OFFICE OF THE INFORMATION	**)**	S 229 of 1993
COMMISSIONER (QLD)	**)**	(Decision No. 94030)

Participants:

LAWRENCE HENRY JOHN NELSON
Applicant

- and -

DEPARTMENT OF EDUCATION
Respondent

- and -

KELLY LOGAN
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - "reverse-FOI" application - documents in issue comprising three letters from the applicant to the respondent concerning the affairs of a State School Parents and Citizens Association - whether the documents comprised "information concerning the personal affairs of a person" - whether matter in the documents is exempt matter under s.44(1) of the *Freedom of Information Act 1992 Qld*.

FREEDOM OF INFORMATION - whether the documents comprised information of a confidential nature - whether the documents were communicated in confidence - whether the documents are exempt under s.46(1)(a) or s.46(1)(b) of the *Freedom of Information Act 1992 Qld*

Freedom of Information Act 1992 Qld s.6, s.32, s.43, s.44, s.46(1)(a), s.46(1)(b), s.52, s.81
Freedom of Information Act 1982 Cth s.41(1)
Freedom of Information Act 1982 Vic s.33(1)

Anderson and Australian Federal Police, Re (1986) 4 AAR 414
"B" and Brisbane North Regional Health Authority, Re (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported)
Brack and Queensland Corrective Services Commission, Re (Information Commissioner Qld, Decision No. 94005, 6 April 1994, unreported)
Burton and Department of Housing, Local Government and Planning, Re (Information Commissioner Qld, Decision No. 94006, 18 April 1994, unreported)
Byrne and Gold Coast City Council, Re (Information Commissioner Qld, Decision No. 94008, 12 May 1994, unreported)
Department of Social Security v Dyrenfurth (1988) 80 ALR 533
Pope and Queensland Health, Re (Information Commissioner Qld, Decision No. 94016, 18 July 1994, unreported)
Stewart and Department of Transport, Re (Information Commissioner Qld, Decision No. 93006, 9 December 1993, unreported)
University of Melbourne v Robinson (1993) 2 VR 177

DECISION

1. The decision under review (being the decision of Mr Parsons, on behalf of the respondent, dated 30 November 1993) is varied, in that I find that the following items of information contained in the documents in issue are exempt matter under s.44(1) of the *Freedom of Information Act 1992 Qld*:

   (a) the last sentence of the letter dated 4 July 1993 from the applicant to Mr Argus of the respondent's North West Regional Office; and

   (b) in respect of the letter dated 7 July 1993 from the applicant to the Minister for Education - the last two words on the fifth line, and the first four words on the sixth line, of the second paragraph on page one.

2. In other respects, I affirm the decision under review.

Date of Decision: 18 November 1994

.....

F N ALBIETZ
INFORMATION COMMISSIONER

TABLE OF CONTENTS

Page

Background 1

The Documents in Issue 1
Chronology of Events 2
The Department's Decisions 2

The External Review Process 4

Application of s.44 of the FOI Act 5

Application of s.46 of the FOI Act 9

Evidence and Submissions of Participants 9
Application of s.46 to the Matter in Issue 11

Conclusion 14

OFFICE OF THE INFORMATION COMMISSIONER (QLD))) S 229 of 1993 (Decision No. 94030)

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REASONS FOR DECISION

Background

1. This is a "reverse-FOI" application by Mr Nelson, who objects to the respondent's decision to give the third party, Mr Logan, access under the *Freedom of Information Act 1992 Qld* (the FOI Act) to a number of documents concerning disputes which affected the Richmond State School Parents and Citizens Association during 1993 (but which now appear to have been resolved).

2. Mr Logan made his FOI access application by completing a standard form used by the Department of Education (the Department) for such requests, and attaching a handwritten description of the documents to which he sought access from the Department. On the application form, Mr Logan described the documents he sought as "*Re Crown Law Deliberation 6/9/93*", and elaborated in the handwritten attachment as follows:

> *Please supply copies of any material (used by Crown Law to reach a decision regarding Richmond P and C Legality) except*
>
> > *Minutes of P & C Meeting*
> >
> > *Letter from* [two named individuals who are not participants in this external review] *to N W Regional Office*
> >
> > *Answer by "new executive " of P & C to above letter.*
>
> *I would particularly like a copy of letter circularised in Richmond by the "old" executive in the form of a petition with many signatures attached.*

The Documents in Issue

3. The documents in issue in this external review are described in the respondent's decision under review as follows:

Folio No	Description
1- 4	two page letter dated 2 August 1993 from Mr Nelson, as president of the [Richmond State School] Parents and Citizens Association to Mr A Higgins, Department of Education, with two page attachment consisting of a petition signed by some 39 persons.
10-11	two page letter dated 4 July 1993 from Mr Nelson to Mr R Argus, North West Region of Education, Department of Education.
30-32	three page letter dated 7 July 1993 from Mr Nelson, as president of the Parents and Citizens Association, to Mr Comben, the Honourable the Minister for Education.

