



Decision and Reasons for Decision

Application Number: 210628

Applicant: Ms L West

Respondent: Banana Shire Council

Decision Date: 19 May 2009

Catchwords: **FREEDOM OF INFORMATION – Section 44(1) of the *Freedom of Information Act 1992 (Qld)* – information concerning the personal affairs of person – identifying information about complainants**

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REASONS FOR DECISION

Summary

1. Having considered the parties' submissions and evidence, relevant legislation, case law and decisions, I am satisfied that access to the Complainant Details should be refused under section 44(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) on the basis that:
 - the information concerns the personal affairs information of other persons
 - on balance, disclosure of the information is not in the public interest.

Background

2. By undated letter received by Banana Shire Council (**Council**) on 30 July 2008, the applicant applied for access to '*all the Council records and correspondence in relation to the complaint of [the applicant's] dogs barking*' (**FOI Application**).
3. By letter dated 8 September 2008 (**Original Decision**) Council's Chief Executive Officer, Mr Jason Bradshaw (**CEO**), provided the applicant with partial access to a two page form titled 'Animal Nuisance Complaint'¹ (**Complaint Form**) and advised that identifying information about the persons who had made the complaints (**Complainant Details**) had been withheld under section 27(3) of the FOI Act on the basis that the information was irrelevant to the FOI Application.
4. The Original Decision mistakenly² informed the applicant of a right of internal review and accordingly the applicant applied to Council for an internal review on 10 September 2008 (**Internal Review Application**).
5. By letter dated 24 September 2008, Council's Acting Director of Corporate Services, Mr Dennis Carr, informed the applicant that he had decided to deny her access to the Complainant Details under sections 42(1)(b), 42(1)(ca) and 42(1)(e) of the FOI Act (**Internal Review Response**).
6. By letter dated 1 October 2008 the applicant applied to this Office for external review of the Internal Review Response (**External Review Application**).

Decision under review

7. The decision under review is the Original Decision referred to in paragraph 3 above.

Steps taken in the external review process

8. In correspondence received by Council on 14 October 2008 this Office:
 - informed Council that the External Review Application had been accepted

¹ Made pursuant to section 25(3) of the Banana Shire Council (Keeping and Controlling of Animals) Local Law No.6.

² Under section 52(3) of the FOI Act there is no right of internal review if the decision on the FOI application is made by an agency's 'principal officer'. Under section 7 of the FOI Act a 'principal officer' of a local government is the CEO. As the Initial Decision was decided by the CEO of Council, no right of internal review arises and the applicant must apply for external review of the Initial Decision. For the purposes of this review I have also considered Council's views as expressed in the Internal Review Response as being a submission.

- requested that Council provide copies of the documents relevant to the review
 - provided Council with the opportunity to submit any additional information it wished to rely on to support its claims for exemption/exclusion under the FOI Act.
9. By letter dated 10 October 2008 Acting Information Commissioner Kinross indicated to the applicant that the External Review Application had been accepted.
 10. By letter dated 23 October 2008 Council provided this Office with a copy of the Complaint Form.
 11. By letter dated 30 October 2008 Council provided submissions in support of its claims under sections 27(3), 42(1)(b), 42(1)(ca) and 42(1)(e) of the FOI Act.
 12. On 29 January 2009 this Office contacted two of the Complainants³ to discuss the possibility of release of the Complainants Details in the context of this FOI Application. Both Complainants stated they did not want the Complainant Details disclosed. During the course of these discussions, one of the Complainants indicated that the applicant was no longer living at her provided address.
 13. On 2 February 2009 this Office, wrote to the applicant at her provided address to request information concerning her current address.⁴
 14. On 4 February 2009 the applicant telephoned this Office to confirm that she had moved. The applicant provided this Office with the details of her new address.
 15. On 9 February 2009 this Office contacted Council and informed it that it was considering the potential application of section 44(1) of the FOI Act to the Complainant Details. Council was provided the opportunity to provide submissions but stated that it did not wish to take up the opportunity.
 16. By letter dated 9 October 2009 Acting Assistant Commissioner Jefferies provided the applicant with a preliminary view that the Complainant Details qualified for exemption under section 44(1) of the FOI Act.
 17. By letter dated 17 February 2009 the applicant indicated that she did not accept the preliminary view.
 18. In making my decision in this review, I have taken into account the following:
 - the FOI Application, Internal Review Application and External Review Application
 - the Original Decision and Internal Review Response
 - the Complaint Form containing the Complainant Details
 - written correspondence received from Council during the course of this review
 - written correspondence received from the applicant during the course of this review
 - file notes of telephone conversations between a staff member of this Office and Council on 8 December 2008, 9 December 2008 and 9 February 2009

