

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 50 of 1993
(Decision No. 94007)

Participants:

E SHEPHERD
Applicant

- and -

DEPARTMENT OF HOUSING, LOCAL GOVERNMENT & PLANNING
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - Request for access - applicant challenging sufficiency of search for documents responsive to application - jurisdiction and powers of Information Commissioner - whether Department has satisfied obligation, inherent in *Freedom of Information Act 1992 Qld*, to locate documents to which access has been requested.

FREEDOM OF INFORMATION - Letter of complaint to the Department of Housing, Local Government & Planning concerning the applicant - matter in issue is claimed to be information of a confidential nature communicated in confidence - application of s.46(1)(a) of the *Freedom of Information Act 1992 Qld*.

Freedom of Information Act 1992 Qld s.46(1)(a), s.46(1)(b), s.46(2), s.51, s.71(1)(b), s.87(2)(a)

Re Anti-Fluoridation Association of Victoria and Secretary, Department of Health (1985) 8 ALD 163

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

Re McMahon and Department and Consumer Affairs (Information Commissioner Qld, Decision No. 94003, 28 February 1994, unreported)

Re Smith and Administrative Services Department (Information Commissioner Qld, Decision No. 93003, 30 June 1993, unreported)

(ii)

DECISION

1. The Department's decision that it has located all documents which fall within the terms of the applicant's FOI access request dated 20 January 1993 is affirmed.
2. The portion of the decision under review which found that the document in issue (folios 22-23) is exempt matter under s.46(1)(a) of the *Freedom of Information Act 1992 Qld* is affirmed.

Date of Decision: 18 April 1994

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F N ALBIETZ
INFORMATION COMMISSIONER

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DEPARTMENT OF HOUSING, LOCAL GOVERNMENT & PLANNING
 Respondent

REASONS FOR DECISION

BACKGROUND

1. By letter dated 20 January 1993, Mrs E Shepherd sought access under the *Freedom of Information Act 1992 Qld* (the FOI Act) to "any documentation plus all letters of complaint by neighbours" held by the Department of Housing, Local Government and Planning (the Department) concerning her tenancy in a residential unit (the property) of the Queensland Housing Commission in Southport, Queensland.
2. In response to that request, Mr V Tumath, Manager of the Department's Administrative Review Unit, advised Mrs Shepherd that he had determined that the Department held one file of 62 pages responsive to the terms of her FOI access application, namely her 'personal rental file', and that he had decided to grant Mrs Shepherd access to the entire file with the exception of one document comprising two pages.
3. In his decision letter to Mrs Shepherd dated 26 February 1993, Mr Tumath advised that the document to which access was refused (identified as folios 22-23 of the file in question) comprised information which had been communicated to the Department in confidence, and was therefore exempt under s.46(1) of the FOI Act.
4. By letter dated 8 March 1993, Mrs Shepherd applied to the Department for an internal review of Mr Tumath's decision to refuse access to folios 22-23. In addition, Mrs Shepherd raised an issue concerning the 'sufficiency of search' which had been conducted by the Department for documents responsive to the terms of her FOI access application, as she asserted that further letters of complaint concerning her had been transmitted to the Department by other tenants of the property, and should therefore have been located and dealt with by the Department in its decision on her FOI access request. In her letter of 8 March 1993, Mrs Shepherd provided details of the further letters which she asserted had been provided to the Department, and which she believed had been removed from her file.
5. By letter dated 25 March 1993, the Director-General of the Department, Mr Dick Persson, advised Mrs Shepherd that he had conducted an internal review of Mr Tumath's initial decision, and that he affirmed that initial decision to refuse access to folios 22-23, on the basis that they were exempt under s.46(1)(a) and s.46(1)(b) of the FOI Act.
6. By letter dated 1 April 1993, Mrs Shepherd lodged an application for external review of Mr Persson's decision of 25 March 1993, raising two separate issues in connection with that decision.

First, Mrs Shepherd challenged the basis for exemption under either s.46(1)(a) or s.46(1)(b) in respect of folios 22-23. Second, Mrs Shepherd reiterated her assertion that certain other relevant documents, which she knew to be held by the Department, had been removed from her file.

