

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 96010
Application S 70/95

Participants:

BERNARD REES
Applicant

QUEENSLAND GENERATION CORPORATION
trading as AUSTA ELECTRIC
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents in issue concern the negotiation, and terms, of the settlement of proceedings commenced by a third party against the respondent in the Human Rights and Equal Opportunity Commission under the *Racial Discrimination Act 1975* Cth - whether documents in issue contain information concerning the personal affairs of the third party - whether disclosure of the documents in issue would, on balance, be in the public interest - application of s.44(1) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.25, s.43(1), s.44(1), s.52
Racial Discrimination Act 1975 Cth

Bleicher v Australian Capital Territory Health Authority (1990) 20 ALD 625
Commissioner of Police v The District Court of New South Wales and Perrin (1993)
31 NSWLR 606
Department of Social Security v Dyrenfurth (1988) 80 ALR 533
Fotheringham and Queensland Health, Re (Information Commissioner Qld, Decision No. 95024, 19 October 1995, unreported)
Pope and Queensland Health, Re (1994) 1 QAR 616
Stewart and Department of Transport, Re (1993) 1 QAR 227
Uksi and Redcliffe City Council, Re (Information Commissioner Qld, Decision No. 95018, 16 June 1995, unreported)

DECISION

I affirm the decision under review (being the decision made on behalf of the respondent by Mr W R Fraser on 10 February 1995).

Date of decision: 14 June 1996

.....
F N ALBIETZ
INFORMATION COMMISSIONER

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 96010
Application S 70/95

Participants:

BERNARD REES
Applicant

QUEENSLAND GENERATION CORPORATION
trading as AUSTA ELECTRIC
Respondent

REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access to documents relating to the negotiation, and terms, of the settlement of proceedings commenced by another person (referred to in these reasons for decision as the third party) against the respondent in the Human Rights and Equal Opportunity Commission (the Commission) under the *Racial Discrimination Act 1975* Cth.
2. In an application dated 26 October 1994, made under s.25 of the *Freedom of Information Act 1992* Qld (the FOI Act), the applicant sought access from the Queensland Electricity Commission (QEC), to "*documents regarding out of court settlement between QEC and [the third party] regarding charges of racism against QEC brought by [the third party] under the Racial Discrimination Act. Court hearing was held on the 14th and 15th (am) of February 1994*".
3. By letter dated 16 December 1994, Mr R M Blackburn, Senior Administration Officer for the QEC (the predecessor of the respondent corporation) informed the applicant of the QEC's decision in response to his FOI access application. Mr Blackburn decided to grant access to two documents (a transcript of proceedings before Commissioner W Carter QC of the Commission on 15 February 1994, and a letter which the applicant had written to the Minister for Minerals and Energy), but refused access to a further 18 documents on the grounds that they were exempt under s.43(1) (legal professional privilege) and/or s.44(1) (matter concerning personal affairs) of the FOI Act.

4. By letter dated 12 January 1995, the applicant requested, in accordance with s.52 of the FOI Act, an internal review of the decision to refuse access to those 18 documents. The internal review was undertaken by Mr W R Fraser, Manager - Finance and Strategic Processes, of the respondent corporation. Mr Fraser informed the applicant, by letter dated 10 February 1995, that he had varied Mr Blackburn's initial decision by granting access in part to a further folio (folio 47(b)), but that in all other respects he affirmed Mr Blackburn's initial decision.
5. By letter dated 3 March 1995, the applicant applied for review by the Information Commissioner, under Part 5 of the FOI Act, of Mr Fraser's decision, saying:

The information relates to the outcome of the inquiry in which [the third party] brought charges against the Queensland Electricity Commission (now AUSTA Electric) under the Racial Discrimination Act.

In bringing these charges against the QEC, [the third party] made very serious accusations against me personally, as an individual.

The case was settled out of court on the second day of the hearing by QEC, without my involvement, thus depriving me of the right to prove my innocence and by implication, admitted guilt on my behalf. The claims made by [the third party], including charges against me were neither withdrawn NOR admitted on settlement.

