OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 96003
Application L 19/94

Participants:

DONALD COVENTRY
Applicant

CAIRNS CITY COUNCIL
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - letter in issue forwarded in confidence to the respondent by a third party - letter contained adverse comments on aspects of the applicant's performance of his employment duties - applicant's employment subsequently terminated by the respondent - whether disclosure of the letter to the applicant would found an action in equity for breach of confidence - whether disclosure of the letter to the applicant would be an unconscionable use of the letter by the respondent - application of s.46(1)(a) of the *Freedom of Information Act 1992* Qld - whether the supplier of the letter had impliedly authorised its disclosure to the applicant if that were necessary to take appropriate action on the information conveyed in the letter - whether disclosure of the letter could reasonably be expected to prejudice the future supply of like information - application of s.46(1)(b) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.46(1)(a), s.46(1)(b), s.52, s.78, s.81
Local Government Act 1936 Qld s.17, s17B

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564; 66 ALJR 271
Annetts v McCann (1990) 170 CLR 596
Attorney-General (NSW) v Quin (1990) 170 CLR 1; 64 ALJR 327
Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockroft (1986) 10 FCR 180; 64 ALR 97; 12 ALD 468
"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Coutts v Commonwealth of Australia (1985) 59 ALR 699
Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (1993) 1 QAR 60
Hamilton and Queensland Police Service, Re (Information Commissioner Qld, Decision No. 94021, 26 August 1994, unreported)

Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648
Kioa v West (1985) 159 CLR 550; 60 ALJR 113; 62 ALR 321
McEniery and Medical Board of Queensland, Re (1994) 1 QAR 349
Pemberton and The University of Queensland, Re (Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported)

DECISION

I set aside the decision under review (being the internal review decision made on behalf of the respondent by Mr N P Briggs on 23 May 1994). In substitution for it, I find that the matter in issue is not exempt from disclosure to the applicant under s.46(1) of the *Freedom of Information Act 1992* Qld, and that the applicant has a right to be given access to the matter withheld from him pursuant to the decision under review.

Date of decision: 3 April 1996

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INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access under the *Freedom of Information Act 1992* Qld (the FOI Act) to a letter which refers to aspects of the applicant's performance of his duties in his former employment as Director of the Cairns Regional Gallery.

2. The applicant contends, in his application for external review, that the letter was used by the then Mayor of Cairns to influence the Board of Directors of the Cairns Regional Gallery, at its meeting on 17 January 1994, when the Board decided to recommend that the office of Gallery Director be made redundant. The Board's recommendation was given effect by a decision of the Cairns City Council, at its meeting on 18 January 1994, and the applicant's employment as Director of the Cairns Regional Gallery was terminated accordingly.

3. The letter in question is dated 7 January 1994 and was written by a Mr Don Hall, Joint Managing Director of Professionally Directed Fundraising Associates Pty Ltd, a firm which had just completed a feasibility study report assessing the potential fundraising capacity of the Cairns Regional Gallery. The letter was addressed to the then Mayor of Cairns, Alderman Kevin Byrne, who was *ex officio* a member of the Board of the Cairns Regional Gallery, and was at that time the Chairman of the Board.

4. In an FOI access application forwarded to the respondent on 7 February 1994, Mr Coventry specifically requested access to the letter described above, as well as a number of other specified files and documents. The letter is, however, the only document which remains in issue. The decision now under review is that of the respondent's then Chief Executive Officer, Mr N P Briggs, made on 23 May 1994 (on internal review pursuant to s.52 of the FOI Act). Mr Briggs decided that the letter in issue comprised exempt matter under s.46(1)(a) and s.46(1)(b) of the FOI Act.

5. By letter dated 30 June 1994, Mr Coventry applied for review by the Information Commissioner, under Part 5 of the FOI Act, of Mr Briggs' decision.

