OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 01/2005
Application 338/03

Participants:

CIRCUMCISION INFORMATION AUSTRALIA
AS AGENT FOR "DMO"
Applicant

HEALTH RIGHTS COMMISSION
Respondent

DR HARRY STALEWSKI
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – matter in issue comprising a response by a medical practitioner to a complaint lodged by the applicant with the Health Rights Commission – whether response was communicated in confidence as against the applicant – application of s.46(1)(a) and 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
Health Practitioners (Professional Standards) Act 1999 Qld s.11, s.62, s.78, s.116
Health Rights Commission Act 1991 Qld s.4, s.10, s.30, Part 5 (ss. 57 – 80), Part 6 (ss. 81 – 94), Part 7 (ss.95 – 127A)

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Chand and Medical Board of Queensland; Dr Adam Cannon (Third Party), Re (2001) 6 QAR 159
Dunford & Elliot Ltd v Firth Brown Ltd [1978] 1 FSR 143
McCann and Queensland Police Service, Re (1997) 4 QAR 30
Orth and Medical Board of Queensland; Dr Robert J Cooke (Third Party) Re, (2003) 6 QAR 209
Pemberton and The University of Queensland, Re (1994) 2 QAR 293
Smith Kline and French Laboratories (Aust) Limited & Ors v Secretary, Department of Community Services and Health (1991) 28 FCR 291
Villanueva and Queensland Nursing Council; Others (Third Parties), Re (2000) 5 QAR 363

DECISION

I set aside the decision under review (which is identified in paragraph 5 of my accompanying reasons for decision). In substitution for it, I decide that the matter in issue (identified in paragraph 17 of my reasons for decision) does not qualify for exemption from disclosure under the *Freedom of Information Act 1992* Qld, and that the applicant is therefore entitled to obtain access to it under the *Freedom of Information Act 1992* Qld.

Date of decision: 17 March 2005

….....
CATHI TAYLOR
INFORMATION COMMISSIONER

TABLE OF CONTENTS

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 01/2005
Application 338/03

Participants:

CIRCUMCISION INFORMATION AUSTRALIA
AS AGENT FOR "DMO"
Applicant

HEALTH RIGHTS COMMISSION
Respondent

DR HARRY STALEWSKI
Third Party

REASONS FOR DECISION

Background

1. Circumcision Information Australia, as agent for a person whom I shall hereinafter refer to as "DMO", seeks review of a decision by the Health Rights Commission (the HRC) refusing DMO access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to information concerning the third party's response to a complaint lodged by DMO with the HRC.

2. On 31 May 1999, the third party performed a circumcision on DMO's one day old son. By letter dated 11 September 2001, DMO lodged a complaint with the HRC in which she alleged that:

   - the third party had failed to inform her that circumcision is no longer considered a routine procedure;
   - the circumcision had caused her son's penis to be crooked when erect; and
   - the circumcision should not have been performed before her son was six weeks old.

3. The HRC assessed DMO's complaint (the various stages involved in the HRC's complaints-handling scheme are discussed in detail below). During that assessment process, it sought and obtained a response to the complaint from the third party, and also obtained an informal expert opinion (over the telephone) from an independent surgeon experienced in performing circumcisions. At the end of the assessment process, the HRC decided that the health service provided by the third party was reasonable, and that DMO's complaint should be closed under s.79(1)(c) of the *Health Rights Commission Act 1991* Qld (the HRC Act), on the basis that the complaint had been adequately dealt with by the HRC. By letter dated 13 August 2002, the HRC informed DMO of its decision, and a summary of the reasons for its decision.

4. By letter dated 23 January 2003, Circumcision Information Australia, acting as agent for DMO, sought access under the FOI Act to correspondence and notes held by the HRC in relation to DMO's complaint, including correspondence with the third party. (Hereinafter, I will, where appropriate, refer to Circumcision Information Australia and DMO collectively as "the applicant").

5. By letter dated 7 March 2003, Mr David Kerslake, Commissioner of the HRC, informed the applicant that he had identified 56 folios as falling within the terms of the applicant's FOI access application. Mr Kerslake decided to give the applicant full access to 50 folios, and partial access to 3 folios, but refused access to 3 folios under s.46(1)(b) of the FOI Act. Those three folios to which Mr Kerslake refused access in full comprised the third party's written response to DMO's complaint, and a file note recording a telephone conversation between the third party and an HRC officer.

6. By letter dated 7 April 2003, the applicant sought internal review of Mr Kerslake's decision to refuse access to three folios in full. However, as Mr Kerslake is the principal officer of the HRC, his decision was not subject to internal review under s.52 of the FOI Act. Accordingly, by letter dated 9 April 2003, Mr Kerslake referred the applicant's application for review to my office. By letter dated 17 April 2003, the Deputy Information Commissioner advised the applicant that Mr Kerslake's decision would be reviewed by the Information Commissioner under Part 5 of the FOI Act.

External review process

7 Copies of the folios containing matter in issue were obtained and examined, together with copies of those folios that had been disclosed to the applicant.

8. The third party was granted participant status in the review, in accordance with s.78 of the FOI Act. By letter dated 26 May 2003, the third party advised that he objected to the disclosure of the matter in issue, and he provided a brief submission in support of his case.

9. On 7 July 2003, at a meeting with members of staff of my office, Mr Kerslake made oral submissions in support of the HRC's case (in this review, and in another review before the Information Commissioner involving the HRC which raises similar issues), that the matter in issue qualified for exemption from disclosure to the applicant because:

- the information provided by the third party to the HRC had been given voluntarily, and had been given and received in confidence;
- the HRC had discharged its duty to accord DMO procedural fairness by informing her, at the end of the assessment process, of the HRC's decision not to take any action against the third party, and by providing DMO with a summary of the information upon which the HRC had relied in reaching that decision; and
- the HRC has no power, during the assessment phase, to compel medical practitioners to provide information to assist the HRC in assessing complaints, and that if the matter in issue were disclosed to the applicant contrary to the third party's understanding of confidence, medical practitioners would simply decline to provide information to the HRC in future during the assessment phase, which would prejudice the HRC's ability to expeditiously assess and resolve complaints.

(Those oral submissions were later incorporated into written submissions which were sent to the applicant for response – see paragraph 12 below).

10. By letters dated 4 August 2003, Assistant Information Commissioner (AC) Moss conveyed to the HRC and to the third party her preliminary view that, with the exception of a segment of information contained in one folio, the matter in issue did not qualify for exemption under s.46(1)(a) or s.46(1)(b) of the FOI Act. In her letters, AC Moss pointed out that some of the matter in issue had already been disclosed to DMO in the HRC's letter to her dated 13 August 2002, such that it could not be regarded as confidential *vis-à-vis* the applicant.

11. By letter dated 19 August 2003, the third party, through his representative, United Medical Protection (UMP), advised that he maintained his objection to disclosure of the matter in issue, and sought an extension of time within which to lodge a written submission in support of his case. By letter dated 25 August 2003, UMP lodged a submission on behalf of the third party, outlining the grounds on which the third party argued that the matter in issue was exempt from disclosure to the applicant.

