OFFICE OF THE INFORMATION COMMISSIONER (QLD))) S 82 of 1993 (Decision No. 94002)

Participants:

DR P T McENIERY
Applicant

- and -

THE MEDICAL BOARD OF QUEENSLAND
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - matter that would identify the author of a letter of complaint forwarded to the respondent concerning certain activities of the applicant - whether exempt matter under s.42(1)(b) of the *Freedom of Information Act 1992 Qld* - explanation of the requirements of s.42(1)(b) of the *Freedom of Information Act 1992 Qld* - explanation of the meaning of the phrase "confidential source of information, in relation to the enforcement or administration of the law".

Freedom of Information Act 1992 Qld s.42(1)(a), s.42(1)(b), s.42(5), s.44(1), s.46(1)(a), s.46(1)(b), s.52, s.81
Medical Act 1939 Qld s.35(vii), s.37, s.37A
Medical Board of Queensland Advertising By-laws 1990
Freedom of Information Act 1982 Cth s.37(1)(b)
Freedom of Information Act 1982 Vic s.31(1)(a), s.31(1)(c)
Criminal Justice Act 1989 Qld s.137
National Health Act 1953 Cth
Criminal Code Qld
Police Service Administration Act 1990 Qld s.10.21

Accident Compensation Commission v Croom [1991] 2 VR 322
Ainsworth v Criminal Justice Commission (1992) 66 ALJR 271
Anderson and Department of Special Minister of State (No. 2), Re (1986) 11 ALN N239
Annetts v McCann (1990) 170 CLR 596
"B" and Brisbane North Regional Health Authority, Re (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported)
Barnes and the Commissioner for Corporate Affairs, Re (1985) 1 VAR 16
Cain & Ors v Glass & Ors (No. 2) [1985] 3 NSWLR 230
Colakovski v Australian Telecommunications Corporation (1991) 100 ALR 111
Coleman and Director-General, Local Government Department, Pentland, Re (1985) 1 VAR 9

DECISION

The matter in issue is exempt matter under s.42(1)(b) of the *Freedom of Information Act 1992* Qld, and accordingly the decision under review is affirmed.

Date of Decision: 28 February 1994

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant is a staff cardiologist employed in a Queensland public hospital. The applicant seeks review of the respondent's decision to deny him access to information which would identify the person who in 1992 asked the respondent to investigate whether the applicant was guilty of "misconduct in a professional respect" under s.35(vii) of the *Medical Act 1939 Qld* on the basis that certain newspaper articles (concerning a treatment called coronary angioplasty performed by the applicant) constituted advertising by the applicant, with a view to the applicant's own gain, otherwise than in accordance with the *Medical Board of Queensland Advertising By-laws 1990*.

2. The applicant provided the Medical Board with a satisfactory explanation as to the circumstances surrounding the publication of the newspaper articles, and no further action was taken by the Medical Board.

3. Although cleared of the allegations that he may be guilty of "misconduct in a professional respect" in the manner contemplated by s.35(vii) of the *Medical Act*, the applicant remained aggrieved that the allegations had been made at all. By letter dated 27 February 1993, the applicant sought access under the *Freedom of Information Act 1992 Qld* (hereinafter referred to as the FOI Act or the Queensland FOI Act) to copies of:

> *"1. The original letter of complaint concerning the subject of coronary angioplasty;*
>
> *2. The name of the person or persons making the complaint; and*
>
> *3. The minutes and other records of the Board's discussions concerning this matter."*

4. The Medical Board's initial response was to give the applicant access to all documents responsive to the terms of his FOI access request, except the original letter of complaint which was claimed to be exempt under s.46(1)(b) of the FOI Act. The applicant applied under s.52 of the FOI Act for internal review, which was undertaken by Dr Diana Lange, the President of the Medical Board of Queensland (the Board). Dr Lange decided on 28 April 1993 to refuse access to the original

handwritten letter of complaint (again relying on s.46(1)(b) of the FOI Act), but to give the applicant access to a typed transcript of the contents of the letter of complaint, subject to the omission of any matter that might identify the author of the letter of complaint (e.g. name, address).

5. By letter dated 4 May 1993, Dr McEniery applied for review by the Information Commissioner of Dr Lange's decision, making it clear that he wished to press for disclosure of the identity of the complainant.

The Review Process

6. Dr Lange's internal review decision letter had suggested that there was a possibility that a meeting between the complainant and Dr McEniery could be convened by a representative of the Australian Medical Association. Presumably this proposal would not have been raised if the complainant had not at one stage been prepared to consider shedding the cloak of confidentiality, and the review process was delayed in case this meeting should eventuate. I was subsequently informed by the respondent, however, that the complainant did not wish to participate in such a meeting, and did not otherwise wish to make her or his identity known to the applicant.

7. During initial discussions with the respondent's legal officer concerning the review process, it was urged on behalf of the respondent that, although the respondent had to that date only invoked s.46(1)(b) of the FOI Act, it was open to me to find, and I should properly find, that the information withheld from the applicant was exempt matter under s.42(1)(b) of the FOI Act. Section 42(1)(b) provides as follows:

> *"42.(1) Matter is exempt matter if its disclosure could reasonably be expected to -*
>
> ...
>
> *(b) enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained;"*

8. I wrote to the applicant on 8 June 1993 alerting him to the fact that, in addition to s.46, I would consider the applicability of s.42(1)(b) of the FOI Act. I also informed him in that regard that the relevant law in respect of the enforcement or administration of which the alleged confidential source supplied information, appeared to be the *Medical Act 1939* (in particular s.35(vii) thereof) read in conjunction with the *Medical Board of Queensland Advertising By-laws 1990*. I also forwarded for the applicant's assistance a number of reported cases involving the interpretation and application of s.37(1)(b) of the *Freedom of Information Act 1982 Cth* (the Commonwealth FOI Act) and of s.31(1)(c)the *Freedom of Information Act 1982 Vic* (the Victorian FOI Act) which correspond to s.42(1)(b) of the Queensland FOI Act. The applicant was invited to lodge a written submission in support of his case, which he did by letter dated 23 June 1993.

9. While the applicant's written submission provided valuable material concerning the Board's investigation and the facts and circumstances which gave rise to the letter of complaint, it was to a large extent directed to showing that there was no reasonable basis for the lodging of the complaint, and that (as the applicant's submission said of the letter of complaint):

> *"This vexatious letter was sent for no other reason but misdirected anger."*

It is no function of mine to make a judgment on that issue, though I have had regard to the applicant's submission to the extent that it is relevant to the issues I have to determine. The applicant's submission stated that *"I have no 'legal arguments' to bring to this debate"*. His position

can be summarised by quoting one sentence from the submission:

> *"I therefore persist in my request to obtain the name of my complainant, as I believe it is the right of an accused to know who the accuser is."*

10. The respondent has the onus under s.81 of the FOI Act of establishing that its decision was justified, and in support of its case the respondent lodged an affidavit of Dr Diana Lange sworn on 23 November 1993. Dr Lange deposed to the following:

> *"1. I am the President of the Medical Board of Queensland ("the Board") and have held this position since 31 October 1991. I am a member of the Board's Complaints Committee.*
>
> *2. I am familiar with the Board's policies and procedures in relation to complaints made to the Board concerning medical practitioners.*
>
> *3. The practice of the Board is to treat all complaints received concerning medical practitioners as confidential whether or not the complainant has specified that the information contained in the complaint has been given on a confidential basis. Whilst the Board does not generally give explicit guarantees of confidentiality to complainants, the Board considers that the obligation of confidence may be implied from the relationship that exists between the Board and the complainant and from the inherently confidential nature of the information contained in complaints.*
>
> *4. Upon receipt of a letter of complaint concerning a medical practitioner, the Board's usual practice is to seek the complainant's consent to the Board forwarding a copy of the letter of complaint to the practitioner concerned. If such consent is given, the Board sends the complaint to the practitioner and requests that the practitioner provide a response concerning the matters complained of. If, following the receipt of the practitioner's response, the Board considers that further investigation is necessary, such investigation would normally involve one or more of the following steps:*
>
> - *interviewing the complainant and any relevant witnesses;*
> - *obtaining independent expert reports;*
> - *inspecting any relevant medical records;*
> - *referral of the complaint to a complaints investigation committee pursuant to section 37(3) of the* Medical Act 1939 *("the Act") for investigation by way of an inquiry.*
>
> *5. In respect of complaints dealing with matters other than advertising, the results of the investigation are referred to the Board's Complaints Committee which subsequently makes recommendations to the Board as to what action should be taken in respect of the complaint. Complaints dealing with matters concerning advertising are dealt with by the Board's Advertising Committee in like manner.*
>
> *6. Where the complainant does not consent to the complaint being sent to the practitioner concerned, the Board may elect to inform the practitioner of the substance of the complaint if it considers that the practitioner can be given sufficient information to enable the practitioner to respond to the matters complained of.*

