"WRT" and Department of Corrective Services

(S 182/98, 26 April 2002, Deputy Information Commissioner)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.-2. These paragraphs deleted.

REASONS FOR DECISION

Background

3. The applicant, ["WRT"], seeks review of a deemed refusal of access by the Department of Corrective Services (the Department) to parts of a psychiatric report concerning him.

4. By letter dated 22 July 1998, the applicant applied to the Department for access, under the FOI Act, to a series of documents connected with his imprisonment. The Department did not process the applicant's FOI access application within the time limits prescribed by the FOI Act. Accordingly, by letter dated 12 November 1998, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of the Department's deemed refusal of access to the requested documents.

External review process

5. Copies of the documents in issue were obtained and examined. As a result of concessions made by the Department during the course of the review, the only matter now remaining in issue comprises parts of a psychiatric report dated 4 July 1998 by [Dr A]. During the course of the review, the applicant was given access to parts of that report, and he withdrew his application for access to segments of information contained in the report that were claimed to be exempt from disclosure to him under s.44(1) of the FOI Act (comprising [Dr A's] address and signature, and the penultimate sentence contained in the last full paragraph on page 5 of the report - which sentence refers to the medical treatment of another person). Accordingly, that information is no longer in issue in this review.

6. The Department has withdrawn its claim for exemption in respect of the remainder of the report. However, [Dr A] (who, in accordance with s.74(1) of the FOI Act, was consulted by my office regarding disclosure of the report) continues to object to disclosure to the applicant of those parts of the report which remain in issue. [Dr A] claims that the matter remaining in issue in his report is exempt from disclosure under s.42(1)(c), s.42(1)(f), s.42(1)(h), s.46(1)(a) and s.46(1)(b) of the FOI Act. [Dr A] has also submitted that, in the event that the matter remaining in issue does not qualify for exemption under the FOI Act, then access should only be given to a qualified medical

practitioner, nominated by the applicant and approved by the Department, in accordance with s.44(3) of the FOI Act.

7. Upon the Department withdrawing its claim for exemption in respect of the report, [Dr A] was invited to lodge submissions and/or evidence in support of his case that the matter remaining in issue is exempt from disclosure under the FOI Act. (Section 81 of the FOI Act provides that, in a review under Part 5 of the FOI Act, the agency which made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant. In the present case, however, the Department has withdrawn its claim for exemption. Accordingly, while [Dr A] does not bear a formal legal onus under s.81 of the FOI Act, like other third party objectors to disclosure of information under the FOI Act, he has, in practical terms, an evidentiary onus to ensure that there is material before me from which I am able to be satisfied that all of the elements of the particular exemption provisions relied upon by [Dr A], are established: see *Brisbane City Council v F N Albietz* (Sup Ct of Qld, S 10342 of 2000, Wilson J, 17 May 2001, unreported) at paragraph 14.) [Dr A] provided a statutory declaration dated 4 June 2001 and advised that he also wished to rely upon an earlier statutory declaration, dated 30 June 1999, which he had provided to the Department.

8. In making my decision in this case, I have taken into account the following material:

1. the matter in issue contained in [Dr A's] report dated 4 July 1998;
2. the applicant's FOI access application dated 22 July 1998 and external review application dated 12 November 1998;
1. the statutory declarations of [Dr A] dated 30 June 1999 and 4 June 2001, and his letter dated 27 December 1998;
2. a letter from the Department dated 21 March 2001; and
3. relevant extracts from the applicant's parole file.

Application of s.46(1) of the FOI Act to the matter in issue

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

46.(1) *Matter is exempt if—*

(a) its disclosure would found an action for breach of confidence; or

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

10. Section 46(2) of the FOI Act provides:

> ***46.(2)*** *Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless its disclosure would found an action for breach of confidence owed to a person or body other than—*
>
> *(a) a person in the capacity of—*
>
> *(i) a Minister; or*
>
> *(ii) a member of the staff of, or a consultant to, a Minister; or*
>
> *(iii) an officer of an agency; or*
>
> *(b) the State or an agency.*

11. Before one arrives at a consideration of the substantive exemption provision contained in s.46(1), it is necessary to consider the application of s.46(2). I am satisfied that the matter in issue comprises matter of a kind mentioned in s.41(1)(a) of the FOI Act - it comprises opinion, advice or recommendation prepared by [Dr A] for the purposes of the deliberations of the Queensland Community Corrections Board (QCCB) regarding the applicant. (The QCCB is a division of the Department, appointed to determine applications by prisoners for parole, release to work, home detention, *et cetera*.) I am further satisfied that [Dr A] was retained by the QCCB as an independent consultant, and therefore that the matter in issue was provided by a person or body outside the categories specified in s.46(2)(a) and (b). In *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, the Information Commissioner said (at paragraph 36):

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

Accordingly, the issue for my determination under s.46(1) of the FOI Act is whether disclosure of the matter in issue to the applicant would found an action for breach of confidence owed to [Dr A] by the Department.

Whether disclosure would found an action for breach of confidence

12. The test for exemption under s.46(1)(a) is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind the respondent agency not to disclose the information in issue. I am satisfied that [Dr A], as author of

the matter in issue, would have standing to bring an action to enforce an obligation of confidence claimed to bind the Department not to disclose the contents of his report which remain in issue in this review.

