

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 231 of 1993
(Decision No. 95025)

Participants:

TERENCE EDWARD MORRIS
AND OTHERS
Applicants

- and -

QUEENSLAND TREASURY
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - matter in issue comprising the names and other identifying particulars of persons who had made complaints or inquiries to the respondent about the applicants' business operations (which involve the sale to customers resident outside Australia of Australian lotto and lottery-type products) - whether information disclosing that a person has engaged, or considered engaging, in gambling activities is information concerning that person's personal affairs, for the purposes of s.44(1) of the *Freedom of Information Act 1992 Qld* - whether the fact that a person has made a complaint to a government agency is information concerning that person's personal affairs for the purposes of s.44(1) of the *Freedom of Information Act 1992 Qld* - application of the public interest balancing test incorporated in s.44(1) of the *Freedom of Information Act 1992 Qld*.

FREEDOM OF INFORMATION - refusal of access - matter in issue comprising the identity of a source from whom information was obtained by a private detection agency engaged to act on behalf of the respondent - whether the identity of the source constitutes information of a confidential nature that was communicated in confidence, by the detection agency to the respondent, for the purposes of s.46(1)(b) of the *Freedom of Information Act 1992 Qld* - whether disclosure of the matter in issue could reasonably be expected to prejudice the future supply of such information - application of the public interest balancing test incorporated in s.46(1)(b) of the *Freedom of Information Act 1992 Qld*.

FREEDOM OF INFORMATION - refusal of access - matter in issue comprising documents communicated to the respondent by an agency of the New South Wales government concerning issues relating to the regulation of the trade in lotto and lottery-type products - whether the matter in issue constitutes information of a confidential nature that was communicated in confidence, for the purposes of s.38(b) and s.46(1)(b) of the *Freedom of Information Act 1992 Qld* - application of the public interest balancing test incorporated within s.38 of the *Freedom of Information Act 1992 Qld*.

Freedom of Information Act 1992 Qld s.28(1), s.38(b), s.42(1)(b), s.44(1), s.46(1)(a),
s.46(1)(b), s.46(2), s.52, s.76(2)(b), s.83(3), s.87
Golden Casket Art Union Act 1978 Qld
Lotteries Act 1994 Qld
Lotto Act 1981 Qld

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Byrne and Gold Coast City Council, Re (1994) 1 QAR 477
Colakovski v Australian Telecommunications Corporation (1991) 100 ALR 111
Pemberton and The University of Queensland, Re (Information Commissioner Qld,
Decision No. 94032, 5 December 1994, unreported)
Stewart and Department of Transport, Re (1993) 1 QAR 227
Yabsley and Department of Education, Re (1994) 1 QAR 587

DECISION

1. In respect of the first decision under review (being the internal review decision made on 7 December 1993 by Mr M Sarquis on behalf of the respondent) -
 - (a) I affirm that part of the decision by which it was decided that matter deleted from the documents identified in paragraph 23A of my reasons for decision is exempt matter under s.44(1) of the *Freedom of Information Act 1992* Qld; and
 - (b) I vary that part of the decision which dealt with documents identified as documents 291 and 292 by finding that the matter contained in documents 291 and 292, to which the applicants have been refused access, is exempt matter under s.46(1)(b) of the *Freedom of Information Act 1992* Qld.

2. In respect of the second decision under review (being the internal review decision made on 22 December 1993 by Mr M Sarquis on behalf of the respondent) -
 - (a) I affirm that part of the decision by which it was determined that documents identified as documents 301 and 304 comprise exempt matter under s.38(b) of the *Freedom of Information Act 1992* Qld; and
 - (b) I set aside that part of the decision by which it was determined that the document identified as document 306 comprises exempt matter under s.38(b) and s.46(1)(b) of the *Freedom of Information Act 1992* Qld, and in substitution for it, I decide that the applicants have a right to be given access to document 306, except for the name and address of the person to whom document 306 is addressed, which comprises exempt matter under s.44(1) of the *Freedom of Information Act 1992* Qld.

Date of Decision: 19 October 1995

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F N ALBIETZ
INFORMATION COMMISSIONER

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Participants:

TERENCE EDWARD MORRIS
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Applicants

- and -

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Respondent

REASONS FOR DECISION

Background

1. The applicants seek review of the respondent's decision to refuse access to three documents, and to delete matter from a large number of other documents to which access has otherwise been given under the *Freedom of Information Act 1992 Qld* (the FOI Act).
2. By letter dated 25 August 1993 to Queensland Treasury, Paul Everingham and Co, Solicitors, on behalf of the applicants (who are identified in Schedule Two of the document quoted below), lodged an FOI access application in the following terms:

Pursuant to Section 25 of the Freedom of Information Act, I request access to documents being:

- (a) *Documents of the nature referred to in Schedule One, which*
- (b) *Record, refer to or relate to either or both:*
 - (i) *Any person, firm or corporation set out in Schedule Two;*
 - (ii) *Any matter or thing set out in Schedule Three.*

SCHEDULE ONE

1. *Letters*
2. *Memoranda*
3. *Facsimile Transmissions*
4. *Telexes*
5. *Telegrams*
6. *Forms of Complaint*
7. *Memoranda*
8. *Interdepartmental Memoranda*
9. *Ministerial Memoranda*
10. *File Notes*
11. *Diary Notes*

12. *Personal Attendance Memoranda*
13. *Telephone Attendance Memoranda*
14. *Any other form of written communication, written record, including any such communication or record kept or stored on any computer system.*

SCHEDULE TWO

1. *Terence Edward Morris*
2. *Lurleen Gaye Morris*
3. *T E Morris & Associates Pty Ltd ACN 004 889 810*
4. *Terry Morris Pty Ltd ACN 010 155 549*
5. *Merle Norman Cosmetics ACN 010 432 185*
6. *Fralo Pty Ltd ACN 010 103 161*
7. *International Lottery Agents (I.L.A.)*
8. *Australian Players' Service (A.P.S.)*
9. *Orion International*

The registered office of all of the above is at 9 Ouyan Street Bundall Queensland 4217

We attach duly executed authorities from all of the above.

