OFFICE OF THE INFORMATION COMMISSIONER (QLD)) L 11 of 1995 (Decision No. 95030)

Participants:

RABY BAY RATEPAYERS ASSOCIATION INCORPORATED
Applicant

- and -

REDLAND SHIRE COUNCIL
Respondent

- and -

CIVIC PROJECTS (RABY BAY) PTY LTD
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - 'reverse FOI' application - documents in issue comprising correspondence between applicant and respondent on matters pertaining to local civic affairs - whether documents in issue are subject to legal professional privilege and hence exempt under s.43(1) of the Freedom of Information Act 1992 Qld - whether disclosure of the documents in issue would found an action for breach of confidence - consideration of s.46(1)(a) of the Freedom of Information Act 1992 Qld - whether the second and third elements for exemption under s.46(1)(b) of the Freedom of Information Act 1992 Qld are satisfied.

Freedom of Information Act 1992 Qld s.43(1), s.46(1)(a), s.46(1)(b), s.51(1)

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Clarkson and Attorney-General's Department, Re (1990) 4 VAR 197
Smith and Administrative Services Department, Re (1993) 1 QAR 22
Smith Kline and French Laboratories (Aust) Limited & Ors v Secretary, Department of Community Services and Health (1991) 28 FCR 291

DECISION

I affirm the decision under review (being the internal review decision made on behalf of the respondent by Mr Ken Jones on 18 May 1995).

Date of Decision: 1 December 1995

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. This is a 'reverse FOI' application. The applicant seeks review of the respondent's decision to give the third party (a developer of land at Raby Bay) access under the *Freedom of Information Act 1992* Qld (the FOI Act) to a number of documents held by the respondent, being either letters from the applicant to the respondent or from the respondent to the applicant. The applicant contends that this correspondence is exempt matter under s.43(1) and s.46(1) of the FOI Act.

2. On 6 February 1995, the third party applied to the Redland Shire Council (the Council) seeking access under the FOI Act to "*all correspondence from the Raby Bay Ratepayers Association to the Redland Shire Council, and all responses from the Council to the Association*". The Council contacted the Raby Bay Ratepayers Association Incorporated (the Association) by letter dated 7 March 1995, in accordance with the Council's obligation under s.51(1) of the FOI Act to consult when it considers that disclosure of any matter may reasonably be expected to be of substantial concern to a person. The Council's letter referred to only one item of correspondence from the Association, a letter dated 15 November 1994 which had been marked "confidential". The Association indicated that there might be other documents it would object to having released. The Council thereupon provided a list of all documents which it considered fell within the terms of the third party's FOI access application. The Association, through its solicitor, then objected to the release of a number of documents, but did not provide any indication of the basis for that objection.

3. By letter dated 7 April 1995, Mr B Callow, on behalf of the Council, determined that the documents in issue were not exempt documents, and that access should be given to the third party. The Association lodged an application dated 4 May 1995 for internal review of Mr Callow's decision, stating "*the documents are exempt documents which were prepared or delivered in confidence and the subject of legal professional privilege*". The Council's internal review decision was made by Mr Ken Jones, Director Corporate Services, on 18 May 1995. Mr Jones listed 12 items of correspondence as falling within the terms of the third party's FOI access application, and considered the possible application of s.43(1) and s.46(1) of the FOI Act to those documents. Mr Jones determined that none of the documents in issue contained exempt matter, and that they should

be released to the third party.

4. By letter dated 16 June 1995, the Association (through its solicitors, McIntyre Cantwell) applied for review by the Information Commissioner, under Part 5 of the FOI Act, of Mr Jones' decision.

The external review process

5. In accordance with s.74(1) of the FOI Act, I wrote to the third party inviting it to apply to become a participant in the external review, which it did. I subsequently granted the third party's application to be a participant in this review.

6. Copies of the documents in issue have been obtained from the Council and examined. Ten of the 12 documents in issue are letters from the Association to the Council, two of which include attachments. The other two documents are letters from the Council to the Association. The letters are dated between 20 April 1994 and 15 November 1994. The letters deal with a variety of issues of concern to the Association, setting out the Association's view in relation to those issues and in some instances, the Council's response. Some of the letters are quite brief, e.g. simply requesting a meeting with Council representatives, or requesting that a Council representative attend a meeting of ratepayers. One merely encloses a copy of a letter which has been published in the *Bayside Bulletin*. As I noted above, one of the letters, dated 15 November 1994, is marked with the heading "confidential", but the other documents bear no express indication that they were intended to be communicated in confidence.