Chronology of Events

4. I consider it useful to set out a brief chronology of relevant events concerning the Richmond State School Parents and Citizens Association (the Richmond P & C) which have given rise to this external review:

> On 9 June 1993, a meeting was held at Richmond at which members of the executive of the Richmond P & C, including the then President, Mr Nelson, were deposed from office.
>
> Between 4 July 1993 and 2 August 1993, Mr Nelson wrote the documents which are in issue in this external review.
>
> On 16 October 1993 at a meeting of the Richmond P & C, members of the deposed executive of the Richmond P & C, including Mr Nelson were restored to office, apparently following advice from the Crown Solicitor to the Department that the meeting at which the office-bearers were deposed was invalid.

In setting out this chronology, I have relied upon the submissions made to me by Mr Nelson, which have been provided to the other participants in this external review, and have not been contested insofar as the above points are concerned.

The Department's Decisions

5. The Department's initial decision was made on 2 November 1993 by its FOI Co-ordinator, Mr Spring. Mr Spring decided that a number of documents were exempt under s.43(1) of the FOI Act (the legal professional privilege exemption). Mr Logan did not seek to challenge the claims of exemption under s.43 of the FOI Act, and those documents are not in issue in this case.

6. Mr Spring's decision also dealt with a submission made by Mr Nelson (who had been consulted in accordance with s.51 of the FOI Act) that the documents in issue in this external review comprised exempt matter under s.46 of the FOI Act. Section 46 of the FOI Act provides as follows:

> ***46.(1)*** *Matter is exempt if -*
>
> *(a) its disclosure would found an action for breach of confidence; or*
>
> *(b) it consists of information of a confidential nature that was communicated*

> *in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*
>
> ***(2)*** *Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless its disclosure would found an action for breach of confidence owed to a person or body other than -*
>
> *(a) a person in the capacity of -*
>
> *(i) a Minister; or*
>
> *(ii) a member of the staff of, or a consultant to, a Minister; or*
>
> *(iii) an officer of an agency; or*
>
> *(b) the State or an agency.*

7. The essence of Mr Spring's decision on this issue is contained in the following passage:

> *The matter contained in the documents at issue is a mixture of general affairs of* [the P & C] *and reflections on individuals in the contending groups seeking control of the Association. By at least early August (if not before), these matters had been made generally public by Mr Nelson through the petitioning process of circulating the letter of 2 August (see document 14) to a large proportion of the school community. The issues of constitutionality of a public body formed and operating pursuant to the* Education (General Provisions) Act 1989 *and the contending claims of rectitude by the competing parties are matters of concern to the school community sector of the public in Richmond and appear to me to have been common public knowledge there for some months. They were further aired and hopefully essentially resolved in the recent re-election process. I do not accept that the matter in the documents remains (if it ever was) strictly "confidential".*

8. Mr Nelson sought internal review of Mr Spring's decision in accordance with s.52 of the FOI Act. Internal review was undertaken on behalf of the Department by Mr Parsons (Manager, Administrative Law and Legislative Operations) who, on 30 November 1993, affirmed Mr Spring's decision that the documents in issue were not exempt under s.46(1) of the FOI Act. Mr Parsons' reasons were similar to Mr Spring's and are considered in more detail below.

9. Mr Parsons also considered the application of s.44 of the FOI Act which (so far as relevant) provides:

> ***44.(1)*** *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*
>
> ***(2)*** *Matter is not exempt under subsection (1) merely because it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to a document containing the matter is being made.*

10. Mr Parsons noted that Mr Nelson had objected to disclosure of the information in issue submitting that it had been written in a personal capacity. Mr Parsons' decision indicated that it was not clear to

him whether Mr Nelson was claiming protection of the information under s.44 of the FOI Act on the basis that it concerned Mr Nelson's personal affairs. However, for the sake of completeness, Mr Parsons considered the application of s.44(1) of the FOI Act. He decided that none of the documents in issue was exempt under s.44 of the FOI Act, because none of the matter in issue concerned the "personal affairs of a person" within the meaning of s.44(1), and it was therefore unnecessary for him to consider the application of the public interest balancing test incorporated within s.44(1).