³ The third complainant is no longer contactable through their provided contacts.

⁴ Under section 77(1)(d) of the FOI Act, the Information Commissioner (or her delegate) can discontinue a review if he/she considers that an applicant is no longer contactable at the address provided and the applicant has not advised this Office of a new address within a reasonable time.

- file notes of telephone conversations between a staff member of this Office and Complainants on 29 January 2009
- file notes of telephone conversations between a staff member of this Office and the applicant on 6 April 2009
- Banana Shire Council (Keeping and Controlling of Animals) Local Law No.6
- Banana Shire Council Complaints Management Policy
- relevant provisions of the FOI Act as referred to in this decision
- decisions of this Office as referred to in this decision.

Matter in issue in this review

19. The applicant is seeking access to the identities and contact information of the persons who lodged a complaint with Council concerning her dogs' barking.
20. As previously indicated the information which Council has refused to provide to the applicant comprises identifying information about the complainants (**Complainant Details**) as contained within the Complaint Form. Specifically it includes the following information about each complainant:
 - first name, last name and gender
 - domestic address
 - domestic telephone number
 - signature

located below the following headings as they appear on pages one and two of the Complaint Form:

- A) Applicant Details
- D) Witness Details.

21. Accordingly, the issue to be determined in this review is whether the Complainant Details qualify for exemption under section 44(1) of the FOI Act.

Findings

Relevant law

Section 44(1) of the FOI Act

22. Section 44(1) of the FOI Act provides:

44 Matter affecting personal affairs

(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.

...

23. Section 44(1) of the FOI Act protects the privacy interests of individuals. The wording of the section gives rise to a presumption against disclosure of 'personal affairs

information' unless, on balance, disclosure of the information would be in the public interest.

24. In *Stewart and Department of Transport*,⁵ a previous decision of this Office, the Information Commissioner discussed the application of section 44(1) of the FOI Act in detail and stated:⁶

*The FOI Act is concerned with access to documents in the possession or control of government agencies and Ministers. Government agencies must gather a good deal of personal information about individuals in the discharge of their public functions, such as the provision of health services, administration of schemes for the provision of welfare benefits, and so forth. Frequently, personal information is volunteered by persons seeking a service or benefit, though usually on the express or implied understanding that the information will be used only for the purpose for which it is provided. In some circumstances, government agencies have coercive powers to compel persons to disclose personal information. In other instances, personal information may be collected without the knowledge of the person concerned. **Clearly, in enacting s.44 of the FOI Act, Parliament intended that much of the personal information that government agencies collect, store and use, should not be able to be accessed as of right by third persons pursuant to the general right of access conferred by s.21 of the FOI Act.***

(my emphasis)

25. It is now well accepted that the following information qualifies as being a person's 'personal affairs information':

- a person's signature⁷
- a person's name in connection with their:
 - home address
 - telephone number.⁸

26. While a person's name does not always automatically qualify as being information concerning their personal affairs, the Information Commissioner has held the fact that a person has made a lawful complaint to a government agency constitutes information concerning their personal affairs.⁹

27. I have examined the Complainant Details and am satisfied that this information concerns the personal affairs of a person other than the applicant.

28. Given my finding above it is necessary to consider whether there are public interest considerations that favour disclosure of that information which outweigh the public interest in protecting personal privacy and any other public interest considerations that favour non-disclosure of the Complainant Details.

⁵ (1993) 1 QAR 227 (**Stewart**).

⁶ At paragraph 72.

⁷ *Stewart* at paragraph 80.