7. By letter dated 7 July 1995, I conveyed to the Association my preliminary view that the documents in issue were not exempt under s.43(1) or s.46(1) of the FOI Act, and invited the Association, if it did not agree with that preliminary view, to provide evidence and written submissions in support of its case, by 18 August 1995. In doing so, I made the following comments about the question of the onus of proof in a 'reverse FOI' case:

> *Section 81 of the FOI Act provides that in a review under Part 5 of the 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. While the formal onus in this case therefor remains on the Redland Shire Council to justify its decision that the documents in issue are not exempt documents under the FOI Act, it can discharge this onus by demonstrating that any one of the necessary elements which must be established, to attract the application of each of the exemption provisions, cannot be made out. Consequently, your client must fail if I am satisfied that any element necessary to found the application of each exemption provision which it relies upon cannot be established. An applicant (such as your client) 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 me sufficient to enable me to be satisfied that all elements of the exemption provisions relied upon are established.*

8. I received no reply from the Association by 18 August 1995. When contacted by telephone, the solicitor for the Association stated to a member of my staff that the Association did not intend to put any further material before me in support of its case.

Section 43(1) of the FOI Act

9. Although the Association did not specifically refer to s.43(1) of the FOI Act, its application for internal review did claim that the documents in issue were subject to legal professional privilege. Section 43(1) provides:

> ***43.(1)*** *Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.*

10. I considered the principles involved in the application of s.43(1) at some length in *Re Smith and Administrative Services Department* (1993) 1 QAR 22 (at pp.49-58; paragraphs 82-103). At paragraph 82 (p.52) of *Re Smith*, I listed a number of principles relating to legal professional privilege, identified by the Victorian Administrative Appeals Tribunal in *Re Clarkson and Attorney-General's Department* (1990) 4 VAR 197 at p.199. The first two principles were:

> *1. To determine whether a document attracts legal professional privilege consideration must be given to the circumstances of its creation. It is necessary to look at the reason why it was brought into existence. The purpose why it was brought into existence is a question of fact.*
>
> *2. To attract legal professional privilege the document must be brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings. Submission to legal advisers for advice means professional legal advice. It includes the seeking and giving of advice. Use in legal proceedings includes anticipated or pending litigation.*

11. In my letter dated 7 July 1995, I expressed my preliminary view to the solicitor for the Association in the following terms:

> *You are no doubt familiar with the concept of legal professional privilege. I can see no basis on which any claim can be made that any part of the documents would be privileged from production in a legal proceeding on the ground of legal professional privilege. The documents are not confidential communications between lawyer and client, nor have they been made for the sole purpose of use in existing or anticipated litigation. It is therefore my preliminary view that no part of the documents in issue is exempt under s.43(1) of the FOI Act.*

12. The Association has not responded to my preliminary view. I cannot see any basis for a claim that any of the documents in issue contain exempt matter under s.43(1) of the FOI Act. None of them can be classed as confidential communications between a client and legal adviser, nor is there any indication that they were prepared for the sole purpose of use in anticipated litigation. They are, in my opinion, to be properly characterised as representations from a civic interest group to a local government authority on issues concerning local civic affairs. I should add that there is no possible basis for a suggestion that the two letters from the Council to the Association are subject to legal professional privilege.

13. I find that no part of the documents in issue is exempt matter under s.43(1) of the FOI Act.

<u>Section 46(1)(a) of the FOI Act</u>

14. Section 46(1)(a) provides:

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

15. In *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(a) of the FOI Act. The test for exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to the plaintiff, in respect of information in the possession or control of the agency or Minister faced with an application, under s.25 of the FOI Act, for access to the information in issue (see *Re "B"* at pp.296-7; paragraph 44). I am prepared to assume that, in the circumstances of this case, there are identifiable plaintiffs (either the Association or the authors, on behalf of the Association, of individual letters) who would have standing to bring an action for breach of confidence.

16. I can see no basis, in the present case, for a suggestion of the existence of a contractual obligation of confidence arising in the circumstances of the communication of the information in issue from the Association to the Council. Therefore, the test for exemption under s.46(1)(a) must be evaluated in terms of the requirements for an action in equity for breach of confidence, there being five criteria which must be established:

    (a) it must be possible to specifically identify the information in issue, in order to establish that it is secret, rather than generally available information (see *Re "B"* at pp.303-304; paragraphs 60-63);

    (b) the information in issue must possess "the necessary quality of confidence"; i.e. the information must not be trivial or useless information, and it must possess a degree of secrecy sufficient for it to be the subject of an obligation of conscience, arising from the circumstances in or through which the information was communicated or obtained (see *Re "B"* at pp.304-310; paragraphs 64-75);

    (c) the information in issue must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see *Re "B"* at pp.311-322; paragraphs 76-102);

    (d) it must be established that disclosure to the applicant for access under the FOI Act would constitute a misuse, or unauthorised use, of the confidential information in issue (see *Re "B"* at pp.322-324; paragraphs 103-106); and

    (e) it must be established that detriment is likely to be occasioned to the original confider of the confidential information in issue if that information were to be disclosed (see *Re "B"* at pp.325-330; paragraphs 107-118).

