

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 141 of 1993
(Decision No. 95003)

Participants:

PETER KYRAN DEVINE
Applicant

- and -

PENINSULA AND TORRES STRAIT REGIONAL HEALTH AUTHORITY
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - clinical notes on a public hospital patient made by the applicant, a registered nurse - whether clinical notes exempt from disclosure to the applicant under s.44(1) of the *Freedom of Information Act 1991* Qld - clinical notes clearly comprise information concerning the personal affairs of a person other than the applicant - whether disclosure to the applicant would, on balance, be in the public interest

FREEDOM OF INFORMATION - refusal of access - matter in issue comprising comments about the applicant made by a third party to an investigator appointed to investigate complaints about the conduct of another member of medical staff - comments not directly relevant to that investigation - whether the matter in issue is exempt matter under s.46(1)(a) of the *Freedom of Information Act 1992* Qld on the basis that its disclosure would found an action for breach of confidence

Freedom of Information Act 1992 Qld s.41(1), s.41(1)(a), s.44(1), s.46(1)(a), s.46(1)(b), s.46(2)

"B" and Brisbane North Regional Health Authority, Re (Information Commissioner Qld, Decision No. 94001, 31 January 1994; 1 QAR 279

G v Day [1982] 1 NSWLR 24

Pemberton and The University of Queensland, Re (Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported)

Stewart and Department of Transport, Re (1993) 1 QAR 227

DECISION

I vary the decision under review (being the internal review decision made on 1 July 1993 by Dr G J Goodier on behalf of the respondent) in that I decide -

- (a) that Folios X17, X26-X39, X65, X66 and X71 (as described in paragraph 6 of my reasons for decision) fall within the scope of Mr Devine's FOI access application, but that those folios comprise exempt matter under s.44(1) of the FOI Act; and
- (b) that the twelfth and thirteenth lines of folio 83, as identified in the internal review decision of Dr Goodier, comprise exempt matter under s.46(1)(a) of the FOI Act.

Date of Decision: 3 March 1995

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F N ALBIETZ
INFORMATION COMMISSIONER

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PENINSULA AND TORRES STRAIT REGIONAL HEALTH AUTHORITY
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REASONS FOR DECISION

Background

1. The applicant, a registered nurse, seeks review of the respondent's decision to refuse him access to documents contained on a medical chart of a former patient (referred to in these reasons for decision as Mr X), and documents regarding himself, held by the respondent, which the respondent contends are exempt under the *Freedom of Information Act 1992* Qld (the FOI Act).
2. By letter dated 13 April 1993, the applicant lodged with the respondent an FOI access application for "my notes and my reports attached to the late Mr [X's] chart" and also for "documents held by Cairns Base Hospital regarding myself".
3. The initial decision on behalf of the respondent was made by Ms S E C Byrne on 11 June 1993. With respect to the first part of Mr Devine's application (the medical chart of Mr X), Ms Byrne found that it could not be located. (The medical chart was subsequently located in the course of this external review, and a number of folios from that chart are considered in the course of my decision). Ms Byrne indicated that 26 folios had been found which fell within the scope of the second part of Mr Devine's application. Of these folios, Ms Byrne determined to release some in full and others in part. Of the latter group, Ms Byrne decided that some parts of documents were exempt under various sections of the FOI Act, and other parts did not fall within the scope of Mr Devine's FOI access application. As a result of concessions made by the respondent, the applicant and third parties in the course of this review, only two lines from one of these folios (folio 83) remain in issue in this external review.
4. Ms Byrne had determined that folio 83 was exempt under s.41(1), s.44(1) and s.46(1)(b) of the FOI Act. Mr Devine applied for internal review of Ms Byrne's decision, which was undertaken on behalf of the respondent by the respondent's principal officer, Dr G J Goodier. Dr Goodier's internal review decision, dated 1 July 1993, differed from the decision of Ms Byrne in a number of respects, but with regard to folio 83, Dr Goodier determined that it was exempt under the same provisions that Ms Byrne had relied upon to find it exempt. Dr Goodier also indicated in his decision that further searches for the medical chart of Mr X had been conducted, but that it had not been found.
5. By letter dated 19 July 1992, Mr Devine applied to me for review under Part 5 of the FOI Act, in respect of Dr Goodier's decision.

