OFFICE OF THE INFORMATION COMMISSIONER (QLD) **)** S 140 of 1993 **)** (Decision No. 94024)

Participants:

"P"
Applicant

- and -

BRISBANE SOUTH REGIONAL HEALTH AUTHORITY
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents recording information supplied by third parties to medical staff of the respondent to assist with the care and treatment of the applicant and with the possible further regulation of the applicant under the *Mental Health Act 1974 Qld* - whether information communicated in confidence - whether exempt matter under s.46(1)(a) of the *Freedom of Information Act 1992 Qld* on the basis that disclosure of the information would found an action for breach of confidence - whether exempt matter under s.46(1)(b) of the *Freedom of Information Act 1992 Qld* - whether disclosure of the information could reasonably be expected to prejudice the future supply of such information - whether disclosure of the information would, on balance, be in the public interest.

Freedom of Information Act 1992 Qld s.6, s.25, s.41(1)(a), s.44(3), s.46, s.46(1)(a), s.46(1)(b), s.46(2), s.46(2)(a), s.46(2)(b), s.76(2), s.87
Freedom of Information Act 1982 Vic s.35
Mental Health Act 1974 Qld

"B" and Brisbane North Regional Health Authority, Re (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported)
Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (Information Commissioner Qld, Decision No. 93002, 30 June 1993); (1993) 1 QAR 60
G v Day [1982] 1 NSWLR 24
M and Health Department, Re (Vic) (1988) 2 VAR 317
Pyle and Health Commission of Victoria, Re (1987) 2 VAR 54
W and Health Department, Re (Vic) (1987) 1 VAR 383

DECISION

I affirm that part of the decision under review (being the decision made on behalf of the respondent by Dr Golledge on 25 July 1993) which relates to folios 9, 10, 11, 34 and 35 (as identified in the decision under review) on the basis that the matter to which the applicant has been refused access is exempt matter under s.46(1)(b) of the *Freedom of Information Act 1992 Qld*. I also find that the matter in folios 9, 10, 11, 34 and 35 to which the applicant has been refused access is exempt matter under s.46(1)(a) of the *Freedom of Information Act 1992 Qld*.

Date of Decision: 9 September 1994

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse the applicant access to certain matter which relates to the applicant's admission and regulation under the *Mental Health Act 1974 Qld* at the Princess Alexandra Hospital some years ago. The matter in issue is claimed by the respondent to be exempt under s.46(1)(b) of the *Freedom of Information Act 1992 Qld* (the FOI Act).

2. By letter dated 15 April 1993, the applicant sought access to the applicant's records from the Princess Alexandra Hospital. The hospital is administered by the Brisbane South Regional Health Authority (the Authority). The initial decision in response to the application was made by Ms Rhondda James and communicated to the applicant by a letter dated 17 June 1993. Ms James identified 58 folios which fell within the terms of the applicant's FOI access application, and decided to grant the applicant full access to 51 folios, partial access to six folios, and to refuse access to one folio in its entirety.

3. On 15 July 1993, the applicant applied for internal review of Ms James' decision. In doing so, the applicant stated that she wished to have every bit of information provided about her though she would accept the withholding of the identities of the information-providers.

4. The internal review was undertaken by Dr J G Golledge, the Director of the Authority. By a letter dated 25 July 1993, Dr Golledge affirmed the initial decision. The applicant then applied (by letter dated 29 July 1993) for external review, under Part 5 of the FOI Act, of Dr Golledge's decision.

The Matter in Issue

5. As noted above, the matter in issue relates to the admission and regulation of the applicant under the *Mental Health Act* at the Princess Alexandra Hospital for a short time some years ago. It may be more specifically described as follows:

   - The relevant parts of folios 9-11 are notes made by Dr N Prior, then a psychiatry registrar at the Princess Alexandra Hospital. They record the details of phone calls made by Dr Prior to two third parties, seeking collateral history of the applicant's behaviour and the problems which led to the applicant's hospitalisation.

   - Folios 34 and 35 are the first two pages of a report created by Dr Prior after the discharge of the applicant. The passages in these folios for which exemption is claimed record details of the conversations that Dr Prior had with the two third parties.