'SUFFICIENCY OF SEARCH' ISSUE

Preliminary Jurisdictional Issue

7. In her 8 March 1993 application for internal review, Mrs Shepherd clearly raised a 'sufficiency of search' issue, and provided particulars of the additional relevant documents which she asserted should be held by the Department. However, Mr Persson's internal review decision of 25 March 1993 described the scope of the internal review as being related to the decision to refuse access to folios 22-23, and did not address the 'sufficiency of search' issue raised by Mrs Shepherd.
8. I had occasion to consider my jurisdiction, and powers on review, in respect of 'sufficiency of search' issues such as that raised by Mrs Shepherd, in my decision in *Re Smith and Administrative Services Department* (Information Commissioner Qld, Decision No. 93003, 30 June 1993, unreported). In accordance with the reasons set out at paragraphs 57-61 of my decision in *Re Smith*, I find that in the particular circumstances of Mrs Shepherd's case, there was a deemed decision by the Department to refuse access to the additional relevant documents which she asserts are, or should be, held by the Department, which decision falls within the scope of my external review functions under s.71(1)(b) of the FOI Act. I am of the view, as I stated in *Re Smith*, that the FOI Act has vested in me both the jurisdiction to review, and the power to give directions, in respect of such 'sufficiency of search' issues.

The Review Process

9. My view that the Department's internal review decision had failed to address the 'sufficiency of search' issue raised by Mrs Shepherd was conveyed to the Department, and it was agreed that a further search would be undertaken for additional documents, in light of Mrs Shepherd's insistence on the existence of further relevant letters of complaint. I requested that the Department's further search efforts include an examination of the files concerning all other tenants of the property, and that I be provided with written notification of the results of that further search.
10. I was subsequently provided with a written report confirming that a further search had been conducted, including an examination of the files of all other tenants of the property. That report confirmed that the Department's further search had failed to disclose any additional letters of complaint, or any other documents responsive to the terms of Mrs Shepherd's FOI access application.
11. In view of Mrs Shepherd's insistence on the existence of such further documents, a member of my investigative staff attended at the Department's Gold Coast Area Office to interview both the officer of the Department who was primarily responsible for the search efforts for documents responsive to Mrs Shepherd's FOI access application, and the Field Officer having responsibility for investigation and follow-up of complaints made by or against tenants in properties administered by the Department, including the property in which Mrs Shepherd resided.
12. Following these interviews, my investigator met with Mrs Shepherd to obtain further particulars about the additional letters of complaint concerning her, which she asserted were held by the Department. As a result of statements made by Mrs Shepherd about certain information which she alleged had been conveyed to her by Mr Tumath in the course of the processing of her FOI access application, and which supported her contention about the existence of further relevant documents, my investigator subsequently interviewed Mr Tumath about the matters raised by Mrs Shepherd.

13. A statutory declaration was prepared for, and executed by, Mrs Shepherd in support of her allegations about the existence of further letters of complaint concerning her. In addition, statutory declarations were prepared and executed on behalf of the Department by Mr Tumath, Mr P Nordstrom (Field Officer, Gold Coast Area Office), and Ms M O'Dempsey (Senior Client Service Officer, Gold Coast Area Office) to verify the information concerning this 'sufficiency of search' issue which they had provided in their interviews with my investigator. Ms O'Dempsey's statutory declaration, together with the substantive portions of the statutory declarations of Mr Tumath and Mr Nordstrom (both in edited form, to remove information which could identify the third party) were forwarded to Mrs Shepherd, with an invitation to Mrs Shepherd to lodge a submission which addressed the Department's evidence on the issue as to whether the Department held any further letters of complaint concerning her. Mrs Shepherd subsequently confirmed that she had received that material, but did not wish to avail herself of the opportunity to make any further submission on the 'sufficiency of search' issue.

