

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 37 of 1993
(Decision No. 94015)

Participants:

MICHAEL PETER GREEN
Applicant

- and -

OFFICE OF THE PARLIAMENTARY COMMISSIONER
FOR ADMINISTRATIVE INVESTIGATIONS
(QUEENSLAND OMBUDSMAN)
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - matter communicated to investigators in confidence - whether exempt matter under s.46(1) of the *Freedom of Information Act 1992 Qld*

Freedom of Information Act 1992 Qld s.5(1)(a), s.5(1)(b), s.25, s.41(1)(a), s.41(1)(a)(i), s.42(1)(b), s.46(1)(a), s.46(1)(b), s.46(2), s.48(1), s.48(1)(a), s.48(3), s.51, s.52, s.72(1)(c), s.76(2), s.83(3), s.87

Freedom of Information Act 1982 Cth s.38

Freedom of Information (Review of Secrecy Provision Exemption) Amendment Bill 1994

Parliamentary Commissioner Act 1974 Qld s.19(1), s.19(2), s.22

Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft (1986) 10 FCR 180

"B" and Brisbane North Regional Health Authority, Re (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported)

Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (Information Commissioner Qld, Decision No. 93002, 30 June 1993, unreported)

Federal Commissioner of Taxation v Swiss Aluminium Australia Ltd (1986) 66 ALR 159

Harrigan v Department of Health (1986) 72 ALR 293

Kavvadias v Commonwealth Ombudsman (1984) 52 ALR 728

News Corporation Ltd v NCSC (1984) 52 ALR 277

DECISION

1. I affirm that part of the decision under review (being the decision of Mr F T King, Deputy Parliamentary Commissioner for Administrative Investigations, dated 5 February 1993) by which it was determined that the matter in issue is exempt matter under s.46(1)(b) of the *Freedom of Information Act 1992 Qld.*
2. I also find that the matter in issue is exempt matter under s.46(1)(a) of the *Freedom of Information Act 1992 Qld.*

Date of Decision: 30 June 1994

.....
F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the decision of Mr F T King, Deputy Parliamentary Commissioner for Administrative Investigations, refusing to grant access to portions of matter on two pages of an investigation report, which portions were claimed to be exempt matter under s.42(1)(b), s.46(1)(b) and s.48(1) of the *Freedom of Information Act 1992 Qld* (referred to in these reasons for decision as the FOI Act or the Queensland FOI Act).
2. On 23 November 1992, Mr Green made application under the FOI Act to the respondent for access to:

... my complete file ref. no. C 1763-89/90 and that of Railway Department's submissions to the Ombudsman, and also include the Ombudsman's references pertaining to this case that eventually led to his decision.
3. By letter dated 21 January 1993, Mr N T Scott, the respondent's Freedom of Information Officer, advised Mr Green it had been decided to grant him full access to all documents held by the respondent which fell within the terms of Mr Green's FOI access application, with the exception of portions of two pages in one of those documents.
4. On 25 January 1993, Mr Green applied for internal review under s.52 of the FOI Act. In his application for internal review, Mr Green made the following statement concerning the grounds on which he felt he should be granted access to the information in issue:

To assist me with my legal litigation against the Railway Department I have to have full access to all reports contained in my file so these people can address a court of law on this matter.
5. The internal review of Mr Scott's decision was undertaken by Mr F T King, Deputy Parliamentary Commissioner for Administrative Investigations and Freedom of Information Internal Review Officer. By letter dated 5 February 1993, Mr King advised Mr Green as follows:

I have confirmed the decision of Mr N T Scott to grant you access to all documents

held on file C1763-89/90, subject to the exemption of certain information contained on pages 5 and 7 of an internal departmental report prepared by P Bailey, A Matheson and C Mifflin dated 5 March 1990. This Office holds no information relating to your complaint other than that which is contained on the above mentioned file.

...

Reasons:

- Section 42(1)(b): I am satisfied that disclosure of the information could reasonably be expected to enable the existence or identity of a confidential source of information in relation to the enforcement or administration of the law to be ascertained;
- Section 46(1)(b): I am satisfied that the information was 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, and its disclosure, would, on balance, not be in the public interest.
- Section 48 of the Freedom of Information Act and Section 22 of the Parliamentary Commissioner Act: Section 48 in effect provides that information is exempt if it is subject to secrecy provisions in another Act and its disclosure would be contrary to the public interest. (This does not apply if the information in question concerns the personal affairs of the person seeking access. However I am satisfied that the information in question does not concern your personal affairs.)