The external review process

6. At my request, the respondent provided me with a copy of the letter in issue, plus (under cover of the respondent's letter to my office dated 8 December 1994) other background documents and information relevant to the termination of Mr Coventry's employment as Director of the Cairns Regional Gallery. On 18 November 1994, I wrote to Mr Don Hall inquiring whether he continued to object to the disclosure to Mr Coventry of the letter in issue (or any particular parts thereof), and drawing his attention to s.78 of the FOI Act. Mr Hall responded by letter dated 28 November 1994, stating that he maintained a strong objection to the disclosure to Mr Coventry of the letter in issue. Mr Hall did not apply under s.78 of the FOI Act to be a participant in this review, but he has sworn an affidavit that was lodged by the respondent in support of its case.

7. It was clear that there were no prospects for a negotiated resolution of this case, and the participants were invited to lodge formal evidence and written submissions in support of their respective cases (and to reply to each other's submissions). The respondent relies on —

- an affidavit of Noel Patrick Briggs sworn 9 May 1995
- an affidavit of Mr Kevin Selwyn (Don) Hall sworn 10 May 1995
- an affidavit of Gerald Anthony Anakin sworn 6 June 1995
- a written submission dated 21 February 1995
- a submission in reply dated 6 June 1995
- a supplementary submission dated 19 July 1995.

8. The applicant relies on —

- an affidavit of Donald Coventry sworn 29 June 1995
- an affidavit of Susan Cutler sworn 29 June 1995
- a written submission dated 17 March 1995
- a submission in reply dated 30 June 1995
- a supplementary submission dated 4 August 1995.

9. Relevant parts of the evidence and submissions lodged by the participants are referred to below.

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

10. The respondent contends that the letter in issue is exempt matter under s.46(1)(a) and s.46(1)(b) of the FOI Act. Section 46(1) of the FOI Act provides:

> ***46.(1)*** *Matter is exempt if—*
>
> *(a) its disclosure would found an action for breach of confidence; or*
>
> *(b) it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*

Application of s.46(1)(a)

11. In *Re "B" and Brisbane North Regional Health Authority* (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 for 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 *Re "B"* at pp.296-7; paragraph 44). In this instance, there are identifiable plaintiffs who would have standing to bring an action for breach of confidence, namely, Mr Don Hall and/or Professionally Directed Fundraising Associates Pty Ltd (being the corporation on behalf of which Mr Hall wrote the letter in issue).

12. I can see no basis, in the present case, for any suggestion of the existence of a contractual obligation of confidence applying to the letter in issue. Therefore, the test of 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 cumulative 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 *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).

13. With respect to the first criterion, I am satisfied that the information which is claimed by the respondent to be confidential can be identified with specificity.

14. With respect to the second criterion, it is either admitted in the respondent's submissions, or is clearly established by other material before me, that the letter in issue:

    (i) was read to a closed meeting of the Board of Directors of the Cairns Regional Gallery (the Gallery Board) on 17 January 1994, at which those present were requested to keep the information confidential, and the Gallery Board decided to recommend that the office of Gallery Director be made redundant (paragraphs 12 and 16 of the respondent's submission dated 21 February 1995);

(ii) was discussed during a confidential meeting of Cairns City Council on 18 January 1994, in connection with the Council's consideration of the recommendation of the Gallery Board that the office of Gallery Director be made redundant (paragraphs 13 and 16 of the respondent's submission dated 21 February 1995); and

(iii) was referred to by the then Mayor of Cairns (in response to concerns raised about the action taken against Mr Coventry) at a meeting on 2 February 1994 of the Far North Queensland Regional Art Gallery Inc (the FNQRAG), a voluntary association of supporters of the Regional Gallery (paragraph 6(a) of the applicant's submission dated 17 March 1995; affidavit of Susan Cutler sworn 29 June 1995; paragraph 5 of the respondent's submission dated 19 July 1995).

