

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 122 of 1993
(Decision No. 94003)

Participants:

MR P R McMAHON
Applicant

- and -

DEPARTMENT OF CONSUMER AFFAIRS
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - reverse FOI application - letter of complaint to the Department of Consumer Affairs concerning a licensed private inquiry agent - author of letter of complaint seeks to restrain its disclosure under the *Freedom of Information Act 1992 Qld* to the licensed private inquiry agent complained against - matter in issue is claimed to be information of a confidential nature communicated in confidence - application of s.46(1) of the *Freedom of Information Act 1992 Qld*.

Freedom of Information Act 1992 Qld s.44(1), s.46(1)(a), s.46(1)(b), s.51, s.78

"B" and the Brisbane North Regional Health Authority, Re (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported)

Dr P McEniery and the Medical Board of Queensland, Re (Information Commissioner Qld, Decision No. 94002, 28 February 1994, unreported)

DECISION

The matter in issue is not exempt matter under s.46(1) of the *Freedom of Information Act 1992 Qld*, and the decision under review is affirmed.

Date of Decision: 28 February 1994

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F N ALBIETZ
INFORMATION COMMISSIONER

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DEPARTMENT OF CONSUMER AFFAIRS
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REASONS FOR DECISION

Background

1. This is a "reverse-FOI" application by Mr McMahon seeking to restrain the respondent from disclosing two letters which he wrote to the respondent on 20 March 1992 and 30 April 1992, respectively. This matter commenced with an FOI access application made to the Department of Consumer Affairs (the Department) on 28 January 1993 by Mr R Spreadborough, who is a licensed private inquiry agent. In that letter, Mr Spreadborough referred to:

"An alleged complaint which was lodged by a Mr Paul McMahon in approximately February 1992 and after investigation was dismissed as unfounded by your investigator."

Mr Spreadborough sought access under the *Freedom of Information Act 1992 Qld* (the FOI Act) to a copy of the complaint, the report by the Department and the investigator's submission.

2. In accordance with s.51 of the FOI Act, the Department, through its Manager, Freedom of Information and Administrative Law (the Manager), consulted with Mr McMahon to obtain his views on the release of Mr McMahon's initial letter of complaint (dated 20 March 1992) to the Department concerning Mr Spreadborough, and a subsequent letter from Mr McMahon to the Department (dated 30 April 1992) concerning the same topic.
3. Mr McMahon responded to the Department by way of a letter dated 29 March 1993 in which he objected to the release of his letters to the Department dated 20 March and 30 April 1992, asserting that part of the first letter was exempt under ss.44(1) and that both letters were exempt under s.46(1)(b) of the FOI Act. Mr McMahon contended that part of the letter of 20 March 1992, which described the state of a relationship in which Mr McMahon had been involved, was personal to him, and should be exempt under s.44(1) of the FOI Act, and that its disclosure would not advance the public interest in any way. The Department agreed and exempted that part of the letter from disclosure to Mr Spreadborough in reliance on s.44(1) of the FOI Act. That part of the Department's decision is not challenged in this review. Mr McMahon also contended that the information contained in both letters was of a confidential nature and was communicated in confidence, and that the disclosure of the information contained in those documents would not advance the public interest in any way.

4. The Manager decided that the balance of the matter contained in the two letters (i.e. other than the matter exempt under s.44(1) of the FOI Act) was not exempt matter under s.46 of the FOI Act, and that Mr Spreadborough was entitled to have access to it. The relevant part of the Manager's reasons for decision reads as follows:

"In my opinion, your letters contained information of a confidential nature and the information was given and received in confidence, as there has been a continuing tradition between the Department and members of the public that information conveyed to the Department regarding possible breaches of the Acts which the Department administers will be kept confidential. The Department is aware that, as members of the public are under no obligation to disclose information to the Department, unless the information is given and received on a confidential basis the future supply of information will be prejudiced, because members of the public will fear the disclosure of information which they have imparted.