The External Review Process

6. Copies of the documents containing the matter in issue were obtained and examined. Matter contained in two folios related to conversations Dr Prior had with a specialist (not employed by the Authority) in relation to the applicant. That specialist was consulted and confirmed that he did not object to release of the matter concerning his conversations with Dr Prior. The Authority then confirmed that it no longer objected to release of that matter and I authorised the Authority to give the applicant access to the two folios in question, in their entirety.

7. I also consulted the two third parties whose conversations with Dr Prior are recorded in the matter remaining in issue. I shall refer to them as Person 1 and Person 2, respectively, throughout these reasons for decision. Both objected to release of the matter in issue.

8. I obtained evidence from Person 1, by way of a statutory declaration executed on 10 November 1993, as to the circumstances in which information was provided to Dr Prior. I obtained evidence from Person 2 by way of a statutory declaration executed on 3 December 1993. I also obtained evidence from Dr Prior by way of a statutory declaration executed on 14 December 1993.

9. By letter of 5 January 1994, I communicated my preliminary view to the applicant that the matter in issue is exempt matter and invited the applicant, if the applicant did not agree with my preliminary view, to put to me anything the applicant wished to raise in support of the contention that the matter in issue is not exempt matter under the FOI Act. The applicant replied in a brief letter, dated 29 January 1994, requesting that the review proceed so that the right of reply would be available in respect of the information supplied to the respondent about the applicant.

10. By a letter of 7 June 1994, I provided the applicant with extracts from Dr Prior's statutory declaration, and summaries of the evidence obtained from Persons 1 and 2. I was unable to give complete copies of the evidence to the applicant at that time and I am constrained from discussing the evidence in full in these reasons for decision, because to do so would subvert s.76(2) and s.87 of the FOI Act which require me to refrain from revealing exempt matter (including, in this case, the identity of Persons 1 and 2). The applicant contacted a member of my staff and indicated that it was not possible to make a written submission because of medical problems affecting the applicant's hands. The applicant then made a number of oral submissions to the staff member. The bulk of these submissions related to the applicant's family history and the applicant's relationship with family members. The oral submissions of the applicant which are relevant to the issues raised before me will be discussed further below in relation to the application of specific exemptions.

The Evidence

11. The material parts of the evidence of Dr Prior which I am able to reproduce in this decision, are contained in paragraphs 2-5 of his statutory declaration of 14 December 1993:

> *2.* *I recall that on 22 February 1991,* [the applicant] *was admitted to the Princess Alexandra Hospital as a psychiatric patient.* [The applicant] *was admitted under the care of Dr Theodoros, Psychiatrist. At the material time I was employed at the Princess Alexandra Hospital as a Psychiatry Registrar and was working under Dr Theodoros.* [The applicant] *was subsequently discharged on 27 February 1991.*
>
> *3.* *I do not have any independent recollection of the telephone conversations I had with* [the third parties] *on 26 February 1991. However, I believe the notes I took of those conversations, as recorded at paragraph 1(b) of this declaration, accurately record the matters discussed during those*

> *conversations. Having refreshed my memory through reading the notes recorded at paragraph 1(b) of this declaration, my only recollections of the conversations are the details of the conversations recorded in the notes I made at the material time.*
>
> *4. I do not recall whether or not* [the third parties] *requested that the matters they discussed with me remain confidential. However, I believe that I received the information recorded in the notes recorded at paragraph 1(b) of this declaration from* [the third parties] *in confidence.*
>
> *5. When I receive information of the kind recorded at paragraph 1(b) of this declaration ... I treat the information as confidential when discussing the issues raised with the patient. Had I discussed the matters raised in my telephone conversations with* [the third parties] *with* [the applicant], *I would not have raised the source of the issues I was raising with* [the applicant] *nor the opinions* [the third parties] *expressed about* [the applicant].

12. The material parts of the evidence of Person 1 which I am able to reproduce in this decision, are contained in paragraphs 3, 5, 6 and 7 of Person 1's statutory declaration made on 10 November 1993:

> *3. I do not have an independent recollection of the matters raised in Dr Prior's telephone conversation with me on 26 February 1991. However, I have refreshed my memory about the conversation through* [a member of the staff of my office] *reading to me the notes of Dr Prior recorded at paragraph 1(b) of this declaration. I believe that Dr Prior's notes accurately record the substance of our telephone conversation on 26 February 1991.*
>
> ...
>
> *5. I do not recall saying to Dr Prior when he phoned me that what I said to him was confidential, but I believed that I would have told him that I did not want* [the applicant] *to know that I had spoken to him nor the details of what I had told him.*
>
> *6. I do not recall whether Dr Prior told me the information was not going to be communicated to* [the applicant]. *However, I believe that I would not have said anything to Dr Prior unless I was sure that my identity and the information I had conveyed would remain confidential.*
>
> *7. I believe that I would have given Dr Prior the information in order to help* [the applicant].

