

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 34 of 1995; S 94 of 1995
(Decision No. 95028)

Participants:

S 34 of 1995

ROSS MALCOLM HOPKINS AND BARBARA WINIFRED HOPKINS
Applicants

- and -

DEPARTMENT OF TRANSPORT
Respondent

S 94 of 1995

LINO ROY PRESOTTO AND MARY W PRESOTTO
Applicants

- and -

DEPARTMENT OF TRANSPORT
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - reports provided to the respondent by registered valuers assessing the compensation payable to the respective applicants following resumption by the respondent of portions of land owned by the respective applicants - reports disclosed to the respective applicants except for the valuation figures assessed by the registered valuers and explanation of the methods and calculations employed in assessing those figures - whether disclosure of the information withheld from the applicants would found an action for breach of confidence - whether a legally enforceable duty of confidence is owed by the respondent to the registered valuers in respect of the matter in issue - application of s.46(1)(a) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.21, s.30, s.41(1)(a), s.46(1), s.46(2), s.78, s.81

Acquisition of Land Act 1967 Qld s.24

Freedom of Information Act 1982 Vic

Valuers Registration Regulation 1992 Qld s.6

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Chantrey Martin v Martin [1953] 2 QB 286
Conlan and Rural Finance Commission, Re (1986) 1 VAR 325
Fraser v Evans [1969] 1 QB 349
Leicestershire County Council v Michael Farraday and Partners, Limited [1941] 2 KB 205
O'Brien v Komesaroff (1982) 150 CLR 310
Parry-Jones v Law Society [1969] 1 Ch 1
*Smith Kline and French Laboratories (Aust) Limited and Ors v Secretary, Department
of Community Services and Health* (1991) 28 FCR 291
Stephenson Jordon & Harrison Ltd v MacDonald & Evans (1952) 69 RPC 10
Tournier v National Provincial and Union Bank of England [1924] 1 KB 461
Wentworth v De Montfort & Ors (1988) 15 NSWLR 348

DECISION

1. In application for review no. S 34 of 1995, I set aside the decision under review (being the internal review decision made on behalf of the respondent by Mr W J Rodiger on 15 February 1995). In substitution for it, I decide that the applicants have a right to be given access under the *Freedom of Information Act 1992* Qld to the matter withheld from them pursuant to the decision under review.

2. In application for review no. S 94 of 1995, I vary that part of the decision under review (being the internal review decision made on behalf of the respondent by Mr W J Rodiger on 4 April 1995) which relates to the matter still remaining in issue in this review, as identified in paragraph 13 of my accompanying reasons for decision, by finding that the applicants have a right to be given access to that matter, under the *Freedom of Information Act 1992* Qld.

Date of Decision: 28 November 1995

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F N ALBIETZ
INFORMATION COMMISSIONER

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Participants:

S 34 of 1995

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Respondent

REASONS FOR DECISION

Background

1. The applicants in each of these cases seek review of decisions by the respondent to refuse them access to parts of valuation reports (and associated documents) obtained by the respondent, in which registered valuers state their assessment (and the method and calculations by which their assessment was reached) of the appropriate amount of compensation to which the respective applicants are entitled, following partial resumption by the respondent (for road-widening purposes) of residential land owned by the applicants.
2. The respective applicants reside on the same road, and were both affected by the respondent's road-widening proposals. These two cases raise common issues, and can be conveniently dealt with together.
3. By application dated 31 October 1994, Mr and Mrs Hopkins applied to the Department of Transport (the Department) under the *Freedom of Information Act 1992 Qld* (the FOI Act) for "*all documents concerning valuation of our property to do with our property resumption*". I will not recount all the steps along the way, but by the time of the making of the decision under review in application for review no. S 34 of 1995 (being the internal review decision made on behalf of the Department by Mr W J Rodiger on 15 February 1995), Mr and Mrs Hopkins had obtained access in full to some 62 pages of material, and access in part to a further four pages of material. The Department, however, refused to give access to certain matter on four pages of a valuation report prepared by Herron Todd White, Valuers (HTW) and also refused to give access

to any matter contained in a valuation report prepared by Michael Slater Property Valuers, on the basis that the matter withheld was exempt matter under s.46(1)(a) of the FOI Act.

4. By letter dated 20 February 1995, Mr and Mrs Hopkins applied for review by the Information Commissioner, under Part 5 of the FOI Act, of Mr Rodiger's decision of 15 February 1995. In their application for review, Mr and Mrs Hopkins said:

*A large section of our property was resumed by the Transport Department for widening of Albany Creek Road. We were told by the Property Services Section that the Transport Department would be **open and accountable in all their dealings with us the property owners**. But when it comes to advising us what value "the professionals" (valuers) put on our resumed land, it is all of a sudden not accountable to us but to the valuer!*

*We are taxpayers, our taxes fund the running of the Government Departments and **our taxes paid the valuer's fees!** So why can't we see a full copy of their report?*

How do we know whether the Transport Department will offer us the value put on our property by the valuers if we don't get to see the reports?

