OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 99002
Application S 136/95

Participants:

"JLC"
Applicant

LEGAL OMBUDSMAN
Respondent

QUEENSLAND LAW SOCIETY INC
Third Party

A SOLICITOR
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - identity of a solicitor who provided the Queensland Law Society Inc with professional legal advice in connection with a complaint received by the Society regarding the conduct of one of its members - whether identity of advising solicitor comprises information communicated in confidence - whether its disclosure could reasonably be expected to prejudice the future supply of such information - application of s.46(1)(b) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - identity of a solicitor who provided the Queensland Law Society Inc with professional legal advice in connection with a complaint received by the Society regarding the conduct of one of its members - whether:

- disclosure of the identity of the advising solicitor could reasonably be expected to prejudice the effectiveness of a method or procedure for the conduct of tests, examinations or audits by an agency - application of s.40(a) of the *Freedom of Information Act 1992* Qld.

- disclosure of the identity of the advising solicitor would disclose matter relating to an agency's deliberative processes - application of s.41(1) of the *Freedom of Information Act 1992* Qld.

ii

- disclosure of the identity of the advising solicitor could reasonably be expected to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law - application of s.42(1)(e) of the *Freedom of Information Act 1992* Qld.

- the advising solicitor's identity would be exempt from production in a legal proceeding on the ground of legal professional privilege - application of s.43(1) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - applicant challenging 'sufficiency of search' by respondent for documents falling within the terms of the applicant's FOI access application - whether reasonable grounds exist for believing that the respondent has possession or control of additional documents which fall within the terms of the applicant's FOI access application, but which have not been dealt with in its response to the applicant's FOI access application - whether search efforts have been reasonable in all the circumstances of the case.

Freedom of Information Act 1992 Qld s.7, s.25, s.26(2), s.28(1), s.40(a), s.41(1), s.42(1)(c), s.42(1)(e), s.43(1), s.46(1)(a), s.46(1)(b), s.51(1), s.74(1)(b), s.78(2), s.78(3)
Freedom of Information Act 1982 Cth
Queensland Law Society Act 1952 Qld
Queensland Law Society Legislation Amendment Act 1997 Qld

Anderson and Australian Federal Police, Re (1986) 4 AAR 414
Attorney-General (NT) v Kearney (1985) 158 CLR 500
Attorney-General (NT) v Maurice (1986) 161 CLR 475
"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Baker v Campbell (1983) 153 CLR 52
Commissioner, Australian Federal Police and Anor v Propend Finance Pty Ltd and Others (1997) 188 CLR 501
Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (1993) 1 QAR 60
G v Day [1982] 1 NSWLR 24
Godwin and Queensland Police Service, Re (1997) 4 QAR 70
Grant v Downs (1976) 135 CLR 674
Hewitt and Queensland Law Society Inc, Re (Information Commissioner Qld, Decision No. 98005, 24 June 1998, unreported)
Hopkins & Presotto and Department of Transport, Re (1995) 3 QAR 59
Lapidos and Auditor-General of Victoria, Re (1989) 3 VAR 343
Murphy and Queensland Treasury & Ors, Re (1995) 2 QAR 744
Pemberton and The University of Queensland, Re (1994) 2 QAR 293
Shepherd and Department of Housing, Local Government and Planning, Re (1994) 1 QAR 464
Smith and Administrative Services Department, Re (1993) 1 QAR 22
"T" and Queensland Health, Re (1994) 1 QAR 386
Waterford v Commonwealth of Australia (1987) 163 CLR 54

DECISION

1. I set aside the decision under review, being the decision of the Lay Observer, Mr Munro, dated 13 June 1995. In substitution for it, I decide that the matter remaining in issue (comprising identifying references to the advising solicitor) is not exempt from disclosure under the *Freedom of Information Act 1992* Qld.

2. I find that there are no reasonable grounds for believing that further documents, which fall within the terms of the applicant's FOI access application dated 19 April 1995, exist in the possession or control of the respondent.

Date of decision: 29 April 1999

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INFORMATION COMMISSIONER

TABLE OF CONTENTS

Page

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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 the name of a solicitor ("the advising solicitor") who provided the Queensland Law Society Inc (the QLS) with his professional opinion concerning a particular issue that arose in connection with the QLS's consideration of a complaint which the applicant had made regarding the conduct of another solicitor.

2. A brief outline of the background to the making of the applicant's complaint will assist an understanding of the reasons for decision which follow. The applicant's son and former daughter-in-law became involved in custody proceedings in the Family Court of Australia concerning a child of their former marriage (i.e., the applicant's granddaughter). The applicant's son raised allegations of sexual abuse of the child against his former wife's new husband. The solicitor for the former wife filed a Family Court Form 66, Notice of Child Abuse or of Risk of Child Abuse, alleging that the child may be at risk of being abused by the applicant (the child's grandfather). An interim order restraining contact by the applicant with the child was made by the Family Court pending investigation of the allegations by the Separate Representative, and pending the final hearing of the custody proceedings. The applicant intervened in the Family Court proceedings, and at the final hearing was exonerated, with the allegations against him expunged. The legal representatives of the

mother of the child put their case on the basis that the mother did not believe that the child had been sexually abused by anyone, but if there was to be an investigation of possible abuse it should consider the particulars raised against the applicant as well as the allegations raised by her former husband against her new husband.

3. The complaints made by the applicant that were ultimately considered by the Professional Standards Committee of the QLS (for an explanation of the QLS's system at that time for dealing with complaints against practitioners, see *Re Hewitt and Queensland Law Society Inc* (Information Commissioner Qld, Decision No. 98005, 24 June 1998, unreported) at paragraph 7) included—

   (a) that the solicitor acting for the applicant's former daughter-in-law drew up and uttered a document (the Form 66) which the solicitor knew at the time to be untrue and not believed by the solicitor's client, and that the document was designed and used in such a way as to be likely to pervert the course of justice; and

   (b) that it was improper for the Form 66 to be signed by the solicitor, rather than by the client.

   The Professional Standards Committee decided that the conduct of the solicitor did not amount to unprofessional conduct warranting disciplinary action by the QLS.

4. The advising solicitor, a practitioner of long experience specialising in family law, was contacted on behalf of the Professional Standards Committee only in respect of issue (b) above, to obtain his opinion as to whether it was permissible under the rules and procedures of the Family Court for a solicitor to sign a Form 66 on instructions from a client.

5. The applicant was dissatisfied with the QLS's handling of his complaints and requested that the Lay Observer intervene on his behalf. The Lay Observer was a statutory office established by the former s.6O of the *Queensland Law Society Act 1952* Qld, with a function of monitoring written complaints to the QLS against solicitors or employees of solicitors, and the manner in which such complaints were dealt with by the QLS. For that purpose, the Lay Observer was empowered by the former s.6S of the *Queensland Law Society Act* to investigate, examine, and make reports and recommendations to the relevant Minister and to the QLS concerning prescribed categories of written complaints against legal practitioners or their employees, and was also empowered to require the QLS to furnish any information in its possession or control relevant to the discharge of the Lay Observer's functions. The office of Lay Observer has since been superseded by the office of the Legal Ombudsman: see s.9 of the *Queensland Law Society Legislation Amendment Act 1997* Qld, and Part 2B of the *Queensland Law Society Act*, as thereby amended.