SCHEDULE THREE

1. *The Business Practices of any Person, Corporation or Firm mentioned in Schedule Two.*
2. *Possible Unlawful Conduct by any Person, Corporation or Firm mentioned in Schedule Two, or in respect of which any such Person, Corporation or Firm is alleged to have been involved or to have participated.*
3. *Complaints by or from any person other than the Persons, Firms and Corporations mentioned in Schedule Two concerning such Persons, Firms or Corporations.*
4. *Any view or opinion expressed by any employee, officer or public official concerning or relating to any Person, Firm or Corporation mentioned in Schedule Two, or the business, conduct or affairs of any such Person, Firm or Corporation.*

3. In a subsequent submission accompanying an application for internal review under s.52 of the FOI Act, the applicants' solicitor explained the background to the making of the FOI access application:

The purpose of making the application for access was to establish the nature of complaints that had been received by the Golden Casket Art Union Office ("GCAUO") about any member of the [applicants] so that Terence Edward Morris [the principal of the group comprising the applicants] could investigate the validity of such complaints.

Terence Edward Morris has applied for a lottery licence in the Northern Territory As part of the investigation of Terence Edward Morris' application for such a licence, a probity check was conducted on Terence Edward Morris and other [applicants].

The result of the probity check was adverse to Terence Edward Morris or other [applicants]. As a result of this adverse result, Terence Edward Morris' application has not succeeded.

The [applicants] believe that the information which caused the adverse probity check result was supplied by GCAUO and one other agency.

Notwithstanding the adverse result of the probity check and subsequent to it the director of GCAUO has provided a reference which endorses Terence Edward Morris' application for the lottery licence.

As a result, the Northern Territory Government is reviewing its decision and undertaking a further probity check.

In this context, Terence Edward Morris wishes to be able to refute, if possible, any information given by GCAUO which contributed to the adverse results of the first probity check.

4. Queensland Treasury's decision-maker, Ms Anthea Derrington, prior to making her decision, clarified with the applicants' solicitor the terms of the applicants' FOI access application as follows:

the applicants did not wish to access promotional material of the companies listed in Schedule Two of the FOI access application;

the applicants did not wish to access every response to complaints referred to at Item 3, Schedule Three of the FOI access application, although they did wish to access copies of various standard responses, and responses which were not standard in nature;

the applicants did wish to access the names and addresses of individual complainants referred to at Item 3, Schedule Three of the FOI access application; and

the applicants did wish to access copies of cheques or credit card statements attached to complaints referred to at Item 3, Schedule Three of the FOI access application.

Initial decision on access

5. By decision dated 29 October 1993, Ms Derrington granted access in full to a number of documents, granted access to a large number of documents subject to deletion of information which would identify third parties on the basis that it was exempt matter under s.44(1) of the FOI Act (those documents are hereinafter referred to as "the personal affairs documents"), and granted access to documents identified as documents 291 and 292, subject to deletion of certain matter on the basis that it was exempt matter under s.42(1)(b) of the FOI Act. Ms Derrington also refused access to a document, identified as document 466, under s.22 of the FOI Act, and deferred access to ten documents, including documents identified as documents 301, 304 and 306 (which remain in issue in this review), in accordance with s.51 of the FOI Act.

First internal review decision

6. On 18 November 1993, the applicants applied for an internal review of Ms Derrington's decision.

By decision dated 7 December 1993, Mr Michael Sarquis varied Ms Derrington's decision in the following respects:

by granting access in full to 6 of the 10 documents to which access had been deferred in Ms Derrington's decision (on the basis that third parties had not lodged requests for internal review of her decision in respect of those documents);

by granting access in full to 9 documents previously subject to deletions of matter claimed to be exempt under s.44(1) of the FOI Act;

by exempting additional matter in a document identified as document 268, previously subject to partial release (no exemption provision was indicated in Mr Sarquis' decision); and

by refusing to grant access to some matter in document 463 which Ms Derrington had agreed to release in its entirety (no exemption provision indicated).

7. Mr Sarquis further deferred access to the remaining four documents (301, 304, 306 and 357) to which access had been deferred in Ms Derrington's decision, on the basis that third parties had lodged applications for internal review of Ms Derrington's decision to release those documents.
8. Mr Sarquis also affirmed Ms Derrington's decision to grant partial access to the remaining "personal affairs documents", affirmed Ms Derrington's decision to refuse access to document 466 under s.22 of the FOI Act, and affirmed Ms Derrington's decision to exempt matter in documents 291 and 292 under s.42(1)(b) of the FOI Act, while deciding that the matter exempted from documents 291 and 292 was also exempt matter under s.44(1) and s.46(1)(a) of the FOI Act.

Second internal review decision

9. In a second internal review decision dated 22 December 1993, Mr Sarquis dealt with documents 301, 304, 306 and 357 (to which access had been deferred in his first internal review decision, and in the decision of Ms Derrington).
10. Mr Sarquis refused access to documents 301, 304 and 306 under s.38(b) of the FOI Act, on the basis that the documents comprise information of a confidential nature communicated in confidence between agencies of the New South Wales and Queensland governments, and also under s.46(1)(b) on the basis that the disclosure of the information contained in them could reasonably be expected to prejudice the future supply of such information.
11. Mr Sarquis granted partial access to document 357, exempting the name of a person on the basis that it was exempt matter under s.44(1) of the FOI Act.

The external review process

12. By applications dated 14 December 1993 and 24 December 1993, the applicants applied to me for review, under Part 5 of the FOI Act, of Mr Sarquis' first and second internal review decisions, respectively.
13. Copies of the documents in issue were obtained and examined. Queensland Treasury confirmed that Mr Sarquis' first internal review decision had exempted matter in documents 268 and 463 on the basis of s.44(1) of the FOI Act.
14. During preliminary discussions, the applicants' solicitor advised that access to document 466 (the

document to which the respondent had refused access in reliance upon s.22 of the FOI Act) would not be pursued. Later during the course of the review, the applicants made a further concession in respect of a substantial segment of the documents comprising the "personal affairs documents". By a letter from their solicitor dated 10 November 1994, the applicants confirmed that they no longer wished to pursue access to the matter deleted (in reliance upon s.44(1) of the FOI Act) from documents described as credit card documents, cheques, money orders and postal documents, Australian Players' Service (APS) documents, International Lottery Agents' (ILA) documents, Millionaire 200 Club documents, and Australian Lottery Agents (ALA) International documents.