*Claiming exemption under s46(1) of the Act as a breach of confidence is a load of rubbish. What difference does it make to the valuers if we the owners of the land know what value they put on the land? After all it **was our land** before the Transport Department came along and decided to build a 6 lane highway through Albany Creek and Aspley. Surely **we should be the first to know** what value they put on our land!*

*We are not asking for information on anyone or thing except matters concerning **our property valuation**.*

5. By letter dated 8 February 1995, Hopgood and Ganim, Solicitors, acting on behalf of Mr and Mrs Presotto, applied for access under the FOI Act to -

1. *All departmental and policy documentation relating to:*

(a) *the proposed widening of Albany Creek Road from Beckett Road to Albany Creek from a two (2) lane road to a four (4) lane road with a central median; and*

(b) *the Department of Transport's requirements regarding the resumption of the whole or part of any parties adjoining Albany Creek Road for the purposes of the proposed road widening.*

2. *All valuations made by the Department of Transport or commissioned by the Department of Transport from external sources relevant to the value of the properties subject to resumption or resumed by the Department of Transport along Albany Creek Road including Lot 1 on RP78433.*

3. *All other departmental documentation relevant to the proposed widening of Albany Creek Road.*

6. As is evident from the terms of their FOI access application, Mr and Mrs Presotto's interest was not, at that stage, confined to valuations of their own property. The Department's initial decision

made on 20 March 1995 gave them full access to some 80 pages of material, and part access to a further two pages, but refused access to valuation reports, and associated documents, prepared by HTW and Michael Slater Property Valuers. On 4 April 1995, that decision was affirmed on internal review by Mr Rodiger, who relied solely on s.46(1)(a) of the FOI Act as the basis for exemption.

7. By letter dated 9 May 1995, Hopgood and Ganim, acting on behalf of Mr and Mrs Presotto, applied for review by the Information Commissioner, under Part 5 of the FOI Act, of Mr Rodiger's decision of 4 April 1995.

The external review process

8. In both cases, the documents claimed to be exempt were produced to my office and examined. In both cases, the Department had obtained valuation reports (and associated documents) from HTW (the valuations in issue) and subsequently from another valuer, Michael Slater (the Slater valuations).
9. It was pointed out to Mr and Mrs Presotto's solicitors that their request for access to valuation reports relating to other landowners may raise issues as to the application of s.44(1) of the FOI Act. By letter to me dated 18 May 1995, Hopgood and Ganim confirmed that their clients' request for access pursuant to the FOI Act to the valuation reports of HTW and Michael Slater Property Valuers was now to be confined to those valuation reports relevant to the value of their clients' property only.
10. I was subsequently informed by officers in the property section of the Department (which handles the process of acquiring land, including assessment and payment of compensation) that, in respect of both sets of applicants, negotiations to resolve the question of compensation for the compulsory acquisition of land had been unsuccessful, and the Department had therefore referred both matters to the Land Court under s.24 of the *Acquisition of Land Act 1967* Qld. Section 24 of the *Acquisition of Land Act* (so far as relevant) provides that either the landowner or resuming authority may refer to the Land Court, for hearing and determination, the matter of the amount of compensation payable for a compulsory acquisition of land. When a resuming authority refers such a matter to the Land Court, s.24(6) of the *Acquisition of Land Act* provides that the resuming authority is to set out the amount that it is willing to pay for compensation in respect of the compulsory acquisition of the land.
11. Since the figures contained in the references to the Land Court were identical to the compensation figures assessed in the Slater valuations, the Department agreed to release the Slater valuations to the respective applicants. This left in issue only the HTW valuations, and of those documents, matter comprising information of a merely factual or descriptive nature concerning the parcels of land owned by the respective applicants, has been released to the respective applicants (clearly, information of that kind is not confidential information *vis-à-vis* the respective applicants). What remains in issue can be broadly described as the valuation assessments arrived at, and the manner of application (including relevant calculations) of the valuation method employed by the registered valuers who undertook these tasks on behalf of HTW.
12. For the sake of precision, I will record that the matter remaining in issue in application for review no. S 34 of 1995 comprises -
 - (a) a dollar amount, concerning Mr and Mrs Hopkins' property, deleted from a letter dated 8 August 1994 from HTW to the Department (other matter deleted from this letter concerns other landowners, and is not in issue);

- (b) the same dollar amount, deleted from page 3 of a document prepared by HTW described as "Assessment Report of compensation resulting from resumptions for road-widening purposes ... Claimant: R M and B W Hopkins"; and
 - (c) all matter contained under the heading "Assessment Calculations" on pages 7 and 8 of the document described in (b) above.
13. The matter remaining in issue in application for review no. S 94 of 1995 comprises -
- (a) a dollar amount, concerning Mr and Mrs Presotto's property, deleted from a letter dated 8 August 1994 from HTW to the Department (other matter deleted from this letter concerns other landowners, and is not in issue);
 - (b) the same dollar amount, deleted from page 3 of a document prepared by HTW described as "Assessment Report of compensation resulting from resumptions for road-widening purposes ... Claimant: L R and M W Presotto";
 - (c) all matter contained under the heading "Assessment Calculations" on page 8 of the document described in (b) above; and
 - (d) a supplementary letter (which partially revises the matter referred to in (c) above) dated 15 September 1994 from HTW to the Department, except for those parts of the letter which specifically refer to the affairs of other landowners (and which are not in issue by virtue of the applicants' concession referred to in paragraph 9 above).
14. On 9 June 1995, a conference was convened by the Assistant Information Commissioner, attended by representatives of the Department and the Crown Solicitor (who has acted on behalf of the Department in this external review) and Mr Ross Perkins, an Associate Director of HTW, who was the valuer who prepared the valuation in respect of land owned by Mr and Mrs Hopkins. These matters could not be resolved at that conference, and accordingly directions for the further conduct of these external reviews were given. Mr Perkins was informed that HTW could participate independently in these reviews (see s.78 of the FOI Act) or, if it wished, could liaise with the Department to ensure that its concerns were satisfactorily addressed in the evidence and submissions lodged on behalf of the Department. By letter dated 15 June 1995 to Ross Perkins of HTW, I extended to HTW the opportunity to lodge evidence and submissions. No material was received directly from HTW; however, the evidence lodged by the Crown Solicitor on behalf of the Department included a statutory declaration from each of the valuers who prepared the reports in issue on behalf of HTW.
15. During the course of this external review, evidence and submissions were lodged (and subsequently exchanged between the participants and HTW) as follows:
- (a) by the Crown Solicitor on behalf of the Department -
 - written submissions lodged on 14 July 1995 in each matter (these were, in essence, identical apart from references to factual differences between the two external reviews)
 - statutory declarations by Errol Norman Miller of the Department, dated 10 July 1995, in each matter (again these were, in essence, identical apart from references to factual differences between the two external reviews)
 - a statutory declaration by Ross Bevan Perkins (of HTW) dated 12 July 1995, in respect of Mr and Mrs Hopkins' application for external review

