

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 96007
Application S 99/94

Participants:

"E"
Applicant

LEGAL AID OFFICE (QUEENSLAND)
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - report prepared for the respondent by a social worker in private practice to assist the respondent in assessing the merits of granting legal aid to the applicant to commence court proceedings for custody of his children - report claimed to be supplied in confidence by the social worker to the respondent - whether disclosure to the applicant of the matter in issue would found an action for breach of confidence - application of s.46(1)(a) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.41(1), s.41(1)(a), s.44(1), s.46(1)(a), s.46(1)(b),
s.46(2), s.74(1)(b), s.78
Legal Aid Act 1978 Qld s.29(3)(b)

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Coventry and Cairns City Council, Re (Information Commissioner Qld, Decision No. 96003,
3 April 1996, unreported)
Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re
(1993) 1 QAR 60
Kioa v West (1985) 159 CLR 550; 60 ALJR 113; 62 ALR 321
*Smith Kline and French Laboratories (Aust) Limited and Ors v Secretary, Department of
Community Services and Health* (1991) 28 FCR 291

DECISION

I vary that part of the decision under review (being the internal review decision made on behalf of the respondent by Mr Ross Beer on 20 May 1994) which concerns the matter described in paragraph 7 of my accompanying reasons for decision, by finding that it is exempt matter under s.46(1)(a) of the *Freedom of Information Act 1992 Qld.*

Date of decision: 24 April 1996

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access under the *Freedom of Information Act 1992 Qld* (the FOI Act) to parts of a "Merit Assessment Report" prepared for the respondent by Mr David Berry, a social worker in private practice. The respondent sought the report in issue to assist its consideration of the applicant's application for legal aid to bring proceedings in the Family Court of Australia with respect to custody of the children of his second marriage. On the occasion in question, the applicant was refused legal aid to seek the court orders he wished to obtain.
2. Mr Berry's report was the only document sought in the applicant's FOI access application dated 31 March 1994. By letter dated 9 May 1994, the respondent's FOI decision-maker, Ms Rosemarie Coxon, granted the applicant partial access to Mr Berry's report. Paragraphs 9, 13 and 14 of Mr Berry's report were withheld from access on the basis that they comprised exempt matter under s.46(1)(b) of the FOI Act.
3. By application dated 12 May 1994, the applicant sought internal review of Ms Coxon's decision. The internal review was undertaken on behalf of the respondent by Mr Ross Beer, who, by letter dated 20 May 1994, confirmed Ms Coxon's decision, and explained his reasons as follows:

The report prepared by Mr Berry was a Merit Assessment Report. In some circumstances, it is appropriate to hold an application for legal aid in abeyance until the Assignments Officer has received a Merit Assessment Report from a Social Worker to assist in determining whether aid should be granted, particularly in matters relating to the welfare of children.

I refer you to the copy of the letter you received from the Maroochydhore Legal Aid Office dated 8 April 1993 advising you that a decision on your

application for aid was deferred pending receipt of a Merit Assessment Report. In that letter, you were advised it is a confidential report. Confidentiality is a vital element in the assessment process as it encourages candour that is so essential in allowing the Social Worker to fully explore all of the issues involved in the dispute. Accordingly, the Office treats sources of information disclosed in the report, as confidential.

I have read the exempted paragraphs 9, 13 and 14 of Mr Berry's report and am satisfied that they have been correctly exempted under section 46(1)(b) of the Freedom of Information Act. These paragraphs relate to information of a confidential nature which was communicated to the Office in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information. Further, on balance, I do not believe it would be in the public interest to give you access to these paragraphs.

4. By letter dated 27 May 1994, the applicant applied to me for external review, under Part 5 of the FOI Act, of Mr Beer's decision.