6. By letter dated 19 April 1995, the applicant applied to the Department of Justice, under the FOI Act, for access to:

   > *... a copy of all correspondence to and from the Lay Observer in connexion with my matter* [the applicant's complaint about the solicitor] *and internal memoranda, other documents and notations.*

In support of his application, the applicant stated:

> *... I need to resolve perceived anomalies in the operation of the Lay Observer... . I am particularly concerned about the degree of collusion of this officer with members of the Queensland Law Society in respect of both my complaints to him and in his involvement with the course of action and deliberations with that body.*

7. The Department of Justice transferred the application to the Office of the Lay Observer pursuant to s.26(2) of the FOI Act. By letter to the applicant dated 25 May 1995, the Lay Observer, Mr Munro, acknowledged receipt of the application and advised that he considered it necessary to consult with various third parties under s.51(1) of the FOI Act regarding disclosure of some of the documents in issue. By letter dated 13 June 1995, Mr Munro advised the applicant that he had decided to grant the applicant access to all documents in the possession of the Lay Observer which fell within the scope of the FOI access application dated 19 April 1995, subject to the deletion of references to the name of the advising solicitor, and to the name of another solicitor whom the QLS had decided to approach to provide advice, but who was unavailable at the relevant time. Mr Munro stated that he had decided that the identities of those solicitors should be kept confidential, and that he had therefore deleted references to them from the three folios on which they appeared. However, he did not identify the exemption provision(s) on which he relied as grounds for making those deletions. The applicant was granted access to the remainder of the documents.

8. By letter dated 25 July 1995, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Munro's decision. He also raised a 'sufficiency of search' issue, stating:

> *I also ask for a review of the file to see if it is complete, since I can find no record of investigation or analysis of the detailed submissions I made to him* [the Lay Observer] *and which underpinned my request for him to intervene.*

9. I note that the identifying references to the advising solicitor also constitute part of the matter in issue in another review (no. S 165/95), involving an FOI access application which the applicant made to the QLS.

External review process

10. Copies of the documents in issue were obtained and examined. By letter dated 17 October 1995, I wrote to the applicant to advise that, unless I heard from him to the contrary, I would proceed on the basis that he did not wish to pursue access to the name of the solicitor who had not provided the QLS with advice because he was unavailable when the QLS attempted to contact him. I did not hear from the applicant to the contrary, and hence the only matter in issue in this review comprises identifying references to the advising solicitor.

11. The QLS and the advising solicitor were informed of my review, in accordance with s.74(1)(b) of the FOI Act, and were invited to apply to participate in the review. Both advised that they wished to object to the disclosure of the advising solicitor's identity. Both applied for, and were granted, status as participants in this review, in accordance with s.78(2) and s.78(3) of the FOI Act.

12. In respect of the 'sufficiency of search' issue raised by the applicant, a senior member of my staff (Assistant Information Commissioner Mr G Sammon) attended at the Lay Observer's office to review the Lay Observer's file relating to the applicant's complaint, in order to check that all of the documents falling within the scope of the applicant's access application had been identified and dealt with in the Lay Observer's response to that application. The applicant was advised that there were no documents located on that file other than the documents listed in the attachment to the Lay Observer's decision dated 13 June 1995. The applicant, however, maintained that other documents should exist in the possession or control of the Lay Observer. The Lay Observer responded to the applicant's contentions by letter dated 9 November 1995. I will discuss those submissions in detail below.

13. The Lay Observer, the QLS and the advising solicitor were invited to lodge written submissions and/or evidence in support of their claims for exemption in respect of the matter remaining in issue. By letter dated 8 November 1995, the advising solicitor lodged a submission and affidavit in support of a claim for exemption under s.46(1)(b) of the FOI Act. By letters dated 15 January 1996, 15 March 1996 and 8 May 1996, the QLS lodged written submissions in support of its claims for exemption under s.40(a), s.41(1), s.42(1)(e), s.43(1) and s.46(1)(b) of the FOI Act. By letter dated 21 March 1996, the Lay Observer stated simply that he did not consider it necessary for the applicant to know the name of the advising solicitor in order to challenge the advice which the advising solicitor had provided to the QLS. The Lay Observer stated that the name of the advising solicitor was not material to the applicant's case and that it was not in the public interest to provide it. He did not rely upon any particular exemption provision contained in Part 3, Division 2 of the FOI Act.

14. The applicant lodged a number of submissions regarding both the 'sufficiency of search' issue, and his contention that the name of the advising solicitor was not exempt from disclosure to him under the FOI Act. Those submissions consisted of letters dated 19 October 1995, 17 November 1995, 20 March 1996 and 31 March 1996. Copies of the various submissions were exchanged between the parties, to enable each to respond to the various issues raised. The submissions are discussed below.

'Sufficiency of search' issue

15. I explained the principles applicable to 'sufficiency of search' cases in my decision in *Re Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464 at pp.469-470 (paragraphs 18 and 19), where I said:

> *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.

16. After attending at the Lay Observer's office and inspecting the Lay Observer's file, Assistant Information Commissioner Sammon assured the applicant that there were no documents located on that file other than the documents listed in the attachment to the Lay Observer's decision dated 13 June 1995. The applicant, however, contended that documents such as minutes of QLS meetings (at which his complaint had been discussed and at which the Lay Observer would have been present), notes, analyses, records of examination of QLS files or of discussions with QLS staff regarding the applicant's complaint, *et cetera*, should exist within the possession or control of the Lay Observer.

17. By letter dated 9 November 1995, the Lay Observer responded to the applicant's contentions. The Lay Observer confirmed that the applicant had been given access to all information contained on the Lay Observer's file, with the exception of the name of the advising solicitor. The Lay Observer stated:

> *I have not withheld any material and have no motive for doing so. In fact some of the material on the file was copied by me from the Law Society's file which* [the applicant] *has apparently been refused access to but which has been provided* [to the applicant] *from my records.*
>
> *My file consists of correspondence to and from the complainant and the Queensland Law Society. Other material is in the form of extracts from the Agenda of Professional Standards Committee meetings when this matter was discussed, and the Minutes of those meetings together with other extracts from the Agenda of meetings where a summary of this complaint was mentioned, speak for themselves.*
>
> *Consequently, there was no need to make independent notes in connection with this issue given that the information was supplied either by the complainant and from the Law Society's file. Further an analysis of the complaint is recorded on the file in the form of correspondence and memoranda on my file.*

> [The applicant] *is clearly wrong ... where he asserts...* "that he [the Lay Observer] keeps on file no minutes of Law Society meetings which he has attended and at which my matter has been discussed...".
>
> *The applicant's complaint was considered as a special item on the agenda by the Professional Standards Committee on two occasions, 19 October and 14 December 1994. On each of those occasions my file contains the agenda report and the subsequent minutes noting the decision of the meeting . These are numbered as items 4, 6/7, 37 and 39-41 respectively and they have been provided to* [the applicant] *in accordance with his application.*

18. A copy of the Lay Observer's response was provided to the applicant by the Deputy Information Commissioner. The Deputy Information Commissioner expressed the preliminary view that there was no substance to the 'sufficiency of search' issue raised by the applicant, and that all documents on the Lay Observer's file had been identified to him.

19. The applicant did not accept the Deputy Information Commissioner's preliminary view but provided no further submissions and/or evidence in support of his contention that further documents ought to exist in the possession or control of the Lay Observer. He simply submitted that it was "in the public interest that the Lay Observer and his staff be asked to justify under oath the extraordinary inadequacy of his records".

20. Given the system in place at the relevant time for dealing with complaints against practitioners (see *Re Hewitt* at paragraph 7), the only "Law Society meetings" at which the applicant's complaints were liable to be discussed were meetings of the Professional Standards Committee of the QLS, and I am satisfied that the applicant has been provided with copies of minutes of all such meetings that were in the possession of the Lay Observer at the time of receipt of the applicant's FOI access application. Nor do I find it unusual that the Lay Observer (an office that was funded as a part-time position, but carried a heavy workload) had not compiled, and did not hold, records in respect of the applicant's complaints that were any more detailed than the records disclosed to the applicant. I accept the Lay Observer's explanation, as contained in his letter dated 9 November 1995 and quoted above, as to the types of documents contained on his file; the fact that his analysis of the issues involved in the applicant's complaint took the form either of correspondence to the applicant or to the QLS, or general memoranda; and that, contrary to the applicant's assertions, his file does in fact contain copies of minutes of QLS meetings at which the applicant's complaint was discussed. I find that there are no reasonable grounds for believing that any documents falling within the terms of the applicant's FOI access application, apart from those identified in the schedule attached to the Lay Observer's decision dated 13 June 1995, existed in the possession or control of the Lay Observer at the time of receipt of the applicant's FOI access application.