a statutory declaration by David John Mapleston (of HTW) dated 13 July 1995, in respect of Mr and Mrs Presotto's application for review (Mr Mapleston was the registered valuer from HTW who assisted Mr Perkins by preparing the valuation in respect of the Presotto land.)

points of reply to the submissions made by the applicants in each matter

(b) by Mr and Mrs Hopkins -

a submission/declaration dated 23 August 1995

(c) by Hopgood and Ganim, on behalf of Mr and Mrs Presotto -

a written submission lodged on 22 August 1995 (no formal evidence was lodged)

a short reply (to the Department's points of reply) lodged on 5 October 1995.

16. Mr and Mrs Hopkins' claim for compensation for the acquisition of their land was resolved shortly after the conference referred to in paragraph 14 above. However, they still wished to pursue access to the matter withheld from them under the FOI Act. Mr and Mrs Presotto's claim for compensation has not yet been resolved.

Evidence lodged by the participants

17. Mr Miller's evidence in relation to each external review is almost identical, and I have edited it so that it reads as applicable to both external reviews. Mr Miller declared:

1. *I am the Area Manager for the Metropolitan North District of the Department and have held this position for approximately ten years.*
2. *I am responsible for the day to day management of resumption matters within the Metropolitan North District of the Department.*
3. *I have been employed by the Department (formerly the Main Roads Department) dealing with property resumption issues for approximately 35 years.*
4. *When a land owner's property is resumed, the Department engages a valuer to prepare a valuation to assist in negotiations for compensation. Valuers are selected on the basis of their known expertise and their ability to give evidence in the Land Court, if required.*
5. *All dealings between the Department and the valuer are confidential. To my knowledge it is not the Department's practice to make valuations available to landowners. When the issue of compensation is to be determined in the Land Court, the final valuation relied upon by the Department is usually made available to the claimants shortly before the hearing, and is only released after consultation with the valuer.*
6. *Any valuer engaged by the Department clearly understands that the valuation will not be released without consultation with the valuer. This is*

particularly so in the case of a valuation which is prepared early in the negotiation period, as a valuation can substantially change during the course of negotiations as further information comes to light.

7. *HTW Valuers have done intermittent work for the Department over a long period of time.*
 8. *The information contained in the valuation provided by [Mr Perkins and Mr Mapleston] in relation to [the properties of the respective applicants] is private to HTW Valuers and the Department, and is not otherwise available.*
 9. *The Department would always keep that valuation confidential and it is the understanding between the Department and HTW Valuers that the valuation will not be released without prior consultation with the valuer.*
 10. *If the valuation was released, this could jeopardise future working relationships between the Department and HTW Valuers and also other valuers. Valuers may be reluctant to provide the Department with detailed valuations.*
18. The statutory declarations by Mr Perkins and Mr Mapleston are substantially similar. Both commenced by setting out their qualifications as valuers. Mr Mapleston is a senior valuer with HTW and has been employed by HTW since 1993. He is an Associate of the Australian Institute of Valuers and Land Economists, and is a registered valuer in Queensland. He has over 20 years experience as a valuer in Queensland and Victoria. Mr Perkins is an Associate Director with HTW and has been employed by HTW since 1991. Between 1983 and 1991, he was employed by the Department of Lands, and was registered as a valuer in early 1988. HTW were engaged by the Department to prepare a series of valuations to assist in negotiations for compensation in relation to resumed land along Albany Creek Road, Bridgeman Downs. Mr Mapleston assisted Mr Perkins by preparing the valuation in relation to the property owned by Mr and Mrs Presotto.
19. The remainder of the evidence by Mr Perkins and Mr Mapleston is largely in common, and I will set out the relevant extract from Mr Mapleston's statutory declaration:
- ...
4. *The valuation report dated 31 March 1994 was prepared and given to the Department on a strictly confidential basis for the sole use of the Department and for no other use or disclosure.*
 5. *There was an implied understanding between the Department and HTW Valuers that the valuation would not be released without prior consultation with me.*
 6. *I am aware that HTW Valuers have done intermittent work for the Department over a long period of time.*
 7. *The information contained in the valuation I prepared dated 31 March 1994 is private to HTW Valuers and the Department and is not otherwise available.*
 8. *If the valuation was released, this could jeopardise future working relationships between the Department and HTW Valuers. In future, I*

would be reluctant to provide the Department with detailed valuations.