The matter in issue

6. The bulk of the matter in issue comprises folios from the medical chart of Mr X. Some 15 folios are clinical notes made by Mr Devine in the course of his involvement with the care of Mr X at a public hospital in far north Queensland (I will refer to these folios as X26-X39 and X71). Two folios are clinical notes made by other hospital staff which contain a mention of Mr Devine's name, as a record of the care being given to Mr X at the hospital (X65 and X66). One folio is a letter of instruction to staff regarding the care of Mr X, which sets out Mr Devine's role in relation to the care of Mr X (X17).
7. The only other matter in issue is two lines from folio 83 which refer to Mr Devine. In 1981, Dr W J Smith, then Acting Chief Executive Officer of the Cairns Base Hospital, conducted an investigation into complaints by members of the public about the handling by a member of the medical staff (referred to in these reasons for decision as Dr Y) of incidents which arose in the course of the care of Mr X at another hospital in the region. Those complaints did not relate to Mr Devine, but Mr Devine had been involved in the care of Mr X at the time of those incidents. Dr Smith interviewed a number of people in the course of the investigation and made notes of those interviews. Folio 83 contains notes of an interview with one of those people (referred to in these reasons for decision as the third party). The bulk of folio 83 relates to the incidents in question and the conduct of Dr Y. However, the comment recorded in the two lines in issue refers to Mr Devine.

The external review process

8. The documents claimed by the respondent to be exempt were obtained and examined, along with notes which recorded consultations with third parties who had provided information to Dr Smith in the course of his investigation.
9. Subsequently, by a letter dated 20 September 1993, the respondent advised that the medical chart of Mr X had been located, and a copy was provided to me. The respondent indicated in that letter that it considered all the material in the chart to be information concerning the personal affairs of Mr X, and that the balance of the public interest lay in protecting the privacy of Mr X. The respondent therefore claimed that the chart was exempt under s.44(1) of the FOI Act.
10. I contacted Dr Smith and a number of third parties to ascertain their attitudes towards release of the medical chart of Mr X, and the other matter then in issue. Dr Smith did not object to release of material subject to my obtaining the views of third parties who had provided information to him. After lengthy consultations with the respondent, the applicant and third parties, the matter in issue was narrowed to the medical chart of Mr X, and to the small part of folio 83 referred to above.
11. By letter dated 4 August 1994, I provided Mr Devine with my preliminary views that the matter still in issue is exempt: the medical chart under s.44(1) of the FOI Act, and the relevant passage from folio 83 under s.46(1)(a) and s.46(1)(b) of the FOI Act. In that letter I provided Mr Devine with the opportunity to make a submission to me, if he did not agree with my preliminary views. Mr Devine responded by a letter dated 8 September 1994, which reads as follows:

I refer to your letter dated 4/8/94 and wish to advise that I contend that the folios on Mr [X's] chart and the paragraph in folio 83 are not exempt.

My submission shall be brief and centres on the principles of natural justice.

The Regional Health respondent has used information from these folios obtained during an investigation, to make decisions which have discredited me. Natural Justice demands that I should have the right to a fair hearing and the freedom from bias. I therefore request access to all this information which has been used by the Regional Authority to make decisions detrimental to me.

12. In view of the unspecified claims of breach of natural justice and the brevity of his submission, one of my staff contacted Mr Devine by telephone, discussed the nature of his claims with him (see paragraph 21 below), and invited Mr Devine to present a further written submission to me together with evidence in support of his claims. Mr Devine indicated that he would do so.
13. I then obtained evidence from Dr Smith and the third party, by way of statutory declarations, as to the circumstances in which the information contained in the relevant passage from folio 83 was communicated to Dr Smith. By a letter dated 21 November 1994, I provided Mr Devine with copies of those statutory declarations (subject to deletion of those parts which would disclose matter claimed to be exempt or the identity of the third party), and invited Mr Devine to comment on them and make any further submission he cared to make, by 12 December 1994. After an approach by Mr Devine, that time limit was extended to 25 January 1995. I have received no further submission from Mr Devine.

Medical Chart of Mr X

Personal affairs - s.44(1) of the FOI Act

14. The respondent has claimed that all relevant folios on the medical chart of Mr X are exempt under s.44(1) of the FOI Act. Section 44(1) provides:

44.(1) Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.