21. I will now examine the various exemption provisions relied upon by the QLS, and the advising solicitor, in claiming exemption for identifying references to the advising solicitor. I will discuss s.46(1)(b) first, as it is the exemption provision common to the submissions of both the QLS and the advising solicitor.

Application of s.46(1)(b) of the FOI Act

22. Section 46(1)(b) of the FOI Act provides:

> ***46.(1)*** *Matter is exempt if—*
>
> ...
>
> *(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.*

23. In *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.337-341 (paragraphs 144-161), I considered, in detail, the elements which must be established in order for matter to qualify for exemption under s.46(1)(b) of the FOI Act. In order to satisfy the test for *prima facie* exemption under s.46(1)(b), three cumulative criteria must be established:

(a) the matter in issue must consist of information of a confidential nature;

(b) that was communicated in confidence; and

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

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

Information of a confidential nature

24. There is no doubt that the matter remaining in issue (identifying references to the advising solicitor) is information of a confidential nature *vis-à-vis* the applicant. The connection of a person's identity with the imparting of confidential information can itself be secret information capable of protection from disclosure under equitable principles: see *G v Day* [1982] 1 NSWLR 24; *Re "B"* at pp.335-336 (paragraph 137). The connection of a person's identity with the imparting of confidential information may likewise, therefore, be capable of satisfying the tests for exemption under s.46(1)(b) of the FOI Act. Moreover, the identity of the supplier of confidential information may still be eligible for protection even though confidentiality in the information supplied has been waived or lost: see *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp.344-345 (paragraphs 108-110).

Information communicated in confidence

25. The following passages (from prior decisions) explain the requirements of criterion (b) for establishing exemption under s.46(1)(b) of the FOI Act:

- *I consider that the phrase "communicated in confidence" is used in this context to convey a requirement that there be mutual expectations that the information is to be treated in confidence. One is looking then for evidence*

of any express consensus between the confider and confidant as to preserving the confidentiality of the information imparted; or alternatively for evidence to be found in an analysis of all the relevant circumstances that would justify a finding that there was a common implicit understanding as to preserving the confidentiality of the information imparted.
(from *Re "B"*, at pp.338-339, paragraph 152)

- *As to the nature of the test inherent in the phrase "communicated in confidence", see* Re McCann *at paragraphs 33-34. The test requires an authorised decision-maker under the FOI Act to be satisfied that a communication of confidential information has occurred in such a manner, and/or in such circumstances, that a need or desire, on the part of the supplier of the information, for confidential treatment (of the supplier's identity, or information supplied, or both) has been expressly or implicitly conveyed (or must otherwise have been apparent to the recipient) and has been understood and accepted by the recipient, thereby giving rise to an express or implicit mutual understanding that the relevant information would be treated in confidence.*
(from *Re Godwin and Queensland Police Service* (1997) 4 QAR 70, at p.87, paragraph 41)

26. There is a contested issue as to the proper characterisation of the role played by the advising solicitor in providing his professional opinion in respect of the narrow issue identified at point (b) in paragraph 3 above. The QLS contends that the advising solicitor was providing privileged legal advice to the Professional Standards Committee, but also that the advice was conveyed in such circumstances that the client, the QLS, understood and accepted a requirement on the part of the advising solicitor that both his advice (although it has since been disclosed to the applicant by the Lay Observer) and his identity (which has not been disclosed) should be treated in confidence. That would be a somewhat unusual situation. While it is a recognised incident of the relationship between professional and client that the professional has a legal duty to keep the client's affairs secret, it is not an ordinary incident of the relationship of professional and client that the client owes a duty of confidence to the professional in respect of information communicated by the professional to the client (see *Re Hopkins & Presotto and Department of Transport* (1995) 3 QAR 59 at p.70, paragraph 31).

27. For his part, the applicant asserts that the role played by the advising solicitor should be equated to that of an expert witness, who gave expert opinion evidence that was relied on by the Professional Standards Committee in deciding that no disciplinary action should be taken against the solicitor who was the subject of the applicant's complaint. In such circumstances, the applicant asserts, natural justice required that the applicant should have been informed of the identity of the expert witness and the expert opinion that he gave, and thus that there was no proper basis for an obligation or understanding that the identity of, and expert opinion provided by, the advising solicitor could be treated in confidence as against the applicant.

Evidence/Submissions of the participants

28. In his application for review, the applicant said: "*I wish to ascertain the name of* [the advising solicitor] *to satisfy myself that he was consulted, and that he is not associated with the actions at the base of my complaint, ... I also wish to establish independently what his advice was and that he had the qualifications to give advice.*" In a subsequent telephone conversation with a member of my staff, the applicant said that he wanted to speak to the advising solicitor to see if, in

fact, the opinion which has been attributed to the advising solicitor was given by him. (The motivation for this remark appears to have been mistrust of the accuracy of the recording by the QLS's case officer of the opinion conveyed orally by the advising solicitor.)

29. In a submission dated 19 October 1995, the applicant said:

> *I need to ascertain from* [the advising solicitor], *as the only qualified source of advice on which the Law Society and the Lay Observer relied and against which I am appealing, precisely what information he was given. In particular I need to know whether he was apprised of the essential information which I have provided above* [i.e., detail about the background to the applicant's complaint], *which the Law Society was well aware was central to the issues. I wish to know precisely what his qualifications are, and whether he was provided with a copy of the document on which he was asked to proffer an opinion. If this was not done, I wish to know why it was not, and why he did not ask for a copy. Why would he risk his reputation by offering an expert's professional opinion in a jurisdictional process under a State Act, open to appeal, over the telephone and without asking to see what it was he was commenting on? This is the stuff of the proverbial bush lawyers.*
>
> *Above all I wish to ascertain whether or not, acquainted with all information, he wishes under appeal to stand by the opinion he gave - whatever precisely that was, or to resile from or discount it. In the first instance I would seek to obtain this information directly from him with his co-operation and without seeking his attendance in Court. His unexplained reluctance to allow himself to be identified suggests that something is amiss.*

30. This passage indicates that the applicant was under a misapprehension as to the scope of the advising solicitor's involvement in the QLS's handling of the applicant's complaint. The advising solicitor was asked for his opinion only on a narrow question of legal interpretation, i.e., whether the rules of the Family Court permitted a solicitor to sign a Form 66 on behalf of his/her client. The advising solicitor need only have been (and was only) informed of the briefest of background details to enable him to advise on that issue (see paragraph 7 of the affidavit of the advising solicitor - reproduced at paragraph 36 below).

31. The advising solicitor decided, in his evidence and submission, to directly address the stated concerns of the applicant: see the segments of his affidavit reproduced at paragraph 36 below. He also gave evidence, in paragraph 8 of his affidavit, as to his qualifications, and the extent of his experience as a Family Law practitioner. In paragraph 11 of his submission, the advising solicitor said: [the applicant] *asks whether I am prepared to stand by the opinion I gave or whether I am prepared to resile from it or discount it. I stand by the opinion I gave at the time.* The applicant has obtained access to the QLS record of that opinion, which was to the effect that the relevant rules of the Family Court permitted a solicitor to sign a Form 66 on behalf of his/her client. That was the only issue on which the advising solicitor was asked to, and did, advise the QLS.