I feel very betrayed that not only did QEC not defend the charges made against me as an individual, which has been confirmed by the QEC, but settled the case hastily and without considering my health and feelings, thus denying me the right to see that justice is done.

Because the charges made against me are still standing and the whole affair was shrouded in secrecy, for reasons best known to the QEC, I have tried in vain, various channels to seek answers to many questions I have pertaining to the case... .

External review process

6. The documents to which the applicant was refused access have been obtained from the respondent and examined. By letter to the applicant dated 17 January 1996, the Deputy Information Commissioner conveyed to the applicant his preliminary views on the application of s.43(1) and s.44(1) of the FOI Act to the documents to which the applicant had been refused access, which were categorised as follows:
 1. Notes of meetings and conversations, made by the QEC's legal officer (Documents 7, 8, 46, 53, 57 and 60)
 2. Memoranda from the QEC's legal officer to other officers of the QEC (Documents 27 and 37)
 3. Letters from the QEC's solicitors (Minter Ellison Morris Fletcher) to the QEC (Documents 34 and 38)

4. Letters from the QEC to the third party or his solicitors (Documents 11 and 40)
 5. Letters from Minter Ellison Morris Fletcher to the solicitors for the third party (Documents 32, 50 and the last 2 pages of document 52)
 6. Letters from the solicitors for the third party to Minter Ellison Morris Fletcher (Documents 33, 59 and the first 3 pages of document 52)
 7. Draft of a letter to the applicant from the then Minister for Minerals and Energy (Document 47(b), for which a partial exemption is claimed).
7. The documents in categories 1, 2 and 3, and the matter deleted from the document in category 7, are claimed by the respondent to be exempt under s.43(1) of the FOI Act.
 8. The documents in categories 4, 5 and 6, and certain documents in categories 1, 2 and 3, are claimed by the respondent to be exempt under s.44(1) of the FOI Act.
 9. In a letter to me dated 25 January 1996, the applicant said:

I should point out that I only want access to documents relating to the final out of court settlement details. I am not interested in any documents that were communicated between different persons or records of telephone conversations before or during the hearing, which only lasted one day.

10. A member of my staff sought clarification from Mr Rees of the documents to which he wished to pursue access. In a telephone conversation on 1 February 1996, Mr Rees confirmed that he was not seeking access to the documents subject to the claim of legal professional privilege (categories 1, 2 and 3) or to the balance of the draft version of the Minister's letter to him (category 7). Mr Rees stated that he was only interested in the details of the final settlement with the third party. Those details appear in documents in categories 4, 5 and 6 above. Mr Rees also confirmed that his letter dated 25 January 1996 should be treated as his submission in respect of the documents in issue.
11. Therefore the documents remaining in issue in this review are the documents in categories 4, 5 and 6 above, which had been numbered by the respondent, for identification purposes, as documents 11, 32, 33, 40, 50, 52 and 59. They are described more precisely below:
 - document 11 copy, "Without Prejudice" letter dated 30 December 1993 from the QEC to Crowley & Greenhalgh (the solicitors for the third party)
 - document 32 letter dated 15 February 1994 from Minter Ellison Morris Fletcher (solicitors for QEC) to Crowley & Greenhalgh
 - document 33 letter dated 15 February 1994 from Crowley & Greenhalgh to Minter Ellison Morris Fletcher
 - document 40 letter dated 18 February 1994 from the QEC to the third

party

- document 50 copy, letter dated 4 March 1994 from Minter Ellison Morris Fletcher to Crowley & Greenhalgh
- document 52 letter dated 9 March 1994 from Crowley & Greenhalgh to Minter Ellison Morris Fletcher and letter dated 18 March 1994 from Minter Ellison Morris Fletcher to Crowley & Greenhalgh
- document 59 letter dated 22 April 1994 from Crowley & Greenhalgh to Minter Ellison Morris Fletcher.