However, in considering the application of section 46(1)(b), I also had to consider whether, notwithstanding these considerations, disclosure of the information would, on balance, be in the public interest. I considered the public interest in favour of disclosure was Mr. Spreadborough's right to know the substance of any complaints made against him. Against this, I weighed the public interest considerations against disclosure, i.e. your right, and that of other members of the public, to make confidential complaints to the Department, knowing that the information will be kept confidential.

On balance, given the circumstances of this particular application, I considered that the grounds of exemption under section 46(1)(b) had not been made out and that disclosure of your two letters (apart from those parts claimed as exempt under section 44(1)) was in the public interest. I considered that Mr. Spreadborough had a right to know the nature of the complaints made against him and he had already been verbally informed of the complaints by the Departmental investigator. Further, you must have been aware at the time you made the complaints that their very nature required them to be raised with Mr Spreadborough in order for them to be resolved, and consequently you had, to that extent, waived confidentiality".

5. Mr McMahon then applied by letter dated 1 June 1992 for internal review of the Manager's decision, arguing as follows:

" ... I was not aware that such letters could be made available, by the Department, to the person against whom I made my complaint. Had I known the possibility existed that such papers could be released, I suggest that I would not have written to the Department but sought alternate solutions to the problem I encountered. However, having said that, I cannot think what alternate measures I could have taken other than notifying who I believed to be the correct authority. I believe this to be a lamentable circumstance as people such as myself will not seek to notify authorities of possible wrongdoings in the future. I believe that when individuals write to the Department they should be notified, prior to the Department taking any action, that the details could be released under the Freedom of Information Act, and individuals given the opportunity of proceeding or otherwise with their action. I believed I wrote to the Department in complete confidentiality that would be preserved."

6. The internal reviewer was Mr P J Byrnes, Acting Director, Policy and Legal Division of the Department, who upheld the decision of the Manager, although on slightly different grounds. The Manager found that Mr McMahon's letters comprised confidential information which had been

communicated in confidence, but that the application of the countervailing public interest test in s.46(1)(b) favoured disclosure to Mr Spreadborough. An alternative basis for the Manager's decision was briefly mentioned, i.e. that Mr McMahon, by asking the Department to take action on his complaint, had impliedly waived confidentiality *vis-à-vis* Mr Spreadborough. At the internal review stage, Mr Byrnes focused on the alternative basis for decision that had been mentioned briefly by the Manager. The relevant passage from his reasons for decision, dated 11 June 1993, is as follows:

"When a member of the public makes a complaint to a public authority, there is an expectation that the complaint be investigated. The last paragraph of the first page of your letter of 20 March 1992 presumes such an investigation would take place.

To carry out an investigation in a matter such as this, a departmental inspector would necessarily have had to interview the applicant and this, of course, happened. Given the specific nature of the complaint, it was impossible to maintain confidentiality in respect of your identity and the grounds of the complaint. (I should point out that this complaint differs from those where it may be possible not to disclose the identity of complainants during investigations, for example if members of the public lodge complaints that a motor vehicle salesman is operating outside of authorised hours.) This, in my view, is sufficient to destroy any reliance on s.46 of the Act in relation to confidentiality. Such a complaint as yours cannot, by its very nature, be communicated in confidence because it is unavoidable for the relevant information to be communicated to the person complained about.

This is clearly supported by the views expressed by the Victorian Administrative Appeals Tribunal in Re Easdown and Director of Public Prosecutions (No.1) (1987) 2 VAR 102 at 115 where it was held that it is unrealistic for persons who give information to the police (outside the "informer" situation) not to think that the information might ultimately become public through some formal process. Freedom of Information is one such process.

Further, natural justice requires that the applicant be apprised of this material. A complainant must accept that the details of the complaint and of all allegations may be brought to the attention of the person complained about. It may be a strong statement to make but to have citizens making secret complaints about other citizens smacks of a police state.

In your letter of 20 March, 1992, you specifically ask what action will the Department take against the applicant. If you put the applicant in such a position, you must be prepared to stand by every detail and allegation in your complaint."