Section 22 of the Parliamentary Commissioner Act provides that this Office can only disclose information for the purpose of an investigation and report or recommendation under the Parliamentary Commissioner Act. The information in question is irrelevant to your complaint to this Office and therefore could not be disclosed to you because such disclosure would not be for the purpose of investigating your complaint or making any report or recommendation there upon.

Public interest considerations: As indicated, sections 46(1)(b) and 48(1)(b) are subject to public interest tests. In other words the information can be released if it is in the public interest to do so.

I am satisfied that there is not sufficient public interest in the release of the information in question to you, such as would entitle me to override the specific exemptions in question.

6. On 18 March 1993, Mr Green made application to the Information Commissioner, in accordance with Part 5 of the FOI Act, for review of Mr King's decision. This is, so far, the only application I have received in my capacity as Information Commissioner which has some connection with the other statutory office which I hold, that of Parliamentary Commissioner for Administrative Investigations. In paragraph 1.10 of my first Annual Report (1992/93) as Information Commissioner, I referred to the arrangements which I had implemented to deal with such a situation:

1.10 One unusual aspect of the government's policy choice has necessitated

internal decision-making arrangements to avoid the possibility of any conflict of interest. While the Information Commissioner is not subject to the FOI Act (apart from Part 2), the Parliamentary Commissioner is subject to the FOI Act. This means that decisions of the Office of the Parliamentary Commissioner refusing access to documents may be the subject of appeal to the Information Commissioner, who is also the Parliamentary Commissioner. To avoid any conflict of interest in this regard, I have established decision-making arrangements within the Parliamentary Commissioner's office which ensure that I have no involvement in making decisions on applications made under the FOI Act to the Parliamentary Commissioner's office, whether at the initial decision-making level or on internal review. Initial decisions are made by officers at the level of Senior Investigator, and decisions on internal review are made by a Deputy Parliamentary Commissioner.

7. The information in issue in this case (as explained in the following paragraph) was not created within the respondent's office in the course of the investigation into Mr Green's complaint against Queensland Rail, but appears in a document prepared by Queensland Rail in the course of an earlier internal investigation conducted by Queensland Rail. In addition, I would note that in my statutory role as Information Commissioner, it is no part of my function to enter into a re-examination of the merits of Mr Green's complaint against Queensland Rail (which has already been investigated by the Parliamentary Commissioner's Office). Rather, my role as Information Commissioner is to determine the entirely separate question of the validity of the exemption claims made under the FOI Act in respect of the matter in issue. Accordingly, I can see no impediment in the circumstances of this case to my proceeding to determine Mr Green's application for review.

The Matter in Issue

8. The information in issue comprises portions of pages 5 and 7 of a 16-page report dated 5 March 1990, submitted by the Commissioner for Railways to the Minister for Transport (having responsibility for Queensland Rail). The circumstances surrounding the creation of that report are encapsulated by the following introductory statement in the report:

Reference is made to your memo. requesting that interviews be conducted with certain Queensland Railway employees who are supporting Mr Green in his claim of victimisation while an employee of Queensland Railways.

Please find attached a report compiled by Mr P Bailey, Corporate Services Officer; Mr A Matheson, Occupational Health and Safety Manager and Mr C Mifflin, Divisional Electrical Engineer, following their investigation.

9. A copy of that report was supplied to the respondent in the course of its subsequent investigation into a complaint lodged by Mr Green concerning Queensland Rail's administrative actions in connection with his employment by that agency.

The External Review Process

10. A copy of the report containing the information in issue was obtained and examined. The records of the respondent's consultation with Queensland Rail, under s.51 of the FOI Act, have also been obtained and examined.
11. The third party who supplied Queensland Rail's investigators with the information in issue was located and asked to indicate whether the third party had any objection to Mr Green being granted

access to the information in question. The third party did object and subsequently provided a statutory declaration, executed on 23 June 1993, to the effect that the information to which access was refused by the respondent had been provided in circumstances in which both the third party and the recipients agreed that it would be kept completely confidential by the recipients.