External review process

5. A copy of Mr Berry's report was obtained and examined.
6. As required by s.74(1)(b) of the FOI Act, I contacted relevant third parties, including Mr Berry and other persons who supplied information to him for the purposes of preparing those segments of his report which have been withheld from the applicant. I drew their attention to s.78 of the FOI Act, but none of the third parties applied to become participants in this external review. Mr Berry has, however, provided a statutory declaration in support of the respondent's case.
7. During the course of this review, third parties have consented to small segments of information being disclosed to the applicant, with the result that the matter which remains in issue comprises—
 - the first 13 words of paragraph 9, appearing on page 3 of the report, and all of that part of paragraph 9 appearing on page 4 of the report
 - the first seven lines, and the first four words in the eighth line of paragraph 13, appearing on page 6 of the report
 - paragraph 14 in its entirety.
8. The respondent submits that all of the matter remaining in issue is exempt matter under s.46(1), or alternatively under s.41(1), of the FOI Act. In respect of that part of paragraph 9 located on p.4 of the report, the respondent submits that this is also exempt matter under s.44(1) of the FOI Act. The respondent relies on a written submission dated 26 July 1995, a supplementary submission dated 4 December 1995, and the statutory declaration of Mr Berry dated 11 December 1995.
9. The applicant relies on a submission dated 14 October 1995, and other material forwarded for my reference during the course of the review. By letter dated 14 December 1995, the applicant was given the opportunity to reply to Mr Berry's statutory declaration and the respondent's supplementary submission, but he has not taken advantage of that opportunity.

10. Relevant parts of the evidence and submissions lodged by the participants are referred to below.

Application of s.46 of the FOI Act

11. Section 46 of the FOI Act provides:

46.(1) Matter is exempt if—

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

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

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

12. Section 46(2) makes special provision in respect of matter of a kind mentioned in s.41(1)(a) of the FOI Act. Section 41(1) of the FOI Act is in the following terms:

41.(1) Matter is exempt matter if its disclosure—

- (a) would disclose—*
 - (i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or*
 - (ii) a consultation or deliberation that has taken place;*

in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and

- (b) would, on balance, be contrary to the public interest.*

13. I consider that the matter in issue is matter of a kind mentioned in s.41(1)(a) of the FOI Act. It comprises opinions and recommendations prepared, and consultations that have taken place, for the purposes of one of the deliberative processes involved in the functions of government, namely, consideration by the respondent of whether or not to grant legal aid to the applicant: see *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.70-71, paragraphs 27-30. Section 46(2) of the FOI Act effectively makes s.46(1)(b) redundant in respect of matter of a kind mentioned in

s.41(1)(a), as I explained in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at p.292, paragraphs 35-36:

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

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

14. Since the matter in issue was communicated to the respondent by Mr Berry, who was not a person or body of the kind mentioned in s.46(2)(a) or (b), the matter in issue may still qualify for exemption under s.46(1) (notwithstanding that it is matter of a kind mentioned in s.41(1)(a) of the FOI Act), provided that its disclosure would found an action for breach of confidence owed to Mr Berry.
15. In recognition of the legal considerations discussed in the preceding two paragraphs, the respondent has abandoned its initial reliance on s.46(1)(b), and has argued in its submissions in this review that the matter in issue is exempt under s.46(1)(a) of the FOI Act.
16. In *Re "B"*, I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(a) of the FOI Act. The test for 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, under s.25 of the FOI Act, for access to the information in issue (see *Re "B"* at pp.296-7, paragraph 44). In this instance, there is an identifiable plaintiff who would have standing to bring an action for breach of confidence, namely, Mr Berry.
17. To found an action in equity for breach of confidence, there are five cumulative criteria which must be satisfied:

- (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 *Re "B"* at pp.303-304, paragraphs 60-63);
 - (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 *Re "B"* at pp.304-310, paragraphs 64-75);
 - (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 *Re "B"* at pp.311-322, paragraphs 76-102);
 - (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 *Re "B"* at pp.322-324, paragraphs 103-106); 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 *Re "B"* at pp.325-330, paragraphs 107-118).
18. With respect to the first criterion, I am satisfied that the information which is claimed by the respondent to be confidential (see paragraph 7 above) can be identified with specificity.
 19. With respect to the second criterion, I note that the respondent contends that the whole of Mr Berry's report is confidential *vis-à-vis* the world at large. The respondent has, however, agreed to disclose to the applicant, under the FOI Act, all information contained in Mr Berry's report which is not confidential information *vis-à-vis* the applicant, either because it was supplied to Mr Berry by the applicant himself, or is otherwise known to the applicant.
I am satisfied, from my examination of it, that the matter remaining in issue is information which is not known to the applicant, and that it possesses the necessary degree of secrecy or inaccessibility which information must possess if its unauthorised use or disclosure by a confidant is to found an action for breach of confidence. I find that the matter remaining in issue has the "necessary quality of confidence" so as to satisfy the second criterion set out above.
 20. Turning to the third criterion set out above, the question of whether a legally enforceable duty of confidence is owed depends on an evaluation of the whole of the relevant circumstances including (but not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and the circumstances relating to its communication, such as those referred to by a Full Court of the Federal Court of Australia in *Smith Kline and French Laboratories (Aust) Limited and Ors v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at pp.302-303: see *Re "B"* at p.316 (paragraph 84) and pp.314-316 (paragraph 82).
 21. The following extract from the applicant's submission dated 14 October 1995 contains the substance of his case, as presented to me:

... the information provided to the Agency (*Legal Aid (QLD)*) was incorrect in fact and it was improper for the Agency to have made such a decision

based upon such information without being satisfied that the information provided was correct. Furthermore, such information should not be restricted to any party to the matter, for to restrict such information was discriminatory and denied natural justice to the parties concerned.

Furthermore no party should enter into such an arrangement without being prepared to substantiate such allegations, particularly as the party providing such allegations know that a decision will be made upon the information so supplied.

Additionally, I was told prior to the assessment by the Legal Aid Office and Dave Berry that the information would be made available to all parties. Had I been advised that was not to have been the case I would not have permitted or been a party to the report.

I believe it was deceptive and misleading conduct on the part of the Legal Aid Office of Qld and unconscionable conduct. Furthermore it denies the right of natural justice.

The allegations that have now been released to me thus far in fact are a lie and unsubstantiable in every respect, and should be viewed in the same light as the declaration of any information "Perjury", it is not withstanding a contempt of the very essence for which Justice is afforded the people of Queensland and purpose of the Freedom of Information Act itself.

I therefore request the contents be completely provided me and the matters which are in fact a lie be dealt with to the utmost of the law.

22. The applicant raises two main contentions: first, that he was told by both the respondent and Mr Berry that Mr Berry's report would be made available to all parties; second, that the withholding from him of the matter in issue constitutes a denial of natural justice.
23. I am satisfied, however, from documentary evidence produced to me by the respondent (see paragraph 24 below), and from Mr Berry's statutory declaration (the truth of which I accept), that the applicant's first contention is not correct. The respondent addressed this issue in its supplementary submission dated 4 December 1995:

[The applicant's] application for aid for custody/access was processed in April 1993. At that time, it was the usual practice in child welfare matters for assessing officers to call for a Merit Assessment Report to assist them in their decision-making process when the information provided, did not clearly indicate merit or lack of merit. The guideline read:

"Merit Assessment Reports - in accordance with the provisions of the [Legal Aid Act 1978 Qld] the Legal Aid Commission has a statutory responsibility to ensure that proceedings which an applicant wishes to bring or defend are likely to terminate in a manner favourable to that person. When the basic questions for determination are of a social nature and/or involve the welfare of children, a social work assessment may be obtained under the provisions of s.27(5) of the Act ...".

In [the applicant's] case, his application for aid was held in abeyance pending the receipt of a Merit Assessment Report. The standard letter was

sent to [the applicant's] solicitors on 8 April 1993, with a copy to [the applicant] (copy attached). The second paragraph of the standard letter makes it clear, the Merit Assessment Report is a confidential report and further, the social worker may interview the person or persons with whom [the applicant] was in dispute and, the social worker may also interview the children, where appropriate.

