the context of the s.43(1)(c)(ii) (business affairs) exemption contained in the Commonwealth FOI Act, Bowen CJ and Beaumont J had this to say:

> *"In our opinion, in the present context, the words 'could reasonably be expected to prejudice the future supply of information' were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act. It is undesirable to attempt any paraphrase of those words. In particular, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like. To construe s.43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based: see* Kioa v West (1985) 62 ALR 321; 60 ALR 113 per Mason J and per Gibbs CJ."

157 In the same case, Sheppard J stated the appropriate test for the decision-maker in the following terms:

> *"In my opinion he will not be justified in claiming exemption unless, at the time the decision is made, he has real and substantial grounds for thinking that the production of the document could prejudice [the future supply of information]. But, stringent though that test may be, it does not go so far as to require the decision-maker to be satisfied upon a balance of probabilities that the production of the document will in fact prejudice the future supply of information."*

158 The most recent Federal Court decision on point is *Searle's case*, in which a Full Court of the Federal Court (Davies, Wilcox and Einfeld JJ) was asked to consider whether there was a fundamental difference in principle between the test proposed in the joint judgment of Bowen CJ

and Beaumont J in *Attorney-General v Cockcroft* and the test proposed by Sheppard J in that case. The Full Court in *Searle Australia Pty Ltd v PIAC* stated:

> *"Their Honours [Bowen CJ and Beaumont J] did not suggest ... that it was sufficient that there be a* possibility *not irrational, absurd or ridiculous that the specified consequence would occur. Their Honours specifically rejected that approach, saying that the words 'could reasonably be expected' meant what they said. The practical application of their Honours' view will not necessarily lead to a result different from that proposed by Sheppard J.*
>
> *In the application of s.43(1)(b), there would ordinarily be material before the decision-maker which would show whether or not the commercial value of the information would be or could reasonably be expected to be destroyed or diminished if the information were disclosed. It would be for the decision-maker to determine whether, if there were an expectation that this would occur, the expectation was reasonable."*

159 The Full Court went on in that case to state that the issue which the decision-maker must determine is not the reasonableness of the claim for exemption, but rather the reasonableness of expecting a particular consequence to flow from disclosure:

> *"However, the question under s.43(1)(b) is not whether there is a 'reasonable' basis for a claim for exemption but whether the commercial value of the information could reasonably be expected to be destroyed or diminished if it were disclosed. These two questions are different. The decision-maker is concerned, not with the reasonableness of the claimant's behaviour, but with the effect of disclosure."*

160 In *News Corporation v NCSC* (1984) 5 FCR 88, Fox J said that a mere risk of prejudice is not sufficient to satisfy the statutory phrase "could reasonably be expected to prejudice". The words call for the decision-maker applying s.46(1)(b) to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.

161 Where persons are under an obligation to continue to supply such confidential information (e.g. for government employees, as an incident of their employment; or where there is a statutory power to compel the disclosure of the information) or persons must disclose information if they wish to obtain some benefit from the government (or they would otherwise be disadvantaged by withholding information) then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information. In my opinion, 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 future supply of such information from a substantial number of the sources available or likely to be available to an agency.

162 If the first three criteria specified in s.46(1)(b) are satisfied, then the application of the countervailing public interest test must be considered.

Application of s.46(1)(b) to the Matter in Issue

163 The Authority found that the matter in issue was exempt under s.46(1)(b), without giving separate consideration to s.46(1)(a). Since I have found that s.46(1)(a) does apply, it is not necessary for me to determine whether s.46(1)(b) also applies and for reasons explained at paragraph 164 below, I do

not propose to do so; but I will make some brief observations.

164 Firstly, for the reasons explained at paragraph 142 above, s.46(2) does not apply so as to render s.46(1) inapplicable. I have already made findings at paragraphs 136 to 139 above that the information in issue in this case is confidential in nature, and that it was received by the Authority in circumstances importing an equitable obligation of confidence. Thus the first two criteria for the application of s.46(1)(b) are also satisfied.

