OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 09/2001
Application S 320/00

Participants:

JENNIFER KAY CHAND
as agent for
DR SUKHI CHAND
Applicant

MEDICAL BOARD OF QUEENSLAND
Respondent

DR ADAM CANNON
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - matter in issue comprising a response by a medical practitioner to a complaint lodged with the Medical Board of Queensland - whether response was communicated in confidence as against the complainant - application of s.46(1)(a) and s.46(1)(b) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.46(1)(a), s.46(1)(b), s.51, s.78, s.90
Freedom of Information Act 1989 ACT s.40(1)(d)
Freedom of Information Act 1991 SA s.11(a), s.11(c)
Medical Act 1939 Qld
Powers of Attorney Act 1998 Qld s.33(4), s.33(5), s.81, Sch. 2 cl. 2

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
B and Medical Board of the ACT, Re (1994) 33 ALD 295
Cardwell Properties Pty Ltd & Williams v Department of the Premier, Economic and Trade Development, Re (1995) 2 QAR 671
Commonwealth of Australia v Cockatoo Dockyard Pty Ltd (1995) 36 NSWLR 662
Esso Australia Resources Ltd & Ors v Plowman & Ors (1995) 183 CLR 10
G v Day [1982] 1 NSWLR 25
Hamilton and Queensland Police Service, Re (1994) 2 QAR 182
McCann and Queensland Police Service, Re (1997) 4 QAR 30
Moore v The Registrar of the Medical Board of South Australia [2001] SADC 106

Ryder v Booth [1985] VR 869

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"S" and Medical Board of Queensland, Re (1994) 2 QAR 249
Smith Kline and French Laboratories (Aust) Limited & Ors v Secretary, Department of Community Services and Health (1991) 28 FCR 291
Sutherland and Brisbane North Regional Health Authority, Re (1995) 2 QAR 449
Villanueva and Queensland Nursing Council, Re (2000) 5 QAR 363

DECISION

I decide to vary the decision under review (being the decision made on 28 November 2000 by Mr J Greenaway on behalf of the respondent) by finding that:

(a) the final paragraph of Dr Cannon's report to the respondent dated 10 April 2000 is exempt matter under s.46(1)(a) of the *Freedom of Information Act 1992* Qld; and

(b) the remainder of that report does not qualify for exemption from disclosure to the applicant under the *Freedom of Information Act 1992* Qld, and the applicant is therefore entitled to be given access to it under that Act.

Date of decision: 30 November 2001

.....
G J SORENSEN
DEPUTY INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the decision by the Medical Board of Queensland (the Board) to refuse her access to a report provided to the Board by Dr Adam Cannon, a Consultant Cardiologist, in response to a complaint about Dr Cannon's treatment of Dr Sukhi Chand. The Board decided that Dr Cannon's report was exempt matter under s.46(1)(b) (matter communicated in confidence) of the *Freedom of Information Act 1992* Qld (the FOI Act).

2. By letter dated 14 September 2000, Messrs Murphy Schmidt, solicitors for the applicant, requested access, under the FOI Act, to all reports obtained by the Board during its investigation of a complaint about medical treatment received by Dr Sukhi Chand. Under s.51 of the FOI Act, the Board consulted with several medical practitioners who had provided reports to the Board in the course of the Board's investigation of the complaint. Dr Cannon and another medical practitioner, Dr Edmeades, objected to the disclosure to the applicant of their reports. Mr Posner of the Board decided that those two reports were exempt from disclosure under s.46(1)(b) of the FOI Act. The applicant was given access to reports by four other medical practitioners who did not object to disclosure.

3. By letter dated 17 November 2000, the applicant's solicitors applied for internal review of Mr Posner's decision. Mr Greenaway conducted the internal review on behalf of the Board, and made a decision, on 28 November 2000, affirming Mr Posner's decision.

4. By letter dated 15 December 2000, the applicant's solicitors applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Mr Greenaway's decision.