12. These documents contain the terms of settlement arrived at between the QEC and the third party in order to settle the inquiry and hearing under the *Racial Discrimination Act 1975* Cth commenced by the third party against the QEC, and correspondence relating to the negotiation of, and compliance with, the terms of settlement.
13. The submissions which the applicant has addressed to me in support of his case in this external review are reproduced below:

I told the solicitors representing QEC only days before the commencement of the hearing that I did not want a settlement under any circumstances as I wanted the right to prove my innocence. I was assured that there would be no settlement. In bringing the charges against QEC, [the third party] made very serious accusations against me personally as an individual. On the second morning of the hearing, QEC unilaterally settled the case out of court without my knowledge and by implication admitted guilt on my behalf, thus depriving me of the right to prove my innocence. I have been told by a QEC appointed psychologist that in settling out of court QEC took all the anguish and stress off [the third party] and dumped it squarely on me.

In regard to the settlement, the court transcript shows that the matter was resolved without admission of liability by any party and in regard to costs, it was agreed that [the third party] would not be "disadvantaged". I have been told by my MLA Mr T Sullivan that the money paid to [the third party] was approximately \$30,000. A more accurate figure is a common knowledge within Austa Electric. In addition to financial compensation, [the third party] was promoted to a higher grade.

I realise that the term "personal affairs" could be applied to "anything", but I am looking for some relief or exoneration in order to bring this unpleasant and upsetting saga to a close.

Application of s.44(1)

14. Section 44(1) and s.44(2) of the FOI Act provide:

44.(1) *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

(2) *Matter is not exempt under subsection (1) merely because it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to a document containing the matter is being made.*

Does the information in issue concern a person's personal affairs?

15. In my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, I identified the various provisions of the FOI Act which employ the term “personal affairs” and discussed in detail the meaning of the phrase “personal affairs of a person”, and relevant variations thereof, in the FOI Act (see pp.256-267, paragraphs 79-114, of *Re Stewart*). In particular, I said that information concerns the “personal affairs of a person” if it relates to the private aspects of a person’s life, and that, while there may be a substantial grey area within the ambit of the phrase “personal affairs”, that phrase has a well accepted core meaning which includes:

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

Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, to be determined according to the proper characterisation of the information in question.

16. I have previously expressed the view that information which merely concerns the performance by an employee of a government Department or agency of his or her employment duties is ordinarily incapable of being properly characterised as information concerning the employee's personal affairs, for the purposes of the FOI Act: see *Re Pope and Queensland Health* (1994) 1 QAR 616 at p.660 (paragraph 116). This is because the affairs are ordinarily not those of the employee but those of the government Department or agency on behalf of which the employee performs his or her duties of employment (cf. the passage from the judgment of Kirby P in *Commissioner of Police v The District Court of New South Wales and Perrin* (1993) 31 NSWLR 606 at p.625, which is quoted in *Re Stewart* at p.259, paragraph 84). I have used the word "ordinarily" in the preceding two sentences because information which, in a broad sense, concerns the performance by an employee of his or her employment duties is capable of straying into the realm of information concerning the personal affairs of the employee as an individual, as has been recognised by the Federal Court of Australia in *Department of Social Security v Dyrenfurth* (1988) 80 ALR 533 and *Bleicher v Australian Capital Territory Health Authority* (1990) 20 ALD 625: see in particular the extracts from these cases set out in *Re Stewart* at pp.240-263, paragraphs 33-36. Moreover, in *Re Stewart*, I said (at pp.261-262, paragraphs 92 and 94):

92. ...*There are also a number of cases...which deal with matters incidental to the relationship of employee and employer and which could properly be said to concern the employee's "personal affairs". Without resiling from the principles I have endorsed above, I consider that there is a relevant distinction to be drawn in respect of matters that relate to an employee as an individual, rather than an employee as agent or representative of the employer, and some matters in the former category may*

fall within the meaning of the phrase "personal affairs", as it has been explained above.

