OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 02/2000
Application S 76/98

Participants:

MARIA M VILLANUEVA
Applicant

QUEENSLAND NURSING COUNCIL
Respondent

A MIDWIFE
MS SIMONE TALBOT
DR MICHAEL GORDON
Third Parties

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to an investigation by the respondent of a complaint made by the applicant about the professional conduct of a midwife - whether disclosure of the matter in issue is prohibited by s.139 of the *Nursing Act 1992* Qld - consideration of s.16 and s.48 of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - whether disclosure 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.

FREEDOM OF INFORMATION - refusal of access - whether disclosure would disclose information concerning the personal affairs of the midwife - whether disclosure would, on balance, be in the public interest - application of s.44(1) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - whether disclosure would disclose 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 - whether disclosure would, on balance, be in the public interest - application of s.46(1)(b) of the *Freedom of Information Act 1992* Qld.

ii

Freedom of Information Act 1992 Qld s.8, s.16, s.42(1)(e), s.43(1), s.44(1), s.46(1)(b), s.48, s.76(1), s.78(2), s.85(1), s.92(1)
Freedom of Information (Review of Secrecy Provision Exemption) Amendment Act 1994 Qld
Freedom of Information Act 1982 Vic s.33(1)
Judicial Review Act 1991 Qld
Medical Act 1939 Qld
Nursing Act 1992 Qld s.103(2), s.103(4), s.103(5)(a), s.109, s.139, s.139(3)
Whistleblowers Protection Act 1994 Qld s.55(1)

Anderson and Australian Federal Police, Re (1986) 4 AAR 414
Annetts v McCann (1990) 170 CLR 596; 65 ALJR 167
"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Cannon and Australian Quality Egg Farms Limited, Re (1994) 1 QAR 491
Director-General, Department of Families, Youth and Community Care and Department of Education; Perriman (Third Party), Re (1997) 3 QAR 459
Esso Australia Resources Ltd v Commissioner of Taxation (1999) 74 ALJR 339
Godwin and Queensland Police Service, Re (1997) 4 QAR 70
Goldberg v Ng (1994) 33 NSWLR 639
Goldberg v Ng (1995) 185 CLR 83
Griffith and Queensland Police Service, Re (1997) 4 QAR 110
Kavvadias v Commonwealth Ombudsman (1984) 52 ALR 728
Lapidos and Auditor-General of Victoria, Re (1989) 3 VAR 343
McCann and Queensland Police Service, Re (1997) 4 QAR 30
McEniery and Medical Board of Queensland, Re (1994) 1 QAR 349
Ng v Goldberg (Supreme Court of New South Wales, No. 5342 of 1989, No. 4995 of 1990, Powell J, 2 March 1993, unreported)
"NHL" and The University of Queensland, Re (1997) 3 QAR 436
Pemberton and The University of Queensland, Re (1994) 2 QAR 293
Pope and Queensland Health, Re (1994) 1 QAR 616
State of Queensland v Albietz [1996] 1 Qd R 215
Stewart and Department of Transport, Re (1993) 1 QAR 227
"T" and Queensland Health, Re (1994) 1 QAR 386
University of Melbourne v Robinson [1993] 2 VR 177

DECISION

I set aside the decision under review (being the decision made on behalf of the respondent by Mr J O'Dempsey on 2 April 1998). In substitution for it, I decide that the matter in issue (as described in paragraph 23 of my accompanying reasons for decision) does not qualify for exemption from disclosure to the applicant under the *Freedom of Information Act 1992* Qld, except for the following information which I find is exempt matter under s.44(1) of the *Freedom of Information Act 1992* Qld -

(a) the 26th-32nd words appearing in the final paragraph on page 1 of document 6;

(b) the first full sentence appearing on page 2 of document 6;

(c) the 5th-9th words of the fifth sentence, and the last eight words of the seventh sentence, as contained in the first paragraph appearing under the heading "Our client's nursing experience" in document 8.

Date of decision: 26 April 2000

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F N ALBIETZ
INFORMATION COMMISSIONER

TABLE OF CONTENTS

Page

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REASONS FOR DECISION

Background

1. The applicant seeks review of the decision of the Queensland Nursing Council (the QNC) to refuse her access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to certain documents and parts of documents that relate to a complaint which the applicant made to the QNC about the professional conduct of a midwife.

2. On 22 December 1994, the applicant gave birth to a stillborn baby at Ipswich General Hospital. The birth took place under the supervision of a registered midwife employed by the Hospital. While it is not necessary for the purposes of this decision to discuss in detail the events surrounding the birth, I should note that it is clear from the material before me that the applicant believes that her baby was alive at the time the applicant was admitted to the Hospital's Maternity Unit. The applicant believes that the actions of the midwife during the delivery caused or contributed to the baby's death.

3. On 3 January 1997, the applicant lodged a complaint with the QNC regarding the midwife's actions during the delivery of the applicant's baby. The QNC has responsibility under the *Nursing Act 1992* Qld for regulating compliance by Queensland nurses with proper standards of professional conduct. A person aggrieved by the conduct of a nurse, midwife *et cetera* is entitled to make a written complaint to the QNC, and the QNC may cause an investigation to be conducted into the conduct of the nurse, midwife *et cetera*. At the conclusion of its investigation, the QNC must decide whether there is substance to the complaint and whether any further action should be taken in respect of the complaint.

4. The QNC conducted an investigation of the applicant's complaint under the *Nursing Act*, which included interviewing the applicant and the midwife, and others present in the maternity unit on the day in question, as well as obtaining expert opinion regarding the midwife's actions during the delivery. At the conclusion of its investigation, the QNC decided that the midwife's actions did not contribute to the death of the applicant's baby, and therefore decided not to bring a disciplinary charge against the midwife under the *Nursing Act*.

5. By application dated 2 January 1998, the applicant applied to the QNC for access under the FOI Act to:

> *Records, information, reports, etc, in full, in relation to the investigation undertaken by Mrs Lisa Harrison - Nurse advisor - investigator appointed by the QNC regarding the conduct of* [the midwife].
> ...
> *Complaint made to the QNC - 3 - January 1997 concerning conduct of* [the midwife] *during management of the labour and delivery of my baby (stillborn) on 22 December 1994. - Documents held by the QNC.*

6. By letter dated 5 March 1998, Ms S Henry, the QNC's FOI Coordinator, advised the applicant that she had decided to give the applicant access to a number of documents falling within the scope of the applicant's FOI access application, but that she had decided that other documents were exempt from disclosure, in whole or in part, under s.43(1) or s.46(1)(b) of the FOI Act. On 26 March 1998, the applicant wrote to the QNC seeking internal review of Ms Henry's decision. Mr J O'Dempsey, Executive Officer of the Council, conducted the internal review and, by letter dated 2 April 1998, informed the applicant that he had decided to affirm Ms Henry's decision.

7. By letter dated 22 May 1998, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr O'Dempsey's decision.

External review process

8. Copies of the matter in issue were obtained and examined. The midwife who was the subject of the applicant's complaint to the QNC was informed of my review, and, through her solicitors (Roberts & Kane) she applied for, and was granted, status as a participant in this review, in accordance with s.78(2) of the FOI Act.

9. On 29 June 1998, I wrote to the applicant to advise her that I had formed the preliminary view that some of the matter in issue qualified for exemption under s.43(1) of the FOI Act - legal professional privilege. The applicant accepted my preliminary view in that regard, and that matter is no longer in issue in this review.

10. Also on 29 June 1998, I wrote to the QNC to convey my preliminary view that one document claimed by the QNC to be exempt from disclosure under s.43(1) of the FOI Act did not qualify for exemption under that provision. I also conveyed my preliminary view that, on the basis of the material then before me, the bulk of the matter in issue claimed to be exempt from disclosure under s.46(1)(b) of the FOI Act did not appear to qualify for exemption under that provision. So that I could give detailed consideration to the QNC's claim for exemption under s.46(1)(b), I asked the QNC, and the officer who conducted the investigation into the complaint lodged by the applicant with the QNC (a Ms Harrison) to provide me with written submissions/evidence in relation to a number of matters concerning the investigation.

11. Mr O'Dempsey responded on behalf of the QNC by letter dated 7 July 1998. He declined to provide the submissions/evidence I had requested due to the expense which he contended would be involved in preparing that material, in addition to the fact that Ms Harrison was absent on maternity leave. Mr O'Dempsey stated that, while the QNC did not resile in any way from its reliance upon s.43(1) and s.46(1)(b) of the FOI Act, it now also wished to rely on s.42(1)(e) of the FOI Act in claiming exemption from disclosure in respect of the matter in issue. Mr O'Dempsey also made a number of observations regarding the QNC's investigative procedures.

12. I responded to the matters raised by Mr O'Dempsey in a letter to the QNC dated 23 July 1998. I expressed the preliminary view that none of the matter in issue qualified for exemption under s.42(1)(e) of the FOI Act. I also addressed a number of the issues raised by Mr O'Dempsey regarding the procedures followed by the QNC in conducting investigations of complaints.

13. Mr O'Dempsey then requested a meeting with the case officer in charge of the preliminary investigation in this review. That meeting took place on 28 August 1998 and was attended by the QNC's solicitor. As part of the purpose of the meeting was to discuss the matter in issue, and the application to it of the relevant exemption provisions relied upon by the QNC, it was not possible to invite the applicant to attend that meeting. As a result of the meeting, Mr O'Dempsey stated that, while the QNC was not prepared to withdraw its claim for exemption, it would give consideration to preparing a summary of the QNC's findings regarding its investigation into the midwife's conduct, and to providing the applicant with a copy of that summary, in an effort to give the applicant some more information regarding the QNC's findings. That summary was provided to the applicant (with the midwife's consent) during the course of the review; however, the applicant indicated that she nevertheless wished to continue to pursue access to the matter in issue.

14. On 4 September 1998, I wrote to the midwife's solicitors to convey to them my preliminary view that the bulk of the matter in issue did not qualify for exemption from disclosure to the applicant under the FOI Act. In the event that the midwife did not accept my preliminary view, I invited her solicitors to lodge written submissions and/or evidence in support of her case for exemption of the matter in issue.

15. In response, the midwife's solicitors advised me that their client did not accept my preliminary view. They provided a 25 page submission, dated 1 October 1998, in support of their client's claim that the matter in issue qualified for exemption under s.44(1) and s.46(1)(b) of the FOI Act. They also argued that there was a secrecy provision contained in the *Nursing Act* which prohibited disclosure of the matter in issue.

16. By letters dated 18 January 1999, the Deputy Information Commissioner wrote to two third parties who are referred to in the matter in issue - Ms Simone Talbot and Dr Michael Gordon - in order to advise them of my review, and to ascertain whether or not they objected to the disclosure to the applicant of the matter in issue which concerned them. Ms Talbot was, at the time of the relevant incident, a student nurse at the Ipswich General Hospital's Maternity Unit, and was present during the birth of the applicant's baby. Dr Gordon is an Obstetrician and Gynaecologist who was approached by the QNC to give his opinion of the midwife's actions during the delivery of the applicant's baby. He also provided a reference for the midwife, which comprises part of the matter in issue.

17. Both Ms Talbot and Dr Gordon advised that they objected to the disclosure to the applicant of the matter in issue which concerned them. Both lodged written submissions in support of their claims for exemption under s.46(1)(b) of the FOI Act. In addition, the Queensland Branch of the Australian Medical Association (the AMA) and the National Association of Specialist Obstetricians & Gynaecologists (NASOG) both lodged written submissions in support of Dr Gordon's objection to disclosure.

