Prisoners' Legal Service Inc. and Department of Corrective Services

(S 110/00, 24 April 2001, Information Commissioner)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.-2. These paragraphs deleted.

REASONS FOR DECISION

Background

3. The applicant seeks review of a decision by the Queensland Corrective Services Commission (now the Department of Corrective Services ("the DCS")) to refuse it access, under the FOI Act, to parts of an investigation report by Mr Horton (an inspector appointed under the *Corrective Services (Administration) Act 1988* Qld) on the circumstances surrounding the death in custody of inmate [B] at the Arthur Gorrie Correctional Centre ("the AGCC") on 1 March 1993.

4. This review is somewhat unusual in that it is a renewal of an earlier external review application made by the applicant in 1994 (external review no. S 67/94), in which the applicant sought access to Mr Horton's report. As I will detail below, the applicant agreed to withdraw its earlier application for external review, on the basis that the DCS indicated, during the course of that review, that it was prepared to give the applicant administrative access to certain parts of the report. Unfortunately, such access was not granted for various reasons, and the applicant therefore applied to me on 22 May 2000 to renew its application for external review of the decision by the DCS to refuse access to the report. In the circumstances, I was prepared to exercise my discretion to re-open the external review. No objection was taken by the DCS (or by any third party subsequently involved in this review) to that course of action.

5. The applicant had originally applied for access to Mr Horton's report by letter to the DCS dated 20 May 1993. By letter dated 7 September 1993, Ms Patricia Cabaniuk advised the applicant that she had identified a 21 page report and a 191 page appendix as falling within the terms of the applicant's FOI access application, and that she had decided that those documents were exempt from disclosure under ss.41(1), 42(1)(a), 42(1)(b), 42(1)(c), 42(1)(e), 42(1)(g), 42(1)(h), 42(1)(j), 44(1), 46(1)(a), 46(1)(b) and 48(1) of the FOI Act.

6. By letter dated 5 October 1993, the applicant requested an internal review of Ms Cabaniuk's decision. The DCS did not process the applicant's application for internal review within the time limit specified by the FOI Act. Accordingly, under s.52(6) of the FOI Act, the DCS was, at the end of the relevant period, taken to have made a decision affirming Ms Cabaniuk's decision to refuse access to the report. By letter dated 14 April 1994, the applicant applied to me for review of the refusal of access by the DCS.

7. As I mentioned above, during the course of the earlier review, the DCS indicated that it was prepared to give the applicant administrative access to certain parts of the report, i.e., access outside the scope of the FOI Act. On that basis, but before actually obtaining access to the relevant parts of the report, the applicant withdrew its application for external review and I closed my file. However, such administrative access was never given due to a change in policy within the DCS and so, by letter dated 22 May 2000, the applicant applied to me to renew its application for external review.

External review process

8. A copy of the report was obtained and examined. In the early stages of the review, the applicant indicated that it was prepared to confine its application for access to three pages of the report, comprising the "Summary of Findings" on page 1, and the "Recommendations" contained on pages 2 and 3. Following discussions with staff of my office, the DCS advised that it was prepared to withdraw its claims for exemption in respect of those three pages. However, the DCS advised that it had consulted with the managers of the AGCC, namely, Australasian Correctional Management Pty Ltd ("ACM") regarding disclosure of the matter in issue and that ACM had advised that it objected to disclosure. (ACM is a private company which operates the AGCC pursuant to a contract with the DCS). Accordingly, by letter dated 8 November 2000, Assistant Information Commissioner Moss wrote to ACM, in accordance with s.74(1)(b) of the FOI Act, to advise it of my review and to invite it, pursuant to s.78 of the FOI Act, to become a participant. In her letter, Assistant Information Commissioner Moss also took the opportunity to communicate her preliminary view that, on the basis of the material before her, the matter in issue did not qualify for exemption under the FOI Act. In the event that it did not accept that preliminary view and wished to participate in the review, ACM was invited to lodge written submissions and/or evidence in support of its case for exemption of the matter in issue.