15. During the course of the review, I received written submissions from Queensland Treasury under cover of letters dated 20 June 1994, and 16 December 1994, and from the Golden Casket Art Union Office (the GCAUO) by letters dated 15 December 1994 and 16 February 1995. Copies of these were provided to the applicants, subject to the deletion of references to matter claimed to be exempt. I also received written submissions on behalf of the applicants forwarded under cover of letters from the applicants' solicitor dated 20 June 1994 (hereinafter referred to as the applicants' first submission) and 5 October 1994 (hereinafter referred to as the applicants' second submission), and supplementary submissions in the form of letters from the applicants' solicitor dated 16 January 1995 and 24 January 1995. In reaching my decision, I have also had regard to the submission which accompanied the applicants' application for internal review under s.52 of the FOI Act.
16. Because documents 301, 304 and 306 originated from an agency of the New South Wales government, that agency was given the opportunity to participate in the external review. It declined to apply to become a participant, but did, by letter dated 23 August 1994, set out the basis of its objection to the release of the documents, and provided evidence, via the respondent, in support of the respondent's claims that documents 301, 304 and 306 are exempt under s.38(b) and s.46(1)(b) of the FOI Act.

Procedural fairness issue

17. During the external review process, the applicants claimed that they had not been afforded procedural fairness in relation to documents 301, 304 and 306 on the basis that they had not been provided with any details of the nature of the documents, sufficient to enable them to participate meaningfully in the review of the respondent's decision with respect to those documents.
18. I acknowledged the applicants' necessary disadvantage in making submissions where all information recorded in a document is claimed to be exempt matter. That is a consequence of the obligations imposed on me by s.76(2)(a) and s.87 of the FOI Act, with respect to ensuring that matter claimed to be exempt is not disclosed to an applicant or an applicant's representative.
19. The applicants' solicitor submitted:

Whilst I understand that the applicant is at a necessary disadvantage in relation to documents which are claimed to be exempt, my point is that in this case my client has not even been provided with a broad description of the nature of the information said to be confidential. For the purposes of making submissions I do not require disclosure of the very matter claimed to be exempt but my clients do require:

- (a) *a description of the nature of the information said to be confidential;*
- (b) *a description of the evidence establishing implicit confidentiality.*

With respect, the necessary disadvantage that you speak of does not mean that my clients should be kept almost completely in the dark about the nature of the claim for

exemption. In my submission, a balance needs to be struck between, on the one hand, not disclosing the matter claimed to be exempt, and on the other hand, extending to my clients sufficient information to enable them to respond meaningfully.

20. I accepted the views expressed by the applicants' solicitor, particularly in light of the requirements of s.83(3) of the FOI Act, which provides:

(3) *In conducting a review, the Commissioner must -*

(a) *adopt procedures that are fair, having regard to the obligations of the Commissioner under this Act; and*

(b) *ensure that each participant has an opportunity to present the participant's views to the Commissioner;*

but, subject to paragraph (a), it is not necessary for a participant to be given an opportunity to appear before the Commissioner.

21. I advised the respondent that in order to afford the applicants natural justice, the substance of the evidence from the New South Wales government agency must be made known to the applicants in a form which avoids the disclosure of any of the matter in issue, and that some further matter (previously deleted from the copy forwarded to the applicants of Queensland Treasury's first written submission) would need to be disclosed to the applicants.

22. I also informed the New South Wales government agency of my decision that Part 5 of the FOI Act (specifically s.83(3)), required, in the interests of procedural fairness, that I paraphrase the substance and effect of the evidence provided by the New South Wales agency in relation to documents 301, 304 and 306, in order to inform the applicants of the nature and substance of the case they had to meet. That material was paraphrased and forwarded to the applicants for response.

The matter remaining in issue

23. The matter remaining in issue (after the concessions by the applicants referred to above, and the respondent's decision to consent to the disclosure to the applicants of the small amount of matter in document 134 which had previously been claimed to be exempt) is as follows:

A. Matter which would enable the applicants to identify the authors of, or complainants named in, the "personal affairs documents", i.e. matter comprising the names, addresses, telephone numbers, signatures and/or other identifying material in respect of those persons. The documents have otherwise been released to the applicants. The "personal affairs documents" remaining in issue are those documents numbered for identification, in the respondent's initial and internal review decisions, as follows -

1, 5, 7-13, 15, 22, 23, 27, 32, 34, 35, 39, 41, 43, 45, 46, 49, 59-61, 63-72, 76-78, 85, 86, 99, 111-128, 130, 131, 133, 135, 138-140, 158, 162, 163, 166, 167, 175-182, 185, 186, 188-190, 192, 195, 198, 202-207, 216-219, 221, 226, 227, 229-232, 235, 240, 241, 244-246, 248-250, 252-259, 261-268, 302, 303, 307, 323, 324, 326, 344-349, 352-364, 372, 373, 375-378, 383-385, 393, 395, 396, 403-408, 411, 413, 415, 417-419, 421, 424, 425, 427, 428, 430, 432, 433, 435, 436, 438-440, 447-451, 453, 454, 456, 458-463.

B. Matter in documents 291 and 292, claimed to be exempt under s.42(1)(b), s.44(1), s.46(1)(a) and s.43(1) of the FOI Act.

- C. Documents 301, 304, and 306, claimed to be exempt under s.38(b) and s.46(1)(b) of the FOI Act.

The "personal affairs documents" and the application of s.44(1)

24. Section 44(1) of the FOI Act 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.

25. The "personal affairs documents", containing matter claimed to be exempt under s.44(1), can be described as follows:

- (a) letters comprising general inquiries as to whether the applicants' business operations (which, in essence, involve the sale overseas of Australian lotto and lottery-type products) are "legitimate";
- (b) letters of complaint about the applicants; or
- (c) letters from the GCAUO to complainants and inquirers, providing information about its Direct Mail Club, and advising that the applicants are not its agents.

26. The information exempted from these documents includes the names, addresses, signatures, account details, phone numbers, and matter that would otherwise identify the author/complainant/inquirer. At paragraph 81 of my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, I said:

*For information to be exempt under s.44(1) of the FOI Act, it must be information which identifies an individual or is such that it can readily be associated with a particular individual. Thus deletion of names and other identifying particulars or references can frequently render a document no longer invasive of personal privacy, and remove the basis for claiming exemption under s.44(1). This is an expedient (permitted by s.32 of the Queensland FOI Act) which has often been endorsed or applied in reported cases: see, eg, *Re Borthwick and Health Commission of Victoria* (1985) 1 VAR 25*

(See also *Re Byrne and Gold Coast City Council* (1994) 1 QAR 477 at p.490, paragraph 38.) No doubt, it was on this basis that the respondent considered that it was able to disclose to the applicants documents of the type described above, provided that identifying particulars were deleted.