18. I also consulted with another Obstetrician and Gynaecologist who is briefly referred to in the matter in issue as having expressed an oral opinion regarding the midwife's conduct, and who also provided the midwife with a reference (which comprises part of the matter in issue) - Dr Gilroy. Dr Gilroy advised that he did not wish to participate in my review and that he would accept my decision regarding whether or not the matter in issue which concerned him, qualified for exemption under the FOI Act.

19. On 23 February 1999, I received a written submission from the Queensland Nurses' Union (the QNU) in support of the midwife's objection to disclosure of the matter in issue. The QNU also stated that it had grave concerns that disclosure of the matter in issue would adversely affect all nurses - not only nurses who are the subject of complaint to the QNC, but any nurse who is requested to provide information, opinions or references for the purpose of a QNC investigation.

20. Copies of all submissions were provided to the applicant for response. She provided a number of separate responses to the various submissions, and copies of those responses were provided to the QNC, the midwife's solicitors, Ms Talbot and Dr Gordon. None of those participants elected to lodge any material in reply. On 1 June 1999, the applicant wrote to me to advise that she had recently reviewed my 5th and 6th Annual Reports and that she had identified a number of cases discussed in those reports which she believed involved issues similar to the issues involved in this review. She then listed the cases which she considered were of relevance to my decision.

21. In summary, the submissions received from the various participants which I have taken into account in reaching my decision in this matter are as follows:

    (a) letter from the QNC dated 7 July 1998 and letter from the QNC's solicitors dated 5 October 1998 (the substance of which I communicated to the applicant in my letter dated 28 January 1999), and the applicant’s submission in reply dated 4 March 1999;
    (b) the midwife's submission dated 1 October 1998 and the applicant’s submission in reply dated 9 March 1999;
    (c) the submission of the QNU dated 23 February 1999 and the applicant’s submission in reply dated 4 March 1999;
    (d) the submission of Dr Michael Gordon dated 11 March 1999;
    (e) the submission of the Queensland Branch of the AMA dated 3 March 1999 (lodged in support of Dr Gordon’s case);
    (f) the submission of NASOG dated 30 March 1999 (lodged in support of Dr Gordon’s case);
    (g) the submission of Ms Simone Talbot dated 12 March 1999;
    (h) the applicant’s submission dated 23 April 1999 in reply to (d) to (g) above.

22. Unfortunately, I have gained little assistance from the submissions which the applicant lodged in support of her case for disclosure of the matter in issue. In those submissions she discussed, at length, the medical procedures that were performed on her on the day in

question, and provided technical information of a medical nature regarding those procedures. I have advised the applicant that submissions and information of that type are not relevant to the issues I am required to determine in this review. I do not have jurisdiction to decide whether or not the midwife's actions were negligent. My jurisdiction is limited to a consideration of the matter in issue and a decision as to whether or not that matter qualifies for exemption under the FOI Act.

Matter in issue

23. The matter in issue in this review consists of the following documents:

- Documents claimed to be wholly exempt from disclosure:

Document Number	Description of Document
5	Letter dated 19 May 1997 from Roberts & Kane to QNC.
6	Transcript of interview with midwife.
8	Letter dated 7 August 1997 from Roberts & Kane to QNC with enclosures: • Reference by Dr Kevin Gilroy (Obstetrician & Gynaecologist) • Reference by Diane Wiseman (Registered midwife) • Reference by Dr Michael Gordon (Obstetrician & Gynaecologist).
9	Draft statement of Simone Talbot (unsigned).
11	Statement of Dr Michael Gordon dated 15 September 1997.
12	Final investigation report by Lisa Harrison (Nurse Adviser) dated 30 September 1997.

- Document claimed to be partially exempt from disclosure:

Document Number	Description of Document
13	Letter dated 13 October 1997 from Lisa Harrison to Roberts & Kane with enclosure: • Outline of final investigation report by Lisa Harrison (Nurse Adviser) dated 13 October 1997.

24. The exemption provisions relied upon by the various participants who object to disclosure of the matter in issue are s.42(1)(e), s.43(1), s.44(1) and s.46(1)(b) of the FOI Act. In addition, the midwife's solicitors claim that s.139 of the *Nursing Act* is a secrecy provision which, notwithstanding the operation of s.16 and s.48 of the FOI Act, prohibits disclosure of the matter in issue under the FOI Act. If that claim were to be accepted, such that I were to find that disclosure of the matter in issue to the applicant is prohibited by s.139 of the *Nursing Act*, it would be unnecessary for me to consider the application to the matter in issue of the particular exemption provisions relied upon. Accordingly, I will deal with the secrecy claim under s.139 first.

Submission that s.139 of the *Nursing Act* prohibits disclosure of the matter in issue

25. Section 139 of the *Nursing Act* provides:

> ***Confidentiality of documents and information***
>
> ***139.(1)*** *In this section—*
>
> *"**court**" includes any tribunal, authority or person having power to require the production of documents or the answering of questions;*
>
> *"**person to whom this section applies**" means a person who is, or has been—*
>
> *(a) a member of the Council or a committee of the Council; or*
>
> *(b) a member of the Committee; or*
>
> *(c) an employee of the Council; or*
>
> *(d) a person performing functions or exercising powers under, or for the purposes of, this Act;*
>
> *"**produce**" includes permit access to;*
>
> *"**protected document**" means a document that was made or obtained by a person as a person to whom this section applies, and includes a document seized, a copy of a document made, or an extract of a document taken, under this Act;*
>
> *"**protected information**" means information that was disclosed to, or obtained by, a person as a person to whom this section applies.*
>
> ***(2)*** *A person to whom this section applies must not—*
>
> *(a) make a copy of, or take an extract from, a protected document; or*
>
> *(b) make a copy of protected information; or*
>
> *(c) whether directly or indirectly, disclose or make use of a protected document or protected information;*
>
> *unless the person does so—*
>
> *(d) in the performance of the person's functions or the exercise of the person's powers under, or in relation to, this Act; or*
>
> *(e) otherwise under or for the purposes of this Act.*

Maximum penalty—100 penalty units or imprisonment for 6 months.

(3) *A person to whom this section applies is not required—*

(a) to disclose protected information to a court; or

(b) to produce a protected document in court;

unless it is necessary to do so for the purpose of carrying this Act into effect.

26. Section 16 of the FOI Act provides:

> ***16.(1)*** *This Act is intended to operate to the exclusion of the provisions of other enactments relating to non-disclosure of information.*
>
> ***(2)*** *Subsection (1) has effect subject to section 48 (Matter to which secrecy provisions of enactments apply).*

27. Section 48 of the FOI Act provides:

> ***48.(1)*** *Matter is exempt matter if its disclosure is prohibited by an enactment mentioned in the Schedule 1 unless disclosure is required by a compelling reason in the public interest.*
>
> ***(2)*** *Matter is not exempt under subsection (1) if it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to the document containing the matter is being made.*

28. The *Nursing Act* is not listed in Schedule 1 to the FOI Act.

29. Notwithstanding s.16 of the FOI Act, which provides that the FOI Act is intended to operate to the exclusion of the provisions of other enactments relating to non-disclosure of information (but subject to the application of s.48 of the FOI Act which makes special provision in respect of a select group of statutory secrecy provisions, of which s.139 of the *Nursing Act* is not one), the midwife's solicitors have argued that s.139 of the *Nursing Act* has the effect of prohibiting disclosure of "protected documents" or "protected information" otherwise than under the *Nursing Act:*

> *Schedule 1* [to the FOI Act] *sets out the ten statutes to which s.48 applies and the* Nursing Act *is not included in this list.*
>
> *Both the* FOI Act *and the* Nursing Act *date from 1992. However, the* FOI Act *was assented to (the last action in the legislative process) on 19 August 1992. The* Nursing Act *was assented to some three and a half months later on 30 November 1992. Accordingly, the* Nursing Act *is later legislation. In terms of documents generated by the Council, the provisions of s.139 of the* Nursing Act *constitutes more specific legislation than the combined operation of ss.16 and 48 of the* FOI Act. *Where there is an inconsistency between the two legislative approaches, a later more specific Act is capable of repealing* pro tanto *the earlier legislation. See* Enman v Enman *[1942] SASR 131. One needs to consider, therefore, whether the two legislative*

> *provisions can be read together and whether the later Act is in fact inconsistent with the more general provisions of the FOI Act. This will depend to some extent on the construction of the definitions contained in s.139* [of the Nursing Act].
>
> ...

30. I do not accept the submission by the midwife's solicitors as set out above. The first flaw in their submission is that the present form of s.48 of the FOI Act was enacted in 1994 (i.e., after Parliament enacted s.139 of the *Nursing Act*), after a thorough review of secrecy provisions in Queensland legislation and a careful assessment of those which should be accorded special status under an amended s.48 of the FOI Act. The position was explained in the preamble to the *Freedom of Information (Review of Secrecy Provision Exemption) Amendment Act 1994* Qld as follows:

> ***Parliament's reasons for enacting this Act are—***
>
> ***1.*** *In order to balance openness against legitimate claims for secrecy in the interest of people about whom the Government holds information and in the public interest, the* Freedom of Information Act 1992 *(the "**FOI Act**") allows exemptions from access to certain matters.*
>
> ***2.*** *Section 48 of the FOI Act makes matter exempt if it falls within the terms of a specified type of secrecy provision (a "**section 48 secrecy provision**") and its disclosure would, on balance, be contrary to public interest.*
>
> ***3.*** *The exemption in section 48 operates only for 2 years from the FOI Act's date of assent on 19 August 1992.*
>
> ***4.*** *On a reference from the Government, the Queensland Law Reform Commission has reviewed existing secrecy provisions in Queensland legislation identified by Government departments.*
>
> ***5.*** *The purpose of the review was to—*
>
> *(a) identify section 48 secrecy provisions; and*
>
> *(b) recommend whether the exemption from access given by each section 48 secrecy provision should continue.*
>
> ***6.*** *As a result of its review, the Commission recommended that the exemption from access given by the section 48 secrecy provision in certain Acts should continue.*
>
> ***7.*** *The Parliament of Queensland accepts the recommendation.*
>
> ...

31. The Queensland Law Reform Commission (the QLRC) had expressed the view that s.139 of the *Nursing Act* did not come within the terms of s.48 of the FOI Act as originally enacted, and did not recommend that it be given special status under an amended s.48 of the FOI Act by inclusion in the proposed new Schedule 1 to the FOI Act. The Legislative Assembly decided to act in accordance with the views expressed by the QLRC. Had the Legislative

Assembly intended that s.139 of the *Nursing Act* should take precedence over the right of access to documents of the QNC conferred by s.21 of the FOI Act, it would have included s.139 of the *Nursing Act* in Schedule 1 to the FOI Act.

32. I do not accept that it was Parliament's intention that the careful provision made by s.16 and s.48 of the FOI Act could be overridden by any piece of legislation enacted subsequent to the FOI Act which contains a secrecy provision, unless that intention appeared in the clearest of terms from the language employed in the subsequently enacted piece of legislation. The purpose of including Schedule 1 in the FOI Act was to allow Parliament to make special provision for the operation, within the scheme of the FOI Act, of selected statutory secrecy provisions, through the application of s.48(1) of the FOI Act, and not simply to permit a secrecy provision, contained in legislation enacted thereafter, to override the provisions of the FOI Act. Parliament's intent in that regard has been made clear by the fact that Schedule 1 to the FOI Act has been amended on various occasions since it was first enacted, so as to include additional statutory secrecy provisions, i.e., Parliament has specifically turned its mind to which secrecy provisions warrant protection of their operation within the access scheme provided for in the FOI Act (by having the benefit of the operation of s.48 of the FOI Act) and has included those secrecy provisions in Schedule 1 to the FOI Act. For example, s.55(1) of the *Whistleblowers Protection Act 1994* Qld has been added to Schedule 1 since that Schedule was first enacted.