15. Though Mr X is now deceased, s.44(1) of the FOI Act clearly extends the scope of its protection to information concerning the personal affairs of deceased persons. In my reasons for decision in *Re Stewart and Department of Transport* (Information Commissioner Qld, Decision 93006, 9 December 1993, now reported at (1993) 1 QAR 227), I identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act (see paragraphs 79-114 of *Re Stewart*). In particular, I said that information concerns "the personal affairs of a person" if it relates to the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:

family and marital relationships;

health or ill-health;

relationships and emotional ties with other people; and

domestic responsibilities or financial obligations.

16. All but one of the folios in issue on the medical chart of Mr X comprise clinical notes produced by staff of the hospital in respect of the care of Mr X. The remaining folio in issue is a directive to staff given specifically in relation to the care of Mr X. In my view, there is no doubt that disclosure of any of these folios would disclose information concerning the personal affairs of Mr X. Mr Devine has not disputed this point. Accordingly, the matter is *prima facie* exempt from disclosure to the applicant under s.44(1), subject to the application of the public interest balancing test contained in s.44(1).

The public interest

17. Prior to making his FOI access application, Mr Devine wrote a letter to the respondent, dated 3 March 1993, in which he indicated that he had been "requested by the Senior Investigating Officer of a Law Enforcement Agency to prepare a full report" on Dr Smith's investigation. As it turns out, the law enforcement agency to which Mr Devine was referring was the Parliamentary Commissioner for Administrative Investigations (the Ombudsman). When lodging his FOI access application with the respondent, Mr Devine provided a letter from the Ombudsman making reference to s.44 of the FOI Act. Mr Devine indicated to the respondent at that stage that he hoped the letter would provide the respondent with the necessary public interest considerations in favour of granting him access. In fact, the Ombudsman's letter did not request Mr Devine to provide a report, but indicated that he might be called on in the future to comment on factual matters which were within his knowledge.
18. As Mr Devine has provided no written submissions other than his letter of 8 September 1994 (see paragraph 11 above), I requested access to (see s.85 and s.92 of the FOI Act), and examined, two Ombudsman files which had some relation to Dr Smith's investigation. One was a file created on the basis of a complaint by Dr Y about the handling of Dr Smith's investigation. The other was a complaint by Mr Devine. Mr Devine had been involved in preparing material which was supplied to the Ombudsman in respect of both complaints. My purpose in examining the material on those files that was created or forwarded by Mr Devine, was to see whether it afforded any more substantial support for the submission which Mr Devine had put to me in the briefest of terms in his letter dated 8 September 1994 (see paragraph 11 above).
19. From the material on the file relating to the complaint made by Dr Y, I gather that both Dr Y and Mr Devine have a general concern as to Dr Smith's investigation and its outcome. They both indicated that they considered that Dr Y was unfairly treated. These claims are made notwithstanding Dr Smith's finding that there was not sufficient material before him to warrant disciplinary action against Dr Y.
20. The only evidence I can find of personal concerns held by Mr Devine are suggestions that Mr Devine considers that Dr Smith, in his report of his investigation, has cast doubts on the reliability of Mr Devine's evidence. There is no suggestion in the material contained in the Ombudsman files that any action was taken against Mr Devine in this regard. I can find no other suggestion that action has been taken against Mr Devine, and there is no criticism of the way in which Mr Devine made his clinical notes relating to Mr X, or of the performance of his duties in the care of Mr X.
21. As noted above, the applicant expanded on his letter of 8 September 1994, in a telephone conversation with a member of my staff on 29 September 1994. The argument presented by Mr Devine on that occasion may be summarised as follows:

Mr Devine has, in recent times, taken a prominent position in public debate over health related issues within the far north Queensland region.

Mr Devine's position on a number of issues has at times been significantly opposed to that of representatives of the respondent.

Representatives of the respondent have used the information contained in the documents in issue to lessen Mr Devine's standing, from the viewpoint of people within the respondent Authority, and generally in the far north region.

Representatives of the respondent have continued investigations of Mr Devine's background and attempts to find information to discredit Mr Devine, notwithstanding that he is no longer employed by the respondent.

As a consequence, Mr Devine's public standing and employment opportunities within the region have been limited.

It is in the public interest that Mr Devine have access to these documents in order to be able to clear his name.

