OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 99005
Application S 145/97

Participants:

RONALD JOHN PRICE
Applicant

SURVEYORS BOARD OF QUEENSLAND
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - whether correspondence from the Office of the Information Commissioner in the hands of another agency answers the description "documents of the Commissioner" in s.12 of the *Freedom of Information Act 1992* Qld, and is therefore excluded from the application of parts 3 and 4 of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - whether letters received from third parties consulted by an agency in the course of handling an access application under the *Freedom of Information Act 1992* Qld were communicated in circumstances giving rise to an equitable obligation of confidence - application of s.46(1)(a) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.7, s.8, s.9(1)(d), s.11(1), s.11A, s.11B, s.12, s.25, s.27(4), s.27(7), s.34, s.46(1)(a), s.51, s.52(6), s.80, s.90
Freedom of Information Act 1982 Cth s.5

A Member of the Legislative Assembly and Queensland Corrective Services Commission, Re (1997) 4 QAR 100
Attorney-General (Tas) v Estcourt & Anor (1995) 88 LGERA 162
"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Christie and Queensland Industry Development Corporation, Re (1993) 1 QAR 1
Loughnan (Principal Registrar, Family Court of Australia) v Altman (1992) 39 FCR 90, (1992) 111 ALR 445

DECISION

I decide to vary the decision under review (which is identified in paragraph 3 of my accompanying reasons for decision) by finding that—

(a) folios 050-051, 065-073, 090-091, 098-099, 102-122, 127-132, 142 and 150-152 are excluded from the application of the access provisions set out in Part 3 of the *Freedom of Information Act 1992* Qld, by the operation of s.12 of the *Freedom of Information Act 1992* Qld, so that the applicant has no right to apply for, or obtain, access to those folios under the *Freedom of Information Act 1992* Qld, and I have no jurisdiction to deal further with those documents in this review; and

(b) folios 019-020 and 022 are exempt from disclosure to the applicant under s.46(1)(a) of the *Freedom of Information Act 1992* Qld.

Date of decision: 26 August 1999

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's refusal of access to the responses of third parties consulted by the respondent under s.51(1) of the *Freedom of Information Act 1992* Qld (the FOI Act), in the course of dealing with a previous FOI access application by the applicant. This case also raises an issue as to whether correspondence from my office to the respondent agency (for the purposes of my conduct of a review under Part 5 of the FOI Act) is excluded from the application of the access provisions in Part 3 of the FOI Act, by the operation of s.12 of the FOI Act.

2. By letter dated 9 September 1997, Mr W Thompson, on behalf of the Surveyors Board of Queensland (the Board), decided that the applicant should be granted access to a large number of folios falling within the terms of the applicant's FOI access application dated 30 June 1997, which sought, amongst other things, documents created in respect of a prior FOI access application by the applicant to the Board. However, Mr Thompson decided that ten folios were exempt under s.46(1) of the FOI Act (the confidential information exemption), and that one folio was exempt under s.41(1) of the FOI Act (the deliberative process exemption). Mr Thompson also informed the applicant that he was refusing access to a number of folios on the basis that they were excluded from the application of Part 3 of the FOI Act by s.12 of the FOI Act. (Mr Thompson also decided to refuse access to five folios on the basis that they were already the subject of an application for external review by the applicant, but he was mistaken in that regard, and those five folios have since been disclosed to the applicant, and are no longer in issue in this review.)

3. By letter dated 9 September 1997, the applicant sought internal review of Mr Thompson's decision. As no internal review decision was made by the Board within the prescribed statutory timeframe of 14 days, the applicant applied to me (by letter dated 13 October 1997)

for review, under Part 5 of the FOI Act, of the decision that the Board was deemed to have made on internal review, affirming the initial decision made by Mr Thompson (see s.52(6) of the FOI Act).

External review process

4. Under cover of a letter dated 27 October 1997, the Board forwarded to me copies of the documents in issue, and an attachment explaining why no internal review decision had been made by the Board. The Board stated that, at the time when the applicant sought internal review of Mr Thompson's decision, there was no member of staff (the Board comprising only three members) capable of fulfilling the role of internal review officer. The position was vacant and a replacement officer had to be appointed by a meeting of the Board, which did not take place until 16 October 1997. The application for external review was made prior to that appointment.