12. By letter dated 2 September 2003, the HRC lodged a written submission in support of its case for exemption of the matter in issue and advised:

> *The HRC would be happy for the release of any information that is already known to the applicants as a result of correspondence we have previously had with them. The HRC maintains its objection to the release of any information, provided on a confidential basis, which is not already known to the applicants.*

13. Under cover of letters dated 2 December 2003, AC Moss sent to the HRC and to the third party, copies of the folios in issue on which was highlighted the matter that had already been disclosed to the applicant during the course of the HRC's review. AC Moss asked the HRC and the third party to advise whether or not they continued to object to the disclosure of that information to the applicant under the FOI Act. Both participants eventually advised that they did not object, and the matter in question was disclosed to the applicant. However, the applicant advised that it wished to continue to pursue access to the remainder of the matter in issue.

14. Also by letter dated 2 December 2003, AC Moss advised the applicant of her preliminary view that a segment of matter contained in one folio in issue qualified for exemption under s.46(1). The applicant advised that it did not continue to pursue access to that segment of matter, and it therefore is no longer in issue in this review. By letter dated 14 January 2004, the applicant lodged submissions in support of its case for disclosure of the matter remaining in issue.

15. The applicant's submissions were sent to the HRC and to the third party. They provided submissions in response dated 4 March 2004 and 11 March 2004, respectively. Those submissions were, in turn, sent to the applicant, which lodged a final submission by email dated 12 April 2004. By letters dated 13 April 2004, AC Moss forwarded the applicant's final submission to the HRC and to the third party, for their information. The third party's representative advised by telephone that, while the third party did not wish to lodge any further written submissions in support of his case, he did wish it to be noted that he was of the view that none of the applicant's final submission dated 12 April 2004 was relevant to the issues for determination in this review.

16. In making my decision in this case, I have taken into account the following material:

- the contents of the matter in issue;
- the applicant's FOI access application dated 23 January 2003, and application for external review dated 7 April 2003;
- the decision of Mr Kerslake of the HRC dated 7 March 2003;
- letters from the applicant dated 5 January 2004, 14 January 2004, 16 February 2004 and 12 April 2004;
- letters from the third party dated 26 May 2003, 19 August 2003, 25 August 2003, 9 January 2004 and 11 March 2004;
- file note of a meeting held on 7 July 2003 with representatives of the HRC, and letters from the HRC dated 2 September 2003, 4 December 2003 and 4 March 2004.

Matter in issue

17. The matter in issue in this review comprises:

(i) parts of a letter dated 8 March 2002 from the third party to the HRC;
(ii) parts of a file note dated 14 May 2002 recording a telephone conversation between the third party and a member of staff of the HRC.

The HRC's complaints-handling scheme – relevant legislative provisions

18. The HRC is an independent authority established by the HRC Act. One of the principal objectives of the HRC (as set out in s.4 of the HRC Act) is to receive and resolve health service complaints. Complaints can be made to the HRC about public and private health services, and about registered health service providers (e.g., dentists, medical practitioners, nurses, *et cetera*) and unregistered health service providers (e.g., acupuncturists, hypnotists, naturopaths, *et cetera*). The HRC's complaints-handling powers differ according to whether or not the subject of the complaint is a registered health service provider. As will be seen in the discussion below, where the complaint involves a registered provider, the HRC is required to involve the provider's registration board at various stages of the complaint-handling process. In addition, the HRC has no formal investigatory powers regarding complaints made against registered health service providers. The complaint must be referred to the relevant registration board for investigation (with the agreement of the board) under the *Health Practitioners (Professional Standards) Act 1999* Qld (hereinafter referred to as the *Health Practitioners Act*).

19. In summary, the HRC Act establishes a four-stage complaint-handling process (see Parts 5-7 of the HRC Act):

(i) Intake

20. The HRC's complaint intake staff obtain relevant preliminary information from complainants and, where appropriate, provide informal advice to complainants to enable them to address their concerns. Where appropriate, the HRC encourages the complainant to make contact with the relevant health service provider with a view to facilitating direct resolution of the complaint. In his 2002-03 Annual Report, the Commissioner stated at page 6: *"The Commission finds that many complaints, especially those of a less serious nature, can be dealt with reasonably quickly by encouraging direct communications between the parties concerned"*.

(ii) Assessment

21. The assessment phase is dealt with in Part 5, Division 2, of the HRC Act. Complaints that are not able to be resolved informally or that are deemed to be unsuited to such an approach are assessed by the HRC to determine what further action, if any, is necessary. Within 14 days of starting the assessment, the HRC is required to give notice of the assessment to the complainant, to the provider complained about, and, if the provider is a registered provider, to the provider's registration board (see s.69 of the HRC Act). During the assessment stage, the HRC seeks to gather sufficient information to enable it to make an informed decision about whether or not to take further action in respect of the complaint. This may entail obtaining access to patient records, seeking submissions (under s.70(1)(a) of the HRC Act) from the health service provider complained about (the HRC has no power to compel the provider to provide a response to the complaint), or perhaps obtaining informal advice on clinical issues from independent experts. If the complaint is against a registered health service provider, the HRC must invite submissions from the provider's health registration board.

22. At page 4 of his 2002-03 Annual Report, the Commissioner said:

> *Firstly, although the Commission is required to invite providers to respond to complaint made against them, it has no power to compel them to do so. In many cases, this means the Commission's capacity to deal with complaints quickly and efficiently will ultimately depend upon the willingness of health service providers to respond to complaints in a thorough and timely way. No-one likes being criticised and I can therefore understand why some providers might react to complaints in a negative or defensive way. I also appreciate that we live in an increasingly litigious age. This is recognised in the Health Rights Commission Act, which provides that the Commission can refer complaints to a process of conciliation, a setting in which anything said or admitted by either party is protected and cannot be used in a court of law. While this process may be appropriate in cases where compensation is a potential outcome, the vast majority of complaints made to the Commission simply do not fall into this category. Nevertheless, in the Commission's experience, providers (or, in many cases, their advisers) often decline to provide even the barest response to a complaint unless the matter can be dealt with in conciliation. …*

23. At the end of the assessment phase, the Commissioner either decides to accept the complaint for action, or decides not to take action on the complaint under s.79 of the HRC Act. The process differs depending upon whether or not the provider complained about is registered. Section 71 provides:

> ***71 Assessment of complaint***
>
> ***(1)*** *On assessing a health service complaint, the commissioner is to–*
>
> *(a) make a decision to accept the complaint for action; or*
>
> *(b) make a decision not to take action on the complaint under section 79.*

(2) *Before deciding to accept a health service complaint for action, the commissioner is to be satisfied–*

(a) that all reasonable steps have been taken by the complainant to resolve the complaint with the provider; or

(b) that a reasonable opportunity has been given to the complainant to resolve the complaint with the provider; or

(c) that it is not practicable for steps mentioned in paragraph (a) to be taken or for the opportunity mentioned in paragraph (b) to be given.