13. The material parts of the evidence of Person 2 which I am able to reproduce are contained in paragraphs 2, 3 and 4 of Person 2's statutory declaration made on 3 December 1993:

> *2. I have a vague recollection of a telephone conversation I had with* [the applicant's] *doctor. However, I have refreshed my memory about that conversation through* [a member of the staff of my office] *reading to me the notes of Dr Prior recorded at paragraph 1(b) of this declaration. I now recall that I had a telephone conversation with Dr Prior on or about 26 February 1991. I believe that Dr Prior's notes accurately record the substance of our telephone conversation on 26 February 1991.*

> *3. I do not recall specifically if I was asked whether or not I wanted the conversation to remain confidential. If I had been asked, I would have said "yes". However I believe that I assumed our conversation would be treated by Dr Prior as confidential. If I had thought my comments would have been put to* [the applicant] *I would not have made any. Further, I would not have talked with Dr Prior if I thought that he would tell* [the applicant] *I had spoken with him about* [the applicant].
>
> *4. I recall that I gave Dr Prior the information as I thought it may help* [the applicant]. ...

Relevant Provisions of the FOI Act

14. In his decision of 25 July 1993, Dr Golledge relied on s.46(1)(b) of the FOI Act in determining that the matter in issue is exempt. In my opinion, s.46(1)(a) of the FOI Act is also relevant.

15. Section 46 of the FOI Act provides as follows:

> ***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.*

Section 46(1)(a) of the FOI Act

16. In *Re "B" and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported), I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(a) of the FOI Act. The test of exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency or Minister faced with an application, under s.25 of the FOI Act, for access to the information in issue (see paragraph 44 in *Re "B"*). I am satisfied that, in the circumstances of this

application, there are identifiable plaintiffs (Persons 1 and 2) who would have standing to bring actions for breach of confidence.

17. There is no suggestion in the present case of a contractual obligation of confidence arising in the circumstances of the communication of the information in issue from Persons 1 and 2 to the Authority. Therefore, the test for exemption under s.46(1)(a) must be evaluated in terms of the requirements for an action in equity for breach of confidence, there being five criteria which must be established:

    (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 paragraphs 60-63 in *Re "B"*);

    (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 paragraphs 64-75 in *Re "B"*);

    (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 paragraphs 76-102 in *Re "B"*);

    (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 paragraphs 103-106 in *Re "B"*); 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 paragraphs 107-118 in *Re "B"*).

18. With respect to the first criterion set out in the preceding paragraph, I am satisfied that the information supplied by each of Persons 1 and 2, which is claimed to be confidential information (as recorded in the documents in issue), can be identified with specificity.

19. With regard to the second criterion, there is nothing before me to suggest that the applicant is aware of any part of the information provided by the third parties. The applicant was, in fact, discharged from the Princess Alexandra Hospital the day after the third parties conveyed the information to Dr Prior. Dr Prior has given evidence that if he had raised with the applicant issues relating to the information conveyed by the third parties, he would not have revealed their opinions or their identities. However, he has not stated that he did raise those issues with the applicant. Further, the applicant has indicated that an opportunity was not given to put the applicant's side of the story, which suggests that the applicant was not made aware of the information conveyed.

20. I find that the information recorded in the matter in issue is not trivial and has the requisite degree of secrecy to invest it with the "necessary quality of confidence", so as to satisfy the second criterion. Information which would reveal the identity of Persons 1 and 2 is also, in my opinion, eligible for protection as confidential information under s.46(1)(a) of the FOI Act, as the connection of a person's identity with the imparting of confidential information can itself be secret information capable of protection in equity (see paragraph 137 of my decision in *Re "B"*, and *G v Day* [1982] 1 NSWLR 24).

21. I now turn to the third criterion. As I stated at paragraph 84 of my decision in *Re "B"*, this determination requires an evaluation of the whole of the relevant circumstances. In evaluating the

relevant circumstances surrounding the communication of information in each case, I have had regard to the evidence referred to above, the circumstances surrounding the seeking and imparting of the information in issue, and the purpose for which that information was sought and given.