5. After concessions made by the Board, which resulted in my authorising disclosure to the applicant of some of the documents to which access had initially been refused, only the following folios remain in issue:

   (a) letters from third parties responding to consultation letters sent by the Board under s.51 of the FOI Act (folios 019-020 and 022), which the Board claims to be exempt under s.46(1)(a) of the FOI Act; and
   (b) letters from the Office of the Information Commissioner to the Board (folios 050-051, 065-073, 090-091, 098-099, 102, 103-115, 116-122, 127-132, 142 and 150-152) which the Board asserts are excluded from the application of Part 3 of the FOI Act, by the operation of s.12 of the FOI Act.

6. By letter dated 7 June 1999, I informed the applicant of my preliminary view that folios 019-020 and 022 qualified for exemption under s.46(1)(a) of the FOI Act, and that s.12 of the FOI Act applied to folios 050-051, 065-073, 090-091, 098-099, 102, 103-115, 116-122, 127-132, 142 and 150-152, so that they could not be the subject of an access application under s.25 of the FOI Act. In the event that he was not prepared to accept my preliminary view, I invited the applicant to provide written submissions and/or evidence in support of his case for access to the folios remaining in issue.

7. The applicant responded by letter dated 21 June 1999, stating that he was unable to provide his submissions within the timeframe set out in my letter. His reasons "were *lack of finance, ill health, court commitments, work load, my lack of legal training and expertise, and other matters I shall not go into at this time, but which may become clear in time*." He stated that he did not envisage being able to make submissions until 30 September 1999. In the meantime, however, the applicant had still managed to engage in protracted correspondence with my Office concerning multiple applications for review under Part 5 of the FOI Act which he currently has on foot. He had also lodged further applications for external review with my Office, and made applications for access to other agencies. Given those circumstances, I wrote to the applicant extending the time for lodgment of submissions or evidence, but only until 4 August 1999.

8. The applicant responded with a five page letter dated 29 July 1999 containing a large amount of irrelevant matter, and demanding that I supply reasons why correspondence from my Office to agencies "*is exempt under section 12*". (I had already conveyed my reasons for forming a preliminary view as to the application of s.12, in my letter to the applicant dated

7 June 1999.) In the course of demanding statements of reasons, the applicant, in effect, set out what I take to be his arguments as to why s.12 of the FOI Act does not apply to correspondence from the Office of the Information Commissioner to the Board.

9. I consider that the applicant has been afforded a reasonable opportunity to put his case to me in relation to the folios remaining in issue in this review, having been allowed approximately 8 weeks to address the issues identified in my letter to him dated 7 June 1999, which fall within a fairly narrow compass. I will therefore now proceed to make my decision in this matter. In doing so, I have taken into account the applicant's letter to me dated 29 July 1999, in which he dealt with the application of s.12 of the FOI Act at some length.

Section 12 of the FOI Act

10. Section 12 of the FOI Act provides:

> ***12.*** *Section 20 and parts 3 and 4 do not apply to the commissioner or documents of the commissioner.*

11. I note that the word "commissioner" is defined in s.7 of the FOI Act to mean the Information Commissioner. Folios 050-051, 065-073, 090-091, 098-099, 102, 103-115, 116-122, 127-132, 142 and 150-152 comprise correspondence from the Office of the Information Commissioner to the Board. If s.12 applies to those folios, they are excluded from the application of Part 3 of the FOI Act, i.e., they cannot be the subject of an access application under s.25 of the FOI Act.

12. Having to decide the correct interpretation and application of s.12 of the FOI Act places me in a slightly invidious position. If I decide that s.12, on its proper construction, extends to correspondence from my Office in the hands of another agency, some, including no doubt the applicant, may contend that I have done so in order to protect myself or my staff. On the other hand, if I were to find that such documents were not excluded from the application of the FOI Act by s.12, it would then be necessary, whenever the issue arose in a review under Part 5 of the FOI Act, for me to make decisions with respect to the application of any exemption provisions claimed to apply to individual documents, or parts of documents, authored by myself or my delegates. This would no doubt create a potential for allegations that I have subjectively applied exemption provisions in order to protect myself or my staff.