165 The evidence presently available to me would be insufficient to satisfy the requirements of the third criterion as explained above. The Authority's decision-makers gave reasons statements which did not set out findings on material questions of fact (nor refer to the evidence or other material on which those findings were based) sufficient to show that this criterion would be satisfied. I have not asked the Authority in this review under Part 5 of the FOI Act to provide evidence going to this issue, because I was satisfied that s.46(1)(a) applies to the matter in issue. I therefore do not intend to make a finding as to whether or not s.46(1)(b) would also apply to the matter in issue.

166 In respect of the third criterion, however, I note that there is a series of cases decided by the Victorian AAT (*Re W and Health Department (Vic)* (1987) 1 VAR 383; *Re Pyle and Health Commission (Vic)* (1987) 2 VAR 54; *Re M and Health Department (Vic)* (1988) 2 VAR 317) that are somewhat similar to the present case, in that each involves an application by a former psychiatric patient for access to portions of the patient's clinical record comprising information about the patient conveyed to an agency by third persons. In all three cases, the Victorian AAT determined that disclosure of the information in issue would impair the future ability of the agencies concerned to obtain similar information. In those cases, however, the personal information concerning the patient was provided to assist in the treatment of the patient. The information in issue in the present case did not relate to B's medical care and treatment by the Authority and its employees, but rather to B's welfare in a more general sense. Indeed, as I remarked at paragraph 139, it appears that the Authority regarded the information recording the third party's concerns for one particular aspect of B's welfare as being related matters that it was not the Authority's function to deal with. It would probably not therefore be of any concern to the Authority if information of that precise kind was not forthcoming in the future. Nevertheless it will frequently be of assistance, and in some cases essential, for those involved in the care and treatment of a psychiatric patient to have access to a broad range of information, both clinical and non-clinical, concerning the patient. I can understand the Authority's concern to ensure that the supply of such information is not prejudiced. In any particular case, however, the Authority would need to demonstrate that a disclosure of requested information under the FOI Act could reasonably be expected to prejudice the future supply of such information.

167 Where a *prima facie* case for exemption is established under s.46(1)(b), it is then necessary to consider whether disclosure of the information in issue would, on balance, be in the public interest. The application of the countervailing public interest test in s.46(1)(b) involves the same considerations as the application of the countervailing public interest test in s.44(1), which I have dealt with below at paragraphs 179 to 189.

SECTION 44 - "MATTER AFFECTING PERSONAL AFFAIRS"

168 My reasons for decision in the case of *Re Stewart and Department of Transport* (Information Commissioner Qld, Decision No. 93006, 9 December 1993), referred to the various provisions in the FOI Act which employ the term "personal affairs", and contained a detailed discussion of the meaning of the phrase "personal affairs of a person" and relevant variations thereof (see paragraphs 79 to 114 of my reasons for decision in *Re Stewart*).

169 Whether or not particular matter contained in a document comprises information concerning an

individual's personal affairs is essentially a question of fact. I have already found the matter in issue to be exempt under s.46(1)(a), and I cannot appropriately give a detailed explanation as to why the matter in issue is also "personal affairs" information without revealing details that ought not to be revealed. The matter in issue comprises information provided by the third party to an employee of the Authority and some notations recording details of the occasions on which the third party contacted the Authority's staff. The last four paragraphs of the matter in issue concern the personal affairs of the third party only, and clearly constitute exempt matter under s.44(1), there being no public interest consideration of any weight that would favour their disclosure. They contain no information concerning the personal affairs of B, so there is no scope for s.6 or s.44(2) to apply to assist B to obtain access to them. (The effect of s.6 and s.44(2) is explained below.)

170 The four paragraphs comprising the balance of the matter in issue would if disclosed, disclose information concerning the personal affairs of the third party and information concerning the personal affairs of B; the matter clearly falls within the meaning of the term "personal affairs" as explained in *Re Stewart* (at paragraphs 79-80 and following) both as it relates to B and to the third party. To the extent that it concerns B it comprises expressions of opinion and of concern by the third party, who felt that the information being provided was relevant to the interests of B, as the third party saw them, at the time of B's hospitalisation. The matter in issue is not of a medical or clinical nature. It was not sought by the staff of the Authority for any purpose relating to B's treatment, but rather was proffered unilaterally by the third party, as being relevant to B's welfare in a more general sense.