22. There is no evidence that either Person 1 or Person 2 sought, or was given, an express assurance that the information each gave would remain confidential. However, I note in this regard what I said at paragraphs 89-90 of my reasons for decision in *Re "B"*:

> *89. The Federal Court in* Smith Kline & French *accepted that equity may impose an obligation of confidence upon a defendant having regard not only to what the defendant actually knew, but to what the defendant ought to have known in all the relevant circumstances. In cases decided under s.45(1) of the Commonwealth FOI Act (prior to its 1991 amendment) the Federal Court had consistently held that the determination of whether information was provided in circumstances importing an obligation of confidence is essentially a question of fact, which depends upon an analysis of all the relevant circumstances, and it is not necessary for there to have been an express undertaking not to disclose information; such an obligation can be inferred from the circumstances: see* Department of Health v Jephcott *(1985) 9 ALD 35; 62 ALR 421 at 425;* Wiseman v Commonwealth of Australia *(Unreported decision, Sheppard, Beaumont and Pincus JJ, No. G167 of 1989, 24 October 1989)*; Joint Coal Board v Cameron *(1989) 19 ALD 329, at p.339.*
>
> *90. It is not necessary therefore that there be any express consensus between confider and confidant as to preserving the confidentiality of the information imparted. In fact, though one looks to determine whether there must or ought to have been a common implicit understanding, actual consensus is not necessary: a confidant who honestly believes that no confidence was intended may still be fixed with an enforceable obligation of confidence if that is what equity requires following an objective evaluation of all the circumstances relevant to the receipt by the confidant of the confidential information.*

23. Dr Prior's evidence is that he believed the information recorded was received in confidence. He has stated that he treats information of this kind as confidential when discussing the issues with a patient, and that he would not have identified the source of the information if he had discussed the matters with the applicant. Both Persons 1 and 2 have given evidence that they believed the information was communicated in confidence, and that they believed their identities would not be revealed. The applicant has challenged this evidence on the basis that Dr Prior indicated that he had no independent recollection of the telephone conversations and the third parties both said they had a "vague recollection" of the conversation. The failure of the witnesses to remember the exact details of conversations which took place almost three years prior to their giving evidence is understandable. Their evidence remains useful in establishing Dr Prior's normal practice in relation to inquiries of this kind, and the beliefs of the third parties at the time of their conversations with Dr Prior.

24. As I pointed out at paragraphs 92 and 93 of my decision in *Re "B"*, a relevant consideration in determining whether the circumstances relating to the communication of confidential information to a government agency are such as to impose an equitable obligation of confidence on the recipient, is the use to which the government agency must reasonably be expected to put the information in the discharge of its functions. In this case it appears that there were two reasons for which Dr Prior sought information from the third parties. The first was to obtain information in order to help in the care of a patient. The second was to assist him in making a decision as to whether the patient

should be further regulated under the *Mental Health Act*. As it happened, the applicant was discharged from hospital the day after Dr Prior spoke to the third parties. There was no further action in relation to regulation of the applicant under the *Mental Health Act*. In the circumstances, I consider it was not unreasonable for either Dr Prior or the third parties to expect that hospital staff could carry out their duties, either in relation to patient care or regulation of the applicant under the *Mental Health Act*, without the need to disclose the identities of the third parties or the detail of information supplied by them. This accords with Dr Prior's stated practice of, where necessary, discussing with a patient the substance of relevant information while withholding details of the information given by, and the identities of, the information-providers.

25. Having regard to the nature and sensitivity of the information communicated by Persons 1 and 2, and the circumstances relating to its communication, I find that the matter in issue was communicated to the Authority in such circumstances as to fix the Authority with an equitable obligation of conscience not to use it in a way that is not authorised by the third parties.

26. With regard to the fourth criterion referred to in paragraph 17 above, I find that disclosure of the matter in issue would constitute an unauthorised use of the information provided by the third parties. The third parties had the expectation that the information in issue would be used by the Authority only for the limited purposes of assisting in the care and treatment of the applicant, and for purposes related to the *Mental Health Act*, and that the information would not be conveyed to any other person except to the extent necessary for those purposes.