12. I subsequently wrote to Mr Green on 9 July 1993, to advise him that in addition to the bases for exemption which Mr King had relied upon in making the decision under review (i.e., s.42(1)(b), s.46(1)(b), and s.48(1) of the FOI Act), I was of the view that s.46(1)(a) of the FOI Act was also a relevant provision in the context of the present case. I provided Mr Green with a summary of the public interest considerations taken into account under those exemption provisions relied upon by the respondent which are subject to a 'public interest balancing test'. Further, I advised Mr Green of the evidence which I had received from the third party concerning the circumstances in which the information in question was transmitted to Queensland Rail's investigators, and I extended to Mr Green the opportunity to put before me any additional submissions he wished to make in support of his contention that he was entitled under the FOI Act to obtain access to the withheld information. No response was received from Mr Green to that letter, nor to a follow-up letter dated 12 July 1993, which forwarded copies of the text of the relevant exemption provisions for his assistance.

13. Section 83(3) of the FOI Act provides:

83. ...

(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.

14. I am satisfied that although no further submission has been received from Mr Green in connection with the issues raised by this external review, Mr Green has been provided with a fair opportunity to present his views to me (even though he has not taken advantage of that opportunity), and that the requirements of s.83(3) of the FOI Act have been met in the circumstances of this case.

Application of s.46 of the FOI Act to the Matter in Issue

15. Section 46 of the FOI Act provides as follows:

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

(a) its disclosure would found an action for breach of confidence; or

- (b) *it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*

(2) *Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless its disclosure would found an action for breach of confidence owed to a person or body other than -*

- (a) *a person in the capacity of -*
- (i) *a Minister; or*
 - (ii) *a member of the staff of, or a consultant to, a Minister; or*
 - (iii) *an officer of an agency; or*
- (b) *the State or an agency.*

Application of s.46(2)

16. At paragraph 35 of my reasons for decision in *Re "B" and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported), I explained that s.46(2) is generally the logical starting point for the application of s.46 of the FOI Act:
35. *FOI administrators who approach the application of s.46 should direct their attention at the outset to s.46(2) which has the effect of excluding a substantial amount of information generated within government from the potential sphere of operation of the s.46(1)(a) and s.46(1)(b) exemptions. Subsection 46(2) provides in effect that the grounds of exemption in s.46(1)(a) and s.46(1)(b) are not available in respect of matter of a kind mentioned in s.41(1)(a) (which deals with matter relating to the deliberative processes of government) unless the disclosure of matter of a kind mentioned in s.41(1)(a) would found an action for breach of confidence owed to a person or body outside of the State of Queensland, an agency (as defined for the purposes of the FOI Act), or any official thereof, in his or her capacity as such an official. Section 46(2) refers not to matter of a kind that would be exempt under s.41(1), but to matter of a kind mentioned in s.41(1)(a). The material that could fall within the terms of s.41(1)(a) is quite extensive (see *Re Eccleston* at paragraphs 27-31) and can include for instance, material of a kind that is mentioned in s.41(2) (a provision which prescribes that certain kinds of matter likely to fall within s.41(1)(a) are not eligible for exemption under s.41(1) itself).*
17. I am satisfied that s.46(2) of the FOI Act does not apply to the matter in issue recorded on folios 5 and 7 (so as to render s.46(1) inapplicable) because it is not "*matter of a kind mentioned in section 41(1)(a)*". Section 41(1)(a) provides as follows:

41.(1) Matter is exempt matter if its disclosure -

(a) would disclose -

(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or

(ii) a consultation or deliberation that has taken place;

in the course of, or for the purposes of, the deliberative processes involved in the functions of government[.]

18. I am precluded by the provisions of s.76(2) and s.87 of the FOI Act from disclosing the information in issue during the course of my review or in my reasons for decision. I can state, however, that the information comprises factual assertions offered gratuitously by the third party to Messrs Bailey, Matheson and Miflin, on matters unrelated to Queensland Rail's investigation into Mr Green's claims of victimisation. The information was therefore not obtained for the purposes of that deliberative process, and in my opinion, it does not answer any of the descriptions contained in s.41(1)(a)(i) and (ii), i.e. "opinion", "advice", "recommendation", "consultation" or "deliberation".