27. The respondent's decision would be justified (subject to the application of the public interest balancing test which qualifies s.44(1) of the FOI Act) if, in each of the documents under consideration, there is information which is properly to be characterised as information concerning the personal affairs of the person whose name (along with other identifying particulars) has been deleted.
28. I consider that each of the "personal affairs documents" remaining in issue, would (if disclosed without deletion of the matter in issue) disclose information which is properly to be characterised as information concerning the personal affairs of a person, on either or both of two bases:

- (a) it would disclose that an identifiable person has engaged, or has made inquiries with a view to engaging, in gambling (on lotto or lottery-type products); and/or
- (b) it would disclose that an identifiable person has sought to make a complaint to a government agency believed to be the appropriate regulatory authority in respect of the Australian lotto or lottery-type products which the person has seen advertised in a foreign country, or to which the person subscribed.

29. As to (a), it is my view that information that a person has engaged, or made inquiries with a view to engaging, in gambling activities is properly to be characterised as information concerning that person's personal affairs, according to the natural and ordinary meaning of the phrase "personal affairs" which I explained in *Re Stewart*, that is, affairs "of or relating to the private aspects of a person's life" (see *Re Stewart* at p.249, paragraph 55 and at p.252, paragraph 63). I do not think there is any doubt on this issue, but if there were, it would be appropriate to resort to the guiding principle which, in *Re Stewart* (at p.256, paragraph 76), I recommended for use when difficult questions of characterisation arise in the "grey area" of the ambit of the phrase "personal affairs". Applying that guiding principle, I consider that, according to the current community standards of persons of ordinary sensibilities, information that a person has engaged, or made inquiries with a view to engaging, in gambling activities, is information the dissemination of which that person ought to be entitled to control, and hence, is information which should be capable of being claimed to be exempt from mandatory disclosure under the FOI Act. The position might be different in the case of a "professional" gambler (having regard to the intended distinction in the scheme of the FOI Act between personal affairs and business/employment affairs), but there is nothing in the present case to suggest that the relevant persons engaged, or considered engaging, in gambling otherwise than as a casual pastime.
30. As to (b), I stated in *Re Stewart* (at p.268, paragraph 119) that the fact that Mr and Mrs Stewart had lodged complaints with a government Department, and with the Parliamentary Commissioner for Administrative Investigations, was a matter concerning their personal affairs. In *Re Byrne*, I held that the fact that a person made a complaint to an elected representative about a matter of concern was information concerning that person's personal affairs, for the purposes of s.44(1) of the FOI Act (see, in particular, at p.487, paragraphs 26-27, and pp.488-490, paragraphs 33-38 of *Re Byrne*). The fact of making the complaint was to be distinguished from the substance of the complaint, which may or may not (but in *Re Byrne* did not) itself comprise information concerning the personal affairs of the complainant.
31. At pages 4-11 of their first submission, the applicants analysed the contents of a sample of the documents in issue (which they have obtained subject to the deletion of the matter now in issue) with a view to persuading me that they are not "personal" or "private" or "confidential" in character. The phrasing of the applicants' submissions suggests that they are based, in part, on a misconception. It is not necessary that matter contained in a document be confidential or secret, and it is certainly not necessary that it be conveyed under an express or implied understanding of confidence, for it to comprise information concerning a person's personal affairs within the meaning of s.44(1) of the FOI Act (see *Re Stewart* at p.251, paragraph 60, and at p.252, paragraph 63; also *Colakovski v Australian Telecommunications Corporation* (1991) 100 ALR 111 per Lockhart J at pp.118-119). Similarly, the attempts in the applicants' first submission to characterise the contents of a document in issue, considered as a whole, cannot assist the applicants if the document contains some information concerning the personal affairs of an identifiable person. If disclosure of a document in issue (without deletions) would disclose some information which is properly to be characterised as information concerning the personal affairs of an identifiable person, then (subject to the application of the public interest balancing test incorporated within s.44(1)) deletion of names and other identifying particulars is justified in order to make anonymous that which would otherwise be exempt matter.

32. Having examined the "personal affairs documents", I consider that, with the possible exception of documents 49 and 111 to 128, the matters complained of, or inquired about (e.g. winnings not received, confirmation of numbers not received, unauthorised credit card deductions or overcharging, requests for advice as to the legitimacy of ILA or APS), relate to the persons concerned having engaged, or made inquiries with a view to engaging, in gambling activities. This is information concerning the personal affairs of the persons concerned. In addition, where documents contain complaints for the reference of the body believed to be the appropriate regulatory authority, the fact of the making of the complaint is information concerning the personal affairs of the complainant. The latter principle applies to documents 49 and 111 to 128 (being documents in respect of which it is not clear, from their face, that the author making the complaint has engaged in, or is considering engaging in, gambling activity). The GCAUO was an appropriate regulatory authority to whom the authors of documents 49 and 111 to 128 might reasonably direct complaints of the kind contained in those documents.
33. It is argued in the applicants' second submission that it is inappropriate to simply characterise all written complaints to a proper authority as a personal affair of the individual. I accept that; indeed in *Re Byrne* I referred to possible exceptions to the principle which I applied in that case: see *Re Byrne* at p.489, paragraphs 34-35. However, I do not accept the correctness of the applicants' attempts, in their written submissions, to read down or confine the principle which I have explained at paragraph 30 above, or to distinguish its application to documents in issue in this case.
34. At pages 14-15 of their first written submission, the applicants raised the following argument:
42. *On page 2 of his reasons, the Internal Review Officer has this to say:*
- "I also considered that it is necessary to protect the rights of dissatisfied customers to complain to a relevant authority in order to seek an explanation or restitution."
- As to that:*
- (a) *Yes, in most cases the customers were either dissatisfied or were making an enquiry. In most cases they thought they were directing their complaint or query to the proper authority;*
- (b) *However, as the GCAUO invariably pointed out, the applicants were not affiliated or connected with the Government or the GCAUO;*
- (c) *That meant that if the letter was a complaint then it would often be referred to the applicants for response. In some cases the Golden Casket Office asked for details or advice of the response (see, for example, document 341);*
- (d) *If the letter is a complaint the "relevant authority" was never the GCAUO; the "relevant authority" was the applicants as the referral of complaints to the applicants implies. Indeed in many cases the authors of the letters were confused as to who they should be writing to (understandably so given the distance).*
43. *Almost invariably where the GCAUO received a complaint the GCAUO would take the opportunity to make the complainant aware of the GCAUO's direct sales system. That really illustrates that in no sense could the*

GCAUO be described as, to use the Internal Review Officer's words, "a relevant authority in order to seek an explanation or restitution". Rather, in a very real sense the applicants and the GCAUO were competitors.