7. Whilst the Board would not usually disclose the identity of a complainant without the complainant's consent, exceptional circumstances may arise where the subject matter of a complaint is such that the Board considers it necessary, in the interests of public health and safety, to summons the complainant (who may have requested that the complaint be dealt with confidentially) to give evidence in disciplinary proceedings taken by the Board against the practitioner concerned. This would inevitably result in the practitioner becoming aware of the complainant's identity. In such cases the Board would need to weigh the risk to public health and safety against its obligation to preserve confidentiality.

8. In relation to the complaint which is the subject of this external review, no explicit guarantees of confidentiality were sought by or given to the complainant. As Dr McEniery provided the Board with a satisfactory explanation as to the circumstances surrounding the publication of the newspaper articles which were the subject of the complaint, the Board took no further action.

9. The Board's primary function is to protect the public through the administration and enforcement of the provisions of the Act and its subordinate legislation. In order to perform this function, the Board relies on the receipt of information from the public concerning the unprofessional, improper, incompetent or unlawful practice of medicine. If such information was not treated confidentially by the Board but disclosed to third parties under the Freedom of Information Act 1992 *("the FOI Act"), members of the public would be deterred from giving information to the Board because of the risk of disclosure of their identity. This would prejudice the ability of the Board to effectively administer or enforce the provisions of the Act.*

10. The complainant in this case provided information to the Board which required the Board to determine whether the relevant newspaper articles constitute 'misconduct in a professional respect' under section 35(vii) of the Act on the part of Dr McEniery or were in breach of the Medical Board of Queensland Advertising By-laws 1990.

11. If the identity of the complainant in this case is disclosed, the Board's ability to give guarantees of confidentiality to future complainants would be undermined. It is reasonable to expect that the complainant in this case would be unwilling to provide information to the Board in the future if such information is able to be disclosed to third parties under the FOI Act without the complainant's consent. Similarly, other persons who may in the future be in a position to supply information to the Board, may withhold that information if they become aware that the Board cannot give any guarantees of confidentiality."

11. Dr Lange's affidavit was forwarded to the applicant, who was extended (by letter dated 25 November 1993) the opportunity to submit evidence or put a further submission in reply, but the offer was not taken up.

Exempting a person's identity from disclosure under the FOI Act

12. There are at least three possible bases on which a person's identity, or information which would enable a person to be identified, may be exempt from disclosure under the FOI Act. The first was adverted to in paragraph 81 of my reasons for decision in *Re R K & C D Stewart and Department of Transport* (Information Commissioner Qld, Decision No. 93006, 9 December 1993, unreported); i.e. the ground of exemption in s.44(1) of the FOI Act may permit deletion of names and other identifying particulars or references so as to render a document no longer invasive of personal

privacy, thereby removing the basis for claiming exemption under s.44(1) over a wider field of the information contained in the document.

13. The second was explained and applied in my reasons for decision in *Re "B" and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported) at paragraph 137. The decision of Yeldham J in *G v Day* [1982] 1 NSWLR 24 was cited as 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 in an action for breach of confidence. Matter of that kind is therefore capable of being exempt matter under s.46(1) of the FOI Act, provided other relevant requirements for exemption are satisfied. In *G v Day* itself, the plaintiff imparted certain confidential information to a proper authority in circumstances where it must have been understood that the information imparted was likely to become public in the course of a public inquiry, but the court ordered that the plaintiff's identity as the provider of the information be protected from disclosure, even though the information itself had since entered the public domain.

14. The third basis is s.42(1)(b), the terms of which are set out at paragraph 7 above. Section 42(1)(b) refers to a "confidential source of information" rather than a source of confidential information. Thus, while a confidential source can frequently be expected to supply confidential information (in the sense explained in *Re "B" and Brisbane North Regional Health Authority* at paragraph 71) it appears that it is not a necessary requirement to attract the application of s.42(1)(b) that the confidential source has supplied confidential information. This point is of consequence in the present case where the information supplied by the allegedly confidential source (hereinafter referred to as "the informant") was information in the public domain, namely newspaper articles which were forwarded to the respondent with a request that they be assessed by the respondent on the basis that they "*could be construed as advertising on* [the applicant's] *behalf and to* [the applicant's] *benefit*".

15. If the information supplied by the confidential source need not be confidential information in order to satisfy s.42(1)(b), it must certainly be information which relates to the enforcement or administration of the law. This requirement is explained further below. The only law which could be relevant in the circumstances of this case comprises the provisions of the *Medical Act* (and the *Medical Board of Queensland Advertising By-laws 1990* made thereunder) which are referred to above.

Analysis of s.42(1)(b)

16. Matter will be eligible for exemption under s.42(1)(b) of the FOI Act if the following requirements are satisfied:

    (a) there exists a confidential source of information;

    (b) the information which the confidential source has supplied (or is intended to supply) is in relation to the enforcement or administration of the law; and

    (c) disclosure of the matter in issue could reasonably be expected to -

        (i) enable the existence of the confidential source of information to be ascertained; or

        (ii) enable the identity of the confidential source of information to be ascertained.

17. In relation to (c), some obvious points are worth making at the outset. In *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441 at p.459, Jones J (President) of the Victorian Administrative Appeals Tribunal (the Victorian AAT) said of s.31(1)(c) of the Victorian FOI Act

(which corresponds, though not precisely, to s.42(1)(b) of the Queensland FOI Act):

> *"It is designed to protect the identity of the informer and has no application where that identity is known or can easily be ascertained independently of the document in question. ..."*

(See also *Re Coleman and Director-General, Local Government Department, Pentland* (1985) 1 VAR 9 at 13; *Re Simons and Victorian Egg Marketing Board (No. 1)* (1985) 1 VAR 54 at 58-59; *Re Barnes and the Commissioner for Corporate Affairs* (1985) 1 VAR 16 at 19-20.) Thus in *Re Lander and Australian Taxation Office* (1985) 17 ATR 173 the Commonwealth AAT held that in the circumstances of the case before it, information disclosed by the taxpayer's broker to the Australian Taxation Office in confidential discussions was not exempt pursuant to s.37(1)(b) of the Commonwealth FOI Act. The Tribunal said (at p.177):

> *"The applicant clearly knows that there had been confidential discussions between the ATO and his own brokers (see para 11 of the document). It is not in our view possible to characterise a person employed by the applicant to conduct as his agent an aspect of his financial affairs, and who is interviewed by the ATO in relation to the applicant's affairs, as a 'confidential source' of the information in question. Nor for that matter would disclosure in the circumstances disclose, or enable the applicant to ascertain, the 'existence or identity' of B, his own broker and agent. Exemption is thus not conferred by s.37(1)(b)."*

18. The question of whether the identity of a source of information is confidential is to be judged as at the time the application of s.42(1)(b) is considered. Thus if the identity of a source of information was confidential when the information was first communicated to a government agency, but the confidentiality has since been lost or abandoned, the test for exemption under s.42(1)(b) will not be satisfied. (See *Re Anderson and Department of Special Minister for State (No. 2),* Commonwealth AAT, Deputy President Hall, No. N83/817, 21 March 1986, at p.36, paragraph 77; *Re Chandra and Department of Immigration and Ethnic Affairs,* Commonwealth AAT, Deputy President Hall, No V84/39, 5 October 1984, at p.21, paragraph 47).