(3) *Also, before making a decision under subsection (1) about a complaint about a registered health provider, the commissioner must consult with the provider's registration board about the complaint.*

(4) *The consultation between the commissioner and the registration board may be in the form of a standing arrangement or more specific consultation.*

(5) *The registered provider's registration board must give the commissioner the board's comments about the complaint within–*

(a) 14 days of the commissioner consulting with the board; or

(b) a longer period agreed to by the commissioner.

(6) *The commissioner–*

(a) must not take any action about the complaint until the first of the following happens–

(i) the commissioner receives the registration board's comments about the complaint;

(ii) the registration board advises the commissioner that the board does not intend to give the commissioner comments about the complaint;

(iii) the period mentioned in subsection (5) for the registration board to provide comments has ended; and

(b) must have regard to any comments made by the registration board in making a decision about the action to be taken in relation to the complaint.

(7) *The commissioner must not decide not to take action on the complaint under section 79 if the registered provider's registration board has advised the commissioner it considers the complaint warrants investigation or other action by the board.*

24. Section 72 provides:

> ***72 Notice of assessment decision***
>
> ***(1)*** *Subject to section 133, the commissioner is to give notice of the commissioner's decision on assessing a health service complaint under section 71 to the complainant and the provider.*
>
> ***(2)*** *If the decision is to take action on the complaint, the notice is to state the action the commissioner has decided to take under section 73 or 74.*
>
> ***(3)*** *If the decision is not to take action on the complaint, the notice given to the complainant is to state the grounds of the decision.*

25. Section 73 relates to complaints about non-registered providers. It states that the HRC can conciliate the complaint under Part 6, or investigate the complaint under Part 7, or refer the complaint to another entity (e.g., the police, or a relevant Commonwealth agency). Conciliation is to be preferred if the HRC considers the complaint can be resolved in that way (see s.73(3)).

26. Section 74 relates to complaints about registered providers. Sections 74(1) – (5) provide:

> ***74 Action on acceptance of complaint about registered provider***
>
> ***(1)*** *This section applies if the commissioner decides under section 71 to accept a health service complaint about a registered provider for action.*
>
> ***(2)*** *The commissioner–*
>
> *(a) if the commissioner and the registered provider's registration board agree that the complaint requires investigation or other action by the board—must immediately refer the complaint to the board; or*
>
> *(b) if either the commissioner or the registered provider's registration board, but not both, consider that the complaint should be referred to the board—must immediately refer the complaint to the Minister; or*
>
> *(c) if neither paragraph (a) nor (b) applies–*
>
> *(i) may refer the complaint to another entity (a "**relevant entity**"); or*
>
> *(ii) may conciliate the complaint under part 6.*
>
> ***(3)*** *If the commissioner takes action under subsection (2)(a) or (b) the commissioner may decide to also take action under subsection (2)(c)(i) or (ii) or both.*

> ***(4)*** *Subject to subsection (5) and section 75, the commissioner is to try to resolve the complaint by conciliation if the commissioner considers it can be resolved in that way.*
>
> ***(5)*** *In deciding whether to conciliate a complaint, the commissioner must take into account the public interest.*

27. Accordingly, as noted above, the HRC does not have power to investigate a complaint under Part 7 if the complaint relates to a registered health service provider. (However, if appropriate, the HRC can still conciliate the complaint under s.74(2)(c) of the HRC Act (it must advise the relevant registration board of its intention to do so), or refer it to another relevant entity for action.) Rather, the complaint is to be referred to the registered provider's registration board for investigation by the board, if the board agrees (see s.62 of the *Health Practitioners Act*). The functions of registration boards under the *Health Practitioners Act* are set out in s.11 of that Act. As far as the investigation of complaints is concerned, registration boards primarily address issues of competency or discipline. Unlike the HRC, the boards do not have power to pursue remedies for individual complainants.

28. While an investigation into a complaint against a registered provider is being conducted by a registration board, the board must give the Commissioner reasonable reports as asked for by him/her (see s.116 of the *Health Practitioners Act*). When conducting an investigation, the board has power to compel persons to provide information to the investigator, or to attend before the committee and provide information or produce evidence (see s.78 of the *Health Practitioners Act*). As soon as practicable after the board prepares its report into the investigation, it must give the Commissioner a copy, which must include the board's findings and the action proposed to be taken. The Commissioner may then give the board comments about the report within 14 days or a longer agreed period. The board is to have regard to the Commissioner's comments in its consideration of the matter.

(iii) Conciliation

29. The conciliation process is dealt with in Part 6 of the HRC Act. It is an entirely voluntary process, designed to assist parties to resolve the complaint through discussion and negotiation. At any stage of the negotiations, either party can decide not to proceed any further in conciliation.

30. The conciliation process is privileged. Section 91 of the HRC Act provides that anything said or admitted during conciliation is not admissible in a proceeding before a court, tribunal or disciplinary body, and cannot be used by the Commissioner as a ground for investigation or inquiry.

31. At the conclusion of the conciliation process, the conciliator is to give to the Commissioner a written report of the results of the conciliation. If no agreement has been reached, the conciliator may make recommendations about the action the Commissioner should take in respect of the complaint.

32. Under s.88 of the HRC Act, upon receiving a report under s.87 that agreement was not reached during the conciliation, the Commissioner may:

- take action on the complaint by:
  - for a complaint about a registered provider, referring it to the registered provider's registration board or another entity;

  - for a complaint about a provider other than a registered provider, by investigating it under Part 7 or referring it to another entity
- decide under s.79 not to take action on the complaint; or
- further conciliate the complaint.

33. Under s.90 of the HRC Act, the Commissioner may end the conciliation if he/she considers that the relevant complaint cannot be resolved in that way. He/she may then take action on the complaint as described above, i.e., by referring it to the relevant registration board (if the subject of the complaint is a registered provider), or by investigating it under Part 7 if the subject of the complaint is a non-registered provider.

(iv) Investigation

34. The Commissioner's investigative powers are dealt with in Part 7, Division 1, of the HRC Act. They can be used only to investigate complaints against non-registered health service providers.

35. The investigation process is a formal process whereby the HRC has power to compel the production of information and records, to interview relevant parties, and to enter and search premises. During the course of the investigation, the Commissioner may refer the complaint (or part thereof) to a relevant authority that has a function to take action on the matter - see s.101 of the HRC Act.

36. At the end of the investigation process, the Commissioner may issue a report outlining the information obtained, sources of the information, the Commissioner's opinion, and any recommendations for action that the Commissioner considers appropriate (see s.125 of the HRC Act). Section 126 identifies the parties to whom such a report can be given. They include any person or entity that has a function or power to take action on matters raised in the report.

37. As noted at paragraph 28 above, in respect of complaints made against registered health service providers, while the HRC does not have power to investigate those complaints, it does have power to monitor the investigations as conducted by the relevant registration boards.

