OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 02/2003
Application S 28/98

Participants:

JACQUELINE ANN ORTH
Applicant

MEDICAL BOARD OF QUEENSLAND
Respondent

DR ROBERT J COOKE
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - matter in issue comprising a report by a medical practitioner responding to a complaint lodged with the Medical Board of Queensland by the applicant - report compulsorily acquired under s.37C(1) of the *Medical Act 1939* Qld - whether report was communicated in confidence as against the applicant - whether communication of the report imported an equitable obligation of confidence binding the Medical Board not to disclose the report to the applicant – whether breach of an implied statutory duty not to use or disclose the report for a purpose not authorised by the *Medical Act 1939* Qld would "found an action for breach of confidence" within the terms of s.46(1)(a) of the *Freedom of Information Act 1992* Qld – whether disclosure of the report to the applicant would involve a breach of such an implied statutory duty - application of s.46(1)(a) and s.46(1)(b) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - whether disclosure of the report would be contrary to an order made or direction given by a body having power to take evidence on oath - application of s.50(b) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.16(1), s.21, s.44(1), s.44(3), s.46(1)(a), s.46(1)(b), s.48(1), s.50(b), s.102(2)
Freedom of Information Act 1982 Cth s.45(1)
Freedom of Information Act 1991 SA clause 13(a) of Schedule 1
Commissions of Inquiry Act 1950 Qld s.5, s.9(2)(ix), s.16(1)
Extradition (Commonwealth Countries) Act 1966 Cth s.15(6)
Local Government Act 1919 NSW s.618
Medical Act 1939 Qld [repealed] s.12, s.13(1), s.37(2), s.37(3), s.37C(1), s.37C(3), s.39(a)
Medical Practitioners Registration Act 2001 Qld
Trade Practices Act 1974 Cth s.155

Attorney-General (UK) v Heinemann Publishers (1987) 75 ALR 353
"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Bray v Workers Rehabilitation & Compensation Corporation & Anor [1994] 62 SASR 218
Cairns Port Authority and Department of Lands, Re (1994) 1 QAR 663
Cardwell Properties Pty Ltd & Williams and Department of the Premier, Economic and Trade Development, Re (1995) 2 QAR 671
Chand and Medical Board of Queensland; Dr Adam Cannon (Third Party), Re (2001) 6 QAR 159
Commonwealth of Australia v Cockatoo Dockyard Pty Ltd (1995) 36 NSWLR 662
Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) & Anor (1987) 74 ALR 428
Coventry and Cairns City Council, Re (1996) 3 QAR 191
Dunford & Elliott Ltd v Johnson & Firth Brown Ltd [1978] 1 FSR 143
Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10
Hamilton and Queensland Police Service, Re (1994) 2 QAR 182
Johns v Australian Securities Commission (1993) 178 CLR 408; 67 ALJR 850; 116 ALR 567
Kupr and Department of Primary Industries, Re (1999) 5 QAR 140
McCann and Queensland Police Service, Re (1997) 4 QAR 30
Moore v The Registrar of the Medical Board of South Australia [2001] SADC 106
Moorgate Tobacco Co Ltd v Philip Morris Ltd (No. 2) (1984) 156 CLR 414
Ex parte Normanby, Re Britliff (1954) 54 StR (NSW) 299
"S" and Medical Board of Queensland, Re (1994) 2 QAR 249
Smith Kline and French Laboratories (Aust) Limited & Ors v Secretary, Department of Community Services and Health (1991) 28 FCR 291
Stewart and Department of Transport, Re (1993) 1 QAR 227
Sutherland and Brisbane North Regional Health Authority, Re (1995) 2 QAR 449
Trade Practices Commission v Ampol Petroleum (Victoria) Pty Ltd and Others (1995) 127 ALR 533
Villanueva and Queensland Nursing Council, Re (2000) 5 QAR 363
Watson v Superintendent, Metropolitan Reception Centre [1971] 1 NSWLR 67

DECISION

I decide to vary the decision under review (which is identified in paragraph 7 of my accompanying reasons for decision) by finding that:

(a) six references to the names of two of Dr Cooke's patients or former patients (other than the applicant) contained on page 5 of Dr Cooke's report (two in the last paragraph, and four in the third last paragraph), comprise exempt matter under s.44(1) of the *Freedom of Information Act 1992* Qld;

(b) the remainder of Dr Cooke's report does not qualify for exemption from disclosure to the applicant under the *Freedom of Information Act 1992* Qld, and the applicant is therefore entitled to be given access to the report under that Act, subject to the deletion of the matter referred to in (a) above.

Date of decision: 20 June 2003

…….
G J SORENSEN
DEPUTY INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant is a former patient of the third party, Dr Robert Cooke. Dr Cooke is an orthopaedic surgeon. The applicant seeks review of the decision by the Medical Board of Queensland (the MBQ) to refuse her access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to a report provided to the MBQ by Dr Cooke. The report was provided in response to a complaint made by the applicant to the MBQ about medical treatment she received from Dr Cooke.

2. The MBQ initially decided that Dr Cooke's report was exempt from disclosure to the applicant under s.50(b) of the FOI Act, on the basis that its disclosure would be contrary to a non-publication order made during an evidentiary hearing under the *Medical Act 1939* Qld. (The *Medical Act* 1939 was repealed on 1 March 2002 when the *Medical Practitioners Registration Act* 2001 Qld came into force; however, the *Medical Act* 1939 was the applicable law at the time the material facts in this case occurred.) During the course of this review, the MBQ submitted that the report was also exempt matter under s.46(1) of the FOI Act (matter communicated in confidence), on the basis that the report was acquired through the exercise of the MBQ's coercive powers to obtain information from medical practitioners (see s.37C(1) of the *Medical Act*), and that the MBQ was therefore under a duty to keep the report confidential, and not to use or disclose the report except in accordance with express or implied statutory authority.

3. The applicant, together with three other patients of Dr Cooke, made complaints to the MBQ about treatment they had received from Dr Cooke. The MBQ provided Dr Cooke with copies of the complaints, and requested Dr Cooke's response. Dr Cooke's response was not forthcoming, despite repeated requests by the MBQ. Eventually, the MBQ's then President, Dr Lange, issued Dr Cooke with requisition letters under s.37C(1) of the *Medical Act*, requiring him to provide a response to the complaints, or face professional misconduct charges in connection with his refusal to respond. By letter dated 4 December 1996, Dr Cooke provided the MBQ with his responses to the various complaints.

4. On 13 May 1997, the MBQ constituted a Complaints Investigation Committee (CIC), under s.37(3) of the *Medical Act*, to investigate the complaints. The CIC conducted oral hearings and heard sworn evidence from the complainants, and from Dr Cooke, on 25 July 1997 and 1 August 1997. At the commencement of the hearings, the CIC purported to make a non-publication order to the effect that no aspect of the proceedings was to be published in any form, subject to specified exceptions. At the conclusion of its investigation, the CIC recommended to the MBQ that no action be taken against Dr Cooke, as there was insufficient evidence to establish a *prima facie* case of misconduct in a professional respect. The MBQ accepted the CIC's recommendations and dismissed the complaints made against Dr Cooke. The MBQ wrote to the applicant on 12 September 1997 to inform her of its decision in respect of her complaint.

5. By letter dated 7 November 1997, the applicant's solicitors requested access, under the FOI Act, to:

> *(a) Dr Cooke's reply to the Medical Board of Queensland in relation to allegations made against him by* [the applicant] *prior to the Complaints Investigation Committee hearing.*
>
> *(b) A copy of the outcome of the Medical Board of Queensland Complaints Investigation Committee hearing.*

6. By letter dated 5 January 1998, the MBQ's Registrar, Mr John Greenaway, advised the applicant's solicitors that he had located 14 folios in response to the applicant's FOI access application, and that he had decided that all 14 folios were exempt matter under s.50(b) of the FOI Act, on the basis that their disclosure under the FOI Act would be in breach of the non-publication order made by the CIC.

7. The applicant's solicitors applied for internal review of Mr Greenaway's decision. Dr Lloyd Toft, the President of the MBQ, conducted the internal review and, by letter dated 20 January 1998, advised the applicant's solicitors that he had decided to affirm Mr Greenaway's decision. By letter dated 29 January 1998, the applicant's solicitors applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Dr Toft's decision. In support of the application, the applicant's solicitors stated:

> *The basis of the request for the review is that the applicant, Mrs Orth, is entitled to be made aware of the respondent Cooke's reply to the Medical Board of Queensland in relation to the allegations made specifically by our client prior to the Complaints Investigation Committee hearing. Whilst we acknowledge that a direction was made by the committee as to the non-publication of material we would submit that this direction was not intended to prevent the applicant herein, Mrs Orth, who was a complainant, being made aware of the response of Dr Cooke to the complaints she made.*
>
> *Furthermore, provision of the relevant documents will not in any way prejudice or disadvantage Dr Cooke in that the relevant Act precludes the use of material arising out of the Complaints Investigation Committee hearing for any other purpose.*
>
> *As a matter of natural justice and equity, Mrs Orth is entitled to know what response Dr Cooke made to her complaints in view of the fact that Dr Cooke was made fully aware of the nature of Mrs Orth's complaints.*

External review process

8. Copies of the matter in issue were obtained and examined. As a result of concessions made by the participants during the course of the review, the only matter which remains in issue is folios C24-28, comprising Dr Cooke's report in response to the applicant's complaint. The report was forwarded to the MBQ by Dr Cooke under cover of a letter dated 4 December 1996. As noted above, that report was provided to the MBQ pursuant to requisitions issued by the MBQ under s.37C(1) of the *Medical Act*.