...

94. I also endorse the principle stated by Smith J (President) of the Victorian AAT in Re Pertion and Attorney-General's Department (1992) 5 VAR 302 at 319.

In our view, material which discloses a complaint or allegations made to the Commissioner for Equal Opportunity pursuant to the Racial Discrimination Act, and the Sex Discrimination Act, as is the case here, will in many circumstances be regarded as 'personal affairs'. This is notwithstanding that the complaint and allegations concern incidents that arose in the work place in the context of a person's employment. Whether or not such material relates to a person's personal affairs is ultimately a question of fact depending on the documents in issue and the context in which they were created.

17. In the present case, the third party's complaints of racial discrimination related to workplace incidents arising from his employment with the QEC. However, the documents in issue do not address the detail or merits of the substantive dispute between the third party and the QEC. (They do not, for instance, refer to the applicant, or workplace incidents involving he applicant, in any way). A settlement proposal had been put forward at a conciliation conference in the Commission. The documents in issue concern subsequent negotiations in respect of that proposal, culminating in agreed terms of settlement, and subsequent exchanges concerning the interpretation and implementation of the agreed terms of settlement.
18. I consider that the commencement, and conduct, by the third party of his proceedings in the Commission against the QEC must properly to be characterised as a personal affair of the third party. In the commencement and conduct of those proceedings, I consider that the third party acted in a purely personal capacity, certainly not as an agent or representative of his employer. He was pursuing a legal remedy enabling the redress of detriment suffered as an individual, notwithstanding that it might have occurred in an employment context. The manner in which he conducted the proceedings was a matter for himself (in consultation with the legal advisers he engaged to represent his interests).
19. I do not mean to convey that any involvement by an individual in litigation, or the pursuit of a legal remedy, is necessarily a personal affair of the individual. I consider, for example, that the commencement and conduct of legal action, by an individual who carries on a trade, business or profession, to recover money owed in respect of goods or services provided, should properly be characterised as the individual's business or professional affairs. On the other hand, I would regard the commencement and conduct of an action for damages for personal injuries, by an employee injured at work, as a personal affair of the injured employee, notwithstanding that it occurred in the course of the performance of the employee's duties of employment.

20. Nor do I mean to convey that, where litigation or the pursuit of a legal remedy is properly to be characterised as being an individual's personal affair, any document or information connected with the litigation (or the pursuit of the legal remedy) is necessarily information which concerns the individual's personal affairs. The primary issue in the application of s.44(1) of the FOI Act is always the proper characterisation of the particular information in issue, i.e., what is the information about?
21. In the present case, the information in issue is about the settlement of the proceedings in the Commission, brought by the third party, in a purely personal capacity, to pursue a legal remedy, including the third party's choices as to the basis on which he was prepared to compromise his rights to pursue that legal remedy to the full extent permitted by the law. I consider that the documents in issue comprise information which is properly to be characterised as information concerning the personal affairs of the third party, and which is therefore *prima facie* exempt from disclosure, under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.44(1).
22. Before leaving the characterisation issue, I should note that, even though it may properly be characterised as a personal affair of an individual, the pursuit of a legal remedy through litigation in courts or tribunals, or by other prescribed means, frequently involves information relevant to the pursuit of the legal remedy becoming a matter of public record. It is arguable that any information which becomes a matter of public record ceases to be information which concerns the private aspects of a person's life, and hence should be ineligible for exemption under s.44(1) of the FOI Act (*cf. Re Stewart* at pp.251-252, paragraphs 60-62).
Alternatively, if it remains information which concerns a person's personal affairs, the fact that the information is accessible from public records would significantly diminish the weight to be accorded to the public interest in protecting that personal affairs information from disclosure under the FOI Act, when that public interest is to be weighed against identifiable public interest considerations which favour disclosure of the information: see *Re Uksi and Redcliffe City Council* (Information Commissioner Qld, Decision No. 95018, 16 June 1995, unreported) at paragraph 48; *Re Fotheringham and Queensland Health* (Information Commissioner Qld, Decision No. 95024, 19 October 1995, unreported) at paragraphs 26-29.
23. In the present case, the settlement of the third party's proceedings against the QEC was reached by negotiation outside the Commission, with agreement that the terms of settlement remain confidential to the parties. The terms of settlement have not become a matter of public record: they are not recorded in any public document available through the Commission.