22. The respondent, for its part, has stressed the public interest in protecting the privacy of the individual (in this case, Mr X) as the overriding factor. From the terms of its initial decision and its decision on internal review, it is clear that the respondent has also recognised the public interest in demonstrating the accountability of government and in allowing individuals access to information that may concern them in some way.
23. Two passages from the respondent's letter to me dated 20 September 1993 (which enclosed the medical chart) address public interest considerations:

The respondent also believes that although Mr Devine wrote those notes, which might suggest that to release them may be less of a breach of privacy, it would be an undesirable precedent to state that nurses or other health care providers had a right to access their notes on patients simply by virtue of having authored them. This is particularly so in the case of Mr Devine, who is no longer an employee of the respondent and therefore not subject to disciplinary action should he choose to publish the notes, which we are inclined to suppose is his intention.

...

As discussed, it is difficult to see any public interest which Mr Devine could adduce to overcome the exemption. Although his application for internal review stated: "Natural justice requires full access", Mr Devine was not the subject of the complaint and was involved only peripherally as a witness. His rights have not been affected in any way by the investigation or in relation to any matter upon which Mr [X's] medical records could have any bearing.

24. It is clear that there is a public interest in disclosure of documents to facilitate the accountability of government. In this case, there appear to be two facets of government activity worthy of consideration.

25. The first of these is the general operation of a public hospital and its treatment of patients. In this context, I do not consider that the disclosure of the particular documents contained in the medical chart, would significantly enhance government accountability. The documents are, generally speaking, notes relating to the care of an individual. They would give members of the public an indication of the care given to a particular patient within a public hospital. There is no doubt a level of public interest in knowing whether or not a public hospital is functioning properly. However, there is nothing in the particular matter in issue, the disclosure of which would serve that public interest; for example, there is nothing suggestive of fault within the system or with any particular officer within the system.
26. The second activity is the conduct by the respondent of an investigation into the performance of one of its staff members, Dr Y. I acknowledge that there is a public interest in enabling the scrutiny of investigations carried out by agencies into the performance of their staff. In this case, complaints had been made to the Criminal Justice Commission and the Ombudsman with respect to the conduct of Dr Smith's investigation. However, when it is appreciated that Dr Smith ultimately recommended that no disciplinary action be taken against Dr Y, the complaints of Mr Devine and Dr Y, that Dr Y was treated too harshly, tend to lose much of their force. In the context of this review, the relevance of those complaints is further diminished because there is nothing in the documents in question which would greatly assist a member of the public to evaluate the conduct of the investigation. The matter in issue is raw material which may or may not have played a part in Dr Smith's decision. It provides no indication of the processes that Dr Smith went through in conducting his investigation and does not appear to have played a key part in any of his findings. In the circumstances, I do not consider there to be a substantial public interest in release of the matter in issue in order to allow a fuller understanding by the public of the steps taken by the respondent to investigate complaints against Dr Y.
27. I also recognise that, in an appropriate case, there may be a public interest in a particular applicant having access to information which affects or concerns that applicant to such a degree as to give rise to a justifiable "need to know" which is more compelling than for other members of the public (see my recent decision in *Re Pemberton and The University of Queensland* (Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported) at paragraphs 164 to 193). However, I am not satisfied that the matter in issue affects or concerns Mr Devine to such a degree as to give rise to a public interest in Mr Devine's obtaining access to the information in Mr X's medical chart.
28. Mr Devine has claimed that he has been denigrated by members of staff of the respondent. He has suggested that natural justice requires that he be given full access to the matter in issue. He has, however, conceded that nothing done by the respondent or its staff members would amount to a breach of natural justice as that term is understood in a legal sense. He has suggested that he has evidence to support his claims of denigration, but has provided no such evidence to me.
29. Having closely examined the folios in issue from the medical chart, I find it difficult to see how, even if he had presented evidence to show that staff of the respondent were attempting to denigrate him, they could have done so by use of the folios in issue taken from the medical chart. In my view, there is nothing contained in the matter in issue which portrays Mr Devine in a negative light.
30. Mr Devine can claim no assistance from s.6 of the FOI Act in terms of my assessment of whether it is in the public interest that he obtain access, since none of the matter in issue in the medical chart concerns Mr Devine's personal affairs. Mr Devine wrote his clinical notes in the course of performing nursing duties at the hospital. He did not include in the clinical notes any reference to personal aspects of his own life. The references to Mr Devine in other folios of the medical chart refer to Mr Devine in a work context, and may be described as purely procedural in nature. None of them contains any comment adverse to Mr Devine.