The Applicant's Evidence

14. In her statutory declaration, executed on 30 July 1993, Mrs Shepherd stated:

that she had personally witnessed at least four letters of complaint concerning her being handed to Field Officer Nordstrom, including the document identified as folios 22-23 of her personal rental file;

that she had provided to the Department, in her application for internal review dated 8 March 1993, details concerning the identities of the authors of those letters of complaint, and had at that time also provided the names of other tenants of the property whom she suspected of having provided the Department with such letters of complaint;

that on the occasion of the transmission of one of the four letters of complaint referred to above, which had occurred in March 1992, she had subsequently called Mr Nordstrom over to speak to her, at which time he had confirmed that the document in question was a complaint letter concerning Mrs Shepherd and had further stated that he had received a further unspecified number of such complaint letters concerning Mrs Shepherd from other tenants; and

that records which Mrs Shepherd had kept of her telephone conversations with Mr Tumath concerning the processing of her FOI access application indicated that on 12 February 1993, Mr Tumath had admitted to Mrs Shepherd that letters (meaning complaint letters concerning Mrs Shepherd from other tenants of the property) had been mislaid, and that in a further conversation on 23 February 1993, Mr Tumath had stated to Mrs Shepherd that those complaint letters would be made available to her the following week.

The Department's Evidence

15. In his statutory declaration, executed on 16 July 1993, Mr Nordstrom stated:

that during the period from October 1988 to December 1992, in which he was the Field Officer within the Department having responsibility for investigation and follow-up of complaints made against tenants of the property in which Mrs Shepherd resided, Mr Nordstrom had received only one document from any tenant of that property which concerned a complaint against Mrs Shepherd; namely, the document identified as folios 22-23 of Mrs Shepherd's personal rental file; and

that to the best of his recollection, during his period of responsibility as Field Officer for the property in which Mrs Shepherd resided, Mr Nordstrom had never stated to Mrs Shepherd that any written communication which he may have received from any other tenant was a letter of complaint concerning her, and had never advised her that other letters of complaint concerning

her had been received from any other tenant of the property.

16. In her statutory declaration, executed on 16 July 1993, Ms O'Dempsey stated:

that, to the best of her knowledge, the Department held only one file relevant to Mrs Shepherd; namely, the personal rental file concerning Mrs Shepherd's tenancy in Queensland Housing Commission accommodation;

that in response to the Information Commissioner's request that a further search be conducted for documents responsive to the portion of Mrs Shepherd's FOI access application concerning letters of complaint against her by other tenants of the property, Ms O'Dempsey had, on 16 June 1993, located the personal rental files of all other tenants of the property;

that on 16 June 1993, Ms O'Dempsey had conducted a page-by-page examination of the 31 personal rental files of the other tenants of the property, and that such search had failed to disclose any further documents concerning complaints against Mrs Shepherd; and

that on 18 June 1993, Ms O'Dempsey had conducted a second search of the 31 files in question, and concluded on the basis of that search and the one which she had previously conducted, that none of the personal rental files of other tenants of the property contained any letters of complaint concerning Mrs Shepherd.

17. In his statutory declaration, executed on 11 February 1994, Mr Tumath stated:

that in response to his initial inquiries concerning Mrs Shepherd's FOI access application, Mr Tumath had determined that the only file responsive to that request was her personal rental file, held at the Department's Gold Coast Regional Office;

that Mr Tumath had obtained the file in question for the purpose of making a determination on Mrs Shepherd's FOI access application, and on the basis of his personal examination of the file, had determined that it consisted of 62 folios (or pages);

that Mr Tumath had no recollection of having had any telephone conversations with Mrs Shepherd as she described, in which he made the statements she attributed to him concerning the existence of, and an undertaking to provide access to, any further letters of complaint concerning Mrs Shepherd;

that Mr Tumath's contemporaneous records of telephone conversations with Mrs Shepherd indicated that:

on 8 February 1993, in response to Mrs Shepherd's suggestion that the Department should hold several letters of complaint concerning her, Mr Tumath had assured her that he could locate only one such letter;

on 17 February 1993, Mr Tumath had advised Mrs Shepherd that her access application was still under consideration, but that he would advise her when the file in issue would be available for inspection; and

on 23 February 1993, Mr Tumath had advised Mrs Shepherd that her file would be available for inspection the following week.

that, to the best of Mr Tumath's knowledge, based upon his personal involvement in the search efforts for documents responsive to Mrs Shepherd's FOI access application, the Department held no complaint letters concerning Mrs Shepherd from her neighbours, other than the

document identified as folios 22-23 of her personal rental file; and

that at no time did Mr Tumath make any statement to Mrs Shepherd in which he admitted that any further such complaint letters existed, had been mislaid, and would subsequently be made available to her.