Application of s.46(1)(a)

19. In *Re "B" and Brisbane North Regional Health Authority*, 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 of exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency or Minister faced with an application for access, under s.25 of the FOI Act, to the information in issue (see paragraph 44 in *Re "B"*). I am satisfied that, in the circumstances of this case, there is an identifiable plaintiff (the third party) who would have standing to bring an action for breach of confidence.
20. There is no suggestion in the present case of a contractual obligation of confidence arising in the circumstances of the communication of the information in issue from the third party to Messrs Bailey, Matheson and Miflin (on behalf of Queensland Rail), or the subsequent provision by Queensland Rail to the respondent of a copy of the report containing that information. 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.
21. Where the hypothetical legal action by which the test of exemption is to be evaluated must, in the circumstances of a particular case, be an action in equity for breach of confidence, there are 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 paragraphs 60-63 in *Re "B"*);
 - (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 paragraphs 64-75 in *Re "B"*);
 - (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 paragraphs 76-102 in *Re "B"*);

- (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 paragraphs 103-106 in *Re "B"*); 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 paragraphs 107-118 in *Re "B"*).
22. With respect to the first criterion set out in the preceding paragraph, I am satisfied that the information claimed to be confidential information (as recorded on pages 5 and 7 of the document in issue) can be identified with specificity.
 23. The information in issue was conveyed by the third party to Messrs Bailey, Matheson and Mifflin (on behalf of Queensland Rail) in the course of Queensland Rail's investigation into Mr Green's claim of victimisation by Queensland Rail. Although that information was, as I have noted in paragraph 18 above, not relevant to that investigation, it cannot be considered trivial. Further, the information in issue has the requisite degree of secrecy to invest it with the "necessary quality of confidence", so as to satisfy the second criterion referred to in paragraph 21 above.
 24. As noted in points (b) and (c) of paragraph 71 of my reasons for decision in *Re B*, publication of confidential information to a limited number of persons on a confidential basis will not of itself destroy the confidential nature of the information (see in this regard *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180). The provision of the information in issue by Queensland Rail to the respondent did not in my opinion detract from its confidential nature. The Queensland Rail report was provided to the respondent for the limited purpose of assisting the respondent's investigation of Mr Green's complaint. Since the information in issue was clearly not relevant to the investigation of Mr Green's complaint, it was not subject to any further disclosure by the respondent. I am satisfied that the information in issue retains the necessary quality of confidence in the hands of the respondent.
 25. As I stated at paragraph 84 of my decision in *Re "B"*, the determination of whether information was communicated in circumstances importing an obligation of confidence on the recipient of such information requires, in any particular case, an evaluation of the whole of the relevant circumstances. Section 72(1)(c) of the FOI Act provides that in the conduct of an external review, I am not bound by the rules of evidence and may inform myself in any way I consider appropriate in a particular case. In evaluating the relevant circumstances surrounding the communication of the information in question in the present review from the third party to Queensland Rail's investigators and subsequently from Queensland Rail to the respondent, I have had regard to the report itself, as well as to the evidence obtained from the third party, the records provided by the respondent which record the submissions made by Queensland Rail in support of its assertion of a mutual understanding of confidentiality between the third party and Messrs Bailey, Matheson and Mifflin concerning the information in issue in this review, and the respondent's files in respect of the respondent's investigation of Mr Green's complaint.
 26. In a statutory declaration executed on 23 June 1993, the third party provided evidence of the conversation the third party had with Messrs Bailey, Matheson and Mifflin concerning the information in issue. In relation to the issue of whether or not the information recorded in folios 5 and 7 was communicated to the recipients in confidence, the third party provided the following evidence:

... two specific passages in an internal Queensland Railways report titled "Claim of Victimisation by Queensland Railways Against Former Employee Mr Michael

Green", which had been prepared by Mr P Bailey, Corporate Services Officer, Mr A Matheson, Occupational Health and Safety Manager and Mr C Miflin, Divisional Electrical Engineer on or about 5 March 1990, were withheld from Mr Green on the grounds, inter alia, that they contained information which had been provided in confidence, and that disclosure of those passages to him would disclose the personal affairs of another person, namely myself.

...