15. As to incident (iii), I am satisfied on the material before me that the letter in issue was not read out at the 2 February 1994 meeting of the FNQRAG, nor tabled for those present to read for themselves. I consider that the then Mayor's reference to the letter did not reveal the detail of the letter's content to an extent which would justify a finding that the matter in issue lacked the "necessary quality of confidence". (Incident (iii) is, however, of some significance for the application of the third criterion referred to above: see paragraphs 28-29 and 36 below).

16. Nor, in my opinion, have incidents (i) and (ii) deprived the letter in issue of the "necessary quality of confidence". As I noted at paragraph 71(b) and (c) of my reasons for decision in *Re "B"*, publication of confidential information to a limited number of persons on a confidential basis will not necessarily, of itself, destroy the confidential nature of the information: see also *Attorney-General's Department and Australian Iron & Steel Pty Ltd v Cockcroft* (1986) 64 ALR 97 at p.108. Disclosure to closed meetings of the Gallery Board, and the Cairns City Council, for the limited purpose of considering a recommendation to make Mr Coventry's office as Director of the Regional Gallery redundant, did not, in my opinion, result in the loss of the necessary degree of secrecy or inaccessibility which information must possess if its unauthorised use or disclosure by a confidant is to found an action for breach of confidence.

17. The applicant claims that he has read the letter in issue, and that, since its contents are not confidential *vis-à-vis* himself, disclosure to him of the letter in issue would not found an action for breach of confidence. The applicant's account of the relevant incident appears on p.2 of his written submission dated 17 March 1995:

> *The Applicant is aware of the contents of the letter as the result of seeing the letter on top of a file titled "Donald Coventry" or "Gallery Director". The file was present on the coffee table at which the parties were seated during the course of a meeting at which the Applicant was informed by the Town Clerk, Mr Briggs, that the Applicant's position as Gallery Director would be made redundant. The Applicant was, at this time, still an employee of the Cairns City Council and thus entitled to view the file. Annexed hereto and marked with the letter "A" is a true copy of the Applicant's handwritten notes made in his 1994 desk diary upon reading the letter. ...*

18. Mr Briggs' account of the incident, in paragraphs 2 and 3 of his affidavit, is as follows:

> *... I refute entirely Mr Coventry's assertion (whether express or implied) that he innocently took the advantage of making a note in his desk diary of the contents of Mr Hall's letter of 7th January, 1994 because the file was present on a coffee table in my office during the course of a meeting at which I informed Mr Coventry that his position as Art Gallery Director was to be*

made redundant. The file (and the letter) were on my desk and not intended for Mr Coventry's viewing.

3. When I informed Mr Coventry of his redundancy he became emotionally upset and I found it necessary to leave my office for a short while in order to give him time to compose himself; it was upon returning to my office that I found him behind my desk going through the file relating to himself. I had not given him any authority to do this.

19. I consider it clear, even on the applicant's own account, that the applicant looked at the letter in issue without the prior knowledge or consent of the respondent, and that there was no intention on the respondent's part to permit him to inspect the letter. In such circumstances, there may be a real question as to whether the applicant's knowledge of the information in issue was improperly obtained, so that an action in equity for breach of confidence could not be defeated solely by reason of knowledge of the information in issue that had been improperly obtained (although the factors referred to in paragraph 36 below might complicate that issue even further).

20. However, I am satisfied on the material before me that the applicant does not know the detail of the contents of the letter in issue, as demonstrated by a fundamental misunderstanding of the nature of the information in issue which has been maintained in his assertions, in material lodged for the purposes of this review, about what he read. I consider that the applicant was clearly (and understandably) in a highly emotional state at the time of the incident described in the evidence set out above, and that his examination of the letter in issue was too hasty for him to properly absorb and understand its contents. He has consistently maintained in the course of this review that he wants access to Mr Hall's comments on his (the applicant's) professional abilities or personal traits. For instance, in paragraphs 6(a) and 9(b) of his submission dated 17 March 1995, and in paragraphs 2-3 of his submission dated 30 June 1995, the applicant asserts that the information contained in the letter is Mr Hall's opinion.
In fact, the letter in issue records opinions conveyed by others to Mr Hall in response to a survey questionnaire used in compiling the feasibility study report referred to in paragraph 2 above. Moreover, the notes in exhibit "A" to Mr Coventry's affidavit appear to be hasty and abbreviated notes of a small part only of the letter in issue.