31. On the material before me, I am satisfied that there are no public interest considerations favouring disclosure of the folios of Mr X's medical chart, which are sufficient to outweigh the public interest in non-disclosure inherent in the satisfaction of the test for *prima facie* exemption under s.44(1) of the FOI Act, i.e., that the matter in issue comprises information concerning the personal affairs of a person other than the applicant for access.

Folio 83

32. In respect of its claim for exemption for the passage from folio 83, the respondent relied on s.41(1), s.44(1) and s.46(1)(b) of the FOI Act. I also consider s.46(1)(a) of the FOI Act to be relevant. 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.*

The Evidence

33. The third party provided evidence, by way of a statutory declaration executed on 17 October 1994, as to the circumstances in which the matter in issue in folio 83 was provided to Dr Smith. The relevant parts of the third party's evidence are set out in paragraphs 2, 3 and 4 of the statutory declaration:

- 2. I recall that at some stage in 1991 I attended Dr Smith's office to discuss with him complaints that had been made against [Dr Y]. During the course of our conversation, I made a statement along the lines of that [recorded in the relevant passage of folio 83]. I do not recall my exact words but believe I would not have stated the information given as a fact. I would have said that I believed this to be the case.*
- 3. At all times during the course of our conversation and thereafter, I believed that the interview was conducted in confidence and that any information I conveyed to Dr Smith was conveyed in confidence. I believe that during the*

conversation I asked Dr Smith whether we were speaking in confidence.

4. *I put forward my opinion in relation to Mr Devine in order to supply Dr Smith with background in relation to the investigation of [Dr Y]. I believed that it might be useful for him to know this whilst considering his report but did not believe it would be necessary for him to include reference to it in his report or to discuss it with [Dr Y].*

34. Evidence was obtained from Dr Smith in the form of a statutory declaration made on 31 October 1994. The relevant parts of that declaration were contained in paragraphs 3 and 5 to 8, which are set out below:

3. *During 1991, I was Acting Chief Executive Officer of the Cairns Base Hospital. At the request of the Regional Director of the respondent, I carried out an investigation into complaints against [Dr Y] ... by two members of the public.*

...

5. *I did not use the information [recorded in the relevant passage of folio 83] in the preparation of my report to Dr Goodier and I did not use the information in any other way adverse to Mr Devine. I am not aware of any person within the respondent having used that information in any way detrimental to Mr Devine.*

6. *I recall that the interview between myself and the third party took place in my office. I have no recollection that the third party requested that the conversation remain confidential or that the third party's identity should not be disclosed. I do not recall saying to the third party at any time that anything the third party told me would be treated as confidential.*

7. *I believe that I would not have said that the discussion would be kept confidential but rather I would have said that the information the third party provided would have been used as I saw fit in formulating my reports.*

8. *In relation to the specific information [recorded in the relevant passage of folio 83], I do not recall any request by the third party that that matter be treated as confidential. I do not recall giving any assurance to the third party that that matter would be kept confidential. I believe that because the information did not relate directly to the investigation of the, complaints, the third party may have assumed that the comment was "off the record" and would not be passed on by me. I had no reason to refer to the information in my report on the complaints against [Dr Y].*

35. Mr Devine has provided no submissions on the evidence of either the third party or Dr Smith, or on the preliminary view which I conveyed to him that the passage from folio 83 is exempt matter under s.46(1)(a) of the FOI Act, other than his general claim that it is in the public interest that he should have access to all documents.

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

36. In *Re "B" and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, now reported at (1994) 1 QAR 279), 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 is an identifiable plaintiff (the third party) who would have standing to bring an action for breach of confidence.