33. In any event, the argument put by the midwife's solicitors fails on the proper construction of the terms of s.139 of the *Nursing Act*, which is a secrecy provision of a type quite common in Queensland legislation, being designed to prohibit officers of a specified government agency from disclosing (otherwise than in the course of, or for the purposes of, discharging their duties of office), or taking personal advantage of, information obtained in the performance of their duties of office. Such provisions are not designed to restrict dissemination of information by an agency where that is necessary or appropriate in carrying out the functions of, or discharging legal duties and obligations imposed on, the relevant government agency or its officers. It is important to note that the terms of s.139 of the *Nursing Act* expressly cast their duties of non-disclosure on individual officers/employees who fall within the definition of "person to whom this section applies", not on the QNC itself. Yet it is the QNC, as a body corporate established by the *Nursing Act*, which is subject to the disclosure obligations imposed on agencies (as defined in s.8 of the FOI Act) by the FOI Act. Section 139 of the *Nursing Act* is concerned with the discipline or integrity of officers of a government agency, and not with an agency's compliance with its obligations under the FOI Act (see *Kavvadias v Commonwealth Ombudsman* (1984) 52 ALR 728).

34. Accordingly, I find that s.139 of the *Nursing Act* does not operate to prohibit disclosure of the matter in issue by the QNC under the provisions of the FOI Act.

35. The midwife's solicitors also argued that s.139(3) is of relevance to the issues before me:

> *In addition, "Court" is defined by s.139(1) very broadly so as to include any Tribunal, authority or person having power to require the production of documents or the answering of questions. It is suggested that the Information Commissioner comes within that definition and so disclosure pursuant to the* FOI Act *is also excluded by the provisions of s.139(3) of the* Nursing Act.

36. Section 139(3) relates to production of documents by officers of the QNC to a court, tribunal, *et cetera*. It does not apply to or affect the disclosure of documents to applicants for access under the FOI Act. I note that the QNC did not seek to rely upon s.139(3) to refuse to produce for my inspection for the purposes of this review, copies of the matter in issue. Nor do I consider that that course of action would have been open to it in reliance upon s.139(3). Section 76(1) of the FOI Act provides:

> ***76.(1)*** *The commissioner may require the production of a document or matter for inspection for the purpose of enabling the commissioner to determine—*
>
> *(a) whether the document or matter is exempt; or*
>
> *(b) if a document in the possession of a Minister is claimed by the Minister not to be an official document of the Minister - whether the document is an official document of the Minister.*

37. Section 85(1) of the FOI Act provides:

> ***85.(1)*** *If the commissioner has reason to believe that a person has information or a document relevant to a review under this division, the commissioner may give to the person a written notice requiring the person—*
>
> *(a) to give the information to the commissioner in writing signed by the person or, in the case of a body corporate, by an officer of the body corporate; or*
>
> *(b) to produce the document to the commissioner.*

38. Section 92(1) of the FOI Act provides:

> ***92.(1)*** *No obligation to maintain secrecy or other restriction on the disclosure of information obtained by or given to agencies or Ministers, whether imposed under an enactment or a rule of law, applies to the disclosure of information to the commissioner for the purposes of a review under this part.*

39. I consider that s.92(1) was deliberately framed in such broad terms to indicate that there should be no restriction on the disclosure (by agencies or Ministers) of documents or information to the Information Commissioner, for the purposes of a review under Part 5 of the FOI Act. That is consistent with the clear intention of the Parliament, apparent on the proper construction of Part 5 of the FOI Act, that the Information Commissioner should "stand in the shoes" of the agency whose decision is under review, for the purpose of undertaking a full review of the merits of that agency's decision, with full access to all relevant information that was available to that agency.

40. I will now deal with the application to the matter in issue of the various exemption provisions in the FOI Act that have been relied upon by the participants.

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

41. 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); ...*

42. The correct approach to the interpretation and application of this exemption provision was explained 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 disclosure of the information could reasonably be expected to prejudice the effectiveness of lawful methods and procedures employed by government agencies undertaking law enforcement activities.

43. In its letter dated 7 July 1998, the QNC raised the issue of the application of s.42(1)(e) of the FOI Act to the matter in issue, but did not address the requirements of the exemption provision, nor did it identify the lawful method or procedure the effectiveness of which, it contended, could reasonably be expected to be prejudiced by disclosure of the matter in issue. I communicated to the QNC my preliminary view that the matter in issue does not qualify for exemption under s.42(1)(e). In their letter dated 5 October 1998, the QNC's solicitors advised that while their client did not withdraw its reliance upon s.42(1)(e), it had no further submissions to make in relation to its claim for exemption under s.42(1)(e).

44. At p.393 (paragraphs 23-24) of *Re "T"*, I stated:

> *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.*

45. The only types of investigative methods or procedures which appear to have been adopted by Ms Harrison in investigating the applicant's complaint consisted of interviewing, or otherwise obtaining written information from, the various people involved in the incident in question (i.e., the midwife, the applicant and her husband, Ms Talbot, *et cetera*), and from other midwives and medical practitioners; and reviewing relevant documentary evidence such as hospital notes and medical records. On the information before me, I am unable to see how the effectiveness of any of those methods or procedures could reasonably be expected to be prejudiced by disclosure of the matter in issue. They are routine methods of investigation, used by law enforcement/investigative agencies on a regular basis.

46. 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.*

47. 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.*

48. At p.394 (paragraph 30) of *Re "T"*, I said:

> *Obviously, the method used by law enforcement agencies of gathering information in relation to an investigation from as many sources as possible, the evaluation of that information and the placement of it on the agencies' records is a fundamental and overt method, the disclosure of which would not prejudice its effectiveness in the future.*

49. I therefore find that none of the matter in issue qualifies for exemption under s.42(1)(e) of the FOI Act.

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

50. 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.*

51. 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. In brief terms, legal professional privilege attaches to confidential communications between lawyer and client made for the dominant purpose of seeking or giving legal advice or professional legal assistance, and to confidential communications made for the dominant purpose of use, or obtaining material for use, in pending or anticipated legal proceedings: see *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 74 ALJR 339.

52. The QNC claims that parts of Ms Harrison's final report (document 12) are exempt from disclosure to the applicant under s.43(1) of the FOI Act. That report was sent to the QNC's solicitors under cover of a letter dated 1 October 1997, with a request for advice in relation to certain matters in connection with the investigation and the report. (The applicant accepted my preliminary view that the covering letter from the QNC to its solicitors qualified for exemption under s.43(1) of the FOI Act, and that letter is therefore no longer in issue in this review.) In my letter to the QNC dated 29 June 1998, I had expressed the preliminary view that the report itself did not qualify for exemption under s.43(1). I also pointed out to the QNC the fact that it had disclosed to the applicant parts of the outline of Ms Harrison's report (document 13) and that some of the information contained in that outline was identical to the information contained in the report itself. I therefore expressed the preliminary view that, even if I were to be satisfied that the final report was subject to legal professional privilege, it was arguable that the QNC had waived its right to claim privilege at least over those parts of the report which had already been disclosed to the applicant in the form of document 13.

53. In its response dated 7 July 1998, the QNC stated that it accepted that it had waived legal professional privilege in respect of those parts of Ms Harrison's report which had already been disclosed to the applicant, but that it did not otherwise "resile in any way from its reliance upon s.43(1)". In their letter dated 5 October 1998, the QNC's solicitors advised that their client had no further submissions to make in support of the claim for exemption under s.43(1).

54. I am not satisfied, on the material before me, that Ms Harrison's final report dated 30 September 1997 was brought into existence for the dominant purpose of seeking or obtaining legal advice from the QNC's solicitors, or for the dominant purpose of use in pending or anticipated legal proceedings, so as to attract legal professional privilege and qualify for exemption under s.43(1) of the FOI Act. Rather, I consider that the report was brought into existence primarily to comply with the requirements of s.103(5)(a) of the *Nursing Act*. Section 103 of the *Nursing Act* deals with the conduct of an investigation by the QNC, and the appointment of an inspector to conduct the investigation (in this case, Ms Harrison). Section 103(4) provides that the inspector must give the person who is the subject of the complaint full particulars of the complaint, and must provide that person with an opportunity, during the course of the investigation, to make a formal submission to the inspector. Section 103(5) provides:

> ***103.(5)*** *The inspector must give—*
>
> *(a) to the Council - a written report, in reasonable detail, of findings and opinions based on the findings, in relation to the complaint; and*
>
> *(b) to the person who is the subject of the complaint - a written outline of the report and general particulars of findings adverse to the person.*

55. Accordingly, I find that document 12 was brought into existence for the dominant purpose of complying with the requirements of s.103(5)(a) of the *Nursing Act*. I accept that a copy of the report was sent by the QNC to its solicitors for advice about certain matters, but I do not accept that that was the dominant purpose for which the report was brought into existence.

56. I therefore find that no part of document 12 attracts legal professional privilege, or exemption from disclosure under s.43(1) of the FOI Act.

Application of s.44(1) of the FOI Act

57. Section 44(1) of the FOI Act provides:

> ***44.(1)*** *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

58. In applying s.44(1) of the FOI Act, one must first consider whether disclosure of the matter in issue would disclose information that is properly to be characterised as information concerning the personal affairs of a person. If that requirement is satisfied, a *prima facie* public interest favouring non-disclosure is established, and the matter in issue will be exempt, unless there exist public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure, so as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

59. In my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, I identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act (see pp.256-257, paragraphs 79-114, of *Re Stewart*). In particular, I said that information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well-accepted core meaning which includes:

- family and marital relationships;
- health or ill health;
- relationships and emotional ties with other people; and
- domestic responsibilities or financial obligations.

60. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, to be determined according to the proper characterisation of the information in question.

61. The midwife claims that all of the matter in issue concerns her personal affairs and therefore is *prima facie* exempt from disclosure under s.44(1) of the FOI Act. In their submission dated 1 October 1998, the midwife's solicitors argued (at p.12):

> ... *The circumstances pertaining to* [the midwife] *are very different to those considered in* State of Queensland v Albietz *[1996] 1 Qd R 215 and a number of other cases discussed by the Information Commissioner. In* State of Queensland v Albietz, *the names of the departmental officers were only relevant because they were acting as public employees. The same applies to the police officers considered by the New South Wales Court of Appeal in* Commissioner of Police v District Court of New South Wales *(1993) 31 NSWLR 606.*
>
> *In one sense, because* [the midwife] *was employed by a government hospital, her duties as a midwife or nurse could be seen to be those of a public employee. This might be particularly applicable if her personal affairs were discussed in a document relating to the financial administration, for example, of the Ipswich Hospital. In reality, the documents* [in] *question came into existence and contained information relating to her employment and other aspects of her life through a complaint made against her in a purely personal capacity. If she had been employed by a nursing home or by a private hospital and she were the subject of a complaint under the* Nursing Act, *very similar documents would have come into existence and the considerations arising with regard to those documents would be no different to those which arise in the present case.*
>
> *The* Nursing Act *provides for a series of complaints and investigations against nurses acting in a professional but purely private capacity. This is very different to the position of public servants or police officers whose names are recorded in documents because they are carrying out a public role.*
>
> *The documents in question relate to* [the midwife's] *general experience as a nurse but more particularly to her actions on a particular day in her employment as a midwife. These matters have no public element at all except to the extent that nurses, like other* [professions] *whose practitioners act in a purely private capacity may be subject to a statutory scheme by which complaints may be made and their actions investigated.*

62. I do not accept the correctness of the distinction sought to be made in the above-quoted passage. I do not consider there to be any doubt that the matter in issue relates to or arises from the midwife's employment by the Ipswich General Hospital as a midwife, and her performance of her duties as a midwife. In my decision in *Re Pope and Queensland Health* (1994) 1 QAR 616, after reviewing relevant authorities (at pp.658-660), I expressed the following conclusion at p.660 (paragraph 116):

> *Based on the authorities to which I have referred, I consider that it should now be accepted in Queensland that information which merely concerns the performance by a government employee of his or her employment duties ... is ordinarily incapable of being properly characterised as information concerning the employee's "personal affairs" for the purposes of the FOI Act.*

63. The general approach evident in this passage was endorsed by de Jersey J of the Supreme Court of Queensland in *State of Queensland v Albietz* [1996] 1 Qd R 215 at pp.221-222.