External review process

5. Copies of the two reports in issue were obtained and examined.

6. At the outset of the review, an issue arose as to whether the relevant FOI access application (made to the Board by Murphy Schmidt, solicitors) was made on instructions from Mrs Jennifer Chand as the client in her own right, or as agent for her husband, or both. The issue arose because the Board's initial and internal review decisions both treated Mrs Chand as the applicant for access, and the conclusions reached were based in part on the respective decision-makers' understanding that the matter in issue comprised medical information about a person (Dr Sukhi Chand) other than the access applicant. This occurred despite the fact that each of the following letters to the Board from Murphy Schmidt referred (in their headers) to Dr Sukhi Chand as the client for whom Murphy Schmidt was acting:

   (a) a letter dated 23 June 2000 foreshadowing an FOI access application;

   (b) a letter dated 25 August 2000 making an FOI access application;

   (c) a letter dated 11 September 2000 forwarding a requested $31 application fee; and

   (d) a letter dated 17 November 2000 applying for internal review of Mr Posner's initial decision on behalf of the Board (the body of this letter also said that the application for internal review was made "on behalf of our client, Dr Sukhi Chand").

7. The application for external review was also expressed, in its first paragraph, as being lodged "on behalf of our client, Dr Sukhi Chand". However, page 2 of that application contained the following statement: "We have made application on behalf of our client, Mrs Chand, as our client, Dr Chand, Mrs Chand's husband, is incapable of making the application".

8. When I sought clarification from Murphy Schmidt, I was provided with a copy of an Enduring Power of Attorney signed by Dr Sukhi Chand on 21 October 1998 giving a power of attorney, for both financial and personal/health matters, to Jennifer Kay Chand. In a covering letter dated 7 February 2001, Murphy Schmidt informed me that:

> *The Enduring Power of Attorney has not been revoked.*
>
> *The Enduring Power of Attorney allows our client, Mrs Chand, to instruct us on behalf of her husband, which includes instructing us to make FOI applications on behalf of her husband.*
>
> *With respect to the FOI application to the* [Board] *and subsequent applications for review, we acted for Mrs Chand on the basis that she, by virtue of the Enduring Power of Attorney, instructed us as agent for her husband, Dr Chand. Therefore, Dr Chand, as the Principal, is the FOI applicant for both the original application and the subsequent applications for review.*

9. I consider that Murphy Schmidt is the best source of evidence as to the instructions it received in those matters, and that none of the other participants is in a position to contradict that evidence. I also note that the correspondence from Murphy Schmidt to the Board (which is referred to in paragraph 6 above) is consistent with the position explained by Murphy Schmidt as set out above. I therefore accept Murphy Schmidt's evidence as to the nature of the instructions it received with respect to the making of the relevant FOI access application to the Board, and the subsequent applications for internal review and external review. Murphy Schmidt also provided me with copies of medical records and reports in respect of Dr Sukhi Chand, which have satisfied me that, at the relevant time, Mrs Chand was entitled to exercise her power as Attorney in personal/health matters by instructing Murphy Schmidt to make the aforementioned applications on behalf of Dr Sukhi Chand (*cf.* s.33(4) and (5), and cl. 2 of Schedule 2, of the *Powers of Attorney Act 1998* Qld).Relevantly for the purposes of this review, I note that s.81 of the *Powers of Attorney Act* provides:

> ***81.(1)*** *An attorney has a right to all the information that the principal would have been entitled to if the principal had capacity and that is necessary to make, for the principal, informed decisions about anything the attorney is authorised to do.*
>
> ***(2)*** *A person who has custody or control of the information must disclose the information to the attorney on request.*
>
> ***(3)*** *This section overrides—*
>
> *(a) any restriction, in an Act or the common law, about the disclosure or confidentiality of information; and*
>
> *(b) for an attorney under an enduring power of attorney - any claim of confidentiality or privilege, including a claim based on legal professional privilege; …*

10. The net effect of s.81(1) and s.81(3) for present purposes is that, if Dr Sukhi Chand would have been entitled to access the matter in issue under the FOI Act, no objection to disclosure can be taken on the basis that the information is confidential as against Mrs Chand.

11. By letters dated 29 January 2001, I wrote to Dr Edmeades and Dr Cannon to advise them of the review, and to ascertain whether or not they continued to object to disclosure of their reports. Both informed me that they maintained their objections to disclosure on the basis that their reports were provided to the Board in confidence. Both were granted status as participants in the review under s.78 of the FOI Act.