19. In the present case, the applicant does not know the identity of the person who forwarded the letter of complaint to the respondent, nor can the identity easily be ascertained independently of the identifying material which is the matter in issue in this case. Of course, it has already been disclosed to the applicant that a person forwarded a letter of complaint to the Board concerning the applicant, so that (c)(i) (from paragraph 16 above) is not applicable in the circumstances of this case. There will be situations, however, particularly in respect of police investigations, where (c)(i) is of particular significance, as remarked by Deputy President Hall of the Commonwealth AAT in *Re Anderson and Department of Special Minister of State (No. 2)* (1986) 11 ALN N239 at N247:

> *"It is important to emphasise that the ground of exemption established by s.37(1)(b)* [of the Commonwealth FOI Act] *extends not only to documents that would disclose the* identity *of a confidential source of information, but also to documents that would disclose the* existence *of such a source. That aspect of s.37(1)(b) has particular relevance in the present case, where the revelation of the nature and extent of the intelligence gathered by the police and others may reveal the fact not otherwise known, that a confidential source has been providing information to government on a particular matter."*

What constitutes a "confidential source of information"?

20. This issue was considered briefly by two judges of a Full Court of the Federal Court of Australia in *Department of Health v Jephcott* (1985) 62 ALR 421. Forster J said (at p.425):

> *"All information given to the Department cannot be 'confidential information' or 'given in confidence' or come from a 'confidential source' so that the mere giving of information without more cannot make the giver a confidential source. What then is a 'confidential source'? I am content to accept the interpretation in* Luzaich v United States *(1977) 435 F Supp 31 at 35, 'a source is confidential if the information is provided under an express or implied pledge of confidentiality'.*
>
> ...
>
> *No doubt the main reason for protecting the identity of informants is to encourage them and others like them to give information, or at least not to discourage them from doing so, in order to assist the enforcement or the administration of the law."*

21. Keely J said (at p.426):

> *"I ... accept ... that 'a confidential source of information' in s.37(1)(b) means a person who has supplied information on the understanding, express or implied, that his or her identity will remain confidential."*

22. I doubt that any essential difference was intended between the statements of Forster J and Keely J, but I consider that Keely J's statement is to be preferred as the more precise statement of the guiding principle. Keely J makes it clear that the relevant understanding relates to the informant's identity remaining confidential, whereas the wording of Forster J's preferred statement of principle leaves it unclear whether the "express or implied pledge of confidentiality" relates only to the information provided by the source, or to both the information provided and the identity of the source. Moreover, to the extent that Forster J's terminology might convey a suggestion that a unilateral pledge of confidentiality by the recipient of the information will satisfy the test for constituting a confidential source, such a suggestion would be wrong in principle (as explained below) and is inconsistent with Keely J's statement of principle which would require a common understanding, either express or implicit, on the part of both the provider of the information and the recipient, that the source was to be treated as confidential. Keely J's statement accords better with common sense, as there is no point in treating as a confidential source, a provider of information who has no wish to be treated as a confidential source. Thus, in *Re Liddell and Department of Social Security* (1989) 20 ALD 259 Deputy President Forgie of the Commonwealth AAT observed (at p.260):

"The first issue is whether the information has come from a confidential source. There is nothing on the face of the document to indicate the name of the informer and there is no section or box to be completed with his or her name or to mark if he or she does not wish to give it or wish it to be recorded or revealed by the respondent. In this case, there is no evidence presented as to whether this particular informer wished to have his identity kept confidential. He may or may not have. There is Mr Harvey's affidavit evidence of the practice of the respondent that 'all information supplied by the public relating to alleged breaches of the Social Security Act be kept confidential'. Taking into account the nature of the information disclosed and all the matters referred to above, I am not satisfied that the information was given to the Department on a confidential basis. The policy of the respondent is one aspect of the factors to be taken into account and cannot in this case determine the issue by itself."

23. Likewise, in *Accident Compensation Commission v Croom* [1991] 2 VR 322, at p.329 (the passage is set out below at paragraph 25) a Full Court of the Supreme Court of Victoria held that witnesses to a workplace injury could not be regarded as confidential sources of information under s.31(1)(c) of the Victorian FOI Act, notwithstanding that they gave the information contained in their statements after being given a promise of confidentiality.

24. In *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441, the documents in issue were a medical report on the applicant who had been examined by a doctor on behalf of a workers' compensation insurer following an industrial injury, and an investigator's report concerning the industrial injury compiled from statements taken from three witnesses. The then President of the Victorian AAT, Jones J, said (at p.459):

"What is at the heart of the exemption is the protection of the informer not the subject matter of the communication.

The provision clearly does not apply to the medical report. The identity of the medical practitioner is known. What is sought is the subject matter of the communication from him to the Commission. The doctor is not a confidential source of information within the meaning of the provision.

Nor do I think that the provision applies to the investigator's report. The witnesses who provided information to the investigator are not confidential sources of information in the relevant sense. As appears from the evidence, they were also employed by [the applicant's employer] *in varying capacities -management, leading hand and fellow worker. In my view, it is likely that their identities, if not well known, could easily be ascertained independently of the investigator's report. Further, the statements did not result from an undertaking that they would be kept confidential and only provided on that basis.* [The investigator] *agreed that he did not assert that the witnesses would not have spoken to him unless they received an undertaking as to confidentiality. He could not guarantee the confidentiality of statements but would do his best to keep them confidential and told worker witnesses that whatever they said to him was confidential for the insurance company. The reality is that the people interviewed by* [the investigator] *were potential witnesses in a hearing in a court or before the Tribunal or body dealing with workers' compensation. In my view they would be*

likely to realise this and that notwithstanding the statements by [the investigator] *about confidentiality, the information they provided might ultimately become public through some formal process. Indeed, that could easily occur through the tender of the report and proceedings before the* [Accident Compensation Tribunal], *which is a relatively common occurrence.*

In these circumstances I do not consider that the witnesses who provided information to the investigator are confidential sources of information within the meaning of s.31(1)(c)."

25. On appeal to a Full Court of the Supreme Court of Victoria, the Tribunal's decision was upheld, O'Bryan J (with whom Vincent J agreed) observing (at p.329):

"In relation to [s.31(1)(c) of the Victorian FOI Act] *the critical words are 'confidential source of information'. Clearly, this paragraph has no application to the medical report because the author of the report is known to the respondent and Mr Uren conceded that his submission was confined to three witnesses' statements taken by* [the investigator] *in the course of his investigation.*

I am of the opinion that it was clearly open to the Tribunal to arrive at the finding that the evidence did not disclose that any witness provided information in confidence to [the investigator]. [The investigator] *offered to maintain confidence in respect of information provided to him but was never informed by a person from whom he took a statement that the person wished his identity to be protected from disclosure.*

... The plain meaning that one might ascribe to this paragraph is that it is concerned with protection of the 'informer' and not with the protection of a potential witness who would prefer not to be identified. Public interest has dictated for a long time the need to protect the true 'informer' but a reluctant witness has never attracted immunity at common law. For instance, the 'newspaper rule' which protects confidential sources of information must yield whenever the interests of justice override the public interest: cf. Herald and Weekly Times Ltd v Guide Dog Owners and Friends Association *[1990] VR 451 and* British Steel Corporation v Granada Television Ltd *[1981] AC 1096.*

Mr Uren submitted that to release the report would disclose the identities of 'confidential' sources of information. The sources were confidential because they gave the information contained in their statements after being given (or offered) a promise of confidentiality.

In my opinion, the words 'confidential source of information' do not apply to a potential witness in a civil proceeding who would prefer to remain anonymous for the time being. A potential witness cannot clothe himself with secrecy in relation to the administration of the law unless he is able to invoke 'informer' immunity. Nor may an investigator confer upon a potential witness 'confidential' status until it is convenient to his principal to reveal the name of the witness."