20. The relevant extracts from Mrs Hopkins' "submission/declaration" are as follows:

In all our discussions with the Department of Transport from the time we were advised that our property was to be resumed/acquired, we have always understood that the Department would assess the value of the estate by employing a registered valuer to assess the value of our interest in the resumed land. I had many discussions with Chris Rowley of Property Services who advised me ... that independent valuers, Herron Todd and White were coming out ... to value the property. He never at any stage, nor did any person from the Department advise us that they would be seeking more than one valuation and that we would not be privy to any of the valuation material.

In the booklet forwarded to us by the Department entitled "Acquisition: Your Property, Your Rights", under the heading "How is compensation assessed?", the second paragraph states "Queensland Transport will have the property valued and our Property Officer will then contact you to discuss compensation". It does not say: but you are not entitled to see the valuation, or that it is a secret document, or the FOI Act prohibits this valuation being disclosed to you, or in fact that we [i.e. the Department] can seek more than one valuation at tax payers' expense and you can never see any of them!!

*This booklet is written to supposedly dispel any fears landowners may have in having their property resumed, and to explain what you are to expect in the resumption process. I expected to be given a copy of the valuation/s on our property and that we and the Property Officer would sit down and discuss compensation. This did not happen. **How can two parties sit down and discuss something when only one party is privy to the information?***

The Transport Department should not be able to claim this information exempt under confidentiality clauses between them and Herron Todd & White, when the costs for this valuation were paid for by taxpayer monies.

The Transport Department, Herron Todd & White state in their latest submission to you that the release of this matter could be detrimental to their interests. ... However, when they take on the job they know that if the matter goes to the Land Court, the whole of the valuation must be made available to the landowner.

If they really believe that the release of the valuation will be detrimental to their interests they wouldn't take on the job.

...

... Ross Perkins came out and inspected the property ... and conducted a thorough inspection of the property and house. I believe their valuation is the only one that honestly can reflect an independent assessment of the property at the time of proclamation.

They [HTW] too had a clause at the bottom of their valuation stating that the report was for the use only of Queensland Transport. However, again they would have known that if their valuation was successful and it was to be used in the event of a Land Court hearing, it would have to be made available to the landowner. If it can really be detrimental to their interests in having the full

valuation released to the land owner, they wouldn't be in this line of work.

Relevant provisions of the FOI Act

21. Section 46 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.*

(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.*

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

22. Pursuant to s.81 of the FOI Act, the Department has the onus of establishing that the decisions under review were justified, or that the Information Commissioner should give a decision adverse to the applicants. The only ground of exemption relied upon by the Department is that contained in s.46(1)(a) of the FOI Act.
23. The Department contends that it owes a duty of confidence to HTW in respect of the matter in issue, the disclosure of which (the Department contends) would found an action for breach of confidence by HTW as plaintiff. The Department states at page 4 of its submission that "*there appears to be no suggestion in the present case of any contractual obligation of confidence arising out of the circumstances of the communication of the information in issue from HTW Valuers to the Department*", and its case for exemption under s.46(1)(a) is consequently put in terms of the requirements for an action in equity for breach of confidence.
24. I note, however, that, while there is no evidence in these cases of any relevant express contractual stipulation for confidence, HTW was in a contractual relationship with the Department with respect to the provision of the valuation reports in question. The learned authors of Meagher, Gummow, Lehane, Equity: Doctrines and Remedies, (Butterworths, 3rd ed, 1992) have commented, in their chapter on confidential information (at p.866):

Where there is a contract then it is to the contract that the court should look to see from express words or necessary implication what the obligations of the parties are and the introduction of equitable concepts should be resisted: Vokes v Heather (1945) 62 RPC 135 at 142; Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd [1979] VR 167 at 191. ... Yet in a number of cases where there has been a contractual nexus the judges have nevertheless treated equitable principles at length as if they overlapped or were concurrent with the common law: [case examples are then cited]

25. Despite the concerns of those who regard it as important to preserve the purity of equitable doctrine, the leading text-writers in this field (F. Gurry, Breach of Confidence, Oxford University Press, 1984; R. Dean, The Law of Trade Secrets, Law Book Co, 1990) would agree with the comment by Professor Finn, after a survey of relevant cases, that *"the implied contractual obligation does not differ from the equitable obligation, either in its content or in the circumstances necessary to bring it into existence, though ... the equitable obligation can arise where there is no contractual relationship at all"*: P. Finn, Fiduciary Obligations, Law Book Co, 1977, at pp.136-137; see also *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.298-300, paragraphs 49-52.
26. It would appear, therefore, that the approach adopted by the Department is permissible, notwithstanding the existence of a relevant contractual relationship between HTW and the Department. The Department's written submission sets out the five cumulative criteria which must be satisfied for protection in equity of confidential information, and addresses each criterion. Those five criteria are:
 - (a) it must be possible to specifically identify the information in issue, 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 possess "the necessary quality of confidence"; i.e. the information must not be trivial or useless information, and it must possess a degree of secrecy sufficient for it to be the subject of an obligation of conscience, arising from the circumstances in or through which the information was communicated or obtained (see *Re "B"* at pp.304-310; paragraphs 64-75);
 - (c) the information in issue 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) it must be established that disclosure to the applicant for access under the FOI Act would constitute a misuse, or unauthorised use, of the confidential information in issue (see *Re "B"* at pp.322-324; paragraphs 103-106); and
 - (e) it must be established that detriment is likely to be occasioned to the original confider of the confidential information in issue if that information were to be disclosed (see *Re "B"* at pp.325-330; paragraphs 107-118).
27. It is unnecessary for me to address each of these criteria, because I am satisfied (for the reasons which follow) that the Department cannot establish the third criterion, and that there is no basis for its assertion that a legally enforceable duty of confidence, whether in equity or pursuant to an implied contractual term, is owed by the Department to HTW in respect of the matter in issue.
28. It appears that the relationship between HTW and the Department was that of professional and