⁸ *Pearce and Qld Rural Adjustment Authority; Various Landholders (Third Parties)* (1999) 5 QAR 242 at paragraph 38.

⁹ *Stewart* at paragraph 119. In *Byrne and Gold Coast City Council* (1994) 1 QAR 477 at paragraph 36 the Information Commissioner noted that that the fact of making a complaint is to be distinguished from the substance of the complaint (which may or may not itself comprise information concerning the personal affairs of the complainant so as to qualify for exemption under section 44(1) of the FOI Act). This is not a relevant consideration in this case given Council has already provided the applicant with access to the substance of the complaint.

Public interest arguments favouring disclosure

Council submissions

29. As Council had variously applied sections 27(3), 42(1)(b), 42(1)(ca) and 42(1)(e) of the FOI Act to exempt the Complainant Details and those provisions do not contain public interest balancing tests, none of the material I had before me from Council contained any consideration of public interest arguments relating to the disclosure of the Complainant Details.
30. Accordingly, I invited Council to make submissions on the applicability of section 44(1) of the FOI Act to the Complainant Details, and therefore to consider any public interest arguments for and against disclosure, but Council declined the invitation.

Applicants submissions

31. The applicant's submissions have also predominantly focussed on the application of sections 27(3), 42(1)(b), 42(1)(ca) and 42(1)(e) of the FOI Act to the Complainant Details.
32. However, in response to the preliminary view concerning the application of section 44(1) of the FOI Act the applicant made the following submissions:
 - this Office has failed to consider whether the complaint received by Council formed the basis of an official Council complaint governed by Local Law No.6
 - the applicant does not consider that Local Law No.6 has been complied with
 - the applicant believes the complaint is based on falsified evidence.
33. The applicant asserts there is both a 'public interest' in ensuring that Council complies with the terms of its local laws¹⁰ and in a person 'accused' under those laws being able to contest the charges made against them.
34. I have considered the applicant's submissions above and acknowledge that in the circumstances, the following public interest considerations favouring disclosure of the Complainant Details may be relevant:
 - Council's accountability in the performance of its functions (**Accountability of government**)
 - the public interest in persons having the opportunity to dispute and/or defend adverse allegations made against them (**Opportunity to dispute/defend adverse allegations**).

Accountability of government

35. The applicant has indicated in communications with this Office that she is distrustful of Council's actions in its handling of the complaint and believes Council, in acting on the complaint has failed to comply with the requirements of the relevant by-law.

¹⁰ In terms of a Council being accountable to its constituents for its processes.

36. Facilitating the accountability of government is a public interest consideration recognised by section 4 of the FOI Act. Enabling accountability of government also promotes informed public participation in the processes of government, recognised as one of the FOI Act's major objectives.
37. The question in this case is whether disclosure of the Complainant Details would allow members of the public a better understanding of action taken by Council and enable them to better scrutinise and assess Council's performance.¹¹
38. As this matter concerns the enforcement of Banana Shire Council (Keeping and Controlling of Animals) Local Law No.6 (**Local Law No. 6**) it is appropriate that information on this law be examined to the extent that it relates to the issues being considered in this external review.
39. Dog barking is dealt with in *Division 4 – Nuisances* of Local Law No. 6.¹² The applicant does not accept that section 25(3)(a) of Local Law No.6¹³ has been complied with because she is not satisfied that:
- Council received complaints from three separate persons
 - the Complainants live in the vicinity of her former street address
 - the Complainants occupy separate premises
 - the barking of her dogs is sufficient to constitute a breach of section 25(1) of Local Law No.6.

¹¹ *Burke and Department of Families, Youth and Community Care* (1997) 4 QAR 205.

¹² The relevant parts of section 25 in Division 4 of Local Law No. 6 state:

Duty to avoid nuisances

25.

(1) *A person must not keep an animal on land if –*

(a) the animal causes a nuisance;

(2) *Without limiting this section, an animal causes a nuisance if*

(a) it makes a noise which –

(i) occurs more than once; and

(ii) disrupts or inhibits an activity ordinarily carried out on adjoining or nearby land;

...