13. At paragraph 43 of *Re "B"*, the Information Commissioner said that an action for breach of confidence may be based on a contractual or an equitable obligation. There is no material before me to suggest that [Dr A] might be entitled to rely upon a contractual obligation of confidence in respect of the matter in issue. In relation to equitable obligations of confidence, the Information Commissioner explained in *Re "B"* that there are five cumulative requirements for protection in equity of allegedly confidential information:

    1. it must be possible to specifically identify the information, in order to establish that it is secret, rather than generally available information (see *Re "B"* at pp.303-304, paragraphs 60-63);
    2. the information in issue must have "the necessary quality of confidence"; i.e., the information must not be trivial or useless information, and it must have a degree of secrecy sufficient for it to be the subject of an obligation of conscience (see *Re "B"* at pp.304-310, paragraphs 64-75);
    3. the information must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see *Re "B"* at pp.311-322, paragraphs 76-102);
    4. disclosure to the applicant for access would constitute an unauthorised use of the confidential information (see *Re "B"* at pp.322-324, paragraphs 103-106); and
    5. disclosure would be likely to cause detriment to the confider of the confidential information (see *Re "B"* at pp.325-330, paragraphs 107-118).

Requirement (a)

14. I am satisfied that the information claimed to be the subject of an obligation of confidence can be specifically identified.

Requirement (b)

15. Some of the matter in issue records statements made to [Dr A] by the applicant during their consultation, and those statements cannot quality as confidential information *vis-à-vis* the applicant. I am satisfied that the rest of the matter in issue has the necessary quality of confidence and is not trivial or useless information. It does not consist of generally available information, nor information that would be known to the applicant. It therefore has a degree of secrecy sufficient for it to be the subject of an obligation of conscience.

Requirement (c)

16. In his statutory declaration dated 30 June 1999, [Dr A] stated:

> …
>
> *1. The large majority of the reports that I prepare for the Queensland Community Corrections Board are prepared on a strictly confidential basis and are not intended for viewing by inmates.*
>
> *2. I usually advise inmates at the interview that my reports are the property of the Queensland Community Corrections Board and cannot be released to them.*
>
> *3. My report was not intended to be provided to the applicant. It was written for the Queensland Community Corrections Board, to be read by the Secretary and the Members only. This is evidenced by the fact that my reports are addressed to the Queensland Community Corrections Board and discuss the inmate as a third person, not as a potential reader.*
>
> *4. I always mark my psychiatric reports with the notation "Confidential" at the top of the front page of the report as I did with the present report on the applicant.*
>
> *12. If I knew that a report was to be provided to the applicant, I would prepare it on a different basis to the majority of confidential reports. I would not include my professional interpretation of the inmate's background and its linkages with the inmate's offending behaviour as do "confidential" reports. I would not include strong recommendations as to parole. I would not include the inmate's potential for re-offending. I would tighten up the language used.*

17. I note that [Dr A's] report is marked "Confidential" but, as the Information Commissioner observed in *Re "B"* (at p.307, para 71), while such a marking may be relevant to the issue, it is not, of itself, determinative of whether or not the recipient of a document is bound by an obligation of confidence. A supplier of confidential information cannot unilaterally and conclusively impose an obligation of confidence: see *Re "B"* at pp.311-316, paragraphs 79-84, and pp.318-319, paragraphs 90-91. The touchstone in assessing whether requirement (c) to found an action in equity for breach of confidence has been satisfied, lies in determining what conscionable conduct requires of an agency in its treatment of information claimed to have been communicated in confidence. That is to be determined by an evaluation of all the relevant circumstances attending the communication of that information to the agency. The relevant circumstances will include (but are not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and circumstances relating to its communication of the kind referred to by a Full Court of the Federal Court of

Australia in *Smith Kline and French Laboratories (Aust) Limited & Ors v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at pp.302-3: see *Re "B"* at pp.314-316, paragraph 82.

18. There is no evidence before me of any express agreement or understanding between [Dr A] and the QCCB that [Dr A's] report was supplied and received in confidence, as against the applicant. I have reviewed the terms of the QCCB's request for the report, as contained in its letter to [Dr A] dated 23 June 1998:

> *The Queensland Community Corrections Board is presently considering an application for community-based supervision submitted by the above named* ["WRT"]. *The Board has requested a psychiatric assessment be prepared and submitted for its further consideration.*
>
> *It would be appreciated if arrangements were made for the assessment to be forwarded to this office as soon as possible. A copy of the case history is enclosed which should be returned to this office when no longer required.*
>
> *The Board has requested, if possible, you make a recommendation on the prisoner's suitability for release to work, home detention and parole.*

19. [Dr A's] case for exemption under s.46(1)(a) of the FOI Act is therefore based on an implied understanding of confidence between him and the QCCB. However, it does not appear that the QCCB shared that understanding. In a letter to this office dated 21 March 2001, Mr Thomas of the Department stated:

> *I would also like to concede that matter contained within* [Dr A's] *report will not be exempt matter under section 46(1)(a). Given that* [Dr A's] *report contains matter of a kind which is mentioned in section 41(1)(a), section 46(2) requires consideration of whether disclosure would found an action of breach of confidence.*
>
> *There is quite clearly no contractual obligation of confidence between* [Dr A] *and the Queensland Community Corrections Board. In considering the five cumulative criteria the Information Commissioner has established as required to be satisfied in order to found an action in equity for breach of confidence, I am not satisfied that matter within* [Dr A's] *report is subject to an equitable obligation of confidence.*
>
> …

20. I note that [Dr A] himself, in paragraph 9 of his statutory declaration (quoted above), acknowledges that his report is the property of the Department. That is the usual position when a professional person is retained to write a report for a client, and is paid a fee for his/her time and effort in producing the report, i.e., upon payment, property in the report passes to the client who requested and paid for it, and clients are ordinarily

free to use the report for their own purposes as they see fit: *cf. Re Hopkins and Department of Transport* (1995) 3 QAR 59 at paragraphs 30-31, 33, 47; *Re Spilsbury and Brisbane City Council* (1999) 5 QAR 355 at paragraphs 24-25.

21. Given the purposes for which it could reasonably be expected the Department would use [Dr A's] report, i.e., to assist in making a decision regarding the applicant's application for community-based supervision/parole, the question is whether equity would hold it to be an unconscionable use of the matter in issue for the Department to disclose it to the applicant without [Dr A's] consent. At paragraphs 92-93 of *Re "B"*, the Information Commissioner said:

> *92. Another principle of importance for government agencies was the Federal Court's acceptance in* Smith Kline & French *that it is a relevant factor in determining whether a duty of confidence should be imposed that the imposition of a duty of confidence would inhibit or interfere with a government agency's discharge of functions carried on for the benefit of the public. The Full Court in effect held that the restraint sought by the applicants on the Department's use of the applicant's confidential information would go well beyond any obligation which ought to be imposed on the Department, because it would amount to a substantial interference with vital functions of government in protecting the health and safety of the community. (This finding could also have followed from an application of Lord Denning's statement of principle set out at paragraph 85 above.)*
>
> *93. 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 the confidential information may ultimately have to be exposed in a public report or perhaps in court proceedings.*

22. The significance of the functions of a government agency as a recipient of information has also been stressed in the High Court decision of *Esso Australia Resources Ltd v Plowman* (1995) 69 ALJR 404; 128 ALR 391 (for a discussion of which see paragraphs 51-60 of the Information Commissioner's decision in *Re Cardwell Properties Pty Ltd & Williams and Department of the Premier, Economic and Trade Development* (1995) 2 QAR 671).

23. In assessing the relevant circumstances attending the communication to the QCCB of [Dr A's] report, I consider that the following paragraphs from the decision of the Information Commissioner in *Re Hamilton and Queensland Police Service* (1994) 2 QAR 182 are also relevant:

41. *In paragraph 139 of my decision in* Re "B", *I stated as follows:*

> 139. There will be cases where the seeking and giving of an express assurance as to confidentiality will not be sufficient to constitute a binding obligation, for example if the stipulation for confidentiality is unreasonable in the circumstances, or, having regard to all of the circumstances equity would not bind the recipient's conscience with an enforceable obligation of confidence (see paragraphs 84 and 85 above). ...

42. *In paragraph 85 of Re "B", I had referred in particular to Lord Denning MR's statement in* Dunford & Elliott Ltd v Johnson & Firth Brown Ltd *[1978] FSR 143 at p.148, which bears repeating in this context:*

> If the stipulation for confidence was unreasonable at the time of making it; or if it was reasonable at the beginning, but afterwards, in the course of subsequent happenings, it becomes unreasonable that it should be enforced; then the courts will decline to enforce it; just as in the case of a covenant in restraint of trade.

I remarked in Re "B" *that, despite the different wording, this dictum probably equates in substance, and in practical effect, to the emphasis in the judgments of the Federal Court of Australia in* Smith Kline & French Laboratories (Aust) Ltd and Others v Secretary, Department of Community Services & Health *(1990) 22 FCR 73 (Gummow J), (1991) 28 FCR 291 (Full Court), that the whole of the relevant circumstances must be taken into account before a court determines that a defendant should be fixed with an enforceable obligation of confidence.*

43. *I also referred in* Re "B" *(at paragraph 83) to the suggestion by McHugh JA in* Attorney-General (UK) v Heinemann Publishers *(1987) 75 ALR 353 at p.454 that special considerations apply where persons outside government seek to repose confidences in a government agency:*

> ... when ... a question arises as to whether a government or one of its departments or agencies owes an obligation of confidentiality to a citizen or employee, the equitable rules worked out in cases concerned with private relationships must be used with caution. ...