Examining the relevant circumstances to find an implied understanding that the identity of a source of information is to remain confidential

26. I am conscious that premature disclosure under the FOI Act of the existence or identity of a source of information, whether confidential or not, could in some circumstances prejudice an investigation into a contravention or possible contravention of the law, but s.42(1)(a) of the FOI Act is available to meet such a situation. Section 42(1)(b) is confined to the protection from disclosure of the existence or identity of a confidential source of information, and I am here concerned with what circumstances, in the absence of express agreement, will justify a finding of an implied understanding that a particular source of information is a confidential source. Specific attention should be drawn to Jones J's observations in *Re Croom* to the effect that the three witnesses were likely to realise that the information they provided might ultimately become public through some formal process, that they were potential witnesses in a hearing and hence were not confidential sources of information in the relevant sense. If one is assessing the circumstances surrounding the imparting of information in order to determine whether there was an implicit mutual understanding that the identity of the person who supplied the information would remain confidential, a relevant (and frequently crucial) issue will be whether the provider and recipient of the information could reasonably have expected that the provider's identity would remain confidential given the procedures that must be undertaken if appropriate action is to be taken by the recipient, in respect of the information, for the purposes of the enforcement and administration of the law.

27. The possible scenarios that can arise in the enforcement or administration of the law are many and varied, but some examples of common scenarios can be given. The most common situation in which a source of information and the agency receiving the information could reasonably expect that confidentiality could be preserved in respect of the identity of the source, is where the information provided can be independently verified by the agency's own investigators, or the source draws the agency's attention to the existence of physical or documentary evidence which speaks for itself (i.e. which does not require any direct evidence from the source to support it). Thus a person may inform the proper authority that a neighbour is illegally carrying on an unlicensed business from the neighbour's premises, and that investigators can observe this for themselves if they visit the premises at certain hours; or a source may alert the revenue authorities to precisely where they may discover the second set of accounting records which will establish that a business has been fraudulently understating its income. On the other hand a victim of wrongdoing who seeks redress from a proper authority cannot reasonably expect that action could be taken without the alleged wrongdoer being informed of the charge that a wrong has been committed against a particular victim. Likewise, if the prosecuting authorities are dependent on the eyewitness evidence of an informer to secure a conviction, then the informer must be produced to give evidence at the committal and trial, if the accused puts the prosecuting authority to proof of its case. By contrast, sources who assist police with intelligence gathering that ultimately bears the fruit of an arrest or conviction may never need to have their identity or existence revealed during the course of the investigative and prosecutorial process.

28. The legal requirement that government agencies observe the rules of natural justice (now also commonly referred to as the requirements of procedural fairness, or the duty to act fairly) whenever they apply to an agency's activities, will also affect the question of whether the supplier of information to a government agency, and the agency itself, could reasonably expect the confidentiality of the supplier's identity to be preserved while taking appropriate action in respect of the information conveyed. In *Kioa v West* (1985) 60 ALJR 113 at 127, Mason J said:

> *"The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention."*

Mason J had earlier explained (at p.126) that his reference to rights or interests *"must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests"*. His Honour continued (at p.127):

> *"... the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, that is, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations ... ."*

His Honour referred to the need for a strong manifestation of contrary statutory intention to be apparent in order for the duty to act fairly to be excluded, and observed:

> *"The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?"*

29. The breadth of application of these principles is illustrated by *Ainsworth v Criminal Justice Commission* (1992) 66 ALJR 271 where the High Court held that the nature of the Criminal Justice Commission (established under the *Criminal Justice Act 1989 Qld*) and its powers, functions and responsibilities are such that, to the extent that the *Criminal Justice Act* does not itself provide, a duty of fairness is necessarily to be implied in all areas involving its functions and responsibilities. The High Court restated that a duty to observe procedural fairness arises (if at all) because the power being exercised by a government agency or official is one which may destroy, defeat or prejudice a person's rights, interests or legitimate expectations (see also *Annetts v McCann* (1990) 170 CLR 596 at 598) and reaffirmed that the relevant interests which, when threatened with prejudice, will attract the duty of procedural fairness (in the absence of clear statutory indications to the contrary) include personal reputation and business or commercial reputation. The High Court held that these principles apply to the exercise of powers of inquiry and investigation.

30. The duty to act fairly necessarily involves a flexible approach requiring a common sense judgment according to the circumstances of each particular case. When powers of inquiry and investigation are being exercised the duty to act fairly to the subject(s) of inquiry and investigation will not require the adoption of procedures that frustrate or unduly inhibit the attainment of the objects of the inquiry or investigation. In *Ainsworth's case*, the High Court said (at p.275):

> *"Obviously, not every inquiry or investigation has to be conducted in a manner that ensures procedural fairness. On the other hand it does not follow that there was no duty of that kind simply because the Commission was engaged in an exercise of that kind."*

The High Court also affirmed (at p.276) that:

> *"It is not in doubt that where a decision-making process involves different steps or stages before a final decision is made, the requirements of natural justice are satisfied if 'the decision-making process, viewed in its entirety, entails procedural fairness'. (*South Australia v O'Shea *(1987) 163 CLR 378, per Mason CJ, at 389.)"*

Thus the stage at which the duty to act fairly requires that a person subject to inquiry or investigation be given the opportunity to know and to answer a case prejudicial to that person's rights, interests or legitimate expectations, may involve a question of appropriate timing. If the investigation process is a preliminary stage which will culminate in a formal opportunity for the subject of investigation to know and to answer any prejudicial case that is found to exist, then it is possible (always according to the circumstances of the particular case) that the duty to act fairly will not require that anything be disclosed to the subject of investigation, during the investigative stage. In an earlier High Court decision, *National Companies and Securities Commission v News Corporation Ltd* (1984) 58 ALJR 308, three justices (Mason, Wilson and Dawson JJ) observed (at p.320) that:

> *"It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry. Of course, there comes a time in the usual run of cases when the investigator will seek explanations from the suspect himself and for that purpose will disclose the information that appears to require some comment."*

31. What constitutes the observance of fair procedures will vary according to the exigencies of particular cases, but ordinarily the duty to act fairly requires that a person be given an effective opportunity to know the substance of the case against the person, including in particular the critical issues or factors on which the case is likely to turn (*cf. Kioa* per Mason J at p.128-9) so that the person is given an effective opportunity of dealing with the case against him or her.

32. If a person can be given an effective opportunity to know the substance of the case against him or her, including the critical issues or factors, without revealing the identity of a source of information, then the source and the relevant government agency may reasonably expect that the confidentiality of the identity of the source is capable of being preserved. Where the substance of the case against a person is dependent on the direct observation and testimony of a source of information, or on the disclosure of the identity of a source of information as the person against whom a wrong is alleged to have been committed, then the source and the government agency could not reasonably expect that the source's identity could remain confidential, if appropriate action is to be taken on the information conveyed by the source, and it would be difficult to find (for the purposes of s.42(1)(b) of the FOI Act) an implicit common understanding that the source's identity would remain confidential.

33. In appropriate circumstances, however, (e.g. in the case of an informer who may be exposed to a real threat of detriment) an implied understanding may be found to the effect that the identity of a source of information will be kept confidential unless and until it must be disclosed in accordance with the legal requirement to observe fair procedures. If, after investigation, the authorities decide not to pursue formal action on the information, or for some other reason it becomes unnecessary to disclose the source's identity (e.g. the alleged wrongdoer confesses to the authorities), then the source may be able to remain a "confidential source of information".

34. The identity of a confidential source of information may pass through a chain of persons (for example, within different investigative agencies who exchange intelligence information) without losing its confidential status, provided the persons who receive it are obliged to respect the understanding of confidentiality. However, once the identity of a source of information is disclosed to a person who is not obliged to respect the understanding of confidentiality, in particular to the person informed against, then ordinarily, in my opinion, the source can no longer be described as a confidential source of information. On the other hand, if the source's identity has not actually passed into the public domain (e.g. through disclosure in open court) and has not been widely circulated by those who have obtained knowledge of it, it is arguable (by analogy with the principles discussed in *Re "B" and Brisbane North Regional Health Authority* at paragraph 71) that the source's identity could remain sufficiently secret or inaccessible for it still to qualify as a confidential source of information *vis-à-vis* an applicant for access under the FOI Act who does not know, and cannot without great difficulty ascertain, the identity of the source of information.