21. On the material before me, I am prepared to make a finding of fact that the matter in issue remains confidential information *vis-à-vis* the applicant. I consider that the respondent is able to establish the second criterion set out at paragraph 12 above.

22. With respect to the third criterion set out at paragraph 12 above, the following parts of Mr Hall's affidavit are relevant:

2. ... I was retained by the Board of the Cairns Regional Gallery to advise on - and facilitate - fundraising for the conversion and establishment of a new Art Gallery for the City and region of Cairns and, specifically, to implement my firm's Feasibility Study Report and Observations and Recommendations, by proceeding to conduct interviews with prospective sponsors of the project.

3. On 7th January, 1994, I wrote a letter, marked "strictly confidential", to the then Mayor of Cairns, Alderman Kevin Byrne, in his ex officio capacity as Chairman of the Cairns Regional Gallery Board and exhibited to this Affidavit is a copy, marked "A", of my said letter.

4. As is apparent from the terms of that letter, the opinions concerning the then Art Gallery Director, Mr Donald Coventry, were not in any respect of

my own origin, but were specific reiteration of opinions - unsolicited by me -which had been expressed to me in the course of such interviews of prospective sponsors. Now exhibited to this Affidavit, marked "B", is a copy of my firm's standard form of questionnaire used in those interviews, in particular Question 11 thereof.

5. The views expressed to me - and passed on in my said letter of 7th January, 1994 - were set down by the interviewees in answer to this question and were before me when I wrote that letter. In view of the disengagement of my firm from the fundraising project on 3rd September 1994, all originals and (if any) copies of such questionnaire forms in my firm's possession were destroyed.

23. The matter in issue was conveyed to the then Mayor of the Cairns City Council in a letter marked "Strictly Confidential", and was thereafter disclosed by the Mayor only to a limited number of persons for the specific purpose referred to in paragraph 16 above. This indicates that the respondent treated the matter in issue as having been communicated in confidence.

24. However, as I stated in *Re "B"* (at p.316, paragraph 84), the fundamental issue in applying the third criterion (stated at paragraph 12 above) is whether, on an evaluation of the whole of the relevant circumstances, the recipient of the information ought to be bound by an equitable obligation of conscience not to use the information in a way that was not authorised by the confider of it. In the present case, there appears to have been a mutual understanding between the supplier and recipient of the information in issue that the information was to be treated in confidence. But, having regard to all the relevant circumstances, would equity require that that mutual understanding be enforced as an equitable obligation of confidence, restraining disclosure of the letter in issue to Mr Coventry? In my view, it would not.

25. The closing words of the letter in issue exhorted the then Mayor to use the information conveyed in the letter with the utmost discretion. Equal attention should be paid to the word "use" as to the words "utmost discretion" (or to the words "Strictly Confidential" which appear at the head of the letter). Having regard to all of the relevant circumstances, I do not think there is any doubt that Mr Hall intended, and hoped or expected, that the respondent would take some appropriate action on the basis of the information conveyed in the letter in issue. Mr Hall had recently furnished his firm's feasibility study report on fundraising for the Cairns Regional Gallery. His firm hoped to be (and was, in fact) retained to provide further assistance with the fundraising project. Responses to his survey had indicated that the fund-raising project may be handicapped by attitudes towards Mr Coventry which had been expressed by potential sponsors and donors. Although the letter in issue did not specify what use should be made of the information conveyed in it (it did not, for instance, suggest a specific course of action in respect of Mr Coventry), I consider that Mr Hall's purposes in writing the letter were to acquaint the Mayor with an apparent obstacle to the success of the fundraising project, and to prompt the Mayor to take some appropriate action with respect to the apparent obstacle.