12. By letter dated 12 June 2001, Assistant Information Commissioner Moss communicated to Dr Cannon her preliminary view that his report did not qualify for exemption under s.46(1) of the FOI Act. By letter dated 19 June 2001, Assistant Information Commissioner Moss communicated a similar preliminary view to Dr Edmeades. Dr Cannon responded by advising that he did not accept the Assistant Information Commissioner's preliminary view and continued to claim that his report was exempt from disclosure under s.46(1) of the FOI Act. Dr Edmeades responded by advising that, although she had some misgivings, she did not wish to contest the preliminary view communicated to her, and that she therefore withdrew her objection to the disclosure to the applicant of her report.

13. The Board was advised of these developments and was requested to confirm whether or not it maintained its claim for exemption in respect of the two reports. It responded by advising that it withdrew its claim for exemption in respect of Dr Edmeades' report, but maintained a claim for exemption in respect of parts of Dr Cannon's report. The applicant was given access to Dr Edmeades' report, which is no longer in issue in this review. However, given the continued objection to disclosure of Dr Cannon's report by Dr Cannon and the Board, it is necessary for me to determine whether or not Dr Cannon's report dated 10 April 2000 qualifies for exemption, in whole or in part, under s.46(1) of the FOI Act. Although the Board has relied only on s.46(1)(b), various statements in Dr Cannon's letters to the Board and to my office indicate that he also places reliance on s.46(1)(a) of the FOI Act.

Application of s.46(1) of the FOI Act to Dr Cannon's report

14. 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.*

Section 46(1)(a)

15. The test for exemption under s.46(1)(a) must 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 Cannon, as author of the report in issue, would have standing to enforce an obligation of confidence claimed to bind the Board not to disclose the contents of his report.

16. At paragraph 43 of *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, 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 Cannon might be entitled to rely upon a contractual obligation of confidence in respect of his report. 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:

(a) 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);

(b) 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);

(c) 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);

(d) 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

(e) 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)

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

Requirement (b)

18. It is clear that a significant portion of Dr Cannon's report dated 10 April 2000 has already been disclosed to the applicant. The Board wrote to the applicant on 17 October 2000 stating that it had finalised its investigation of the complaint against Dr Cannon, and setting out findings in support of its conclusion that, on the evidence available to the Board, there had been no misconduct in a professional respect by Dr Cannon. In explaining its findings, the Board referred in some detail to information provided by Dr Cannon in his report dated 10 April 2000, responding to the complaint made against him.

19. The Board has withdrawn its claim for exemption in respect of those parts of Dr Cannon's report which comprise information that the Board disclosed to the applicant in its letter dated 17 October 2000. However, the Board continues to claim exemption from disclosure in respect of the balance of Dr Cannon's report. With respect to the undisclosed segments of information from Dr Cannon's report, I am satisfied that they are not known to the applicant, and that they have a sufficient degree of secrecy/inaccessibility to satisfy requirement (b) set out in paragraph 16 above.

20. In response to the Assistant Information Commissioner's preliminary view that the bulk of Dr Cannon's report did not have the requisite degree of secrecy/inaccessibility, as against the applicant, to satisfy requirement (b), Dr Cannon argued that the Board had not sought his permission to disclose parts of his report to the applicant and that the Board had therefore "breached [his] requirement of confidentiality".

21. The information in Dr Cannon's report which has been disclosed to the applicant through the Board's letter dated 17 October 2000 can no longer be considered confidential information *vis-à-vis* the applicant. In certain circumstances, however, that might not necessarily disqualify that information from protection in equity. Assuming that circumstances were such that the grant of an equitable remedy would not be futile, a defendant would not ordinarily be permitted to avoid an equitable obligation where the only asserted ground for avoidance arose by virtue of the defendant's own conduct in breach of the equitable obligation. The crucial factor is whether or not the disclosure by the Board to the applicant, through the Board's letter dated 17 October 2000, in itself constituted a breach of an equitable obligation of confidence owed to Dr Cannon. If it did, equity might not permit that breach to be compounded by a further disclosure of the information in the form of a copy of Dr Cannon's report: *cf. G v Day* [1982] 1 NSWLR

25, where the Supreme Court of New South Wales was prepared to restrain the publication of confidential information (the identity of an informant in a sensitive police investigation) notwithstanding a prior unauthorised publication of that information (by way of a brief mention in a television news report).