Express agreement that the identity of a source of information is to remain confidential

35. Where an express assurance has been sought by a source of information that his or her identity will remain confidential, and has been given, perhaps inappropriately, by or on behalf of a government agency, the agency would ordinarily be obliged to honour the express assurance given, even though it may mean that no effective action can be taken in respect of the information conveyed. If the agency wishes to take action on the information conveyed, it may have to negotiate with the source as to a more appropriate understanding, i.e. that the source's identity will be kept confidential unless and until it must be disclosed in accordance with the legal requirement to observe fair procedures. Sometimes an assurance of confidentiality will be given to a source in the hope that investigation of the information conveyed will allow the information to be verified by other means, thereby allowing appropriate action to be taken on the information. For the purposes of s.42(1)(b) the seeking by a source of information, and the giving by the relevant government agency, of an express assurance that the source's identity will remain secret, will ordinarily suffice to qualify the source as a "confidential source of information", at least until such time as the confidentiality of the source's identity is effectively lost or abandoned.

The requirement that information relate to the enforcement or administration of the law

36. This issue has received little attention in cases decided under s.37(1)(b) of the Commonwealth FOI Act. Many of the cases have involved information obtained by the Australian Federal Police for law enforcement purposes, which clearly falls squarely within the concept of information relating to the enforcement of the law. In *Department of Health v Jephcott* (1985) 62 ALR 421, it was accepted without comment that information questioning a person's entitlement to receipt of a domiciliary nursing care benefit under Part VB of the *National Health Act 1953 Cth* was information in relation to the enforcement or administration of the law. In a series of cases in the Commonwealth AAT, it has been accepted that information suggesting or alleging that a recipient of social security benefits did not satisfy the eligibility requirements to receive the benefit, was information relating to the enforcement or administration of the law (see for example *Re Letts and Director-General of Social Security* (1984) 6 ALN N176; *Re Sinclair and Secretary, Department of Social Security* (1985) 9 ALN N127; *McKenzie v Secretary, Department of Social Security* (1986) 65 ALR 645; *Re Sullivan and Department of Social Security* (1989) 20 ALD 251; *Re Liddell and Department of Social Security* (1989) 20 ALD 259). In *Re Mr & Mrs AD and Department of Territories* (Commonwealth AAT, Deputy President Hall, No. A85/75, 6 December 1985, unreported) it was accepted that information in relation to the administration of the law of the Australian Capital Territory with respect to child welfare met the relevant part of the requirements of s.37(1)(b) of the Commonwealth FOI Act. And in *Re Chandra and Minister for Immigration and Ethnic Affairs* (Commonwealth AAT, Deputy President Hall, No. V84/39, 5 October 1984) it was held, for the purposes of applying s.37(1)(b) of the Commonwealth FOI Act, that investigations as to the

whereabouts of a person believed to be a prohibited immigrant under the *Migration Act 1958 Cth* were related to the enforcement or administration of the law (at p.22, paragraph 41), as was the enforcement of a deportation order made under the *Migration Act 1958 Cth* (at p.39-40, paragraph 83).

37. Some guidance can be obtained from Victorian decisions interpreting s.31(1)(a) of the Victorian FOI Act, which corresponds roughly with s.42(1)(a) of the Queensland FOI Act. Whereas s.42(1)(a) of the Queensland FOI Act refers to disclosure prejudicing "the investigation of a contravention or possible contravention of the law (including revenue law) in a particular case", s.31(1)(a) of the Victorian FOI Act refers to a disclosure prejudicing "the investigation of a breach or possible breach of the law or [prejudicing] the enforcement or proper administration of the law in a particular instance". The closing words of s.31(1)(a) of the Victorian FOI Act convey a similar concept, in a generally similar context, to the words "enforcement or administration of the law" where they appear in s.42(1)(b) of the Queensland FOI Act. In *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441 Jones J (President) of the Victorian AAT made the following remarks as to the meaning of the words "the enforcement or proper administration of the law" in s.31(1)(a) of the Victorian FOI Act (at p.453-7):

> *"It is helpful to briefly examine the legislative history. The FOI Act follows legislative initiatives elsewhere to change the common law and administrative tradition by providing for the disclosure of government information. In 1966 the Congress of the United States of America enacted a* Freedom of Information Act. *Following extensive investigations the Commonwealth Parliament enacted a Federal* Freedom of Information Act *in early 1982. The Victorian Act followed shortly thereafter and substantially mirrors the Federal FOI Act.*
>
> *The equivalent provision in the Federal FOI Act is s.37. Sections 31(1)(a) and (c) of the Victorian FOI Act closely resemble s.37(1)(a) and (b) of the Federal Act. Section 37 is based on the law enforcement provision in the United States* Freedom of Information Act: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 *para 20.2. Because of the similarity between the US provision and the Federal and Victorian provisions useful guidance is obtained from a consideration of the United States experience. This is summed up as follows by the Senate Standing Committee (para 20.2 and 20.3):*
>
> > 'Because of the similarity between the two provisions United States experience provides some guide as to the likely effectiveness of clause 27 (s.37 of the Federal FOI Act) in permitting maximum public access to requested records, consistent with the legitimate interests of law enforcement agencies.
> >
> > These agencies include not only those responsible for the detection and punishment of law violation through criminal prosecutions but also, as mentioned above, the prevention of law violation, and in addition, the enforcement of law through civil and regulatory proceedings. On the face of it, clause 27 would have application to the operations of the federal and territory law enforcement authorities (including the ACT police force and licensing, health standards and building safety inspectorates), security intelligence operations, personnel investigations within the public service, and the enforcement of legislation on a range of issues embracing trade practices, the environment, broadcasting, securities, customs, export

> and import controls, immigration, discrimination, labour relations, taxation and social security. United States experience of the operation of its law enforcement clause reflects the scope of the activities protected by the exemption as well as the public's interest in the conduct of those activities.'

It needs to be borne in mind that the United States provision is confined to documents described as 'investigatory records compiled for law enforcement purposes'. The Federal and Victorian provisions are obviously broader. It is apparent that the Senate Committee envisaged a wide range of areas of the law being encompassed by the provision extending beyond the traditional areas of law enforcement. They contain an element of regulation of activities which has to be enforced and administered. ...

A helpful commentary on the meaning of 'the administration of the law ... in a particular instance' as used in s.37(1)(a) of the Federal FOI Act is provided by Peter Bayne in his book Freedom of Information *at 151 and 152:*

> 'The concept of the "administration of the law ... in a particular instance" is more extensive than the concepts of "investigation" and "enforcement" and is not limited to activity which contemplates a particular proceeding concerning a (possible) past or (possible) future breach of the law. "Administration" would clearly embrace preventive activity ... but more generally could embrace activity which collects information in documentary form in order to monitor whether a particular person is complying with the law.'

...

As the Senate Committee points out, s.31 embraces not only agencies involved in the detection, punishment and prevention of criminal law violations but also the enforcement of law through civil and regulatory action by agencies entrusted with that task. It is not confined to the criminal law but encompasses a broad range of areas of the law. The concept of administration of the law is a broad one. It is wider than the concepts of 'investigation' and 'enforcement' but its breadth is limited by the context. What is being addressed by the legislature is administration of the law as a further process to investigation of breaches of the law or the enforcement of the law. As Peter Bayne points out, administration in this context can embrace such functions as the collection of information to monitor compliance.

I return to the position of the Commission and the Accident Compensation Act*. I do not find the application of s.31(1)(a) and (c) to this situation an easy matter. The Act creates a wide range of rights and obligations. The Commission has the responsibility to determine whether claims for compensation should be paid or disputed. It has the responsibility to ensure that compensation is only paid to those who are entitled to it and to terminate payments when entitlement ceases. The Commission has a responsibility to ensure compliance with the Act and to take action where it is not being complied with. I do not think it can be said, as submitted by Mr Cavanough, that s.31(1)(a) and (c) cannot apply to the* Accident Compensation Act*. In my view 'investigation', 'enforcement' and 'administration' of the law in the relevant sense can, depending on the circumstances, encompass provisions of the* Accident Compensation Act*. The position, in my view, can be likened to the position under the* Social Security Act*. Rights to benefits are created*

> *by both Acts. In that sense they are beneficial legislation. They also impose obligations and penalties. A person is charged with the responsibility of ensuring that the rights and obligations are enforced and administered in accordance with the legislation. In the case of the* Social Security Act *the person responsible is the Director-General of Social Security. In the case of the* Accident Compensation Act *it is the Commission.*
>
> *In this case the information in dispute was obtained by the Commission for the purpose of determining the entitlement of the applicant to compensation under the* Accident Compensation Act*. As such, it related, in my view, to the proper administration of the law, namely the* Accident Compensation Act*."*

(Jones J went on to hold, at p.457-9, that no relevant prejudice to the proper administration of the law could be established in terms of s.31(1)(a) of the Victorian FOI Act.)