9. By letter dated 12 March 1998, the former Information Commissioner (Mr F N Albietz) wrote to the MBQ to express his preliminary view that, on the basis of the material before him, Dr Cooke's report did not qualify for exemption under s.50(b) of the FOI Act. Having regard to s.13 of the *Medical Act*, Commissioner Albietz accepted that, for the purpose of investigating the various complaints made against Dr Cooke, the CIC was deemed to be a commission of inquiry within the meaning of the *Commissions of Inquiry Act 1950* Qld. However, Commissioner Albietz also observed that the non-publication order which the CIC had made, appeared to exceed the limits of the relevant power available to the CIC under s.16(1) of the *Commissions of Inquiry Act*. The order was in the following terms:

> *The meeting of the Committee shall be conducted in camera and the Committee orders that no aspect of these proceedings is to be published in any form except to the Board, the Medical Assessment Tribunal, or to persons the Committee is required to consult to complete its investigations.*

10. Section 16(1) of the *Commissions of Inquiry Act* provides:

> ***16.(1) Power to prohibit publication of evidence.*** *A Commission may order that any evidence given before it, or the contents of any book, document, or writing produced at the inquiry, shall not be published.*

11. Commissioner Albietz expressed the view that the CIC was not empowered to make an order that *"no aspect of these proceedings is to be published in any form …"* because the terms of that order exceeded the limits of the relevant power available to the CIC under s.16(1) of the *Commissions of Inquiry Act* (*cf.* the legal maxim that a stream cannot rise higher than its source). The order made by the CIC therefore had to be read down to the extent necessary to ensure that it remained within the bounds of the relevant source of power available to the CIC, i.e., it had to be read down as if it were an order that any evidence given before the CIC, or the contents of any book, document or writing produced at the CIC's inquiry, should not be published (subject to the specified exceptions).

12. Commissioner Albietz stated that he could not be satisfied that Dr Cooke's report fell within the terms of the CIC's non-publication order (as read down to be within power), or that it consequently fell within the terms of s.50(b) of the FOI Act, until evidence or other material was placed before him to establish that the report was produced at the CIC's inquiry.

13. By letter dated 1 April 1998, Mr Posner of the MBQ advised that the MBQ accepted the Information Commissioner's views about the reading down of the CIC's order and advised that there was no deliberate intention by the CIC to exceed the powers conferred by s.16(1) of the *Commissions of Inquiry Act*. Mr Posner advised that the MBQ no longer claimed exemption under s.50(b) in respect of Dr Cooke's report, as further investigations had revealed that Dr Cooke's report had not been tabled as evidence at the CIC's hearing.

14. By letter dated 9 April 1998, Assistant Commissioner (AC) Shoyer wrote to Dr Cooke to explain the Information Commissioner's preliminary view about the application of s.50(b) of the FOI Act, and to inform Dr Cooke that the MBQ had withdrawn its claim for exemption under s.50(b) in respect of his report. Dr Cooke's solicitors responded by letter dated 27 April 1998, stating that Dr Cooke objected to disclosure of his report on the basis that it was exempt matter under s.46(1) and s.50(b) of the FOI Act.

15. By letter dated 1 May 1998, Commissioner Albietz responded to the letter from Dr Cooke's solicitors, explaining in detail the reasons for his preliminary view that Dr Cooke's report did not qualify for exemption under either s.46(1) or s.50(b) of the FOI Act. By letter dated 15 May 1998, Dr Cooke's solicitors advised that their client did not accept the Information Commissioner's preliminary view, and maintained that the report was exempt matter under s.46(1) and s.50(b) of the FOI Act. Dr Cooke's solicitors provided brief submissions in support of their client's case for exemption.

16. Under cover of letters each dated 26 May 1998, AC Shoyer provided the MBQ, and the applicant's solicitors, with copies of the submissions made by Dr Cooke's solicitors, together with the Information Commissioner's 'preliminary views' letter dated 1 May 1998. The MBQ responded with a lengthy submission dated 10 June 1998, which stated that, after reviewing the correspondence between Dr Cooke's solicitors and the Information Commissioner, the MBQ had identified a number of new considerations. As a result, it now submitted that Dr Cooke's report qualified for exemption under s.46(1) and s.50(b) of the FOI Act. A copy of the MBQ's submission was forwarded to the applicant's solicitors, who responded by saying that their client did not wish to make any submissions in relation to the various issues for determination, and would await the Information Commissioner's decision.

17. Over a period of several months, numerous attempts were made to negotiate the disclosure to the applicant of parts of Dr Cooke's report, on the basis that some information contained in it appeared to be purely factual in nature, taken from examination notes or hospital admission notes, or because some information in the report had been included in a letter dated 12 September 1997 which the MBQ had sent to the applicant at the conclusion of the CIC hearing. Ultimately, Dr Cooke's solicitors advised that their client was not prepared to agree to the disclosure to the applicant of any part of the report.

18. Accordingly, I have to decide whether or not folios C24-28, comprising Dr Cooke's report to the MBQ in response to the applicant's complaint about him, qualify for exemption under s.46(1) or s.50(b) of the FOI Act. In making my decision in this matter, I have taken into account:

- the contents of Dr Cooke's report;
- the applicant's FOI access application dated 7 November 1997, application for internal review dated 15 January 1998, and application for external review dated 29 January 1998;
- the initial and internal review decisions of the MBQ, dated 5 January 1998, and 20 January 1998, respectively;
- letters from the MBQ dated 26 February 1998, 1 April 1998, 10 June 1998 and 13 October 1998;
- letters from Dr Cooke's solicitors dated 27 April 1998, 15 May 1998 and 21 January 1999;
- letter from the applicant's solicitors dated 17 July 1998;
- letters from the MBQ to Dr Cooke dated 19 December 1995, 19 April 1996 and 15 November 1996;
- the MBQ's letter to the applicant dated 12 September 1997; and
- the Summons to Attend and Produce Documents served upon Dr Cooke by the MBQ.

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

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

> ***46.(1)*** *Matter is exempt if—*
>
> *(a) its disclosure would found an action for breach of confidence; or*
>
> *(b) it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*

20. In *Re Chand and Medical Board of Queensland; Dr Adam Cannon (Third Party)* (2001) 6 QAR 159, I made findings on the application of s.46(1) of the FOI Act to a report given by Dr Cannon to the MBQ in response to a complaint made about Dr Cannon's medical treatment of the applicant's husband. Dr Cannon's report expressly stated that it was provided in confidence to the MBQ for the sole purpose of assisting the MBQ to resolve the complaint, and was not to be provided to a third party. However, I decided that:

(a) while it may have been reasonable for Dr Cannon to expect that the MBQ would treat his report in confidence as against the rest of the world, his request that his report be treated in confidence as against the complainant was not reasonable, having regard to the functions of the MBQ and the uses it might properly wish to make of the information contained in the report in discharging its responsibility to deal fairly and properly with the complaint;
(b) equity would not treat Dr Cannon's request for confidentiality in respect of his report as giving rise to a binding obligation of confidence, restraining the MBQ from disclosing to the complainant those parts of the report which addressed the particular issues of complaint (including giving relevant background information); and
(c) some material contained in Dr Cannon's report, which was irrelevant or non-responsive to the complaint, was capable of being the subject of an obligation of confidence as against the complainant, having regard to Dr Cannon's express stipulation for confidential treatment and the MBQ's acceptance of it.

21. In this case, Dr Cooke has argued that his report given in response to the applicant's complaint was subject to an equitable obligation binding the MBQ not to disclose the report to the applicant. For reasons explained below (which are essentially the same as those expounded in *Re Chand*), I cannot accept that Dr Cooke's contention is correct.

22. However, the MBQ has raised a novel argument, based on a different kind of legal duty, i.e., the implied statutory duty which binds a government agency or official not to use or disclose information obtained through the exercise of coercive statutory powers, except for a purpose expressly or implicitly authorised by the relevant statute. That argument is open on the facts of this case only because Dr Cooke's report was forwarded in response to requisitions issued by the MBQ under s.37C(1) of the *Medical Act* (in contrast to the report in *Re Chand*, which was voluntarily supplied by Dr Cannon).

23. The MBQ's contention raises complex legal issues which are addressed separately below, after my consideration of Dr Cooke's contention that an equitable obligation of confidence restrains the MBQ from disclosing Dr Cooke's report to the applicant.

Application of s.46(1)(a) of the FOI Act to Dr Cooke's report

(a) Dr Cooke's submissions - whether disclosure to the applicant of Dr Cooke's report would found an action for breach of an equitable obligation of confidence

24. In a letter dated 15 May 1998, Dr Cooke's solicitors argued that:

- the whole of Dr Cooke's report is confidential and was marked "Strictly Confidential";
- an implied understanding of confidence existed between Dr Cooke and the MBQ;
- Dr Cooke's expectation of confidentiality arose out of the nature of the MBQ's proceedings and investigations, and the fact that his evidence at the CIC hearing was heard separately, i.e., without the various complainants against him being present; and
- it was reasonable for Dr Cooke to expect only that the MBQ would need to advise the applicant of the results of its investigation, and not to provide her with Dr Cooke's response to her complaint.