32. The material before me discloses that, at a meeting on 19 October 1994, the Professional Standards Committee considered the applicant's complaint that the solicitor who had represented the applicant's former daughter-in-law had acted improperly by signing a Form 66, Notice of Child Abuse. The Professional Standards Committee resolved that an experienced family law practitioner be contacted to seek confirmation that the relevant rules of court permitted a solicitor for a party to sign a Form 66 on behalf of the party.

33. On 7 November 1994, Ms Kate Rodgers, the officer from the Professional Standards Department of the QLS who had carriage of investigations in respect of the applicant's complaint, telephoned the advising solicitor. Ms Rodgers' file note of her contact with the advising solicitor (which has been disclosed to the applicant subject to deletion of identifying references) records that she outlined the issue to the advising solicitor, who researched the rules and rang back to convey his opinion that the relevant rules of court did permit a solicitor to sign a Form 66 on behalf of his/her client.

34. Although the QLS was invited to lodge any evidence on which it wished to rely to support its case in this review, it did not lodge any evidence from Ms Rodgers as to the basis on which the advising solicitor's opinion was sought, or as to anything said in their conversation that might be relevant to the question of whether information was communicated by the advising solicitor on the basis that his identity would be treated in confidence. I do have before me a letter dated 6 June 1995 sent by the Director, Professional Standards, of the QLS to the Lay Observer (apparently in response to an opportunity for consultation under s.51 of the FOI Act extended to the QLS by the Lay Observer when he was processing the applicant's FOI access application for documents held by the Lay Observer). So far as relevant for present purposes, it says:

> *I do not consider that there is anything to be gained from providing* [the applicant] *with a copy of the ... memorandum ... with respect to Mrs Rodgers' telephone conversation with* [the advising solicitor]. [The advising solicitor] *was approached merely to assist the Society with its investigations and he did not charge for the advice which he gave. I would prefer that the complainant was not provided with access to* [the advising solicitor's] *name.*

35. I note that although the quoted passage refers to the opinion given by the advising solicitor as "advice", and suggests that it was advice of a kind for which a solicitor would be entitled to charge, the letter to the Lay Observer from the Director, Professional Standards, of the QLS did not claim or suggest that the memorandum was a record of privileged legal advice that qualified for exemption under s.43(1) of the FOI Act. A week later, the Lay Observer decided to grant the applicant access to the memorandum under the FOI Act, subject to the deletion of identifying references to the advising solicitor. On the other hand, it is recorded in the Minutes of the Professional Standards Committee on 20 July 1995 (when considering its response to a letter from the applicant to the QLS requesting further information in respect of the handling of his complaint, including the name of the advising solicitor) that the Committee resolved that the complainant be informed that the Committee had obtained the advice of an experienced family law practitioner for its own benefit, in assisting in the consideration of one of the issues raised in the applicant's complaint, on a privileged basis, and that the Committee was of the view that it was under no obligation to provide the name of the practitioner to the complainant.

36. The evidence given by the advising solicitor confirms that he shared the same understanding of his involvement in the matter as did the Professional Standards Committee. The advising solicitor has given evidence, by way of sworn affidavit, as follows:

> *2. The Queensland Law Society Inc. (QLS) sought my opinion in respect of a matter under the* Family Law Act. *I was informed by the person from the QLS who sought my opinion, and this I do verily believe, that a solicitor had signed a Form 66 under the Family Law Rules and my opinion was sought as to whether a Form 66 can be signed by a solicitor representing a party. I was not shown a copy of this particular form in this instance. It would not have assisted me in my opinion.*

3. *I cannot now recall if I was supplied the name of the practitioner concerned but if I was I cannot now remember the name of the practitioner. In any event, the name of the practitioner was irrelevant to me and would continue to be irrelevant to me as the question related to whether a practitioner can sign a Form 66 in the capacity of practitioner for a party to proceedings.*

4. *I duly supplied my opinion in confidence to the person who had contacted me.*

5. *Because of the nature of the matters dealt with in a Form 66 I was particularly concerned to give a considered opinion because of the serious nature of such matters, and consequences, for the parties concerned and the child or children.*

6. *I have acted and continue to act in matters in which allegations of child abuse have been made and am cognizant of the seriousness and consequences of making such allegations.*

7. *I was not given the names of the parties concerned at the time but from the bare facts that were given to me it was clear to me that I had no adverse interest in or had any prior involvement in the matter concerned.*

37. In a written submission accompanying his affidavit, the advising solicitor contended:

...

4. *The Queensland Law Society (QLS) sought my opinion to assist a committee in its deliberations. The committee had the option of rejecting or accepting my opinion. The opinion was sought confidentially.*

5. *Here it is my name that is sought to be disclosed. The information was freely given by me to the QLS on a gratuitous basis.*

6. *If my name were disclosed then it could reasonably be expected to prejudice future supply of such information, if the names of persons organisations or other bodies from whom the QLS may seek opinions, will be subject to disclosure under the* Freedom of Information Act.

...

9. *... As a lawyer I regard* [the applicant's] *right to have access to relevant information regarding processes in which he is involved as an important matter.*

10. *The need for* [the applicant] *to know my name is not material to the process or procedures about which* [the applicant] *seeks to have redress or knowledge. ... I am not prepared to disclose what my opinion was, as I treat that matter as one of confidence between myself and the QLS and I have not received any indication from the QLS that such confidentiality has been waived.*

My findings

38. I accept the evidence of the advising solicitor, and I find that there was a mutual understanding between the advising solicitor and the Professional Standards Committee that the former had provided privileged legal advice to the latter, albeit on a gratuitous basis. (I do not regard it as unusual that a senior practitioner would be prepared to assist his or her professional body in the discharge of its public regulatory functions by providing legal advice (especially on a fairly narrow issue within his/her recognised area of expertise) at no charge. It is not uncommon for lawyers to provide professional services in certain matters, or for certain clients, at no charge, and communications between lawyer and client made solely for a privileged purpose would still attract legal professional privilege, notwithstanding that the professional services were being provided at no charge.)

39. I can understand the viewpoint of the applicant, who asserts that the real nature of the involvement of the advising solicitor was in providing expert opinion evidence to the Professional Standards Committee, which the Committee relied on to the applicant's detriment in deciding that no disciplinary action was warranted in respect of the applicant's complaint, and that the expert opinion evidence should therefore have been disclosed to him. Thus, the applicant has argued that:

> *... the public interest requires that the* [QLS] *be expected, in its administration of the complaints provisions of the* Law Society Act*, to follow clearly defined and discernible procedures and processes, as far as is reasonably possible to avoid secrecy and to demonstrate openness and impartiality.*
>
> *... all the information sought relates directly to the underpinnings of a final decision made by the Society disadvantageous to my interests which the* Law Society Act *provided to me as a citizen; ... I submit that Natural Justice required and requires that I be given access to evidence underpinning a determination disadvantageous to me.*
>
> ...
>
> *If the* [QLS] *claims some sort of agreement to preserve confidentiality, I ask that the Commissioner determine that such an agreement was unnecessary and that the Society had no right to enter into such an agreement, having regard to the fact that it would prohibit me from satisfying myself that the solicitor was qualified, that he/she was in fact not associated directly or indirectly with the case and/or its participants, and that his/her advice was properly considered and correctly reported to the quasi judicial Committee by the officer of the Law Society responsible.*

40. It may seem anomalous to a member of the public that a body like the Professional Standards Committee, frequently required to make decisions that turn on a point or points of law, can obtain professional legal advice from a lawyer pursuant to a client-lawyer relationship, rely on that legal advice in making a decision as to the disposition of a complaint against a solicitor, and yet maintain (questions of waiver aside) a claim of legal professional privilege in respect of that advice. In contrast, a body established to regulate standards of conduct in the medical profession, if it were to obtain expert medical opinion on which it proposed to rely to dismiss a complaint before it, could not claim privilege to withhold the expert medical opinion from the complainant, and might well be obliged to disclose the expert medical opinion to the complainant if the dictates of procedural fairness required that result in the circumstances of a particular case.