Handling of the applicant's complaint

38. As noted at paragraph 3 above, the HRC assessed DMO's complaint under Part 5, Division 2 of the HRC Act. Under s.69(1) of the HRC Act, it notified both the third party, and the third party's registration board (the Medical Board of Queensland), of the complaint, and invited submissions in response to the complaint. The third party provided submissions in response, part of which comprise the matter in issue in this review (see paragraph 17 above). After consideration of the third party's submissions, and an informal expert opinion obtained from an independent surgeon, the HRC notified DMO that it was of the view that the health service provided by the third party was reasonable, and that the HRC was therefore closing DMO's complaint in accordance with s.79(1)(c) of the HRC, i.e., on the basis that the complaint had been adequately dealt with by the HRC.

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

39. 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.*

40. The issue of whether or not a person's response to a complaint made about them to a regulatory authority can be regarded as having been provided in confidence as against the complainant has been considered in a number of previous decisions of the Information Commissioner's office: see particularly *Re Villanueva and Queensland Nursing Council; Others (Third Parties)* (2000) 5 QAR 363, *Re Chand and Medical Board of Queensland; Dr Adam Cannon (Third Party)* (2001) 6 QAR 159, and *Re Orth and Medical Board of Queensland; Dr Robert J Cooke (Third Party)* (2003) 6 QAR 209.

41. In each of those cases, it was decided that, while it may have been reasonable for the person supplying the response to the complaint to expect that the response would be kept confidential from the world at large, an expectation that the response would be treated in confidence as against the complainant was not reasonable, having regard to the functions of the relevant regulatory authority, and the uses it might properly wish to make of the information contained in the response in discharging its responsibility to deal fairly and properly with the complaint.

42. Both the HRC and the third party have sought, in this case, to distinguish those previous decisions. I will discuss their submissions in that regard below, in the context of considering the application of s.46(1)(a) and s.46(1)(b) to the particular matter in issue in this review.

Submissions of the participants

(a) The HRC's submissions

43. In its various submissions, the HRC argued as follows in support of its case that the matter in issue was communicated in confidence as against the applicant:

- the third party's response to the applicant's complaint was marked "In Confidence";
- the general understanding of confidence under which the response was provided and received was recognised by the HRC to be subject to the obligation on the HRC to accord the applicant procedural fairness in dealing with her complaint;
- however, in according the applicant procedural fairness, the HRC was obliged only to provide the applicant with a summary of the substance of the third party's response, and not with a copy of the response itself;
- procedural fairness does not require disclosure to a complainant of the source and nature of all information that comes to the attention of an administrative decision-maker;

- the amount and nature of the information to be disclosed to a complainant will depend upon the extent to which the HRC actually relied upon the information supplied in the response - if the HRC looked elsewhere for information to form the basis of its decision, it may be necessary to disclose only a very small part (perhaps not any) of the response;
- s.72 of the HRC Act provides only that a complainant must be advised of the reasons for the Commissioner's decision.

44. As regards the third and fourth requirements for exemption under s.46(1)(b) - that disclosure could reasonably be expected to prejudice the future supply of similar information, and that disclosure would, on balance, be contrary to the public interest - the HRC argued as follows:

- unlike the Medical Board of Queensland (the MBQ), the HRC has no power to conduct a formal investigation of a complaint against a registered health service provider. Moreover, at the assessment stage of its complaint-handling process, the HRC cannot compel the provider (registered or unregistered) to respond to a complaint made against him or her. It can do no more than invite a response (see s.70 of the HRC Act);
- in many cases, it would be impossible for the HRC to conduct even the most rudimentary of inquiries into a complaint without the co-operation of providers in supplying essential information;
- if the HRC's capacity to receive information in confidence were seriously eroded, some health service providers would refuse to co-operate with the HRC's inquiries at all, or would provide a response only on the condition that the complaint be referred to conciliation, where the information provided is protected from disclosure under the FOI Act by s.91 and s.92 of the HRC Act. Because of the HRC's limited number of trained conciliators, this would lead to significant delays in resolving complaints, which would be contrary to the public interest;
- if registered health service providers refuse to provide any information at all, many complainants would end up with no-where to go. On the one hand, their complaints may not be serious enough to attract the attention of the relevant registration board. On the other hand, even if the relevant board agreed to deal with the case, it could only address competency or disciplinary issues. Unlike the HRC, boards have no power to pursue remedies for individual complainants. Either way, the only avenue available to complainants may be recourse to litigation, with all the costs and delays that this entails. This would appear to defeat one of the key objectives of the HRC Act.

> *In summary, it would be contrary to the public interest for the Commission to place at risk the cooperation it receives from health providers … by release of documents that have been provided in confidence. The end result would be that many complainants would be denied a free and impartial means of having their health concerns looked into and resolved. Many would be denied a remedy to which they would otherwise be entitled. … More importantly, most of the cases the Commission deals with are not about compensation. They are about seeking explanations or acknowledgements, outcomes that would also be jeopardised if the Commission's sources of information were to dry up.*
>
> [HRC's submission dated 4 March 2004]

(b) The third party's submissions

45. In support of his case for exemption of the matter in issue under s.46(1)(a) and/or s.46(1)(b) of the FOI Act, the third party argued as follows:

- the third party's letter was marked "In confidence" and a response to a complaint must inherently be of a confidential nature;
- the fact that the HRC extracted some of the information provided by the third party in his response and gave it to the complainant only enhances the quality of confidence attaching to the remainder of the information, because it indicates that it was done by the HRC in an effort to protect the confidentiality of that remaining information;
- the previous decisions of the Information Commissioner's office (cited at paragraph 40 above) can be distinguished because the HRC is not a regulatory authority. It is a body with only limited powers to deal with complaints against registered health service providers. Section 72 of the HRC Act provides only that a complainant be informed of the grounds for the HRC's decision in response to a complaint. If Parliament had intended that the service provider's response be given to the complainant, it would have specifically included it within s.72. All that a complainant is reasonably entitled to expect is that they will be given, where necessary, a summary of the relevant parts of what the respondent said.

46. As regards the third and fourth requirements for exemption under s.46(1)(b) - that disclosure could reasonably be expected to prejudice the future supply of similar information, and that disclosure would, on balance, be contrary to the public interest - the third party argued relevantly as follows:

- the third party himself would not provide information to the HRC in future cases if his expectation of confidence were not upheld in this matter;
- the experience of UMP is that the level of concern by medical practitioners about many complaints merely being fishing expeditions prior to the institution of civil proceedings is such that a significant number of practitioners will elect not to provide any information to the HRC except in conciliation, where there is clear protection for the information. This will result in delays being experienced in the resolution of complaints;
- if the matter in issue were to be disclosed to the applicant, UMP would advise its members not to communicate with the HRC during any assessment process; and
- the balance of the public interest lies in protecting the confidentiality of voluntary responses to complaints. It is not in the public interest to allow the complaints-handling processes of the HRC to be used by complainants as a form of pre-litigation disclosure.