44. *An illustration of this is afforded by the result in* Smith Kline & French *where Gummow J refused to find that the first respondent was bound by an equitable obligation not to use confidential information in a particular way, because the imposition of such an obligation on the first respondent would or might clash with, or restrict, the performance of the first respondent's*

functions under a relevant legislative scheme. (The relevant passages are set out at paragraphs 80 and 81 of Re "B"*, and see also my remarks at paragraph 92 of* Re "B"*.)*

45. Another illustration of this principle, in my opinion, is the fact that government officials empowered to make decisions which may adversely affect the rights, interests or legitimate expectations of citizens are ordinarily subject to the common law duty to act fairly, in the sense of according procedural fairness, in the exercise of such decision-making powers (see, for example, Kioa v West *(1985) 159 CLR 550; 60 ALJR 113, relevant extracts from which are reproduced at paragraph 28 of my reasons for decision in* Re McEniery and the Medical Board of Queensland [(1994) 1 QAR 349]*). Circumstances may be encountered where the duty to accord procedural fairness clashes with an apparent duty to respect the confidentiality of information obtained in confidence, for example, where a government decision-maker proposes to make a decision which is adverse to the rights or interests of a citizen, on the basis of information obtained in confidence from a third party. …*

24. In *Re McEniery and Medical Board of Queensland* (1994) 1 QAR 349, at pp.361-364, paragraphs 28-33, the Information Commissioner pointed out that the legal requirements binding government agencies to observe the rules of procedural fairness will affect the question of whether a supplier of confidential information and the recipient agency could reasonably expect the confidentiality of the information to be preserved while taking appropriate action in respect of the information conveyed. Procedural fairness usually requires that a person, whose rights or interests are liable to be affected by some proposed government decision or action, be given an effective opportunity to know the substance of information provided to the government decision-maker which is adverse to his/her rights or interests, including, in particular, the critical issues or factors on which the case is likely to turn, so that the person is given an effective opportunity of dealing with the case against him or her.

25. It is clear from judgments of the High Court of Australia, and of superior courts in the Australian states, that Parole/Community Corrections Boards are required to accord procedural fairness to persons whose rights or interests may be adversely affected by their decisions, except to the extent that the requirements of procedural fairness are excluded by express provision (or by necessary implication) in legislation governing the operations of the particular board: see, for example, the High Court decision in *South Australia v O'Shea* (1987) 163 CLR 378 (where, I note, the parole board in question had given the prisoner copies of relevant psychiatric reports); *Re Bromby v Offenders' Review Board* (1991) 51 A Crim R 249 at p.277 per Clarke & Handley JJA of the New South Wales Court of Appeal; and the Queensland Supreme Court cases discussed below. Some jurisdictions (for example, Western Australia and Victoria) have legislated to expressly exclude what would otherwise be a common law requirement for their parole boards to accord procedural fairness (see s.115 of the *Sentencing*

Administration Act 1995 WA and s.69 of the *Corrections Act 1986* Vic), but that is not the case in Queensland.

26. In *Re Solomon (No. 2*) [1994] 2 Qd R 97, Ambrose J stated that procedural fairness can be said to require the parole board to bring to the notice of the applicant for parole, who might be adversely affected by the board's determination, the critical issues or factors on which the determination is likely to turn, so that he or she may have an opportunity of dealing with them.

27. In *McEncroe v Queensland Community Corrections Board* [1997] QSC 159, Thomas J stated:

> *I consider then that in making a decision upon an application of this kind the Queensland Community Corrections Board is not free from a duty to accord natural justice to the applicant, and that subject to some obvious limitations which may be implied in relation to the content of the procedural fairness that must be provided, the principles of* Kioa v West *(1985) 159 CLR 550, 584, 588*; Annetts v McCann *(1990) 170 CLR 596, 598, 607, are applicable.*

28. I note also a comment made by McPherson J in the case of *Re Smith* [1991] 2 Qd R 467 (although this case did not involve a procedural fairness issue but one of whether leave should be granted to issue a *subpoena duces tecum* to the parole board to produce documents to the court), that where the existence of a psychiatric report and identity of the psychiatrist is known to the applicant, there is no advantage in allowing the contents of the assessment to remain in the realm of speculation as it would only tend to engender suspicions that may be more dangerous than what the psychiatric report actually contains.

29. In the present circumstances, it is clear that the QCCB requested that [Dr A] provide a report for the purpose of assisting the QCCB to consider the applicant's application for community release/parole, and that that report was before the QCCB when it considered the applicant's application. [Dr A] was specifically asked to make a recommendation on the applicant's suitability for release to work, home detention and parole. The QCCB ultimately rejected the applicant's application for parole, but gave approval for the applicant to be granted leave of absence during a period of 6 months for the purposes of seeking, or engaging in, employment, and to prepare the applicant for community resettlement. The applicant was advised that his application for parole would be considered when he had completed 6 months on release to work. The applicant then specifically queried why his application for parole was not approved, given that his eligibility date for parole had passed. He was advised by the Secretary of the QCCB that a Ministerial Guideline provided that early release from custody should ordinarily be a staged process, i.e., through release to work, to home detention, to parole. The QCCB stated that it was of the view that there were no particular circumstances in the applicant's case which justified a departure from the Ministerial Guideline.

30. Given that [Dr A's] report was part of the material considered by the QCCB in deciding the applicant's application for parole, and that the report contained some material adverse to the applicant's interests in obtaining parole, I consider that procedural fairness required the QCCB to apprise the applicant of at least the substance of the adverse material, so as to give the applicant an effective opportunity to respond to those findings and perhaps to gather his own psychiatric evidence.