41. However, if such a medical profession disciplinary body required legal advice to assist it in the discharge of its statutory functions, it too would be entitled to obtain, rely on, and maintain (questions of waiver aside) a claim of legal professional privilege in respect of, professional legal advice which that body, as a client, obtained from a professional legal adviser. So too would a Minister of the Crown who obtained legal advice to assist him or her with the proper exercise of a statutory power or statutory discretion. That the Professional Standards Committee of the QLS is entitled to claim legal professional privilege in respect of professional legal advice which the Committee, as a client, obtains to assist it in its consideration of a complaint lodged against a solicitor is clearly established by the decision of Williams J of the Supreme Court of Queensland in *Queensland Law Society v F N Albietz and Sir Lenox Hewitt* (Sup Ct of Qld, No. 6571 of 1998, Williams J, 29 October 1998, unreported) at pp.3-4, where His Honour said:

> *Given the decision of the High Court in* Waterford v The Commonwealth *(1987) 163 CLR 54 the applicant* [i.e., the QLS] *would be entitled to claim legal professional privilege with respect to the advice from Bartley. ...*
>
> *Brennan J at 74 said:*
>
> > In any event, I should think that the public interest is truly served by according legal professional privilege to communications brought into existence by a government department for the purpose of seeking or giving legal advice as to the nature, extent and manner in which the powers, functions, and duties of government officers are required to be exercised or performed. If the repository of a power does not know the nature or the extent of the power or if he does not appreciate the legal restraints on the manner in which he is required to exercise it, there is a significant risk that a purported exercise of the power will miscarry. The same may be said of the performance of functions and duties. The public interest in minimising that risk by encouraging resort to legal advice is greater, perhaps, than the public interest in minimising the risk that individuals may act without proper appreciation of their legal rights and obligations. In the case of governments no less than in the case of individuals, legal professional privilege tends to enhance application of the law, and the public has a substantial interest in the maintenance of the rule of law over public administration. Providing the sole purpose for which a document is brought into existence is the seeking or giving of legal advice as to the performance of the statutory power or the performance of the statutory function or duty, there is no reason why it should not be the subject of legal professional privilege.
>
> *Here the applicant was seeking legal advice as to how the duty imposed on it by s.6(2) of the* Queensland Law Society Act *should be exercised. Insofar as the advice was given to it for that sole purpose the communication was privileged.*
>
> *It is of some significance to note that the court in* Waterford *specifically rejected an argument addressed to it by counsel for the appellant to the effect that legal professional privilege did not extend to a communication which "relates ... to ... the manner in which a person should exercise a power of an administrative nature conferred upon him by law ...". (See especially judgment of Mason and Wilson JJ at 62-3).*

> *Here Bartley's advice was directed to how the power conferred on the applicant by s.6 of the* Queensland Law Society Act *should be exercised, but for the reasons given in the High Court judgment that does not afford a basis for excluding it from the umbrella of legal professional privilege.*

(The present case differs from the facts considered in my decision in *Re Hewitt*, and in *Queensland Law Society Inc v Albietz and Hewitt*, where the Professional Standards Committee of the QLS had voluntarily disclosed the identity of the solicitor from whom it obtained advice (and a summary of the conclusions reached in his advice), but claimed legal professional privilege in respect of the letter of advice. In the present case, the applicant has obtained the record of the legal advice given (albeit initially through the Lay Observer rather than the QLS) but has been denied access to the identity of the legal adviser.)

42. However, my finding above that there was a mutual understanding between the advising solicitor and the Professional Standards Committee that the former had provided privileged legal advice to the latter, does not necessarily mean that the identity of the advising solicitor is protected from disclosure under the FOI Act. The rationale of legal professional privilege is to protect the confidentiality of communications between lawyer and client, not to protect the identity of the lawyer (see paragraphs 79-80 below). Moreover, if a claim of legal professional privilege is challenged, one of the basic elements necessary to establish the validity of the claim is to demonstrate that the lawyer was duly qualified and competent to give professional legal advice or assistance, and it is ordinarily necessary for that purpose to disclose the identity and qualifications of the lawyer. In my view, a lawyer providing legal advice to a client would ordinarily understand that he/she was obliged to preserve the confidentiality of instructions received from the client, and advice given to the client, but that the client was entitled to disclose the instructions or advice, or to disclose the identity of the lawyer. Absent special circumstances, the client would be entitled to disclose the fact that legal advice had been obtained from a particular lawyer, perhaps one of some eminence or acknowledged expertise in a particular field, and was being relied upon to support a certain course of action (even if the client still sought to maintain privilege in the advice itself); e.g., an insurer may wish to inform a claimant that: "After receiving legal advice from Mr X QC, liability will be denied in respect of your claim." (This is essentially what the Professional Standards Committee of the QLS did in the circumstances considered in *Re Hewitt*, when it volunteered the identity of a lawyer, expert in professional disciplinary matters, who had provided legal advice to the Committee; however the extent of its disclosure of the relevant advice reached a point where an issue of imputed waiver of privilege was raised.)

43. Although the evidence and submissions lodged by the advising solicitor in this review (see paragraphs 36 and 37 above) referred to his opinion having been "sought confidentially" (submission, paragraph 4) and to his having provided his opinion to the QLS in confidence (affidavit, paragraph 4), neither the advising solicitor nor the QLS have pointed to any material facts or circumstances (in particular, there is no evidence of an express assurance about confidential treatment by the QLS of his opinion or identity, being sought or given) that might support a finding that there existed an express or implicit mutual understanding that the advising solicitor desired, and the QLS accepted, that the advising solicitor's identity should be treated in confidence by the QLS. Rather, the language used by the advising solicitor in his affidavit and submission is consistent with the understanding that would ordinarily attend the provision of legal advice to a client; i.e., that the QLS as client expected him to, and that he as advising solicitor was bound to, treat the instructions received from, and advice given to, the client, in confidence (unless privilege was waived by the client): see also paragraph 10 of the submission lodged by the advising solicitor, quoted in paragraph 37 above.

44. In the absence of evidence demonstrating the existence of an express mutual understanding of confidence, it is necessary to consider whether, having regard to the material circumstances attending the relevant communication, an implicit mutual understanding existed between the advising solicitor and the QLS that the former desired, and the QLS accepted, that his identity would be treated in confidence by the QLS.

45. Both the QLS and the advising solicitor have sought to place emphasis on the fact that the advising solicitor provided his opinion orally, over the telephone, and that the opinion was freely given on a gratuitous basis. However, I am unable to see any significance in those factors, in the sense that I do not consider that they tend to support a finding that there existed an implicit mutual understanding that the advising solicitor desired, and the QLS accepted, that the former's opinion or identity should be treated in confidence by the QLS. Whether an opinion is communicated in a brief oral conversation, or in a detailed written document for which the solicitor is paid, makes no difference, in my view, to what the solicitor should reasonably expect the QLS may do with the opinion. It would appear that the opinion was sought orally in this case simply because it was a relatively straightforward, discrete point that appeared to require only a brief response. That is no less a legal opinion than if the advising solicitor had carried out extensive research, prepared a written opinion, and received payment for his time and effort. The opinion in this case was freely given, and there is no evidence of any express condition or restriction sought, by the advising solicitor, to be put on its use.