Had [the applicant] elected not to proceed with a Merit Assessment Report, this factor would have been taken into account by the assessing officer in deciding [the applicant's] application for aid. In all likelihood, [the applicant's] application for aid would have been refused. This was made clear to [the applicant] in the penultimate paragraph of the standard letter; "If you do not telephone within 14 days, the application for aid may be refused."

In the event, Mr Berry, the social worker who wrote the Merit Assessment Report, concluded [the applicant] had little merit in his application for aid for custody/access. On 21 April 1993, [the applicant's] application for aid for custody/access was refused on the following ground:

"The Merit Assessment Report concludes that the applicant has insufficient merit to justify a grant of legal aid in this matter. A copy of the report's conclusions are enclosed for your information."

It was the policy of the Office only to release the conclusions of Merit Assessment Reports, not the entire Report.

24. The relevant part of the letter dated 8 April 1993 from the respondent to the applicant's solicitors is in the following terms:

A decision on the application [for legal aid] is deferred pending receipt of a Merit Assessment Report from a Social Worker. Your client will be requested to attend an interview with a Social Worker, who will prepare a Merit Assessment Report. Following this, a determination will be made as to whether legal aid will be granted. If aid is refused, the conclusions of the report will be made available to you and your client.

A Merit Assessment Report assists the Legal Aid Office to decide whether your client has reasonable prospects of success if the matter proceeds to court. It is a confidential report and is prepared after the Social Worker has interviewed your client and anyone else involved in the dispute. The person(s) with whom your client is in dispute may be interviewed and so may children if they are involved in the matter.

It is important for your client to know that the Social Worker will also endeavour to assist your client and the person(s) with whom your client is in dispute to resolve the dispute in a constructive way, so that the matter does not become unpleasant for all concerned.

Your client is required to telephone [an officer of the respondent] within fourteen (14) days of the date of this letter and advise whether your client wishes to proceed with your application. If your client does, we will take a telephone number and address from your client and arrange for a social worker to contact you within seven days. If your client does not have a

telephone we will write to you requesting your client to contact the social worker direct.

Once the Social Worker has made contact with your client they will tell your client in detail how the interviews are conducted. It is not necessary for your client to contact the person with whom your client is in dispute. The Social Worker will talk to you about this aspect of the matter.

If you do not telephone within 14 days, the application for legal aid may be refused.

The writer has taken the liberty of pre-organising this merit assessment report. [my underlining]

25. The words underlined in the above extract establish to my satisfaction that it was made clear to the applicant, before he agreed to participate in the process which led to the preparation of the report in issue, that the report was to be a confidential report and only the conclusions of the report would be made available to him. The following extracts from Mr Berry's statutory declaration are also relevant:

3. *I was requested by the LAO [Legal Aid Office] to undertake a merit assessment report in relation to an application made by [the applicant] for legal aid relating to [the applicant] seeking legal custody of his children.*
4. *I adopt a standard procedure when conducting interviews for the purpose of the preparation of merit assessment reports for the LAO. I inform the parties to be interviewed that the interviews will be conducted on a confidential basis, and that the merit assessment report will be submitted to the LAO in confidence, but that a copy of the conclusion page of the report will be made available to the parties. I also inform the parties that the decision on whether or not to grant legal aid is based on the merit assessment report but that the decision on whether or not legal aid is granted is made by the LAO, not by me. I also inform the parties of their rights of appeal in relation to the LAO's decision on whether or not to grant legal aid.*
5. *I recall, but not in specific detail, my contact with [the applicant and his second wife] prior to creating the merit assessment report which is annexure 'A' of this declaration. I have refreshed my memory of my contact with [the applicant and his second wife] from reading the merit assessment report.*
6. *I have been informed that [the applicant] has claimed that I told him prior to the merit assessment process that the information obtained from interviews with the parties, and the merit assessment report, would be made available to the parties. While I cannot specifically remember my conversations with the parties, I categorically deny that I would have told [the applicant] that the information obtained from the interviews or contained in the merit assessment report would be made available to the parties as this is contrary to my standard procedure.*