26. It is difficult to envisage any meaningful action which Mr Hall could have contemplated the Mayor and the respondent taking in respect of Mr Coventry which would not have necessitated disclosure of the letter in issue, or its substance, to Mr Coventry. It is possible that counselling Mr Coventry and requiring him to address any behaviour that gave rise to the concerns recorded in the letter in issue, might have been considered appropriate action.
In that event, the substance of the information in the letter in issue would have to have been disclosed to Mr Coventry. It would have been entirely appropriate that the letter still be treated in confidence as against the world at large, but not as against Mr Coventry.

27. In my view, Mr Hall intended to prompt the then Mayor of Cairns to take whatever action was considered appropriate in the light of the information conveyed in the letter in issue, and implicitly authorised the then Mayor to make whatever limited disclosure of the letter in issue was necessary for that purpose, but otherwise expected the letter to be treated in confidence. I think the relevant circumstances support a finding that there was a mutual understanding that the letter was generally to be treated in confidence (with limited exceptions for the purpose I have indicated above). The contents of the letter were damaging to Mr Coventry's professional reputation, and any unnecessary disclosure of them ought properly to have been avoided. Moreover, in the event that the respondent had decided to take no action against Mr Coventry, Mr Hall may have desired the preservation of the letter's confidentiality for the sake of a co-operative working relationship in respect of the fundraising project for the Gallery. However, the crucial issue in this case, in my view, is whether equity required that the letter in issue not be disclosed by the respondent to Mr Coventry, once the receipt of the letter in issue had prompted the respondent to embark on a course of action with such serious consequences for Mr Coventry.

28. Within a fortnight of the receipt of the letter in issue, the position of Director of the Cairns Regional Gallery had been made redundant, and Mr Coventry's employment in that position had been terminated. At a meeting of the FNQRAG some two weeks later (2 February 1994), the then Mayor of Cairns referred in general terms to the concerns raised in the letter in issue (and the fact that it had been considered by the Gallery Board) in the course of justifying the action taken against Mr Coventry. (I note that upon the position of Gallery Director being made redundant, the applicant received some financial compensation by way of a redundancy package, but no offer of alternative employment. No opportunity was given to the applicant to address either the adverse comments made against him personally, or the more general proposition that the position of Gallery Director was no longer necessary for the conduct of the affairs of the Gallery. In that regard, I also note that, after the applicant's departure, a gallery administrator was appointed, that the position of Gallery Director was subsequently advertised by the respondent, and that the program of exhibitions set up by the applicant was continued.)

29. Given these circumstances, I consider that the scope of the equitable obligation of confidence binding the uses to which the respondent could put the letter in issue did not extend to restraining the disclosure to Mr Coventry of the letter in issue. Once the respondent commenced action adverse to Mr Coventry's interests, which action was based at least in part on the information contained in the letter in issue, equity would not have restrained disclosure to Mr Coventry as an unconscionable use by the respondent of the letter in issue.

30. In *Re Hamilton and Queensland Police Service* (Information Commissioner Qld, Decision No. 94021, 26 August 1994, unreported), a case in which the circumstances disclosed a conflict between a legal duty to accord procedural fairness by disclosing certain information, and an equitable obligation of confidence said to restrain disclosure of the same information, I made the following remarks:

> *41. In paragraph 139 of my decision in* Re "B"*, I stated as follows:*
>
> > 139. There will be cases where the seeking and giving of an express assurance as to confidentiality will not be sufficient to constitute a binding obligation, for example if the stipulation for confidentiality is unreasonable in the circumstances, or, having regard to all of the circumstances equity would not bind the recipient's conscience with an enforceable obligation of confidence (see paragraphs 84 and 85 above). ...