44. *Indeed, at every opportunity the GCAUO said both that it had no responsibility for the applicants and that it offered an alternative direct service.*
 45. *In fact the only entity which could or would give an "explanation or restitution" was the applicants. That makes it rather odd for it to be said against the applicants that the authors deserve protection against disclosure to the applicants to preserve the authors' right to complain to the "relevant authority".*
 46. *It is also important to ask, even if the Internal Review Officer's argument were correct, why it is necessary to conclude that the rights of the dissatisfied customers were protected by preserving their anonymity, and indeed preserving their anonymity against the applicants. In other words, what is confidential or personal about the complaints.*
35. The applicants here are, in effect, arguing that so far as the matter in issue comprises names, addresses and other information concerning persons who have subscribed to lotto and lottery-type products through the applicants, information that these persons have engaged in gambling activity is not "personal" or "private" or "confidential" *vis-à-vis* the applicants; and likewise in respect of the fact that a person has made a complaint about the applicants where the complaint has in fact been passed on to the applicants. Arguments of this nature, which have regard to the position and relevant knowledge of a particular applicant for access, may well be relevant to a decision by an agency as to whether or not, in a particular case, to exercise the discretion conferred by s.28(1) of the FOI Act to refuse access to exempt matter or an exempt document. But that is a discretion which is denied to the Information Commissioner, in a review under Part 5 of the FOI Act, by the terms of s.88(2) of the FOI Act. In cases where an applicant disputes a refusal of access to matter, the Information Commissioner is ordinarily called upon to determine whether matter in issue is or is not exempt matter, and hence whether an applicant for access has or has not a legally enforceable right to be given access in accordance with the FOI Act to the matter in issue. That task is, with limited exceptions (see *Re Yabsley and Department of Education* (1994) 1 QAR 587, at p.592, paragraph 16; *Re Pemberton and The University of Queensland* (Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported), at paragraphs 164-193), to be approached by evaluating the consequences of disclosure of the matter in issue as if disclosure were to any person, or as is sometimes said, "to the world at large", since in the usual case there is no restriction (other than any applying under the general law, *cf.* s.102(2) of the FOI Act) on the further use or dissemination by an applicant for access of matter obtained under the FOI Act.
 36. I also note that the applicants, in a submission accompanying their application for internal review, offered an undertaking that they would not contact any persons named in any of the documents to which they are given access. If this is relevant at all (given that neither the respondent nor the Information Commissioner have any powers to enforce compliance with such an undertaking), it could only be relevant to the exercise of the discretion conferred on agencies by s.28(1) of the FOI Act.
 37. The arguments set out in the passage quoted at paragraph 34 above do not affect my finding, for the reasons explained at paragraphs 28-30 and 32 above, that the matter deleted from the "personal affairs documents" comprises information concerning the personal affairs of persons other than the applicants, and hence is *prima facie* exempt from disclosure to the applicants, subject to the

application of the public interest balancing test incorporated within s.44(1) of the FOI Act.

38. In their written submissions prepared for the purposes of my review, the applicants did not address any arguments to the application of the public interest balancing test incorporated within s.44(1) of the FOI Act. In the written submission which accompanied the applicants' application for internal review, a brief argument was addressed to the effect that, given that the applicants were not pursuing access to some of the deleted information, given the applicants' assurance that they will not attempt to contact complainants, and given the importance which the application for the Northern Territory lottery licence holds for Terence Edward Morris, the public interest, on balance, required the disclosure of the names and additional information deleted from the documents in issue.
39. Other than names and other identifying particulars, the "personal affairs documents" have been released to the applicants, who have thus been made aware of the nature and substance of the inquiries and complaints. This is not a situation in which a regulatory authority proposes to take action against the applicants in respect of a particular complaint of wrongdoing. In such a situation, the public interest in fair treatment of the applicants might (according to the circumstances of the particular case, including the requirements of procedural fairness) require the disclosure of the identity of the particular complainant. In the present case, however, given that the applicants have obtained access to edited versions of the documents in issue which disclose the nature and substance of relevant complaints and inquiries, I am unable to accept that any public interest that may exist in the applicants knowing the identities of the complainants/inquirers is sufficiently strong to outweigh the public interest in non-disclosure which is inherent in satisfaction of the test for *prima facie* exemption under s.44(1) of the FOI Act.
40. I am satisfied that the matter contained in the documents identified in paragraph 23A above, to which the applicants have been refused access, is exempt matter under s.44(1) of the FOI Act.

Matter in documents 291 and 292 and the application of s.46(1)(b)

41. Document 291 comprises a letter dated 27 March 1991 from the GCAUO's solicitors, Clarke and Kann, to the Deputy Director of the GCAUO, and its enclosure, a report from a private detection agency engaged by Clarke and Kann on behalf of the GCAUO. The report contains the results of an undercover investigation conducted by the detection agency into suspected activities of the applicants. The letter has been released in full. The detection agency's report has also been released, subject to the deletion of the name of a source from whom the detection agency obtained information under a pretence, i.e., the source was unaware that information was being provided to a detection agency, and ultimately the GCAUO.
42. Document 292 comprises two letters, dated 18 and 19 February 1991, from Clarke and Kann to the Deputy Director of the GCAUO, and a facsimile transmission sheet dated 19 February 1991. The letter dated 19 February 1991 has an enclosure, being a further report from the private detection agency. Both letters and the facsimile transmission sheet have been released in full, and the detection agency's report has been released, subject to the deletion of the name and position of the same source of information referred to in the preceding paragraph.
43. The matter in documents 291 and 292 was claimed in Mr Sarquis' first internal review decision to be exempt under s.42(1)(b), s.44(1), s.46(1)(a) and additionally, in the course of my review, under s.43(1). Following examination of documents 291 and 292 and the matter claimed to be exempt, and consideration of the submissions received from the respondent and the applicants, I came to the view that there were difficulties with the application to the matter in issue of each of the exemption provisions invoked by the respondent. (Given the view I have ultimately reached, it is unnecessary for me to go into the detail of those difficulties.) It appeared to me, however, that there was sufficient foundation in the nature of the matter in issue, and in the submissions made by the

respondent, to attract the application of another exemption provision not specifically argued by the respondent, namely s.46(1)(b) of the FOI Act. Accordingly, the applicants were informed by letter dated 19 June 1995 that the facts and arguments relied on by the respondent supported an arguable case for the application of s.46(1)(b) to the matter claimed to be exempt in documents 291 and 292. The applicants were given the opportunity to submit arguments and evidence going to this issue. By a letter from the applicants' solicitor dated 30 August 1995, that opportunity was formally declined.