(c) The applicant's submissions

47. The applicant's submissions in support of disclosure of the matter in issue can be summarised as follows:

- the HRC's policy of providing the medical practitioner with a copy of the complaint made against them, but refusing to supply the complainant with a copy of the medical practitioner's response, is fundamentally unfair;
- the third party's refusal to co-operate with future HRC complaint assessments may simply force future complainants to proceed directly to litigation, which would be in conflict with the interests of the HRC, the third party, and UMP;

- the HRC failed to give to independent experts, with whom it consulted about the third party's treatment of DMO's son, a copy of the third party's response to DMO's complaint, resulting in the experts being unable to give an accurate assessment of the third party's treatment. The proper functioning of the HRC is, in fact, impaired by withholding the third party's response;
- the public interest weighs in favour of disclosure of the third party's response so that it can be assessed by experts in the field – peer review is an integral and essential component of quality control in the practice of medicine; and
- withholding the third party's response from DMO will only arouse mistrust and resentment from parents, who have come to believe that the HRC serves only to defuse public complaints regarding health care. If the HRC is genuinely concerned with the health rights of patients, and if the third party and UMP are genuinely concerned about the possibility of civil action, it would be counter-productive for all three parties to force the complainant into a situation where the only avenue of resolution is litigation.

Application of s.46(1)(a) of the FOI Act to the matter in issue

48. In *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, Commissioner Albietz explained in some detail (at pp.288-335) the correct approach to the interpretation and application of s.46(1)(a) of the FOI Act. The test for exemption under s.46(1)(a) must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind the respondent agency not to disclose the information in issue. I am satisfied that there is an identifiable plaintiff, the third party, who would have standing to bring such an action for breach of confidence.

49. There are five requirements, all of which must be established, to obtain protection in equity of allegedly confidential information:

(a) it must be possible to specifically identify the information, 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 have "the necessary quality of confidence"; i.e., the information must not be trivial or useless information, and it must have a degree of secrecy sufficient for it to be the subject of an obligation of conscience (see *Re "B"* at pp.304-310, paragraphs 64-75);

(c) the information 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) disclosure to the applicant for access would constitute an unauthorised use of the confidential information (see *Re "B"* at pp.322-324, paragraphs 103-106); and

(e) disclosure would be likely to cause detriment to the confider of the confidential information (see *Re "B"* at pp.325-330, paragraphs 107-118).

Requirement (a)

50. I am satisfied that the information claimed to be the subject of an obligation of confidence can be specifically identified.

Requirement (b)

51. I am satisfied that the matter in issue has not been disclosed to the applicant, and that it has the necessary degree of secrecy/inaccessibility to satisfy requirement (b) above.

Requirement (c)

52. In its letter dated 20 February 2002 to the third party, in which it advised the third party of the applicant's complaint and requested the third party's response, the HRC said:

> *As our files are accessible under the* Freedom of Information Act 1992, *any comment you make may be accessible under that Act, subject to possible exemptions such as the confidentiality of information provided. You may wish to advise us when any comment you make is "Given in Confidence" for the purpose of that legislation. If a decision is made to refer the complaint to another body, for example, a registration board, the Commission may decide to provide it with a copy of any submission you make.*

53. I note that, in response to the HRC's invitation, the third party marked his letter dated 8 March 2002 "In Confidence".

54. However, a supplier of confidential information cannot unilaterally and conclusively impose an obligation of confidence: see *Re "B"* at pp.311-316, paragraphs 79-84, and pp.318-319, paragraphs 90-91. If a 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 to enforce it, then the courts will not do so: *Dunford & Elliott Ltd v Johnson & Firth Brown Ltd* [1978] 1 FSR 143 at p.148 per Lord Denning MR.

55. The touchstone in assessing whether requirement (c) to found an action in equity for breach of confidence has been satisfied, lies in determining what conscionable conduct requires of an agency in its treatment of information claimed to have been communicated in confidence. That is to be determined by an evaluation of all the relevant circumstances surrounding the communication of that information to the agency. The relevant circumstances will include (but are not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and circumstances relating to its communication of the kind referred to by a Full Court of the Federal Court of Australia in *Smith Kline and French Laboratories (Aust) Limited & Ors v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at pp.302-3: see *Re "B"* at pp.314-316, paragraph 82.

56. *Re Orth* clearly sets out the relevant circumstances that need to be evaluated in each case (see paragraph 34):

> *In evaluating the relevant circumstances, it should be borne in mind that the courts have recognised that special considerations may apply in determining whether a government agency owes an obligation of confidence in respect of*

information communicated to it by a person outside government: Attorney-General (UK) v Heinemann Publishers *(1987) 75 ALR 353 at p.454; for example:*

- *in* Smith Kline & French, *Gummow J refused to hold that the first respondent was bound by an equitable obligation not to use confidential information in a particular way because to do so would or might inhibit the first respondent's statutory functions.*

- *account must be taken of the uses to which the government agency must reasonably be expected to put information, purportedly communicated to it in confidence, in order to discharge its functions. The giving of information to a regulatory or law enforcement authority may mean an investigation must be started in which particulars of the information must be put to relevant witnesses, and the information may ultimately have to be exposed in a public report or perhaps in court or tribunal proceedings:* Re "B" *at p.319, paragraph 93.*

- *a government official, who is required to comply with common law principles of procedural fairness when making decisions, may be confronted with an apparently conflicting duty to respect a confidence, in circumstances where the official proposes to make a decision adverse to a person's rights or interests on the basis of confidential information obtained from a third party. Ordinarily, conscionable conduct on the part of a government agency would require compliance with a common law duty to accord procedural fairness, and equity would not enforce an obligation of confidence to the extent that it conflicted with a legal duty of that kind: see, for example,* Re Hamilton and Queensland Police Service *(1994) 2 QAR 182 at p.198, paragraph 52;* Re Coventry and Cairns City Council *(1996) 3 QAR 191 at pp.199-200, paragraphs 27-29, and pp.202-203, paragraphs 36-37;* Re Kupr and Department of Primary Industries *(1999) 5 QAR 140 at pp.156-157, paragraphs 42-45.*

- *public interest considerations (relating to the public's legitimate interest in obtaining information about the affairs of government) may affect the question of whether enforceable obligations of confidence should be imposed on government agencies in respect of information purportedly supplied in confidence by parties outside government: see* Esso Australia Resources Ltd v Plowman *(1995) 183 CLR 10;* Commonwealth of Australia v Cockatoo Dockyard Pty Ltd *(1995) 36 NSWLR 662;* Re Cardwell Properties Pty Ltd & Williams and Department of the Premier, Economic and Trade Development *(1995) 2 QAR 671 at pp.693-698, paragraphs 51-60.*

57. Applying those principles to the present circumstances, I note that the third party knew that he was responding to a formal complaint made against him by the applicant (a copy of the complaint had been provided to him), and that the HRC was assessing that complaint with a view to deciding whether or not to take any action in respect of it. In those circumstances, I do not consider that it was reasonable for the third party to expect that his response would be kept confidential from the applicant. Both the third party and the HRC ought reasonably to have expected that, in properly dealing with the complaint, the HRC might want or need

to put the third party's response (or aspects of it) to the applicant, as part of the process of testing their respective accounts of relevant events, or indeed as part of a proper explanation to the applicant of the outcome of her complaint (especially if the third party's response was relied upon by the HRC as a basis for taking no further action in respect of her complaint).