31. In summary, it appears that the state of the law in Queensland, where the principles of procedural fairness clearly apply to the operations of the QCCB, is such that, in the ordinary case, neither a psychiatrist submitting a report adverse to an applicant for parole, nor the QCCB receiving such a report, could reasonably have an expectation that the report is to be treated in confidence as against the subject of the report. I consider that equity would not ordinarily find a parole board conscience-bound to treat a psychiatric report as confidential from the subject of the report, in a situation where the common law principles of procedural fairness require disclosure of information in the psychiatric report to the subject of the report.

32. It is arguable that, in exceptional circumstances, equity might impose a binding obligation of confidence restraining a parole board from disclosing an adverse psychiatric report to the subject of the report, e.g., where the subject of the report has a demonstrated propensity to violence or retribution against persons perceived to have wronged the subject, and certain information in the report is so sensitive in nature that its disclosure to the subject could reasonably be expected to pose a genuine danger to the physical safety of others. In such circumstances, the common law requirements of procedural fairness may not extend to requiring disclosure of the adverse material, or equity might hold that conscionable conduct on the part of the parole board required non-disclosure regardless of the usual rules of procedural fairness. (I observe that, in a situation of that kind, exemption would ordinarily be available under s.42(1)(c) of the FOI Act. For the reasons explained at paragraphs 38-42 below, I am not satisfied that the requirements for exemption under s.42(1)(c) are met by the matter in issue in this case.)

33. However, in the ordinary case, I consider that equity would hold that conscionable conduct on the part of the QCCB and the Department would require compliance with the principles of procedural fairness. I am not satisfied from my examination of the matter in issue, and the applicant's known criminal history, that there are any circumstances which take this case outside of the ordinary.

34. In the particular circumstances of this case, I am satisfied that equity would not hold the Department and the QCCB subject to a binding obligation of confidence restraining disclosure to the applicant of the matter in issue from [Dr A's] report.

35. As requirement (c) from paragraph 13 above is not satisfied, I find that disclosure to the applicant of the matter remaining in issue from [Dr A's] report would not found an action for breach of confidence, and hence that it does not qualify for exemption from disclosure to the applicant under s.46(1) of the FOI Act.

36. Given the terms of s.46(2) of the FOI Act (as explained at paragraph 11 above), no separate consideration of s.46(1)(b) is called for. I observe, however that s.46(1)(b) requires that there be an express or implicit mutual understanding between the supplier and the recipient of confidential information that the relevant information was communicated in confidence, and here it is apparent that the Department did not share such an understanding. Nor, in my opinion, could it reasonably have done so, given the legal obligations on parole boards to accord procedural fairness to parole applicants as explained above.

Application of s.42(1)(c) of the FOI Act to the matter in issue

37. Section 42(1)(c) of the FOI Act provides:

> ***42.(1)*** *Matter is exempt matter if its disclosure could reasonably be expected to—*
>
> *...*
>
> *(c) endanger a person's life or physical safety; ...*

38. The phrase "could reasonably be expected to" imposes a requirement that there be a reasonably based expectation (that the relevant prejudicial consequences would follow as a result of disclosure of the matter in issue), namely, an expectation for which real and substantial grounds exist. A mere possibility, speculation or conjecture is not enough. (See *Re "B"* at pp.339-341, paragraphs 154-160, and the Federal Court decisions referred to there.) In this context, "expect" means to regard as likely to happen.

39. The Information Commissioner discussed the application of s.42(1)(c) of the FOI Act in *Re Murphy and Queensland Treasury* (1995) 2 QAR 744 (see, particularly, paragraphs 43-57). At paragraph 45 (page 761), the Information Commissioner stated that the question posed by s.42(1)(c) is to be examined objectively by the decision-maker authorised to determine questions of access under the FOI Act, in light of the relevant evidence: see *News Corporation Ltd v National Companies and Securities Commission* (1984) 57 ALR 550, per Fox J at p.555. At paragraph 52 (page 762) of *Re Murphy*, the Information Commissioner said that the relevant words of s.42(1)(c) require an evaluation of the expected consequences of disclosure of the particular information in issue in terms of endangering (i.e., putting in danger) a person's life or physical safety, rather than in terms of the actual occurrence of physical harm. The risk to be guarded against is that of a person's life or physical safety being endangered by disclosure of the particular information in issue.

40. In support of his case for exemption under s.42(1)(c), [Dr A] submitted, in essence, that the disclosure to the applicant of [Dr A's] opinion regarding the applicant's psychiatric condition would upset the applicant and, given the applicant's past history of violence

against women, could reasonably be expected to endanger [Dr A's] life or physical safety.