64. In reviewing relevant authorities in *Re Pope*, I specifically endorsed the following observations concerning s.33(1) (the personal affairs exemption) of the *Freedom of Information Act 1982* Vic, made by Eames J of the Supreme Court of Victoria in *University of Melbourne v Robinson* [1993] 2 VR 177 at p.187:

> *The reference to the* "personal affairs of any person" *suggests to me that a distinction has been drawn by the legislature between those aspects of an individual's life which might be said to be of a private character and those relating to or arising from any position, office or public activity with which the person occupies his or her time.*

65. While the passage quoted in paragraph 62 above refers specifically to government employees (because of the particular context in which that case was decided), I did not intend the general point (that an individual's employment affairs cannot ordinarily be characterised as part of his/her personal affairs) to be confined to government employees as distinct from private sector employees, and I note that the comments by Eames J quoted immediately above are not confined to government employees. I consider that information concerning the performance by an individual of his/her business, professional or employment affairs does not concern the private aspects of his/her life, and hence cannot ordinarily be characterised as information concerning his/her personal affairs. Thus, while I do not consider that it is in any relevant sense accurate for the midwife's solicitors to assert that their client was acting in a "professional but purely private capacity" or that "these matters have no public element at all" (the midwife was clearly a public sector employee, employed by a public hospital and remunerated from public funds), my approach to the initial question of characterisation under s.44(1) would have been no different if the midwife had been employed by a private hospital.

66. In *Re Stewart* (at pp.261-264), I acknowledged that employment-related matters provide many instances of information that inhabits the rather substantial 'grey area' at the boundaries of what is encompassed within the phrase "personal affairs of a person" (and relevant variations thereof) as used in the context of the FOI Act. In *Re Stewart* (at p.261, paragraph 92), I said that there is a relevant distinction to be drawn in respect of matters that relate to an employee as an individual, rather than to an employee as an agent or representative of the employer, and that some matters in the former category may fall within the meaning of the phrase "personal affairs". Where an allegation of intentional misconduct in the course of employment becomes an issue, that grey area between personal affairs and employment affairs (discussed in *Re Stewart* at pp.261-264) is encountered: see *Re "NHL" and The University of Queensland* (1997) 3 QAR 436 at paragraph 29. However, an allegation of negligent performance by an employee of his or her duties of employment clearly concerns that individual's employment affairs, rather than his/her personal affairs.

67. I do not accept that information concerns the personal affairs of an employee merely because it relates to the investigation of a complaint made against the employee arising out of the performance of his/her duties of employment. In some cases, it may be that the conduct of the employee bears no relationship to the performance or misperformance of his or her employment duties, but can be said to concern the private aspects of his or her life, and thus to concern his or her personal affairs. However, where a disciplinary investigation relates to conduct which occurred in the performance of the employee's duties of employment, information relating to the incident and the subsequent investigation cannot generally be said to concern the personal affairs of the employee: see *Re Griffith and Queensland Police Service* (1997) 4 QAR 110, where I said (at paragraphs 51-53):

> *I consider that conduct of a public sector employee which occurs in the course of performing his or her employment duties is properly to be characterised as part of the employee's employment affairs rather than his or her personal affairs, even in respect of conduct alleged or proven to involve misconduct or a breach of discipline. For example, I consider that a police officer who arrests and interrogates a suspect is performing his or her duties of employment, and if that conduct is alleged or proven to have involved excessive force and therefore to have involved misconduct or a breach of discipline, I consider that the conduct nevertheless remains part of the police officer's employment affairs, not his or her personal affairs.*
>
> *Conduct which occurs in the workplace or through opportunities presented by a person's employment duties, but does not occur in the course of actually performing employment duties, raises more difficult questions of characterisation. For example, a person who engages in conduct amounting to sexual harassment, even though it occurs in the workplace, is not actually performing his or her duties of employment when engaged in such conduct. In a case which involved the difficult question of characterising conduct of that kind, I decided that an individual's sexual conduct, and relations with others, had a sufficiently strong element of the personal about it, that it was properly to be characterised as concerning the individual's "personal affairs": see* Re "NHL" *at paragraph 29. Other kinds of misconduct that take advantage of opportunities presented by a person's employment duties, but do not involve the actual performance of employment duties, also involve difficult questions of characterisation: for example, an employee who for personal gain (e.g., selling of information to a private investigator) conducts unauthorised computer searches to obtain personal information about others from his agency's information databases. Arguments could be mounted either way as to whether conduct of this kind should be properly characterised as part of the employee's personal affairs or employment affairs, though I tend to favour the latter.*
>
> *Of course, the disciplinary process itself is an incident of the employment relationship, and an employee's involvement in the disciplinary process must, in my opinion, be properly characterised as an aspect of his or her employment affairs, rather than his or her personal affairs. However, there would remain an issue as to whether mention of the employee's name in connection with some alleged or possible (but still unproven) wrongdoing is properly to be characterised as information concerning the employee's personal affairs. In my opinion, it cannot ordinarily be characterised in that way where the impugned conduct occurred in the course of the performance by the employee of his or her duties of employment.*

68. In respect of the paragraph quoted immediately above, it appears from their submission dated 1 October 1998 that the midwife's solicitors contend that the QNC's investigation, under the *Nursing Act*, of the complaint made against the midwife is not an incident of the employment relationship between the midwife and the Ipswich General Hospital, because all nurses in Queensland, regardless of where they are employed, are subject to the provisions of the *Nursing Act* and to the jurisdiction of the QNC in the conduct of an investigation if a complaint is made against them. Hence, the midwife's solicitors argue that the complaint made to the QNC against the midwife, and the QNC's investigation of that complaint, do not arise as an incident of the midwife's employment by the Ipswich General Hospital, but rather by virtue of the fact that she is a member of the nursing profession, and that they therefore are matters concerning the midwife's personal affairs.

69. While I acknowledge that there is a distinction between the situation in *Re Griffith* (where the matter in issue related to an internal investigation by the Queensland Police Service of an officer's conduct) and the situation in the present case, where the investigation in question was conducted by a statutory body charged with regulating compliance by Queensland nurses with proper standards of professional conduct, I do not accept that the midwife's involvement in the investigation by the QNC is properly to be characterised as a matter concerning her personal affairs. In my view, it is the subject matter of the investigation and the nature of the information generated in respect of it, rather than the identity or constitution of the body conducting the investigation, which is of primary importance when characterising the nature of the matter in issue. I am satisfied that the QNC's investigation of the applicant's complaint against the midwife related to an incident which occurred during the course of the midwife's performance of her duties of employment. All of the documents in issue were created as part of the disciplinary procedures laid down by the *Nursing Act*, to which the midwife was subject as an incident of her employment in Queensland as a nurse. I consider that the complaint made against the midwife, and the QNC's investigation of that complaint (as discussed in the matter in issue) are properly to be characterised as information concerning the employment affairs of the midwife, rather than as information concerning her personal affairs.

70. Having said that, I consider that a small amount of the matter in issue in document 6 (the transcript of interview of the midwife), and in document 8, is properly to be characterised as information concerning the personal affairs of the midwife, rather than her employment affairs. I find that, in the final paragraph appearing on page 1 of document 6, the 26th-32nd words of that paragraph, which deal with aspects of the midwife's family relationships, comprise information which is properly to be characterised as information concerning the midwife's personal affairs, and which is therefore *prima facie* exempt from disclosure under s.44(1) of the FOI Act. Similarly, I find that the first full sentence appearing on page 2 of document 6 comprises information which is properly to be characterised as information concerning the midwife's personal affairs. In respect of the first paragraph appearing immediately under the first heading in document 8, I find that the 5th-9th words of the fifth sentence, and the last eight words of the seventh sentence, comprise information which is properly to be characterised as information concerning the personal affairs of the midwife, rather than her employment affairs. With respect to the application of the public interest balancing test incorporated in s.44(1), in light of the personal nature of the information in question, and the fact that it has no relevance to the applicant's complaint against the midwife, I am unable to identify any public interest considerations weighing in favour of the disclosure of that matter to the applicant. I therefore find that that matter is exempt from disclosure to the applicant under s.44(1) of the FOI Act.

Public interest balancing test

71. I have found that the bulk of the matter in issue must be characterised as information concerning the midwife's employment affairs rather than her personal affairs, and that it therefore does not qualify for exemption from disclosure under s.44(1). Even if that matter was properly to be characterised as information concerning the personal affairs of the midwife, it would still be necessary to consider the application to that matter of the public interest balancing test incorporated in s.44(1). I will discuss the public interest balancing test in detail below, in the context of my discussion of the application to the matter in issue of s.46(1)(b) of the FOI Act. For reasons which I will explain, I consider that disclosure of the matter in issue to the applicant would, on balance, be in the public interest.

72. I find that, with the exception of the matter described in paragraph 70 above, the matter in issue does not qualify for exemption under s.44(1) of the FOI Act because it cannot properly be characterised as information concerning the midwife's personal affairs and because, in any event, its disclosure to the applicant would, on balance, be in the public interest.

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

73. 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.*

74. The elements of the test for exemption under s.46(1)(b) of the FOI Act are considered in detail in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.337-341 (paragraphs 144-162). In order to establish the *prima facie* ground of exemption under s.46(1)(b) of the FOI Act, three cumulative requirements must be satisfied:

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

(b) that was communicated in confidence;

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

75. 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.

76. Each of the participants in this review who objects to the disclosure of the matter in issue which concerns them, contends that such information is exempt under s.46(1)(b) of the FOI Act. I will discuss in turn each of the requirements of s.46(1)(b), and the submissions of the various participants in relation to those requirements.

(a) matter of a confidential nature

77. I said in *Re "B"* that in order to satisfy the first requirement for exemption under s.46(1)(b), the matter in issue must consist of information of a confidential nature (i.e., which has the requisite degree of relative secrecy or inaccessibility: see *Re "B"* at pp.337-338, paragraph 148; and at pp.304-310, paragraphs 64-73).

78. I have noted above that some of the matter in issue in document 12 has already been disclosed to the applicant in document 13. Accordingly, I am not satisfied that all of the matter in issue is confidential information *vis-à-vis* the applicant. However, for the purposes of the following discussion, I will proceed on the basis that all of the matter in issue satisfies the first requirement for exemption under s.46(1)(b).