9. By facsimile dated 17 November 2000, ACM's solicitors confirmed that ACM wished to participate in the review. They further advised that ACM withdrew its objection to the disclosure of pages 2 and 3 of the report, (i.e., the "Recommendations") but maintained its objection to the disclosure of page 1 (i.e., the "Summary of Findings") on the basis that that matter was exempt under s.41(1) of the FOI Act. (The applicant has been given access to pages 2 and 3 of the report and they are no longer in issue in this review).

10. By letter dated 16 January 2001, ACM's solicitors lodged a written submission in support of ACM's case for exemption of page 1 of the report under s.41(1) of the FOI Act. Copies of ACM's submission were provided to the applicant and the DCS for response. The DCS advised that it did not wish to provide any material in response. By letter dated 23 February 2001, the applicant lodged a submission in reply, copies of which were provided to the solicitors for ACM for response, and to the DCS for its information.

11. By facsimile letter dated 16 March 2001, ACM's solicitors lodged short points of reply which were, in turn, provided to the applicant and to the DCS.

12. In making my decision in this review, I have taken into account the following:

1. the matter remaining in issue, namely page 1 of the report;
2. the applicant's FOI access application dated 20 May 1993;
3. the decision by Ms Cabaniuk on behalf of the DCS dated 7 September 1993;
4. the applicant's application for external review dated 14 April 1994, letter dated 22 May 2000 and submission dated 23 February 2001; and
5. the submissions lodged on behalf of ACM dated 16 January 2001 and 16 March 2001.

13. I have also had regard to parts of a submission, dated 21 April 1995, which was lodged on behalf of ACM in the earlier external review. Although this submission was lodged in support of ACM's case for exemption of the entire report, it contains brief submissions which are relevant to ACM's present case for exemption under s.41(1) of the FOI Act in respect of page 1 of the report. A copy of that submission was provided to the DCS and the applicant during the course of the earlier review.

Application of s.41(1) of the FOI Act to the matter in issue

14. Section 41(1) of the FOI Act provides:

> ***41.(1)*** *Matter is exempt matter if its disclosure—*
>
> *(a) would disclose—*
>
> *(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or*
>
> *(ii) a consultation or deliberation that has taken place;*
>
> *in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and*
>
> *(b) would, on balance, be contrary to the public interest.*

15. A detailed analysis of s.41 of the FOI Act can be found in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.66-72, where, at p.68 (paragraphs 21-22), I said:

> *21. Thus, for matter in a document to fall within s.41(1), there must be a positive answer to two questions:*
>
> *(a) would disclosure of the matter disclose any opinion, advice, or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, (in either case) in the course of, or for the purposes of, the deliberative processes involved in the functions of government? and*

(b) would disclosure, on balance, be contrary to the public interest?

22. The fact that a document falls within s.41(1)(a) (ie. that it is a deliberative process document) carries no presumption that its disclosure would be contrary to the public interest. ...

16. An applicant for access is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; an applicant is entitled to access unless an agency (or third party objector) can establish that disclosure of the relevant deliberative process matter would be contrary to the public interest. In *Re Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206, I said (at paragraph 34):

> *The correct approach to the application of s.41(1)(b) of the FOI Act was analysed at length in my reasons for decision in* Re Eccleston, *where I indicated (see p.110; paragraph 140) that an agency or Minister seeking to rely on s.41(1)(a) needs to establish that specific and tangible harm to an identifiable public interest (or interests) would result from disclosure of the particular deliberative process matter in issue. It must further be established that the harm is of sufficient gravity when weighed against competing public interest considerations which favour disclosure of the matter in issue, that it would nevertheless be proper to find that disclosure of the matter in issue would, on balance, be contrary to the public interest.*

Deliberative process matter

17. I am satisfied that the matter in issue meets the requirements of s.41(1)(a) of the FOI Act because it discloses an opinion, advice or recommendation that has been obtained, prepared or recorded, or a consultation or deliberation that has taken place, in the course of, or for the purposes of, the DCS's deliberative processes in deciding what action should be taken as a result of the circumstances surrounding the death in custody of [B]. I must therefore consider whether disclosure of the matter in issue would, on balance, be contrary to the public interest.