58. Both the HRC and the third party accepted in the submissions that they lodged during the course of this review, that any understanding of confidence they held about the third party's response to the complaint must necessarily have been subject to implicit conditions/exceptions permitting disclosure of relevant information to persons directly involved in the investigation (see *Re McCann and Queensland Police Service* (1997) 4 QAR 30 at pp. 53-54). That is, they accepted that the HRC was obliged to accord the complainant procedural fairness in dealing with her complaint, and that, in fulfilling that obligation, the HRC might be required to disclose to the complainant some of the information contained in the third party's response. However, they both have argued that procedural fairness did not require the complainant to be given a full copy of the third party's response. All that procedural fairness required was that the complainant be informed of the HRC's decision in response to her complaint and the reasons for that decision, and, to the extent that the third party's response was taken into account in making the decision, a summary of the substance of the response. Both the third party and the HRC argue that that has occurred, and that any information contained in the response that was not required to be communicated to the complainant in those circumstances should be regarded as having been communicated in confidence as against the complainant.

59. I accept that what is required to accord procedural fairness in any given case may vary according to the circumstances of the particular case (see the discussion about procedural fairness at paragraphs 33-36 of *Re Chand*). However, I consider that there are problems with the approach advocated by the HRC and the third party. In effect, they have argued that it is up to the HRC to choose which parts of a response to a complaint will be disclosed to a complainant on the basis that, if the HRC does not consider particular information relevant or responsive to the complaint, there is no need for it to be put to the complainant. A similar argument by Dr Cannon was dealt with in *Re Chand* (see paragraphs 38-44). In *Re Chand* it was accepted that while different considerations might apply to genuinely "peripheral" information contained in Dr Cannon's report which had not already been disclosed to the complainant, and which was not responsive or relevant to the complaint that had been made against him, equity would not ordinarily impose an obligation of confidence restraining the MBQ from disclosing to a complainant any information contained in a response to a complaint, which is information that is relevant to the substance and details of the relevant complaint. (As explained in *Re Chand* "ordinarily" was qualified because there could be exceptions in certain cases, where, for example, disclosure would not be in the best interests of the complainant's continued health-care treatment, or where disclosure of medical information about a person other than the complainant would infringe the patient's interests in privacy and confidentiality. I am satisfied that no such exceptional circumstances exist in this case.)

60. Procedural fairness requires that a complainant be satisfied that the assessment of their complaint has been conducted fairly – for example, that the assessing body took into account all relevant information; that it did not erroneously rely upon, or make findings based upon, incorrect or irrelevant information; and that the findings it made were reasonable in all the circumstances, *et cetera*. It is difficult to see how a complainant could properly scrutinise an assessing body's decision in that regard without being given access to all relevant information contained in a response to the complaint. In this case, the complainant is expected to be satisfied that the summary of the substance of the third party's

response that the HRC gave to her, in its letter dated 13 August 2002, was an accurate and fair summary – that the HRC did not, for example, mistakenly overlook some information contained in the response that the complainant might consider to be of significance; that it did not mistakenly misstate some information provided by the applicant; or that it did not place undue emphasis on parts of the response while dismissing other parts that the complainant, at least, might consider to be of relevance or importance. While, in the particular circumstances of this case, the summary of the third party's response that the HRC provided to the applicant may have been an entirely accurate and fair summary, it is not difficult to envisage circumstances where that may not be the case, or may not be perceived by the complainant to be the case. Hence, the problems in the HRC simply preparing what it considers to be a fair and accurate summary of the substance of a response to a complaint, and providing only that information to the complainant.

61. The matter remaining in issue in this case is information that was not disclosed to the complainant at the conclusion of the HRC's assessment of her complaint. I am satisfied, from my examination of it, that all of that information is relevant and responsive (including relevant background information) to the particular issues of complaint that DMO raised in her letter dated 11 September 2001. There is nothing in the matter in issue that I regard as being genuinely peripheral or irrelevant information, such that procedural fairness would not require its disclosure to the applicant. Accordingly, I do not consider that equity would impose on the HRC an obligation of confidence, as against the applicant, in respect of any of the matter in issue.

62. As to the third party's contention that the decisions in *Re Villanueva*, *Re Chand* and *Re Orth* ought to be distinguished because, unlike the Nursing Council and the MBQ, the HRC is not a regulatory authority, I can see no valid basis for that contention. The HRC is a statutory body established for the primary purpose of receiving, assessing, conciliating or investigating health service complaints (see s.10 of the HRC Act). In performing those functions, it is clear that the HRC is bound to observe the requirements of procedural fairness. Section 30 of the HRC Act specifically provides that, in performing functions and exercising powers under the HRC Act, the Commissioner is to have regard to the rules of natural justice (more commonly referred to today as procedural fairness).

Finding

63. For the reasons discussed above, I find that requirement (c) to found an action in equity for breach of confidence is not satisfied with respect to the matter in issue, and hence that the matter in issue cannot qualify for exemption under s.46(1)(a) of the FOI Act. (It is unnecessary, in light of that finding, to consider requirements (d) and (e) from paragraph 49 above.)

Application of s.46(1)(b) to the matter in issue

64. Matter will be exempt under s.46(1)(b) of the FOI Act if:

(a) it consists of information of a confidential nature;

(b) it was communicated in confidence;

(c) its disclosure could reasonably be expected to prejudice the future supply of such information; and

(d) the weight of the public interest considerations favouring non-disclosure equals or outweighs that of the public interest considerations favouring disclosure.

(See *Re "B"* at pp.337-341; paragraphs 144-161.)

Requirements (a) and (b)

65. The first two requirements for exemption under s.46(1)(b) are similar in nature to requirements (b) and (c) to found an action in equity for breach of confidence (considered at paragraphs 51 to 62 above). I find that the first requirement for exemption under s.46(1)(b) is satisfied with respect to the matter in issue.

66. As to the second requirement for exemption under s.46(1)(b), Commissioner Albietz explained the meaning of the phrase "communicated in confidence", at paragraph 152 of *Re "B"*, as follows:

> *152 I consider that the phrase "communicated in confidence" is used in this context to convey a requirement that there be mutual expectations that the information is to be treated in confidence. One is looking then for evidence of any express consensus between the confider and confidant as to preserving the confidentiality of the information imparted; or alternatively for evidence to be found in an analysis of all the relevant circumstances that would justify a finding that there was a common implicit understanding as to preserving the confidentiality of the information imparted.*

67. The test inherent in the phrase "communicated in confidence" in s.46(1)(b) requires an authorised decision-maker under the FOI Act to be satisfied that a communication of confidential information has occurred in such a manner, and/or in such circumstances, that a need or desire, on the part of the supplier of the information, for confidential treatment (of the supplier's identity, or information supplied, or both) has been expressly or implicitly conveyed (or otherwise must have been apparent to the recipient) and has been understood and accepted by the recipient, thereby giving rise to an express or implicit mutual understanding that the relevant information would be treated in confidence (see *Re McCann* at paragraph 34).