25. Dr Cooke's solicitors disputed that the applicant, as the complainant against Dr Cooke, had a special interest in knowing the information provided by Dr Cooke in response to her complaint:

> *The applicant is entitled to know simply that the complaint has been acted upon and the results of the investigation. To decide otherwise would be to encourage patients who commence legal proceedings against medical practitioners to use the complaints investigation process simply to obtain information in furtherance of the action which would be quite contrary to the spirit and intention of the legislation by which the investigation process was established. Indeed, the Board, and in many instances the Complaints Investigation Committee, includes a lay person for the purpose of ensuring that complaints are properly investigated.*

Analysis

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

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

(a) it must be possible to specifically identify the information, in order to establish that it is secret, rather than generally available information (see *Re "B"* at pp.303-304, paragraphs 60-63);
(b) the information in issue must have "the necessary quality of confidence"; i.e., the information must not be trivial or useless information, and it must have a degree of secrecy sufficient for it to be the subject of an obligation of conscience (see *Re "B"* at pp.304-310, paragraphs 64-75);

(c) the information must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see *Re "B"* at pp.311-322, paragraphs 76-102);
(d) disclosure to the applicant for access would constitute an unauthorised use of the confidential information (see *Re "B"* at pp.322-324, paragraphs 103-106); and
(e) disclosure would be likely to cause detriment to the confider of the confidential information (see *Re "B"* at pp.325-330, paragraphs 107-118).

Requirement (a)

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

Requirement (b)

29. It is clear that the information contained in parts of Dr Cooke's report has already been disclosed to the applicant. As noted above, the MBQ wrote to the applicant on 12 September 1997 stating that the CIC had finalised its investigation and advising that the CIC had recommended that no action be taken against Dr Cooke. In that letter, the MBQ summarised the evidence given by the complainants and by Dr Cooke. The summary of Dr Cooke's evidence set out in that letter is materially identical to information contained in parts of the report now in issue. In addition, much of the information contained in Dr Cooke's report is purely factual in nature and simply recounts the history of the applicant's illness and treatment, as taken from her hospital admission notes (to which the applicant has had access). I do not consider that such information has the necessary quality of confidence, as against the applicant, to make it the subject of an equitable obligation of confidence binding the MBQ not to disclose it to the applicant.

30. (The considerations which I noted at p.166 (paragraph 21) of *Re Chand* might possibly be relevant if the disclosure by the MBQ to the applicant which has already occurred was done in breach of an equitable obligation of confidence binding the MBQ, but, for reasons explained below, I am satisfied that that was not the case.)

Requirement (c)

31. There is nothing in the material before me to suggest that the MBQ gave any indication that it would accord confidential treatment, as against the applicant, to the report it requisitioned from Dr Cooke in response to the applicant's complaint.

32. I note that Dr Cooke marked his report "Strictly Confidential". However, a supplier of confidential information cannot unilaterally and conclusively impose an obligation of confidence: see *Re "B"* at pp.311-316, paragraphs 79-84, and pp.318-319, paragraphs 90-91. If a stipulation for confidence was unreasonable at the time of making it, or if it was reasonable at the beginning but afterwards, in the course of subsequent happenings, it becomes unreasonable to enforce it, then the courts will not do so: *Dunford & Elliott Ltd v Johnson & Firth Brown Ltd* [1978] 1 FSR 143 at p.148 per Lord Denning MR.

33. The touchstone in assessing whether requirement (c) to found an action in equity for breach of confidence has been satisfied, lies in determining what conscionable conduct requires of an agency in its treatment of information claimed to have been communicated in confidence. That is to be determined by an evaluation of all the relevant circumstances surrounding the communication of that information to the agency. The relevant circumstances will include

(but are not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and circumstances relating to its communication of the kind referred to by a Full Court of the Federal Court of Australia in *Smith Kline and French Laboratories (Aust) Limited & Ors v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at pp.302-3: see *Re "B"* at pp.314-316, paragraph 82.

34. In evaluating the relevant circumstances, it should be borne in mind that the courts have recognised that special considerations may apply in determining whether a government agency owes an obligation of confidence in respect of information communicated to it by a person outside government: *Attorney-General (UK) v Heinemann Publishers* (1987) 75 ALR 353 at p.454; for example:

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

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

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

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

35. Applying those principles to the present circumstances, I note that Dr Cooke knew that he was responding to a formal complaint made against him by the applicant (a copy of the complaint had been provided to him), and that the MBQ was investigating that complaint with a view to deciding whether or not to take any further action in respect of it. I do not consider that it was reasonable for Dr Cooke to expect that his report would be kept

confidential from the applicant. Both Dr Cooke and the MBQ ought reasonably to have expected that, in properly dealing with the complaint, the MBQ might want or need to put Dr Cooke's response (or aspects of it) to the applicant, as part of the process of testing their respective accounts of relevant events, or indeed as part of a proper explanation to the applicant of the outcome of her complaint (especially if Dr Cooke's response was relied upon as a basis for taking no further action in respect of her complaint).

36. I do not accept Dr Cooke's submission (see paragraph 25 above) that the applicant has no special interest in knowing the substance of his response to her complaint. The following observations by Commissioner Albietz (in *Re Villanueva and Queensland Nursing Council* (2000) 5 QAR 363 at pp.389-390, paragraphs 93-97), about the complaints investigation processes of the Queensland Nursing Council are equally applicable to the complaint-handling procedures of the MBQ, as the regulatory authority for medical practitioners in Queensland:

> *93. … the line of authority established by the High Court in cases such as* Annetts v McCann *(1990) 170 CLR 596 indicates that the duty to accord procedural fairness is not confined to the subject of a disciplinary investigation. In my view, a complainant to a regulatory authority has a "right, interest or legitimate expectation" in having his/her complaint properly dealt with by the regulatory authority, which would ordinarily be sufficient to attract a duty to accord procedural fairness to the complainant (although the precise requirements of procedural fairness would have to be worked out according to the particular circumstances and exigencies of each individual case). …*
>
> *94. I note the comments of Toohey J of the High Court of Australia in Goldberg v Ng (1995) 185 CLR 83 at pp.110-111, where His Honour said of the conduct of the New South Wales Law Society in purporting to accept responses to a complaint (which complaint it later dismissed) from the subject of the complaint, on the basis that the responses would be treated in confidence as against the complainant:*
>
> > Arguably, the Society did not afford natural justice to Mr Ng [the complainant] in dismissing the complaint without informing him of the material provided by Mr Goldberg [the subject of the complaint] and of the part (if any) it played in that dismissal.
>
> *95. In his judgment at first instance,* Ng v Goldberg *(Supreme Court of New South Wales, No. 5342 of 1989, No. 4995 of 1990, Powell J, 2 March 1993, unreported), Powell J said:*
>
> > With respect to those who hold another view, I cannot accept that it is necessary to the effective operation of the Law Society's complaints investigation system that it be conducted "under the constraints of strict confidence" - which seems as if it operates only in one direction anyway, for the complaint, of necessity, must be disclosed to the solicitor - and, still less am I persuaded that the practice which the Law Society apparently has adopted ensures that the system works effectively.

> The reasons for the doubts which I have just expressed are readily to be found in the facts of the present case. ... whatever be the truth of the matter, the fact that, without disclosing Mr Goldberg's reply to Mr Ng so that he might comment upon it, and, if it be possible, provide further material to demonstrate its falsity, if it be false, the Complaints Committee felt able to dismiss the complaint on the ground that "there is no evidence ..." leaves me with no great confidence in either the Complaints Committee's understanding of its role, or its ability to fulfil that role.

96. *An appeal against Powell J's judgment was unanimously dismissed by the New South Wales Court of Appeal in* Goldberg v Ng *(1994) 33 NSWLR 639, with both Kirby P (at pp.647-649) and Clarke JA (at pp.678-679) making comments supportive of the above-quoted remarks of Powell J.*

37. I also refer to and rely on the passages quoted in *Re Chand* at pp.171-172 (paragraphs 34 and 35) from decisions of a court and a tribunal in other Australian jurisdictions, concerning the obligation of a regulatory authority for the medical profession to accord procedural fairness to a complainant, including allowing the complainant to know the substance of a medical practitioner's response to the complaint.

38. In addition, I consider that the MBQ has a duty to justify the decision which it reaches at the end of an investigation - such a duty is fundamental to all law enforcement/regulatory bodies charged by statute with the responsibility of maintaining, on behalf of the community and in the interests of public health and safety, sufficient standards of competence and professional conduct by the professionals which the body has been established to regulate. The MBQ is accountable to both the public generally, and to the complainant specifically, to demonstrate that it discharged its duty to conduct an adequate and fair investigation of the complaint made to it, and that the decision that it reached at the conclusion of the investigation was fair and reasonable in all the circumstances.

39. I note Dr Cooke's submission that one of the reasons he expected his report would be kept confidential from the applicant was because, during the CIC's hearing, the evidence of the parties was heard separately, without the "other side" being present. The CIC's hearing was held some seven months after Dr Cooke provided his report to the MBQ. At the time he communicated his report to the MBQ, Dr Cooke could not have based any understanding about confidential treatment of his report upon the procedures followed by the CIC in a hearing held seven months later. (As to the CIC's decision to exclude the applicant from the hearing when Dr Cooke was giving evidence, I refer to the critical comments about a similar practice of the Medical Board of South Australia, made by Smith J in *Moore v The Registrar of the Medical Board of South Australia* [2001] SADC 106, and quoted in *Re Chand* at p.172, paragraph 35.)