13. Nevertheless, there is clear authority that a tribunal of limited jurisdiction (such as the Information Commissioner) has both the power, and a duty, to consider and determine the limits of its jurisdiction, when they are raised as an issue in an appeal lodged with the tribunal, as they are now by the Board's argument that the abovenoted folios are not subject to the application of Part 3 of the FOI Act: see *Re Christie and Queensland Industry Development Corporation* (1993) 1 QAR 1 at pp.5-6, and the cases there cited; see also the decision of a Full Court of the Supreme Court of Tasmania in *Attorney-General (Tas) v Estcourt & Anor* (1995) 88 LGERA 162 at pp. 168-170 and the cases there cited. The jurisdictional issue here involves a relatively straightforward question of statutory interpretation.

14. The Information Commissioner is a "public authority" within the meaning of s.9(1)(d) of the FOI Act, and hence an "agency" as defined in s.8 of the FOI Act. Part 3 of the FOI Act confers and regulates a right of access to "documents of an agency", i.e., documents in the possession or under the control of an agency, as per the definition of "document of an agency" in s.7 of the FOI Act. In providing that Part 3 of the FOI Act does not apply to the

Information Commissioner, s.12 of the FOI Act clearly intends that citizens shall not have the right to apply to the Information Commissioner for access, under the FOI Act, to documents in the possession or under the control of the Information Commissioner. In that regard, the effect of the words "*...parts 3 and 4 do not apply to the Commissioner*" is similar to that of the words employed in s.11(1) of the FOI Act, which I explained in *Re A Member of the Legislative Assembly and Queensland Corrective Services Commission* (1997) 4 QAR 100 at p.104, paragraph 11:

> *11. Section 11(1) of the FOI Act lists persons or bodies to whom or to which the FOI Act does not apply, either generally, or in respect of specified functions performed by specified persons or bodies. (Section 11(1)(j) is the only exception in this regard, since it applies to every agency, as defined in the FOI Act, in respect of a defined class of documents, i.e., documents received from Commonwealth agencies whose functions concern national security. I note, however, that the material difference in the wording and effective operation of s.11(1)(j), when contrasted to all other sub-paragraphs of s.11(1) of the FOI Act, reinforces the views I express below.) Section 11(1) of the FOI Act operates so as to exclude the persons or bodies listed in its various sub-paragraphs from the obligations imposed on agencies by the FOI Act (viz, to publish certain documents and information in accordance with Part 2 of the FOI Act; to deal with applications for access to documents, made in accordance with s.25 of the FOI Act, in the manner prescribed under Part 3 of the FOI Act; to deal with applications for amendment of information relating to the personal affairs of the applicant in the manner prescribed under Part 4 of the FOI Act) either generally, or in respect of specified functions performed by specified persons or bodies. Thus, if the third party had applied in writing to the MLA, requesting access under the FOI Act to the MLA's office copy of the letter now in issue, s.11(1)(b) of the FOI Act would have entitled the MLA to refuse the request on the ground that the MLA was excluded from the application of the FOI Act.*

15. However, the wording of s.12 goes further, and the question arises as to what additional work was intended to be performed by the words "*... parts 3 and 4 do not apply to ... documents of the commissioner.*" They cannot have been intended merely to cover documents in the possession or under the control of the Information Commissioner, because the application of parts 3 and 4 of the FOI Act to documents in the possession or under the control of the Information Commissioner has been effectively excluded by the words "*... parts 3 and 4 do not apply to the commissioner ...*". Given that context, I consider that the logical construction of the words "*... parts 3 and 4 do not apply to ... documents of the Commissioner*" is that they were intended to extend the exclusions effected by s.12 to documents authored by the Information Commissioner (or his/her delegates under s.90 of the FOI Act), even though such documents are in the possession or control of another agency which is subject to the application of the FOI Act.