client. In *Leicestershire County Council v Michael Farraday and Partners, Limited* [1941] 2 KB 205, the English Court of Appeal held that the relationship between the Leicestershire County Council and the respondents, a firm of valuers, was that of "client and professional man". (I also note that, speaking extra-judicially, the recently retired Chief Justice of the High Court of Australia, Sir Anthony Mason, has expressed the view that "... nowadays we would have little difficulty in recognising that valuers constitute a profession": see Mason, "Legal Liability and Professional Responsibility", (1992) 14 *Sydney Law Review*, 131, at p.135.) It is characteristic of recognised professions that their members offer a service that -

is expert, being the product of special skill and knowledge (entry to the profession being conditional, invariably, on successful completion of a prescribed course of study, and, frequently, on obtaining additional practical experience under the supervision of experienced members of the profession); and

is provided for the benefit of the client and in the interests of the client, and not in the interests of the professional service provider (apart, of course, from the latter's interest in receiving reasonable remuneration for the service rendered).

29. In the instant cases, the Department has contracted with HTW for the exercise of one of the ordinary professional services which a registered valuer offers, i.e. the application of the professional valuer's skill, knowledge and experience to the task of assessing the amount of compensation to which Mr and Mrs Hopkins and Mr and Mrs Presotto are entitled, for the diminution in value of their respective properties, resulting from resumption of portions of their land for the Department's purposes.
30. In the ordinary case, that which the valuer has contracted to provide to the client (usually a report containing the valuer's professional assessment, for example, of the value of a particular parcel of land at a specified date or dates, and an explanation of the basis on which the valuation figures were reached) becomes the property of the client, who has paid for the preparation of the report, to do with as the client pleases. There is a clear implication in the judgments in *Leicestershire County Council v Michael Farraday and Partners* that those documents which it is the duty of a professional valuer, pursuant to the terms of the relevant contract, to prepare and forward to his or her client, become the property of the client (though documents prepared by the professional for his or her own assistance in carrying out the expert work remain the property of the professional): see per MacKinnon LJ at p.215, and per Goddard LJ at p.217; see also *Chantrey Martin v Martin* [1953] 2 QB 286. These two English Court of Appeal decisions were among the authorities relied on by the New South Wales Court of Appeal in *Wentworth v De Montfort & Ors* (1988) 15 NSWLR 348 where, in the context of the professional relationship of solicitor and client, the Court expressed approval of the proposition that documents prepared by the solicitor for the benefit of the client and which may be said to have been paid for by the client, belong to the client (at p.355 per Hope JA, with whom Samuels and Mahoney JJA agreed).
31. It is a recognised incident of the relationship between professional and client that the professional has a legal duty to keep the client's affairs secret (*Parry-Jones v Law Society* [1969] 1 Ch 1, at p.7), though the scope of the duty of secrecy must vary with the special circumstances peculiar to each profession (*Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, at p.486, per Atkin LJ). It is not an ordinary incident of the relationship of professional and client that the client owes a duty of confidence to the professional in respect of the information communicated by the professional to the client, pursuant to the professional retainer.
32. Specific legislative provision has been made in Queensland with respect to the duty of confidence owed by a registered valuer to a client. Section 6 of the *Valuers Registration Regulation 1992* Qld provides:

Duty of confidentiality

6.(1) *A registered valuer must not disclose or make use of a valuation made for a client.*

(2) *Subsection (1) does not apply if -*

(a) the client gives the valuer written permission to disclose the details of the valuation; or

(b) the valuer is required by law to disclose the details.

This provision, particularly s.6(2)(a), is consistent with my view that it is ordinarily the right of the client to control the use and dissemination of a valuation which the client has paid to obtain.

33. There is nothing special or exceptional about the instant cases that would take them outside of the ordinary principle that a valuation prepared by a professional valuer for a client, and paid for by the client, becomes the property of the client, which may be used or disseminated as the client pleases. The matter in issue in these cases contains no special information of particular sensitivity or value to the valuers who prepared it, and who communicated it to the Department. The matter in issue merely records the basis on which the valuers exercised their skill, knowledge and experience - their 'know-how' - in executing the task which they contracted to perform, and the result of that exercise (i.e., the figures assessed).

34. In *Stephenson Jordon & Harrison Ltd v MacDonald & Evans* (1952) 69 RPC 10, a firm of management consultants sought to restrain the publication of lectures written by, and said to be based upon expertise acquired by, a former employee while he was in the firm's employment. In refusing the application to restrain the dissemination of allegedly confidential information, Lord Evershed MR said (at p.15):

... I think that the most that can be said under this head is that the putting together and the applying in a particular way of principles which were generally common to the profession of management engineers is the subject which is said to be confidential; and that is described by one of the witnesses, I think not inaptly, by a phrase which has obtained some popularity today - namely, 'know-how'. 'Know-how' seems to me to indicate something essentially different from secret and confidential information. It indicates the way in which a skilled man does his job, and is an expression of his individual skill and experience.