40. I consider that equity would not ordinarily impose an obligation of confidence restraining the MBQ from disclosing to a complainant any information (especially factual information, but also expressions of medical opinion) contained in a response from a medical practitioner that addresses the substance and details of the relevant complaint.

41. I say "ordinarily" because there may well be exceptions in appropriate cases; for example, if disclosure would be against the best interests of the complainant's continued health-care treatment (*cf. Re Sutherland and Brisbane North Regional Health Authority* (1995) 2 QAR 449 at pp.457-458, paragraphs 18-21), although the possibility of disclosure in accordance with s.44(3) of the FOI Act should be considered (see *Re "S" and Medical Board of Queensland* (1994) 2 QAR 249); or where disclosure (without the patient's express or implied consent) of medical information about a person other than the complainant would infringe the other person's interests in privacy and confidentiality. However, no such exceptional circumstances exist in the present case (allowing that privacy interests of patients other than the complainant/applicant will be protected by my finding at paragraph 111 below).

42. While Dr Cooke might reasonably have expected that the MBQ would treat his report in confidence as against the world at large, I consider that his expectation that a report responding to particular issues of complaint against him would be treated in confidence, as against the complainant, was not a reasonable expectation, having regard to the functions of the MBQ and the uses it might properly wish to make of the information in the report in discharging its responsibility to deal fairly and properly with the complaint. I consider that equity would not impose on the MBQ an obligation of confidence, as against the applicant, in respect of any information in Dr Cooke's report which is relevant and responsive (including relevant background information) to the particular issues of complaint to which Dr Cooke was asked to respond. I am satisfied from my examination of Dr Cooke's report that all of the information in it answers that description.

Findings

43. I find that requirement (c) (from paragraph 27 above) is not satisfied in that Dr Cooke's report was not communicated to the MBQ in circumstances which imported an equitable obligation of confidence binding the MBQ not to disclose the report to the applicant. Hence, disclosure by the MBQ, to the applicant, of Dr Cooke's report would not found an action in equity for breach of confidence, and Dr Cooke's report cannot qualify (on that basis) for exemption from disclosure to the applicant under s.46(1)(a) of the FOI Act. (It is unnecessary, in light of that finding, to consider requirements (d) and (e) from paragraph 27 above.)

(b) The MBQ's submissions – whether disclosure to the applicant of Dr Cooke's report would found an action for breach of a "statutory duty of confidence"

44. The MBQ asserts that, because Dr Cooke's report was compulsorily acquired under s.37C(1) of the *Medical Act*, the MBQ is under a statutory duty to use and disclose the report only for the purpose for which it was obtained.

45. An implied statutory duty, binding the MBQ not to use or disclose Dr Cooke's report for a purpose not expressly or implicitly authorised by the *Medical Act*, is capable of being overridden by a clear intention in another statute. Thus, Dr Cooke's report is amenable to access under the FOI Act which (by s.21) confers on any person a "legally enforceable right" to be given access to any document in the possession or control of an agency, such as the MBQ (and I note that s.16 of the FOI Act provides that the FOI Act is intended to operate to the exclusion of the provisions of other enactments relating to non-disclosure of information). However, the right of access conferred by the FOI Act is subject to the exceptions provided for in the FOI Act itself. The question then is whether Dr Cooke's report is covered by one of the exceptions to the right of access.

46. The MBQ argues that disclosure of Dr Cooke's report to the applicant would found an action for breach of what it describes as a "statutory duty of confidence", consequent upon the fact that Dr Cooke's report was obtained through the exercise of coercive statutory powers, and hence that s.46(1)(a) is satisfied:

> [Dr Cooke's report is] *exempt from disclosure under s.46(1) of the FOI Act on the authority of High Court's decision in* Johns v Australian Securities Commission *(1993) 116 ALR 567* (Johns) *and* Bray and Smith v Workers Rehabilitation and Compensation Corporation *(1994) 62 SASR 218* (Bray).
>
> *In* Johns *the High Court has held that a statute which confers a power to obtain information by compulsion limits, expressly or impliedly, the purposes for which the information obtained can be used or disclosed. The Court further held that information compulsorily acquired under statutory powers is held as confidential information and consequently subject to a duty of confidentiality and may only be used or disclosed in accordance with express or implied statutory authority.*
>
> *In* Bray *the Full Court of the Supreme Court of South Australia applying* Johns *held that, as the information to which access had been sought under the freedom of information statute of that state, had been compulsorily acquired pursuant to statutory powers, the disclosure to the applicant would found an action for breach of confidence under the equivalent provision to s.46(1)(a) of the FOI Act – the information there being held subject to an implied statutory duty of confidence. The Court held that the equivalent FOI exemption to s.46(1)(a) extended to a cause of action to enforce such a statutory duty.*
>
> …
>
> *Applying the foregoing to the present case, it will be observed that s.37C of the* Medical Act 1939 *confers a power to obtain information by compulsion. Accordingly, it is contended that such compulsorily acquired information is eligible for exemption from disclosure under the FOI Act on the same basis as was determined in* Bray *(applying* Johns*). It follows that* [Dr Cooke's report] … *is exempt from disclosure under s.46(1)(a) of the FOI Act the contents of the same not having entered the public domain.*
>
> [extract from MBQ's submission dated 10 June 1998]

Analysis

47. Some passages in the judgment of a Full Court of the Supreme Court of South Australia in *Bray v Workers Rehabilitation and Compensation Corporation and Anor* [1994] 62 SASR 218, arguably lend support to the MBQ's contentions. However, it is not entirely clear that the court in *Bray's* case made the findings asserted in the MBQ's submission above. If it did, I consider that it proceeded on a misunderstanding of principles stated by judges of the High Court of Australia in *Johns v Australian Securities Commission* (1993) 178 CLR 408, as explained below.

48. Firstly, I accept that Dr Cooke's report was compulsorily acquired by the MBQ under s.37C(1) of the *Medical Act*. Sections 37C(1) and (3) provided:

> ***Power to obtain written information***
>
> ***37C.(1)*** *The board, by written requisition signed by the president, for the purposes of an investigation by it pursuant to section 37 or 37A, may require a medical practitioner in respect of whom the investigation is being undertaken, to furnish to the board –*
>
> *(a) an answer in writing to any question put by the board to the medical practitioner;*
>
> *(b) such information in writing as the board requires.*
>
> …
>
> ***(3)*** *A medical practitioner who fails to comply with a requisition made pursuant to this section shall be guilty of misconduct in a professional respect.*

49. I have examined the requisition letters sent by the MBQ to Dr Cooke under s.37C(1) of the *Medical Act*. I am satisfied that Dr Cooke provided his report pursuant to those letters, and that his report was therefore compulsorily acquired by the MBQ for the purposes of its investigation under s.37 of the *Medical Act* into the complaints made by the applicant (and three other patients) against Dr Cooke.

50. In *Johns v ASC*, the High Court examined the obligations imposed upon a government agency or official who obtains information by exercise of a statutory power. At pp.423 – 424, Brennan J said:

> *... A person to whom information is disclosed in response to an exercise of statutory power is thus in a position to disseminate or to use it in ways which are alien to the purpose for which the power was conferred. But when a power to require disclosure of information is conferred for a particular purpose, the extent of dissemination or use of the information disclosed must itself be limited by the purpose for which the power was conferred. In other words, the purpose for which a power to require disclosure of information is conferred limits the purpose for which the information disclosed can lawfully be disseminated or used. In* Marcel v Commissioner of Police *Sir Nicholas Browne-Wilkinson V-C said, in reference to a statutory power conferred on police to seize documents:*
>
> > Powers conferred for one purpose cannot be lawfully used for other purposes without giving rise to an abuse of power. Hence, in the absence of express provision, the Act cannot be taken to have authorised the use and disclosure of seized documents for purposes other than police purposes.
>
> *And in* Morris v Director of the Serious Fraud Office, *Sir Donald Nicholls V-C said in reference to information acquired by exercise of statutory powers:*
>
> > The compulsory powers of investigation exist to facilitate the discharge by the SFO of its statutory investigative functions. The powers conferred by s.2 are exercisable only for the purposes of

> an investigation under s.1. When information is obtained in exercise of those powers the SFO may use the information for those purposes and purposes reasonably incidental thereto and such other purposes as may be authorised by statute, but not otherwise. Compulsory powers are not to be regarded as encroaching more upon the rights of individuals than is fairly and reasonably necessary to achieve the purpose for which the powers were created. That is to be taken as the intention of Parliament, unless the contrary is clearly apparent.
>
> *A statute which confers a power to obtain information for a purpose defines, expressly or impliedly, the purpose for which the information when obtained can be used or disclosed. The statute imposes on the person who obtains information in exercise of the power a duty not to disclose the information obtained except for that purpose.*

51. In my view, the first flaw in the MBQ's argument is its assumption that disclosure to the applicant of Dr Cooke's report would be alien to the purposes for which the MBQ was conferred with the statutory power which enabled it to compulsorily acquire a response from Dr Cooke to the applicant's complaint. The applicant's complaint was the trigger for the MBQ's investigation, and for its use of the statutory power to require Dr Cooke to respond to the complaint. Dr Cooke was provided with a copy of the complaint, and his report is directly responsive to the complaint. Even at this late stage, it would not be alien to the purposes for which the power in s.37C of the *Medical Act* was conferred, for the MBQ to provide the applicant with a copy of Dr Cooke's report so that she can better understand how the MBQ reached its decision that there was insufficient evidence to establish a case against Dr Cooke of misconduct in a professional respect. I am not satisfied that disclosure to the applicant of Dr Cooke's report would be contrary to the MBQ's implied statutory duty not to use or disclose Dr Cooke's report except for the purpose of its investigation of the applicant's complaint, or for purposes reasonably incidental to that investigation.