The External Review Process

11. The applicant, Mr Nelson, provided evidence consisting of statutory declarations executed by himself (dated 23 February 1994) and by the former secretary of the Richmond P & C, Ronda Margaret White (also dated 23 February 1994).

12. The Department filed evidence consisting of statutory declarations executed by Andrew Hamilton Higgins (dated 10 May 1994) and by Robert Allan Argus (dated 11 May 1994). The third party, Mr Logan, did not file any formal evidence.

13. Submissions were received from all participants, which were then exchanged, with the opportunity given to each participant to respond to the submissions made by other participants. Relevant parts of the evidence and submissions are referred to later in these reasons for decision.

14. During the course of the external review, Mr Logan indicated that he was not interested in obtaining the names of persons who signed the petition accompanying one of the documents in issue, namely the two page letter dated 2 August 1993 referred to in paragraph 3 above. This external review therefore proceeded on the basis that the names and signatures of the persons who completed the petition were not in issue. The effect of Mr Logan's concession is that the names and signatures of those persons who completed the petition will not be disclosed to Mr Logan by the Department.

15. In my recent decision in another "reverse-FOI" application, *Re Pope and Queensland Health* (Information Commissioner Qld, Decision No. 94016, 18 July 1994, unreported) I made the following observations (at paragraph 17):

> *17. Section 81 of the FOI Act provides that in a review under Part 5 of the FOI Act, the agency which made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant. In the present case, therefore, the formal onus remains on Queensland Health to justify its decision that the Seawright Report is not exempt under s.45(1)(c). Queensland Health can discharge this onus, however, by demonstrating that any one of the three elements which must be established to found a valid claim for exemption under s.45(1)(c) cannot be made out. Thus, the applicant in a "reverse-FOI" case, while carrying no formal legal onus, must nevertheless, in practical terms, be careful to ensure that there is material before the Information Commissioner from which I am able to be satisfied that all elements of the exemption provision relied upon (in this case the three elements of s.45(1)(c)) are established.*

16. Likewise, in the present case, the Department (which, under s.81 of the FOI Act, carries the onus of justifying the decision under review) can discharge its onus by demonstrating that any one of the elements which must be established to found a valid claim for exemption under s.44(1) or s.46, cannot be made out.

Application of s.44 of the FOI Act

17. In my reasons for decision in *Re Stewart and Department of Transport* (Information Commissioner Qld, Decision No. 93006, 9 December 1993, unreported), I identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and the relevant variations of that phrase) as it appears in the FOI Act (see paragraph 79-114 of *Re Stewart*). In particular, I said that information concerns the "personal affairs of a person" if it relates to the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:

> family and marital relationships;
>
> health or ill-health;
>
> relationships with and emotional ties with other people; and
>
> domestic responsibilities or financial obligations.

18. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, based on a proper characterisation of the matter in question. The submissions of the applicant and the third party going to this issue have not really addressed the essential question. In his application for internal review, Mr Nelson contended that the documents in issue were "*... written by me to the Department and Minister in a "personal capacity", as I had been removed as P & C President at that time.*" In his written submission for the purposes of this external review, Mr Nelson wrote:

> *Please be advised that from June 9* [1993] *when my executive was removed from office, I ceased to be the President of the Richmond P & C Assoc. Thereby any correspondence written by me from that date* ***was*** *in a private capacity seeking advice on how to handle this complex problem. I still believe to this day my executive was wrongly dismissed.*
>
> ...
>
> *I felt I had a "personal obligation" to the parents who originally elected me to try and have the matter treated by the Department even handedly.*

19. The third party, Mr Logan, being unaware of the precise nature of the matter in issue, was obviously handicapped in his ability to comment on its proper characterisation. He did, however, respond to Mr Nelson's submissions by contending that:

> *... the documents which are the subject of my* [FOI access] *application were not forwarded by Mr Nelson in a private capacity. In the opening paragraph of Mr Nelson's letter, he states,* "I still believe to this day my executive was wrongly dismissed". *He goes on to emphasise the re-election* "with my original executive being decisively returned", *and in other places refers to* "my old executive". *Mr Nelson loudly contended, to any who would listen, that he was the only legally elected President of the Richmond State School P & C. Mr Nelson went so far as to sign letters which purported such and it is thereby clearly demonstrated that he did not, at that time, consider that he was writing in a private capacity. It may be now convenient for him to so argue at this juncture.*
>
> *It is evident that the letter and two page attachment consisting of a petition signed*

> *by some 39 persons is, in fact, a public document. Mr Nelson canvassed signatories to this letter. Such canvassing for signatories puts this document in a public domain. In addition, its contents became known to people in the community who did not then, and do not now, hold to Mr Nelson's views. ... Additionally, it must be noted that Mr Nelson's Statutory Declaration declares that he canvassed the letter, and if in agreement, people were asked to sign it. He could not be certain whether all people he approached would sign it. Some did not sign since it contained something to which they could not put their name.*
>
> ...