My recollection of the events surrounding the interview recorded in the extract described above is that Mr Michael Green had requested an investigation into the circumstances surrounding his resignation from Queensland Rail, and in particular into allegations he had made concerning equipment which Queensland Rail staff were required to operate, when it was not in a safe working order. ... Messrs Bailey, Matheson and Miflin attended ... , and indicated that they were conducting an investigation into Mr Green's allegations, and wished to obtain additional information from me concerning the statements I had made

I concede that in the course of my discussion with Messrs Bailey, Matheson and Miflin ... , I did make the statement recorded in the last sentence of the quote beginning at the top of page 5, and in the paragraph beginning at the fifth line of page 7 of their report. However, as their report accurately records at page 7, I did request that my statement in this regard be considered as "off the record".

By asking that the statement be considered as "off the record", my intention at that time was that the information provided to Messrs Bailey, Matheson and Miflin in that regard should be kept completely confidential by them, and not disclosed to anyone else, or become part of any official record of the interview.

My intention that the information recorded in the document be kept confidential and not disclosed by Messrs Bailey, Matheson and Miflin to anyone else, remains unchanged.

27. As discussed in my decision in *Re "B"*, it is not necessary for there to have been an express undertaking by the recipient of information, on behalf of an agency, not to disclose the information communicated to the recipient, as such an obligation may be inferred from the circumstances. In particular, paragraphs 89 and 90 of my decision in *Re "B"* are relevant:

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.

28. On the basis of the evidence obtained from the third party, and the totality of the circumstances surrounding the communication of the information in issue from the third party to Queensland Rail, as recorded in the report dated 5 March 1990 in which that information appears, I am satisfied that the third party and Messrs Bailey, Matheson and Mifflin (on behalf of Queensland Rail) clearly contemplated and understood that the information in issue was supplied by the third party in confidence. I am further satisfied that the particular information which has been withheld in this case was totally unrelated to Mr Green's complaint against Queensland Rail, or to the subsequent investigation by Queensland Rail which resulted in the creation of the report containing the information in issue. It was offered gratuitously by the third party in order to raise other issues that were of concern to the third party. As the information in issue concerned matters totally unrelated to the subject of Mr Green's complaint, it is my view that the principles of procedural fairness would not have required that the information in question be disclosed to Mr Green in the course of Queensland Rail's investigation and report into his allegations of victimisation.
29. I am satisfied that the information in issue was communicated by the third party to Queensland Rail's investigators in circumstances such as to import an equitable obligation of confidence binding on Queensland Rail.
30. The question then arises whether the respondent, by virtue of having received from Queensland Rail a copy of the report containing the information in issue, is also bound by an obligation of confidence owed to the third party in respect of the information in issue.
31. At paragraph 97 of my reasons for decision in *Re B*, I discussed the circumstances in which an obligation of confidence may be imposed on a party who acquired confidential information indirectly, rather than directly from the confider of such information:

... An obligation of confidence may also attach to a third party (i.e. one who is not privy to a disclosure by a confider) who derives confidential information as a result of a breach of duty on the part of a direct confidant. It is possible that a government agency could become fixed with an obligation of confidence if it receives information through a person who, by communicating it, was breaching a duty of confidence which that person owed to the original confider of the information. The relevant principles in this regard are conveniently summarised in Gurry, "Breach of Confidence" in P Finn (Ed) Essays in Equity at p.121-2:

"It is clear that, in the exercise of this equitable jurisdiction, liability will be imposed on any third party who knowingly participates in the confidant's breach of duty which results in the acquisition of the information by the third party. Such liability will run from the date of the knowing participation. Knowing participation in this context means actual knowledge of the breach, imputed knowledge (for example, the knowledge imputed to a company which an aberrant confidant establishes to exploit confidential information) and constructive knowledge. ... Since a direct confidant will be affixed with liability if he ought to have known that information was communicated for a limited purpose, it would be consistent to

impose liability also on the third party who ought to have known that he was deriving information through an impropriety. ...

To be contrasted with the third party who receives confidential information with knowledge, whether actual, imputed or constructive, is the third party who is innocent of all knowledge of the impropriety at the time he receives the information. There is now a considerable body of authority to support the proposition that such a third party, even if innocent at the time of acquisition of the confidential information, will be liable to be restrained from using or disclosing the information after receiving notice of the impropriety. On this basis, his position is differentiated from the knowing third party recipient of confidential information only in respect of the time at which liability commences. In the case of the "innocent" third party, liability dates from receipt of knowledge of the impropriety through which he derived the information, while the liability of the knowing third party dates from the time of the impropriety in which he has participated with knowledge."