171 Further complications arise because the information concerning the personal affairs of B is inextricably intertwined with the information concerning the personal affairs of the third party -it is not practicable to delete any information concerning the personal affairs of the third party, and to allow B access to any surviving material. Moreover if any of the information were disclosed to B, it would enable B to identify the third party, and as I have found above, the Authority is bound by an enforceable obligation of confidence not to disclose the third party's identity to B.

Shared Personal Affairs

172 I accept the correctness of the position stated by Deputy President Galvin of the Victorian AAT in a case involving an application for access to adoption records, *Re Thomas and Royal Women's Hospital and Another* (1988) 2 VAR 618, at 622:

> *"I cannot see any reason why a particular matter might not be a personal affair of more than one party. 'Personal' has not been said to connote exclusiveness."*

173 The application of the Queensland FOI Act to matter that concerns the personal affairs of more than one person becomes a trifle complex. The starting point is the general right of access conferred by s.21 of the FOI Act, by which any person has a legally enforceable right to be given access, under the Act, to documents of an agency or official documents of a Minister, subject only to such reservations and exceptions as are to be found in the scheme of the FOI Act itself.

174 When dealing with an FOI access application an agency or Minister has a discretion to refuse access to exempt matter. Applied literally, the opening words of s.44(1) would produce the result that information concerning the personal affairs of an applicant is *prima facie* exempt matter. Section 44(2) therefore provides for an exception to the operation of s.44(1), i.e. that matter is not exempt under s.44(1) merely because it relates to information concerning the personal affairs of the applicant. Section 44(2) cannot be construed as a provision which confers a personal right of access to information concerning an applicant's personal affairs. There is only one provision in the FOI Act which confers a right of access, and that is s.21; moreover, the scheme of the Act makes it clear that information relating solely to an applicant's personal affairs may be exempt under any applicable exemption provision in Part 3, Division 2. Section 44(2) is, according to its plain terms, no more than an exception to an exemption provision.

175 The presence of the word "merely" in s.44(2) places a significant qualification on the scope of the exception, and one which is directly relevant to the circumstances under consideration. In paragraph 49 of my decision in *Mr S T Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade Development* (Information Commissioner Qld, Decision No. 93004, 13 August 1993), I expressed the view that the word "merely" in the phrase "merely factual matter" in the former s.36(2) of the FOI Act (since amended by the *Freedom of Information Amendment Act 1993 Qld*) meant purely factual matter, or solely or no more than factual matter. The English word "mere" comes from the Latin *merus*, meaning "pure, unmixed". Thus the Collins English Dictionary (Australian edition) gives the meaning of the word "mere" as "being nothing more than something specified". The correct sense of s.44(2) would be conveyed by paraphrasing it as - matter is not exempt under subsection (1) purely by reason that it relates to information concerning the personal affairs of the applicant for access.

176 Thus, if matter relates to information concerning the personal affairs of another person as well as the personal affairs of the applicant for access, then the s.44(2) exception to the s.44(1) exemption does not apply. The problem here arises where the information concerning the personal affairs of the applicant is inextricably interwoven with information concerning the personal affairs of another person. The problem does not arise where some document contains discrete segments of matter concerning the personal affairs of the applicant, and discrete segments of matter concerning the personal affairs of another person, for in those circumstances:

(a) the former will fall within the s.44(2) exception;
(b) the latter will be exempt under s.44(1) (unless the countervailing public interest test applies to negate the *prima facie* ground of exemption); and
(c) s.32 of the FOI Act can be applied to allow the applicant to have access to the information concerning the applicant's personal affairs, by the provision of a copy of the document from which the exempt matter has been deleted.

Where, however, the segment of matter in issue is comprised of information concerning the personal affairs of the applicant which is inextricably interwoven with information concerning the personal affairs of another person, then:

(a) severance in accordance with s.32 is not practicable;
(b) the s.44(2) exception does not apply; and
(c) the matter in issue is *prima facie* exempt from disclosure to the applicant according to the

terms of s.44(1), subject to the application of the countervailing public interest test contained within s.44(1).