(b) that was communicated in confidence

79. I discussed the meaning of the phrase "communicated in confidence" in paragraph 152 of *Re "B"* as follows:

> *152 I consider that the phrase "communicated in confidence" is used in this context to convey a requirement that there be mutual expectations that the information is to be treated in confidence. One is looking then for evidence of any express consensus between the confider and confidant as to preserving the confidentiality of the information imparted; or alternatively for evidence to be found in an analysis of all the relevant circumstances that would justify a finding that there was a common implicit understanding as to preserving the confidentiality of the information imparted.*

80. The test inherent in the phrase "communicated in confidence" in s.46(1)(b) 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 otherwise must 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 (see *Re McCann and Queensland Police Service* (1997) 4 QAR 30 at paragraph 34).

81. There is no clear evidence before me to suggest that Ms Harrison provided any of the relevant persons whom she contacted in the course of her investigation, and who are referred to in the matter in issue (e.g., the midwife, Ms Talbot, Dr Gordon, Dr Gilroy *et cetera*), with an express assurance that the information they provided would be treated in confidence as against the applicant (whose complaint Ms Harrison was investigating). There is a reference in the middle of page 13 of the transcript of interview between Ms Harrison and the midwife (document 6) to a discussion regarding the confidentiality of information provided to Ms Harrison, but its meaning and scope, or the question of what information it was intended to refer to, are unclear to me from a reading of the paragraphs immediately preceding the reference. Neither the QNC or the midwife has sought to clarify the scope of, or to rely upon, that reference as a ground for arguing that Ms Harrison provided the midwife with an express assurance of confidentiality. The QNC simply advised that Ms Harrison

unfortunately could not recall discussing the issue of confidentiality with any of the persons

whom she interviewed during the course of her investigation. It stated, however, that it understood that the midwife intended making a submission to the effect that she understood the information she provided to Ms Harrison was communicated in confidence.

82. Accordingly, on the information before me, I am not satisfied that Ms Harrison gave an express assurance to any of the persons from whom she obtained information during the course of her investigation that the information would be treated in confidence as against the applicant. In the absence of evidence demonstrating the existence of such an express assurance of confidential treatment, it is necessary to consider whether, having regard to all of the relevant circumstances, an implicit mutual understanding existed that the information those persons provided to Ms Harrison would be treated in confidence by Ms Harrison and the QNC, and, if so, the scope or extent of the understanding of confidence. The assessment must be made according to what could reasonably have been understood and expected, in all the relevant circumstances, including the known purpose for which the information was supplied.

83. I will deal firstly with the submissions made by the midwife, the QNC and the QNU on this point.

Submissions of the midwife, the QNC and the QNU

84. The QNU submitted that it was its understanding that during the investigation phase, all information gathered by the QNC was of a confidential nature (it did not state on what grounds it based that understanding) and that it was not until a charge was preferred against a nurse (which did not occur in this case) that such information entered the public forum.

85. The midwife submitted that the information she provided to Ms Harrison was communicated on the basis of an implied understanding of confidence. In support of that claim, the midwife's solicitors submitted that the statutory context in which an investigation is conducted under the *Nursing Act*, particularly with regard to the matters provided for in s.139, *"is such as to constitute the information contained in the documents under consideration of a confidential nature"*. They further submitted:

> *... One should also take into account the fact that the details of the information relate to* [the midwife's] *work as a health professional. The disclosure of information with regard to patients is confined by ethical requirements applying to all health professionals* [in] *a very close and small sphere. Even though the applicant is the patient in the present circumstances, one is looking at the nature of the information and the circumstances of disclosure to the investigator and the Council. Such information with regard to the treatment of a patient would not normally be disclosed to a third party and it would be held to be confidential between the health professional and the patient. These are matters of very significant importance to be taken into account in considering first, whether the information is of a confidential nature and, second, whether the communication to the investigator and to the Council was a communication in confidence. It is submitted that no reasonable decision maker would fail to conclude that both aspects were satisfied in the present circumstances.*

86. I accept that health professionals are under an obligation of confidence regarding information provided to them by their patients and are ordinarily prohibited from disclosing that information to third parties without the patient's consent. I accept that there would have been a mutual understanding that the information supplied by the midwife to Ms Harrison would be treated in confidence as against the world at large (because it is medical information about the applicant). But the issue for consideration here is whether it was implicitly understood that the information would be treated in confidence as against the applicant. As the midwife's solicitors themselves have acknowledged, in this case it is the patient herself who is seeking access to the information in question. It is not a question of disclosing the information to a third party, where I acknowledge that very different considerations would apply.

87. As to the midwife's solicitors' submission regarding the statutory context in which an investigation under the *Nursing Act* is conducted, and the matters provided for in s.139 of the *Nursing Act*, I do not accept (for the reasons explained at paragraph 33 above) that s.139 purports to regulate the maintenance of obligations or understandings of confidential treatment that are binding on the QNC in respect of information conveyed to the QNC. In its terms, s.139 binds officers of the QNC, and not the QNC itself, and binds them not to disclose "protected" information or documents (i.e., any information or documents provided to an officer, rather than merely confidential information) acquired through holding office with the QNC, otherwise than for the purposes of the *Nursing Act*. As I stated above, it is a secrecy provision of a type quite common in Queensland legislation. I do not accept that it was designed to restrict dissemination of information where that is necessary or appropriate in carrying out the functions of, or discharging legal duties and obligations imposed upon, the QNC or its officers. Whether particular information communicated to the QNC is exempt under s.46(1)(b) of the FOI Act will depend on whether, having regard to all of the relevant circumstances, the requirements for exemption under that provision are satisfied.

88. The issue which I must decide under this limb of s.46(1)(b) is whether, at the time the midwife communicated the information in question to the QNC, there existed an implicit mutual understanding that the information would be treated in confidence as against the applicant. Clearly, both parties to the communication now submit, in the face of the applicant's FOI access application, that such an implicit understanding existed. However, it is necessary for me to examine the relevant circumstances that existed at the time the communication took place and to decide whether those circumstances warrant a finding that such an understanding of confidence existed at the relevant time.

89. The midwife was being interviewed as part of a disciplinary investigation which was instigated as a result of a complaint made against her by the applicant. In my view, she ought reasonably to have appreciated the possibility that Ms Harrison might consider it appropriate, for example, to put to the applicant, for response, those parts of the midwife's account of events which were inconsistent, in material respects, with the applicant's account of events (see the discussion at paragraph 49 of *Re Godwin and Queensland Police Service* (1997) 4 QAR 70). That is an ordinary investigative technique commonly used by investigators to try to clarify factual disputes between material witnesses to an investigation. I do not think it is unreasonable to expect that the midwife ought to have anticipated that as a possibility. I also think that the midwife ought reasonably to have appreciated that the QNC might decide that the evidence gathered by Ms Harrison warranted the laying of disciplinary charges against her, in which case a hearing (potentially a public hearing) was

likely to be held, with Ms Harrison required to give evidence about her investigation, and with her final report, in all likelihood, comprising part of the evidence before the QNC's Professional Conduct Committee.

90. Even if the midwife anticipated that disciplinary charges would not be laid against her, I consider that she should reasonably have expected that the QNC would or may need to disclose details of the investigation in order to give a proper account to the applicant/complainant of the manner in which it carried out its statutory functions in relation to the complaint, the outcome of the investigation, and the reasons for that outcome. The QNU has argued that information gathered during an investigation should be kept confidential unless and until a charge is preferred against the person being investigated, at which time the information will enter the public forum. But if that were the case, in a situation where no charge is preferred (i.e., the complaint is, in effect, dismissed with no disclosure of the evidence/information relied upon in reaching that decision) how is the person who made the complaint to know whether or not the investigation was conducted fairly, whether or not the QNC took into account all relevant information during its investigation and interviewed all relevant witnesses, and whether the QNC's findings were reasonable in all the circumstances?

91. At paragraph 93 (page 319) of *Re "B"*, I said:

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

92. I acknowledge that the applicant has been provided with partial access to the outline of Ms Harrison's final report (document 13) but I note that those parts of the report which have been withheld from the applicant basically comprise the direct evidence/submissions which the midwife or her solicitors provided to Ms Harrison regarding the events surrounding the birth of the applicant's baby. As I see it, the applicant has, in effect, been denied access to the midwife's version of the events which occurred that day. As it is clear that the QNC took such information into account in deciding to take no further action against the midwife, it is difficult to see how an adequate explanation of the QNC's decision could totally exclude such matter.

93. I accept that what is required to accord procedural fairness in any given case may vary according to the circumstances of the particular case. However, the line of authority established by the High Court in cases such as *Annetts v McCann* (1990) 170 CLR 596 indicates that the duty to accord procedural fairness is not confined to the subject of a disciplinary investigation. In my view, a complainant to a regulatory authority has a "right, interest or legitimate expectation" in having his/her complaint properly dealt with by the regulatory authority, which would ordinarily be sufficient to attract a duty to accord procedural fairness to the complainant (although the precise requirements of procedural fairness would have to be worked out according to the particular circumstances and exigencies of each individual case). The QNC's own published document, "Complaints Concerning Conduct" (November 1993), states (at paragraph 3.1): "*The complaints function*

of the Council includes the assurance of a person's rights through natural justice. This applies to the person who makes the complaint and to the person who is the subject of the complaint." The same document states that a complainant will be advised of the actions to be taken by the QNC in regard to the report of an investigator (paragraph 6.2), has the right to be advised of the QNC's decision in regard to the complaint (paragraph 3.3.2), is entitled to be represented by legal counsel or a nominated agent if a charge is referred to the Professional Conduct Committee (paragraph 8.5), and has the right to be advised of the outcome of a matter referred to the Professional Conduct Committee (paragraph 3.3.3).

94. I note the comments of Toohey J of the High Court of Australia in *Goldberg v Ng* (1995) 185 CLR 83 at pp.110-111, where His Honour said of the conduct of the New South Wales Law Society in purporting to accept responses to a complaint (which complaint it later dismissed) from the subject of the complaint, on the basis that the responses would be treated in confidence as against the complainant:

> *Arguably, the Society did not afford natural justice to Mr Ng* [the complainant] *in dismissing the complaint without informing him of the material provided by Mr Goldberg* [the subject of the complaint] *and of the part (if any) it played in that dismissal.*

95. In his judgment at first instance, *Ng v Goldberg* (Supreme Court of New South Wales, No. 5342 of 1989, No. 4995 of 1990, Powell J, 2 March 1993, unreported), Powell J said:

> *With respect to those who hold another view, I cannot accept that it is necessary to the effective operation of the Law Society's complaints investigation system that it be conducted* "under the constraints of strict confidence" - *which seems as if it operates only in one direction anyway, for the complaint, of necessity, must be disclosed to the solicitor - and, still less am I persuaded that the practice which the Law Society apparently has adopted ensures that the system works effectively.*
>
> *The reasons for the doubts which I have just expressed are readily to be found in the facts of the present case. ... whatever be the truth of the matter, the fact that, without disclosing Mr Goldberg's reply to Mr Ng so that he might comment upon it, and, if it be possible, provide further material to demonstrate its falsity, if it be false, the Complaints Committee felt able to dismiss the complaint on the ground that* "there is no evidence ..." *leaves me with no great confidence in either the Complaints Committee's understanding of its role, or its ability to fulfil that role.*

96. An appeal against Powell J's judgment was unanimously dismissed by the New South Wales Court of Appeal in *Goldberg v Ng* (1994) 33 NSWLR 639, with both Kirby P (at pp.647-649) and Clarke JA (at pp.678-679) making comments supportive of the abovequoted remarks of Powell J.