52. The MBQ has attached significance to *Bray's* case because it involved the application of an exemption provision (cl.13(a) of Schedule 1) in the *Freedom of Information Act 1991* SA (the SA FOI Act), which corresponds to s.46(1)(a) of the Queensland FOI Act. The matter came before a Full Court of the Supreme Court of South Australia on a case stated. From the limited facts disclosed in the case stated, it appears that a Ms Stanley made a claim for workers compensation in respect of alleged employment injuries. A loss adjuster retained by the first respondent (WorkCover) interviewed two of Ms Stanley's work colleagues (the appellants) regarding their observations of the claimant. The loss adjuster (correctly) told the appellants that they were required to assist him in his investigations pursuant to s.110 of the *Workers Rehabilitation and Compensation Act 1986* SA. The appellants understood from the loss adjuster that the information given to him was to be given in the strictest confidence and to be used only for the purpose of determining the validity of Ms Stanley's claim for compensation, and that it would not be disclosed at any time to Ms Stanley or to any other person. Ms Stanley subsequently applied for access, under the SA FOI Act, to the loss adjuster's report. WorkCover refused access to the parts of the report that referred to statements made by the appellants.

53. The relevant passage from the judgment of Bollen J (at p.225-227) commences with findings that the report contained matter given under a promise of secrecy, and that the givers of the information had relied on that promise. Such findings are usually part of the process of ascertaining the existence of an equitable obligation of confidence.

54. Bollen J then stated that he had obtained assistance from the reasons of Brennan J in *Johns v ASC,* and from the reasons of Deane J in *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No. 2)* (1984) 156 CLR 414 (the latter being the well-known passage, at pp.437-438, about the existence of a general equitable jurisdiction to grant relief against an actual or threatened abuse of confidential information, the basis for which lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained). Bollen J then quoted a passage from the reasons of Brennan J in *Johns v ASC* (at pp.426-427). In it, Brennan J refers to both the equitable jurisdiction to enforce an equitable obligation of confidence, and the implied statutory duty not to use or disclose information acquired under coercive statutory powers except for a purpose authorised by the statute. (Brennan J also makes the point that the two are conceptually distinct, even though the equitable remedy of injunction would be available in appropriate cases to enforce a statutory duty against a public authority.)

55. Bollen J then briefly noted that the information in issue had been acquired under compulsory powers in a statute. In a separate paragraph, Bollen J stated the bare finding that disclosure of the information in issue would found an action for breach of confidence.

56. I think it can be safely inferred from his reasons for judgment (in particular, the findings referred to in paragraph 53 above) that Bollen J considered that disclosure would found an action for breach of an equitable obligation of confidence. However, it is not entirely clear whether Bollen J considered that disclosure would found an action for breach of a "statutory duty of confidence".

57. On the basis of the facts stipulated in the case stated, a finding that disclosure of the information supplied to the loss adjuster by the appellants would found an action for breach of an equitable obligation of confidence, is unexceptionable. Because the dispute came before the court on a case stated, the court had no occasion to examine any wider circumstances attending the disclosure of the relevant information (*cf.* paragraphs 33-34 above) that might have told against such a finding. For example, if the information supplied by the appellants had been relied upon by WorkCover to refuse Ms Stanley's claim for compensation, procedural fairness would probably have required disclosure of that information to the claimant, and equity would probably not have enforced the promise of confidential treatment made at the time the information was given. (Likewise, in such circumstances, disclosure to the claimant in order to accord her procedural fairness in the resolution of her claim for compensation would not be alien to the purposes of the statute which authorised compulsory acquisition of the relevant information.)

58. However, to the extent (if at all), that Bollen J's conclusion (that the loss adjuster's report was exempt from disclosure to Ms Stanley under the "breach of confidence" exemption in the SA FOI Act) was based on a finding that disclosure of the information supplied by the appellants would found an action for breach of a "statutory duty of confidence" (arising from the fact that compulsory powers were exercised in obtaining the information), I cannot accept that it was correctly decided. (I note that Ms Stanley was not represented by counsel, and no arguments were put to the court in *Bray's* case raising issues comparable to those addressed below.)

59. In my view, a breach of an implied statutory duty not to use or disclose information obtained by the exercise of coercive statutory powers, except for a purpose authorised by the relevant statute, would not "found an action for breach of confidence" according to the intended meaning of that phrase in the context of s.46(1)(a) of the Queensland FOI Act.

60. In *Re "B"* at pp.289-291 (paragraphs 26-30), Commissioner Albietz traced the antecedents of s.46(1)(a) of the FOI Act, prior to the Queensland Parliament's enactment of that provision in 1992. The wording of s.46(1)(a) is materially identical to the wording of s.45(1) of the *Freedom of Information Act 1982* Cth (the Commonwealth FOI Act), as amended by the *Freedom of Information Amendment Act 1991* Cth. The Explanatory Memorandum for the latter Act explained that the breach of confidence exemption was being amended to make clear that it provides exemption where, and only where, the person who provided the confidential information to government would be able to prevent disclosure under the general law relating to breach of confidence. Commissioner Albietz concluded that the Queensland Parliament, in enacting s.46(1)(a) of the Queensland FOI Act in a materially identical form to the then recently amended s.45(1) of the Commonwealth FOI Act, had the same intention as to the meaning and scope of the exemption provision.

61. After further reference to case law and to leading text writers, Commissioner Albietz expressed the view (at p.296, paragraph 43) that:

> *… the words "found an action for breach of confidence" in s.46(1)(a) of the Queensland FOI Act should be taken to refer to a legal action brought in respect of an alleged obligation of confidence in which reliance is placed on one or more of the following causes of action:*
>
> *(a) a cause of action for breach of a contractual obligation of confidence;*
>
> *(b) a cause of action for breach of an equitable duty of confidence;*
>
> *(c) a cause of action for breach of a fiduciary … duty of confidence and fidelity.*

62. The implied statutory duty that binds a government agency or official not to use or disclose information (acquired through the exercise of coercive statutory powers) for a purpose not authorised by the relevant statute, is conceptually distinct. Although it has been loosely referred to as a "statutory duty of confidence", the duty applies even to information which is not confidential in nature, whereas it is an essential element of an action for breach of confidence that the information sought to be protected must have the necessary quality of confidence. Although equitable remedies like an injunction or declaration may be used to enforce the duty, the duty is not a creature of equity: the existence and extent of the duty are to be divined from the terms of the statute which confers the coercive powers to obtain information: per Dawson J in *Johns v ASC* at p.436. These points are made clear in the following passages from the judgment of Brennan J in *Johns v ASC* (at p.424; p.427):

> *... The person obtaining information in exercise of such a statutory power must therefore treat the information obtained as confidential <u>whether or not the information is otherwise of a confidential nature</u>. Where and so far as a duty of non-disclosure or non-use is imposed by the statute, the duty is <u>closely analogous to</u> a duty imposed by equity on a person who receives information of a confidential nature in circumstances importing a duty of confidence.*
>
> *…*

> … *there is certainly jurisdiction in equity to grant relief against actual or threatened abuse of confidential information. In* Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2], *Deane J said:*
>
> > It is unnecessary, for the purposes of the present appeal, to attempt to define the precise scope of the equitable jurisdiction to grant relief against an actual or threatened abuse of confidential information not involving any tort or any breach of some express or implied contractual provision, some wider fiduciary duty or some copyright or trade mark right. A general equitable jurisdiction to grant such relief has long been asserted and should, in my view, now be accepted. … Like most heads of exclusive equitable jurisdiction, its rational basis does not lie in proprietary right. It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained.
>
> *Deane J was speaking of the exclusive jurisdiction of equity to enforce a duty imposed by equity. The jurisdiction to restrain the repository of a statutory power from using or disclosing information obtained in exercise of the power cannot rest on the same basis. A duty not to use or to disclose information obtained in the exercise of a statutory power except for a purpose authorised by the statute is a duty imposed by statute, not by equity. Yet the equitable remedy of injunction is available in appropriate cases to enforce a statutory duty against a public authority. …*
>
> [my underlining]

63. To like effect are the comments of Davies J of the Federal Court of Australia in *Trade Practices Commission v Ampol Petroleum (Victoria) Pty Ltd and Others* (1995) 127 ALR 533. In that case, a number of persons were required by the Trade Practices Commission to provide information under s.155 of the *Trade Practices Act 1974* Cth. At p.539, Davies J stated:

> *In my opinion, a s.155 examination is an occasion of the exercise of statutory power, the incidents of which are to be implied from the statute. … In this circumstance, the obligations of the TPC and of the examinees as to confidentiality, if any, arise by virtue of the statutory provision. … The communications made in the course of the examinations were subject to such duties as were to be implied from the grant of the statutory power, not from principles of common law and equity developed with respect to communications made in confidence by one person to another.*
>
> [my underlining]

64. I am satisfied that the scope of s.46(1)(a) of the FOI Act is confined to actions for breach of confidence under the general law, and does not extend to an action invoking an equitable remedy to enforce an implied statutory duty binding a government agency or official not to use or disclose information, acquired by the use of coercive statutory powers, for a purpose not authorised by the statute. I am reinforced in that conclusion by reference to the remarks of Gummow J, then sitting as a member of a Full Court of the Federal Court of Australia, in

Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) & Anor (1987) 74 ALR 428, a case which involved the application of the "breach of confidence" exemption in the Commonwealth FOI Act. Gummow J said (at p.437):

> *... If the documents for which exemption is claimed under s45* [of the Commonwealth FOI Act] *in these proceedings had been supplied by Alphapharm only pursuant to direct requirements of the* [Australian Customs] *Service under its statutory powers (eg Customs Act 1901, s 38B) I would have some difficulty in seeing how from these circumstances any obligation of confidence could arise under the general law. The question in such a case would rather be one of finding a statutory restriction (if there be one) upon use by the Service of the information in the documents, and then of measuring the terms of that statutory restriction against the terms of the exemption in s38* [which roughly corresponds to s.48 of the Queensland FOI Act] *of the* [Commonwealth] *FOI Act:* News Corp Ltd v NCSC *(1984) 52 ALR 277;* Kavvadias v Commonwealth Ombudsman *(1984) 52 ALR 728.*

65. Commissioner Albietz made observations to the same effect in *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 at pp.691-692 (paragraph 63):

> *… If the Valuer-General was doing no more than discharging a statutory obligation, one would normally look to the terms of the statute for any provisions governing the discharge of the statutory obligation. Section 8 of the VL Act did make provision for secrecy obligations to be imposed on the Valuer-General and his staff. I doubt whether an action for breach of a statutory duty of that kind properly answers the description "an action for breach of confidence", a term which I have said, at paragraph 43 of my reasons for decision in* Re "B", *refers to one or more of the three causes of action there identified. In this regard, I accept the correctness of what was said by Brennan J (with whom Dawson J agreed) in* Johns v Australian Securities Commission *(1993) 67 ALJR 850 at p.857 to the effect that a duty not to use or to disclose information obtained in exercise of a statutory power except for a purpose authorised by the statute is a duty imposed by statute, not by equity, and is enforceable by an action for a declaration, or an action for an injunction to enforce a statutory duty against a public authority. In any event, the FOI Act itself makes special provision, in s.48, for dealing with statutory secrecy obligations of this kind. The effect of the secrecy provision in the VL Act, in conjunction with s.48 of the FOI Act, is considered at paragraphs 153-174 below.*

(I note that there was no statutory secrecy provision in the *Medical Act* capable of affording a basis on which to argue that Dr Cooke's report qualifies for exemption under s.48(1) of the FOI Act.)

Findings

66. For the reasons given at paragraphs 51 to 65 above, I reject the MBQ's submission that Dr Cooke's report qualifies for exemption under s.46(1)(a) of the FOI Act on the basis that the MBQ is under a statutory duty not to use or disclose Dr Cooke's report for a purpose not authorised by the *Medical Act*, and that disclosure of the report to the applicant would amount to a breach of that statutory obligation. I am satisfied that a breach of that statutory duty would not "found an action for breach of confidence" according to the intended

meaning of that phrase in s.46(1)(a) of the FOI Act. In any event, I am satisfied that disclosure of Dr Cooke's report to the applicant would be a use implicitly authorised by the *Medical Act*, as one reasonably incidental to the purposes for which the statutory power was conferred on the MBQ to compel Dr Cooke to provide a report in response to the applicant's complaint.

Application of s.46(1)(b) of the FOI Act to Dr Cooke's report

67. While both Dr Cooke's solicitors and the MBQ referred in their submissions to the application of s.46(1)(b), neither made any specific submissions about the requirements of s.46(1)(b), or the application of those requirements to Dr Cooke's report. Dr Cooke's solicitors simply submitted that the report was of a confidential nature and was communicated in confidence. For the sake of completeness, I will deal briefly with the application of s.46(1)(b).

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

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

(b) it was communicated in confidence;

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

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

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

69. The first two requirements for exemption under s.46(1)(b) are similar in nature to requirements (b) and (c) to found an action in equity for breach of confidence (considered at paragraphs 29 to 42 above). I find that the first requirement for exemption under s.46(1)(b) is not satisfied with respect to the information in Dr Cooke's report which is materially identical to information which has already been disclosed to the applicant (see paragraph 29 above).

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

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

71. The test inherent in the phrase "communicated in confidence" in s.46(1)(b) requires an authorised decision-maker under the FOI Act to be satisfied that a communication of confidential information has occurred in such a manner, and/or in such circumstances, that a need or desire, on the part of the supplier of the information, for confidential treatment (of the supplier's identity, or information supplied, or both) has been expressly or implicitly conveyed (or otherwise must have been apparent to the recipient) and has been understood and accepted by the recipient, thereby giving rise to an express or implicit mutual understanding that the relevant information would be treated in confidence (see *Re McCann and Queensland Police Service* (1997) 4 QAR 30 at paragraph 34).

72. Dr Cooke marked his report "Strictly Confidential", but, as I remarked at paragraph 31 above, while the MBQ would ordinarily understand that material obtained for the purposes of an investigation would be treated in confidence as against the world at large, there is nothing in the material before me to suggest that the MBQ gave any indication that it would treat the report in confidence as against the applicant.

73. The circumstance that Dr Cooke's report was obtained through the exercise of coercive statutory powers supports a finding that the MBQ and Dr Cooke had an implicit mutual understanding that Dr Cooke's report would not be used or disclosed for a purpose not expressly or implicitly authorised by the *Medical Act*, and that, to that extent, the report was "communicated in confidence". However, whenever a mutual understanding exists, it is usually necessary to construe the true scope of the confidential treatment required in the circumstances; e.g., whether it was or must have been the intention of the parties that the recipient should be permitted to disclose the information to a limited class of persons, or to disclose it in certain circumstances. Thus, for example, in *Re McCann* at pp.53-54, paragraph 58, Commissioner Albietz said:

> *I consider that there are three main kinds of limited disclosure which, in the ordinary case, ought reasonably to be in the contemplation of parties to the communication of information for the purposes of an investigation relating to law enforcement. Unless excluded, or modified in their application, by express agreement or an implicit understanding based on circumstances similar to those referred to in the preceding paragraph, I consider that the following should ordinarily be regarded as implicitly authorised exceptions to any express or implicit mutual understanding that the identity of a source of information, and/or the information provided by the source, are to be treated in confidence so far as practicable (consistent with their use for the purpose for which the information was provided) –*
>
> > *(a) where selective disclosure is considered necessary for the more effective conduct of relevant investigations …;*
> >
> > …
> >
> > *(c) where selective disclosure is considered necessary -*
> >
> > > *(i) for keeping a complainant … informed of the progress of the investigation; and*
> > >
> > > *(ii) where the investigation results in no formal action being taken, for giving an account of the investigation, and the reasons for its outcome, to a complainant … .*

74. In the present case, the exceptions to the duty of the MBQ to accord confidential treatment to Dr Cooke's report would encompass any disclosure expressly or implicitly authorised by the *Medical Act*, as a disclosure consistent with, or reasonably incidental to, the purposes for which the MBQ was conferred with statutory power to require Dr Cooke to provide a written response to the applicant's complaint. Consistently with my observations at paragraph 51 above, I consider that disclosure of Dr Cooke's report to the applicant was an implicitly authorised exception to the MBQ's duty to treat Dr Cooke's report in confidence.

75. With regard to the passage from *Re McCann* quoted in paragraph 73 above, the MBQ's investigation of a patient's complaint against a medical practitioner is broadly analogous to other kinds of law enforcement and disciplinary investigations. I consider that exceptions (a) and (c) from the quoted passage are also relevant and operative in the circumstances of this case, so as to permit the MBQ to disclose to the applicant any of the information in Dr Cooke's report which is relevant and responsive to the applicant's complaint. I therefore find that the information contained in Dr Cooke's report was not "communicated in confidence", as against the applicant, and that the report does not qualify for exemption from disclosure to the applicant under s.46(1)(b) of the FOI Act.

76. The third requirement for exemption under s.46(1)(b) (see paragraph 68 above) largely turns on the test imported by the phrase "*could reasonably be expected to*", which requires a reasonably based expectation, i.e., an expectation for which real and substantial grounds exist, that disclosure of the particular matter in issue could have the specified prejudicial consequences. A mere possibility, speculation or conjecture is not enough. In this context "*expect*" means to regard as likely to happen. (See *Re "B"* at pp.339-341, paragraphs 154-160, and the Federal Court decisions referred to there.)