22. On the other hand, if, having regard to all the relevant circumstances, the disclosure by the Board was not an unconscionable use of information claimed to have been communicated in confidence, then the fact that the information had previously been communicated to the applicant (in circumstances involving no breach of an equitable obligation of confidence) would mean that no protection was available in equity from disclosure to the applicant of the same information in the form of a copy of Dr Cannon's report. For practical purposes then, the application of requirement (c) from paragraph 16 above can be treated as determinative, in the circumstances of this case, of whether or not both the undisclosed, and the previously disclosed, information from Dr Cannon's report qualifies for exemption under s.46(1)(a).

Requirement (c)

23. I have examined a copy of a letter dated 15 March 2000 to Dr Cannon from Dr Rachel Darken of the Board, forwarding a copy of the complaint received by the Board and requesting that Dr Cannon provide a report addressing the matters raised in the letter of complaint. Neither that letter, nor a brochure attached to it titled "Complaints About Doctors", gave any indication that the Board would accord confidential treatment to the report requested from Dr Cannon. In response to a request from a member of my staff, Mr Posner of the Board confirmed (in a letter to me dated 24 May 2001) that he had not been able to locate any record in Dr Cannon's file of any telephone or written communication between Dr Darken and Dr Cannon which indicated that a promise of confidentiality was given by Dr Darken for information provided by Dr Cannon to the Board.

24. However, Dr Cannon commenced his report dated 10 April 2000 with the following statement (which, in the report, was in capital letters with underlining): *This information is provided in confidence to the Medical Board for the sole purpose of assisting the Board to resolve this complaint. This is not to be provided to a third party.*

25. I have difficulty in reconciling Dr Cannon's statement that his report was provided to assist the Board to resolve the complaint made against him, with his present claim that he intended his report would be kept confidential from the complainant. That means, in effect, that Dr Cannon could really only have contemplated that his report would be used by the Board to resolve the complaint in his favour, without reference to the complainant.

26. Bearing in mind the legal context in which the Board deals with complaints from members of the public against medical practitioners, I consider that a fair and objective reading of Dr Cannon's stipulation would not have excluded the complainant from the parties to whom Dr Cannon's report might be disclosed for the purpose of assisting the Board to resolve the complaint. I do not consider that the complainant can properly be regarded as a third party to the complaint process. The parties to the complaint process were the complainant and Dr Cannon, with the Board as a neutral investigator/adjudicator.

27. Nevertheless, in his response to a s.51 consultation letter from the Board, and in his submissions to my office, Dr Cannon asserted that he intended to use "third party" to refer to any party other than himself and the Board, and that, in prefacing his report with the statement quoted above, Dr Cannon's intention was to purport to impose a requirement on the Board to keep his report confidential from the applicant, as well as from the world at large.

28. 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.

29. In assessing the relevant circumstances attending the communication to the Board of Dr Cannon's report dated 10 April 2000, 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 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. …*

30. Further to paragraph 43 of *Re Hamilton* (quoted above), I note that, since *Re Hamilton* was decided, the High Court of Australia has held that public interest considerations (relating to the public's legitimate interest in obtaining information about the affairs of government) may affect the question of whether enforceable obligations of confidence should be imposed on government agencies, in respect of information relevant to the performance of their functions, that has purportedly been supplied in confidence by parties outside government: see *Esso Australia Resources Ltd & Ors v Plowman & Ors* (1995) 183 CLR 10; *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662; *Re Cardwell Properties Pty Ltd & Williams v Department of the Premier, Economic and Trade Development* (1995) 2 QAR 671 at pp.693-698, paragraphs 51-60.

31. I consider that the following statement by the Information Commissioner in *Re "B"* (at p.319, paragraph 93) is also relevant to the circumstances attending the communication to the Board of Dr Cannon's report dated 10 April 2000:

> *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.*

32. In his written submission dated 9 June 2001, Dr Cannon made the following contentions:

> *The Medical Board did not seek my permission to release the content of my report to the complainant, Mrs Chand. In failing to do so, the Medical Board has breached my requirement of confidentiality. The Medical Board did not have to provide a substantive report to Mrs Chand by way of what you say is "procedural fairness". The Medical Board could simply have written to Mrs Chand to state that her complaint had been investigated and it was found there was no case to answer on my part.*
>
> *There is no public interest involved in the release of a copy of my report to Mrs Chand.*
>
> *I believe that Mrs Chand has always been motivated to pursue litigation. She has sought to orchestrate a situation to obtain a copy of a report written by me about the circumstances of my treatment of her husband so that she can then use that against me in litigation. I note that she has always had solicitors acting on her behalf.*

33. I do not accept Dr Cannon's contention about procedural fairness. In *Re Villanueva and Queensland Nursing Council* (2000) 5 QAR 363 at pp.389-390 (paragraphs 93-97), the Information Commissioner made the following observations about the complaints investigation processes of the Queensland Nursing Council (the QNC):

> *93. … 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). …*

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.*

I consider that the observations quoted above are equally applicable to the complaint-handling procedures of the Board, as the regulatory authority for medical practitioners in Queensland.