16. I consider that any doubt that this was the construction intended by the legislature is dispelled by reference to the legislative history of s.12 of the FOI Act. The FOI Act is largely based on the draft Bill recommended by the Electoral and Administrative Review Commission (EARC) in its Report on Freedom of Information (December 1990, Serial No. 90/R6). The present s.12 of the FOI Act is closely modelled on cl. 9(2) of the draft Bill contained in that

EARC report, and the rationale for inclusion of that clause in the draft Bill was discussed at paragraphs 8.27-8.32 of that EARC report:

> *8.27 Save in respect of the publication requirements contained in Part II of the draft Bill, the Information Commissioner recommended by this Commission as the external review body for FOI legislation (see Chapter 17), should not be subject to FOI legislation (clause 9(2)). In the circumstances, FOI legislation is not an appropriate mechanism for establishing the openness and accountability of the Information Commissioner. To that end the position can be compared with the Parliamentary Commissioner, who does not conduct investigations of the Office of the Parliamentary Commissioner.*
>
> *8.28 In the absence of such an exemption, FOI legislation would allow disclosure of documents which would interfere with the independence of the Information Commissioner's role as the external review mechanism for FOI legislation. That is, it would allow people to seek access to the documents the subject of the review. Such a right of access also has the potential to frustrate and delay the external review mechanism ... .*
>
> *8.29 As discussed in Chapter 17, the Information Commissioner is based on similar offices in New Zealand and Canada. Those Offices in New Zealand and Canada are not subject to FOI legislation.*
>
> *8.30 The Commission considers that there is not an appropriate review body which could review the decision of the Information Commissioner in respect of access to the Information Commissioner's documents. To allow a right of appeal to a court would introduce a qualitatively different review mechanism. More disconcertingly, it has the potential to undermine the authority of the Information Commissioner.*
>
> *8.31 Finally, an obligation to disclose would have the potential to prejudice the judgment which the Information Commissioner must make as the external review body. In short, if the Information Commissioner is subject to access on matters being reviewed, it may influence decisions to be made.*
>
> *8.32 Conversely, the Information Commissioner must be otherwise open and accountable. The FOI legislation which the Commission recommends, ensures openness and accountability through the following mechanisms:*
>
> *(a) a requirement that the Information Commissioner report to a Parliamentary Committee (clause 92(1) of the draft Bill);*
>
> *(b) a requirement that the Information Commissioner provide an annual report (clause 92(3));*

> *(c) a requirement that, upon a review, written reasons be provided to an applicant and to the agency, to the extent that in doing so the Information Commissioner does not publish exempt material (clause 80(1), (2) and (3);*
>
> *(d) a requirement that the Information Commissioner's decision be made available to the public, and a provision authorising the Information Commissioner to make such arrangements as are necessary with a commercial publisher, or other publisher, to have reasons for decisions of the Information Commissioner published (clause 80(4));*
>
> *(e) the Information Commissioner can, upon an address from the Legislative Assembly, be removed by the Governor in Council for proved misbehaviour (clause 58(1); and*
>
> *(f) the Information Commissioner will be amenable to judicial review (see para. 17.44).*

17. I consider that, in enacting s.12 in terms that are virtually identical to cl. 9(2) of EARC's draft Bill, Parliament intended to reduce, as far as possible, the potential for the Information Commissioner to be placed in the invidious position of being required to decide, in an application for review under Part 5 of the FOI Act, whether or not documents authored by the Information Commissioner (or his/her delegates under s.90 of the FOI Act), or documents received by the Information Commissioner in discharging his/her functions, were exempt from disclosure under the FOI Act. Although the construction of s.12 which I have explained above may still require the Information Commissioner, on occasion, to address jurisdictional issues as to whether particular documents are excluded from the application of Parts 3 and 4 of the FOI Act by s.12 of the FOI Act, that will ordinarily involve very straightforward questions of fact (giving rise to far less potential for claims of self-interested decision-making than would be the case if the Information Commissioner had to decide issues of the kind referred to in the first sentence of this paragraph).