27. With regard to the fifth criterion referred to in paragraph 17 above, I am satisfied that disclosure to the applicant of the information in issue would cause detriment to each of Persons 1 and 2. In paragraph 111 of my decision in *Re "B"*, I stated that it was not necessary to establish that a threatened disclosure of confidential information would cause detriment in a financial sense, but that detriment could also include embarrassment, a loss of privacy, fear, or an indirect detriment, for example, that disclosure of the information may injure some relation or friend. I am satisfied that disclosure to the applicant of the information in issue in each case would cause detriment to Persons 1 and 2 of one or more of the kinds mentioned above.

28. In the circumstances of the present case, no occasion arises to consider the application of any of the defences to an equitable action for breach of confidence discussed in my decision in *Re "B"* at paragraphs 119-134.

29. I am satisfied that s.46(2) of the FOI Act does not apply in the circumstances of this case, because neither Person 1 nor Person 2 comes within the terms of paragraph (a) or (b) of s.46(2). As I have found that disclosure of the matter in issue would found actions for breach of confidence owed to Persons 1 and 2, s.46(2) does not apply, even if the matter in issue were matter of a kind mentioned in s.41(1)(a) of the FOI Act.

30. I am satisfied that disclosure of the matter in issue would found an action for breach of confidence, and that it is therefore exempt matter under s.46(1)(a) of the FOI Act.

Section 46(1)(b) of the FOI Act

31. In paragraphs 35-36 of *Re "B"*, I explained the effect of s.46(2) when matter claimed to have been communicated in confidence is also matter of a kind mentioned in s.41(1)(a) of the FOI Act. The terms of s.46(2) actually render s.46(1)(b) redundant, for practical purposes, in respect of matter of a kind mentioned in s.41(1)(a). If a duty of confidence is said to be owed to a person or body mentioned in s.46(2)(a) or (b), then s.46(1) is precluded from applying to the relevant information if it is matter of a kind mentioned in s.41(1)(a). Even where matter of that kind was provided by a person or body outside the categories referred to in s.46(2)(a) and (b), s.46(2) stipulates that disclosure of the matter must found an action for breach of confidence owed to such a person or body. If that requirement can be satisfied, then s.46(1)(a) will apply, and the issue of whether s.46(1)(b) also applies is of academic interest only.

32. In its decisions in response to the applicant's FOI access application (which I acknowledge were given before my decision in *Re "B"* was published) there is no indication that the respondent turned its attention to the logical starting point before attempting to apply s.46(1)(b) to information provided by persons other than those mentioned in s.46(2)(a) or (b), i.e. whether the matter in issue is matter of a kind mentioned in s.41(1)(a). If it is matter of a kind mentioned in s.41(1)(a), the question of whether its disclosure would found an action for breach of confidence has to be considered first, and if answered affirmatively, s.46(1)(a) will apply and there is academic interest only, in attempting to apply s.46(1)(b). If the matter in issue is not matter of a kind mentioned in s.41(1)(a), then it is open to the decision-maker to apply s.46(1)(b) without considering whether its disclosure would found an action for breach of confidence. I mention this to draw the attention of FOI administrators to a possible problem area when the application of s.46(1)(b) of the FOI Act is being considered.

33. In this case, it is certainly arguable that the matter in issue, or parts of it, is matter of a kind mentioned in s.41(1)(a) and relates to deliberative processes involved in the administration of the *Mental Health Act*. In view of the findings I have come to, it is not necessary for me to address that issue. Nor, having already found that s.46(1)(a) applies to the matter in issue, is it necessary that I consider the application of s.46(1)(b). But since I wrote to the applicant setting out my preliminary views in terms of s.46(1)(b) of the FOI Act and invited the applicant to address the applicant's case to me on that basis, it is appropriate that I also consider that provision.

34. As discussed at paragraph 146 of my decision in *Re "B"*, in order to establish the *prima facie* ground of exemption under s.46(1)(b) of the FOI Act three cumulative requirements must be satisfied:

(a) the matter in issue must consist of information of a confidential nature;
(b) that was communicated in confidence; and
(c) the disclosure of which could reasonably be expected to prejudice the future supply of such information.

If the *prima facie* ground of exemption is established, it must then be determined whether the *prima facie* ground is displaced by the weight of identifiable public interest considerations which favour the disclosure of the particular information in issue.