20. In some circumstances, the capacity in which the author of a document was acting when writing and disseminating the document can be a factor relevant to the essential question (for the purposes of applying s.44(1) of the FOI Act) which is identified at the beginning of paragraph 18 above, i.e. the proper characterisation of the information contained in the document. For instance, at paragraph 83 of *Re Stewart* I referred, with approval, to what was said by Deputy President Hall of the Commonwealth Administrative Appeals Tribunals in *Re Anderson and Australian Federal Police* (1986) 4 AAR 414 at pp.433-4, as follows:

> *There are many circumstances in which a person may be referred to in correspondence or other documents without the documents containing information with respect to that person's personal (or "non-business") affairs. Correspondence signed in the course of one's business, profession or employment is an obvious example. Documents signed as the secretary of a social club or sporting body would normally be of a similar nature. In my view, acts, matters or things done by a person in their representative capacity on behalf of another person, body or organisation, would not normally be said to relate to that person's "personal affairs".*

21. To similar effect (dealing with s.33(1) of the *Freedom of Information Act 1982 Vic*) are the observations of Eames J of the Supreme Court of Victoria in *University of Melbourne v Robinson* [1993] 2 VR 177 at p.187:

> *The reference to the "personal affairs of any person" suggests to me that a distinction has been drawn by the legislature between those aspects of an individual's life which might be said to be of a private character and those relating to or arising from any position, office or other public activity with which the person occupies his or her time.*

22. In this case, I consider that Mr Nelson did believe himself to be acting in a representative capacity, on behalf of the parents who originally elected him President of the Richmond P & C (see paragraph 18 above). However, in the circumstances of this case, I consider it largely irrelevant whether Mr Nelson was acting in a representative capacity or in a purely personal capacity, since on a proper characterisation of the matter in issue, it is clear that (subject to two minor exceptions) the matter in issue does not concern the personal affairs of Mr Nelson or other individuals. It can only properly be characterised as information concerning the affairs of the Richmond P & C.

23. In *Re Byrne and Gold Coast City Council* (Information Commissioner Qld, Decision No. 94008, 12 May 1994, unreported), I found that the making of a complaint by a citizen to the local Alderman about the length of grass on public land was a personal affair of the complainant, and that it was proper, in accordance with s.44(1) of the Act, for identifying details of the complainant to be deleted from a document which recorded details of the complaint (see paragraphs 32-36 of *Re Byrne*). However, I also expressed the view that the subject matter of the complaint could not itself be

characterised as information concerning the personal affairs of the complainant (it was information concerning local civic affairs) and had properly been disclosed under the FOI Act (see paragraphs 36 and 38 of *Re Byrne*).

24. In the present case, Mr Nelson's identity as the author of the documents in issue is well known to Mr Logan, so that even if Mr Nelson had been acting in a purely personal capacity (which I do not accept) deletion of identifying details as in *Re Byrne* would be futile. For the reasons identified in paragraph 22 above, I can see no basis for treating the contents of Mr Nelson's letters (with two minor exceptions) other than in the same way as the subject-matter of the complaint in *Re Byrne*.

25. The two minor exceptions that I have referred to consist of the following parts of two of the documents in issue:

    (i) the last sentence of the letter of 4 July 1993; and

    (ii) in the letter of 7 July 1993 - the last two words on the fifth line, and the first four words on the sixth line, of the second paragraph on page one.

26. Mr Nelson did not single out those passages when making submissions to the Department's decision-makers, and it is not surprising that they were overlooked. Mr Nelson did, however, draw specific attention to them in the course of my external review. Although they comprise minor references in the midst of information which clearly concerns the affairs of the Richmond P & C, those minor references do concern the applicant's relationships with other people, and hence do fall within the core meaning of the term "personal affairs" as explained at paragraph 17 above.