41. The sexual offences for which the applicant was convicted occurred approximately eight years ago. There is no evidence before me to suggest that, since that time, the applicant has engaged in any behaviour that could reasonably be regarded as endangering any person's life or physical safety. As far as I am aware, he has never displayed violent behaviour towards an adult male. Moreover, the applicant has previously been given access to a number of psychological assessments and reports concerning him which deal with matter not dissimilar to the matter contained in [Dr A's] report. There is nothing before me to suggest that the disclosure to the applicant of that information resulted in the endangerment of any person's life or physical safety. I am not satisfied that there is anything exceptional about the nature of the matter in issue in this review (as compared with matter that has previously been disclosed to the applicant) such as to afford a reasonable basis for expecting that its disclosure could endanger the physical safety of [Dr A]. The applicant has been aware of [Dr A's] identity as the author of the report for some time. [Dr A] has not suggested that the applicant has attempted to initiate any contact with [Dr A]. In any event, mere contact, even if it is perceived by the recipient as harassment or intimidation, is not enough to satisfy the requirements of s.42(1)(c) of the FOI Act. The focus of s.42(1)(c) is on physical safety. An expectation of harassment or intimidation will not satisfy s.42(1)(c) unless it is harassment or intimidation which endangers a person's life or physical safety.

42. I am not satisfied, on the evidence before me, that disclosure to the applicant of the matter in issue could reasonably be expected to endanger the physical safety of [Dr A] or any other person. Accordingly, I find that the matter in issue does not qualify for exemption under s.42(1)(c) of the FOI Act.

Application of s.42(1)(f) and s.42(1)(h) of the FOI Act to the matter in issue

43. Section 42(1)(f) and s.42(1)(h) of the FOI Act provide:

> ***42.(1)*** *Matter is exempt matter if its disclosure could reasonably be expected to—*
>
> ...
>
> *(f) prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety;*
>
> ...
>
> *(h) prejudice a system or procedure for the protection of persons, property or environment; …*

44. Both exemption provisions involve consideration of the test imposed by the phrase "could reasonably be expected to", and my comments at paragraph 38 above are again applicable in that regard.

Section 42(1)(f)

45. The focus of s.42(1)(f) is on the maintenance or enforcement of a lawful method or procedure for the protection of public safety. This wording contrasts with that of s.42(1)(e) which refers to prejudice to the "effectiveness" of a lawful method or procedure: see *Re Byrne and Gold Coast City Council* (1994) 1 QAR at p.484, paragraph 20. In order to find that the matter in issue in [Dr A's] report is exempt matter under s.42(1)(f), I must be satisfied that its disclosure could reasonably be expected to prejudice the maintenance or enforcement of a lawful method or procedure for the protection of public safety.

46. In support of the application of s.42(1)(f) to his report, [Dr A] submitted:

> *The second ground I rely upon is section 42(1)(f) of the Act on the basis that disclosure of the remaining sections of the report could reasonably be expected to prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety. The report was prepared at the request of the* [Queensland Community Corrections] *Board in relation to the appropriateness of* ["WRT"] *being considered for release to work, home detention and parole. … There is an identifiable method or procedure; the method or procedure is for protecting public safety; the method or procedure is lawful and disclosure of the particular matter in issue could reasonably be expected to prejudice the maintenance or enforcement of the method or procedure. If the remaining sections of the report had to be disclosed the disclosure could reasonably be expected to prejudice the maintenance or enforcement of the parole procedure.*

47. Put at its highest, [Dr A's] case for exemption under s.42(1)(f) must be that disclosure to the applicant of the matter in issue in his report could reasonably be expected to result in psychiatrists refusing to provide the QCCB with reports on prisoners, or providing less frank and candid reports. Even if I were to accept that that was a reasonable expectation (and I do not, in the particular circumstances of this case, for the reasons indicated at paragraphs 57-58 below), it would be unfortunate, but it would not amount to prejudice to the maintenance or enforcement of the parole system under s.42(1)(h). The parole system itself would remain in place, whether or not it became harder to obtain full and frank psychiatric reports on prisoners. Moreover, the system is not of its nature one that is enforceable; it is simply a procedure that is available to prisoners who are eligible to apply for early release from prison.

48. I am not satisfied that disclosure of the matter in issue could reasonably be expected to prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety, and I find that the matter in issue does not qualify for exemption under s.42(1)(f) of the FOI Act.

Section 42(1)(h)

49. Section 42(1)(h) requires me to consider whether disclosure of the matter in issue could reasonably be expected to prejudice a system or procedure for the protection of persons, property or the environment.

50. The Information Commissioner considered the meaning of "system or procedure" in s.42(1)(h) in *Re Ferrier and Queensland Police Service* (1996) 3 QAR 350 (see, especially, paragraphs 27-36). In *Re "ROSK" and Brisbane North Regional Health Authority* (1996) 3 QAR 416, the Information Commissioner decided that certain provisions contained in the *Mental Health Act 1974* Qld established a system or procedure whereby members of the community who hold a genuine belief that a person is mentally ill, and a danger to himself/herself or to others, can initiate action to protect that person or others from the apprehended danger. The Information Commissioner decided that that system answered the description of "a system or procedure for the protection of persons", within the meaning of s.42(1)(h) of the FOI Act.