Conclusion on 'Sufficiency of Search' Issue

18. It is my view that in an external review application involving 'sufficiency of search' issues, the basic issue for determination is whether the respondent agency has discharged the obligation, which is implicit in the FOI Act, to locate and deal with (in accordance with Part 3, Division 1 of the FOI Act) all documents of the agency (as that term is defined in s.7 of the FOI Act) to which access has been requested. It is provided in s.7 of the FOI Act that:

"document of an agency' or 'document of the agency' means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes -

- (a) *a document to which the agency is entitled to access; and*
- (b) *a document in the possession or under the control of an officer of the agency in the officer's official capacity;"*

19. In dealing with the basic issue referred to in paragraph 18, there are two questions which I must answer:

- (a) whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency (as that term is defined in s.7 of the FOI Act);

and if so,

- (b) whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.

20. In this case, there is no independent evidence which supports Mrs Shepherd's assertions as to the existence of further letters of complaint against her. Indeed, the individual to whom Mrs Shepherd insists such letters were given denies having ever received any such letters. In the face of such conflicting evidence, I find that I cannot confidently answer the first question, as set out above, in the affirmative.

21. Notwithstanding my reservations in this regard, and in view of Mrs Shepherd's insistence on the existence of such further documents, I requested that the Department undertake a further search for any such documents. The Department did so willingly, and in my view, went to considerable effort in complying with my request, in an attempt to satisfy Mrs Shepherd's concerns about the existence of further documents.

22. With regard to the second question set out in paragraph 19 above, I agree with the view expressed by the Commonwealth Administrative Appeals Tribunal, in its decision on a 'sufficiency of search' case in *Re Anti-Fluoridation Association of Victoria and Secretary, Department of Health* (1985) 8 ALD 163 at p.167, that:

"the adequacy of the search effort made to locate the document should be judged by having regard to what was reasonable in the circumstances."

23. On the basis of the evidence set out in the statutory declarations provided by officers of the Department, as referred to above, I am of the view that the Department has made extensive and well-directed search efforts for the further letters of complaint which Mrs Shepherd asserts are held, or should be held, by the Department. I am satisfied that the Department's search efforts have fulfilled the obligation to make all reasonable searches and inquiries to locate requested documents, as described above, and I conclude that there are no reasonable grounds to believe that the Department has, in its possession or control, any letters of complaint concerning Mrs Shepherd other than the document described as folios 22-23 of her personal rental file.

EXEMPTION CLAIM FOR FOLIOS 22-23 UNDER s.46(1)(a) AND s.46(1)(b)

Description of the Document in Issue

24. The provisions of s.87(2)(a) of the FOI Act preclude me from including in a decision, or in the reasons for a decision, any exempt matter. As a result of that prohibition, and in view of my conclusion in this case, I am able to describe the document in issue only in very general terms.
25. That document, comprising folios 22 and 23 of Mrs Shepherd's personal rental file, is an undated and unsigned handwritten note. The note contains certain information about Mrs Shepherd, and details of certain events involving the author of the note (the third party) and Mrs Shepherd, and other tenants of the property and Mrs Shepherd.
26. While the identity of the third party is not expressly stated in the document, there is a heading written by the third party and a marginal notation added by the Department, each of which would, in my view, enable Mrs Shepherd to identify the third party.