18. This rationale for the enactment of s.12 obviously encompasses documents held by the Information Commissioner, but I consider that it extends just as strongly, if not more so, to documents that have been created by the Information Commissioner and forwarded to (or otherwise received by) another agency. The significant point about correspondence between my office and respondent agencies is that, since both have access to the contents of the documents in issue, there can be free reference to the matter in issue in a review, for the purpose of making or illustrating arguments about the merits of exemption claims (when seeking to effect a negotiated resolution of disputes pursuant to s.80 of the FOI Act, or to clarify issues on which evidence or submissions are sought), whereas in correspondence from my office to other participants in a review, I am obliged to avoid disclosure of the matter in issue: see s.87 of the FOI Act. Correspondence between my Office and respondent agencies, for the purposes of a review under Part 5 of the FOI Act, frequently contains references to matter claimed to be exempt, and to information provided on a confidential basis. It may comment on information of considerable commercial sensitivity, or serious personal concern to individuals. It may discuss information which is subject to legal professional privilege or statutory secrecy provisions.

19. Some guidance as to the interpretation of the words "documents of the commissioner" in s.12 of the FOI Act can be obtained from the decision of the Full Court of the Federal Court of Australia in *Loughnan (Principal Registrar, Family Court of Australia) v Altman* (1992) 39 FCR 90, (1992) 111 ALR 445 which concerned the proper construction of the phrase "document of the court" in the context of the following words from s.5 of the *Freedom of Information Act 1982* Cth (the Commonwealth FOI Act):

> *... this Act does not apply to any request for access to a document of the court, unless the document relates to matters of an administrative nature.*

20. While the public interest considerations for the enactment of that exclusion provision are different from those relevant to the enactment of s.12 of the Queensland FOI Act, I consider that the comments made by the Court in *Loughnan v Altman* in respect of the interpretation of the phrase "document of the court" are equally relevant to the interpretation of the phrase "documents of the Commissioner" in the context of s.12. Both phrases focus the scope of exclusion upon the identity of particular documents, rather than upon the identity of an agency (as in s.11(1) of the Queensland FOI Act) to which an access application might otherwise have been made.

21. After referring to an argument that the word "of" in the phrase "document of an agency" denotes possession, and that the same should apply with respect to the phrase "document of the court", the Full Court of the Federal Court said (at ALR pp.450-451):

> *But considerations pointing in the opposite direction apply when what is being considered is not a provision that facilitates a general right of access within the scheme of the FOI Act but, as here, an exclusion of the FOI Act from its application to requests for documents conforming to a particular description, an exclusion introduced for reasons of the public interest.*
>
> ...
>
> *The word "of" in the general sense in which it is used in s.5 is not, as a matter of ordinary usage, limited to expressing physical possession. It may readily describe other connections between a person, or an aggregate of persons, and a thing, and for the reasons we have given we do not think it correct to confine the word to possession by reference to the definition of "document of an agency" in s.4(1). Moreover, the purpose of the exclusionary provision in s.5 is not advanced by giving a narrow meaning to the word "of". On the contrary, a narrow meaning equating "of" with possession would lead to results which, having regard to the evident purpose of the exclusion, would be foreign to the policy expressed by it.*
>
> *We consider that the expression "a document of the court" in s.5 of the FOI Act has a significantly wider meaning than possession and we therefore conclude that the learned president was in error in determining that the unrevised transcript to which access was sought was not a document "of the Family Court" for the reason that it was in the possession of Auscript.*

22. Likewise, in my view, a document authored by the Information Commissioner (or his/her delegate under s.90 of the FOI Act) remains a "document of the Commissioner" within the terms of s.12 of the FOI Act, notwithstanding that it is in the possession of another agency (such as, in this instance, the Board).

