

## O'Grady and Veterinary Surgeons Board of Queensland

(S 81/98, 10 September 1998, Information Commissioner)

*(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)*

1.-4. These paragraphs deleted.

### **REASONS FOR DECISION**

#### **Background**

5. By application dated 29 January 1998, Mr Allen O'Grady sought access under the FOI Act to the following documents of the Veterinary Surgeons Board (the Board):
  1. *All correspondence from one [the 3<sup>rd</sup> party], of [a certain address], that was addressed to the Veterinary Surgeons Board.*
  2. *All correspondence from the Board to [the 3<sup>rd</sup> party].*
  3. *All correspondence from the Pine Rivers Shire Council to the Board in relation to the Eatons Hill Veterinary Surgery on South Pine Rd, Eatons Hill.*
  4. *All reply correspondence from the Board to the Pine Rivers Shire Council in relation to item 3 above.*
6. Mr W Murray, Registrar of the Board, consulted [the 3<sup>rd</sup> party] in accordance with s.51 of the FOI Act. By letter to the Board dated 14 February 1998, [the 3<sup>rd</sup> party] indicated that he objected to the disclosure under the FOI Act of one letter only, being a letter received by the Board from [the 3<sup>rd</sup> party] on 17 September 1997 (the letter in issue). [The 3<sup>rd</sup> party] also indicated that he would be prepared to accept disclosure of parts of the letter in issue, as marked by him on a copy which he forwarded to the Board.
7. However, by decision dated 26 February 1998, Mr Murray decided that the applicant was entitled to access to the whole of the letter in issue. [The 3<sup>rd</sup> party] then applied for internal review of that decision, in accordance with s.52 of the FOI Act. By a letter to [the 3<sup>rd</sup> party] dated 3 April 1998, Mr R J Rogers, President of the Board, varied Mr Murray's decision by deciding to give access to the letter in issue, subject to deletions which corresponded with those requested by [the 3<sup>rd</sup> party] in his letter dated 14 February 1998.
8. Subsequently, by letter dated 24 April 1998, and prior to Mr Rogers' internal review decision being communicated to Mr O'Grady, [the 3<sup>rd</sup> party] requested further deletions from the letter in issue. Mr O'Grady was informed of Mr Rogers' decision by letter dated 5

May 1998. Mr O'Grady was provided with access to a copy of the letter in issue, subject to the deletion of the additional matter specified by [the 3rd party] in his letter dated 24 April 1998, as well as the matter specified in [the 3rd party's] letter to the Board dated 14 February 1998. Mr O'Grady then applied to me (by letter dated 26 May 1998) for review, under Part 5 of the FOI Act, of the decision of Mr Rogers, as communicated to him by letter dated 5 May 1998.

### **External review process**

9. After perusing a copy of the letter in issue, a member of my staff contacted [the 3rd party] by telephone on 9 June 1998 and consulted him with respect to the matter remaining in issue in the letter. As a result, [the 3rd party] agreed to the disclosure to the applicant of further matter from the letter in issue (which has since been disclosed by the Board to Mr O'Grady, pursuant to my authorisation), leaving only the following parts of the letter in issue:
  - (a) the letterhead on page 1 and the signature block on page 3;
  - (b) paragraph 1 on page 1;
  - (c) the paragraph commencing "Dogs and other animals" on page 2;
  - (d) the paragraph commencing "We don't regard ..." on page 2;
  - (e) the paragraph commencing "Even if ...", which spans pages 2-3.
10. With respect to that matter remaining in issue, [the 3rd party] sought, and was granted, status as a participant in this review, in accordance with s.78 of the FOI Act. [The 3rd party] contends that the matter remaining in issue is exempt matter under s.46(1) of the FOI Act.
11. A member of my staff interviewed Mr Murray, who provided a statement, (dated 29 June 1998) concerning the circumstances surrounding the submission of the letter in issue from [the 3rd party] to the Board. By letter dated 7 July 1998, I provided [the 3rd party] with a copy of Mr Murray's statement, and advised him of my preliminary view that the matter in issue does not qualify for exemption under either s.46(1)(a) or s.46(1)(b) of the FOI Act. [The 3rd party's] response (dated 23 July 1998) asserted that the letter in issue was communicated in confidence, and raised queries in respect of Mr Murray's recollection of events.
12. I provided the Board with copies of my letter to [the 3rd party] dated 7 July 1998, and [the 3rd party's] response. The Board replied by letter dated 27 August 1998, saying that it did not wish to make any submissions in response, and that it was prepared to accept my preliminary view that the matter in issue is not exempt from disclosure to Mr O'Grady under the FOI Act.