35. The requirement that the information must be of a confidential nature calls for a consideration of the same matters that would be taken into account by a court (in an action in equity for breach of confidence) in determining whether, for the purpose of the second criterion identified at paragraph 17 of this decision, the information in issue has the requisite degree of relative secrecy or inaccessibility (see paragraph 148 of *Re "B"*).

36. In relation to the second requirement, I discussed the meaning of the phrase "communicated in

confidence" at paragraph 152 of my decision in *Re "B"* as follows:

> *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.*

37. I have already made findings at paragraphs 20 and 25 above that the information recorded in the matter in issue is confidential in nature, and that it was received by Dr Prior in circumstances importing an equitable obligation of confidence. I am satisfied that there was a common understanding between each of the third parties and the Authority (through its agent Dr Prior) as to preserving the confidentiality of the information imparted. In my view, the third parties implicitly authorised any limited disclosure that might be necessary for the purposes of the proper conduct of the Authority's functions, but the nature of the information conveyed by the third parties was such that it was unlikely that any necessity for disclosure of anything more than the substance of the information would arise. In the event, it did not prove necessary to disclose even the substance of the information. Thus, the first two criteria for the application of s.46(1)(b) of the FOI Act are satisfied.

38. The nature of the inquiry in relation to the third requirement of s.46(1)(b), i.e. that disclosure of the matter in issue could reasonably be expected to prejudice the future supply of such information, was discussed at paragraphs 154-161 of my decision in *Re "B"*. The test is not to be applied by reference to whether the particular confider whose confidential information is being considered for disclosure could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice the future supply of such information from a substantial number of sources available or likely to be available to an agency. The meaning of the phrase "could reasonably be expected to" was explained at paragraphs 154-160 of my reasons for decision in *Re "B"*. Where an expectation is asserted of prejudice to the future supply of information of a like character to the information in issue, it must be determined whether the expectation claimed is reasonably based. The words "could reasonably be expected to" call for the decision-maker applying s.46(1)(b) to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.

39. In the present case, the nature of the inquiry concerns the expected effects of disclosure to a person who has been hospitalised because of the person's psychological state, of the full details of discussions between treating medical staff and people able to give information about the patient which may be of assistance to medical staff in the care and treatment of the patient, and if necessary, the further regulation of the patient under the *Mental Health Act*. The applicant submitted that this requirement could not be satisfied if one of the third persons was the applicant's son, who lives with the applicant, because the applicant had ordered him to leave the house. He would therefore, according to the applicant, no longer be in a position to provide any information in relation to the applicant's state of mind. Whether or not the applicant's son is one of the third parties, it is clear from my discussion in the preceding paragraph that the question which must be answered is far more general than whether a specific source will in future be dissuaded from supplying information.

40. The initial decision of the Authority indicates that the hospital regularly relies on sources of confidential information in its overall management of patient care. It seems clear that in a case where concerns are raised about a patient's mental health, there is considerable benefit in a Health Authority having access to information from third parties in order to make a proper assessment of the patient's mental health. I note that there are several cases decided by the Victorian Administrative Appeals Tribunal under s.35 of the *Freedom of Information Act 1982 Vic* (*Re W and Health Department (Vic)* (1987) 1 VAR 383; *Re Pyle and Health Commission (Vic)* (1987) 2 VAR 54; *Re M and Health Department (Vic)* (1988) 2 VAR 317) which are somewhat similar to the present case, in that each involved an application by a former psychiatric patient for access to portions of the patient's clinical record comprising information about the patient conveyed to an agency by third persons. In all three cases, the Victorian AAT determined that disclosure of the information in issue would impair the future ability of the agencies concerned to obtain similar information. I accept that it will frequently be of assistance, and in some cases essential, for those involved in the care and treatment of a psychiatric patient to have access to a broad range of information, both clinical and non-clinical, concerning the patient. I can understand the Authority's concern to ensure that the supply of such information is not prejudiced.

41. While the wording of s.46(1)(b) of the FOI Act is slightly different to the Victorian provision, I have come to a similar conclusion in this case. In my view, disclosure of the matter in issue could reasonably be expected to prejudice the future supply of information of the type discussed. If those who are in a position to disclose such information become aware that the patient may obtain access under the FOI Act to information they provide, I think it is reasonable to expect that many would either refuse to give information, or would give guarded or misleading information which would be of little use to Health Authorities in the care and treatment of the patient. In taking such a course, third parties may be motivated by concern for the patient's well being, concern to maintain a continuing relationship with the patient, or concern for their own welfare. Whatever the reasons, I consider there are real and substantial grounds for the expectation that disclosure of the matter in issue would prejudice the future supply of like information.