51. Similarly, it is arguable that Part 4 of the *Corrective Services Act 1988* Qld, together with the relevant provisions contained in the *Corrective Services Regulations 1989* Qld, comprise a system or procedure for the protection of persons or property. The statutory framework is one under which prisoners may apply for release into the community, but I note that the first of the principles contained in "Ministerial Guidelines to the Queensland Community Corrections Board", a document issued under s.139(1) of the *Corrective Services Act*, is:

> *1.1 When considering whether a prisoner should be released from custody to a community based programme the priority for the Queensland Community Corrections Board should always be the protection of the community.*

52. While it is reasonably arguable that the regime established in Part 4 of the *Corrective Services Act* regarding the making, and determining, of applications for parole, answers the description of "a system or procedure for the protection of persons, property or the environment" under s.42(1)(h) (and perhaps also the description "a lawful procedure for the protection of public safety" under s.42(1)(f)), it is unnecessary for me to express a conclusion on that issue in this case (where the issue has not been fully argued), because, even assuming the point in
[Dr A's] favour, I am not satisfied that there is a reasonable basis for expecting disclosure of the matter in issue to have the specified prejudicial consequences.

53. As regards the application to the matter in issue of s.42(1)(h) of the FOI Act, [Dr A] submitted as follows, in his statutory declaration dated 4 June 2001:

> *The third ground upon which I rely is section 42(1)(h) of the Act in that disclosure of the remaining sections of the report could reasonably be expected to prejudice a system or procedure for the protection of persons, property or environment. It is essential for the efficacy of the parole system*

for medical practitioners not to be unduly inhibited when assessing prisoners pursuant to the system, "ROSK" and Brisbane North Regional Health Authority & Ors (18 November 1996).

54. I accept that the parole system generally would be prejudiced if parole boards were unable to make fully informed decisions regarding whether or not to release prisoners into the community because psychiatrists were declining to provide the parole boards with psychiatric assessments of prisoners, or were providing less frank and candid assessments. In its letter to this office dated 21 March 2001, the Department also expressed concern that psychiatrists would become less frank in their reports to the QCCB because of the potential for those reports to be disclosed to prisoners, resulting in prejudice to the parole system.

55. The "candour and frankness" argument raised by [Dr A] (and supported by the Department) has been upheld in various decisions of the Victorian Administrative Appeals Tribunal and the Victorian Civil and Administrative Tribunal. In *Re Fogarty and Office of Corrections; Re Fogarty and Health Department* (1989) 3 VAR 215, Judge Jones considered an application by a prisoner under the *Freedom of Information Act 1982* Vic (the Victorian FOI Act) to obtain access to documents held by the respondent agencies in connection with the prisoner's incarceration. The documents included memoranda between officers of the Office of Corrections, parole board reports, and correspondence between psychiatrists concerning the applicant. Jones J accepted the respondents' arguments that the provision of full and frank information was vital to the operations of the parole board and that disclosure to prisoners of reports supplied to the parole board would inhibit the provision of reports and the quality and value of such reports. In relation to psychiatric reports in particular, Jones J said at pp.235-236:

> *… The comments I have expressed about the importance of full and frank parole reports to the Parole Board apply as much if not more to psychiatric reports such as these. … The comments on the effect of such reports not being provided also apply with as much if not more force to psychiatric reports. It is of critical importance that the Parole Board has comprehensive, open and frank psychiatric reports. The consequences would be serious if such reports were not provided because psychiatrists were concerned that their reports could be disclosed to the prisoner concerned. Such a situation would prejudice the administration of the parole system and consequently the administration of the law.*

56. However, these remarks were made in a jurisdiction where specific legislative provision curtailed a common law requirement to disclose information adverse to the interests of an applicant for parole: see paragraph 25 above, and paragraphs 26-28 for the legal position in Queensland. Jones J was also considering the application of exemption provisions contained in the Victorian FOI Act which have no direct counterparts in the Queensland FOI Act.

57. As far as s.42(1)(h) of the Queensland FOI Act is concerned, what must be assessed are the reasonably apprehended consequences on the parole system of disclosure of the particular matter in issue. I do not accept that disclosure of the matter remaining in issue in [Dr A's] report, in the particular circumstances of this case, could reasonably be expected to cause the type of prejudice to the parole system which is contended for by the applicant. It is nearly four years since [Dr A's] report was written and the applicant's application for parole was considered by the QCCB, and more than three years have passed since the applicant was released from prison. As I noted in the context of my discussion above regarding the application of s.42(1)(c), there is no evidence before me to suggest that the applicant has ever displayed violent behaviour towards an adult male, or that he currently poses a physical threat to any person. I have already noted that there has been no suggestion that the applicant has made any attempt to contact [Dr A], despite being aware for some years of [Dr A's] identity as the author of the report in issue, and having already been given access to parts of the report (and to other psychological reports and assessments). I am unable to accept that the matter remaining in issue is of such sensitivity that its disclosure to this applicant could reasonably be expected to cause substantial concern to a substantial number of psychiatrists.

58. I am not satisfied that disclosure to the applicant of the matter remaining in issue from [Dr A's] report could reasonably be expected to cause psychiatrists to decline to provide parole boards with psychiatric assessments of prisoners, or to provide less frank and candid assessments, or to otherwise prejudice the parole system, and I find that the matter remaining in issue does not qualify for exemption under s.42(1)(h) of the FOI Act.