34. Similar views have been expressed by FOI review tribunals in other Australian jurisdictions. In *Re B and Medical Board of the ACT* (1994) 33 ALD 295, the President of the Australian Capital Territory Administrative Appeals Tribunal, Professor Lindsay Curtis, considered whether a complainant could obtain access under the *Freedom of Information Act 1989* ACT to a report requested by the ACT Medical Board from a medical practitioner, in response to the complaint against him, in circumstances where (unlike the present case) the ACT Medical Board had itself given an assurance of confidential treatment of the report. The Tribunal held that the ACT Board's blanket assurance of confidentiality exceeded what was reasonably necessary for the performance of its functions, and decided that parts only of the medical practitioner's report qualified for exemption from disclosure to the complainant. The Tribunal's decision turned on the application of an exemption provision (s.40(1)(d)) which has no counterpart in the Queensland FOI Act, but the following passages are indicative of Professor Curtis' attitude to the entitlements of complainants to have information about the handling of their complaints:

- *No doubt the board prefers, as a matter of good administration and of maintaining good relations with the medical profession, to seek the co-operation of doctors and others rather than use its compulsory powers, and this is a proper attitude to take. But the board must also have regard to the principles of procedural fairness, which require that a party to proceedings before the board is entitled, in the absence of some overriding consideration, to know what matters are adverse to him or her and which are being considered by the board.*
  (from p.299, paragraph 11)

- *In the present case Mr Bayne argued that it was in the public interest that complaints to the Medical Board should, so far as practicable, be resolved without them going to the stage of a formal inquiry, and that resolution of a dispute between patient and doctor would be facilitated by ensuring that the complainant had access to all of the material which the board proposed to consider in deciding whether to take formal action on the complaint. He also submitted that it was in the public interest to know that the board had properly dealt with the complaint. …*

  As to the first of these matters said to be matters of public interest, what was put by Mr Bayne had substantial force. It may be a very good reason why the board should be forthcoming in the material it passes on to complainants and, as is shown by the evidence of Dr McIntosh, is in any event substantially in accord with what the board does in practice.
  (from p.302, paragraphs 20-21)

- *… in her capacity as complainant to the Medical Board, B has a considerable interest in knowing what material the doctor has put before the board and which will be considered by the board in dealing with her complaint.*
  (from p.304, paragraph 26)

35. In *Moore v The Registrar of the Medical Board of South Australia* [2001] SADC 106, the applicant sought access, under the *Freedom of Information Act 1991* SA (the SA FOI Act), to the transcript of a hearing before the Medical Board of South Australia which arose from the applicant's complaint against a medical practitioner. The transcript qualified for exemption under s.11(a) and s.11(c) of the SA FOI Act, which have no counterparts in the Queensland FOI Act. However, the nature of the review jurisdiction possessed by the South Australian District Court in FOI matters enabled the Court, "for cogent reasons", to depart from the respondent's decision to claim the exemption. Smith J decided that the part of the transcript which related to Mrs Moore's complaints should be disclosed to her, notwithstanding its exempt status, and made the following observations:

- *As far as Mrs Moore's complaint was concerned - and I regard it as, in substance,* her *complaint, though it was ultimately prosecuted by the Registrar - she should not have been precluded from attending* [the hearing by the Medical Board of the complaint], *nor from knowing in detail and within a reasonable time, the outcome of her complaint. If attending the hearing presented problems in relation to other patient complaints, given the need to preserve patient confidentiality, then appropriate arrangements could and should have been made for separating at least the evidence if not the complaints. I think it was arbitrary of the Board to preclude her.*
  (from p.12, paragraph 33)

- *… in this case, the appellant, who was the effective complainant, has a compelling interest in what was said to the Board in response to her complaint.*
  (from p.14, paragraph 46)