35. The significance of this distinction has been recognised by the High Court of Australia in a case reasonably (though not precisely) analogous to the instant cases, in that it concerned the communication of allegedly confidential information by a professional person pursuant to a professional-client relationship: see *O'Brien v Komesaroff* (1982) 150 CLR 310. The solicitor in that case, Mr Komesaroff, failed to establish that certain information, legal advice and legal documents, which had been conveyed to an agent of his client, were entitled to protection as confidential information. Mr O'Brien, an accountant, had approached Mr Komesaroff about the possibility of minimising the tax liability of a client. Mr Komesaroff's firm acted on behalf of the client in devising a viable scheme for tax minimisation, including providing legal advice and drafting relevant legal documents. The client had insisted that relevant documents be made available to his accountant, O'Brien. It was claimed that O'Brien then used the information thus obtained for the benefit of his own clients. Mason J (with whom Murphy, Aickin, Wilson and Brennan JJ agreed) said:

The action for breach of confidence is founded upon an alleged confidential

communication to the appellant of, and consequential misuse of, certain information relating to, first, the form of a unit trust deed drafted by the respondent which expressed a concept to minimise taxation and estate duty for the beneficiaries of the trust and, secondly, a scheme designed to minimise taxation by using an overseas trust in a suitable "tax haven" country in conjunction with an Australian trust entity.
(at p.134)

...

In relation to the unit trust deeds, the primary judge was not satisfied that any information of a confidential nature was imparted to the applicant by the respondent. His Honour held that there was much that was public property and common knowledge in the deeds and that, although the respondent's skill and ingenuity went into producing them, the deed was not to be regarded as containing confidential information capable of founding an action for breach of confidence. His Honour said that he was not satisfied that a reasonable person in the position of the appellants would recognise that the documents contained information which was, apart from the question of copyright, the property of the respondent: Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd. [1979] VR 167 at p.191.
(at p.323)

...

Plainly enough, in the light of the findings of the primary judge and the evidence, there is very little, if anything, in the [unit trust deeds, and draft memorandum and articles of association for a private company, drafted by Mr Komesaroff] that can constitute confidential information. Generally speaking the contents of the unit trust deeds and the articles of association were matters of common knowledge. Information may be categorised as public knowledge though only notorious in a particular industry or profession: see Finn, Fiduciary Obligations (1977), p.146. Only those improvements evolved by the respondent could give rise to a claim for relief for breach of confidence ... [cases cited] It is at this point that the respondent has consistently failed to identify the particular contents of the documents which he asserts constitute information the confidentiality of which he is entitled to protect. The consequence is that he has failed to formulate a basis on which the court could grant him relief on the assumption that some part or parts of the documents constitute confidential information.
(at p.326)

...

... In particular I have some difficulty in perceiving how advice as to the general legal effect of statutory provisions can constitute confidential information. And the form of minutes, resolutions and the provisions of a trust deed seem unlikely repositories of confidential information. ...
(at p.327)

...

In some respects the information which the respondent seeks to protect in this case resembles know-how. The information represents his accumulated knowledge, skill and experience in a particular field. He asserts that it is all

confidential information. Obviously this cannot be right. Much of it is common knowledge, as the findings of fact made by the primary judge indicate. As to the problems associated with the classification of know-how as confidential information, see Amway Corporation v Eurway International Ltd [1974] RPC 82 at pp.85-87; Stephenson Jordan & Harrison Ltd v MacDonald & Evans (1952) 69 RPC 10 at p.15. ...
(at p.328)

36. Mason J went on to say that "*if the respondent [Mr Komesaroff] were able to identify some particular pieces of information and show that they were confidential or that an obligation of confidence had arisen with respect to them he would be entitled to protection of them*". However, it is fairly clear from the parts of the judgment quoted above (in particular the third paragraph quoted above) that Mason J was of the view that a professional person could obtain relief for breach of confidence only in respect of an interest in protecting the confidentiality of some identifiable innovation or improvement on the store of common knowledge in the relevant profession.
37. Like a lawyer advising on the meaning and effect of a statute, the provision of valuation reports of the kind in issue is one of the basic professional services which valuers provide. The valuer places his or her accumulated skills, knowledge and experience at the service of a client who requires them for a particular task. The matter in issue embodies the application of the valuers' accumulated knowledge, skill and experience, their 'know-how', to a particular task they contracted to perform for a client. In my opinion, there is nothing in the matter in issue which the valuers are entitled to protect as the valuers' confidential information.
38. I draw attention, in this regard, to what was said by Rowlands J (President) of the Victorian Administrative Appeals Tribunal in *Re Conlan and Rural Finance Commission* (1986) 1 VAR 325, a case in which the respondent sought to resist disclosure to the applicant of a valuation report prepared for the respondent in respect of the applicant's property. Although he was considering exemption provisions in the *Freedom of Information Act 1982* Vic which do not correspond to s.46(1) of the Queensland FOI Act, the following remarks by Rowlands J are of general relevance (at p.327):

In this case the information in itself is of no substantial value to the valuer (or his business undertaking) once it is transmitted to the respondent agency, in his report. ...