23. The applicant appears to assert, in his letter dated 29 July 1999, that general correspondence from this Office to agencies is not the same as the transcript of proceedings that was in issue in *Loughnan v Altman*, which was "*produced by a court reporting service at the request of a judge, not for general publication but for confidential use of the judge …*". In relation to the transcript in *Loughnan v Altman*, the Court said (at ALR p.451):

> *Such a document is produced to enable a member of a court to perform one of his or her essential judicial functions, namely the publication of reasons for judgment. A document of that character is so closely connected with the court for which it is produced as to fall easily within the description of "a document of the court" as that expression is used in s 5. It is quite different in character from a document produced by a member of the public for his or her own purposes from shorthand notes taken during the hearing.*

24. Thus, by its very nature, the transcript in that case was a document of the court although it was actually produced by a court reporting service, Auscript, at the request of the judge for his confidential use. No matter where the transcript was situated at the time an application for access to it was made, it was a "document of the court". The applicant asserts that it was the confidential nature of the transcript which made it a "document of the court" and distinguished it from general letters and correspondence of the Information Commissioner. However, the confidential nature of the transcript was relevant to the question of why it was a document of the Court, rather than of Auscript. The attribute of confidentiality was otherwise of no consequence. The documents in issue in the present case (identified in paragraph 5(b) above) were created in my Office and forwarded to the Board, so that the initial difficulty addressed by the Court in *Loughnan v Altman*, of characterising a document created by Auscript as a document of the Court, is not present in this case.

25. In his letter dated 29 July 1999, the applicant asserted that s.12 could not apply to correspondence from my Office once it becomes a "document of an agency". The two issues are, however, separate. The definition of "document of an agency" in s.7 of the FOI Act focuses on the relevant agency having possession or control of documents. It is clear that the folios in question are "documents of an agency", i.e., the Board. However, the jurisdictional question which I must consider is whether those folios are, nevertheless, "documents of the commissioner", which are excluded from the application of Part 3 of the FOI Act by the operation of s.12 of the FOI Act. (I note that many documents which are in the possession of bodies answering the definition of "agency" in s.8 of the FOI Act, and which would therefore fall within the definition of "documents of an agency" as defined in s.7 of the FOI Act, are nevertheless excluded from the application of the FOI Act by the terms of s.11, s.11A and s.11B of the FOI Act.)

26. In my view, the reasoning of the Full Court of the Federal Court in *Loughnan v Altman*, the evident rationale for the enactment of s.12 of the FOI Act, and the need to give meaning to the inclusion by Parliament of the words "documents of the commissioner" in s.12, all reinforce what I consider to be the logical construction of s.12 which I stated in paragraph 15 above.

27. I find that the folios listed in paragraph 5(b) above are excluded from the application of Part 3 of the FOI Act by the operation of s.12 of the FOI Act. It follows that the applicant has no right to apply for, or obtain, access to those folios under the FOI Act, and I have no jurisdiction to deal further with those folios in this external review.

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

28. Folios 019-020 and 022 comprise responses from third parties to consultation letters sent by the Board pursuant to s.51 of the FOI Act. They are claimed to be exempt under s.46(1)(a) of the FOI Act, which provides:

> ***46.(1)*** *Matter is exempt if—*
>
> *(a) its disclosure would found an action for breach of confidence ... .*

29. I discussed the requirements to establish exemption under s.46(1)(a) in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. 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 faced with an application, under s.25 of the FOI Act, for access to the information in issue. I am satisfied that there are identifiable plaintiffs (the third parties consulted by the Board in accordance with s.51 of the FOI Act) who would have standing to bring an action for breach of confidence.

30. In *Re "B"*, I indicated that there are five cumulative criteria that must be satisfied in order to establish a case for protection in equity of allegedly confidential information:

(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).

31. I find that the first two criteria are satisfied. The information can be identified with specificity. It is not known to the applicant and is not of a trivial or useless nature. It possesses the requisite degree of secrecy to satisfy criterion (b) above.

32. The third criterion for exemption under s.46(1)(a) requires an assessment of all the relevant circumstances attending the communication of the matter in issue, to determine whether they were such as to bind the recipient (the Board) with an equitable obligation of conscience not to use that information in an unauthorised manner.