97. I can see no obvious reason why the concerns expressed by Powell J at first instance, by Kirby P and Clarke AJ in the NSW Court of Appeal, and by Toohey J in the High Court of Australia, about the complaint-handling practices of the regulatory authority for the solicitors' profession in New South Wales do not readily transpose to the complaint-handling practices of the regulatory authority for the nursing profession in Queensland.

98. In its submission dated 7 July 1999, the QNC attempted to argue that it was not subject to the requirements of procedural fairness in the conduct of its investigations:

> *With respect, you seem to be under a misapprehension that the Council is in some way beholden to a complainant as if the Council has a responsibility to demonstrate to a complainant that the Council has properly investigated a matter. There is no requirement under the* Nursing Act *for the Council to tell a complainant anything about its investigations or, indeed, of its decision whether or not to prefer a charge. ...*
>
> *In the next paragraph of your letter on page 6* [my 'preliminary views' letter to the QNC dated 29 June 1998] *you say that it is "arguable" that there is a public interest on accountability grounds for the Council to disclose information concerning its investigation. I respectfully reject such a contention. ... Your suggestion of the Council having to justify its decision arising from an investigation would add an unnecessary, and indeed a totally unjustifiable, burden on the Council.*
>
> *...*

99. I consider that the QNC's comments above are not only inconsistent with its own published statement of procedures (see paragraph 93 above) but demonstrate the want of a full understanding of the public purposes for which it has been given a statutory function/duty of investigating complaints from members of the public about the conduct of registered nurses. The QNC has a duty to justify the decision which it reaches at the end of an investigation - such a duty is fundamental to all law enforcement/regulatory bodies charged by statute with the responsibility of maintaining, on behalf of the community and in the interests of public health and safety, sufficient standards of competence and professional conduct by the professionals which the body has been established to regulate. The QNC is accountable to both the public generally and to the complainant specifically, to demonstrate that it discharged its duty to conduct an adequate and fair investigation of the complaint made to it, and that the decision that it reached at the conclusion of the investigation was fair and reasonable in all the circumstances.

100. For the reasons given above, I am not satisfied, having regard to all of the relevant circumstances attending the communication of information by the midwife to the QNC, that those circumstances support a finding that there existed an implicit mutual understanding that the information would be treated in confidence as against the applicant. Accordingly, I find that the second requirement for exemption under s.46(1)(b) is not satisfied in respect of that information.

Submissions of Ms Talbot

101. The matter in issue which concerns Ms Talbot is a draft statement (document 9) which Ms Harrison apparently prepared after speaking with Ms Talbot on the telephone. As I stated above, Ms Talbot was a student nurse who was present during the delivery of the applicant's baby. She has stated that she was not aware that the information she provided over the telephone to Ms Harrison would be incorporated into a statement; that, had she known that, she would have sought legal advice before speaking to the QNC; and that the draft statement was never forwarded to her by the QNC and that she was unaware of its existence until the applicant made her FOI access application. She stated as follows in her submission dated 12 March 1999:

> *It is my submission that the information I provided to Ms Harrison of the Queensland Nursing Council was communicated in confidence. I note that in order to satisfy this requirement there must be a mutual expectation that the information be treated in confidence. It is my understanding that the Nursing Act Qld 1992 makes no provision that the complainant be provided with a written report of findings and opinions. Therefore, there was no requirement for the Queensland Nursing Council to disclose to the complainant the confidential information provided by me. At the time I provided the information to the investigating officer I was not informed that it would be disclosed to the complainant. It was evident to me that the Queensland Nursing Council did not intend to disclose this information to the complainant and that the information would be used for the purpose of the investigation only and at no time did I ever expect that it would be released to the complainant.*
>
> *Furthermore, it is also my understanding that it is only when the Queensland Nursing Council is satisfied that there is substance to the complaint that they may prefer a charge against a nurse and refer the matter to the Professional Conduct Committee for hearing and determination. It is only then that the information is brought into the public arena. Prior to this the information is confidential. ...*

102. In *Re McCann* at paragraph 48, I acknowledged that there exist factors which may, in a particular case, inhibit a witness from providing an investigatory body with information relevant to the investigation. I also discussed those factors at paragraph 50 of *Re McEniery and Medical Board of Queensland* (1994) 1 QAR 349. I appreciate that, for example, for reasons of loyalty, persons may not wish to provide information to the investigator which may be adverse to the interests of a colleague under investigation; that they simply may not wish to get involved in the investigation and have their time taken up by that involvement; or that they may fear harassment, intimidation, retribution, or threats to, for example, their livelihood or personal safety, if they cooperate with the investigator. Factors of those kinds may be evident in a particular case, and may warrant a finding that there existed an implicit mutual understanding between a source of information, and the relevant regulatory or law enforcement agency, to the effect that the identity of the source, and/or the information supplied by the source, would be treated in confidence so far as practicable, consistent with the use of that information for the purposes of the agency's investigation and the prosecution of any charges stemming from the investigation.

103. However, as a material witness to the events in question, with no complaints made by the applicant about her conduct during the delivery of the baby, and apparently no other risk of detriment being suffered by Ms Talbot in the event that she decided to cooperate with Ms Harrison's investigation, I am satisfied that Ms Talbot's interests were not under threat as a result of the investigation. I note that s.103(2) of the *Nursing Act* provides that a person does not incur civil liability for the disclosure to an inspector of information or documents relating to the person the subject of the complaint. Further, there is nothing to suggest that the information which Ms Talbot provided could be considered adverse to the midwife's interests, or that she was reluctant to provide Ms Harrison with information because of that concern. Nor is there any evidence that Ms Talbot feared harassment, retribution *et cetera* were she to cooperate with Ms Harrison's investigation. I therefore am not satisfied that, in all of the relevant circumstances of this case, any of the inhibiting factors to which I referred in the preceding paragraph attended the communication of information from Ms Talbot to

Ms Harrison, such as to warrant a finding that that there existed a mutual, conditional understanding that that information would be treated in confidence so far as practicable.

104. Ms Talbot's submissions as set out above essentially mirror the submissions made by the midwife, the QNC and the QNU, which I have already analysed. It is clear that Ms Talbot was contacted by Ms Harrison to provide information as part of a disciplinary investigation into the midwife's actions. Ms Talbot was aware that the investigation had been initiated by a complaint made against the midwife by the applicant. I think Ms Talbot ought reasonably to have expected that the QNC would take into account the information she provided in deciding whether or not to take any further action against the midwife. Ms Talbot was present during the birth of the applicant's baby, and therefore had first hand knowledge of the events which took place that day. She was responsible for admitting the applicant and recording a number of admission observations. I think it was reasonable for her to expect that the information she provided might be of some value to Ms Harrison in corroborating the version of events given either by the midwife or the applicant. There is nothing before me to suggest that Ms Talbot disputes the accuracy of the contents of the draft statement.

105. Even if Ms Talbot did not reasonably anticipate that disciplinary charges would be laid against the midwife, I consider that she should have expected that the QNC would or may need to disclose to the applicant details of its investigation, and of the information it had gathered, in order to give the applicant a proper account of the manner in which it had carried out its statutory functions in relation to her complaint, including a statement of the outcome of the investigation, and information as to the reasons for that outcome. As I have said, the information she provided was obviously of some importance given that she was present during the events in question, and in a position to give an independent "eye witness" account of at least some of the matters central to the applicant's complaint against the midwife. The importance or relevance of the information Ms Talbot provided is demonstrated by the fact that Ms Harrison included that information in her final report to the QNC. As it appears that the QNC took such information into consideration in deciding to take no further action in respect of the applicant's complaint, it is again difficult to see how the QNC could totally exclude such matter in giving the applicant an adequate explanation of the QNC's decision.

106. For the reasons given above, I am not satisfied, having regard to all of the relevant circumstances attending the communication of information by Ms Talbot to the QNC, that those circumstances support a finding that there existed an implicit mutual understanding that the information would be treated in confidence as against the applicant. I can see no indications sufficient to support a finding that a need or desire, on the part of Ms Talbot, for the information she provided to be treated in confidence as against the applicant, must have been apparent, or implicitly conveyed, to Ms Harrison, and understood and accepted by Ms Harrison, so as to give rise to an implicit mutual understanding that the relevant information would be treated in confidence as against the applicant. Accordingly, I find that the second requirement for exemption under s.46(1)(b) is not satisfied in respect of that information, and hence that it is not exempt matter under s.46(1)(b) of the FOI Act.

Submissions of Dr Gordon

107. The matter in issue which concerns Dr Gordon comprises a general reference (an enclosure to document 8) which he gave in support of the midwife's nursing skills and experience (which reference the midwife in turn submitted to the QNC in support of her case), and a statement which Dr Gordon provided to the QNC in which he gave his opinion regarding

the

actions of the midwife in delivering the applicant's baby (document 11). In his submission dated 11 March 1999, Dr Gordon stated:

> *In 1997 I volunteered to give a reference for* [the midwife]. *I was contacted by a member of the Nursing Council regarding giving opinions as well as a reference. ... I had misgivings about giving opinions because of the potential consequences. I was concerned however that a miscarriage of justice may have occurred. I made it clear to the Sister from the Nursing Council that I had not studied the case or seen the case notes but would only answer questions of management in general and not specifically in this case although realising that there was a case involved. I understood that the opinions would be used only for the enquiry and confidential to outside sources. At no time was I told that my report would be given to persons other than the Nursing Council. I would not have given my opinions if I knew they were to be given to the complainant. I do believe that a personal reference given to an enquiry is confidential. ...*

108. I will deal briefly with the reference to which Dr Gordon refers above. It is the usual type of employment reference frequently prepared by a person's employer or work supervisor, testifying to the subject's work experience and skills. The reference which Dr Gordon prepared for the midwife is one of three which are in issue in this review. The midwife's solicitors provided such references to the QNC under cover of a letter dated 7 August 1997 (document 8) in support of the submission by the midwife's solicitors regarding their client's experience and reputation in the midwifery area. All three references are titled "To Whom It May Concern".

109. I do not accept that any of the three references were given by their authors to the midwife with an expectation that those references be kept confidential from the applicant or from anyone else. The purpose of such references, as evidenced by the fact that they are usually titled "To Whom It May Concern", is that they are provided to the subject of the reference on the understanding that that person may use them in any manner in which he or she chooses and disclose them to anyone he or she chooses (most commonly such references are disclosed to prospective employers in support of a job application, or where evidence of good character is required in support of a general application of some type *et cetera*). Although it appears that the QNC's investigation was the spur for the preparation of the references, I do not accept that any of the three references were written on the basis that they be used specifically for the QNC inquiry and for no other purpose. They are written in very general terms and could be used by the midwife for a number of purposes.

110. Nor do I accept that, in communicating the references to the QNC, the midwife could reasonably have understood or expected that the references would be kept confidential from the applicant. The midwife sought to rely on the references attesting to her nursing experience and reputation to persuade the QNC that, in light of her skills and experience, the judgment she exercised (in terms of the medical procedures performed on the applicant) was sound and reasonable in all the circumstances. The QNC took into account the midwife's experience in deciding that her actions were not unreasonable in the circumstances, and I do not see how the midwife or the QNC could reasonably have understood or expected that material attesting to the midwife's skills, experience and reputation ought to be treated in confidence as against the applicant. Accordingly, I find

that the three references which are in issue were not communicated pursuant to an implied understanding of confidence, and that they therefore do not satisfy the second requirement for exemption under s.46(1)(b) of the FOI Act.