The Review Process

27. At the outset of my investigation and review in this matter, I advised the Department that it appeared that there may be other interested parties, who may have been consulted by the Department in accordance with s.51 of the FOI Act, in the course of the determination of Mrs Shepherd's FOI access application. I requested that the Department provide me with the names and addresses of any such individuals, as well as copies of any correspondence or other records of discussions between the Department and those individuals.
28. In response to my request, the Department provided me with the name and address of the one individual who had been consulted by the Department in the course of its initial determination of Mrs Shepherd's FOI access application; namely, the third party. The Department also provided me with copies of file notes recording the substance of its consultations with that individual.
29. In the course of my preliminary investigation in the matter, Mrs Shepherd advised a member of my investigative staff that the identity of the third party had been disclosed to her by Mr Tumath in the course of the initial determination of her FOI access application, and that certain extracts from folios 22-23 had been read to her by Mr Tumath. As a result of this, the statutory declarations of Mrs Shepherd and Mr Tumath (referred to previously in connection with the 'sufficiency of search' issue) also addressed, respectively, Mrs Shepherd's assertions in this regard and Mr Tumath's response to those assertions.
30. In addition, Mr Tumath's statutory declaration also provided further details of the third party's views concerning disclosure of folios 22-23 to Mrs Shepherd, as conveyed to Mr Tumath during his telephone consultations with the third party in the course of the initial determination of Mrs

Shepherd's FOI access application. Mr Nordstrom's statutory declaration also addressed the subject of the circumstances of the third party's transmission to him (on behalf of the Department) of the document in question.

31. I subsequently contacted the third party to obtain further particulars concerning the circumstances of the creation of the document in issue and the provision of that document to the Department. I also asked whether the third party still maintained an objection to the disclosure of the document in question to Mrs Shepherd. The third party verbally expressed to a member of my investigative staff very strong opposition to the release to Mrs Shepherd of folios 22-23, and subsequently provided me with a written statement concerning the creation of the document in question and its transmission to Mr Nordstrom, as well as confirmation of the third party's views concerning the disclosure of that document to Mrs Shepherd.
32. As stated previously in paragraph 13, the statutory declarations of Mr Tumath and Mr Nordstrom were provided to Mrs Shepherd (in edited form, with any information which could identify the third party deleted), and Mrs Shepherd was given an opportunity of reply to the evidence contained in those statutory declarations on the 'confidentiality' issue. Mrs Shepherd was also provided with a transcript (in non-identifying terms) of the third party's written statement concerning the circumstances of the provision of folios 22-23 to the Department, and the third party's views on the disclosure of that information to Mrs Shepherd. As with the 'sufficiency of search' issue, Mrs Shepherd confirmed receipt of the material provided to her, but advised that she did not wish to make any submission in reply to the matters addressed in the Department's evidence or the third party's statement.

The Applicant's Evidence

33. In her statutory declaration, Mrs Shepherd stated that at some time after her inspection of the portions of her personal rental file to which access had been granted by the Department, Mr Tumath had disclosed to her the identity of the third party, and had read extracts of the document identified as folios 22-23 to her at that time. On that basis, Mrs Shepherd asserted that any confidentiality attaching to the document in issue, or to the identity of the third party, had been waived by the Department.

The Department's Evidence

34. In response to Mrs Shepherd's assertions, as described above, Mr Tumath stated in his statutory declaration that, to the best of his recollection, he had at no time identified the third party to Mrs Shepherd, nor had he read to Mrs Shepherd any extracts from folios 22-23.
35. As indicated above, Mr Tumath's statutory declaration also contained particulars of his telephone consultations with the third party, in which the third party had advised Mr Tumath that the document had been provided to Mr Nordstrom in confidence. According to Mr Tumath's statutory declaration, the third party had stated to Mr Tumath at that time that the document had been provided at the specific request of Mr Nordstrom, and then with some reluctance on the third party's part. Further, Mr Tumath's statutory declaration set out the particulars of the third party's objections to the release of the document in question to Mrs Shepherd, including the specific reasons for those objections, as conveyed by the third party to Mr Tumath.
36. In his statutory declaration, Mr Nordstrom provided particulars of the specific circumstances in which he had requested, and had subsequently received, the document in question from the third party. Further, Mr Nordstrom's statutory declaration stated that at the time of that request, he had indicated to the third party that such documentation would be of assistance to the Department, and would be kept on file for the Department's future reference in the event of further difficulties

involving Mrs Shepherd and her neighbours.