68. In marking his response to the applicant's complaint "In Confidence", the third party conveyed his desire for confidential treatment of his response. However, both the third party and the HRC have acknowledged that any implicit mutual understanding of confidence that existed between them regarding the response was conditional, and that the HRC was impliedly authorised to disclose to the complainant any information contained in the response that was relevant to the complaint. For the reasons explained at paragraphs 60 to 61 above, I consider that all of the matter remaining in issue is relevant to the complaint made against the third party, and therefore that, as least against the applicant, none of that information was "communicated in confidence", such as to qualify for exemption under s.46(1)(b) of the FOI Act.

69. While it is not strictly necessary for me to do so, I will make some comments about requirements (c) and (d) for exemption under s.46(1)(b), in light of the fact that both the HRC and the third party have made submissions relevant to those requirements.

Requirement (c) – prejudice to future supply

70. The third requirement for exemption under s.46(1)(b) largely turns on the test imported by the phrase "*could reasonably be expected to*", which requires a reasonably based expectation, i.e., an expectation for which real and substantial grounds exist, that disclosure of the particular matter in issue could have the specified prejudicial consequences. A mere possibility, speculation or conjecture is not enough. In this context "*expect*" means to regard as likely to happen. (See *Re "B"* at pp.339-341, paragraphs 154-160, and the Federal Court decisions referred to there.)

71. The third party submitted that, if the matter in issue in this review were to be disclosed to the applicant, he would not, in the future, provide any information to assist the HRC in its assessment of a complaint. However, this requirement for exemption under s.46(1)(b) does not apply by reference to whether the particular confider, whose confidential information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice the future supply of such information from a substantial number of sources available, or likely to be available, to an agency: see *Re "B"* at p.341, paragraph 161.

72. I accept that the HRC has no power, at any stage of its complaint-handling process, to compel registered health service providers (such as the third party) to respond to complaints made against them (it can compel the provision of information from non-registered providers during the investigation stage). Commissioner Albietz considered the same situation in *Re Villanueva* regarding the Nursing Council. In that case, the Queensland Nurses Union, the Australian Medical Association, and the National Association for Specialist Obstetricians and Gynaecologists submitted that, in the event that the matter in issue in that review were to be disclosed to the complainant, they would all, in the future, advise their members not to provide any information to the Nursing Council to assist with an investigation. Similarly, in this case, UMP has made the same submission in respect of its clients.

73. I acknowledge the difficult position in which the HRC finds itself. It is charged with the important function of assessing, and resolving where possible, complaints against registered health service providers for the benefit and protection of the Queensland public. Yet it has been given no coercive powers to assist it in the discharge of that function. If a registered health service provider against whom a complaint has been made to the HRC simply refuses to provide information to the HRC to assist it to assess the complaint, the HRC must try to assess the complaint as best it can, perhaps, for example, by seeking expert advice from an independent third party, or simply by assessing the information provided by a complainant and forming its own view about the merits of the complaint (in its submission dated 2 September 2003, the HRC stated that it in fact resolved quite a number of complaints using those methods). However, I accept that a considerable number of complaints may be unable to be adequately assessed by the HRC without the provision of relevant information by the health service provider under investigation. While it is open to the HRC to refer such unassessed complaints to relevant registration boards (which have coercive powers) such as the MBQ for investigation, there is no guarantee that the boards will accept the complaints as serious enough to warrant board intervention (see the HRC's submissions at paragraph 44 above).

74. From the submissions and evidence provided by the HRC and the third party, it appears that there is already a degree of reluctance amongst medical practitioners to provide any information to the HRC during the assessment stage, even without the "threat" of disclosure under the FOI Act. That fact could be seen as casting doubt on the proposition that disclosure under the FOI Act, of itself, could reasonably be expected to prejudice the future

supply of information to the HRC. Moreover, while acknowledging the apparent inadequacy of the powers that have been given to the HRC in conducting assessments of complaints, I would note that I find the position taken by the HRC and the third party in respect of this issue in this particular case to be somewhat anomalous. On the one hand, they both apparently accept that it is reasonable for a medical practitioner to expect that the substance or thrust of his response to a complaint, upon which the HRC relies in making its decision, may need to be given to the complainant in the interests of procedural fairness. Yet they both argue that disclosure to the complainant, under the FOI Act, of that same information, could reasonably be expected to cause a substantial number of medical practitioners to refuse to supply the HRC with any information at all, relevant or otherwise. I have difficulty in seeing why disclosure of relevant information to a complainant under the FOI Act, should be viewed any differently from the HRC disclosing that same information to the complainant when conveying the HRC's decision in response to the complaint. Based upon the third party's submissions, disclosure of such information to the complainant should always be within the medical practitioner's contemplation when responding to a complaint. If the matter in issue were to be disclosed to the complainant and if the third party's submissions were followed through to their logical conclusion, what would be the effect? In that scenario, the only information that medical practitioners could reasonably be expected to refuse to supply in the future would be irrelevant or non-responsive information that they did not contemplate the HRC would rely upon in assessing the complaint. It is difficult to accept that the efficacy of the HRC's complaints-handling process would suffer any detriment through the refusal to supply that type of information in the future.

75. However, returning to the general proposition asserted by the HRC and the third party, namely, that disclosure to complainants under the FOI Act of responses provided by medical practitioners could reasonably be expected to prejudice the future supply of information from a substantial number of medical practitioners, I note the comments made by Commissioner Albietz at paragraph 126 of *Re Villanueva*:

> *I consider it reasonable to assume that nurses under investigation by the QNC would be willing to cooperate with the investigation if they consider that they have nothing to fear and they wish to take the opportunity to exculpate themselves. The supply of information in such a case would be motivated by the wish to explain matters to the investigator and avoid disciplinary action. Equally, I think it is reasonable to assume that in cases where nurses fear that disciplinary action may result from an investigation, they will be inhibited from cooperating with the investigation in any event, quite apart from the added 'threat' of the possibility of disclosure under the FOI Act of the information they provide. <u>However, in a situation where nurses think that they can demonstrate to an investigator that they did nothing wrong such that there is no warrant for disciplinary action being taken against them, but they also fear exposure to a civil suit by the complainant if the information they provide to the investigator can be accessed under the FOI Act by the complainant, I accept that, in those circumstances, nurses may choose, because of the potential for disclosure under the FOI Act of information adverse to their interests, not to provide the QNC with any information at all during the course of its investigation, thereby resulting in prejudice to the supply of information to the QNC.</u>*
>
> [my underlining]

76. In this case, it is clear that, like the midwife in *Re Villanueva*, the third party believed that he had done nothing wrong in the medical treatment he had provided to the complainant's son. He chose to co-operate with the HRC during its assessment of the complaint so as to be in a position to provide his version of events, and to try to avoid any further action being taken in respect of the complaint made against him. However, unlike the midwife in *Re Villanueva*, I accept that there was a valid basis for the third party to fear exposure to a civil suit by the complainant. In their letter of complaint dated 11 September 2001 to the HRC, DMO and her husband stated:

> … *We gave uninformed consent regarding something that we should have been fully advised about. We are both angry and hurt over this, and had we been informed, we would not have consented to the unnecessary and irreversible procedure of circumcision on our son.* *We would like to take legal action against him* [the third party].
>
> [my underlining]

77. While it is not necessary for me to make a conclusive finding on this issue, I would simply note that I consider that it is not unreasonable to expect that a substantial number of medical practitioners in the same situation as the third party (that is, having received a direct threat of legal action being brought against them) may choose, regardless of their belief that they have done nothing wrong, not to provide any information to the HRC to assist it with its assessment of a complaint made against them, for fear of any adverse information being used against them in the course of any legal proceedings.