38. In my opinion, this passage, although dealing with the words in a slightly different statutory context, correctly captures the sense of the words "enforcement or administration of the law" as used in s.42(1)(b) of the Queensland FOI Act, and in a way that accords with the decided cases in the Commonwealth AAT and the Federal Court of Australia under s.37(1)(b) of the Commonwealth FOI Act.

39. The waters were muddied, however, by some comments in the judgments of Young CJ and O'Bryan J, when the case went on appeal to a Full Court of the Supreme Court of Victoria: *Accident Compensation Commission v Croom* [1991] 2 VR 322. O'Bryan J (with whom Vincent J agreed) expressed the view (at p.328) that:

> *"A careful examination of all the paragraphs in s.31 indicates to me that for a document to fall within one of the exemptions it should have a connection with the criminal law or with the legal process of upholding or enforcing civil law."*

His Honour went on to say, however, that he was content to decide the question of law upon the more narrow basis that if s.37(1)(a) of the Victorian FOI Act is concerned with the proper administration of the *Accident Compensation Act* by the Accident Compensation Commission, the appellant had failed to show that disclosure of the relevant documents would prejudice the appellant in a relevant sense (thereby placing in doubt the status of the proposition quoted in the preceding passage).

40. Young CJ said (at p.324):

> *"Exemption was claimed under the 'administration of the law' but in my opinion that phrase in the context is quite inapt to protect what the appellant here seeks to protect. Disclosure of the documents could not prejudice the proper administration of the law for they are in no way concerned with that administration. ... The administration of the law indicates something concerned with the process of the enforcement of legal rights or duties. I agree, with respect, in O'Bryan J's observation that to fall within s.31 a document should have a connection with the criminal law or with the process of upholding or enforcing civil law."*

41. The reference in these two passages to the requirement that documents have a connection with the criminal law leaves open a potentially wide sphere of operation when it is understood that the criminal law is not confined to breaches of the provisions of Queensland's *Criminal Code* but extends to any statutory provision which prescribes a penalty (i.e. a fine or term of imprisonment or both) for its contravention, of which there are literally thousands on the Queensland statute books.

Indeed given the terms of s.42(5), which was obviously inserted with the object of protecting co-operative arrangements (including exchange of information) with law enforcement authorities of other jurisdictions, the relevant law is not confined to Queensland law.

42. These two passages from *Croom's case* are somewhat unhelpful, however, in that they fail to explore what is encompassed within the "process of upholding or enforcing civil law". O'Bryan J referred to the "legal process of upholding or enforcing civil law", but Young CJ dropped the reference to the word "legal". It is not at all clear whether their Honours were intending to confine the process of upholding or enforcing civil law to something that is done through the established courts. If so, it would represent a significant and, in my opinion, an unwarranted narrowing of the scope of the words "enforcement or administration of the law" as they have been understood and applied in the Commonwealth AAT and the Federal Court of Australia. Jones J was clearly cognisant of this line of authority in his decision at first instance. Despite Jones J's careful explanation of why the terms "investigation", "enforcement" and "administration" of the law in s.31(1)(a) of the Victorian FOI Act encompassed the Accident Compensation Commission's responsibility for ensuring that the rights and obligations conferred and imposed by the *Accident Compensation Act 1985 Vic* were enforced and administered in accordance with the legislation, Young CJ summarily asserted that disclosure of the documents in issue *"could not prejudice the proper administration of the law for they are in no way concerned with the proper administration of the law"*. Similarly, O'Bryan J doubted (at p.328) that s.31 of the Victorian FOI Act was really concerned with documents of the type for which exemption was claimed. Neither Young CJ nor O'Bryan J referred to the cases mentioned in paragraph 36 above where it has been clearly accepted, not only in the Commonwealth AAT but in the Federal Court of Australia, that the interpretation of the words "enforcement or administration of the law" in s.37(1)(b) of the Commonwealth FOI Act extend to the responsibility of a government agency for ensuring that entitlements to statutory benefits are correctly enforced and administered in accordance with the relevant legislation. In *McKenzie v Secretary to Department of Social Security* (1986) 65 ALR 645, Muirhead J of the Federal Court of Australia dealt with an appeal from a decision of the Commonwealth AAT which held that details which would identify the author of a letter to the respondent which alleged that the applicant was ineligible for social security benefits she had been receiving, were exempt from disclosure under s.37(1)(b) of the Commonwealth FOI Act. Muirhead J said (at p.649) that three essential questions faced the Tribunal, the second of which was whether the letter was properly classified as relating to the enforcement or administration of the law. His Honour said:

> *"As to (2) I can see no error in the Tribunal's approach. It stressed the duties and functions of the respondent under the Social Security Act ... There was adequate evidence to support the Tribunal's finding that 'the letter clearly relates to the administration of the law within the meaning of s.37(1)(b)'."*

I see no reason to doubt the correctness of *McKenzie's case* (or the other cases referred to in paragraph 36 above) on this particular issue.

43. In *Sobh v Police Force of Victoria* (1933) 65 A Crim R 466 at p.481, Nathan J sitting as a member of a Full Court of the Supreme Court of Victoria said of the words "the law" in s.31(1)(a) of the Victorian FOI Act:

> *"As to what the law may be, there is no doubt it includes both the civil and criminal law of the State of Victoria, that law is expressed by statute, regulation and the case and common law."*

Statute law in particular is capable of being enforced and administered within government agencies, by means other than resort to the legal processes of the courts of law. To take a simple example, if an agency responsible for administering a scheme for the payment of statutory benefits receives

information from a confidential source which indicates that a person is receiving benefits to which that person is not entitled under the relevant legislation, and the agency is satisfied following investigation that the person is not entitled to benefits, it may simply cease payment of the benefits to the person concerned. I could accept at face value Young CJ's statement to the effect that words like "enforcement or administration of the law" require a connection with the criminal law or with the process of upholding or enforcing civil law, with the proviso that the process of upholding or enforcing civil law can, in appropriate cases, (and the process of upholding or enforcing criminal law will almost invariably) commence with and involve action taken within government agencies. In the context of a provision like s.42(1)(b) of the Queensland FOI Act, the object of which is to protect from disclosure information in the possession of government agencies or Ministers which would disclose the existence or identity of a confidential source of information, this seems to me to be a logical interpretation.

The meaning of "could reasonably be expected to"

44. The phrase "could reasonably be expected to" in s.42(1) of the FOI Act bears the same meaning as it does in s.46(1)(b) of the FOI Act, and which was explained in *Re "B" and Brisbane North Regional Health Authority* at paragraphs 154-160. In the context of s.42(1)(b) of the FOI Act, it requires a judgment to be made by the decision-maker as to whether it is reasonable to expect that disclosure of particular matter in a document would enable the existence or identity of a confidential source of information to be ascertained. A mere risk that disclosure would enable existence or identity to be ascertained is not sufficient to satisfy the test imposed by these words. The words call for the decision-maker applying s.42(1) to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.

45. In the present case, there is no doubt that disclosure of the matter in issue will enable the identity of the informant to be ascertained - the matter comprises such clearly identifying details as name and address. In other cases, the judgment required may be a more subtle and demanding one, such as whether the applicant for access under the FOI Act could deduce that only a certain person could have known and passed on to a government agency a particular item of information contained in a requested document.