42. *In paragraph 85 of* Re "B", *I had referred in particular to Lord Denning MR's statement in* Dunford & Elliott Ltd v Johnson & Firth Brown Ltd *[1978] FSR 143 at p.148, which bears repeating in this context:*

> If the stipulation for confidence was unreasonable at the time of making it; or if it was reasonable at the beginning, but afterwards, in the course of subsequent happenings, it becomes unreasonable that it should be enforced; then the courts will decline to enforce it; just as in the case of a covenant in restraint of trade.

I remarked in Re "B" *that, despite the different wording, this dictum probably equates in substance, and in practical effect, to the emphasis in the judgments of the Federal Court of Australia in* Smith Kline & French Laboratories (Aust) Ltd and Others v Secretary, Department of Community Services & Health *(1990) 22 FCR 73 (Gummow J), (1991) 28 FCR 291 (Full Court), that the whole of the relevant circumstances must be taken into account before a court determines that a defendant should be fixed with an enforceable obligation of confidence.*

43. *I also referred in* Re "B" *to the suggestion by McHugh JA in* Attorney-General (UK) v Heinemann Publishers *(1987) 75 ALR 353 at p.454 that special considerations apply where persons outside government seek to repose confidences in a government agency:*

> ... when ... a question arises as to whether a government or one of its departments or agencies owes an obligation of confidentiality to a citizen or employee, the equitable rules worked out in cases concerned with private relationships must be used with caution. ...

44. *An illustration of this is afforded by the result in* Smith Kline & French *where Gummow J refused to find that the first respondent was bound by an equitable obligation not to use confidential information in a particular way, because the imposition of such an obligation on the first respondent would or might clash with, or restrict, the performance of the first respondent's functions under a relevant legislative scheme. (The relevant passages are set out at paragraphs 80 and 81 of* Re "B", *and see also my remarks at paragraph 92 of* Re "B".*)*

45. *Another illustration of this principle, in my opinion, is the fact that government officials empowered to make decisions which may adversely affect the rights, interests or legitimate expectations of citizens are ordinarily subject to the common law duty to act fairly, in the sense of according procedural fairness, in the exercise of such decision-making powers (see, for example,* Kioa v West *(1985) 159 CLR 550; 60 ALJR 113, relevant extracts from which are reproduced at paragraph 28 of my reasons for decision in* Re McEniery and the

> Medical Board of Queensland [(1994) 1 QAR 349]*). Circumstances may be encountered where the duty to accord procedural fairness clashes with an apparent duty to respect the confidentiality of information obtained in confidence, for example, where a government decision-maker proposes to make a decision which is adverse to the rights or interests of a citizen, on the basis of information obtained in confidence from a third party.*

31. The last-quoted sentence also fairly describes the situation of the respondent in this case, when taking action to terminate the applicant's employment, after having regard to the information contained in the letter in issue.

32. In *Kioa v West* (1985) 159 CLR 550, Mason J said (at p.584):

> *The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.*

And in *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, Deane J said (at p.653) that the law seemed to him:

> *... to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognised as applying generally to governmental executive decision-making.*

(Both passages set out in this paragraph were quoted with approval in the majority judgment (Mason CJ, Deane and McHugh JJ) of the High Court of Australia in *Annetts v McCann* (1990) 170 CLR 596 at p.598.)

33. The applicant was not a servant of the Crown whose service could be terminated at the pleasure of the Crown (*cf. Coutts v Commonwealth of Australia* (1985) 59 ALR 699 at p.704, p.707). The respondent was at the relevant time a statutory authority established under the *Local Government Act 1936* Qld, and its power to appoint officers was conferred by s.17 of that Act. The applicant was appointed by the respondent to the office of Director, Gallery of Fine Art (later changed in title to Director, Cairns Regional Gallery) with effect from 1 October 1991. The action which the respondent decided to take against the applicant, after the receipt by the then Mayor of the letter in issue, was clearly adverse to the applicant's interest in having the benefits of continued employment in the office to which he had been appointed. (It may also be the case that the applicant had a legitimate expectation of continued employment in the office to which he had been appointed, in the absence of any conduct on his part which would afford a ground for dismissal; *cf. Attorney-General (NSW) v Quin* (1990) 170 CLR 1 per Mason CJ at pp.20-22). Moreover, reputation (including personal, business or commercial reputation) is an interest that attracts the protection of the rules of natural justice (and may require that procedural fairness be accorded before the making of "an adverse recommendation based on the reports of other bodies or authorities"): *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at p.578. The respondent's action in moving to declare the applicant's position redundant (especially in circumstances where it was clear that the respondent intended to persevere with its plans for the Gallery, and sufficient work remained to justify the appointment of an interim gallery administrator: see paragraph 28 above), was, in my view, clearly liable to adversely affect the applicant's