42. In the circumstances, I consider that the first three requirements necessary to establish that the documents in issue are exempt under s.46(1)(b) of the FOI Act have been satisfied. It remains to be considered whether disclosure of the matter in issue would, on balance, be in the public interest.

43. As discussed at paragraph 19 of *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (Information Commissioner Qld, Decision No. 93002, 30 June 1993, now reported at (1993) 1 QAR 60) and at paragraph 179 of *Re "B"*, s.46(1)(b) of the FOI Act is framed so as to require an initial judgment as to whether disclosure of the document in issue would have certain specified effects, which if established would constitute a *prima facie* ground of justification in the public interest for non-disclosure of the matter, unless the further judgment is made that the *prima facie* ground is outweighed by other public interest considerations, such that disclosure of the document in issue "would, on balance, be in the public interest".

44. The meaning of the phrase "public interest" was discussed in detail in my decision in *Re Eccleston* at paragraphs 35-57, of which the following are relevant:

> *54. Likewise, under freedom of information legislation, the task of determining, after weighing competing interests, where the balance of public interest lies, will depend on the nature and relative weight of the conflicting interests which are identifiable as relevant in any given case.*

55. While in general terms, a matter of public interest must be a matter that concerns the interests of the community generally, the courts have recognised that: 'the public interest necessarily comprehends an element of justice to the individual' (per Mason CJ in Attorney-General (NSW) v Quin *(1990) 64 ALJR 627). Thus, there is a public interest in individuals receiving fair treatment in accordance with the law in their dealings with government, as this is an interest common to all members of the community. Similarly, the fact that individuals and corporations have, and are entitled to pursue, legitimate private rights and interests can be given recognition as a public interest consideration worthy of protection, depending on the circumstances of any particular case.*

56. Such factors have been acknowledged and applied in several decisions of the Commonwealth AAT; for example in Re James and Others and Australian National University *(1984) 6 ALD 687 at p.701, Deputy President Hall said:*

> '87 In [Re Burns and Australian National University (1984) 6 ALD 193] my colleague Deputy President Todd concluded that, for the purposes of the Freedom of Information Act, the concept of public interest should be seen as embodying public concern for the rights of an individual. Referring to a decision of Morling J, sitting as the former Document Review Tribunal (Re Peters and Department of Prime Minister and Cabinet (No. 2) (1983) 5 ALN No. 218) Deputy President Todd said:
>
> > *"But what is important is that his Honour clearly considered that there was a public interest in a citizen having such access in an appropriate case, so that if the citizen's 'need to know' should in a particular case be large, the public interest in his being permitted to know would be commensurately enlarged." (at 197)*
>
> I respectfully agree with Mr Todd's conclusion ... The fact that Parliament has seen fit to confer upon every person a legally enforceable right to obtain access to a document of an agency or an official document of a minister, except where those documents are exempt documents, is to my mind a recognition by Parliament that there is a public interest in the rights of individuals to have access to documents - not only documents that may relate more broadly to the affairs of government, but also to documents that relate quite narrowly to the affairs of the individual who made the request.'

57. The force of this principle has been recognised, at least in so far as it relates to documents concerning the personal affairs of an applicant for access, in s.6 of the FOI Act, ...

45. Section 6 of the FOI Act provides that:

> ***6.*** *If an application for access to a document is made under this Act, the fact that the document contains matter relating to the personal affairs of the applicant is an element to be taken into account in deciding -*

(a) whether it is in the public interest to grant access to the applicant; and

(b) the effect that the disclosure of the matter might have.

46. The public interest considerations for and against disclosure were given careful consideration in Ms James' initial decision on behalf of the Authority, as follows:

The arguments in favour of disclosure are:

1. Your public interest in obtaining access to information associated with the decisions made in relation to your medical treatment at the Hospital.

2. The Hospital's accountability for its management of patient care issues may be enhanced by the release of the information.

3. The promotion of open community discussion of patient care issues.

The arguments against disclosure are:

1. Information was provided by certain persons on a voluntary basis on the understanding that it would remain confidential.