Submissions of the Third Party

37. As noted at paragraph 24 above, I am precluded from including in a decision, or the reasons for that decision, any exempt matter. I am therefore not able to recite in great detail some of the submissions made by the third party, as to do so would, in my view, enable that individual to be identified.
38. In the written submission which I received from the third party, that individual stated that the document in question comprised private notes compiled for the third party's own information. The third party stated that, at Mr Nordstrom's request, those notes had been loaned to Mr Nordstrom, and that the third party would not have complied with Mr Nordstrom's request if the third party had known that a copy of those notes would be kept on file by the Department as a letter of complaint.
39. Further, the third party indicated vehement opposition to the release of the document in question to Mrs Shepherd, and set out the grounds for that opposition, including several specific prejudicial effects which the third party believed could reasonably be expected to result if such release occurred.

The Relevant Provisions of the FOI Act

40. The document in issue is claimed by the Department to be exempt under s.46(1)(a) and s.46(1)(b) of the FOI Act. Section 46 of the FOI Act provides as follows:

"46.(1) Matter is exempt if -

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

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

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

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

41. In my opinion, the document in issue qualifies for exemption under s.46(1)(a) of the FOI Act, on the basis that disclosure of the document would found an action, by the third party, for breach of

confidence.

42. In my recent decision in *Re "B" and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported), I had occasion to consider in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(a) of the FOI Act. The test of exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency or Minister faced with an application for access under s.25 of the FOI Act to the information in issue (see paragraph 44 in *Re "B"*). Where the hypothetical legal action by which the test of exemption is to be evaluated must, in the circumstances of a particular case, be an action in equity for breach of confidence, there are five criteria which must be established:
- (a) it must be possible to specifically identify the information in issue, in order to establish that it is secret, rather than generally available information (see paragraphs 60-63 in *Re "B"*);
 - (b) the information in issue must possess the "necessary quality of confidence"; i.e. the information must not be trivial or useless information, and it must possess a degree of secrecy sufficient for it to be the subject of an obligation of conscience, arising from the circumstances in or through which the information was communicated or obtained (see paragraphs 64-75 in *Re "B"*);
 - (c) the information in issue must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see paragraphs 76-102 in *Re "B"*);
 - (d) it must be established that disclosure to the applicant for access under the FOI Act would constitute a misuse, or unauthorised use, of the confidential information in issue (see paragraphs 103-106 in *Re "B"*); and
 - (e) it must be established that detriment is likely to be occasioned to the original confider of the confidential information in issue if that information were to be disclosed (see paragraphs 107-118 in *Re "B"*).
43. In the particular circumstances of the present case, no suggestion arises of a contractual obligation of confidence between the third party and the Department concerning the communication of the document in issue. Therefore, the test for exemption under s.46(1)(a) must be evaluated in terms of the requirements for an action in equity for breach of confidence.
44. I am satisfied, in the particular circumstances of this case, that the third party is an identifiable individual who would have standing to bring an action for breach of confidence, and that the information claimed to be confidential information (as recorded in folios 22-23) can be identified with specificity.
45. Based on a careful review of the information recorded in folios 22-23, I am satisfied that it is not trivial or useless information, and that it has the requisite degree of secrecy to invest it with the "necessary quality of confidence", so as to satisfy the second criterion referred to in paragraph 42 above.
46. As I stated at paragraph 84 of my decision in *Re "B"*, the determination of whether information was communicated in circumstances importing an obligation of confidence on the recipient of such information requires, in any particular case, an evaluation of the whole of the relevant

circumstances. In undertaking this evaluation in the present case, I have had regard to the submissions of the third party, and the evidence of Mr Nordstrom, concerning the circumstances of the communication by the third party, and the receipt by Mr Nordstrom (on behalf of the Department) of the information in issue, as recorded in folios 22-23.