Requirement (d) – public interest balancing test

78. I have discussed above, in some detail, the principles of procedural fairness, and the fact that, in assessing a complaint and deciding whether or not to accept the complaint for action, the HRC has a duty to accord the complainant, and the subject of the complaint, procedural fairness, by demonstrating that it has discharged its duty to conduct an adequate and fair assessment of the complaint made to it. I have explained why I am of the view that, in respect of the applicant in this case, the HRC has not discharged that duty, and that procedural fairness requires that the applicant be given access to all information that is relevant and responsive (including relevant background information) to the particular issues of complaint which DMO raised in her letter dated 11 September 2001. In this case, I am satisfied that the matter in issue is all information of that type, and that there is therefore a strong public interest weighing in favour of disclosure of that information to the applicant.

79. I consider that there is a public interest in the accountability of the HRC for the discharge of its functions, that would be assisted by the disclosure of the matter in issue. DMO, as the complainant against the third party regarding the third party's treatment of her son, has a special interest in scrutinising the HRC's assessment process and the relevant information collected by the HRC during that process. Commissioner Albietz recognised in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp.376-377 (paragraph 190) that a particular applicant's interest in obtaining access to particular documents is capable of being recognised as a facet of the public interest, which may justify giving a particular applicant access to documents:

> *The kind of public interest consideration dealt with in the above cases is closely related to, but is potentially wider in scope than, the public interest consideration which I identified in* Re Eccleston *at paragraph 55, i.e., the public interest in individuals receiving fair treatment in accordance with the law in their dealings with government. This was based on the recognition by*

> *the courts that: "The public interest necessarily comprehends an element of justice to the individual" (per Mason C J in* Attorney-General (NSW) v Quin *(1989-90) 170 CLR 1 at 18; to similar effect see the remarks of Jacobs J from* Sinclair v Mining Warden at Maryborough *quoted at paragraph 178 above). It is also self-evident from the development by the courts of common law of a set of principles for judicial review of the legality and procedural fairness of administrative action taken by governments, that compliance with the law by those acting under statutory powers is itself a matter of public interest (see* Ratepayers and Residents Action Association Inc v Auckland City Council *[1986] 1 NZLR 746 at p.750). The public interest in the fair treatment of persons and corporations in accordance with the law in their dealings with government agencies is, in my opinion, a legitimate category of public interest. It is an interest common to all members of the community, and for their benefit. In an appropriate case, it means that a particular applicant's interest in obtaining access to particular documents is capable of being recognised as a facet of the public interest, which may justify giving a particular applicant access to documents that will enable the applicant to assess whether or not fair treatment has been received and, if not, to pursue any available means of redress, including any available legal remedy.*

80. The public interest considerations weighing against disclosure of the matter in issue which have been identified by the HRC and the third party are mostly subsumed within the *prima facie* ground of exemption under s.46(1)(b) of the FOI Act, i.e., they mostly relate to the third requirement for exemption - prejudice to the future supply of information to the HRC (discussed above), and the resulting detrimental effect which that could reasonably be expected to have on the HRC's complaint assessment processes.

81. I acknowledge that the HRC's complaint assessment processes may suffer if persons are reluctant to provide it with information in a situation where there is no power to compel them to do so. However, I think that the issues that have arisen during the course of this review demonstrate a need for the HRC to review its complaint-handling procedures, and the information that it provides to health service providers when it invites them to respond to a complaint made against them. While the HRC accepted, during the course of this review, that at least parts of the third party's response ought to be disclosed to the applicant (and had, in fact already been disclosed by the HRC, albeit in summary form, during the course of its assessment of the complaint), it was only through the external review process that this disclosure occurred. The decision that the HRC gave in response to the applicant's FOI access application was that all information contained in the third party's response was confidential from the applicant. The HRC's decision in that regard apparently was made on the basis that the third party, in response to an invitation from the HRC, had marked his response as being given "in confidence" (see paragraph 43 above). For the reasons explained above, I do not consider that it was reasonable for the third party to have had an understanding that any relevant and responsive information contained in his response could, except in exceptional circumstances, be kept confidential from the applicant, taking into account the purpose for which he provided his response, i.e., to assist the HRC to discharge its responsibility to deal properly and fairly with the applicant's complaint. If that had been made clear to the third party from the outset, some of the problems encountered in this case could, in my view, have been avoided. It may also improve the quality of the responses that the HRC receives from medical practitioners who are the subject of complaint, in that they may be more careful in framing their responses, and confine their responses to the issues directly under consideration.

82. In its submissions dated 4 March 2004, the HRC argued that disclosure of the matter in issue would not, on balance, be in the public interest, because it would place at risk the co-operation that the HRC receives from health service providers, and that the *"end result would be that many complainants would be denied a free and impartial means of having their health concerns looked into and resolved…"*. I would simply point out that, at least as far as DMO is concerned, she clearly is not satisfied that her complaint has been properly handled, or that she has been treated fairly by the HRC. She considers that the HRC's practice of giving the person complained about a copy of the complaint, but refusing to give the complainant a copy of the response to the complaint, to be inherently unfair. I would simply observe that there may be little point in trying to protect a complaints assessment process if that process leaves a party feeling that they have not been treated fairly or equitably. (I would also note that, despite the HRC's contention that complainants would be denied a free and impartial means of having their complaints examined, the HRC still has the option of dealing with appropriate complaints through its conciliation process.)

83. In summary, I consider that there is a legitimate public interest in a complainant being given access to all relevant information gathered during a complaint assessment process so as to be satisfied that the investigating body has conducted a thorough assessment and reached a fair and realistic decision about whether the available information and evidence was sufficient or insufficient to justify the complaint being accepted for action.

84. For the reasons discussed above, I am satisfied that disclosure to the applicant of the matter in issue would, on balance, be in the public interest.

Finding

85. I find that the matter in issue does not satisfy the second and fourth requirements for exemption under s.46(1)(b) of the FOI Act, and that the matter in issue therefore does not qualify for exemption from disclosure to the applicant under s.46(1)(b).

Conclusion

86. For the foregoing reasons, I set aside the decision under review (being the decision dated 7 March 2003 by Mr David Kerslake of the HRC). In substitution for it, I decide that the matter in issue (identified in paragraph 17 above) does not qualify for exemption from disclosure to the applicant under the FOI Act.

.....
CATHI TAYLOR
INFORMATION COMMISSIONER