44. Section 46 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.*

(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.*

45. No question as to the application of s.46(2) arises in this instance because the matter in issue is clearly not information of a kind mentioned in s.41(1)(a) of the FOI Act.

46. The elements of s.46(1)(b) are discussed in some detail in my reasons for decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.337-342 (paragraphs 144-162, 167). In order to establish the *prima facie* ground of exemption under s.46(1)(b) of the FOI Act, three cumulative requirements must be satisfied:

- (a) the matter in issue must consist of information of a confidential nature (see *Re "B"* at pp.337-338, paragraph 148, and at pp.306-310, paragraphs 71-73);
- (b) that was communicated in confidence (see *Re "B"* at pp.338-339, paragraphs 149-153); and
- (c) the disclosure of which could reasonably be expected to prejudice the future supply of such information (see *Re "B"* at pp.339-341, paragraphs 154-161).

If the *prima facie* ground of exemption is established, it must then be determined whether the *prima facie* ground is displaced by the weight of identifiable public interest considerations which favour the disclosure of the particular information in issue (see *Re "B"* at p.342, paragraph 167).

47. The first element of s.46(1)(b) turns on whether the information in issue has the requisite degree of relative secrecy or inaccessibility. I note that documents 291 and 292 are marked "confidential", and document 291 states that "*all reports (written or verbal) rendered by the [detection] agency are strictly confidential and privileged*". These indicators are not in themselves conclusive (see *Re "B"* at p.307, paragraph 71(h)). More importantly, however, it is clear from the nature of the information contained in the detection agency's reports that it comprised information not generally known or accessible (it would have been kept confidential by the detection agency and the respondent's solicitor, in accordance with duties of confidence owed by them to the respondent, and would not have been made generally accessible by the respondent) and would not have been known by the applicants prior to the disclosure to them of edited copies of documents 291 and 292 under the FOI Act. I find that the information in documents 291 and 292, which has been withheld from the applicants, has the requisite degree of secrecy and inaccessibility to be properly characterised as information of a confidential nature for the purposes of s.46(1)(b) of the FOI Act.
48. The second element of s.46(1)(b) requires that there be mutual expectations, as between the supplier and recipient of the information in issue, 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 (see *Re "B"* at p.338, paragraph 152).
49. Having regard to the general contents of the detection agency reports, I have no doubt that both the detection agency and the respondent's solicitors would have understood that they were under a duty to their client, the respondent, to keep the reports confidential. However, I doubt that there could have been any understanding, express or implied, that the respondent, as client, was to keep confidential, at the detection agency's behest, the general contents of the reports which the detection agency had been engaged, and paid, to supply for the respondent's purposes. Ordinarily, it would have been the respondent's privilege, in those circumstances, to deal with the reports as it wished. However, there might be exceptions to that general principle, eg, where the detection agency obtained information from a source in circumstances imposing on it an obligation of confidence, but one which permitted a limited disclosure to the detection agency's client provided that the client, in turn, agreed to receive the information under an obligation of confidence. Another exception might exist in circumstances where the detection agency conveyed information of such sensitivity or value to the detection agency that the recipient must have understood that it was expected to keep the information confidential.
50. In my opinion, the last-mentioned scenario applies to the matter which the respondent has deleted from documents 291 and 292. In its first written submission, the respondent addressed arguments to this issue which, although raised in the context of s.42(1)(b) of the FOI Act, are equally germane to the establishment of the second element of s.46(1)(b):

It is generally accepted that detective agencies are desirous of maintaining the confidentiality of the sources of information which such agencies use.

The reason for wishing to protect such sources arises from the fact that those confidential sources of information may be able to be used for the same or different clients in future investigations. However, the agencies would not be able to use a source if the identity of the source was published.

Thus the confidentiality surrounding the identity of the informant remains current.

51. Having regard to the regulatory responsibilities which the GCAUO has under the *Golden Casket Act*

Union Act 1978 Qld and the *Lotto Act 1981 Qld*, and the expanded regulatory responsibilities which its successor, the Golden Casket Lottery Corporation, will have upon the commencement of the *Lotteries Act 1994 Qld*, there is a strong possibility of further investigations being commissioned in the future, in which the source could again prove valuable. I am prepared to accept that the identity of the detection agency's source was understood by both the detection agency and the GCAUO to have continuing sensitivity and value, and that there were mutual expectations that the identity of the source would be treated in confidence.

52. In respect of the third element of s.46(1)(b), the words "could reasonably be expected to" call for the decision-maker applying s.46(1)(b) to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist (see *Re "B"* at pp.339-341, paragraphs 154-160). The test is to be applied by reference to whether disclosure of the information in issue could reasonably be expected to prejudice the future supply of such information (ie. information of a like character) from a substantial number of the sources available, or likely to be available, to an agency (see *Re "B"* at p.341, paragraph 161).
53. The nature of investigations conducted on behalf of government agencies can differ markedly. The very purpose of some kinds of investigation would be rendered futile if sources of information were not prepared to be identified and to give evidence on the public record in subsequent proceedings. Other investigations may be more in the nature of intelligence-gathering exercises in which an agency is willing to obtain information on the basis that its source is not to be further disclosed by the agency. (The agency would usually need a record of the source's identity to assist in evaluating the accuracy and reliability of the source's information.) Detection agencies would ordinarily understand the nature and purpose of investigations they are commissioned to undertake, and the basis on which evidence is to be obtained. If it is understood that sources have to be identified for the purposes of a particular investigation, then I do not think the prospect of sources being disclosed under the FOI Act could reasonably be expected to inhibit detection agencies from identifying sources in reports to their government agency clients.
54. In my opinion, however, the disclosure under the FOI Act of the identity of a source of information used by a detection agency, which both the detection agency and the recipient of the information had understood was communicated in confidence, could reasonably be expected to prejudice the future supply by detection agencies, conducting investigations on behalf of government agencies, of the identities of sources of information which the detection agencies wished, or felt bound, to protect.
55. Accordingly, I am satisfied that the three cumulative requirements for establishing the *prima facie* ground of exemption under s.46(1)(b) are made out in respect of matter claimed to be exempt in documents 291 and 292.
56. I must now decide whether the *prima facie* ground for exemption is displaced by the weight of any identifiable public interest considerations favouring disclosure of the matter in issue.
57. The applicants have chosen not to make a submission addressing s.46(1)(b), and have not identified any public interest considerations favouring disclosure of the matter in issue in documents 291 and 292. I do not think it can be said that any public interest in fair treatment of the applicants warrants disclosure of the identity of the source used by the detection agency. The applicants have obtained access to the contents of the detection agency's reports to the respondent based on information obtained from the source. I am not able to identify any public interest considerations favouring disclosure of the matter deleted from documents 291 and 292 which are of sufficient weight to displace the public interest in non-disclosure which is inherent in the satisfaction of the test for

prima facie exemption under s.46(1)(b) of the FOI Act.