111. As to the statement which Dr Gordon provided to the QNC, it does appear that he was approached by Ms Harrison to provide such information on the basis that he had provided a personal reference for the midwife. One might question the wisdom of an investigating body approaching, for the purposes of obtaining an independent expert opinion, a person who has provided a character reference in support of the subject of the investigation. Nevertheless, I am satisfied that in providing his statement to the QNC, Dr Gordon was acting as an expert witness. It is clear that he was contacted by Ms Harrison to provide information as part of a disciplinary investigation into the midwife's actions, and that he was aware that such investigation had been initiated by a complaint made against the midwife by the applicant. He gave his opinion as to whether he thought the actions of the midwife, in the circumstances surrounding the birth of the applicant's baby, were reasonable. Moreover, it is clear that he gave his opinion freely, with no condition or restriction sought to be put on its use by the QNC. The QNC therefore was free to do with the opinion what it wished.

112. In my view, medical specialists have a professional responsibility to the public to assist bodies like the QNC or the Medical Board of Queensland to properly investigate complaints against health care professionals. Nevertheless, there may be instances (particularly, perhaps, where the medical practitioner is not being paid for providing an expert opinion, as was the case with Dr Gordon) where a medical practitioner may not wish to become involved in an investigation because of the same type of inhibiting factors which I have referred to in paragraph 102 above. A medical practitioner may not, for example, wish to give evidence which may be adverse to the interests of a friend or colleague; he or she may not wish to give up the time necessary to write the requested opinion; or simply may not wish to become involved in the investigation because of the possibility that legal proceedings may result, in which case he/she may be called upon to give evidence before a court or tribunal (with the associated demands upon his/her time) were the matter to proceed to that stage. I accept that such factors may, in certain cases, act as disincentives to an expert witness becoming involved in an investigation. I also accept, in the case of expert witnesses, that an investigating body is reliant upon the cooperation of such persons in order to obtain the necessary opinion. I will discuss this issue further below, in relation to the third requirement for exemption under s.46(1)(b).

113. In this case, although Dr Gordon has said in his submission dated 11 March 1999 that he had misgivings about providing an opinion because of the "potential consequences" (he did not identify the consequences he had in mind) it does not appear from the evidence before me that, at the time he gave his opinion, Dr Gordon raised any concerns or inhibitions with the QNC regarding the communication of his opinion, such as to warrant a finding that the opinion was given subject to a conditional understanding that it would be treated in confidence. As I said, he apparently gave his opinion freely and without restriction.

114. Like the midwife and Ms Talbot, I consider that Dr Gordon ought reasonably to have expected that the QNC would or may need to disclose to the applicant, details of its investigation and of the information which it had gathered and relied upon in forming its conclusions, in order to give the applicant a proper account of the manner in which it had carried out its statutory functions in relation to her complaint, including a statement of the outcome of the investigation, and information as to the reasons for that outcome. I consider

that it is reasonable to expect that Dr Gordon should have anticipated, or contemplated the

possibility, that the QNC would rely upon his opinion in deciding whether or not the complaint against the midwife was made out, and further, that the QNC might need, in discharging its public regulatory function under the *Nursing Act*, to disclose relevant details of that opinion to the applicant or to the midwife, in explaining its reasons for finding that the complaint did/did not warrant action being taken against the midwife.

115. Furthermore, it appears from Ms Harrison's final report that she did, in fact, take Dr Gordon's opinion into account in recommending to the QNC that the midwife not be charged.

116. For the reasons given above, I am not satisfied, having regard to all of the relevant circumstances attending the communication of information by Dr Gordon to the QNC, that those circumstances support a finding that there existed an implicit mutual understanding that the information would be treated in confidence as against the applicant. Accordingly, I find that the second requirement for exemption under s.46(1)(b) is not satisfied in respect of that information.

117. Given that I have found that the second requirement for exemption under s.46(1)(b) is not satisfied in respect of any of the matter in issue, it is not strictly necessary for me to consider the third requirement. However, I will take this opportunity to make some observations regarding the various parties' submissions in relation to this requirement.

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

118. In order to satisfy the third requirement for exemption under s.46(1)(b), it must be the case that disclosure of the information could reasonably be expected to prejudice the future supply of such information. (As to the meaning of the phrase "could reasonably be expected to", see *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at p.515, paragraphs 62-63.) This requirement does not apply 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 the future supply of such information from a substantial number of sources available, or likely to be available, to an agency: see *Re "B"* at p.341, paragraph 161.

119. The QNC, the midwife, the QNU and Ms Talbot all claim that disclosure of those parts of the matter in issue which were provided to the QNC by the midwife and Ms Talbot could reasonably be expected to prejudice the future supply of such information to the QNC by members of the nursing profession. Dr Gordon, the AMA and NASOG all claim that disclosure of those parts of the matter in issue which were provided to the QNC by Dr Gordon could reasonably be expected to prejudice the future supply of such information to the QNC by medical practitioners approached to assist the QNC with an investigation.

Submissions of the midwife, the QNC and the QNU

120. I note that the QNC has no power under the *Nursing Act* to compel a nurse to provide information to the QNC for the purposes of an investigation. Unlike the Medical Board, for example, which has power under the *Medical Act 1939* Qld to compel medical practitioners who are under investigation to provide the Board with information, the QNC is reliant upon the voluntary cooperation of nurses for the provision of information to its investigators.

Section 103(4) of the *Nursing Act* merely provides that the investigator must provide the person who is the subject of the complaint with an opportunity during the course of an investigation to make a formal submission to the investigator. Only if the QNC decides at the conclusion of its investigation to prefer a charge against the subject of the complaint, in which case the matter is referred to the Professional Conduct Committee for a formal hearing, does that Committee have the power to summons witnesses to appear before it and give evidence.

121. The fact that a nurse can choose whether or not to assist an investigation into his/her conduct by providing the investigator with information, is used as the basis for arguments by the QNC, the midwife and the QNU that disclosure in this review of the information voluntarily provided to Ms Harrison by the midwife, will prejudice future cooperation by nurses with QNC investigations, thereby prejudicing the future supply of information to the QNC.

122. In their submission dated 5 October 1998, the QNC's solicitors stated:

> *We are instructed that the Council has been advised by the Queensland Nurses Union (which represents a large number of nurses whose conduct is investigated by the Council) that if a transcript of the interview between the investigator and* [the midwife] [were] *subject to disclosure under the FOI Act then the Union would advise its members not to submit to an interview. On that basis, the Council submits that the information provided by* [the midwife] *to the investigator should be exempted from disclosure under section 46(1)(b) of the FOI Act; namely, that the disclosure could reasonably be expected to prejudice the future supply of such information.*
>
> *The Council is concerned that those nurses who are represented by the Queensland Nurses Union (which represents about 50% of the nursing population in Queensland) will not make submissions to the Council's investigator during the course of investigations which will result in the Council having to consider an incomplete investigation report in determining whether or not to prefer a charge. ...*

123. I note, however, that in his earlier submission dated 7 July 1998, Mr O'Dempsey of the QNC said:

> *On page 6 of your letter* [my letter to the QNC dated 29 June 1998] ... *you say that a nurse would be motivated to explain matters to the investigator in order to avoid any disciplinary action being taken. I can assure you that with the benefit of the Council's experience this is not the case. A number of nurses have elected not to make any submissions to the Council during the course of investigations, as is their right. ...*

124. According to Mr O'Dempsey therefore, the QNC has experienced difficulties generally in persuading nurses to cooperate with QNC investigations, even without the 'threat' of disclosure under the FOI Act. That fact could be seen as casting doubt on the proposition that disclosure under the FOI Act of itself, could reasonably be expected to prejudice the future supply of information to the QNC.

125. In its submission dated 23 February 1999, the QNU submitted:

> *... it has been our policy to encourage nurses to participate fully and cooperatively with the Queensland Nursing Council when under investigation. ...*
>
> *However, since becoming aware of the FOI application requesting release of information pertaining to our member we are now, unfortunately, recommending to all our members that they exercise extreme caution when dealing with the Queensland Nursing Council as any information provided by them to the Queensland Nursing Council, such as a response to a complaint, a reference in support of another nurse or merely a response to an enquiry about a nurse, may be information required to be released subject to an FOI application. The result is that our members are no longer willing to co-operate as fully personal and confidential information may be released to an FOI applicant. ...*

(I must say I find it disappointing that a body such as the QNU would react to the possibility of disclosure to a patient of information concerning that patient's health and the nursing attention she received, by advising its members not to assist investigations by the body charged with regulating the nursing profession in Queensland. The QNC has been conferred with regulatory powers in respect of the nursing profession for the benefit and protection of the Queensland public. One of the methods of discharging those functions is to properly investigate the merits of complaints received from members of the public. Complainants, too, ought to be accorded fair treatment in the discharge of the QNC's functions, in particular to the extent of being given sufficient information to be satisfied that their complaints have been properly investigated. If the stance taken by the QNU means that the QNC cannot perform its functions effectively, presumably it will have to seek coercive powers similar to those conferred on the Medical Board of Queensland.)

126. I consider it reasonable to assume that nurses under investigation by the QNC would be willing to cooperate with the investigation if they consider that they have nothing to fear and they wish to take the opportunity to exculpate themselves. The supply of information in such a case would be motivated by the wish to explain matters to the investigator and avoid disciplinary action. Equally, I think it is reasonable to assume that in cases where nurses fear that disciplinary action may result from an investigation, they will be inhibited from cooperating with the investigation in any event, quite apart from the added 'threat' of the possibility of disclosure under the FOI Act of the information they provide. However, in a situation where nurses think that they can demonstrate to an investigator that they did nothing wrong such that there is no warrant for disciplinary action being taken against them, but they also fear exposure to a civil suit by the complainant if the information they provide to the investigator can be accessed under the FOI Act by the complainant, I accept that, in those circumstances, nurses may choose, because of the potential for disclosure under the FOI Act of information adverse to their interests, not to provide the QNC with any information at all during the course of its investigation, thereby resulting in prejudice to the supply of information to the QNC.

127. In the present circumstances, I think it is clear that the midwife believed that she had done nothing wrong in relation to the delivery of the applicant's baby. She chose to cooperate with Ms Harrison's investigation so as to be in a position to provide her side of the story and to avoid disciplinary action being taken against her. As an employee of a public hospital, it would not appear that the midwife herself needed to fear exposure to personal liability in a

civil suit by the applicant if the information she provided to Ms Harrison were to be disclosed to the applicant. The general principle of employment law is that an employer is vicariously liable for any acts of negligence committed by an employee in the course of performing his/her duties of employment. Accordingly, regardless of the advice which the QNU may give to its members, I do not think it is reasonable to expect that, if the matter in issue in this review were to be disclosed, a significant number of nurses in the same situation as the midwife would refrain from seeking to exculpate themselves from possible disciplinary action by disclosing all relevant information available to them, merely because their explanation might later be disclosed to the patient.

Submissions of Ms Talbot

128. The third requirement for exemption under s.46(1)(b) of the FOI Act will frequently be satisfied with respect to independent witnesses such as Ms Talbot when the witness has supplied information adverse to a person subject to investigation by a law enforcement agency or regulatory authority, and especially where the witness has some reasonable basis for expecting recrimination, harassment *et cetera*, as a result of disclosure. I have referred to those type of inhibiting factors above, in my discussion of the second requirement for exemption under s.46(1)(b).