32. In this case the respondent requested Queensland Rail to provide the respondent with copies of all documents relevant to the respondent's investigation of Mr Green's complaint. The report containing the information in issue was clearly relevant for that purpose, although the segments of the report containing the particular information in issue in this review were not. Queensland Rail could have declined to supply the information now in issue on the basis that it was not relevant to the respondent's investigation, but it appears that this possibility was overlooked at the time. There would have been little point in Queensland Rail refusing to supply the information now in issue on the basis that to do so would breach an obligation of confidence owed to the third party. If the respondent considered the information relevant, it could have exercised the coercive powers conferred by s.19(1) of the *Parliamentary Commissioner Act 1974*, and could have invoked s.19(2) which provides:

No obligation to maintain secrecy or other restriction upon the disclosure of information obtained by or furnished to officers of an agency, whether imposed by any enactment or by a rule of law, applies to the disclosure of information for the purposes of an investigation by the Commissioner under this Act.

33. While the respondent may override legal obligations of confidence to obtain information for the purposes of investigations under the *Parliamentary Commissioner Act 1974*, the respondent may only use, or further disclose (e.g. if necessary to accord procedural fairness in the conduct of its investigations), the information for the purposes of discharging the respondent's functions under that Act.
34. The information now in issue was not only subject to an obligation of confidence owed by Queensland Rail to the third party, but was irrelevant for the purposes of the respondent's investigation under the *Parliamentary Commissioner Act 1974*. In these circumstances, I consider that the respondent is obliged to respect the obligation of confidence owed to the third party.
35. On the basis of my examination of the information in issue, I am satisfied that at the time of the transmission by Queensland Rail to the respondent of the report containing that information, it should have been apparent to the respondent, if any attention had been paid to the issue, that the segments of the report containing the information now in issue were subject to an obligation of confidence owed by Queensland Rail to the third party. Since the information now in issue was irrelevant for the respondent's purposes and there was no prospect of it being (nor has it in fact been)

further disclosed, I consider that the third party became entitled (on the application of the principles set out in paragraph 31 above) to enforce an obligation of confidence against the respondent, in respect of the information now in issue, from the time of its communication to the respondent (on the basis of either actual or constructive knowledge). Alternatively, if this be regarded as a case of innocent acquisition by the respondent of confidential information, the third party became entitled to enforce an obligation of confidence against the respondent from the time at which the respondent received notice that Queensland Rail considered the information now in issue to be the subject of a binding obligation of confidence (i.e. when consultations occurred in accordance with s.51 of the FOI Act). The information in issue had not been further disclosed by the respondent, and still had the necessary quality of confidence at that time.

36. I find that disclosure of the information in issue under the FOI Act would constitute an unauthorised use of that information. The third party had an expectation that the information in issue would be used by Queensland Rail only for the limited purpose of dealing with the matters addressed in that information, and would not be conveyed to any other person. The third party has also advised my office that the third party continues to object to the release to the applicant of the information in issue. In the circumstances, I find that the fourth criterion set out in paragraph 21 above, is satisfied.
37. I am also satisfied that disclosure to the applicant of the information in issue would cause detriment to the third party. At paragraph 111 of my decision in *Re "B"*, I stated that it was not necessary to establish that a threatened disclosure of the matter in issue would cause detriment in a financial sense but that detriment could also include embarrassment, a loss of privacy, fear, or an indirect detriment (for example, disclosure of the information may injure some relation or friend). I am satisfied that disclosure to the applicant of the information in issue would cause detriment to the third party of one or more of the kinds mentioned above.
38. In the circumstances of the present case, no occasion arises to consider the application of any of the defences to an equitable action for breach of confidence discussed in my decision in *Re "B"* at paragraphs 119 to 134.
39. I am satisfied that disclosure of the information in issue would found an action for breach of confidence, and that it is therefore exempt matter under s.46(1)(a) of the FOI Act.