(I should pause at this point to observe that I am analysing the situation according to a strict application of the exemption provisions, which I am bound to do by virtue of s.88(2) of the FOI Act. At the primary decision-making stage, and on internal review, an agency or Minister has the benefit of the discretions reserved by s.28(1) and s.14(b) of the FOI Act, which allow access to be given to matter even if it is technically exempt matter. Where it is clear by reason of the relationship or interaction between the applicant and the other person that the information concerning the personal affairs of the other person is such that it would be known to the applicant in any event or that its disclosure to the applicant would not be likely to be objected to by the other person, then it would appear to serve no useful purpose to exercise the discretion to grant or withhold access to exempt matter otherwise than in favour of disclosure to the applicant. This is particularly so if the other person is contacted, pursuant to s.51 or otherwise, and raises no objection to release of the information, either generally or to the particular applicant for access.)

177 The result in the present case is that the segment of the matter in issue in which information concerning the personal affairs of B is inextricably interwoven with information concerning the personal affairs of the third party, is *prima facie* exempt from disclosure to B under s.44(1), subject to the application of the countervailing public interest test contained within s.44(1).

178 In that regard B is entitled to whatever assistance can be obtained from s.6 of the FOI Act, which provides:

> ***"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."*

Application of the Countervailing Public Interest Test

179 Section 44(1) is one of several exemption provisions (s.46(1)(b) is another) which are framed so as to require an initial judgment as to whether disclosure of matter in a document would have certain specified effects, which if established will 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 matter in the document "would, on balance, be in the public interest".

180 The meaning of the phrase "public interest" was discussed in some detail in my decision in *Re Eccleston;* see in particular paragraphs 49 to 57, of which the following is 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.

56 Such factors have been acknowledged and applied in several decisions of the Commonwealth AAT; for example in Re James and Others and Australian National University (1984) 6 ALD 687 at p.701, Deputy President Hall said:

> '87 In [Re Burns and Australian National University (1984) 6 ALD 193] my colleague Deputy President Todd concluded that, for the purposes of the Freedom of Information Act, the concept of public interest should be seen as embodying public concern for the rights of an individual. Referring to a decision of Morling J, sitting as the former Document Review Tribunal (Re Peters and Department of Prime Minister and Cabinet (No. 2) (1983) 5 ALN No. 218) Deputy President Todd said:
>
> > *"But what is important is that his Honour clearly considered that there was a public interest in a citizen having such access in an appropriate case, so that if the citizen's 'need to know' should in a particular case be large, the public interest in his being permitted to know would be commensurately enlarged." (at 197)*
>
> I respectfully agree with Mr Todd's conclusion ... The fact that Parliament has seen fit to confer upon every person a legally enforceable right to obtain access to a document of an agency or an official document of a minister, except where those documents are exempt documents, is to my mind a recognition by Parliament that there is a public interest in the rights of individuals to have access to documents - not only documents that may relate more broadly to the affairs of government, but also to documents that relate quite narrowly to the affairs of the individual who made the request.'

57 The force of this principle has been recognised, at least in so far as it relates to documents concerning the personal affairs of an applicant for access, in s.6 of the FOI Act, ... "

181 I have taken into account B's submissions as to public interests considerations favouring disclosure, the essence of which is summarised in the passages set out at paragraphs 13 to 16 above. B has submitted that a patient's medical record bears witness to all medical treatment of the patient, and that there is a public interest in patients being able to gain access to information concerning their medical treatment. B further argues that while it may be in the interests of medical staff to withhold from a patient certain aspects of their treatment, withholding such information is not in the public interest. With respect to the particular information withheld, B states that:

> *"[t]he deleted entry in my medical report on 18/6/'92 is especially relevant as a part of my medical history since the report by Dr A Sheehan (19/6/'92), indicates that I was over-sedated on that day."*

182 I accept that there is a public interest consideration in patients being able to gain access to information concerning their medical treatment, though it is certainly not an unqualified one (*cf.* s.44(3) of the FOI Act where it is expressly recognised that there may be instances where disclosure to an applicant of information of a medical or psychiatric nature concerning the applicant would be prejudicial to the applicant's physical or mental health or wellbeing). In an appropriate case, I would be prepared to give appropriate weight to a public interest consideration of this nature and measure it against other relevant public interest considerations weighing for and against disclosure of the matter in issue.