Public interest considerations

18. The public interest considerations favouring non-disclosure of the matter in issue as identified by ACM in its various submissions are as follows:

6. disclosure would inhibit frankness and candour by inspectors in the preparation of future reports and restrict the effectiveness of future investigations;
7. the passage of time and the turnover of management staff at AGCC mean that it would be almost impossible to obtain any value from disclosure of the matter in issue;
8. ACM stands to have its corporate reputation called into question in relation to events occurring many years ago under a different management regime;
9. the matter in issue contains no valuable forensic material but is simply the unchallenged opinion of the investigator;

10. the public interest in scrutinising the circumstances surrounding the death of [B] has been satisfied by the holding of a coronial inquest and by the disclosure of the "Recommendations" on pages 2 and 3 of the report.

19. ACM also submitted that my decision in *Re Prisoners' Legal Service Inc. and Queensland Corrective Services Commission* (1997) 3 QAR 503, where I decided that the bulk of an inspector's report into a death in custody which was in issue in that case (the "Eames Report") was not exempt from disclosure under the FOI Act, could be distinguished on the grounds that Mr Eames was murdered whereas [B] committed suicide, together with the fact that an inquest was held into [B's] death, which did not occur in relation to Mr Eames.

20. The applicant identified the following public interest considerations weighing in favour of disclosure of the matter in issue:

11. the accountability of ACM and the DCS as regards their duty of care for [B], who died whilst held in a designated "protection" unit at a privately operated prison;
12. the public interest in reviewing the findings made by the inspector and scrutinising the actions taken by ACM to prevent such incidents occurring again.

21. In response to ACM's submission that the public interest in the release of the matter in issue has been significantly diminished by the passage of time, the applicant submitted:

> … *PLS has been attempting to access this report for nearly eight years.*
>
> *We submit that the extensive delays we have experienced in attempting to access the material should not be permitted as grounds for refusal of access. This could potentially provide added incentive for those dealing with FOI requests to be slow in responding to such requests.*
>
> *Additionally, the AGCC is still operated by ACM under contract and still houses vulnerable remand prisoners in "protection" units, about which we still receive complaints from prisoners who claim there is inadequate protection.*
>
> *We remain anxious to satisfy ourselves that the ACM and the DCS have heeded the findings of the Inspector's report into* [B's] *death and have implemented recommendations where appropriate.*

22. Finally, in response to ACM's submission that my decision in relation to the disclosure of the "Eames Report" could be distinguished from the facts in this case, the applicant submitted:

> … *we submit that any findings and recommendations in relation to suicide prevention, and protection from sexual assault, are of great public interest, just as the report on the circumstances surrounding Mr Eames' murder was.*

We would also point out that there were criminal proceedings in relation to the death of Mr Eames, and that the existence of these proceedings did not result in a decision (by the Information Commissioner) *that the Investigator's report should not be released….*

Discussion

23. As regards ACM's "candour and frankness" argument, I stated as follows in *Re Eccleston* at pp.106-107 (paragraphs 132-135) in relation to such an argument:

> *1. I consider that the approach which should be adopted in Queensland to claims for exemption under s.41 based on the third Howard criterion (i.e. that the public interest would be injured by the disclosure of particular documents because candour and frankness would be inhibited in future communications of a similar kind) should accord with that stated by Deputy President Todd of the Commonwealth AAT in the second* Fewster *case (see paragraph 129 above): they should be disregarded unless a very particular factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative process communications of a like kind, and that tangible harm to the public interest will result from that inhibition.*
>
> …
>
> *In the absence of clear, specific and credible evidence, I would not be prepared to accept that the substance or quality of advice prepared by professional public servants could be materially altered for the worse, by the threat of disclosure under the FOI Act.*