27. In *Department of Social Security v Dyrenfurth* (1988) 80 ALR 533, a Full Court of the Federal Court of Australia observed (at p.540) that an assessment of an employee's work performance (which is not ordinarily "personal affairs" information) might contain information relating to the personal affairs of the employee (such as information concerning his or her state of health, the nature or condition of any marital or other relationship, domestic responsibilities or financial obligations) and that the latter information would be eligible for consideration for exemption under s.41(1) of the *Freedom of Information Act 1982 Cth* (which for present purposes is comparable to s.44(1) of the FOI Act). Likewise, the information identified in paragraph 25 above, is, in my opinion, eligible for consideration for exemption under s.44(1) of the FOI Act.

28. As I indicated at paragraph 179 of my decision in *Re "B" and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994 unreported), the effect of the public interest balancing test contained within s.44(1) is such that if it is found that matter concerns a person's personal affairs, that will constitute a *prima facie* ground of justification in the public interest for non-disclosure of the matter, unless the further judgment is made that the *prima facie* ground is outweighed by other public interest considerations such that disclosure of the matter in the document "would, on balance, be in the public interest".

29. The second item of information identified in paragraph 25 above concerns the relationship between Mr Nelson and Mr Logan. The first item of information identified in paragraph 25 above concerns the personal relationship between Mr Nelson and another person. As to the first item, I cannot discern any countervailing public interest consideration that would carry sufficient weight to overcome the public interest in non-disclosure inherent in the satisfaction of the *prima facie* ground for exemption under s.44(1) of the FOI Act. Disclosure of that sentence would not further the public interest in accountability for the management of the affairs of the Richmond P & C, or the respondent's handling of the dispute which occurred, and I find that sentence to be exempt matter under s.44(1) of the FOI Act.

30. As to the second item of information identified in paragraph 25 above, the position is more complex since the information should probably be characterised as information concerning the personal affairs of both Mr Nelson and Mr Logan. Mr Logan was the original applicant for access to information under the FOI Act, and hence is entitled to the benefit of s.6 of the FOI Act, which provides:

> ***6.*** *If an application for access to a document is made under this Act, the fact that the document contains matter relating to the personal affairs of the applicant is an element to be taken into account in deciding -*
>
> *(a) whether it is in the public interest to grant access to the applicant; and*
>
> *(b) the effect that the disclosure of the matter might have.*

31. I analysed the considerations applicable to matter which concerns "shared personal affairs" in my decision in *Re "B"* at paragraphs 172-178. Applying what I said at paragraph 176 of *Re "B"*, the position here is that the segment of matter in issue is comprised of information concerning the personal affairs of the applicant for access under the FOI Act (Mr Logan) which is inextricably interwoven with information concerning the personal affairs of another person (Mr Nelson), which means that:

(a) severance in accordance with s.32 of the FOI Act is not practicable; and

(b) the s.44(2) exception does not apply (for the reasons explained at paragraphs 175-176 of *Re "B"*); and

(c) the matter in issue is *prima facie* exempt from disclosure to the applicant for access under the FOI Act (Mr Logan) according to the terms of s.44(1), subject to the application of the countervailing public interest test contained within s.44(1).

32. Applying the countervailing public interest test in s.44(1), I am not satisfied that disclosure of the second item of information to Mr Logan would, on balance, be in the public interest. In this instance, the public interest recognised in s.6 of the FOI Act is to be applied to a piece of information which does no more than give Mr Nelson's characterisation of his relationship with Mr Logan. In the circumstances, I do not think it carries any substantial weight as a public interest consideration favouring disclosure. Again, disclosure of this information would not further the public interest in accountability for the management of the affairs of the Richmond P & C, or the respondent's handling of the dispute which occurred. I do not think there are public interest considerations favouring disclosure that are of sufficient weight to overcome the public interest in non-disclosure inherent in the satisfaction of the *prima facie* ground for exemption under s.44(1) of the FOI Act. I find the second item of information identified in paragraph 25 above to be exempt matter under s.44(1) of the FOI Act.

Application of s.46 of the FOI Act

Evidence and Submissions of Participants

33. When first consulted in accordance with s.51 of the FOI Act, Mr Nelson arranged for solicitors acting on his behalf to forward to the Department a short written submission (dated 28 October 1993) claiming that the documents in issue were exempt under s.46 of the FOI Act on

the following basis:

> *... the information supplied was of a confidential nature communicated in confidence to the Department for the purpose of resolving a dispute. The disclosure of this information would certainly prejudice any future supply of such information to the Department in other circumstances where the Department would be attempting to resolve disputes involving parents, P&C Committees and/or children. This would prejudice the Department in its attempt to resolve any such problems if parties knew that their communications to the Department could be the subject of release. The free disclosure of information to the Department could then be inhibited and the Department may not therefore become knowledgeable of all the facts of later disputes because of this fear of release.*