183 I emphasise again, however, that the information in issue is not concerned with B's medical treatment, as B supposes, but is entirely non-clinical information in the nature of an expression of opinion and of concerns held by the third party concerning B's interests and welfare in a general sense at the time of B's hospitalisation. Disclosure of the information in issue would do nothing to advance B's knowledge and understanding of B's medical treatment. A public interest consideration relating to patient access to information concerning medical treatment is not sufficiently relevant to the matter in issue to be of any assistance to the applicant's case for disclosure.

184 I also note that B's submissions indicate that a review of the portions of the medical file released by the respondent disclosed certain inaccuracies in its contents, which B wishes to correct or clarify:

> *"As a result of the release of my medical file, I discovered the numerous misinterpretations and inaccurate data this document contained in relation to my state of mental well-being. On every page were errors and half-truths, which previous to my knowledge, I could have no opportunity to explain. Why would anyone wish to deny me the benefit of clarifying aspects of my medical report which cast doubt on my ability to use reasoned logic at that time? Should anyone be denied this right? Only by complete access to my file, am I given the opportunity to correct mistaken views, held in relation to my mental health".*

185 I recognise that B's stated aim of gaining access to the entire contents of the medical file, for the purposes of correcting what B perceives as misinformation contained in that file, is consistent with s.5(1)(c) of the FOI Act, which states that one of the reasons for the enactment of the FOI Act was Parliament's recognition of the public interest in members of the community having the right to have access to information held by government in relation to their personal affairs, including the provision of mechanisms whereby they could ensure that such information was accurate, complete, up-to-date and not misleading. However, it must also be recognised that Part 4 of the FOI Act, which provides such a mechanism for amendment of personal affairs information held by government, is subject to the limitation that the person must have had access to a document containing the information from an agency or Minister, whether or not under the FOI Act (see s.53 of the FOI Act). The scheme of the FOI Act contemplates that even information which relates solely to the personal affairs of an applicant (for the purposes of s.44) may be withheld from access if it is exempt matter under any other of the exemption provisions in Part 3 Division 2 of the FOI Act.

186 While the public interest in members of the community being given ways to ensure the accuracy of personal affairs information held by government is a relevant consideration, I do not regard it, considered as a separate factor, as adding any greater weight to the applicant's case for disclosure than the public interest consideration favouring disclosure which carries most weight in this context, namely the public interest (which is given special recognition in s.6) in an individual having access

to information concerning that individual's personal affairs. However, with the advantage necessarily denied to B, of knowing the contents of the information in issue, I am satisfied that disclosure of that information to B would not serve B's interests in any positive way, apart perhaps from satisfying B's understandable curiosity concerning the identity of the third party and the nature of the confidential information conveyed to the Authority by the third party.

187 I am satisfied that the public interest considerations favouring disclosure of the matter in issue in this case are not of sufficient weight to displace the *prima facie* ground of exemption in the public interest under s.44(1), and that the matter in issue is exempt matter under s.44(1).

188 In B's supplementary submission, lodged on 20 August 1993, B proposed a compromise which B felt would accommodate the interests of the third party, while allowing B to obtain the information sought:

> *"In my requesting that the information withheld be made available to me (having noted the reluctance of the confidant to be identified), I request only that the information and the employment status of this person be made available. (Their occupation and whether or not they were medical personnel is relevant, but I do not require their name.) By submitting to this half-way mark, I have proposed an arrangement of mutual concession without compromising my requirements."*

189 The third party, however, maintains a vehement opposition to the release of any of the matter in issue, including both the identity of the third party and the substance of the information provided to the Authority. As I have previously stated, it is not possible to disclose the information which concerns B's personal affairs without also disclosing information which concerns the third party's personal affairs, and which would identify the third party.

CONCLUSION

190 Having found that the matter in issue is exempt matter under s.46(1)(a) and s.44(1) of the FOI Act, I affirm the decision under review.

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F N ALBIETZ
INFORMATION COMMISSIONER