17. It is not necessary for me to address each of these criteria, because I am satisfied (for the reasons which follow) that the third criterion cannot be established in respect of the documents in issue, and that the Association's claim for exemption under s.46(1)(a) must fail. In *Re "B"* at p.316 (paragraph 84), I stated that the third criterion set out above requires an evaluation of the whole of the relevant circumstances including (but not limited to) the nature of the relationship between the parties, the

nature and sensitivity of the information, and the circumstances relating to its communication, such as those referred to by a Full Court of the Federal Court of Australia in *Smith Kline and French Laboratories (Aust) Limited & Ors v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at pp. 302-3 (the relevant passage is reproduced in *Re "B"* at pp.314-316, paragraph 82). In evaluating the relevant circumstances surrounding the communication of each document in issue, I have had regard to the internal review decision of Mr Jones, the contents of the documents themselves, the general nature of the relationship between a civic interest group and a local government authority, and the information which I have before me regarding the circumstances surrounding the imparting of the information in issue, and the purpose for which that information was given.

18. While there is no evidence of an express assurance of confidentiality having been given by the Council, and the evidence is that the only indication that confidentiality was sought by the Association is the placing of the word "confidential" at the head of one of the documents in issue, this does not necessarily rule out the existence of an equitable obligation of confidence. I note in this regard what I said 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.*

19. As I pointed out at paragraphs 92 and 93 of my decision in *Re "B"* (p.319), a relevant consideration in determining whether the circumstances relating to the communication of confidential information to a government agency are such as to impose an equitable obligation of confidence on the recipient, is the use to which the government agency must reasonably be expected to put the information in the discharge of its functions.

20. Although I have considered each document individually, I can best explain my reasons for decision by dividing the documents into three groups: the first being the letter dated 15 November 1994, the second being the other letters from the Association to the Council, and the third being the two letters from the Council to the Association.

Letter dated 15 November 1994

21. This letter differs from the other correspondence in that it is marked with the word "confidential" at its head. The letter deals with a particular issue of concern to the Association and is clearly a call for the Council to take action of some sort in relation to the issue, and to advise the Association of the action that the Council proposes to take. It would appear from the terms of the letter that the Association's concern to maintain confidentiality is, at least in part, derived from a desire to avoid publicity relating to the issue, which it is suggested might have an adverse effect on ratepayers and the Council.

22. In his internal review decision, Mr Jones stated:

> *With regards the documents numbered 1-11 above, there is no evidence to suggest that the documents were exchanged in circumstances which suggest a confidential relationship. It is acknowledged that the* [letter dated 15 November 1994] *is marked "confidential". However, for a confidential relationship to be established it must be understood on both sides that the information is being supplied on the basis that it will be kept secret and the officer must receive it on that basis. It is not sufficient for the supplier of the information to merely request that the information be treated as confidential.*

23. It is clear from this passage that Mr Jones determined that Council officers did not consider that they received any of the correspondence from the Association on a confidential basis, and the Association has submitted no evidence to the contrary. This is not necessarily an end of the matter because, as I noted at paragraph 90 of *Re "B"* (see paragraph 18 above), there may be circumstances where an agency is bound by an equitable obligation of confidence even if the officers who received the information honestly believed that no confidence was intended.

24. In the case of the document dated 15 November 1994, it is relevant to consider the functions of the Council and the purposes to which it must reasonably have been expected that the Council was likely to put the information, in order to discharge its functions (see paragraph 19 above). If one accepts the position taken by the Association in the letter, the matter raised is a significant one which would be of concern to ratepayers and other members of the public. It is certainly one about which the Association considered that the Council should take immediate and substantial action. If there were substance in the issue raised by the Association, there would be a significant public interest in the Council taking steps to resolve the matter.

25. The matter relates to works which have been carried out by, or at the direction of, the third party developer. If, after initial assessment of the concerns raised, the Council considered it was necessary that action be taken, I consider it highly likely that the Council, in the proper exercise of its functions, would have found it both necessary and appropriate to raise the matters set out in the letter with the third party, in order to obtain its views as to the seriousness of the matter and its attitude towards resolution of the problem. If action was to be taken on the matter (which the Association clearly desired), then it is my view that the Association must have expected that the information contained in the letter was likely to be disclosed to the third party.