36. In response to an argument by the QNC that was similar to the argument put by Dr Cannon in the third and fourth sentences quoted from his written submission at paragraph 32 above, the Information Commissioner made the following remarks in *Re Villanueva* (at p.391, paragraph 99):

> *I consider that the QNC's comments … 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.*

37. Again, I consider that these remarks are equally applicable to the Board. I have already referred to the fact that the Board wrote to the applicant on 17 October 2000 explaining the outcome of its investigation, and, for that purpose, referring to information supplied in Dr Cannon's report. I consider that equity would not have imposed an obligation of confidence restraining the Board

from making use, in that way, of information supplied in Dr Cannon's report, notwithstanding the stipulation for confidential treatment made by Dr Cannon at the start of his report.

38. Indeed, I consider that equity would not ordinarily impose an obligation of confidence restraining the Board from disclosing to a complainant any information (especially factual information, but also expressions of medical opinion) contained in a response from a medical practitioner who is the subject of a complaint to the Board, which is information that addresses the substance and details of the relevant complaint.

39. I say "ordinarily" because there may well be exceptions in appropriate cases; for example, if disclosure would be against the best interests of the complainant's continued health-care treatment (*cf. Re Sutherland and Brisbane North Regional Health Authority* (1995) 2 QAR 449 at pp.457-458, paragraphs 18-21), although the possibility of disclosure in accordance with s.44(3) of the FOI Act should be considered (see *Re "S" and Medical Board of Queensland* (1994) 2 QAR 249); or where disclosure (without the patient's express or implied consent) of medical information about a person other than the complainant would infringe the patient's interests in privacy and confidentiality. (I note that both Dr Cannon and the Board raised an issue similar to the last-mentioned one, but I consider that it has no substance, in the circumstances of the present case, for the reasons explained in paragraphs 9-10 above).

40. No such exceptional circumstances exist in the present case. The first paragraph of Dr Cannon's report identifies the two particular issues which the Board requested him to address, and most of the balance of the report addresses those two issues. (The report does contain some extraneous matter, which I will discuss below.)

41. While Dr Cannon might reasonably have expected that the Board would treat his report in confidence as against the world at large, I consider that his stipulation that a report responding to particular issues of complaint against him be treated in confidence, as against the complainant, was not a reasonable stipulation, having regard to the functions of the Board and the uses it might properly wish to make of the information in Dr Cannon's report in discharging its responsibility to deal fairly and properly with the complaint. I consider that equity would not treat Dr Cannon's stipulation as giving rise to an obligation of confidence binding on the Board, in respect of those segments of the report which address (including giving relevant background information) the particular issues of complaint to which Dr Cannon was asked to respond.

42. However, different considerations might apply to the information contained in Dr Cannon's report which has not already been disclosed to the applicant, and which is not responsive to the particular issues of complaint against him. Unless there are other sound reasons for equity not to bind the Board with an obligation of confidence, that peripheral information is capable of being the subject of an obligation of confidence based on Dr Cannon's stipulation for confidential treatment, and the Board's apparent acceptance (given the position it has taken in this review) that that information should be treated in confidence.

43. While it is clear that the Board considered it necessary or appropriate to disclose to the complainant some of the information contained in Dr Cannon's report, and to that extent did not accept Dr Cannon's stipulation for confidential treatment, the Board claims that the information in Dr Cannon's report which was not disclosed to the applicant in the Board's letter dated 17 October 2000, should be treated in confidence as against the applicant.

44. I have reviewed the information contained in Dr Cannon's report which has not been disclosed to the applicant. In my view, the only material which can properly be considered to be irrelevant or non-responsive to the particular issues of complaint against Dr Cannon, or unnecessary to a proper appreciation of Dr Cannon's response to them, is that contained in the final paragraph of the report. I do not consider that equity would bind the Board with an obligation of confidence restraining disclosure to the applicant of any part of the balance of Dr Cannon's report. However, I consider that it was reasonable for Dr Cannon to have expected that the Board would not take the last paragraph of his report into account, or rely upon it, in conducting its investigation, and therefore would have no need to disclose that information to the applicant for the purposes of its investigation, or in order to account to the applicant for the outcome of its investigation. The nature of that information, and the circumstances in which it was communicated to the Board, are such that I am satisfied that the Board was fixed with an equitable obligation of confidence in respect of that information.