34. In his internal review decision, Mr Parsons dealt with the claim for exemption under s.46 as follows (considering s.46(1)(a) first):

> *The matter contained in the folios in question is essentially general affairs of the* [Richmond P & C] *with some reflections on certain individuals. The issues by mid 1993 at least had been made generally public through the petitioning process of circulating folios 1-4 to a portion of the school and perhaps the wider community, and in the re-election process. I do not accept that the matter in the documents remains (if it ever was) strictly "confidential". I am not able to hold, therefore, that the information is inherently confidential.*
>
> *I am not convinced that the matter at issue was communicated in a relationship of mutual confidence between the internal review applicant and the other parties. The documents in question contain no express claims for confidential handling. No obligation of confidence was established. I do not hold, therefore, that the document, or the information contained therein, was given in circumstances which establish either expressly or by implication the existence of a relationship of confidence.*
>
> *There is no evidence provided to me that* [Mr Nelson] *would suffer some detriment if the information were to be disclosed. In the absence of that I am not able to hold, therefore, that the unauthorised use of information would cause detriment to the supplier.*
>
> *Turning now to s.46(1)(b), I have already determined that the text in question does not consist of information of a confidential nature, nor was it communicated in confidence. Another factor under this part of the Act that needs to be considered turns on whether disclosure could reasonably be expected to prejudice the future supply of such information, unless the disclosure would, on balance, be in the public interest.*
>
> ...
>
> *I am not convinced by a claim that disclosure of this information:*
>
> > *would certainly prejudice any future supply of such information to the department in other circumstances where the department would be attempting to resolve issues involving parents, parents and citizens associations, and children; and*

> *would prejudice the Department in its attempt to resolve any such problems if parties knew that their communications to the department could be the subject of release.*
>
> *The likelihood that future voluntary supply of like information would be damaged does not appear convincing in the particular circumstances of this case. The documents in questions were designed and intended to protect and promote certain claims against the contrary assertions of others.*

35. In the course of this external review, Mr Nelson lodged statutory declarations responding to the Department's finding as set out in the first paragraph of the above extract from Mr Parsons' decision. Mr Nelson's explanation as to how the petitioning process occurred in relation to the letter of 2 August 1993 is described in his statutory declaration as follows:

> *I wrote the letter* [of 2 August 1993] *to Mr Higgins* [of the Department] *and in order to point out to him some of the citizens feelings I asked the signatories to first read the letter and if in agreement with the sentiments expressed within, they signed in my presence. This was done in 90% of cases. The remaining 10% (approximately) my former Secretary (Ronda Margaret WHITE) adopted the same procedure. This petition never left the scrutiny of either myself or Mrs White, and was never placed in a public place (e.g. Post Office, School). Several signatories expressed the fear that if it became general knowledge that they signed such a petition it may reflect on their children at school. I could not give them any undertaking that this would not happen but I would do my best to see it did not. Hence my objections to Mr Logan's F.O.I. Demands.*

36. The statutory declaration by Mrs White was simply to the effect that she agreed with the contents of the statutory declaration of Mr Nelson in relation to those sections which are relevant to herself.

37. In his written submission to me, Mr Nelson did not address the s.46 exemption in any detail, but did argue that:

> *If citizens are going to be treated in this way they will "never" feel free to advise those in authority of what is really happening. I would hope our community has not reached these levels. I would have hoped also that information I provided would have remained confidential to the recipients. As in a small community release of correspondence could be "detrimental" to some students. Some parents have expressed this belief to me. The best interests of the students must always be paramount.*

38. From the material he submitted during the course of my review, I formed the impression that Mr Nelson's primary concern in respect of confidentiality arguments was to protect the identities of parents who had signed in support of Mr Nelson's letter to the Department dated 2 August 1993. As events transpired, the concession made by Mr Logan (see paragraph 14 above) means that that information is no longer in issue.

39. Of the three letters in issue, the earliest was addressed to Mr Argus of the Department, the second was addressed to the Minister for Education, and the third was addressed to Mr Higgins of the Department. Both Mr Argus and Mr Higgins have lodged short statutory declarations pointing out that none of the documents in issue contained the words "confidential" or "for your information only". Their statutory declarations also stated that there was no discussion, expectation or indication of confidentiality, between Mr Higgins or Mr Argus, respectively, and Mr Nelson, in respect of the documents in issue.