In all the circumstances, I consider that a court would not regard disclosure by the Council to the third party of the information in question as an unconscionable use of that information. Hence disclosure to the third party would not found an action in equity for breach of confidence.

26. I therefore find that the third requirement (set out in paragraph 16 above) is not satisfied, and that no part of the letter dated 15 November 1994 is exempt matter under s.46(1)(a) of the FOI Act.

Other letters from the Association

27. There is nothing in this correspondence which would lead me to find that the authors intended that it be communicated in confidence. As noted above, some of the letters merely request a meeting with an officer of the Council, or request a representative of the Council to attend a meeting of ratepayers. Others are requests for information, while one simply encloses a copy of a letter which had already been put in the public domain by its publication in the *Bayside Bulletin*. As to those which do contain substantive complaints or submissions, there is nothing in the nature of those complaints or submissions that would lead me to find that either the sender or the recipient intended or ought to have understood that the matters should be kept confidential. While there may be matters which a ratepayers association would wish to keep confidential because of their possible effect on land values in a particular area, there is nothing in the nature of these documents that would lead me to find that the Council is bound by an equitable obligation of confidence not to disclose them to the third party.

28. I therefore find that the third requirement (set out in paragraph 16 above) is not satisfied, and that no part of these documents contains exempt matter under s.46(1)(a) of the FOI Act.

Letters from the Council to the Association

29. The Association has given no indication as to the basis for its claim that these documents are exempt under s.46(1)(a) of the FOI Act, in the face of the Council's disclaimer, in the decision under review, of any understanding of confidentiality. I can only assume that it is suggested that they repeat information which was communicated by the Association in confidence. While small parts of the letters repeat information communicated by the Association, the letters consist, for the most part, of information provided by the Council to the Association, and the Association cannot maintain a claim that disclosure of that matter would disclose information communicated by it in confidence. As to those parts of the letters which repeat or refer to information provided by the Association in the letters discussed above, I conclude, for the reasons set out above, that disclosure of that information would not found an action in equity for breach of confidence.

30. I therefore find that these letters do not contain matter which is exempt under s.46(1)(a) of the FOI Act.

Section 46(1)(b) of the FOI Act

31. Section 46(1)(b) of the FOI Act provides:

> ***46.(1)*** *Matter is exempt if -*
>
> ...
>
> *(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.*

32. In *Re "B"* at p.337 (paragraph 146), I indicated, that, 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;

    (b) that was communicated in confidence;

    (c) the disclosure of which could reasonably be expected to prejudice the future supply of such information.

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.

33. In relation to requirement (b) above, I discussed the meaning of the phrase "communicated in confidence" at paragraph 152 of my decision in *Re "B"* (pp.338-9) 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.*

34. There is no evidence of a mutual understanding between the authors (on behalf of the Association) and officers of the Council, that any of the documents in issue were communicated in confidence. In relation to all of the documents in issue apart from the letter dated 15 November 1994, there is no evidence that either the authors or the Council intended that the information supplied be held in confidence. In relation to the letter of 15 November 1994, there is an indication that its author had such a desire, but as I have found above, its recipient had no expectation or understanding of confidence. Thus, the second requirement for exemption under s.46(1)(b) has not been established, and I find that no part of the documents in issue is exempt under s.46(1)(b) of the FOI Act.

35. I note also that there is nothing before me which would support a contention that disclosure of the documents in issue could reasonably be expected to prejudice the future supply of like information to the Council. A ratepayers association provides a vehicle for raising the concerns of its members with the relevant local authority. A significant part of its functions is directed towards raising issues of common concern. I do not accept that ratepayers associations would in future be discouraged from performing this function because of the disclosure of the documents in issue in this case. It

may be that, in particular circumstances, an association could lay a clear evidentiary basis for a claim that disclosure of a particular document would prejudice the future supply of like information. However, having examined the documents in issue in this case, and not having had the benefit of any evidence or explanation as to the nature of, or the basis for, an expected prejudicial effect of the kind required by the third element of s.46(1)(b), I find that the third element of s.46(1)(b) has not been satisfied. This affords an additional basis for my conclusion that no part of the documents in issue is exempt under s.46(1)(b) of the FOI Act.

Conclusion

36. For the foregoing reasons, I affirm the decision of Mr Jones, dated 18 May 1995, that the documents in issue in this external review do not contain exempt matter.

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F N ALBIETZ
INFORMATION COMMISSIONER