45. Accordingly, I find that requirement (c) to found an action in equity for breach of confidence is satisfied with respect to the final paragraph of Dr Cannon's report dated 10 April 2000. However, I find that requirement (c) is not satisfied with respect to the balance of Dr Cannon's report, and hence that it cannot qualify for exemption under s.46(1)(a) of the FOI Act.

Requirements (d) and (e)

46. As to requirement (d) for exemption under s.46(1)(a), it is clear that Dr Cannon objects to the disclosure to the applicant of his report, and I am therefore satisfied that disclosure to the applicant of the last paragraph of the report would constitute an unauthorised use. In respect of requirement (e), I am satisfied that disclosure to the applicant of the information contained in the last paragraph of Dr Cannon's report would occasion detriment to Dr Cannon of one or more of the kinds mentioned in paragraph 111 of *Re "B"*.

Conclusion

47. I find that the only information contained in Dr Cannon's report dated 10 April 2000 which satisfies all five of the cumulative requirements to found an action in equity for breach of confidence (thereby qualifying for exemption under s.46(1)(a) of the FOI Act) is the final paragraph of the report. I find that the remainder of Dr Cannon's report does not qualify for exemption under s.46(1)(a) of the FOI Act.

Section 46(1)(b)

48. Matter will be exempt under s.46(1)(b) of the FOI Act if:

(a) it consists of information of a confidential nature;
(b) it was communicated in confidence;
(c) its disclosure could reasonably be expected to prejudice the future supply of such information; and
(d) the weight of the public interest considerations favouring non-disclosure equals or outweighs that of the public interest considerations favouring disclosure.
(See *Re "B"* at pp.337-341; paragraphs 144-161.)

49. Given my finding at paragraph 47 above, it is not necessary for me to consider the application of s.46(1)(b) of the FOI Act to the final paragraph of Dr Cannon's report.

50. As regards the remainder of Dr Cannon's report, the first two requirements for exemption under s.46(1)(b) are similar in nature to requirements (b) and (c) considered at paragraphs 18-45 above in relation to s.46(1)(a). The first requirement for exemption under s.46(1)(b) is clearly not satisfied in respect of the information in Dr Cannon's report which has been disclosed to the applicant in the Board's letter dated 17 October 2000.

51. As to the second requirement for exemption under s.46(1)(b), the Information Commissioner explained the meaning of the phrase "communicated in confidence", at 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.*

52. 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).

53. Dr Cannon expressly conveyed his desire for confidential treatment of his report, but the Board acknowledges that it was not accepted by the Board, in respect of the information that the Board chose to disclose in its letter to the complainant dated 17 October 2000. Even where a mutual understanding as to confidential treatment of certain information exists between the supplier and the recipient of the information, there will ordinarily be issues as to its scope and whether there are any express or implicit conditions or exceptions. In *Re McCann* at pp.53-54, paragraph 58, the Information Commissioner said:

> *I consider that there are three main kinds of limited disclosure which, in the ordinary case, ought reasonably to be in the contemplation of parties to the communication of information for the purposes of an investigation relating to law enforcement. Unless excluded, or modified in their application, by express agreement or an implicit understanding based on circumstances similar to those referred to in the preceding paragraph, I consider that the following should ordinarily be regarded as implicitly authorised exceptions to any express or implicit mutual understanding that the identity of a source of information, and/or the information provided by the source, are to be treated in confidence so far as practicable (consistent with their use for the purpose for which the information was provided) -*

> *(a) where selective disclosure is considered necessary for the more effective conduct of relevant investigations …;*
>
> …
>
> *(c) where selective disclosure is considered necessary -*
>
> *(i) for keeping a complainant … informed of the progress of the investigation; and*
>
> *(ii) where the investigation results in no formal action being taken, for giving an account of the investigation, and the reasons for its outcome, to a complainant … .*

54. I consider that exceptions (a) and (c) above were relevant and operative in the circumstances of this case, so as to permit the Board to disclose to the applicant any of the information in Dr Cannon's report which addressed the particular issues of complaint against him. I therefore find that, at least as against the applicant, the information contained in Dr Cannon's report (except for the last paragraph) was not "communicated in confidence", and that information does not qualify for exemption under s.46(1)(b) of the FOI Act.