47. The third party's submission, and the evidence of Mr Nordstrom, are consistent in stating that the document in issue was provided by the third party to Mr Nordstrom at Mr Nordstrom's specific request, and that Mr Nordstrom made certain assurances to the third party about the specific and limited purpose for which that information was requested. I have no reason to doubt the consistent versions of events provided by the third party and Mr Nordstrom in this respect, nor to doubt the third party's statement concerning the reluctance with which Mr Nordstrom's request was complied with by the third party.
48. The third party's submission that the document in issue comprised personal notes created for the author's own use, and which were never intended to form part of the Department's files, or to be treated as a letter of complaint, is borne out by both the form and content of folios 22-23. Specifically, I note that folios 22-23 are not set out in the form of a letter, are unsigned, and bear neither the name nor address of the author. Further, the heading and marginal note which appear on folio 22 are such that they could identify the third party only by reference to extraneous documents or information.
49. On the basis of my examination of folios 22-23, and the circumstances surrounding the transmission of that information by the third party to Mr Nordstrom (on behalf of the Department), I am satisfied that the document in issue was not intended by the third party, nor treated by the Department, as a letter of complaint requiring that any further action be taken by the Department in connection with the matters recorded in folios 22-23. The situation in the present case is therefore distinguishable from that discussed in my recent decision in *Re McMahon and Department of Consumer Affairs* (Information Commissioner Qld, Decision No. 94003, 28 February 1994, unreported). In *Re McMahon*, I held that the circumstances (involving the transmission of a letter of complaint to the Department of Consumer Affairs concerning a licensed private inquiry agent) were such that neither the author of the letter, nor the recipient agency, could reasonably have expected that the identity of the author and the substance of the complaint could remain confidential from the subject of the complaint, if appropriate action was to be taken in respect of the complaint, as had been clearly requested by the author of the letter of complaint (see paragraph 23 of *Re McMahon*).
50. For the reasons set out in paragraphs 47-49 above, I am satisfied that in this particular case the information contained in folios 22-23 was communicated by the third party, and received by Mr Nordstrom (on behalf of the Department), in circumstances such as to import an obligation of confidence binding on the Department.
51. I find that disclosure of folios 22-23 under the FOI Act would constitute an unauthorised use of that information (for clear confirmation of this by the third party, see paragraphs 31 and 39 above) and that detriment would be occasioned to the third party, as confider of the information in issue, if such disclosure were to occur. As I stated at paragraph 111 of my decision in *Re "B"*, it is not necessary to establish that the resulting detriment would be pecuniary in nature, but that it can be something as ephemeral as embarrassment, fear, or a loss of privacy, or indeed can be indirect detriment, such as injury to a relation or friend. In this case, I am satisfied that disclosure of folios 22-23 could reasonably be expected to cause detriment to the third party of one or more of the types mentioned above.
52. I am therefore satisfied that all of the requisite elements necessary for exemption under s.46(1)(a) are made out in respect of the information recorded in folios 22-23.

53. As I discussed at paragraph 137 of my decision in *Re "B"*, a person's identity is ordinarily not information which is confidential in character, but there are some situations in which the connection of a person's identity with the imparting of confidential information can itself be secret information capable of protection in equity. I note the concerns expressed by the third party, both to the Department and to me, concerning the specific detrimental effects which the third party believed could reasonably be expected to result from disclosure of folios 22-23. While I am precluded from setting out the details of the third party's submissions in this regard, I am satisfied that unauthorised disclosure of the third party's identity could reasonably be expected to result in detriment to the third party of a not insubstantial nature. I therefore find that in the particular circumstances of this case, the third party's identity qualifies for protection under s.46(1)(a), on the same basis as for the information provided by that individual.
54. None of the defences to an action for breach of confidence, as discussed in my decision in *Re "B"* (see paragraphs 119 to 134), are applicable in the circumstances of the present case. Further, the exception set out in s.46(2) of the FOI Act is not applicable to the information in issue, so as to render s.46(1)(a) inapplicable. The information in issue in the present case does not answer the description of "matter of a kind mentioned in s.41(1)(a)"; moreover, disclosure of the information in issue 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).

Conclusion

55. I am satisfied that disclosure of the document in issue (folios 22-23) would found an action for breach of confidence. I therefore affirm that portion of the decision of Mr Persson, dated 25 March 1993, which found that the document in issue is exempt under s.46(1)(a) of the FOI Act. Having decided that the document is exempt on that basis, it is not necessary for me to consider whether the document is also exempt from disclosure under s.46(1)(b) of the FOI Act.

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 F N ALBIETZ
INFORMATION COMMISSIONER