professional reputation, especially in circles where he might be expected to seek alternative employment.

34. In my opinion, once it was decided to embark on a course of action that would be adverse to the applicant's interests, the respondent came under a legal duty to accord procedural fairness to the applicant. There is no indication in any relevant statute of a necessary intention to exclude the application of the rules of natural justice; such an intention is not to be inferred from the presence in a relevant statute of rights which are commensurate with some of the rules of natural justice: see *Annetts v McCann* at p.598 (and *cf*. s.17B of the *Local Government Act 1936*).

35. In *Re McEniery and Medical Board of Queensland* (1994) 1 QAR 349, I said (at p.363, paragraph 31):

> *31. What constitutes the observance of fair procedures will vary according to the exigencies of particular cases, but ordinarily the duty to act fairly requires that a person be given an effective opportunity to know the substance of the case against the person, including in particular the critical issues or factors on which the case is likely to turn* (cf. Kioa *per Mason J at p.128-9) so that the person is given an effective opportunity of dealing with the case against him or her.*

36. If action prejudicial to a person's interests is proposed to be taken by reference to adverse comments from third parties, the common law duty to accord procedural fairness would ordinarily require that the person be informed of the substance of those adverse comments and be given an opportunity of responding to them. On the material before me (in particular the events described in paragraphs 14 and 28 above, and the timing of those events), I am satisfied that the information conveyed in the letter in issue was a substantial factor in prompting the action taken against Mr Coventry. When the respondent decided to take action to declare the applicant's office redundant, at least in part on the basis of factors personal to the applicant disclosed in information obtained from a third party, procedural fairness required, in my opinion, that the substance of the adverse material be conveyed to the applicant and that he be given a reasonable opportunity to respond to it. I consider that the scope of the equitable obligation of confidence owed by the respondent in respect of the letter in issue could not have extended to prevent disclosure of the letter in issue to the applicant, at least from the time at which it was decided on behalf of the respondent to take action that might result in the applicant's office being declared redundant.

37 While a relevant obligation of confidence should be respected as far as possible (see *Re Hamilton* at paragraphs 51-52), editing of the letter in issue (so as to convey the substance of the adverse material while respecting an obligation of confidence as far as possible) is neither practical nor necessary in this case. Mr Hall (it appears from the material before me) considered himself under an obligation not to betray the confidence of those persons who volunteered comments adverse to Mr Coventry, and he more than adequately discharged that obligation by recording the adverse comments in such a way as to make them anonymous and untraceable. I consider that disclosure to Mr Coventry of the whole of the letter in issue would not be an unconscionable use by the respondent of that document.

38. I find that the third criterion set out at paragraph 12 above has not been established because, having regard to all the relevant circumstances, disclosure of the letter in issue to the applicant by the respondent would not be an unconscionable use by the respondent of the letter in issue. I therefore find that the letter in issue is not exempt from disclosure to the applicant under s.46(1)(a) of the FOI Act.

Application of s.46(1)(b)

39. The respondent also submits that the letter in issue is exempt matter under s.46(1)(b) of the FOI Act, the terms of which are set out at paragraph 10 above.

40. In *Re "B"* at p.337 (paragraph 146), I indicated, that, 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;

    (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.