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

13. 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.*

14. I discussed the requirements for exemption under s.46(1)(a) and s.46(1)(b) of the FOI Act in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. As to s.46(1)(a), there is no question of any contractual obligation of confidence arising in the circumstances of this case. To establish an equitable duty of confidence owed by the Board to [the 3rd party], which would be breached by disclosure of the matter in issue (thus founding an action for breach of confidence brought by [the 3rd party] as plaintiff), each of the following five criteria must be satisfied:

- (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).

15. For exemption under s.46(1)(b) of the FOI Act to be established, each of the following criteria must be satisfied:

- (a) the information in issue is information of a confidential nature;

- (b) the information was communicated in confidence;
- (c) disclosure of the information could reasonably be expected to prejudice the future supply of such information to the Board; and
- (d) disclosure of the information would not, on balance, be in the public interest.

The second and third requirements for exemption under s.46(1)(a) involve similar considerations to the first two requirements for exemption under s.46(1)(b).

Necessary quality of confidence/information of a confidential nature

16. In *Re "B"* at pp.337-338 (paragraph 148), I said:

*148 In my opinion, [the first criterion for exemption under s.46(1)(b)] calls for a consideration of the same matters that would be taken into account by a court in determining whether, for the purpose of satisfying the second element of the equitable action for breach of confidence, the information in issue has the requisite degree of relative secrecy or inaccessibility. The matters referred to in paragraphs 71 to 72 above will also therefore be relevant to the question of whether this first criterion for the application of s.46(1)(b) is satisfied. It follows that, although it is not a specific statutory requirement, it will for practical purposes be necessary to specifically identify the information claimed to be of a confidential nature, in order to establish that it is secret, rather than generally available, information. The question of whether the information in issue is of a confidential nature is to be judged as at the time the application of s.46(1)(b) is considered. Thus if information was confidential when first communicated to a government agency, but has since lost the requisite degree of secrecy or inaccessibility, it will not satisfy the test for exemption under s.46(1)(b).*

(See also *Re McMahon and Department of Consumer Affairs* (1994)  
1 QAR 377, at p.383, paragraph 21.)

17. On the material before me, it is clear that [the 3rd party's] identity as the author of the letter in issue does not have the necessary quality of confidence. The first and second items of Mr O'Grady's FOI access application (see paragraph 5 above) sought access specifically to correspondence between the Board and [the 3rd party]. Both decision letters of the Board refer to the document in issue as a document authored by [the 3rd party]. The matter described in subparagraph 9(a) above, which merely identifies [the 3rd party] as the author of the letter in issue, does not satisfy the second element of the test for exemption under s.46(1)(a), nor the first element of the test for exemption under s.46(1)(b), and hence cannot qualify for exemption from disclosure to Mr O'Grady under either of s.46(1)(a) or s.46(1)(b) of the FOI Act.

18. On the material before me, it is clear that the issues raised in the matter in issue which is described in subparagraphs 9(b), (c) and (e) above have specifically been put by the Board to Mr O'Grady. That information now lacks the necessary quality of confidence to support a finding that it is exempt from disclosure to Mr O'Grady under either s.46(1)(a) or s.46(1)(b) of the FOI Act (see Mr Murray's letter to [the 3rd party] dated 15 October 1997, and Mr Murray's statement, particularly paragraph 13). I find that the matter in issue identified in subparagraphs 9(b), (c) and (e) above does not qualify for exemption from disclosure to Mr O'Grady under either of s.46(1)(a) or s.46(1)(b) of the FOI Act
19. However, there is nothing before me to show that the matter described in subparagraph 9(d) above has been disclosed to Mr O'Grady. It therefore satisfies the second requirement for exemption under s.46(1)(a), and the first requirement for exemption under s.46(1)(b).

Equitable obligation of confidence/Communicated in confidence

20. In his statement dated 29 June 1998, Mr Murray stated that, in 1997 (probably September), he received a telephone call from [the 3rd party] complaining about certain aspects of the operations of Mr O'Grady's veterinary premises. Paragraphs 8-12 of Mr Murray's statement are relevant to the question of the existence and scope of any understanding of confidentiality:
  8. *I then informed [the 3rd party] that the Board was to speak personally to Mr O'Grady on an unrelated matter and that if he wished, this issue of the cages could be addressed at the same time. [The 3rd party] was informed that he would be required to provide his complaint in writing and he agreed providing he could remain anonymous.*
  9. *It was made clear to [the 3rd party] that for the matter to be put to Mr O'Grady a letter outlining the complaint would be required and it follows that the subject matter would therefore not be confidential.*
  10. *I pointed out the likelihood that Mr O'Grady would know where the complaint originated from as soon as it was raised with him.*
  11. *The written complaint was subsequently received on 17 September 1997. No-where in that letter was it mentioned that the source of the complaint was confidential.*
  12. *On the day when Mr O'Grady was to be interviewed on the unrelated matter, I informed the Board that this new issue needed to be addressed with Mr O'Grady but that the complainant's name was not to be given.*
21. In his letter to me dated 23 July 1998, in response to Mr Murray's statement, [the 3rd party] stated:

*It is my submission that the letter was communicated in confidence; that the Registrar of the Veterinary Surgeons Board of Queensland Mr W G Murray knew it was a confidential document; and further, that Mr Murray's recollection of some of the events (nine months after the phone call) is incorrect.*

1. *Mr Murray, in his statement to you dated 29 June 1998, is able to apparently recall with precise detail the circumstances of the phone call, yet he is unable to even tell you with certainty in what month the conversation took place viz: "[The 3rd party] rang in 1997 (probably September)". Does he have a note of the conversation?*
2. *I say that his statement cannot be relied upon and that the following assertion, in particular, is incorrect: "It was made clear to [the 3rd party] that for the matter to be put to Mr O'Grady, a letter outlining the complaint would be required and it follows that the subject matter would therefore not be confidential".*

*On that basis enough of the criteria required for confidential protection have been satisfied to qualify for exemption and I again seek excision of the items referred to on page one of your letter.*

22. In a letter to the Board dated 14 February 1998, [the 3rd party] had stated:

*During our conversation, I specifically raised the question of confidentiality/anonymity. You assured me that the Board would not reveal our identity to Mr O'Grady (or anyone representing him) and on that basis we went ahead and laid the complaint.*

23. On my assessment of the evidence, it appears that there was an understanding between [the 3rd party] and Mr Murray that the Board would endeavour to avoid any specific disclosure of [the 3rd party's] identity as a complainant. I do not think the nature of the understanding (at least on the part of Mr Murray and the Board) can be put any higher than that, because I consider that it was apparent to Mr Murray (see paragraph 10 of Mr Murray's statement), as it is apparent to me (given the history of relations between [the 3rd party] and Mr O'Grady), that Mr O'Grady would readily recognise the source of the complaint once the substance of the complaint was put to Mr O'Grady. I do not consider that that understanding could have founded a basis for an equitable obligation of confidence binding the Board not to disclose [the 3rd party's] identity as a complainant. Even if it did, the scope of any such obligation would have been confined to non-disclosure (or perhaps, more accurately, non-confirmation) of [the 3rd party's] identity. There is no evidence before me which would support a finding that an express assurance was given that any of the information recorded in the letter in issue would be kept confidential from Mr O'Grady.
24. I consider Mr Murray to be a credible witness who has provided his best recollection of his telephone conversation with [the 3rd party], and I accept his evidence that he made it clear to [the 3rd party] that the subject matter of the complaint would not be kept confidential from Mr O'Grady. Indeed, there was no other proper way in which the Board could have

proceeded to deal with the complaint. I find that there was no express mutual understanding that any of the matter in the body of the letter in issue would be kept confidential from Mr O'Grady. I also note that Mr Murray informed [the 3rd party] by letter dated 23 September 1997 that:

*Mr O'Grady will be coming before the Board on unrelated matters during October and that will be an opportune time to discuss the siting of the recovery cages with him.*

25. Where a person is the subject of an investigation by a regulatory agency, such as the Board, the legal duty to accord procedural fairness will usually require at least that a person, against whom specific adverse allegations have been made, be given an effective opportunity to know the substance of the case against him or her, so that he/she is afforded an effective opportunity to answer it (see *Re McEniery and Medical Board of Queensland* (1994) 1 QAR 349, at pp.361-364, paragraphs 27-32). [The 3rd party's] letter strongly urged the Board to investigate the matters raised and take any steps possible regarding the various matters complained of. I do not consider that [the 3rd party] could reasonably have expected that the matters raised in the letter in issue could be properly acted upon by the Board without the substance of the complaints being disclosed to Mr O'Grady. Certainly, the Board understood that, and I am satisfied that there was no implicit mutual understanding that any of the matter in the body of the letter in issue was to be kept confidential from Mr O'Grady.
26. I find that there was no express or implicit mutual understanding that the contents of [the 3rd party's] letter would be kept confidential from Mr O'Grady. The circumstances of the communication were not such as to warrant a finding that there was an equitable obligation of confidence binding the respondent not to disclose the contents of the letter in issue to Mr O'Grady. I am satisfied that none of the matter in issue satisfies the third requirement for exemption under s.46(1)(a) or the second requirement for exemption under s.46(1)(b), and I find that it is not exempt from disclosure to Mr O'Grady under s.46(1)(a) or s.46(1)(b) of the FOI Act.

### **DECISION**

27. I set aside the decision under review (being the decision made by Mr Rogers on behalf of the respondent, and communicated to the applicant by letter dated 5 May 1998). In substitution for it, I find that no part of the letter in issue (described in paragraph 6 above) is exempt from disclosure to Mr O'Grady under the FOI Act.