Application of the public interest balancing test

24. The applicant's submissions appear to place reliance on a public interest consideration of a kind I have accepted in previous decisions, that is, the public interest in the fair treatment of an individual, in this instance the applicant himself. However, it is clear from my examination of the documents in issue that they contain no information which, if disclosed, would be capable of answering any of the concerns raised in the applicant's submission, apart from his expressed desire to know the actual terms of settlement. Disclosure of the documents in issue would not further the applicant's understanding of the details of the third party's complaints against the applicant, or of any views that might have been held by the QEC or the Commission in respect of them.

25. The allegations made by the third party concerning the workplace conduct of Mr Rees comprised only a small element of a complex series of allegations made against the QEC and several of its officers. Mr Rees was not a party to the proceedings in the Commission, and though he may have been required as a witness in support of the QEC's case in any formal hearing, he was not in a position to direct the QEC's conduct of the proceedings, or insist upon an opportunity to prove his innocence. The transcript of proceedings in the Commission before Commissioner W Carter QC on 15 February 1994 records that the parties had resolved the matter without any admission of liability by any party. The QEC did not admit any breach of the *Racial Discrimination Act* by it or its employees, and no breach was proved by the third party in proceedings before the Commission. The basis of settlement could not give rise to any implication in law that the applicant was guilty of breaches of the *Racial Discrimination Act*.
26. A party's assessment of its prospects of success in litigation is not always the dominant factor in prompting it to seek a negotiated settlement of a dispute. Moreover, the QEC's assessment of its prospects of successfully defending the specific allegations involving Mr Rees would necessarily have been a minor factor in determining its strategy for the conduct of a much broader and more complex dispute. I note the following comments made by Commissioner Carter after the parties had announced that a settlement had been reached:

And might I commend actually both sides for coming to some measure of unanimity in this respect, and I trust that the workplace relationship will be fruitful and worthwhile, and I am sure it will be. I think there is a measure of goodwill on both sides. These matters of concern arise from time to time and are genuinely felt, and indeed are genuinely resisted. The legislation is designed to provide the resolution of any disputes which might arise in that respect, but I can commend both sides.

It has been a very difficult case, a very difficult case from my point of view, and I am sure an enormously difficult case from [the third party's] point of view and from the [QEC's] point of view, and I have sympathy for each of you. And that is why I feel that you have both acted very responsibly in this respect. I think untold damage can be done through litigation and I think now is the time for people to look forward with some measure of equanimity towards seeking to achieve a rapprochement, if that is the right word, in your future relationship as employer and employee.

27. Apart from the concerns raised by the applicant, there is a general public interest in the accountability of government agencies for the conduct of their operations and the expenditure of their funds. However, I consider that the public interest in the accountability of the QEC, for its conduct and settlement of the proceedings brought by the third party in the Commission, is counterbalanced in this instance by the public interest in assisting to secure a lasting settlement of a sensitive dispute (in circumstances where settlement involves a continuation of the employer-employee relationship between the previous disputants) by respecting the agreement of the parties that the terms of settlement remain confidential.
28. I am not satisfied that the public interest considerations favouring disclosure of the documents in issue are of sufficient weight to justify a finding that their disclosure would, on balance, be in the public interest.

29. I therefore find that documents 11, 32, 33, 40, 50, 52 and 59 comprise exempt matter under s.44(1) of the FOI Act.

Decision

30. I affirm the decision under review.

.....
F N ALBIETZ
INFORMATION COMMISSIONER