77. In *Re "B"*, Commissioner Albietz said (at p.341, paragraph 161):

> *Where persons are under an obligation to continue to supply such ... information (e.g. for government employees, as an incident of their employment; or where there is a statutory power to compel the disclosure of the information) or persons must disclose information if they wish to obtain some benefit from the government (or they would otherwise be disadvantaged by withholding information) then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information. In my opinion, the test is not to be applied by reference to whether the particular* [supplier] *whose ... 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 future supply of such information from a substantial number of the sources available or likely to be available to an agency.* [See also the comments to like effect made by Young CJ of the Supreme Court of Victoria in *Ryder v Booth* [1985] VR 869 at p.872.]
>
> [my underlining]

78. Here, of course, Dr Cooke's report was supplied in response to a requisition under s.37C of the *Medical Act*, with its accompanying threat that a failure to respond would itself be regarded as professional misconduct. Clearly the MBQ has quite potent coercive powers to compel medical practitioners to provide written responses to complaints lodged with the MBQ. I am not satisfied that disclosure of the matter in issue could reasonably be expected to prejudice the future supply of like information to the MBQ.

79. I note that, in *Re Chand*, where the report in issue was supplied voluntarily, the MBQ argued that the more it is reliant upon its coercive powers to obtain information from medical practitioners, the less helpful and informative the medical practitioners will be in their responses to the MBQ. In effect, the quality of the information supplied to the MBQ would be prejudiced.

80. In *Re Chand*, I acknowledged (at paragraph 59) that it may be that, in a small number of cases, medical practitioners who are compelled to answer a complaint may choose to provide brief, factually based responses, without further elaboration or explanation, which may, in turn, add difficulty to the MBQ's task in investigating some complaints. But I stated that I did not accept that that was likely to occur in a substantial number of cases. I expressed the view that it was reasonable to expect that practitioners under investigation by the MBQ would be willing to cooperate with the investigation, and provide all relevant information, both as a matter of accepted professional obligation, and to give their explanation of relevant events.

81. Certainly, Dr Cooke did not choose, in his compulsorily acquired report, to provide only a brief, factual response to the allegations made against him. To the contrary, his report contains a full and robust response to those allegations. Like Dr Cannon in *Re Chand*, it seems clear that Dr Cooke considered that he had done nothing wrong in his treatment of the applicant, and he therefore took the opportunity to explain fully to the MBQ his version of events. I consider it reasonable to expect that that is the course of action that would commend itself to most medical practitioners.

Findings

82. I find that the first requirement for exemption under s.46(1)(b) is satisfied in respect of part only of Dr Cooke's report (see paragraph 29 above), and that the second and third requirements for exemption under s.46(1)(b) are not satisfied in respect of any of the report. Accordingly, there is no need to discuss the application to the matter in issue of the public interest balancing test incorporated in s.46(1)(b). I find that Dr Cooke's report does not qualify for exemption from disclosure to the applicant under s.46(1)(b) of the FOI Act.

Application of s.50(b) of the FOI Act to Dr Cooke's report

83. Section 50(b) of the FOI Act provides:

> ***50.*** *Matter is exempt matter if its public disclosure would, apart from this Act and any immunity of the Crown—*
>
> ...
>
> *(b) be contrary to an order made or direction given by—*
>
> *(i) a royal commission or commission of inquiry; or*
>
> *(ii) a person or body having power to take evidence on oath; ...*

84. Section 37(2) and s.37(3) of the *Medical Act* related to the MBQ's power to appoint a CIC to investigate a complaint made against a medical practitioner. Those sections provided:

> ***37.(2)*** *Any person aggrieved by any alleged misconduct in a professional respect of a medical practitioner (including a specialist) may make a complaint to the Board with respect thereto.*
>
> ***(3)*** *Upon a complaint made to it under subsection two of this section the Board shall investigate such complaint and, without limiting its powers to so investigate, may—*
>
> ...
>
> *(c) in respect of the complaint, appoint 2 or more of its members to constitute a complaints investigation committee, one of whom shall be appointed by the Board to be chairman, and refer the complaint to it for investigation.*

85. Section 39(a) of the *Medical Act* provided that the CIC shall have the same powers as the MBQ to investigate the complaint as provided for in, *inter alia*, s.12 and s.13(1) of the *Medical Act*. Section 12 and s.13(1) of the *Medical Act* relevantly provided:

> ***12. Power of Board to examine on oath.*** *The Board may for the purposes of this Act examine any person on oath or take a statutory declaration from any person.*
>
> ...
>
> ***13. Board a Commission of Inquiry.*** *(1) For the purpose of hearing any application or making any investigation or holding any inquiry into any matter under this Act, the Board shall be deemed to be a Commission of Inquiry within the meaning of* The Commissions of Inquiry Acts, 1950 to 1954 *and the provisions of those Acts, other than sections 4, 4A, 10(3) and 13, shall apply accordingly.*
>
> *(2) ...*

86. I am satisfied that, for the purpose of investigating the various complaints made against Dr Cooke, the CIC was deemed to be a commission of inquiry within the meaning of the *Commissions of Inquiry Act*. Hence it was a body having power to take evidence on oath, and s.50(b)(ii) of the FOI Act could potentially be applicable.

87. I have referred, at paragraphs 11 to 13 above, to the views expressed by Commissioner Albietz regarding the non-publication order made by the CIC. I am satisfied that Commissioner Albietz's view was correct as a matter of law, and that the non-publication order made by the CIC must be read down to the extent necessary to ensure that it remains within the bounds of the relevant source of power available to the CIC, i.e., it must be read as if it were an order in the following terms:

> *This meeting of the Committee shall be conducted in camera and the Committee orders that any evidence given before it, or the contents of any book, document or writing produced at the Committee's inquiry, shall not be published except to the Board, the Medical Assessment Tribunal, or to persons the Committee is required to consult to complete its investigations.*

88. The case presented by the MBQ and supported by Dr Cooke turns on whether Dr Cooke's report was produced at the CIC's inquiry, so as to fall within the terms of the CIC's non-publication order.

Submissions of Dr Cooke and the MBQ

89. In its submission dated 10 June 1998, the MBQ stated that the complete complaint file (on which was located a copy of Dr Cooke's report) had been "made available" to the members of the CIC by the MBQ's Complaints Unit and argued that:

> *It is only right therefore to make the finding that* [Dr Cooke's report] [was] ***produced*** *(albeit not formally made an exhibit) at the hearings conducted by the Committee into the complaints lodged with the MBQ by the complainants which included the applicant.*
>
> *Although Mr Posner on behalf of the MBQ has earlier advised the Commissioner that* [Dr Cooke's report] [was] *not "tabled as evidence", he having concluded that to be so on the basis of his checking the list of exhibits for the hearings, those documents should be viewed as having been "produced" at those hearings. Accordingly,* [Dr Cooke's report] *fall*[s] *within the non-publication order which was made by the Committee pursuant to s.16 of the* Commissions of Inquiry Act …
>
> [MBQ submission dated 10 June 1998]
>
> *Our client objects* [to disclosure] *on the basis that such a document is one which responded to a requisition from the Medical Board as part of its investigation procedures. We understand that the Committee made a non-disclosure order with respect to its proceedings. In our submission this would include our client's letter as a document provided in the investigation process. Furthermore, the letter clearly would have been referred to the Complaints Investigation Committee and is therefore a document produced to it.*
>
> [Submission by Dr Cooke's solicitors dated 27 April 1998]

Analysis

90. Dr Cooke's report was brought into existence some seven months before the CIC hearing. It was produced in response the applicant's complaint, and to allow the MBQ to determine what further action, if any, it would take in relation to the complaint. Although it contained material relevant to the CIC's investigation, it was not prepared for the purposes of the CIC hearing.

91. It is clear from the information provided by the MBQ that Dr Cooke's report was not formally produced before the CIC at the hearings conducted on 25 July 1997 and 1 August 1997. Rather, it was contained on a complaint file which was made available to the CIC members to review in preparation for the hearing. On that basis, I am not satisfied that it falls within the terms of the non-publication order which the CIC was empowered to make by virtue of s.16(1) of the *Commissions of Inquiry Act.*

92. I consider that the word "produced", in the context of both s.16(1) of the *Commissions of Inquiry Act* and the terms of the non-publication order which the CIC must be taken to have made, means something more formal than merely making material, already in the possession of the MBQ, available to the CIC members. The New Shorter Oxford English Dictionary defines *"produce"* as *"bring forward or out, esp. for inspection or consideration, present to view or notice"*. The Macquarie Dictionary defines it as *"to bring forward; present to view or notice; exhibit"*.