40. In its reply to Mr Nelson's evidence and submission, the Department raised two additional points, namely that:

> the absence of any indication in Mr Nelson's statutory declaration that there was any understanding or agreement between Mr Higgins and Mr Nelson giving rise to a duty of confidence on the part of the Department; and
>
> Mr Nelson's evidence that he was unable to give signatories an undertaking that the information contained in the petition would not become general knowledge;

tended to indicate that the matter in issue is not confidential in nature.

41. Mr Logan did not lodge any evidence pertaining to the application of s.46 of the FOI Act, and in his written submission, the only point of relevance is a submission that the letter of 2 August 1993 (and the attached petition) are public documents and that Mr Nelson's activities in canvassing for signatories to that letter put the letter in the public domain. Mr Logan submitted that the contents of that document became known to people in the community who were not prepared to support Mr Nelson's position (see the second paragraph of the extract from Mr Logan's submission quoted at paragraph 19 above).

42. In his written reply, Mr Nelson made a further submission relevant to the application of s.46(1)(b), specifically concerning prejudice to the future supply of information such as the matter in issue, if the matter in issue were to be disclosed:

> *I understand a factor which you should consider is, if you release this correspondence against my wishes, why in the future would citizens ever take an interest in P & C, or ever bring to those in authority's attention occurrences which happened in this instance?*

Application of s.46 to the Matter in Issue

43. The requirements for establishing exemption under s.46(1)(a) and s.46(1)(b) of the FOI Act are explained in considerable detail in my reasons for decision in *Re "B"*, and in briefer detail in decisions such as *Re Brack and Queensland Corrective Services Commission* (Information Commissioner Qld, Decision No. 94005, 6 April 1994, unreported) and *Re Burton and Department of Housing, Local Government and Planning* (Information Commissioner Qld, Decision No. 94006, 18 April 1994, unreported). I do not think it is necessary, for the purposes of this case, to recite that detail. As explained at paragraphs 15-16 above, the respondent can discharge its onus under s.81 of the FOI Act by satisfying me that at least one of the elements which must be established to found exemption under s.46(1)(a) or s.46(1)(b) cannot be made out. I consider that the Department's approach to the issues, in the extract from Mr Parsons' decision set out at paragraph 34 above, was basically correct. I will confine my comments to two of the requirements which must be satisfied to establish exemption under s.46(1)(a) or s.46(1)(b).

44. To establish exemption under s.46(1)(b), the first requirement which must be satisfied is that the matter in issue must consist of information of a confidential nature. Likewise, for the purposes of s.46(1)(a), it is an essential element of an action in equity for breach of confidence (there being no suggestion in the circumstances of the present case that a contractual obligation of confidence could apply) that the information in issue must possess the "necessary quality of confidence", that is, it must possess a degree of secrecy sufficient for it to be the subject of an obligation of conscience, arising from the circumstances in or through which the information was communicated or obtained (see paragraphs 64-75 of *Re "B"*).

45. I am not satisfied that the matter contained in the documents in issue is confidential in nature. A great deal of it (including most of the letter dated 7 July 1993 to the Minister for Education) describes events which took place at a meeting of the Richmond P & C, and which, in my opinion, must be regarded as public events. Moreover, the actions of Mr Nelson and his supporters in canvassing for supporting signatories to his letter of 2 August 1993 (which annexed a copy of his letter of 4 July 1993), are to my mind inconsistent with any notion that the contents of those letters were intended to be confidential in nature. While publication to a limited number of persons on a confidential basis will not of itself destroy the confidential nature of information, there is no suggestion in the evidence that the citizens of Richmond, who were shown the letters and asked to sign in support of them, were also asked to keep the contents of the letters confidential.

46. The second requirement which must be satisfied to establish exemption under s.46(1)(b) is that the matter in issue was communicated in confidence. I explained this requirement in paragraph 152 of my decision in *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.*

47. There is no evidence of an express consensus on confidentiality. The evidence of the Department is that there was no understanding, on the part of the Department or its relevant employees, that the documents in issue were provided on a confidential basis. The absence of any words or phrases in the letters purporting to stipulate confidentiality is relevant to the issue of whether or not there was a common implicit understanding as to confidentiality, but not in itself decisive. However, I can see nothing in the relevant circumstances (including the nature of the information conveyed, and the purpose for which it was conveyed) that would justify a finding that there was a common implicit understanding, on the part of Mr Nelson and the recipients of his letters, as to preserving the confidentiality of the documents in issue.