129. I am not satisfied that the third requirement for exemption under s.46(1)(b) is satisfied with respect to the information provided by Ms Talbot. As I said above, Ms Talbot did not provide information which could be considered adverse to the midwife's interests. There was apparently no suggestion of any wrongdoing on Ms Talbot's part causing her to have had concerns about protecting her own interests were she to become involved in the investigation. It seems clear that Ms Talbot decided to provide Ms Harrison with information about the events on the day in question because she felt it might assist the midwife's case. In her submission dated 12 March 1999, Ms Talbot stated that *"... at no time did I reasonably expect that charges would be preferred against* [the midwife] *given her level of expertise, the nature of the complaint and the nature of the information I provided in support of her"*. I do not think that disclosure of information of that kind could reasonably be expected to prejudice the future supply to the QNC of information from witnesses to an incident who believe that a friend or colleague has been wrongly or mistakenly accused of misconduct.

Submissions of Dr Gordon

130. As to the position of medical practitioners who assist the QNC with its investigations by providing opinions *et cetera*, Dr Gordon submitted:

> *... Not only will I not co-operate with the Nurses Council if my exemption is overturned but I have demonstrated that the future supply of information to the Nurses Council would be prejudiced. I have spoken to the AMA, the National Association of Obstetricians and Gynaecologists and the Nursing Union. Each of those bodies will have provided you with a letter of support of my position. The Nursing Council have demonstrated difficulty in obtaining opinions. Indeed to obtain an opinion from one giving a reference would suggest a certain desperation. The above three groups are all integral to the proper working of the Nurses Council. In fact the Nursing Council will not function in a meaningful way without the co-operation of the above three groups to give information. ...*

131. The AMA submitted:

> ...
>
> *Dr Gordon is a member of the AMA which has over 4,300 members across Queensland, and over 25,000 members nation-wide. Dr Gordon is concerned about being forced to allow a patient access to a document that he believes was written in confidence and designed for the Nursing Council, a group of professionals and not the patient. ...*
>
> *The AMAQ will stand by a carefully considered decision of a member to not supply information in a particular situation - and would advise all members in that situation accordingly. There are obvious concerns that any action may result in a defensive reaction by the community of doctors which may affect the information available.*

132. NASOG's brief submission focussed on the reference which Dr Gordon provided in support of the midwife, rather than his statement. It did state, however:

> *As a matter of principle I think it is important for the medical profession to be able to provide confidential information to act as expert assistance to various Government instrumentalities.*

133. I have acknowledged above in my discussion of the second requirement for exemption under s.46(1)(b) that there may exist, in particular cases, factors which inhibit expert witnesses from becoming involved in an investigation by providing an opinion on the conduct of a friend or colleague. I have also acknowledged that whether or not an expert chooses to assist an investigation, by giving an opinion on the relevant issues, is entirely up to the individual. However, I am not satisfied that the third requirement for exemption under s.46(1)(b) is satisfied with respect to the information provided by Dr Gordon. As was the case with Ms Talbot, I consider that Dr Gordon provided the QNC with his opinion about the midwife's conduct because he felt it may assist the midwife. He stated in his submission that he gave his opinion because he was concerned that a miscarriage of justice had occurred as far as the midwife was concerned and that if he did not give his opinion, he feared that the midwife could have been "unrightfully given a period of suspension or limited registration".
As in the case of Ms Talbot, I do not think that disclosure of information of the kind provided by Dr Gordon could reasonably be expected to prejudice the future supply to the QNC of information from expert witnesses who believe that a friend or colleague has been wrongly or mistakenly accused of misconduct, and who give their opinion in the hope that it will assist to exculpate that friend or colleague.

134. Quite apart from the fact that, in this case, Dr Gordon gave his expert opinion to the QNC in order to assist a colleague, I again find it surprising and disappointing to hear that some members of the medical profession would contemplate refraining from providing their expert opinion in order to assist an investigation of the kind in question here, simply because that opinion might be disclosed to the patient whose complaint is being investigated. In fact it seems reasonable to me to expect that, in the absence of any agreement to the contrary, the majority of medical practitioners approached to provide expert opinion or advice in their professional capacities, for the purpose of assisting law enforcement/regulatory/disciplinary investigations or legal proceedings, would have no expectation of confidentiality with respect to that opinion or advice. Rather they would

appreciate the distinct possibility that

their opinion or advice may be relied upon, and communicated to the parties to the dispute, in support of a particular finding by the investigating body. Dr Gordon attached no conditions to the giving of his opinion to the QNC. The fact that he apparently did not contemplate the disclosure of his opinion to the applicant, and is upset by that prospect, is unfortunate, but I do not think that it in any way justifies a knee-jerk reaction from bodies such as the AMA and NASOG to the effect that they will give a blanket advice to their members not to provide such opinions in the future.

135. Dr Gordon has made much of the fact that he gave his opinion to the QNC free of charge. I readily acknowledge that it is no doubt becoming increasingly difficult for bodies such as the QNC to secure expert opinions unless they are prepared to pay for those opinions. However, while medical specialists are free to decline to provide expert opinion for the purposes of a law enforcement/regulatory/disciplinary investigation, or indeed criminal and civil proceedings, there does not seem to be any shortage of medical specialists willing to provide expert opinion to assist investigations and legal proceedings of the kind indicated, in return for payment for their time and effort. Even if the QNC were to experience a prejudice to the future supply of expert opinions from medical specialists willing to provide their opinions free of charge, that is not the relevant test under the third requirement for exemption under s.46(1)(b).

136. For the reasons given above, I am not satisfied that disclosure of any of the matter in issue in this review could reasonably be expected to prejudice the future supply of like information.

Public interest balancing test

137. I have discussed above in some detail the principles of procedural fairness and my view that the QNC has a duty to justify, both to the applicant and the midwife, the decision it reached at the conclusion of its investigation, and to demonstrate that it discharged its duty to conduct an adequate and fair investigation of the complaint made to it. I do not consider, at least in respect of the applicant, that the QNC has discharged that duty, having regard to the information it has provided to the applicant to date. I appreciate that, during the course of this review, the QNC prepared and gave to the applicant a brief summary of the QNC's reasons for deciding not to take further action against the midwife. Nevertheless, having regard to the general information contained in that summary, and the fact that it does not disclose the evidence or submissions of the midwife regarding the events which occurred on the day in question, nor those of other persons who were interviewed by Ms Harrison during the course of her investigation, and bearing in mind that those submissions and evidence appear to have been taken into account by the QNC in reaching its decision, I consider that there is a strong public interest favouring disclosure of the matter in issue to the applicant.

138. There is a public interest in the accountability of the QNC for the discharge of its functions, that would be assisted by the disclosure of information concerning the actions of the QNC in conducting its investigation, and in deciding to take no further action against the midwife. The applicant, as the complainant against the midwife regarding the midwife's involvement in the birth of the applicant's baby, has a special interest in scrutinising the QNC's investigation and the information collected by the QNC during the investigation, upon which its findings were based. I recognised in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp.376-377 (paragraph 190) that a particular applicant's interest in obtaining access to particular documents is capable of being recognised as a facet of the public interest, which may justify giving a particular applicant access to documents:

> *The kind of public interest consideration dealt with in the above cases is closely related to, but is potentially wider in scope than, the public interest consideration which I identified in* Re Eccleston *at paragraph 55, i.e., the public interest in individuals receiving fair treatment in accordance with the law in their dealings with government. This was based on the recognition by the courts that:* "The public interest necessarily comprehends an element of justice to the individual" *(per Mason C J in* Attorney-General (NSW) v Quin *(1989-90) 170 CLR 1 at 18; to similar effect see the remarks of Jacobs J from* Sinclair v Mining Warden at Maryborough *quoted at paragraph 178 above). It is also self-evident from the development by the courts of common law of a set of principles for judicial review of the legality and procedural fairness of administrative action taken by governments, that compliance with the law by those acting under statutory powers is itself a matter of public interest (see* Ratepayers and Residents Action Association Inc v Auckland City Council *[1986] 1 NZLR 746 at p.750). The public interest in the fair treatment of persons and corporations in accordance with the law in their dealings with government agencies is, in my opinion, a legitimate category of public interest. It is an interest common to all members of the community, and for their benefit. In an appropriate case, it means that a particular applicant's interest in obtaining access to particular documents is capable of being recognised as a facet of the public interest, which may justify giving a particular applicant access to documents that will enable the applicant to assess whether or not fair treatment has been received and, if not, to pursue any available means of redress, including any available legal remedy.*

139. The public interest considerations weighing against disclosure of the matter in issue which have been identified by the various participants in this review are mostly subsumed within the *prima facie* ground of exemption under s.46(1)(b) of the FOI Act, i.e., they mostly relate to the third requirement for exemption - prejudice to the future supply of information to the QNC and the resulting detrimental effect which that could reasonably be expected to have on the QNC's investigative processes. I have discussed those submissions above.

140. I acknowledge that the QNC's investigative processes may suffer if persons are reluctant to provide it with information in a situation where there is no power to compel them to do so. However, I think that the issues that have arisen during the course of this review demonstrate a clear need for the QNC to review its investigative procedures. Had this investigation been handled differently, with an explanation given to each witness approached by the investigator to the effect that the information they supplied may need to be disclosed (including to the complainant) in certain circumstances (comparable, *mutatis mutandis*, to the three exceptions to understandings of confidentiality relevant in police investigations, which I identified in *Re McCann* at pp.53-54, paragraph 58), many of the problems encountered in this particular case could, in my view, have been avoided. However, there does not appear to have been any discussion of confidentiality, and it appears that no-one turned their minds to what the QNC might reasonably be expected to do with the information supplied to it.

141. It remains the case that the applicant's complaint against the midwife was, in effect, dismissed by the QNC, and that she has not been provided with a sufficient explanation as to why that decision was reached. The extent of the detail that is offered by way of explanation in such circumstances will necessarily vary from case to case, depending on the need to respect any applicable obligations or understandings of confidence, or applicable privacy

considerations. Subject to any such constraints, I consider that there is a legitimate public interest in a complainant being given sufficient information to be satisfied that the investigating body has conducted a thorough investigation and reached a fair and realistic decision about whether the available evidence was sufficient or insufficient to justify any formal action being taken in respect of the complaint.

142. In their submission, the midwife's solicitors discussed at length the other processes open to the applicant if she were dissatisfied with the QNC's decision, e.g., seeking a statement of reasons under the *Judicial Review Act 1991* Qld. However, it is not relevant to the application of the FOI Act whether or not the applicant has explored all other avenues for obtaining access to the matter in issue (see my comments in *Re Director-General, Department of Families, Youth and Community Care and Department of Education; Perriman (Third Party)* (1997) 3 QAR 459 at p.464). My function simply is to decide whether or not the matter in issue qualifies for exemption under the FOI Act.

143. For the reasons discussed above, I am satisfied that disclosure of the matter in issue to the applicant would, on balance, be in the public interest.

Conclusion

144. For the foregoing reasons, I set aside the decision under review (being the decision made on behalf of the QNC by Mr J O'Dempsey on 2 April 1998). In substitution for it, I decide that, with the exception of the information described below, which I find qualifies for exemption under s.44(1) of the FOI Act, the matter in issue in this review does not qualify for exemption from disclosure to the applicant under the FOI Act -

(a) the 26th-32nd words appearing in the final paragraph on page 1 of document 6;

(b) the first full sentence appearing on page 2 of document 6;

(c) the 5th-9th words of the fifth sentence, and the last eight words of the seventh sentence, as contained in the first paragraph appearing under the heading "Our client's nursing experience" in document 8.

.....
F N ALBIETZ
INFORMATION COMMISSIONER