93. In *Watson v Superintendent, Metropolitan Reception Centre* [1971] 1 NSWLR 67, Isaacs J considered s.15(6) of the *Extradition (Commonwealth Countries) Act 1966* Cth which provided that certain documents may be "produced" to the magistrate hearing an application. At p.69, Isaacs J said:

> *Does* [this] *mean "produced in evidence" or does it mean merely produced in the sense that he can view it visually without it being admitted to evidence? For myself I strongly doubt whether it means simply production in the latter sense. I think it means produced in evidence, although the words "in evidence" do not appear in this particular sub-section.*

94. In *Ex parte Normanby, Re Britliff* (1954) 54 StR (NSW) 299, Herron J considered s.618 of the *Local Government Act 1919* NSW which provided that the "production" of a copy of the Gazette containing any proclamation shall be *prima facie* evidence of the due making, confirmation and approval of such proclamation and of its contents. At pp.306-307 he said:

> *"Production" in s.618, I think, means produced to the court so as to make it evidence in the case. This is the equivalent of tendering it. ... I think ... that "production" means, in effect, "put in evidence".*

95. The wording of s.16(1) can be compared with s.5 and s.9(2)(ix) of the *Commissions of Inquiry Act*, which respectively provide:

> ***5.*** *A Chairman may, by writing under his hand, summon any person to attend before the Commission at a time and place named in the summons, and then and there to give evidence and may further require him to produce any books, documents, or writings in his custody or control, which he is required by the summons to produce.*
>
> ***9.(2)*** *A person who –*
>
> …
>
> *(ix) publishes, or permits or allows to be published, any evidence given before a Commission or any of the contents of a book, document, or writing produced at the inquiry which a Commission has ordered not to be published,*
>
> *shall be guilty of contempt of the Commission concerned.*

96. The wording used in s.5, s.9(2) and s.16(1) is the same, insofar as each provision refers to the giving of evidence and the production of books, documents or writings. I consider that the terms of s.5 and s.9(2) reinforce my view that s.16(1) was intended to provide for the protection from disclosure of (apart from oral evidence given before the inquiry) books, documents, or writings formally produced by a witness before the inquiry in response to a written summons served upon that person, or otherwise tendered in evidence to the inquiry.

97. The MBQ has provided a copy of the summons that was served on Dr Cooke in preparation for the CIC hearing. It required him to:

> *(a) attend and give evidence…; and*
> *(b) produce all books, documents or writing in* [his] *custody or control in relation to …* [the applicant] ….

98. There is no evidence before me to suggest that Dr Cooke was formally called upon by the CIC, whether in answer to the summons served upon him or otherwise, to produce the report now in issue. Mr Posner of the MBQ has confirmed that Dr Cooke's report was not listed as an exhibit, and was not tendered in evidence at the CIC's hearing.

99. I am satisfied that Dr Cooke's report was not "produced" at the CIC's inquiry, according to the meaning of that term in s.16(1) of the *Commissions of Inquiry Act*, and in the non-publication order which the CIC must be taken to have made. Accordingly, I find that disclosure of Dr Cooke's report would not be contrary to an order made or direction given by a body mentioned in s.50(b), and that it does not qualify for exemption from disclosure to the applicant under s.50(b) of the FOI Act.

100. My finding that Dr Cooke's report does not qualify for exemption under s.50(b) of the FOI Act can be supported on an additional ground. In my view, a non-publication order made by the CIC under s.16(1) of the *Commissions of Inquiry Act* cannot sensibly be construed as an order directed to, or binding on, the MBQ. A CIC was appointed by the MBQ under the provisions of the *Medical Act* for the purpose of investigating complaints on behalf of the MBQ and in order to report back, and make recommendations, to the MBQ at the conclusion of its investigation. The grant of powers under the *Commissions of Inquiry Act* to a CIC cannot be sensibly construed as enabling the CIC to make a non-publication order which is binding on the body which appointed or constituted it. Moreover, the MBQ must be free to deal with the evidence and other material given by it to the CIC, or given by the CIC to the MBQ, in order to discharge the MBQ's express or implicit statutory obligations in dealing with complaints (which are not necessarily finalised by a CIC recommendation), and which may include accounting to a complainant for the outcome of the MBQ's investigation. Both the terms of the relevant order (see paragraph 87 above) and of the CIC's actual order (see paragraph 9 above) contemplate disclosure to the MBQ of evidence given to, or documents produced at, a meeting of the CIC, and, in my view, a non-publication order made by the CIC cannot sensibly be construed as applying to the MBQ in respect of material thus disclosed to it. Certainly, the MBQ does not appear to have understood or treated the CIC's non-publication order as an order binding on the MBQ. In its letter to the applicant dated 12 September 1997, the MBQ included a summary of the evidence given by Dr Cooke to the CIC.

101. The purpose of non-publication orders under s.16(1) of the *Commissions of Inquiry Act* is to restrain journalists, witnesses, or other persons present at an inquiry (or persons who otherwise become aware of evidence given at the inquiry) from publishing sensitive evidence given or produced to that inquiry, where such publication could prejudice the inquiry or unfairly prejudice a person's rights, interests or reputation. The MBQ, or a CIC appointed by the MBQ, have no doubt been conferred with power to make non-publication orders because they receive sensitive evidence about medical treatment of individuals, and perhaps also out of concern to prevent any unfair prejudice to the professional reputation of medical practitioners by the publication of allegations that may or may not be substantiated by the MBQ's investigations.

102. However, non-publication orders are not intended, apart from exceptional circumstances, to prevent disclosure of evidence and other material to those parties who are directly involved in the relevant hearing. Normally, procedural fairness requires disclosure of relevant evidence to parties involved in the hearing, although non-publication orders may be used to bind the parties not to further disclose material of a prejudicial kind referred to above.

103. The requirements of procedural fairness are flexible, and can be adjusted for the exigencies of a particular case. In hearings of an investigative nature, there may sometimes be good reasons for keeping the evidence of a complainant, or parts of it, confidential from the subject of complaint, and *vice versa*. However, the applicant's complaint against Dr Cooke does not appear to have involved any considerations of that kind. Dr Cooke's interests and the complainant's interests could have been sensibly reconciled by permitting the complainant to hear Dr Cooke's evidence, and view relevant documents produced by Dr Cooke, even if it was considered necessary to subject the applicant to a non-publication order in respect of same.

Findings

104. For the reasons given above, I find that disclosure of Dr Cooke's report to the applicant would not be contrary to an order made or direction given by a body mentioned in s.50(b) of the FOI Act, and hence that Dr Cooke's report does not qualify for exemption from disclosure to the applicant under s.50(b) of the FOI Act.

Application of s.44(1) of the FOI Act

105. 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.*

106. In applying s.44(1) of the FOI Act, the first question to ask is whether disclosure of the matter in issue would disclose information concerning the personal affairs of a person other than the applicant for access. If that is the case, a public interest consideration favouring non-disclosure is established, and the matter in issue will be exempt, unless there are public interest considerations favouring disclosure which outweigh all public interest considerations favouring non-disclosure.

107. There are six references contained on page 5 of Dr Cooke's report (two in the last paragraph and four in the third last paragraph) to the names of two of Dr Cooke's patients or former patients (other than the applicant). Those references clearly comprise information concerning the personal affairs of those other patients. Medical information about an identifiable individual falls within the core meaning of the phrase "personal affairs", as explained by the Information Commissioner in *Re Stewart and Department of Transport* (1993) 1 QAR 227 at pp.256-257, paragraph 79. The references to the other individuals appear in Dr Cooke's report because they were in the same post-operative ward as the applicant, and they also made complaints to the MBQ about Dr Cooke. I consider that those references must properly be characterised as information concerning the personal affairs of the other patients. That information is therefore *prima facie* exempt from disclosure to the applicant under s.44(1) of the FOI Act, subject to the application of the public interest balancing test which is incorporated in s.44(1).

Public interest balancing test

108. Because of the way that s.44(1) of the FOI Act is worded and structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always tip the scales against disclosure of that information (to an extent that will vary from case to case according to the relative weight of the privacy interests attaching to the particular information in issue in the particular circumstances of any given case), and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue. It therefore becomes necessary to examine whether there are public interest considerations favouring disclosure and, if so, whether they outweigh all public interest considerations favouring non-disclosure.

109. The applicant already knows the identities of the other patients referred to on page 5 of Dr Cooke's report. Her knowledge in that regard may reduce the weight of the public interest in protecting the privacy of the relevant information about those persons, at least as against the applicant. However, the weighing process must give due regard to the fact that the FOI Act imposes no restrictions on the further use or dissemination of information which a person obtains under the FOI Act (although there may be restrictions under the general law, as contemplated by s.102(2) of the FOI Act).

110. I am unable to identify any public interest considerations weighing in favour of disclosure to the applicant of the names of the other patients, which are sufficiently strong to outweigh the public interest in protecting the privacy of medical information about identifiable individuals. I am satisfied that the applicant does not need to obtain access to the names of the other patients in order to understand Dr Cooke's response to her complaint. I consider that deletion of identifying information in respect of the other patients would adequately protect their privacy interests (*cf. Re Stewart* at p.258, paragraph 81), and would not affect the applicant's understanding of Dr Cooke's response to her complaint.

Findings

111. I find that the identifying information in respect of two of Dr Cooke's patients or former patients (other than the applicant) contained in the last paragraph, and in the third last paragraph, on page 5 of Dr Cooke's report, is exempt matter under s.44(1) of the FOI Act. I will forward to the MBQ, with these reasons for decision, a copy of page 5 of Dr Cooke's report marked up to show the information which I have decided is exempt matter under s.44(1).

Conclusion

112. For the foregoing reasons, I decide to vary the decision under review (which is identified in paragraph 7 above) by finding that:

(a) six references to the names of two of Dr Cooke's patients or former patients (other than the applicant) contained on page 5 of Dr Cooke's report (two in the last paragraph, and four in the third last paragraph), comprise exempt matter under s.44(1) of the FOI Act;

(b) the remainder of Dr Cooke's report does not qualify for exemption from disclosure to the applicant under the FOI Act, and the applicant is therefore entitled to be given access to that report under the FOI Act, subject to the deletion of the matter referred to in subparagraph (a) above.

113. I have made this decision as a delegate of the Information Commissioner's powers, under s.90 of the FOI Act.

.....
G J SORENSEN
DEPUTY INFORMATION COMMISSIONER