41. As indicated at paragraph 16 above, I am satisfied that the matter in issue is information of a confidential nature.

42. I discussed the requirements to establish the second element of s.46(1)(b) in *Re "B"* at pp.338-339 (paragraphs 149-153). Although there was, in general terms, a mutual understanding between the supplier and the recipient of the letter in issue that the letter was communicated in confidence, I consider (for the reasons given at paragraph 25 above) that Mr Hall intended and hoped that the respondent would take some appropriate action in response to the information conveyed in the letter, and that there was an implicit mutual understanding that there could be further limited disclosure of the letter to the extent necessary to permit appropriate action to be taken. If, for example, the respondent had informed Mr Hall that it had decided to take action to make Mr Coventry's position redundant, but had received legal advice that this could only be done if the contents of the letter in issue were conveyed to Mr Coventry so that Mr Coventry had an adequate opportunity to respond to them, Mr Hall may well have consented to that course of action. Construing the precise scope of the implicit mutual understanding of confidence that attended the initial communication of the letter in issue is, however, a task I need not pursue in view of the finding I have reached on the third element of s.46(1)(b).

43. The respondent (which bears the onus, under s.81 of the FOI Act, of establishing that its decision was justified or that I should give a decision adverse to the applicant) has not lodged any evidence which goes to the third element of s.46(1)(b), i.e., whether disclosure of the information in issue could reasonably be expected to prejudice the future supply of such information. In its brief written submission on this point, the respondent did not suggest that a consultant, like Mr Hall, might not in future furnish a report like the letter in issue, if the letter in issue were to be disclosed. Rather it focused on the persons surveyed by Mr Hall, who volunteered comments adverse to Mr Coventry. The respondent submitted that: "*Persons questioned in such a survey, which is a matter of importance, in a case such as this would not ... venture frank and honest opinions necessary to the proper functioning of the gallery if such information were not to be treated confidentially*."

44. The correct approach to the application of the phrase "could reasonably be expected to" in s.46(1)(b) is explained in *Re "B"* at pp.334-341, paragraphs 154-160. Those words call for the decision-maker to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g., merely speculative/conjectural

"expectations") and expectations which are reasonably based, that is, expectations for the occurrence of which real and substantial grounds exist.

45. As I noted above at paragraph 37, Mr Hall has taken appropriate steps to record the adverse comments on Mr Coventry, as contained in the letter in issue, in such a way that the comments are anonymous and untraceable. I am not satisfied that there is a reasonable basis for expecting that disclosure of the letter in issue would prejudice the future supply of like information by persons responding to a similar confidential survey.

46. Similarly, although the respondent did not put its case in this way, I do not consider that there is any reasonable basis for expecting that disclosure of the letter in issue would prejudice the future supply of reports by consultants who, like Mr Hall, had taken appropriate steps in a report to ensure the anonymity of confidential sources of information.

47. I find that the respondent has not established the third element of the test for *prima facie* exemption under s.46(1)(b) of the FOI Act. It is therefore unnecessary for me to consider the public interest balancing test incorporated in s.46(1)(b). I am prepared to venture the opinion, however, that had that been necessary, the public interest in the fair treatment of an individual according to law (see *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at p.80, paragraph 55; *Re Pemberton and The University of Queensland* (Information Commissioner Qld, Decision No. 94032,
5 December 1994, unreported) at paragraph 190) would, in all the circumstances of this case, have carried determinative weight against the competing public interest considerations identified in the respondent's submissions, so as to favour disclosure to the applicant of the letter in issue.

48. I find that the letter in issue is not exempt matter under s.46(1)(b) of the FOI Act.

Conclusion

49. For the foregoing reasons, I set aside the decision under review. In substitution for it, I find that the matter in issue is not exempt from disclosure to the applicant under the FOI Act, and that the applicant has a right to be given access to the matter withheld from him pursuant to the decision under review.

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F N ALBIETZ
INFORMATION COMMISSIONER