Application of s.44(3) of the FOI Act to the matter in issue

59. Section 44(3) of the FOI Act provides:

> ***44.(3)*** *If—*
>
> *(a) an application is made to an agency or Minister for access to a document of the agency or an official document of the Minister that contains information of a medical or psychiatric nature concerning the person making the application; and*
>
> *(b) it appears to the principal officer of the agency or the Minister that the disclosure of the information to the person might be prejudicial to the physical or mental health or wellbeing of the person;*
>
> *the principal officer or Minister may direct that access to the document is not to be given to the person but is to be given instead to a qualified medical practitioner nominated by the person and approved by the principal officer or Minister.*

60. In his statutory declaration dated 4 June 2001, [Dr A] submitted:

The fifth alternative ground upon which I rely to support my contention that the remaining material in my report should not be disclosed to ["WRT"] *is pursuant to section 44(3) of the Act. The remaining sections of the report relate to my assessment of* ["WRT's"] *psychiatric condition and disclosure of that material might be prejudicial to* ["WRT's"] *physical or mental health or well being. If it is determined that the remaining sections of my report are to be disclosed then pursuant to section 44(3) of the Act the Principal Officer should direct that access to the remaining sections of the report be given only to a qualified medical practitioner for* ["WRT's"] *continuing medical treatment and not for the purpose of disclosure to* ["WRT"].

61. Under s.88(1) of the FOI Act, the Information Commissioner has the power to decide any matter in relation to an application for review that could have been decided by an agency, and the decision of the Information Commissioner in that regard has the same effect as a decision of the agency or Minister. Accordingly, I have the power, as an authorised delegate of the Information Commissioner, to decide whether or not information of a medical or psychiatric nature about the applicant should be disclosed in accordance with s.44(3) of the FOI Act. In *Re "S" and the Medical Board of Queensland* (1994) 2 QAR 249, the Information Commissioner endorsed the following approach to the application of s.44(3):

> *12. The terms of s.44(3) of the FOI Act are almost identical to the terms in which s.41(3) of the* Freedom of Information Act 1982 *Cth (the Commonwealth FOI Act) was framed, prior to its amendment by the* Freedom of Information Amendment Act 1991 *Cth. In its former terms, s.41(3) of the Commonwealth FOI Act was considered by Deputy President Smart QC (now His Honour Mr Justice Smart of the New South Wales Supreme Court) in the decision of the Commonwealth Administrative Appeals Tribunal in* Re K and Director-General of Social Security *(1984) 6 ALD 354. Deputy President Smart observed (at pp.356-7) that the provision raised these matters for consideration:*
>
> 1. Does the document in issue contain information of a medical or psychiatric nature concerning the applicant?
>
> 2. If the information were disclosed direct to the applicant is there a real and tangible possibility as distinct from a fanciful, remote or far-fetched possibility of prejudice to the physical or mental health or well-being of the applicant? This is what the words "might be prejudicial" mean. Well-being has a wide import and a phrase "physical or mental health or well-being" indicates that a broad approach is to be taken. The general health, welfare and good of the person of the person is to be considered.

3. If there is a real and tangible possibility of such prejudice the decision-maker is called upon to exercise his discretion whether to direct that access which would otherwise be given to the applicant should be given to a medical practitioner nominated by him. In the exercise of such discretion the decision-maker should consider the nature and extent of any real and tangible possible prejudice and the likelihood of it occurring. A number of situations could arise:

   (a) The possible prejudice may be small and not such as to justify giving a direction.

   (b) The possible prejudice may be sufficient to be of concern, but not major concern. In such a case if the likelihood of such prejudice eventuating was small, the decision-maker may not give a direction.

   (c) The possible prejudice, if it eventuated, may be great but the likelihood of it occurring may be small. In such a case the gravity of possible consequences might prove decisive in exercising the discretion whether to give a direction.

   In the exercise of his discretion the decision-maker has to carefully consider all the circumstances and balance the relevant factors.

13. I consider that this passage should be accepted and applied in Queensland as correctly stating the general approach to be taken by decision-makers when considering the application of s.44(3) of the FOI Act.

62. The matter in issue is clearly information of a medical or psychiatric nature about the applicant. However, [Dr A] has merely asserted that "disclosure of that material might be prejudicial to ["WRT's"] physical or mental health or well-being". He has not attempted to explain how the disclosure of the matter in issue might have such an effect, or to explain the nature or seriousness of the possible prejudice, or to assess the degree of likelihood of such prejudice occurring. From my own examination of the matter in issue, I am not satisfied that the possibility of its disclosure to the applicant having a prejudicial effect on the applicant's health or wellbeing is sufficiently high, or that any prejudicial effect would be sufficiently serious, as to warrant a decision that access should be given to a qualified medical practitioner in accordance with s.44(3). Accordingly, I decline to exercise the discretion contained in s.44(3) so as to direct that access to the matter in issue be given to a qualified medical practitioner nominated by the applicant.

DECISION

63. I set aside the decision under review (being a deemed decision by the Department of Corrective Services to refuse access to the matter in issue). In substitution for it, I decide that those parts of [Dr A's] report dated 4 July 1998 which remain in issue do not qualify for exemption from disclosure to the applicant under the FOI Act, and that the applicant is therefore entitled to be given access to them under the FOI Act.