Application of s.46(1)(b)

40. As discussed at paragraph 146 of my decision in *Re "B"*, 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; and
 - (c) the disclosure of which could reasonably be expected to prejudice the future supply of such information.
41. 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.
42. The requirement that the information must be of a confidential nature calls for a consideration of the same matters that would be taken into account by a court (in an action in equity for breach of confidence) in determining whether, for the purpose of the second criterion identified at paragraph 21 of this decision, the information in issue has the requisite degree of relative secrecy or inaccessibility (see paragraph 148 of *Re "B"*).
43. In relation to the second element, I discussed the meaning of the phrase "communicated in

confidence" at paragraph 152 of my decision in *Re "B"* as follows:

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.

44. I have already made findings at paragraphs 23-24 and 29 above that the information in issue is confidential in nature, and that it was received by Messrs Bailey, Matheson and Mifflin, on behalf of Queensland Rail, in circumstances importing an equitable obligation of confidence. I am satisfied that there was a common understanding between the third party and Queensland Rail (through its agents Messrs Bailey, Matheson and Mifflin) as to preserving the confidentiality of the information imparted, and that the circumstances surrounding the disclosure to the respondent by Queensland Rail of the report containing that information justify a finding that there was a common implicit understanding as to preserving the confidentiality of the information now in issue. Thus, the first two criteria for the application of s.46(1)(b) of the FOI Act are satisfied.
45. The nature of the inquiry in relation to the third requirement of s.46(1)(b), i.e. that the disclosure of the information in issue could reasonably be expected to prejudice the future supply of such information, was discussed at paragraphs 154-161 of my decision in *Re "B"*. The test is not to be applied by reference to whether the particular confider whose confidential information is being considered for disclosure could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice the future supply of such information from a substantial number of sources available or likely to be available to an agency.
46. The meaning of the phrase "could reasonably be expected to" was explained at paragraphs 154 to 160 of my reasons for decision in *Re "B"*. Where an expectation is asserted of prejudice to the future supply of information of a like character to the information in issue, it must be determined whether the expectation claimed is reasonably based. 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 and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.
47. In the present case, the nature of the inquiry concerns the expected effects of disclosure of information such as that in issue in the present case. While I am unable to provide a full explanation of all of the factors which I consider to be relevant in the circumstances of this case (as to do so would disclose the very matter which is claimed to be exempt), I am satisfied that the nature of the information itself, and certain contextual factors extraneous to the information itself, are such that there is little doubt that its disclosure could reasonably be expected to prejudice the future supply of information of a like character.
48. In the circumstances, I am satisfied that a *prima facie* case is established that the withheld information is exempt under s.46(1)(b) of the FOI Act. It remains to be considered whether disclosure of that information to the applicant would, on balance, be in the public interest.
49. The meaning of the phrase "public interest" in the context of FOI legislation was discussed in detail in my decision in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (Information Commissioner Qld, Decision No. 93002, 30 June 1993, unreported) at

paragraphs 35-57, of which the following are presently relevant:

54. *Likewise, under freedom of information legislation, the task of determining, after weighing competing interests, where the balance of public interest lies, will depend on the nature and relative weight of the conflicting interests which are identifiable as relevant in any given case.*
55. *While in general terms, a matter of public interest must be a matter that concerns the interests of the community generally, the courts have recognised that: 'the public interest necessarily comprehends an element of justice to the individual' (per Mason CJ in Attorney-General (NSW) v Quin (1990) 64 ALJR 627). Thus, there is a public interest in individuals receiving fair treatment in accordance with the law in their dealings with government, as this is an interest common to all members of the community. Similarly, the fact that individuals and corporations have, and are entitled to pursue, legitimate private rights and interests can be given recognition as a public interest consideration worthy of protection, depending on the circumstances of any particular case."*

50. As discussed at paragraph 19 of *Re Eccleston* and paragraph 179 of *Re "B"*, s.46(1)(b) of the FOI Act is framed so as to require an initial judgment as to whether disclosure of the document in issue would have certain specified effects, which if established would constitute a *prima facie* ground of justification in the public interest for non-disclosure of the matter, unless the further judgment is made that the *prima facie* ground is outweighed by other public interest considerations, such that disclosure of the document in issue "would, on balance, be in the public interest".