48. Turning to s.46(1)(a), in order to found an action in equity for breach of confidence, the information in issue must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see paragraphs 76-102 of *Re "B"*). Under the equitable principles, it is not necessary for there to have been express undertakings about confidentiality (as I explained at paragraphs 89-90 of *Re "B"*):

> *89 The Federal Court in* Smith Kline & French *accepted that equity may impose an obligation of confidence upon a defendant having regard not only to what the defendant actually knew, but to what the defendant ought to have known in all the relevant circumstances. In cases decided under s.45(1) of the Commonwealth FOI Act (prior to its 1991 amendment) the Federal Court had consistently held that the determination of whether information was provided in circumstances importing an obligation of confidence is essentially a question of fact, which depends upon an analysis of all the relevant circumstances, and it is not necessary for there to have been an express undertaking not to disclose information; such an obligation can be inferred from the circumstances: see* Department of Health v Jephcott *(1985) 9 ALD 35; 62 ALR 421 at 425*;

Wiseman v Commonwealth of Australia *(Unreported decision, Sheppard, Beaumont and Pincus JJ, No. G167 of 1989, 24 October 1989*); Joint Coal Board v Cameron (*1989) 19 ALD 329, at p.339.*

> *90 It is not necessary therefore that there be any express consensus between confider and confidant as to preserving the confidentiality of the information imparted. In fact, though one looks to determine whether there must or ought to have been a common implicit understanding, actual consensus is not necessary: a confidant who honestly believes that no confidence was intended may still be fixed with an enforceable obligation of confidence if that is what equity requires following an objective evaluation of all the circumstances relevant to the receipt by the confidant of the confidential information.*

49. The evidence establishes that the recipients of the documents in issue did not understand them to have been received in confidence. Having regard to what the recipients ought to have known, i.e. having regard to an objective evaluation of all the relevant circumstances, would equity impose enforceable obligations of confidence on the recipients of the documents in issue? I am not satisfied that it would. I consider that it would have been reasonable for the recipients to infer that the letter of 2 August 1993 (to which a copy of the letter of 4 July 1993 was attached) had been shown to a significant number of the citizens of Richmond for the purpose of gathering public support, by way of petition, for the views expressed in those letters. People are ordinarily requested to sign a petition for the purpose of placing on record their support for a particular position. If there were to be some requirement of confidentiality for the contents of those letters, it would hardly arise by implication from these circumstances; in my opinion, it would need to have been expressly stated by the confiders of the information.

50. I can see nothing in the circumstances surrounding the communication of the letters from Mr Nelson to the Department, including the contents of the letters and the apparent purpose for which they were communicated, which warrants a conclusion that the Department implicitly understood, or ought to have understood, that the documents were communicated in confidence. Mr Nelson was asking, on behalf of himself and a substantial number of supporters in the Richmond community, that the Department assist to resolve a problem of a quite public nature, which had arisen in the Richmond P & C. The reasonable implication to be drawn from the contents and tenor of the letters, and the purpose for which they were provided, is that the Department was welcome to use the information in the letters for the purpose of attempting to resolve the problem. I consider that the Department had an obligation to attempt to resolve the dispute, in the interests of the public of Richmond. If it was necessary or desirable for the Department to disclose the information for that purpose, that would be a factor which would tell against the imposition on the Department of an enforceable obligation of confidence.

51. I am not satisfied that the matter in issue is exempt matter under s.46(1)(a) or s.46(1)(b) of the FOI Act.

52. In his submissions, Mr Nelson raised concerns that if the matter in issue in this external review were to be disclosed, other persons involved in parents and citizens associations could not feel free to make representations to the authorities without fear of disclosure. First, it should be said that the result in the particular circumstances of this case should not be taken as setting any kind of general precedent, in the manner suggested by Mr Nelson. Each case must be assessed on its merits. Secondly, I do not think it is reasonable to expect that citizens will be inhibited from raising with the Department genuine issues of concern. I agree with what was said by Mr Parsons in the last two paragraphs of the extract from his decision set out at paragraph 34 above.

Conclusion

53. I affirm the decision under review (being the decision of Mr Parsons made on 30 November 1993), except with respect to the following matter, which I find to be exempt matter under s.44(1) of the FOI Act:

(a) the last sentence of the letter dated 4 July 1993 from the applicant to Mr Argus of the respondent's North West Regional Office; and

(b) in respect of the letter dated 7 July 1993 from the applicant to the Minister for Education - the last two words on the fifth line, and the first four words on the sixth line, of the second paragraph on page one.

F N ALBIETZ
INFORMATION COMMISSIONER