2. These persons have not given permission for the information which was provided in confidence to be released.

3. The providers of health services to the community are often reliant upon the goodwill of other persons in assisting with relevant information to make informed patient care decisions.

4. Given the perceived breach of trust, release of this information could prejudice the continued supply of information to health facilities.

In balancing the public interest arguments I have given some weight to the importance of people continuing to provide health agencies with information that will assist in decisions made in the provision of health services. I have placed greater weight on the need to respect the privacy and sensitivity of information which identifies individuals, other than the applicant, in medical records. To release such matter could prejudice the continued supply of information that would be to the detriment of these services. I have therefore decided that the public interest lies in deleting information that was communicated in confidence.

47. The arguments which the applicant has addressed to me may be summarised as follows:

- The applicant believes that the statements of the third parties may not be correct. The applicant is concerned that disaffected relatives may not have told the truth about the applicant. The applicant is strengthened in this belief by what the applicant claims to be inaccuracies in the material which has already been released to the applicant under the FOI Act.

- The applicant believes that it is only fair that the applicant should have an opportunity to respond to anything said about the applicant and considers that, in failing to disclose the information to the applicant, lies are being protected.

- The applicant is concerned that this inaccurate material will be kept on the

applicant's file for a long time, and will give people who read it an inaccurate reflection of the applicant.

- The applicant is so concerned about this that the applicant may well be forced to stop going to doctors and thereby the applicant's health will suffer.

48. I accept that there is a public interest in patients being able to gain access to information concerning their medical treatment, though it is certainly not an unqualified one (see s.44(3) of the FOI Act where it is expressly recognised that there may be instances where disclosure to an applicant of information of a medical or psychiatric nature concerning the applicant would be prejudicial to the applicant's physical or mental health or well being).

49. While the public interest in members of the community being given ways to ensure the accuracy of personal affairs information held by government is a relevant consideration, I do not regard it, considered as a separate factor, as adding any greater weight to the applicant's case for disclosure than the public interest consideration favouring disclosure which carries most weight in this context, namely the public interest (which is given special recognition in s.6) in an individual having access to information concerning that individual's personal affairs. (My remarks at paragraph 185 of *Re "B"* are also relevant in this context.)

50. However, based on my examination of the matter in issue, I consider that its disclosure would not have any positive or beneficial consequences for the applicant, and certainly none of sufficient substance to outweigh the detriment that would be occasioned to the third parties, nor the potential detriment referred to in paragraph 41 above.

51. The public interest in the accountability of government will normally carry substantial weight in an appropriate case, but in this case I cannot see how disclosure of the matter in issue is likely to enhance the accountability of government in any significant way. As noted earlier, the discharge of the applicant from hospital occurred within one day of the information being provided by the third parties, and there is nothing in the matter in issue to suggest that Dr Prior, or any member of staff of the Authority, acted on the information in a way that was contrary to the interests of the applicant or the requirements of fair administration.

52. I am not satisfied that the public interest considerations favouring disclosure of the matter in issue to the applicant are of sufficient weight to displace the public interest favouring non-disclosure which is evident in the satisfaction of the *prima facie* test for exemption under s.46(1)(b) of the FOI Act. I therefore find that the matter in issue is exempt matter under s.46(1)(b) of the FOI Act.

53. Finally, I note that I have not undertaken an investigation into whether the information supplied by the third parties was accurate, and my findings should not be regarded as having any bearing on an issue of that kind. My findings should not be taken to suggest that agencies can or should proceed on the assumption that all information supplied to them on a confidential basis is correct and appropriate to be acted upon. The inquiries which an agency must or should undertake in order to satisfy itself that information received on a confidential basis is sufficiently reliable to be acted upon will vary from case to case. There may well be instances where it would be inappropriate for an agency to accept and act upon information offered on a confidential basis, because its reliability could only properly be tested by putting it to the very person from whom it is claimed to be confidential. Common sense judgments must be made according to the circumstances which present themselves in each particular case.

Conclusion

54. I affirm that part of the decision of Dr Golledge which found that the matter in issue, as contained in folios 9, 10, 11, 34 and 35 is exempt matter under s.46(1)(b) of the FOI Act. I also find that the matter in issue is exempt matter under s.46(1)(a) of the FOI Act.

.....
F N ALBIETZ
INFORMATION COMMISSIONER