46. In my view, the only material circumstance which tends to support the existence of an implicit mutual understanding that the identity of the advising solicitor would be treated in confidence by the QLS was the nature and background of the dispute from which arose the specific complaint in relation to which the advising solicitor expressed his professional opinion. It appears from paragraph 7 of his affidavit that the advising solicitor was apprised by Ms Rodgers (the QLS's case officer) of sufficient detail concerning the background to the applicant's complaint to enable the advising solicitor to be sure that he had no interest, or prior involvement, in the relevant custody dispute. From his long experience specialising in the practice of family law, including involvement in custody/access disputes in which allegations of child abuse had been made, the advising solicitor would have been well aware of the emotional strain and volatility that frequently attends such disputes, and of their propensity to engender deep-seated hostility and resentment on the part of participants in such disputes. In certain circumstances, it might be open to infer that a solicitor giving independent advice to the Professional Standards Committee of the QLS would not wish to become the subject of unwanted attention through misdirected hostility and resentment from a complainant (the inference could be more readily drawn where both the solicitor and the QLS were aware of some prior behaviour on the part of the complainant that gave rise to a reasonable apprehension of further misdirected hostility/resentment), and that the QLS understood and accepted that desire, and thus that there was an implicit mutual understanding that the identity of the solicitor would be treated in confidence.

47. However, in the present case, the advising solicitor's involvement was confined to giving his professional opinion on a narrow question involving interpretation of the Family Court rules, and not on any aspect of the rights or wrongs, or the strategic conduct, of the custody proceedings in which the applicant became embroiled. I find it difficult to accept that both the advising solicitor and the QLS could have contemplated, at the relevant time, that the advising solicitor's brief and narrowly confined involvement in the process of the QLS dealing with the applicant's complaint was likely to attract unwanted and misplaced attention from the applicant.

48. The Lay Observer submitted (in his letter dated 21 March 1996) that: ... *it is not necessary for* [the applicant] *to know the identity of the* [advising solicitor] *for him to challenge the advice ... provided. The name of the* [advising solicitor] *is not material to his case and it is not in the public interest to provide it.* I agree with those comments; however, they are not sufficient to establish a case for exemption under one of the exemption provisions in Part 3, Division 2 of the FOI Act. The FOI Act provides that any person has a legally enforceable right to be given access, under the FOI Act, to any document of an agency (as defined in s.7 of the FOI Act) that is requested in a valid access application made under s.25 of the FOI Act, subject to the exceptions provided for in the FOI Act itself, chief of which is the discretion conferred on agencies by s.28(1) of the FOI Act to refuse access to an exempt document, or to exempt matter in a document. In a review under Part 5 of the FOI Act concerning a refusal of access, the legal onus of establishing that the matter in issue is exempt from disclosure to the applicant lies with the agency which made the decision under review, and, if it is not discharged, the applicant has a legally enforceable right of access to the matter in issue.

49. I have taken careful account of the evidence and submissions of the advising solicitor, the submissions of the QLS, and other relevant material before me (such as the matter in issue in this review, and in the related review no. S 165/95 in which the QLS is the respondent agency), but, having regard to the matters discussed in paragraphs 42-47 above, I am not satisfied, on the balance of probabilities, that at the time of the communication of advice from the advising solicitor to the QLS, there existed an implicit mutual understanding that the advising solicitor desired, and the QLS accepted, that the identity of the advising solicitor should be treated in confidence by the QLS. I therefore find that the second criterion necessary to establish exemption under s.46(1)(b) of the FOI Act is not satisfied, and that the matter in issue does not qualify for exemption under s.46(1)(b) of the FOI Act.

50. I can see no valid reason why the applicant should feel any need to contact the advising solicitor (who, in my view, has acted honestly and professionally in his brief involvement in the matter), although given the applicant's stated concerns (see paragraphs 28-29 above) there appears to be some chance that he would attempt to do so. Nothing in the applicant's conduct or demeanour has suggested that the advising solicitor has anything to fear, other than uninvited and unwelcome attempts to engage his attention and press him in respect of issues in which he (the advising solicitor) had minimal and peripheral involvement. There is no basis, for instance, on which I could conclude that disclosure of the matter in issue could reasonably be expected to endanger the physical safety of the advising solicitor (which would afford a ground of exemption under s.42(1)(c) of the FOI Act).

Prejudice to the future supply of information

51. I will also record my finding in respect of criterion (c) for exemption under s.46(1)(b) - that disclosure of the matter in issue could reasonably be expected to prejudice the future supply of such information to government.

52. In *Re "B"* at pp.339-341 (paragraphs 154-160), I analysed the meaning of the phrase "*could reasonably be expected to*", by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the *Freedom of Information Act 1982* Cth. In particular, I said in *Re "B"* (at pp.340-341, paragraph 160):

> *The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are*

> *reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.*

The ordinary meaning of the word "expect" which is appropriate to its context in the phrase "could reasonably be expected to" accords with these dictionary meanings: "to regard as probable or likely" (Collins English Dictionary, Third Aust. ed); "regard as likely to happen; anticipate the occurrence ... of" (Macquarie Dictionary, 2nd ed); "Regard as ... likely to happen; ... Believe that it will prove to be the case that ..." (The New Shorter Oxford English Dictionary, 1993).

53. In paragraph 6 of his submission (see paragraph 37 above) the advising solicitor contended that if the names of persons, organisations or other bodies from whom the QLS seeks opinions, were subject to disclosure under the FOI Act, then it could reasonably be expected to prejudice the future supply of such information, but he did not elucidate any grounds for reasonably expecting that consequence to follow. The QLS submitted that prejudice to future supply could reasonably be expected because of the likely reluctance of providers of such advice to find themselves dragged into acrimonious disputes between parties to complaints.

54. I have difficulty thinking of another profession whose members are likely to be more hardened to involvement in acrimonious disputes, as an ordinary incident of their professional duties, than the legal profession. Perhaps the QLS intended to convey that senior professionals would be reluctant to venture professional opinions on issues that arise in potentially acrimonious disputes, on a gratuitous basis. Even then, I am inclined to think that senior professionals would recognise a professional obligation to assist their professional society in the discharge of its regulatory function with respect to compliance with proper standards of professional conduct, for so long as the profession retains the privilege of self-regulation. In any event, I do not consider that there is any reasonable basis for expecting that a substantial number of solicitors would decline to provide professional advice or assistance to the QLS, if sought on a fee for service basis, even if their identities as legal advisers were likely to be disclosed.

55. At paragraph 161, p.341, of my decision in *Re "B"*, I said:

> *In my opinion, the test is not to be applied by reference to whether the particular confider whose confidential information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of sources available or likely to be available to an agency.*

56. I am not satisfied on the material before me that a substantial number of solicitors available to the QLS to assist it in the discharge of its regulatory functions, by providing professional legal advice or assistance, could reasonably be expected to be inhibited from doing so because their identities may be disclosed. In the absence of exceptional circumstances, or any agreement to the contrary in a particular case, I consider that the majority of solicitors approached by the QLS (in the context of its investigation of a complaint) to provide an opinion or advice in a professional capacity, would have no expectation of confidential treatment of their identity for the reasons indicated in paragraph 42 above.

57. I am not satisfied that disclosure of the matter in issue could reasonably be expected to prejudice the future supply of such information, and this affords a further ground for finding that the matter in issue does not qualify for exemption under s.46(1)(b) of the FOI Act.

58. Much of the remainder of the submissions of both the advising solicitor and the QLS with respect to the application of s.46(1)(b), focussed on the public interest balancing test contained in s.46(1)(b). Both submitted that the disclosure of the advising solicitor's name was not in the public interest, but in the personal interest of the applicant alone. I need not deal with those submissions, since I am not satisfied that criterion (b) or criterion (c) for exemption under s.46(1)(b) have been established in respect of the matter in issue. Only if the *prima facie* ground of exemption has been established, is it necessary to consider the public interest balancing test incorporated in s.46(1)(b).