7. The internal reviewer also specifically addressed the submission by Mr McMahon that disclosure of information of the kind contained in the two letters concerned would prejudice the future supply of such information, saying:

"In my view, this is one such case where the disclosure of the documents containing the details of your complaint will not prejudice future complaints by members of the public. As indicated earlier, such a complainant must reasonably expect that details of the complaint will be communicated to the person complained about by Departmental investigations, given the nature of the complaint."

8. By letter dated 6 July 1993, Mr McMahon applied for external review of Mr Byrne's decision, setting out brief arguments in support of his case.

THE REVIEW PROCESS

9. Copies of Mr McMahon's two letters to the Department dated 20 March 1992 and 30 April 1992 have been obtained and examined, together with copies of other relevant correspondence between the Department and Mr Spreadborough and Mr McMahon, respectively, and copies of the documents to which Mr Spreadborough has already been given access.
10. On 12 July 1993, I wrote to Mr Spreadborough advising him of the application for review, referring him to s.78 of the FOI Act and inviting him to apply to be a participant in the review process, if he so desired. Mr Spreadborough chose not to avail himself of that opportunity.
11. I subsequently wrote to Mr McMahon, extending to him:

"... the opportunity to forward ... a written submission detailing all facts, matters and circumstances, and any legal arguments, on which you rely to establish that the relevant documents are exempt from disclosure under the FOI Act. You should specifically address any aspects of the Department's two decision letters which you dispute. You may care to address in particular the public interest arguments dealt with by the Department that were decisive in favour of the release of the documents to Mr Spreadborough, namely the Department's view that Mr Spreadborough had a right to know the nature of the complaint made against him and the fact that he had already been informed of the complaints by the Department's investigator."

12. Mr McMahon's letter in response (dated 25 August 1993) stated that he interpreted my letter as suggesting that he should seek legal advice in relation to the matter. Mr McMahon was subsequently assured in a telephone conversation with a senior member of my staff that he had misinterpreted the intention of my letter. It is not necessary for an applicant to make legal submissions, still less to incur the expense of legal representation, for the purposes of a review under Part 5 of the FOI Act as I will ultimately make my own determination on relevant legal issues. In conducting a review under Part 5 of the FOI Act, however, I am obliged to observe the requirements of procedural fairness, and it was necessary to extend to Mr McMahon the opportunity to make a submission on the issues for my determination, including the relevant legal issues. While submissions on relevant legal issues are always welcome, they are not essential, and it is a matter of choice for any participant in a review under Part 5 of the FOI Act whether or not to take up the opportunity that is extended. In the result, Mr McMahon confirmed that all of the arguments and concerns which he wished to raise were adequately set out in his application for internal review, his application for review by the Information Commissioner, and his letter to me dated 25 August 1993.

Description of the Documents in Issue

13. The first document in issue is the letter of complaint dated 20 March 1992 which Mr McMahon forwarded to the Department concerning an incident that occurred between Mr McMahon and Mr Spreadborough on the previous day. The version of the document which the Department proposes to release to Mr Spreadborough has a number of details deleted, pursuant to s.44(1) of the FOI Act, including residential addresses, the paragraph concerning Mr McMahon's involvement in a personal relationship, and Mr McMahon's signature. However, the details of Mr McMahon's complaint against Mr Spreadborough are preserved.
14. The other document in issue is a letter from Mr McMahon to the Department dated 30 April 1992 which can be described as a "follow-up" letter to Mr McMahon's previous letter of complaint. The letter is in response to a reply from the Department in which the Department reported to Mr McMahon on its inquiries following Mr McMahon's complaint, and indicated that the Department did not intend to take any further action in the matter. Significantly for the purposes of this review, the Department's letter had informed Mr McMahon that:

"Mr Spreadborough has been interviewed in regard to the matters raised in your letter."

Mr McMahon therefore knew as early as 30 April 1992 that the substance of his complaint had been put to Mr Spreadborough.