It might be said that keeping in touch with property values in the area is of some worth to a person in the valuer's position just as each case builds up the reservoir of knowledge of any professional person. However, having been rewarded by the agency for the assembly and delivery of the information the valuer cannot reasonably complain that its disclosure unreasonably compromises his interests. This is not the case of a business undertaking supplying information concerning itself to Government nor is it the situation of a business supplying hard won information concerning other businesses or business in general which it might properly regard as an asset of its own which ought not to be given away by Government to others.

39. Absent exceptional circumstances (and none are present in the instant cases), I am unable to accept that information provided by a valuer to a client, of the kind now in issue (which, in essence, states the figures assessed by HTW as appropriate compensation for the resumption of land from Mr and Mrs Hopkins, and Mr and Mrs Presotto, respectively, and explains the method and calculations by which those figures were assessed), can constitute confidential information which the valuer is entitled to protect from further disclosure by virtue of a binding legal

obligation of confidence owed by the client to the valuer. In my opinion, equity would not recognise or enforce an obligation of conscience owed by the Department to HTW not to use or disclose the matter in issue in a way which is not authorised by HTW, nor would the law imply a contractual term to that effect.

40. The Department's written submission contends that the evidence of Mr Miller, Mr Mapleston and Mr Perkins (see paragraphs 17 and 19 above) establishes that there was a mutual understanding between HTW and the Department that mutual duties of non-disclosure applied to valuation reports supplied to the Department by HTW.
41. The existence of a mutual understanding that person A will not further disclose information supplied by person B does not necessarily mean that a legally enforceable duty of confidence is owed by person A to person B. Whether a legally enforceable duty of confidence is owed depends on an evaluation of the whole of the relevant circumstances including (but not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and the circumstances relating to its communication, such as those referred to by a Full Court of the Federal Court of Australia in *Smith Kline and French Laboratories (Aust) Limited and Ors v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at pp.302-3: see *Re "B"* at p.316 and pp. 314-316; paragraphs 84 and 82.
42. Here, there is no doubt that HTW owed a duty of confidence to the Department in respect of the matter in issue: see s.6 of the *Valuers Registration Regulation 1992 Qld*, which is reproduced at paragraph 32 above. The Department's understanding that HTW would treat the matter in issue as confidential was soundly based. However, when all the relevant circumstances are evaluated, there is, in my opinion, no basis for elevating the practice of the Department (as disclosed in the evidence) of treating valuation reports as confidential, into a legally enforceable duty of confidence owed by the Department to HTW.
43. Mr Miller has attested (in paragraph 5 of his statutory declaration) that, to his knowledge, it is not the Department's practice to make valuations available to land owners. When the issue of compensation is to be determined in the Land Court, the final valuation relied upon by the Department is usually made available to the claimants shortly before the hearing, and is only released after consultation with the valuer. If the adoption of this practice was contributed to by a belief that the Department owed a legal duty of confidence to its valuers, I consider that belief was mistaken.
44. The more likely explanation is that the practice has been adopted and maintained by the Department because it suits the Department's own purposes and convenience. The Department can negotiate with a landowner over compensation for resumption without disclosing its expert valuation evidence until the time when disclosure is required for the purposes of a hearing in the Land Court. If further relevant information, not taken into account by its valuers, comes to light in the course of negotiations, it can arrange for a fresh valuation which takes account of the further relevant information. If so minded, it could approach a number of different valuers, and choose to rely on the valuation most favourable to the Department, perhaps (in circumstances where a valuation is capable of being undertaken without access to the landowner's premises) without the landowner even being aware of the existence of multiple valuations.
45. The adherence by the Department, for its own purposes and convenience, to a practice of ordinarily not disclosing the valuation reports it acquires, accounts for the expectation of non-disclosure of valuation reports which is referred to in the evidence of Mr Perkins and Mr Mapleston. The fact that the Department consults the relevant valuer before disclosing a valuation report preparatory to a hearing in the Land Court must, in my opinion, be properly characterised as merely a matter of professional courtesy (the valuer may be required to give evidence in the Land Court explaining and supporting his or her valuation). I do not think it can

be seriously suggested that, at that point (or at any earlier stage in negotiations if, for example, it suited the Department's purposes to exchange valuation reports with a person whose land had been resumed), the valuer would be entitled, if so minded, to restrain the Department from disclosing the valuation report by an action for breach of confidence based on a legally enforceable duty of confidence owed by the Department to the valuer.

46. In my opinion, the whole of the relevant circumstances, particularly the nature of the relationship between professional valuer and client, and the considerations referred to at paragraphs 30-38 above, tell against the existence of a legally enforceable duty of confidence owed by the Department to HTW.
47. The situation in these cases is roughly analogous to that described by the English Court of Appeal in *Fraser v Evans* [1969] 1 QB 349, a case in which Mr Fraser, a public relations consultant retained to act on behalf of the Greek Government, owed a contractual duty of confidence in respect of reports supplied by him to the Greek Government. The position of HTW is analogous to that of Mr Fraser, and the position of the Department is analogous to that of the Greek Government, as described in the following extract from the judgment of Lord Denning MR (at p.361):

There is no doubt that Mr Fraser himself was under an obligation of confidence to the Greek Government. The contract says so in terms. But there is nothing in the contract which expressly puts the Greek Government under any obligation of confidence. Nor, so far as I can see, is there any implied obligation. The Greek Government entered into no contract with Mr Fraser to keep it secret. We have seen affidavits - one of them as late as this morning - which say that it was not the policy of the Greek Government to publish, or allow the publication, of any documents prepared by Mr Fraser or his firm, and that they would, as matter of practice, keep them confidential. But that policy still leaves them free, in point of law, to circulate the documents or their contents to anyone whom they pleased. The information was so obtained for them by Mr Fraser under a contract with them. They paid for it. They were the people entitled to the information. They were the people to say aye or no whether it should be communicated elsewhere, or be published generally.