Application of s.42(1)(b) in the present case

46. I consider that the information supplied to the respondent by the informant in this case was information relating to the enforcement or administration of the law. The Queensland Parliament has seen fit to pass legislation (the *Medical Act 1939*) to provide for the regulation in the public interest of the practice of medicine, including, *inter alia*, prescribing requirements for registration (and continued registration) as a medical practitioner, and prescribing examples of conduct on the part of a medical practitioner that will amount to "misconduct in a professional respect". In

particular s.35(vii) of the *Medical Act* provides that a medical practitioner shall be guilty of "misconduct in a professional respect" if he or she, with a view to his or her own gain, advertises either directly or indirectly, or sanctions advertisements, otherwise than in accordance with the *Medical Board of Queensland Advertising By-laws 1990.*

47. The relevant information provided to the respondent by the informant comprised the two newspaper articles briefly described in paragraph 1 above, together with the comment: *"I understand Dr McEniery has the right to private practice at the Prince Charles Hospital"*. (If not for the fact that the applicant's contract of employment with the relevant government authority permitted him a limited right of private practice, it would not have been possible to suggest that the newspaper stories could have been given with a view to the applicant's own gain).

48. Section 37 of the *Medical Act* provides that where the Board is of opinion that any medical practitioner is guilty of misconduct in a professional respect, it may proceed to have the medical practitioner charged accordingly before the Medical Assessment Tribunal (which by s.33 is to be constituted by a Supreme Court judge, and have the status of a superior court of record) in which case the Board shall have the conduct of the charge as prosecutor. Alternatively, where the misconduct is of a less serious nature, the Board may deal with the matter itself in accordance with s.37A of the *Medical Act*. In these circumstances, the information supplied by the informant clearly satisfies the requirement in s.42(1)(b) that it relate to "the enforcement or administration of the law".

49. Is the informant a person who has supplied information on the understanding, express or implied, that his or her identity will remain confidential? Paragraph 8 of Dr Lange's affidavit sworn on 23 November 1993 deposes to the fact that:

> *"In relation to the complaint which is the subject of this external review, no explicit guarantees of confidentiality were sought by or given to the complainant."*

For reasons discussed below, this case is an example of one where an explicit guarantee of confidentiality could reasonably have been given, and was capable of being honoured. In its absence, however, the question becomes whether a mutual understanding that the informant's identity would remain confidential is implicit, having regard to all the relevant circumstances. Dr Lange has deposed (in paragraph 2 of her affidavit) that it is the practice of the Board to treat all complaints received concerning medical practitioners as confidential whether or not the complainant has specified that the information contained in a complaint has been given on a confidential basis. I suspect (for reasons explained in para 52 below) that this overstates the position, and that the very nature of the statutory functions which the Board is required to discharge makes it unlikely that all complaints concerning medical practitioners are capable of being treated as confidential. I am prepared to accept, however, that it is the practice of the Board, wherever it is practicable and consistent with the proper discharge of its functions, to treat complaints received concerning medical practitioners as confidential. Consistently with principles applied in *Re Liddell* and in *Accident Compensation Commission v Croom* (see paragraphs 22 and 23 above), this should be treated as a relevant factor, but not one that is necessarily conclusive of the issue.

50. The determination of whether the relevant information was supplied by the informant and received by the respondent on the implicit understanding that the informant's identity would remain confidential (and hence whether the informant qualifies as a confidential source of information for the purposes of s.42(1)(b)) requires a careful evaluation of all the relevant circumstances including, *inter alia*, the nature of the information conveyed, the relationship of the informant to the person informed upon, whether the informant stands in a position analogous to that of an informer (*cf.* paragraph 25 above), whether it could reasonably have been understood by the informant and recipient that appropriate action could be taken in respect of the information conveyed while still preserving the confidentiality of its source, whether there is any real (as opposed to fanciful) risk

that the informant may be subjected to harassment or other retributive action or could otherwise suffer detriment if the informant's identity were to be disclosed, and any indications of a desire on the part of the informant to keep his or her identity confidential (e.g. a failure or refusal to supply a name and/or address, *cf. Re Sinclair, McKenzie's case*, cited in paragraph 36 above).

51. I consider that there is sufficient indication in the circumstances surrounding the imparting of information by the informant to the respondent to warrant the conclusion that the informant intended and expected that his or her identity would remain confidential, that the expectation was a reasonable one having regard to the procedures that the respondent would need to follow in order to take appropriate action in respect of the information supplied, and that the respondent was prepared to accept and act in accordance with the informant's expectation, so as to give rise to a common understanding that the informant's identity would remain confidential. The position of the informant in this case is analogous to that of an informer (*cf.* paragraph 25 above). That both the informant and the respondent expected and understood that the informant's identity was to remain confidential is confirmed by subsequent events, wherein it was discussed between the respondent and the informant whether the informant would be prepared to shed the cloak of confidentiality to participate in a chaperoned meeting with the applicant, and the informant considered but ultimately rejected that possibility. Of particular significance is the fact that the information supplied did not depend on the informant being willing and able to give testimony as to events which happened to the informant or were directly observed by the informant, in order for appropriate action to be taken in respect of the information supplied. The content of the newspaper articles spoke for itself, and the question of whether or not the applicant had a right to private practice (and therefore the potential, in theory at least, to gain from the publicity) was a factual matter which the respondent could easily verify upon inquiry of the applicant or the applicant's employer. No further involvement was required of the informant, even if the matter had proved serious enough to warrant prosecution through to a formal hearing before the Medical Assessment Tribunal. (If an express assurance had been sought by the informant to the effect that the informant's identity would remain strictly confidential, the Board would have been able to give such an assurance, and honour it, in these circumstances. I mention this by way of observation only, and not as a reason for the finding I have made).

52. I should have thought that it would more frequently be the case that complaints to the Board would relate to the conduct of a medical practitioner towards a particular patient or patients, and would be based (at least in part) on evidence that was dependent on direct observations made by particular patients, or perhaps by their relatives or friends, or by other medical staff. If the medical practitioner is to be given a fair opportunity to answer the complaint, sufficient particulars of the substance of the complaint must be provided, and this would ordinarily necessitate the disclosure of the identity of the patient(s) concerned, or of other sources who directly observed the conduct complained of. In such cases, it may not be possible to say that a complainant could have a reasonable expectation that his or her identity would remain confidential, if appropriate action is to be taken by the Board on the information conveyed.

53. If the complainant insists upon confidentiality, the Board may be left in the position of not being able to act upon the complaint, unless it can obtain evidence from other sources upon which to proceed. Such situations are adverted to in the affidavit of Dr Lange at paragraphs 6 and 7. In paragraph 7, Dr Lange states that in exceptional circumstances, where the Board considers it necessary in the interests of public health and safety, the Board would be prepared to summons a complainant to give evidence on oath in proceedings against a medical practitioner, notwithstanding the complainant's expressed desire to have his or her identity kept secret. This may constitute an example of a compelling public interest warranting the overriding of a private interest in the maintenance of confidentiality.

54. Whenever the application of s.42(1) is being considered, regard must also be paid to s.42(2) which

provides that matter is not exempt under s.42(1) if certain criteria are met. None of the criteria in s.42(2) are applicable to the matter in issue in the present case.

55. For the reasons given above, I am satisfied that the matter in issue in this case is exempt matter under s.42(1)(b) of the FOI Act because its disclosure could reasonably be expected to enable the identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained.

Sources who supply false information

56. In his written submission, the applicant stated that he believed it is the right of an accused to know who the accuser is. While the application of the rules of natural justice (see paragraphs 28 to 31 above) will frequently produce this result, the common law of England and Australia does not recognise any unqualified principle to the effect of the broadly stated one invoked by the applicant.