33. The letters in issue were sent in response to consultation letters under s.51(1) of the FOI Act, which provides:

> ***Disclosure that may reasonably be expected to be of substantial concern***
>
> ***51.(1)*** *An agency or Minister may give access to a document that contains matter the disclosure of which may reasonably be expected to be of substantial concern to a government, agency or person only if the agency or Minister has taken such steps as are reasonably practicable to obtain the views of the government, agency or person concerned about whether or not the matter is exempt matter.*

34. Under the FOI Act, when consultation under s.51 is mandated in respect of the processing of an FOI access application, the agency's notice of decision is to be given within 60 days of the receipt of the FOI access application (see s.27(4) and s.27(7) of the FOI Act). Thus, there is only limited time in which to obtain and consider the views of third parties. There is no express requirement that an agency decision-maker must allow an applicant to respond to the views expressed by third parties consulted under s.51, before making his/her decision on access. The views expressed by third parties may be notified to the applicant in the notice of decision itself, which may be amenable to internal review (and, in turn, amenable to external review by the Information Commissioner). Given the limited time available for consultation and making an initial decision on access, and given the availability of avenues for seeking review of the merits of an agency's initial decision, I do not consider that the requirements of procedural fairness would ordinarily necessitate disclosure to the access applicant, prior to the making of the agency's initial decision on access, of the substance or detail of views expressed by third parties consulted under s.51 of the FOI Act. There may, however, be cases where it is necessary to include in the agency's initial notice of decision information provided by a third party consulted under s.51, in order to explain the basis for a decision to refuse the applicant access to requested information.

35. In this case, each of the consultation letters from the Board to the third parties stated that "*….your response* [is] *confidential and* [is], *therefore, NOT releasable under FOI.*" I do not consider that a blanket promise of confidential treatment of any response received from a person consulted under s.51 would ordinarily be appropriate. Often, what an agency seeks to obtain through consultation is evidence of material facts that establish a case for exemption, and which would ordinarily need to be disclosed in the agency's reasons for decision. No doubt, sensitive information will sometimes be disclosed by a person consulted under s.51, and, to the extent that it is not necessary to disclose such sensitive information in order to discharge obligations imposed by the FOI Act, protection from disclosure may be available. In this instance, there were clear indications in information available to the Board about the nature of relations between the applicant and the third parties that made it appropriate to offer confidential treatment of responses from the third parties. Given the relationship

between the applicant and the third parties, I have no difficulty in accepting that they would have wished (and the Board would have understood and accepted) that their communications with the Board be treated in confidence as against the applicant. The sensitive nature of the information in the letters in issue would have reinforced that understanding. But I consider that the third parties must or ought to have appreciated that it may be necessary for the Board to disclose some information in order to explain the reasons for a decision to refuse access to the applicant. I consider that there was a mutual understanding that the letters would be kept confidential, except to the extent necessary for the Board to properly discharge its obligations under the FOI Act.

36. In the circumstances of this case, the only disclosure that the initial decision-maker considered necessary in his notice of decision was an indication that the third parties objected to disclosure. It was therefore unnecessary to disclose to the applicant any part of the letters in issue. Given that, I find that the Board remains bound by an equitable obligation of confidence not to disclose to the applicant the letters in issue. Criterion (c) set out in paragraph 30 above is satisfied.

37. Criterion (d) is also established. The third parties object to disclosure to the applicant of matter concerning them. Thus, disclosure to the applicant of the letters from the third parties would constitute an unauthorised disclosure of the information contained in them.

38. As for the fifth criterion, I find that detriment of one or more of the kinds discussed in *Re "B"* at pp.326-327 (paragraph 111) would likely be occasioned to the third parties as a result of the disclosure of their letters.

39. I therefore find that disclosure of folios 019-020 and 022 would found an action in equity for breach of confidence against the Board, and that those letters qualify for exemption under s.46(1)(a) of the FOI Act.

Conclusion

40. I decide to vary the decision under review (which is identified in paragraph 3 above) by finding that—

    (a) folios 050-051, 065-073, 090-091, 098-099, 102-122, 127-132, 142 and 150-152 are excluded from the application of the access provisions set out in Part 3 of the FOI Act by the operation of s.12 of the FOI Act, so that the applicant has no right to apply for, or obtain, access to those folios under the FOI Act, and I have no jurisdiction to deal further with those documents in this review; and

    (b) folios 019-020 and 022 are exempt from disclosure to the applicant under s.46(1)(a) of the FOI Act.

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F N ALBIETZ
INFORMATION COMMISSIONER