58. Accordingly, I find that the matter in issue in documents 291 and 292 is exempt matter under s.46(1)(b) of the FOI Act.

Documents 301, 304 and 306 and the application of s.38(b) and s.46(1)(b)

59. Document 301 is a letter from a New South Wales government agency to the GCAUO. Documents 304 and 306 are copies of letters to third parties which were attachments to document 301. The documents are claimed to be exempt under s.38(b) and s.46(1)(b).

60. The requirements of s.46(1)(b) have been discussed above. Section 38(b) of the FOI Act provides:

38. Matter is exempt matter if its disclosure could reasonably be expected to -

...

(b) divulge information of a confidential nature that was communicated in confidence by or on behalf of another government;

unless its disclosure would, on balance, be in the public interest.

61. When s.38(b) is contrasted with s.46(1)(b), it can be seen that its key elements, i.e., that the information in issue is of a confidential nature and that it was communicated in confidence, are in essence identical to the first and second requirements of s.46(1)(b) (save that the relevant communication must be made by or on behalf of another government). Section 38(b) contains no equivalent to the third requirement of s.46(1)(b) (i.e. that disclosure could reasonably be expected to prejudice the future supply of like information), but, like s.46(1)(b), s.38(b) is qualified by a public interest balancing test.
62. I discussed the meaning of the phrases "could reasonably be expected to", "information of a confidential nature" and "communicated in confidence", in the context of s.46(1)(b), in *Re "B"* at pp.337-341, paragraphs 148-161, and at paragraphs 46-48 and 52 above. I consider that these phrases have the same meaning, when employed in s.38(b), as they do in s.46(1)(b).
63. The respondent made the following submissions (which have been edited to reflect the form in which they were provided to the applicants during the course of the review) in respect of documents 301, 304 and 306:

The nature of the information comprising the documents is confidential. The information specifically identifies an issue of concern facing [NSW and Queensland] and the information is not trivial. The disclosure of the information would be a misuse of the information taking into account the reason for the provision of the information.

...

The ... members freely exchange information to enhance their products, marketing strategies, etc. Implicit in the free flow of information is a "gentlemen's agreement" that all information communicated among members of the ... is done so on the basis that it is provided and received on the understanding that it will be treated in a confidential manner.

The Lotto agencies fiercely compete with other organisations (such as the TAB and

art unions) for the public's recreation dollar and would suffer a commercial disadvantage if information relating to aspects of Lotto which cause concern for Lotto agencies were to be released to those agencies' competitors.

In a letter dated 24 November 1993, the NSW ... stated that if the documents were to be released the NSW ... "would not be in a position to further disclose confidential information to government agencies in the State of Queensland". The letter further stated that such an action would have a significantly detrimental effect on the free flow of information between our respective government agencies.

The documents were provided by the NSW ... which forms part of the New South Wales Government.

The need to maintain a high level of integrity in all matters relating to gaming requires the flow of relevant information between state authorities to continue unabated and with full candour. It has therefore been held that the release of information which would serve to stop such flows of information would not be in the public interest.

In addition, the ability of the Golden Casket Art Union Office to maximise its revenue raising activities for the Queensland Government would be jeopardised if the Office was no longer able to gain access to information of other jurisdictions (such as marketing strategies). Accordingly, it has been concluded that the disclosure of the documents would not, on balance, be in the public interest.

...

The matters contained in documents 301, 304 and 306 were intended to provide the Golden Casket Office with background information

... that information is provided ... on the basis of confidentiality.

Whilst that flow of information is provided on the basis of confidentiality which all members ... observe, the confidentiality is implied rather than explicit. However, Treasury contends that the information was communicated in such a manner as to oblige the Golden Casket Art Union Office to treat the letters in a confidential manner.

The information was intended for use only by the Golden Casket Art Union Office thus the disclosure of the information to the applicant would be a misuse of the information.

The nature of the information which is provided among members ... is not intended for publication and is only provided in order to seek to maintain the high standard of integrity within the lotteries industry Australia-wide. Australia needs to preserve its high standard of operations within the lotteries industry and therefore needs to be able to continue to exchange relevant information among the ... Any State lottery which is unable to provide an appropriate guarantee of confidentiality will not continue to be given such information. Thus the supply of future information from ... will be prejudiced.

64. In support of its contentions, the respondent provided evidence from an officer of the New South Wales government, which for the benefit of the applicants, was paraphrased in the following terms:

documents 301, 304 and 306 were provided on the implicit understanding that the contents thereof would remain confidential and not be disclosed to any party;

the information would not have been provided if it had been understood that it would be revealed to third parties;

the information includes matter that would be severely detrimental to the commercial interests of the New South Wales government if revealed; and

disclosure of the information would severely hamper the release of information between the New South Wales government and agencies of the government of Queensland.

65. The respondent also provided, by way of evidence, a statutory declaration from the Acting Manager of the GCAUO attesting to the following matters:

the GCAUO regularly disseminates information and documents to, and receives information and documents from, New South Wales;

the exchange of information between the GCAUO and the New South Wales agency is critical to the integrity and conduct of lotteries, and the monitoring of unauthorised activity; and

all communications between the GCAUO and the New South Wales agency are made on the implicit understanding that the communication and any documents forming part of the communication remain confidential and not be disclosed to any party.

66. In response, the applicants submitted that:

the respondent has not explained why or how the exchange of information is critical to the integrity and conduct of lotteries - not all exchanges of information will be critical;

the monitoring of illegal operations might be important, but the GCAUO refers only to the monitoring of "unauthorised activity" - the meaning of "unauthorised activity" is unclear;

the GCAUO has not alleged that the applicants have committed an offence, so it is unclear what was being monitored - unless it is an activity which is legal but which the GCAUO considers should be illegal;

the information is not of a confidential nature;

unless the information concerns criminal activity or something akin to a trade secret it is difficult to see what could be detrimental to the commercial interests of the New South Wales government;

no factual basis is given for the assertion that the information was disclosed on an implicit understanding of confidence. The information is not said to have been marked confidential nor is there evidence that its circulation within the GCAUO was restricted or that it was kept within restricted files;

the real question is, was the communication submitted and received in confidence prior to the FOI access request; and

the applicants are not competitors within Australia. The applicants' business involves selling to overseas citizens. On the other hand the claim of confidentiality seems to be based on the desire to "maintain the high standard of integrity within the lotteries industry Australia wide" (applicants' underlining).