59. I note that s.46(1)(a) of the FOI Act was not specifically invoked as a ground of exemption by the Lay Observer, the QLS, or the advising solicitor, and no submissions were addressed as to its possible application. In the circumstances of this case, the elements to found an action in equity for breach of confidence (restraining the Lay Observer from disclosing the identity of the advising solicitor) would have to have been established. I need not set them out here. (They are explained in detail in *Re "B"* at pp.303-330, and conveniently summarised in *Re Godwin* at pp.77-78, paragraph 14.) For the same reasons as I was not satisfied that criterion (b) for exemption under s.46(1)(b) could be established, I am not satisfied that the circumstances attending the relevant communication were such as to fix the QLS and the Lay Observer with an equitable obligation of conscience binding them not to disclose the identity of the advising solicitor. I find that the matter in issue does not qualify for exemption under s.46(1)(a) of the FOI Act.

Application of s.40(a) of the FOI Act

60. Section 40(a) of the FOI Act provides:

> ***40.*** *Matter is exempt matter if its disclosure could reasonably be expected to—*
>
> *(a) prejudice the effectiveness of a method or procedure for the conduct of tests, examinations or audits by an agency; or*
>
> *...*
>
> *unless its disclosure would, on balance, be in the public interest.*

61. In support of the application of s.40(a) to the matter in issue, the QLS submitted:

> *The Society is of the view that the identity of the solicitor in this case is exempt pursuant to Section 40(a), in that the Society has occasion to place reliance in the course of investigations on the specialised knowledge and expertise of practitioners and that the identity of such persons is not relevant to the determination of the investigation being carried out. To create the possibility that such identities will be revealed will have the effect of discouraging such persons from providing assistance and this in turn will prejudice the effectiveness of the investigative capacity of the Society.*
>
> *In the Society's submission, far from the disclosure of this class of material being in the public interest, its deleterious effect on the investigation and possible prosecution of complaints would be quite adverse to the public interest.*

62. I discussed s.40(a) of the FOI Act in my decision in *Re Murphy and Queensland Treasury & Ors* (1995) 2 QAR 744 at paragraphs 96-107. The focus of this exemption provision is on prejudice to the effectiveness of a method or procedure for the conduct of tests, examinations or audits by an agency.

63. The QLS's argument is similar to that which it raised (in the similar context of investigations into complaints of unprofessional conduct against solicitors), and which I rejected, in *Re Hewitt* at paragraphs 157-158. I consider that the QLS's claim for exemption under s.40(a) must fail, as the matter in issue cannot be properly characterised as bearing any relationship to the conduct of a "test, examination or audit", giving those words their ordinary and natural meaning. There will be occasions when the QLS conducts audits of solicitors' trust accounts, a process which I consider would fall within the terms of s.40(a) of the FOI Act, but the matter now in issue does not fall within the ambit of the s.40(a) exemption. Even if it did, the basis advanced by the QLS for apprehended prejudice appears to be no different from that which I have considered, and rejected, in dealing with criterion (c) for exemption under s.46(1)(b) at paragraphs 53-57 above.

Application of s.41(1) of the FOI Act

64. Section 41(1) of the FOI Act provides:

> ***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.*

65. In support of the application of s.41(1) to the matter in issue, the QLS submitted:

> *The release of this material would disclose an opinion or advice that has been prepared in the course of a deliberative process - that is, the investigation and prosecution of complaints against solicitors - and in the Society's view its release would be contrary to the public interest, insofar as it would tend to prejudice the effectiveness of the Society's regulatory function in protecting the public from unprofessional conduct and professional misconduct.*
>
> *It is clear that pursuant to Section 41(1) the material subject to the present application is part of the deliberative process, as that term has come to be accepted in this jurisdiction - (*Re Waterford and Department of Treasury (No 2) (1984) 5 ALD 588; Eccleston -v- Department of Family Services and Aboriginal and Islander Affairs (1993) 1 QAR 60) *and does not constitute the enunciation of a final decision. In this regard, it does not fall within the bounds of Section 41(3)(b).*

66. A detailed analysis of s.41 of the FOI Act can be found in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.66-72, where, at p.68 (paragraph 21), I said:

> *21. Thus, for matter in a document to fall within s.41(1), there must be a positive answer to two questions:*
>
> *(a) would disclosure of the matter disclose any opinion, advice, or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, (in either case) in the course of, or for the purposes of, the deliberative processes involved in the functions of government? and*
>
> *(b) would disclosure, on balance, be contrary to the public interest?*

67. I do not accept that the matter in issue, which consists of identifying references to the advising solicitor, falls within the terms of s.41(1)(a) of the FOI Act. The record of the advising solicitor's opinion has already been disclosed to the applicant.

68. In any event, the basis on which the QLS contends that disclosure would be contrary to the public interest is, in substance, identical to that which I have considered and rejected at paragraphs 53-57 above. I find that the matter in issue does not qualify for exemption under s.41(1) of the FOI Act.

Application of s.42(1)(e) of the FOI Act

69. Section 42(1)(e) of the FOI Act provides:

> ***42.(1)*** *Matter is exempt matter if its disclosure could reasonably be expected to—*
>
> *...*
>
> *(e) prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law); ...*

70. The QLS submitted as follows in support of the application of s.42(1)(e) to the matter in issue:

> *The Society is also of the view that the identity of the solicitor is exempt pursuant to Section 42 in that its disclosure can reasonably be expected to, pursuant to Section 42(1)(e), prejudice the effectiveness of the procedures of the Society for investigating and dealing with alleged contraventions of the law and/or professional standards.*
>
> *In seeking the expert advice of practising practitioners, on however an informal basis, the Society is able to more effectively carry out its investigative process. Not surprisingly, practitioners who are asked to provide such advice on a gratuitous basis do not expect their identity and background to be turned into an issue between the parties to a complaint and naturally will be very reluctant to be involved if that is the case.*

If the Society's investigative and disciplinary system is to be in any way prejudiced by the release of information that would undermine its effectiveness, then clearly it is not in the public interest for such information to be disclosed.

71. I discussed the requirements of s.42(1)(e) in my decision in *Re "T" and Queensland Health* (1994) 1 QAR 386. The object of s.42(1)(e) is to provide a ground for refusing access to information where its disclosure could reasonably be expected to prejudice the effectiveness of methods and procedures used by government agencies undertaking law enforcement activities.

72. It appears that the QLS contends that its practice, when investigating a complaint, of sometimes seeking an opinion or advice from an experienced solicitor, is a lawful method or procedure for dealing with a possible contravention of the law, the effectiveness of which could reasonably be expected to be prejudiced by disclosure of the name of the advising solicitor. At p.393 (paragraphs 23 and 24) of *Re "T"*, I said:

> *23. There is a diverse group of government agencies in Queensland performing law enforcement functions directed towards preventing, detecting, investigating or dealing with contraventions or possible contraventions of the law. Each agency will have developed (and will probably continue to develop and refine) methods and procedures to assist in the performance of its particular law enforcement responsibilities. Some methods and procedures may depend for their effectiveness on secrecy being preserved as to their existence, or their nature, or the personnel who carry them out, or the results they produce in particular cases. It is not possible to list the types of methods or procedures which may qualify for protection under s.42(1)(e) of the FOI Act. Each case must be judged on its own merits. The question of whether or not the effectiveness of a method or procedure could reasonably be expected to be prejudiced by the disclosure of particular matter sought in an FOI access application, is the crucial judgment to be made in any case in which reliance of s.42(1)(e) is invoked.*
>
> *24. There may be cases where the disclosure of particular matter will so obviously prejudice the effectiveness of law enforcement methods or procedures that the case for exemption is self-evident, but ordinarily in a review under Part 5 of the FOI Act it will be incumbent on an agency to explain the precise nature of the prejudice to the effectiveness of a law enforcement method or procedure that it expects to be occasioned by disclosure, and to satisfy me that the expectation of prejudice is reasonably based. I will ordinarily not be able to refer in my reasons for decision to the precise nature of the prejudice, nor in many cases to the nature of the relevant methods or procedures (where that would subvert the reasons for claiming an exemption in the first place) but I will, in any event, need to be satisfied that the agency has discharged its onus under s.81 of the FOI Act of establishing all requisite elements of the test for exemption under s.42(1)(e) of the FOI Act.*