15. Mr McMahon's letter of 30 April 1992 can best be described as a letter which makes further representations to the Department concerning his complaint, following the advice from the Department that it did not intend to take the matter any further.
16. A number of other documents responsive to Mr Spreadborough's FOI access application have been released to Mr Spreadborough, with some detail such as addresses and signatures deleted pursuant to s.44(1) of the FOI Act. These have also been examined. Two of the documents are reports dated 28 April 1992 and 20 May 1992 by the Department's investigation officer. The reports indicate that the substance of Mr McMahon's complaint was put to Mr Spreadborough in the course of the investigation. Comparison of the letter of complaint with the investigator's reports indicates that there is nothing of substance in the letter of complaint (apart from the material which the Department has decided to exempt under s.44(1) of the FOI Act) which has not already been put to Mr Spreadborough. The investigator's reports have been released in their entirety to Mr Spreadborough in response to his FOI application.

The Relevant Provisions of the FOI Act

17. Although the applicant has invoked reliance only on s.46(1)(b) of the FOI Act, I will set out s.46(1) in full, as s.46(1)(a) is arguably also relevant:

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.*

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

18. In my opinion, the Department's decision under review is clearly correct. The case involves a relatively straightforward application of principles discussed in my recent decisions in *Re B and the Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported) and *Re Dr P McEniery and the Medical Board of Queensland* (Information Commissioner Qld, Decision No. 94002, 28 February 1994, unreported).
19. In order to establish the *prima facie* ground of exemption under s.46(1)(b) three cumulative requirements must be satisfied:
- (a) the matter in issue must consist of information of a confidential nature;
 - (b) that was communicated in confidence;
 - (c) the disclosure of which could reasonably be expected to prejudice the future supply of such information.
20. Principles relevant to the first criterion were discussed in my reasons for decision in *Re B and the Brisbane North Regional Health Authority* at paragraph 148 and paragraphs 71 to 72. At paragraph 148 I said:
- "The question of whether the information in issue is of a confidential nature is to be judged as at the time the application of s.46(1)(b) is considered. Thus if information was confidential when first communicated to a government agency, but has since lost the requisite degree of secrecy or inaccessibility, it will not satisfy the test for exemption under s.46(1)(b)".*
21. The contents of Mr. McMahon's letter to the Department dated 20 March 1992 may well have been information of a confidential nature when first communicated to the Department, but as noted in paragraphs 14 and 16 above, the details of Mr McMahon's complaint were subsequently disclosed to Mr Spreadborough by a Departmental investigator (and in my view quite properly disclosed) in the course of the Departmental investigation which Mr McMahon had specifically requested. The matter in issue contained in the letter of 20 March 1992 was not therefore information of a confidential nature *vis-à-vis* Mr Spreadborough at the time when the Department came to respond to Mr Spreadborough's FOI access request. At the time that I now come to consider the application of s.46(1) of the FOI Act, Mr Spreadborough has also had access to the investigator's reports referred to in paragraph 16 above. This means that neither the first element of s.46(1)(b), nor the first element necessary to found an action in equity for breach of confidence for the purposes of s.46(1)(a) (see paras 60-72 of my reasons for decision in *Re B and Brisbane North Regional Health Authority*) are satisfied in the circumstances of this case.
22. Moreover the reason that the substance of the letter of 20 March 1992 was conveyed to Mr Spreadborough was because the Department could not take action on Mr McMahon's complaint against Mr Spreadborough, while complying with its legal duty to observe fair procedures, without making such a disclosure to Mr Spreadborough (*cf.* my reasons for decision in *Re Dr P McEniery and the Medical Board of Queensland* at paragraphs 26 to 32). This indicates, in my opinion, that the second element of s.46(1)(b) also cannot be established in the circumstances of this case. At paragraphs 152-3 of my reasons for decision in *Re B and the Brisbane North Regional Health Authority*, I said:

"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.