7. *I have no doubt that I would have followed my standard procedure in conducting the interviews for the purpose of this merit assessment report, having regard to my knowledge, at the time, of the history of conflict between [the applicant and his second wife]. I would definitely not have informed [the applicant] that information obtained during the interview, or the merit assessment report itself, would be made available to the parties.*
 8. *I consider that the merit assessment report was submitted to the LAO by me in confidence and that it contains confidential information.*
26. I propose to make one observation on Mr Berry's evidence. I have difficulty in accepting that a social worker, undertaking a process of the kind in which Mr Berry was engaged (i.e., attempting to mediate a settlement of the substantive dispute between the parties to prospective litigation, and failing that, reporting on the merits of the case of the applicant for legal aid), was in a position to give blanket undertakings of confidentiality in respect of all information conveyed by persons interviewed for the purpose of that process. Much of the information conveyed by the participants in a custody/access dispute would necessarily relate to facts known to the other participants in the dispute. Moreover, I consider that to attempt mediation, or to undertake a satisfactory assessment of the merits of a custody/access dispute, it would be necessary for the social worker, selectively and with discretion, to put to individual participants (for response) some of the information conveyed to the social worker by other participants. Any understanding of confidentiality with respect to information conveyed to the social worker by persons interviewed would, in my opinion, ordinarily be subject to an exception permitting limited disclosure by the social worker for purposes necessary for the effective conduct of the process in which the social worker was engaged.
 27. Nevertheless, with respect to the information conveyed by Mr Berry to the respondent in the report in issue, I am satisfied that both Mr Berry and the respondent understood and expected that the merit assessment report was to be treated in confidence as against the world at large, subject to an exception for disclosure of the report's conclusions to the applicant for legal aid. (The fact that segments of the report have been disclosed to the applicant following his FOI access application is a consequence of the fact that information in the report which is not confidential information *vis-à-vis* the applicant does not qualify for exemption from disclosure to the applicant under s.46(1) of the FOI Act.)
 28. It appears that the respondent considered that the efficacy of its scheme for seeking merit assessment reports would be best served by stipulating to participants in the scheme that a merit assessment report was to be confidential from the participants except for the report's conclusions (see paragraphs 23-24 above, and the second paragraph of Mr Berry's internal review decision quoted at paragraph 3 above) It is clear that Mr Berry was made aware of the respondent's policy in this regard, and that he made it his standard practice, in turn, to reinforce to persons whom he interviewed the terms of confidentiality which he understood to attend the process which he had been engaged to undertake. I consider that the respondent's stated policy, reinforced by the course of prior dealings between Mr Berry and the respondent, evidenced a mutual understanding, or promise, of confidential treatment by the respondent of Mr Berry's merit assessment reports (subject to the exception noted above).
 29. I consider that, in respect of the matter remaining in issue in this review, the understanding, or promise, of confidential treatment would be enforced as an equitable obligation of confidence, in the absence of circumstances which made it unreasonable and inequitable for