73. On the material before me, I am unable to accept that the effectiveness of the QLS's procedure of seeking opinions or advice from experienced solicitors (on issues of law or practice relevant to the investigation of a complaint against a solicitor), could reasonably be

expected to be prejudiced by disclosure of the matter in issue. I have already explained at paragraphs 53-57 above why I do not accept that disclosure of the advising solicitor's identity could reasonably be expected to prejudice the future supply to the QLS of professional legal advice or assistance, relating to investigations of complaints against solicitors. Further, the practice of seeking expert opinion or advice in the context of investigating a complaint or dispute is, if it can be described as a method or procedure of investigation, a routine method or procedure used by investigative/regulatory agencies on a regular basis. In *Re Anderson and Australian Federal Police* (1986) 4 AAR 414, Deputy President Hall of the Commonwealth AAT said (at p.425):

> *Questions of prejudice are, I think, more likely to arise where the disclosure of a document would disclose covert, as opposed to overt or routine methods or procedures.*

In *Re Lapidos and Auditor-General of Victoria* (1989) 3 VAR 343, Deputy President Galvin of the Victorian AAT said (at p.352):

> *Document No. 14 identifies certain methods or procedures but of so patently an ordinary and fundamental kind as to preclude the conclusion that disclosure of them would or would be reasonably likely to prejudice their effectiveness.*

74. I find that the matter in issue does not qualify for exemption from disclosure under s.42(1)(e) of the FOI Act.

Application of s.43(1) of the FOI Act

75. Section 43(1) of the FOI Act provides:

> ***43.(1)*** *Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.*

76. The s.43(1) exemption turns on the application of those principles of Australian common law which determine whether a document, or matter in a document, is subject to legal professional privilege. The grounds on which a document attracts legal professional privilege are fairly well settled in Australian common law. In brief terms, legal professional privilege attaches to confidential communications between lawyer and client for the sole purpose of seeking or giving legal advice or professional legal assistance, and to confidential communications made for the sole purpose of use, or obtaining material for use, in pending or anticipated legal proceedings. (For a more detailed analysis of legal professional privilege, see *Re Smith and Administrative Services Department* (1993) 1 QAR 22 at pp.51-52 (paragraph 82), which sets out a summary of the principles established by the High Court authorities of *Grant v Downs* (1976) 135 CLR 674, *Baker v Campbell* (1983) 153 CLR 52, *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, and *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.)

77. In its submission dated 15 January 1996, the QLS raised this argument:

> *Pursuant to the accepted principles of legal professional privilege, if the Society were to be a party to proceedings then it would not be required to reveal the details of legal advice which it had received, nor the identity of persons providing such information.*

78. The Assistant Information Commissioner invited the QLS to expand upon its submission and, if possible, provide some authority for its contention that the identity of the advising solicitor could be subject to a claim of legal professional privilege. The QLS provided a further submission dated 15 March 1996 in which it stated that it could find no specific authority which addressed that issue. However, it submitted that:

> *... given the fundamental underpinning of legal professional privilege as "necessary to promote freedom of consultation of legal advisers by clients" ..., a finding that the identity of a legal adviser consulted by a client would be revealed to another party could in certain circumstances materially affect the willingness of a party to seek such advice.*
>
> *Examples are not too difficult to imagine - in commercial matters particular lawyers with expertise in certain areas are sought out by a variety of clients. The general class of advice which they might offer could well become known anecdotally to other individuals, including legal advisers acting on behalf of other individuals. For example, if one assumes for a moment that a taxpayer became involved in litigation with the Australian Tax Office, then it may be of a real advantage, even to the extent of no more than filling in one more blank space in a jigsaw, to know that the taxpayer had sought and received advice from a particular legal adviser.*
>
> *It is not difficult to imagine other cases where the knowledge by one side of the identity of individuals who have provided advice to the other side could render assistance to that other party in the preparation of litigation, etc.*
>
> *There is no doubt that the very fact of the identity of legal advisers being made known where the advice given remains privileged strikes a blow at the fundamental reason for the existence of legal professional privilege. In short, in the Society's submission, if the advice received is privileged then the identity of the adviser should also be privileged. Essentially, the shield of legal professional privilege operates to say to one side that the advice given to another party is "none of their business" and it is the Society's submissions that that is also the case when dealing with the identity of the adviser.*

79. In the High Court's recent consideration of aspects of legal professional privilege in *Commissioner, Australian Federal Police and Anor v Propend Finance Pty Ltd and Others* (1997) 188 CLR 501, there was evident in several of the judgments a renewed emphasis on the basic principle that the subject matter of the privilege is communications - either oral, written or recorded - made solely for a purpose that attracts legal professional privilege: see, for example, per McHugh J at p.552, per Gummow J at ALR pp.568-569, per Kirby J at pp.584-585.

80. I find the arguments advanced by the QLS unconvincing. It is no part of the rationale of legal professional privilege to protect the identity of the advising lawyer. The privilege exists for the benefit of the client, to facilitate and encourage resort to professional legal advisers, by protecting the confidentiality of communications between lawyer and client, at the discretion of the client (who is entitled to waive privilege as he/she sees fit). Identifying references to a legal adviser may be incidentally protected from disclosure, if contained in a document that is itself wholly protected by legal professional privilege because it was brought into

existence for the sole purpose of seeking or giving professional legal advice. However, if a claim of legal professional privilege is challenged, one of the basic elements to be proved is that the legal adviser was competent and qualified to give professional legal advice, which would ordinarily require disclosure of the identity and qualifications of the advising lawyer.

81. The matter in issue in the present case consists of identifying references to the advising solicitor that appear in documents which, with one exception, clearly were not created solely for a purpose which attracts legal professional privilege. The other document, being the memorandum which recorded the advice conveyed orally by the advising solicitor, has been disclosed to the applicant.

82. I do not consider that the identity of a legal adviser, in isolation, is capable of attracting legal professional privilege. The QLS contends that if the advice received is privileged (which, I note, is itself a point of some difficulty for the QLS in this instance, since the opinion of the advising solicitor has been disclosed to the applicant), then the identity of the adviser should also be privileged. I do not agree. The opinion or advice may be privileged if it satisfies the 'sole purpose' test. The identity of the legal adviser cannot, by itself, satisfy that test. It simply is not in the nature of a confidential communication brought into existence for the sole purpose of seeking or providing legal advice.

83. I find that the matter in issue does not qualify for exemption under s.43(1) of the FOI Act.

Conclusion

84. For the foregoing reasons, I set aside the decision under review, being the decision of the Lay Observer, Mr Munro, dated 13 June 1995. In substitution for it, I decide that the matter remaining in issue (comprising identifying references to the advising solicitor) is not exempt from disclosure under the FOI Act, and the applicant therefore has a legal right to be given access to it under the FOI Act.

85. I also find that there are no reasonable grounds for believing that further documents, which fall within the terms of the applicant's FOI access application dated 19 April 1995, exist in the possession or control of the respondent.

.....
F N ALBIETZ
INFORMATION COMMISSIONER