153 *The matters discussed at paragraphs 103 and 104 above concerning the scope or extent of an obligation of confidence will also be relevant to the extent of the mutual understanding as to confidence for the purposes of s.46(1)(b), i.e. it is a question of fact whether in the circumstances it was or must have been the intention of the parties that the recipient should be at liberty to divulge the information to a limited class of persons which may include a particular applicant for access under the FOI Act."*

23. The circumstances of this case constitute a useful illustration of the principles discussed in my reasons for decision in *Re Dr P McEniery and the Medical Board of Queensland* at paragraphs 26 to 32. In this case, neither the applicant nor the Department could reasonably have expected that the applicant's identity and the substance of the applicant's complaint against Mr Spreadborough could remain confidential from Mr Spreadborough, if appropriate action was to be taken in respect of the applicant's complaint. An analysis of all the relevant circumstances does not justify a finding that there was a common implicit understanding that the information imparted by the applicant was to be confidential *vis-à-vis* Mr Spreadborough. (No express assurances as to confidentiality were sought or given, and unless the applicant wished to withdraw his request that action be taken on the complaint, the Department could not appropriately have given an express assurance that confidentiality would be observed *vis-à-vis* Mr Spreadborough). The same considerations would tell against an equitable obligation of confidence being imposed on the Department so as to found an action in equity for breach of confidence for the purposes of s.46(1)(a) of the FOI Act (*cf.* paragraphs 76 to 96 of my reasons for decision in *Re B and the Brisbane North Regional Health Authority*).
24. The contents of the second document in issue (the applicant's letter to the Department dated 30 April 1992) also do not comprise information of a confidential nature *vis-à-vis* Mr Spreadborough. Parts of that letter reiterate aspects of the applicant's initial complaint against Mr Spreadborough. Other parts are critical of aspects of the Department's report on its investigation, which report has been disclosed to Mr. Spreadborough. There are also passing references to matters which are matters of public record; for example, there are references to the fact that the applicant had recently been registered by the Department as a Justice of the Peace, and to precedents (that were newsworthy and matters of public record, *circa* April 1992) involving the suspension of persons subject to investigation in the interests of public accountability. The matter in issue as contained in the second document is not information of a confidential nature capable of being protected from disclosure under s.46(1)(b) of the FOI Act, nor in an action in equity for breach of confidence for the purposes of s.46(1)(a) of the FOI Act.
25. The applicant's various submissions claiming exemption have stressed two related themes; first, that disclosure of the matter in issue will have the effect of drying up sources of information that would normally be readily available to the Department, in that "*people such as myself will not seek to notify authorities of wrongdoings in the future*"; and second, that when he initially wrote to the Department, a procedure should have been in place to warn him, prior to the Department taking any action, that details could be released under the FOI Act, so that he had the option of proceeding or otherwise with his complaint. I think the first of these was adequately dealt with in the internal reviewer's reasons for decision (see para 7 above), but in respect of both, the applicant is mistakenly blaming the FOI Act for consequences that are really attributable to the legal requirement that the

Department follow fair procedures in the conduct of its investigations. The key disclosure in this case occurred even before the passage of the FOI Act through the Queensland Parliament, i.e. when the Department's investigator disclosed the details of the applicant's complaint to Mr Spreadborough.

26. I am sure that if the applicant gives careful and objective consideration to the nature of his complaint against Mr Spreadborough, involving as it did allegations concerning an incident that occurred between the applicant and Mr Spreadborough and being entirely dependent on the applicant's eyewitness evidence, he will appreciate that there was no practicable way in which the Department could have taken action on his complaint without disclosing the details of his complaint to Mr Spreadborough. Moreover, the last 2 paragraphs of the applicant's letter of complaint can only be construed as containing unambiguous demands that the Department investigate and take appropriate action on his complaint against Mr Spreadborough. There is no hint of a suggestion that the complaint is made for the Department's information only, and is to be kept confidential from Mr Spreadborough. In these circumstances, the applicant could not reasonably have expected that the details of his complaint would not be put to Mr Spreadborough.
27. Given the disclosure which occurred even before the FOI Act was passed by the Queensland Parliament, there is a certain futility about this application to restrain disclosure under the FOI Act itself. That prior disclosure has, of course, affected the result of the application of s.46 of the FOI Act to the circumstances of this case, in the manner explained above.

Conclusion

I find that the matter in issue is not exempt matter under s.46(1) of the FOI Act, and I affirm the decision under review.

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 F N ALBIETZ
INFORMATION COMMISSIONER