(3) *An authorised person may –*

(a) on receiving three complaints in writing of a contravention of section 25.(1) of this local law from 3 persons all of whom occupy separate premises in the same or adjoining street to the land the subject of the complaints; or

(b) on receiving fewer than 3 complaints in writing of a contravention of section 25(1) of this local law and, having regard to the nature and location of the complainants' property, an authorised person has reasonable grounds for believing that a contravention of section 25(1) exists.

give written notice to the keeper of the animal requiring the person to take relevant action to prevent further contravention or to remove the animal.

¹³ Which requires a 'dog barking complaint' to be made by three individuals all living separately, but in the same or adjoining streets to that of the dog/s complained about.

40. The applicant also submits that the Complainant's 'testimony' (their reasons for the complaint, as provided to her by Council) is incomplete and does not satisfy the minimum criteria for Council to take action under Local Law No.6.
41. Although it is not the role of this Office to investigate the validity of the complaint or Council's investigation of it,¹⁴ I do acknowledge that there is a general public interest in enhancing the accountability of Council for its investigation of, or action taken in response to complaints. In relation to action taken by Council in response to the complaint, Council submits the following:
- in response to a telephone complaint, a compliance officer employed by Council (**Compliance Officer**) (together with a member of the Queensland Police Service) visited the applicant on 4 July 2008 and spoke with her concerning her dogs' barking
 - on receipt of a written complaint, the Compliance Officer contacted the complainants to confirm information relating to the complaint and verify their details
 - the Compliance Officer attended at the applicant's residence on 23 July 2008 but the applicant was not at home¹⁵ so the Compliance Officer left a visit card requesting that the applicant call Council
 - on 24 July 2008 a written notice¹⁶ was sent to the applicant
 - further contact was made with the Complainants
 - no further action was taken by Council in respect of this complaint because the applicant moved to another residence, away from the vicinity of the Complainants.
42. Notwithstanding the above, the applicant submits that release of the Complainant Details is the only method in which she can properly scrutinise whether Council has complied with the requirements of 25(3) of Local Law No.6.¹⁷
43. I consider it is evident from the partially released Complaint Form provided to the applicant by Council, that the contact details of three separate individuals have been removed from the document, one from the 'Applicant' section and two from underneath the 'Witness Details' section below 'Witness One' and 'Witness Two'. Although only one of these persons is identified as the 'applicant' who made the animal nuisance complaint, it appears that the Complaint Form is designed to satisfy section 25(3)(a) of Local Law No.6, in that the two witnesses (living in separate premises in the vicinity) must also be affected by the nuisance. Therefore, the applicant's argument that the names are required to scrutinise Council is not made out, because she can see on the face of the document (with deletions) that three separate individuals are named, and in what capacity those names appear.
44. Although it is not clear from Council's written notice what part of section 25(3) of Local Law No.6 it relied upon, I note that even if there were fewer than 3 persons listed on

¹⁴ These are matters which may be pursued through Council or an appropriate investigative body.

¹⁵ This submission was put to the applicant by a staff member of this Office, however the applicant disputes these facts on the basis that she considers the visit related to another matter.

¹⁶ Pursuant to section 25(3) of Local Law No.6.

¹⁷ The applicant's submissions on this point only discuss Council's compliance with the requirements of section 25(3)(a) of Local Law No.6.

the Complaint Form, Council would still be able to issue a written notice under section 25(3)(b) of Local Law No.6.

45. In view of the above, I do not consider that disclosure of the Complainant Details would materially enhance the applicant's ability to scrutinise whether Council has complied with the requirements of section 25(3) of Local Law No.6. Accordingly, the public interest in ensuring accountable government should be afforded little or no weight in these circumstances.

Opportunity to dispute/defend adverse allegations

46. Although this public interest consideration would normally carry considerable weight in the public interest balancing test, in this matter the substantive content of the complaint has already been released to the applicant by Council during the FOI process.

47. In view of this I am satisfied that:

- the information already released to the applicant is sufficient to address this public interest consideration
- disclosure of the Complainant Details would not advance this public interest in the circumstances.