67. I agree with the applicants that the crucial issues are whether documents 301, 304 and 306 contain confidential information, and whether the documents were submitted and received in confidence. There is no doubt that documents 301, 304 and 306 were communicated to the respondent by or on behalf of another government (within the terms of s.38(b) of the FOI Act).
68. Document 301 is a letter from a New South Wales government agency to the GCAUO. Document 304 is a letter from a New South Wales government agency to the regulatory authority for lotteries in an overseas jurisdiction. Both these letters deal with matters relating to regulation of the trade in lotto and lottery-type products, which would be of concern to the regulatory authorities to which the letters are addressed. I am satisfied that documents 301 and 304 contain information which would be known only by a limited group, and is sufficiently secret/inaccessible in nature, for it to be properly characterised as information of a confidential nature, for the purposes of s.38(b) and s.46(1)(b) of the FOI Act.
69. Having regard to the evidence lodged on behalf of the respondent, and to the fact that the information conveyed in documents 301 and 304 relates to issues in the regulation of lotto and lottery-type products of mutual concern to the supplier and recipients of the documents, and likely to be regarded by them as inappropriate for wider dissemination, I find that documents 301 and 304 comprise information that was communicated in confidence by or on behalf of another government, for the purposes of s.38(b) of the FOI Act. (It is also information communicated in confidence for the purposes of s.46(1)(b), but in the view I have come to, it is unnecessary for me to give further consideration to s.46(1)(b) of the FOI Act.)
70. Accordingly, I am satisfied that documents 301 and 304 are *prima facie* exempt under s.38(b) of the FOI Act, subject to the application of the public interest balancing test which qualifies s.38(b).
71. The respondent has referred in its submission to public interest considerations favouring non-disclosure, which are predicated on the assumption that disclosure of the information in documents 301 and 304 would prejudice the future supply of like information. The applicants' submissions (with the handicap of not knowing the nature of the information contained in documents 301 and 304) are largely confined to attacking the respondent's case, without advancing public interest considerations which favour disclosure.
72. The applicants must know that documents 301 and 304 concern or refer to them in some way, or the documents would not have fallen within the terms of the applicants' FOI access application. To that extent, there is a question as to whether this is an appropriate case for the application of the principle that an applicant's involvement in, and concern with, particular information is of such a nature that it should be taken into account as a public interest consideration favouring disclosure (see *Re Pemberton* at paragraphs 164-193). This is a borderline case in that respect, since documents 301 and 304 raise issues or concerns which are not specific to the operations of the applicants, and canvas solutions at a general policy level. I am prepared to give some weight, but not substantial weight, to a public interest consideration of the kind mentioned in this paragraph.
73. In addition, there are more general public interest considerations favouring disclosure, for the purpose of informing the public about issues of concern in the regulation of the trade in lotto and lottery-type products, of which the general public are both consumers and beneficiaries (in respect of the return to consolidated revenue of the Queensland government's share of the profits from trading in these products).

74. However, on balance, the public interest considerations favouring disclosure are not, in my opinion, sufficient to outweigh the public interest favouring non-disclosure of documents 301 and 304 which is inherent in the satisfaction of the test for *prima facie* exemption under s.38(b) of the FOI Act. Accordingly, I find that documents 301 and 304 comprise exempt matter under s.38(b) of the FOI Act.
75. Document 306 does not, in my opinion, qualify for exemption under either s.38(b) or s.46(1)(b) of the FOI Act, because I am not satisfied that it meets the first requirement for exemption under both of those provisions, i.e. that it comprises information of a confidential nature. Document 306 is a letter from a New South Wales government agency to a citizen of the United States of America who has made a complaint or inquiry concerning the operations of one of the applicants. There is nothing inherently confidential about the nature of the information that document 306 conveys to the US citizen; it is not secret or inaccessible information. Indeed, document 306 is similar in character to the replies forwarded by the GCAUO to persons who have made complaints or inquiries to it concerning the operations of the applicants. (The respondent has given the applicants access to copies of those replies, subject to the deletion of the names, and other identifying particulars, of the persons to whom they are addressed.) The letter is not marked "confidential" and there is nothing about the nature of the information which might have led the US citizen who received it to understand that it was forwarded in confidence. That person would have been free to further disseminate the letter as he pleased.
76. It is true that, according to the respondent's evidence, a copy of document 306 was provided to the GCAUO pursuant to a general understanding of confidentiality. However, the elements which must be established to attract the application of s.38(b) and s.46(1)(b) of the FOI Act are cumulative: failure to establish any one of them negates the application of the exemption provision. In this case, I am not satisfied that document 306 comprises information of a confidential nature, and I find that it is not exempt under s.38(b) or s.46(1)(b) of the FOI Act. However, for the same reasons given at paragraphs 28-30 and 32 above, I consider that the name and address of the US citizen to whom document 306 is addressed is exempt matter under s.44(1) of the FOI Act, and the respondent may choose to delete that exempt matter, when giving the applicants access to document 306 in accordance with my decision.

Conclusion

77. For the foregoing reasons -
- (a) I affirm that part of the first internal review decision (i.e., the decision made on 7 December 1993 by Mr Sarquis on behalf of the respondent) by which it was decided that matter deleted from the documents identified in paragraph 23A of my reasons for decision, is exempt matter under s.44(1) of the FOI Act;
 - (b) I vary that part of the first internal review decision which dealt with documents 291 and 292 by finding that the matter contained in documents 291 and 292, to which the applicants have been refused access, is exempt matter under s.46(1)(b) of the FOI Act;
 - (c) I affirm that part of the second internal review decision (i.e., the decision made on 22 December 1993 by Mr Sarquis on behalf of the respondent) by which it was determined that documents identified as documents 301 and 304 comprise exempt matter under s.38(b) of the FOI Act;
 - (d) I set aside that part of the second internal review decision by which it was determined that the document identified as document 306 comprises exempt matter under s.38(b) and s.46(1)(b) of the FOI Act, and in substitution for it, I decide that the applicants have a right

to be given access to document 306 under the FOI Act, except for the name and address of the person to whom document 306 is addressed, which comprises exempt matter under s.44(1) of the FOI Act.

F N ALBIETZ
INFORMATION COMMISSIONER