37. 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 the third party to the respondent. 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"*).
38. With respect to the first criterion set out in the preceding paragraph, I am satisfied that the information supplied by the third party, which is claimed to be confidential information (as recorded in folio 83), can be identified with specificity.
39. With regard to the second criterion, there is nothing before me to suggest that the applicant is aware of the information provided by the third party or the identity of the third party. 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 the third party 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).
40. I now turn to the third criterion. As I stated at paragraph 84 of my decision in *Re "B"*, this requires an evaluation of the whole of the relevant circumstances. In evaluating the relevant circumstances surrounding communication of the information, I have had regard to the evidence referred to above,

the circumstances surrounding the imparting of the information in issue, and the purpose for which the information was sought and given.

41. The third party has stated that the third party raised the issue of confidentiality with Dr Smith at the time of the interview. Dr Smith has indicated that he does not recall having given an assurance of confidentiality to the third party during the interview, and does not believe that he would have given a general assurance as to confidentiality. It is therefore by no means clear whether an express assurance of confidentiality was given, but an express assurance is not an essential element for the establishment of exemption under s.46(1)(a) of the FOI Act. 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.*

42. The evidence of the third party is that the third party conveyed all the information provided at the interview in confidence. With respect to the particular information in issue, the third party has stated that the information was provided as background information in relation to Dr Smith's investigation of Dr Y. Dr Smith has declared that he does not consider that all of the information given during the course of the interview was given in confidence. However, in relation to the particular information recorded on folio 83 which comprises the matter in issue, Dr Smith acknowledges it may have been open to the third party to assume that the comment was "off the record" and would not be passed on. Dr Smith has confirmed that he had no reason to refer to the particular information in his report on the complaints against Dr Y.

43. 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. Given the background nature of the particular information supplied by the third party, which is the matter in issue, there is nothing to suggest that it was reasonable for the

third party to believe that the information would be included in the report, or would have to be put to Mr Devine, or anyone else, for the purposes of the proper conduct of Dr Smith's investigation, or for any other purpose relating to the proper functioning of the respondent. There is no indication that the information provided led to any investigation by the respondent into the work practices of Mr Devine. I do not think that there was, in this case, any factor relating to the use to which a government agency must reasonably be expected to put information conveyed to it, which would override the inference which I consider can readily be drawn from the nature of the information in issue, i.e., that it was communicated on a confidential basis, and ought to have been understood as such.

44. Having regard to the nature of the particular information in issue and the circumstances in which it was communicated to Dr Smith, I find that it was communicated in such circumstances as to fix the respondent with an equitable obligation of confidence.
45. With regard to the fourth criterion referred to in paragraph 37 above, I find that disclosure of the matter in issue would constitute an unauthorised use of the information provided by the third party. The third party had the expectation that the information in issue would be used by Dr Smith on behalf of the respondent only for the limited purpose of providing background to Dr Smith's investigation of the conduct of a member of the medical staff (Dr Y), and that the information would not be conveyed to any other person except to the extent necessary for that purpose.
46. With regard to the fifth criterion referred to in paragraph 37 above, I am satisfied that disclosure to the applicant of the information in issue would cause detriment to the third party. 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 would cause detriment to the third party of one or more of the kinds mentioned above.
47. 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.
48. I am satisfied that s.46(2) of the FOI Act does not apply in the circumstances of this case, because the third party does not fall within the words of paragraph (a) or (b) of s.46(2). As I have found that disclosure of the matter in issue would found an action for breach of confidence owed to the third party, 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.
49. I am satisfied that disclosure of the matter in issue contained in folio 83 would found an action for breach of confidence, and that it is therefore exempt matter under s.46(1)(a) of the FOI Act.
50. As I have found that the relevant part of folio 83 is exempt under s.46(1)(a) of the FOI Act, I do not propose to examine other grounds of exemption that were claimed by the respondent.

Conclusion

51. As the internal review decision of Dr Goodier made no finding as to the exemption of folios contained in the medical chart of Mr X, and I have found part of folio 83 to be exempt on a different basis from those considered by Dr Goodier, it is appropriate that my formal decision should vary Dr Goodier's decision of 1 July 1993 to the extent that I decide -

- (a) that Folios X17, X26-X39, X65, X66 and X71 (as described in paragraph 6 above) fall within the scope of Mr Devine's FOI access application, but that those folios comprise exempt matter under s.44(1) of the FOI Act; and
- (b) that the twelfth and thirteenth lines of folio 83 comprise exempt matter under s.46(1)(a) of the FOI Act.

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F N ALBIETZ
INFORMATION COMMISSIONER