24. There is no clear, specific and credible evidence before me to suggest that disclosure of the matter in issue would inhibit frankness and candour by inspectors in the preparation of future reports. Since my decision in *Re Prisoners' Legal Service Inc.*, where I found that the bulk of the "Eames Report" was not exempt from disclosure under the FOI Act, other inspectors' reports have come before me as matter in issue in FOI reviews and there has been nothing to suggest that the authors of those reports have been any less frank or candid in their analysis, findings or recommendations, as a result of the disclosure of the "Eames Report".

25. Accordingly, I do not attach any significant weight to the "candour and frankness" argument raised by ACM as a public interest consideration favouring non-disclosure of the matter in issue.

26. I consider that there is a significant public interest in the community in general, and in representative groups such as the applicant in particular, being informed of the findings of inspectors who are appointed to investigate deaths in custody. As I said in *Re Prisoners' Legal Service Inc.*, (at paragraph 82):

> *1. … The punishment and rehabilitation of criminal offenders, the effectiveness of the administration of systems established for that purpose, and their cost to the public, are matters of real public interest, and there is,*

> *in my opinion, a strong public interest in disclosure of information which will enhance public scrutiny of, and accountability for, the conduct of those operations on behalf of the people of Queensland. … One of the fundamental responsibilities of the QCSC is the safe custody and welfare of prisoners …. It is appropriate that it be accountable to the public for the occurrence of a fatal assault on a prisoner in its custody, and for the measures taken to prevent a similar incident occurring in the future. Disclosure of the matter in issue will enhance the accountability to the QCSC in that regard, and to the extent that disclosure of the matter in issue can be made without prejudicing the ability of the QCSC to continue to ensure the security of prisoners and the safe custody and welfare of prisoners, then the balance of the public interest, in my opinion, clearly favours disclosure of the matter in issue.*

27. While I acknowledge that this case involves a suicide in custody rather than a murder, I do not consider that that diminishes the public interest in the accountability of ACM and the DCS as regards their management of [B]. I remain of the view that ACM and the DCS are accountable to the public for the steps they took to care for [B's] welfare while he was incarcerated, and for the steps they took after his death to try to prevent other inmates at risk from committing suicide. I consider that disclosure of the matter in issue will enhance the accountability of ACM and the DCS in that regard. Nor do I consider the fact that a number of years have passed since the incident occurred, or that an inquest was held into [B's] death, as lessening the public interest in obtaining access to the matter in issue. It remains the fact that Mr Horton's findings have not been publicly disclosed and there is, in my view, a continuing public interest (which has not been extinguished by the passing of time) in the applicant being given the opportunity to satisfy itself that ACM and the DCS have heeded the inspector's findings and have implemented appropriate measures regarding the future management of inmates at AGCC. In my view, that public interest consideration outweighs significantly, ACM's stated concerns about possible damage to its corporate reputation. Such concerns are, in any event, merely speculative.

28. As regards ACM's submission that disclosure of the matter in issue would damage the reputations of the officers involved, I note that the matter in issue does not identify, or adversely refer to, any particular officer. Rather, it is a general discussion of methods and procedures.

29. Accordingly, I am not persuaded that ACM has discharged the onus upon it to establish that disclosure of the matter in issue would, on balance, be contrary to the public interest. As I have indicated above, it is my view that the public interest considerations in favour of disclosure of the matter in issue outweigh significantly, the public interest considerations identified by ACM as favouring non-disclosure. I therefore am not satisfied that the matter in issue qualifies for exemption under s.41(1) of the FOI Act.

DECISION

30. For the reasons explained above, I set aside the decision by Ms Cabaniuk of the DCS dated 7 September 1993. In substitution for it, I decide that the matter in issue, comprising page 1 of the report referred to in paragraph 3 above, is not exempt matter under s.41(1) of the FOI Act, and that the applicant is therefore entitled to be given access to it.