48. The assertions by the declarants to the effect that if the valuations were released, valuers may be reluctant to provide the Department with detailed valuations (see the final paragraph of each of the statutory declarations lodged on behalf of the respondent: at paragraphs 17 and 19 above) do not, in my opinion, have any credence. It would not be acceptable to the Department to receive valuation reports which did not disclose the method and calculations used to assess the valuation figures arrived at. The Department would need to make its own assessment of the quality and reliability of valuation reports, so as to assess whether they could appropriately be relied on in negotiations with a landowner, and in Land Court proceedings if necessary. It is part of the discipline of a professional valuer to explain and justify assessments made in the exercise of professional judgment. I do not believe there is any shortage of competent valuers willing to undertake work for the Department, even though they might face the prospect of scrutiny of their valuation reports by an applicant for access under the FOI Act, in addition to the prospect of scrutiny by the Land Court.
49. This issue is, in any event, not really relevant to the application of s.46(1)(a). It would be relevant to a consideration of the third element which must be established to found an exemption under s.46(1)(b) (i.e. that disclosure could reasonably be expected to prejudice the future supply of like information). The Department, however, has conceded in its written submission that the matter in issue is matter of a kind mentioned in s.41(1)(a) of the FOI Act; hence, by virtue of s.46(2), s.46(1) does not apply to the matter in issue unless its disclosure would found an action

for breach of confidence owed to a person or body other than the persons or bodies mentioned in s.46(2)(a) and (b). (The Department has asserted that disclosure of the matter in issue would found an action for breach of confidence owed to HTW, which is not a person or body mentioned in s.46(2)(a) or (b)). Section 46(1)(b) is therefore rendered redundant in the circumstances of this case: see *Re "B"* at p.292, paragraphs 35-36.

50. At page 10 of its written submission, the Department has drawn attention to the fact that each of the valuation reports in issue contained a disclaimer clause in the following terms:

This valuation is for the use only of Queensland Transport, to whom it is addressed and for no other purpose. No responsibility is accepted to any third party who may use or rely on the whole or any part of the content of this valuation. No responsibility will be accepted for photocopied signatures.

51. This disclaimer clause, however, is consistent with the views I have expressed above. It acknowledges that the valuation report is for the use of the respondent Department, and that it may consequently come into the hands of a third party or parties. The clause disclaims any responsibility on the part of HTW in respect of the use of, or reliance on, the valuation report by any third party who might obtain it. It represents a prudent attempt to limit any professional liability that might potentially be visited on HTW solely to that occasioned by the use of, or reliance on, the valuation report by the particular client for whom it was prepared.

52. The valuation reports in issue also contain another paragraph in the following terms:

Neither the whole nor any part of this valuation nor any references thereto may be included in any published documents, circular or statement, nor published in part or full in any way, without written approval of the form and context of which it may appear.

53. Again, this contemplates that HTW's client may wish to exercise its rights of property in the valuation report which it has paid to acquire, by republishing it in whole or in part. The paragraph purports to reserve to HTW (presumably for safeguarding against any possible professional liability) a right to approve the form and context of any re-publication. Assuming this to be a valid contractual term between HTW and the Department, I think that, in the event of a dispute arising in respect of it, it would be interpreted by a court so as not to unreasonably restrict the client's right to use the report it has paid for, i.e. that HTW could not unreasonably withhold written approval of the form and context of a proposed re-publication by the Department.

54. No issue as to form or context could reasonably arise in respect of the provision of a complete copy of the valuation report to an applicant for access under the FOI Act. Indeed, such an issue should not even arise in that context. Section 21 of the FOI Act confers a legally enforceable right of access to documents in the possession or control of the Department, subject only to exemptions and other exceptions to be found in the FOI Act itself. The paragraph of the valuation report now under consideration does not, in its terms, purport to impose any duty of confidence, nor does it raise any other basis for the application of any of the statutory exemptions or exceptions to the right of access conferred by the FOI Act. The provisions of the FOI Act would therefore override any contractual reservation made by the paragraph of the valuation report now under consideration: the forms by which access may be obtained to documents of an agency are prescribed in the FOI Act itself (see s.30 of the FOI Act).

Conclusion

55. For the foregoing reasons, I am not satisfied that the matter in issue is exempt matter under

s.46(1)(a) of the FOI Act.

56. In application for review no. S 34 of 1995, I set aside the decision under review, and in substitution for it I decide that the applicants have a right to be given access under the FOI Act to the matter which has been withheld from them pursuant to the terms of the decision under review.
57. In application for review no. S 94 of 1995, the Department has refused access under the FOI Act to some matter which the applicants no longer seek (see paragraph 9 above). I therefore vary that part of the decision under review which concerns the matter remaining in issue, as identified at paragraph 13 above, by finding that the applicants have a right to be given access under the FOI Act to the matter remaining in issue in this review, as identified in paragraph 13 of my reasons for decisions.

.....
F N ALBIETZ
INFORMATION COMMISSIONER