Public interest arguments favouring non-disclosure

48. I consider that there are two public interest considerations which favour non-disclosure of the Complainant Details in this case. These are:

- the inherent public interest in protecting personal privacy of those persons who may be identified by the Complainant Details (**Privacy Interest**)
- the public interest in safeguarding the flow of information to government which will allow the relevant government agency to deal properly with complaints made to it (**Flow of Information**).¹⁸

Privacy Interest

49. As indicated above, there is an inherent public interest in protecting personal privacy if the information in issue concerns the personal affairs of a person other than the applicant. An appropriate weight must be allocated to that interest, having regard to the character and significance of the particular matter in issue.¹⁹

50. Ordinarily, the weight to be accorded to the privacy interest in matter relating to the identities of persons providing information to Council in these circumstances is relatively high, unless that information has been treated in such a way as to reduce the weight of the privacy interest. For instance, if matter in issue could be obtained with little difficulty from sources in the public domain, or has received publicity in the media, and in particular, where an individual has volunteered (or consented to) the public disclosure of information. In such cases the weight that can be sensibly accorded to the protection of a privacy interest must be reduced.²⁰

¹⁸ See *Pemberton and The University of Queensland* (1994) 2 QAR 293 at paragraphs 164-193.

¹⁹ See *Lower Burdekin Newspaper Company Pty Ltd and Burdekin Shire Council; Hansen, Covolo and Cross (Third Parties)* (2004) 6 QAR 328 (**Burdekin**) at paragraph 23.

²⁰ See *Burdekin* at paragraph 24.

51. In the current review the applicant has indicated that on two separate occasions she received threatening letters for which she requested police assistance. The applicant further states that the author of one of these letters identified themselves to her as one of the complainants and confirmed that they were one of the three people who Council was liaising with about the dog barking complaint.
52. Although the applicant suspects the identity of one of the complainants, there is no evidence before me which substantiates this claim or demonstrates that the applicant has at any time received official confirmation as to the identities of any of the Complainants. Further, I note that in consultations with this Office each of the Complainants (who were able to be contacted) indicated that they did not wish for their identity to be released to the applicant. One of the complainants expressed particular concern about 'any repercussions' if their identity were made known to the applicant.
53. Although the applicant has maintained an argument that she requires the Complainant Details in order to determine Council's compliance with Local Law No.6, she has also indicated in communications with this Office that on receipt of such information she intends to contact the Complainants and closely question those persons about the incidents complained about.
54. Given the concerns of the Complainants noted at paragraph 52 above and in view of the fact that there is no evidence to suggest that the identities of the Complainants are known to the applicant, I consider that the weight which should be attributed to this public interest remains high.

Flow of Information

55. A further public interest consideration favouring non-disclosure of the Complainant Details, is the public interest in safeguarding the future flow of information from members of the public concerning possible breaches of the law. As the Assistant Commissioner said in *Kinder and Department of Housing*:²¹

Those essential public interests include ensuring that government agencies do not suffer any unwarranted hindrance to their ability to perform their important functions for the benefit of the wider Queensland community, as a result of any unwarranted inhibition on the supply of information from citizens, on whose co-operation and assistance government agencies frequently depend.

56. I note that government agencies such as Council discharge important regulatory functions on behalf of the community and in discharging those functions frequently rely on information provided by members of the community.
57. In the circumstances I believe that members of the public would be less likely to provide similar information to Council if there was a possibility that information as to their identity would be disclosed to a person about whom a complaint was made.
58. I am therefore satisfied that the weight to be given to this public interest consideration is relatively high.

Summary of public interest considerations

59. I have weighed the public interest considerations which favour disclosure against those that favour non-disclosure of the Complainant Details.

²¹ (Unreported, Queensland Information Commissioner, 12 March 2002) at paragraph 31.

60. Whilst I acknowledge that there are a number of public interest considerations which favour disclosure, in the current circumstances I am satisfied that the weight of the public interest considerations which favour non-disclosure of the Complainant Details, including the privacy interest of those persons and the free flow of that information to Council, continue to outweigh those public interest considerations in favour of disclosure of the Complainant Details.

DECISION

61. I vary the decision under review by finding that the Complainant Details qualify for exemption under section 44(1) of the FOI Act.

V Corby
Assistant Commissioner

Date: 19 May 2009