57. In particular, in *R v Lewes Justices; ex parte Secretary of State for the Home Department* [1973] AC 388, Lord Simon said (at p.407-8):

> *"Sources of police information are a judicially recognised class of evidence excluded on the ground of public policy unless their production is required to establish innocence in a criminal trial."*

58.. In that case, that principle was extended to persons from whom the Gaming Board received information for the purposes of the exercise of its statutory functions under the *Gaming Act 1968 UK*. In *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, the same principle was extended to the relationship between the respondent Society and ordinary persons volunteering information and voluntarily lodging complaints with the Society. The House of Lords held that the principle applied to prevent the plaintiff obtaining the identity of a person who had lodged with the Society a wholly false report concerning the plaintiff's alleged cruelty to her baby daughter. Lord Diplock said (at p.218-9):

> *"The public interest which the NSPCC relies on as obliging it to withhold from the respondent and from the court itself material that could disclose the identity of the Society's informant is analogous to the public interest that is protected by the well-established rule of law that the identity of police informers may not be disclosed in a civil action, whether by the process of discovery or by oral evidence at the trial.*
>
> *The rationale of the rule as it applies to police informers is plain. If their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should not be withheld from that tribunal. By the uniform practice of the Judges, which by the time of* Marks v Beyfus *[1890] 25 QBD 494 had already hardened into a rule of law, the balance has fallen upon the side of non-disclosure except where, upon the trial of a defendant for a criminal offence, disclosure of the identity of the informer could help to show that the defendant was innocent of the offence. In that case and in that case only the balance falls upon the side of disclosure."*

59. These principles have been accepted and applied in Australia: see *Cain & Ors v Glass & Ors (No. 2)* [1985] 3 NSWLR 230, especially per McHugh JA at p.347. In *Signorotto v Nicholson* [1982]

VR 413, Fullagar J of the Supreme Court of Victoria said (at p.422):

> *"The fact that the House of Lords did not hesitate to extend the police informer rule to Gaming Board informants and NSPCC informants shows that it applies to all analogous situations ... ."*

60. The courts have recognised that the application of this principle can lead to a perceived sense of injustice, of the kind expressed by the applicant in this case, or indeed can lead to an actual injustice. In *D v National Society for the Prevention of Cruelty to Children*, Lord Edmund-Davies at p.242 quoted an article by Professor Hanbury ('Equality and Privilege in English Law' (1952) 68 LQR 173, 181) as follows:

> *"Few situations in life are more calculated to arouse resentment in a person than to be told that he has been traduced but cannot be confronted with his traducer."*

61. In the same case, Lord Simon said (at p.233):

> *"I cannot leave this particular class of relevant evidence withheld from the court without noting, in view of an argument for the respondent, that the rule can operate to the advantage of the untruthful or malicious or revengeful or self-interested, or even demented police informant, as much as one who brings information from a high-minded sense of civic duty. Experience seems to have shown that though the resulting immunity from disclosure can be abused, the balance of public advantage lies in generally respecting it."*

62. Arguably, the public policy considerations underlying this rule of law are insufficiently sensitive to the plight of a person who is falsely accused by a person able to hide behind a shield of anonymity, and the rule of law is insufficiently flexible to provide a more sensitive balance to the competing public interests that need to be adjusted in such situations. To be falsely accused can occasion very real trauma for the accused person and his or her family, financial loss (through unnecessary expenditure on legal representation, or time lost from a business or employment) plus general stress, anxiety and inconvenience. The public interest in ensuring the free flow of information to investigative and regulatory authorities may well require that this unfortunate consequence must be tolerated where an informer honestly but mistakenly believes that information concerning a person requires investigation by the relevant authorities. Does the appropriate balance of public interest, however, really require that the informer who knowingly supplies false information should be permitted to hide behind the shield of anonymity? Not only does such conduct have severe and unwarranted consequences for the person improperly informed against, but it occasions a waste of scarce public resources when they are devoted by the police or the relevant regulatory authority to an unnecessary investigation. There is a trend in recent legislation to make provision for such a situation, see for example s.10.21 of the *Police Service Administration Act 1990 Qld* concerning false complaints made to the police, and s.137 of the *Criminal Justice Act 1989 Qld* concerning false complaints made to the Criminal Justice Commission. Both provisions make it an offence to knowingly make a false complaint or supply false information. Likewise, the Electoral and Administrative Review Commission's 1991 Report on Protection for Whistleblowers (Serial No. 91/R4) recommended that it should be a criminal offence to make a disclosure to a proper authority, knowing it to be false or misleading (see paragraph 9.103 to 9.109 of the EARC Report and clause 65 of its recommended Whistleblowers Protection Bill). I consider this trend to be more in conformity with current community standards. While in respect of complaints made to the Queensland Police Service and the Criminal Justice Commission, the aforementioned statutory provisions afford a deterrent, and a means of seeking some redress for a person who has been subjected to a false complaint known by the informer to be false, there remain many areas of enforcement or administration of the law where an informer may make a false complaint almost

with impunity, and a person falsely and unjustly accused has little choice but to accept the situation and the lack of redress.

63. I should add that there can be no suggestion in the present case that the informant has knowingly supplied false information concerning the applicant nor indeed that the informant has mistakenly supplied incorrect information. The informant merely supplied the two newspaper articles as published, and drew attention to the likelihood that the applicant had a limited right of private practice, which was correct. The informant then merely asked the Board to assess this information against the relevant provisions of the *Medical Act*. The informant would doubtless argue that she or he was doing no more than s.37(2) of the *Medical Act* expressly permits:

> *"(2) Any person aggrieved by any alleged misconduct in a professional respect of a medical practitioner (including a specialist) may make a complaint to the Board with respect thereto."*

The applicant would put a different complexion on the informant's conduct, as indicated in paragraph 9 above.

64. It is clear, however, that s.42(1)(b) and s.42(2) presently admit of no exceptions for situations of the kind just discussed. There is no countervailing public interest test incorporated within s.42(1), of the kind which is incorporated within s.44(1), s.46(1)(b) and several other exemption provisions in the FOI Act. It has been accepted by Muirhead J of the Federal Court of Australia in *McKenzie v Secretary, Department of Social Security* (1986) 65 ALR 645 and by the Victorian AAT in *Re Richardson and Commissioner for Corporate Affairs* (1987) 2 VAR 51 at p.52-53 that the Commonwealth and Victorian equivalents of s.42(1)(b) of the Queensland FOI Act are not concerned with whether the confidential source of information supplies information which is false or erroneous. In *Re Sutcliffe and Victoria Police (No. 1)* (1989) 3 VAR 306, the Victorian AAT recognised that in some instances, a malicious person who gave false information to an agency could be protected at the expense of an innocent person.

Other possible bases for exemption

65. In paragraphs 12 and 13 above, I indicated that there are at least two other possible bases on which a person's identity, or information which would enable a person to be identified, may be exempt from disclosure under the FOI Act. Having found that s.42(1)(b) applies, I do not propose to consider whether the matter in issue is also exempt under other exemption provisions. On the facts of this case, the application of those other exemption provisions would raise some difficulties in any event. It is noted in paragraph 13 above that a person's identity is ordinarily not information which is confidential in quality, but the connection of a person's identity with the imparting of confidential information can itself be secret information capable of protection in equity in an action for breach of confidence (and presumably can also be "information of a confidential nature" for the purposes of s.46(1)(b) of the FOI Act). In the present case, the information imparted by the informant was not information of a confidential nature, but information in the public domain. Whether the connection of a person's identity with the imparting of non-confidential information is capable of being categorised as confidential information for the purposes of the application of s.46(1)(a) and (b) is a difficult issue, best left for consideration in a case where its resolution is essential.

66. In respect of s.44(1), the argument would be that the fact that the informant made the complaint to the Board is a personal affair of the informant (*cf.* the passage from *Colakovski v Australian Telecommunications Corporation* (1991) 100 ALR 111 at p.123 per Heerey J, which is set out in my decision in *Re Stewart* at paragraph 39). Although the material conveyed in the letter of complaint could not be characterised as information concerning the informant's, or indeed any person's, personal affairs (it is properly to be characterised as information concerning the applicant's

professional affairs, and has in fact been released to the applicant) the deletion of material which would identify the informant could be argued to be justified in order to prevent the disclosure of matter that is *prima facie* exempt, i.e. the personal affair of the informant comprising the fact that it was the informant who made the complaint to the Board. If this argument succeeded in establishing a *prima facie* case for exemption, it would be necessary to consider the application of the countervailing public interest test incorporated within s.44(1).

67. I do not propose to consider the application of s.44(1), which was not relied on by the respondent, and not addressed in evidence or submissions from either participant, but my foregoing comments illustrate its potential application in a comparable situation.

Conclusion

68. For the reasons given at paragraphs 46 to 55 above, the matter in issue is exempt matter under s.42(1)(b) of the FOI Act, and I affirm the decision under review.

.....
F N ALBIETZ
INFORMATION COMMISSIONER