such an obligation to be enforced. I am not aware of any such circumstances in the present case. Confidential treatment by the respondent of the matter in issue is consistent with the promises of confidentiality (albeit necessarily conditional in my view - see the reservation expressed in paragraph 26 above) given by Mr Berry to persons whom he needed or wanted to interview, for the purpose of securing their participation and full co-operation in the process undertaken by Mr Berry. Moreover, the promise of confidential treatment of a merit assessment report should ensure that the respondent receives detailed assessments/explanations to support the report's conclusions, and thereby assist the respondent's consideration of whether public money should be dispensed to an applicant for legal aid, having regard to one of the important considerations (whether the proposed litigation is likely to terminate in a manner favourable to the applicant for legal aid) required to be taken into account by the respondent: see s.29(3)(b) of the *Legal Aid Act 1978* Qld. Those assessments/explanations will traverse difficult and sensitive issues (likely to produce highly emotional responses from the persons involved) such as the character, and respective parenting capabilities, of the persons disputing custody/access of children. Disputes of this kind are frequently attended by emotional volatility on the part of the participants, and often occur against a background of deep-seated hostility between some of the participants. (I note that the report in issue was prepared at a time when both the applicant and his second wife had initiated domestic violence proceedings against each other.) Confidential treatment of merit assessment reports avoids any unnecessary inflammation of potentially volatile disputes.

30. Having regard to all the relevant circumstances, I am satisfied that Mr Berry's report was communicated in circumstances which imported an obligation of confidence binding the respondent not to use or disclose the report in a manner that was not implicitly or expressly authorised by Mr Berry.
31. The applicant's contention that withholding the matter in issue from him constitutes a denial of natural justice (the courts now prefer to use the term 'procedural fairness' instead of natural justice) is, in my opinion, not sustainable in the circumstances of this case. In *Kioa v West* (1985) 159 CLR 550, Mason J said (at p.585)

... 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, i.e., 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

32. The applicant in this case was an applicant for a benefit payable from public funds (a grant of legal aid) upon the favourable exercise by the respondent of a statutory discretion, which was to be exercised by reference to considerations prescribed by statute. The applicant was asked to participate in a process that would result in the preparation of a Merit Assessment Report by Mr Berry, and was clearly informed beforehand that the report was to be confidential except for the conclusions set out in the report. The applicant was interviewed by Mr Berry (and in that sense accorded a hearing). The applicant was also supplied with Mr Berry's conclusions, and was thereby provided with the substance of material adverse to his application for legal aid, that was taken into account by the respondent in deciding to refuse legal aid. I do not consider that the respondent exercised its statutory decision-making power in a way that was procedurally unfair to the applicant, nor that, in all the relevant circumstances, the requirements of procedural fairness necessitated an exception to

the obligation of confidence owed by the respondent to Mr Berry so as to permit disclosure to the applicant of the matter in issue. (This case is materially different from the situation examined in *Re Coventry and Cairns City Council* (Information Commissioner Qld, Decision No. 96003, 3 April 1996, unreported) where Mr Coventry was deprived of a present benefit (his continued employment) by reference to adverse material purportedly supplied in confidence, without notice of the adverse material or an opportunity to be heard in response to it. In that case I found, having regard to the legal requirements of procedural fairness, that equity would not have restrained disclosure to Mr Coventry of the adverse material once it came to be used as a basis (at least in part) for action to deprive him of his employment.)

33. It is clear from the material before me that disclosure to the applicant of the matter remaining in issue would constitute an unauthorised use of confidential information, and hence the fourth criterion set out at paragraph 17 above is satisfied. In respect of the fifth criterion,
I am satisfied that disclosure to the applicant of the matter remaining in issue would cause detriment to Mr Berry of one or more of the kinds mentioned in *Re "B"* at p.327, paragraph 111.
34. I am satisfied that disclosure of the matter remaining in issue would found an action for breach of confidence, and that it is therefore exempt matter under s.46(1)(a) of the FOI Act. In the circumstances, it is unnecessary for me to consider the respondent's alternative claims for exemption under s.41(1) and s.44(1) of the FOI Act.

Conclusion

35. I note that some additional matter has been released to the applicant during the course of my review, and that the decision under review found the matter in issue to be exempt matter under s.46(1)(b) of the FOI Act. It is appropriate that I vary that part of the decision under review which concerns the matter described in paragraph 7 of my reasons for decision, by finding that it is exempt matter under s.46(1)(a) of the FOI Act.

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F N ALBIETZ
INFORMATION COMMISSIONER