55. As regards the third requirement for exemption under s.46(1)(b), Dr Cannon said in a letter to the Board dated 16 October 2000:

> *If a decision is made to disclose my report, I will not co-operate with the Board in any future investigations and I will make it known to my colleagues that there is no security of information provided in confidence to the Board. This will no doubt increase the Board's costs, prejudice the future supply of information and the time necessary to resolve issues before the Board.*

56. The third requirement for exemption under s.46(1)(b) largely turns on the test imported by the phrase "*could reasonably be expected to*", which requires a reasonably based expectation, i.e., an expectation for which real and substantial grounds exist, that disclosure of the particular matter in issue could have the specified prejudicial consequences. A mere possibility, speculation or conjecture is not enough. In this context "*expect*" means to regard as likely to happen. (See *Re "B"* at pp.339-341, paragraphs 154-160, and the Federal Court decisions referred to there.)

57. In *Re "B"*, the Information Commissioner said (at p.341, paragraph 161):

> *Where persons are under an obligation to continue to supply such ... information (e.g. for government employees, as an incident of their employment; or where there is a statutory power to compel the disclosure of the information) or persons must disclose information if they wish to obtain some benefit from the government (or they would otherwise be disadvantaged by withholding information) then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information. In my opinion, the test is not to be applied by reference to whether the particular [supplier] whose ... information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of the sources available or likely to be available to an agency.* [See also the comments to

like effect made by Young CJ of the Supreme Court of Victoria in *Ryder v Booth* [1985] VR 869 at p.872.]

[my underlining]

58. In letters to the Board and Dr Cannon, Assistant Information Commissioner Moss expressed the view, in accordance with the principles stated above, that, because the Board has powers under the *Medical Act 1939* Qld to compel persons to provide information for the purposes of an investigation, disclosure of Dr Cannon's report could not reasonably be expected to prejudice the future supply of like information. In its response, the Board took issue with that proposition. It argued that the more the Board is reliant upon its compulsory powers to obtain information from medical practitioners, the less helpful and informative the medical practitioners will be in their responses to the Board. In effect, the quality of the information supplied to the Board will be prejudiced.

59. It may be that, in a small number of cases, medical practitioners who are compelled to answer a complaint may choose to provide brief, factually based responses, without further elaboration or explanation, which may, in turn, add difficulty to the Board's task in investigating some complaints. But I do not accept that that is likely to occur in a substantial number of cases. In my view, it is reasonable to expect that practitioners under investigation by the Board would be willing to cooperate with the investigation, and provide all relevant information, in order to take the opportunity to exculpate themselves. I consider that there is abundant incentive for the voluntary supply of relevant information in such cases, and that most medical practitioners would be motivated by the wish to explain matters to the investigator, and to avoid disciplinary action.

60. In this case, it seems clear that Dr Cannon considered that he had done nothing wrong in his treatment of Dr Sukhi Chand, and he therefore chose to respond to the applicant's complaint so as to take the opportunity to explain to the Board his version of events. I consider it reasonable to expect that that is the course of action that would commend itself to most medical practitioners. I am therefore not satisfied that disclosure to the applicant of Dr Cannon's report could reasonably be expected to prejudice the future supply to the Board of like information from a substantial number of medical practitioners.

61. I find that the first requirement for exemption under s.46(1)(b) is satisfied in respect of part only of the matter remaining in issue (see paragraph 50 above), and that the second and third requirements for exemption under s.46(1)(b) are not satisfied in respect of any of the matter remaining in issue. Accordingly, there is no need to discuss the application to the matter in issue of the public interest balancing test incorporated in s.46(1)(b) (although I have referred in these reasons for decision to public interest considerations which favour disclosure to the applicant). I find that the balance of Dr Cannon's report (i.e., apart from the last paragraph of the report) does not qualify for exemption under s.46(1)(b) of the FOI Act.

Conclusion

62. For the foregoing reasons, I decide to vary the decision under review (being the decision made on 28 November 2000 by Mr J Greenaway on behalf of the Board) by finding that:

(a) the final paragraph of Dr Cannon's report dated 10 April 2000 is exempt matter under s.46(1)(a) of the FOI Act; and

(b) the remainder of that report does not qualify for exemption from disclosure to the applicant under the FOI Act, and the applicant is therefore entitled to be given access to it under the FOI Act.

63. I have made this decision as a delegate of the Information Commissioner's powers under s.90 of the FOI Act.

.....
G J SORENSEN
DEPUTY INFORMATION COMMISSIONER