51. I accept that there is a public interest in a person who complains to a government agency having access to documents relevant to his or her complaint. This public interest consideration is consistent with the notion of the accountability of government, which has been given express recognition by Parliament in s.5(1)(a) and (b) of the FOI Act. I discussed the public interest in the accountability of government in my decision in *Re Eccleston* at paragraphs 58 to 75. In particular, at paragraph 58, I stated that one of the intentions of the FOI Act is to:

... enable interested members of the public to discover what the government has done and why something was done, so that the public can make more informed judgments of the performance of the government, and if need be bring the government to account through the democratic process

52. The applicant submits that he requires full access to all reports contained in his file for the purposes of litigation which he has commenced, or intends to commence, against Queensland Rail. However, as I have indicated previously, the information in issue is totally unrelated to the substance of the applicant's complaint against Queensland Rail, as investigated by Messrs Bailey, Matheson and Mifflin on behalf of Queensland Rail, and subsequently by the respondent. Based on my examination of that information, I consider that its disclosure would not have any positive or beneficial consequences for the applicant and certainly none of sufficient substance to outweigh the detriment that its disclosure would occasion to the third party, nor the potential detriment to the future supply of such information (referred to in paragraphs 37 and 47, respectively, above).

53. The public interest in the accountability of government must ordinarily carry substantial weight, and I do accord it substantial weight in this context, even though disclosure of the withheld information in this case is not likely to enhance the accountability of government in any significant way. Nevertheless, I am not satisfied in the circumstances of this case that, collectively, the public interest considerations favouring disclosure of the information in issue are of sufficient weight to displace

the public interest favouring non-disclosure which is evident in the satisfaction of the *prima facie* test for exemption under s.46(1)(b) of the FOI Act. I find that the withheld portions of folios 5 and 7 comprise exempt matter under s.46(1)(b) of the FOI Act.

Conclusion

54. I am satisfied that the information in issue qualifies for exemption under both s.46(1)(a) and s.46(1)(b) of the FOI Act. Having decided that the information in issue is exempt on those bases, it is not necessary for me to consider the alternate bases of exemption relied upon by the respondent; namely, s.42(1)(b) of the FOI Act, and s.48(1) of the FOI Act (in conjunction with s.22 of the *Parliamentary Commissioner Act 1974*).
55. I have reservations as to whether s.42(1)(b) and s.48(1) are applicable in any event. My reservations as to s.42(1)(b) turn solely on the facts of the present case, and involve no issue of principle, so that I see no real value in exploring them given the conclusion I have reached as to the application of s.46(1).
56. On the application of the principles discussed by the Federal Court of Australia when applying s.38 of the *Freedom of Information Act 1982 Cth* (which corresponds to s.48 of the Queensland FOI Act) in *News Corporation Ltd v NCSC* (1984) 52 ALR 277, *Kavvadias v Commonwealth Ombudsman* (1984) 52 ALR 728, *Federal Commissioner of Taxation v Swiss Aluminium Australia Ltd* (1986) 66 ALR 159 and *Harrigan v Department of Health* (1986) 72 ALR 293, I do not think that s.22 of the *Parliamentary Commissioner Act 1974 Qld* would satisfy the test imposed by the words of s.48(1)(a) of the Queensland FOI Act. The *Freedom of Information (Review of Secrecy Provision Exemption) Amendment Bill 1994* has now had its second reading in the Queensland Parliament and is expected to become law in August 1994 when the sunset clause in s.48(3) of the Queensland FOI Act takes effect. If the Bill is enacted in its present form, the issue of whether s.22 of the *Parliamentary Commissioner Act 1974* satisfies the test imposed by the present words of s.48(1)(a) of the Queensland FOI Act will be of no future significance, since s.22 of the *Parliamentary Commissioner Act* will not be included in the limited group of secrecy provisions which are given recognition by the proposed new s.48. Again, therefore, I see no real value in a detailed consideration of s.48 of the FOI Act in this case, given the conclusion I have reached as to the application of s.46(1).
57. I therefore affirm that portion of the decision under review (being the decision of Mr F T King dated 5 February 1993) whereby he found the information in issue to be exempt under s.46(1)(b) of the FOI Act. I also find that the information in issue comprises exempt matter under s.46(1)(a) of the FOI Act.

.....
F N ALBIETZ

INFORMATION COMMISSIONER