

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 119 of 1993
(Decision No. 94022)

Participants:

RAYMOND JOHN NEGUS
Applicant

- and -

QUEENSLAND POLICE SERVICE
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - letter of objection to the applicant's application for a standing stall licence under the *Traffic Regulation 1962 Qld* - express assurances of confidence sought and given at the time of delivery of the letter of objection to the respondent - no circumstances which would make it inequitable for the respondent to be bound by the assurances of confidence given - whether letter of objection exempt under s.46(1)(a) of the *Freedom of Information Act Qld 1992*.

Freedom of Information Act Qld 1992 s.25, s.41(1)(a), s.44(1), s.46, s.46(1)(a), s.46(1)(b), s.46(2), s.46(2)(a), s.46(2)(b), s.52, s.76(2), s.78, s.87
Traffic Regulation 1962 Qld s.118

"B" and *Brisbane North Regional Health Authority, Re* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported)
G v Day [1982] 1 NSWLR 24

DECISION

The documents in issue (being a handwritten letter of objection to the respondent in relation to the applicant's application for a standing stall licence, together with attachments) are exempt under s.46(1)(a) of the *Freedom of Information Act 1992 Qld*, and accordingly the decision under review is affirmed.

Date of Decision: 9 September 1994

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F N ALBIETZ
INFORMATION COMMISSIONER

Participants:

RAYMOND JOHN NEGUS
Applicant

- and -

QUEENSLAND POLICE SERVICE
Respondent

REASONS FOR DECISION

Background

1. Mr Negus seeks review of the respondent's decision to refuse him access to a letter dated 27 November 1992 (together with attachments), objecting to an application by Mr Negus under s.118 of the *Traffic Regulation 1962 Qld* for a standing stall licence in respect of a roadside stall operated by him in front of his property at Eagle Heights, Mount Tamborine. Section 118 of the *Traffic Regulation* provides:

118. A person shall not set up or use upon any road any stall, stand or standing vehicle for the purpose of offering for sale any goods, or for the pursuit of any business, calling or employment, unless he is the holder of a licence issued by the District Superintendent authorising him so to do.

2. By letter dated 11 December 1992, the applicant lodged with the Queensland Police Service (the QPS) an FOI access application in the following terms:

I am writing for information held by the Tamborine Mt Police Station. A number of people, I was told by police, have complained about my roadside stall in front of my property. I would like to know the name and address, and nature of complaint of each person who has made complaints to police.

3. The initial decision on behalf of the QPS was made by Senior Sergeant D A Wright and communicated to Mr Negus by letter of 18 March 1993. Senior Sergeant Wright identified 17 folios which fell within the terms of Mr Negus' FOI access application. He decided to grant access to four folios in their entirety, and to refuse access to the other 13 folios, which comprise the documents in issue in this review. Senior Sergeant Wright concluded that the documents in issue contained matter that was exempt under s.44(1) and s.46(1)(b) of the *Freedom of Information Act Qld 1992* (the FOI Act). In respect of s.44(1), Senior Sergeant Wright said:

I find that:

- (a) *information deleted by virtue of Section 44(1) concerns information that is of private concern, that is, the names and addresses and other information of persons other than yourself;*
- (b) *the deletion of names alone could not overcome objections to the invasion of privacy involved where sufficient information may be available in the documents from which identification could be effected.*

4. Senior Sergeant Wright also found that the documents were exempt under s.46(1)(b) on the basis that:

- (a) *Documents which contain exempt matter as defined by [s.46(1)(b)] contain information that was communicated in confidence to police. Police conduct inquiries with people who provide information and statements on a confidential basis, with the reasonable expectation that the information will not be released without, firstly, their prior approval and, secondly, only in circumstances which are required by a court;*
- (b) *The release of the documents could also be reasonably expected to prejudice the future supply of that information, consequently, I have formed the opinion that, on balance, it would not be in the public interest to disclose this information.*

5. By letter dated 14 April 1994, Mr Negus applied, in accordance with s.52 of the FOI Act, for internal review of Senior Sergeant Wright's decision. In that letter Mr Negus stated:

When you apply to the council for something, and it fails, the council sends you a copy of the letters of objection, and I think the police should do the same. After all what is the use of having a Freedom of Information unit funded by the public if you can't get any information. After all how do I know whether there have been any complaints at all if you don't show me the letters of complaint.

6. Internal review of the decision was undertaken by P J Freestone, Acting Assistant Commissioner, Metropolitan North Region of the QPS, who affirmed the initial decision of Senior Sergeant Wright. Mr Negus subsequently applied for review by the Information Commissioner under Part 5 of the FOI Act.

The External Review Process

7. After obtaining a copy of the documents in issue, I consulted the two persons who had provided them to the QPS (and who will be referred to in these reasons for decision as Person 1 and Person 2, or collectively, as the third parties). They indicated that the documents had been supplied to the QPS on their own initiative after they became aware that Mr Negus was going to apply for a standing stall licence under the *Traffic Regulation*. Persons 1 and 2 confirmed that they objected to the release of the documents and applied (in accordance with s.78 of the FOI Act) to become participants in the external review application. I granted that application by a letter dated 13 September 1993.

8. Evidence was obtained from Person 1 and Person 2 in the form of statutory declarations executed on 7 April 1994. In light of that evidence, I formed the view that s.46(1)(a) of the FOI Act was also relevant to this external review application. By letter dated 4 May 1994, Mr Negus was informed that s.46(1)(a), as well as s.46(1)(b) and s.44(1), was a potentially applicable exemption provision, and Mr Negus was given the opportunity to provide evidence and any submission he wished to make in support of his case that the documents in issue are not exempt under the FOI Act.

9. Further evidence was obtained from the QPS in the form of a statutory declaration executed on 9 May 1994 by Sergeant K D Taylor, who had received the documents in issue on behalf of the QPS. The evidence of Sergeant Taylor and Persons 1 and 2, edited where necessary so as to avoid disclosure of matter claimed to be exempt (as required by s.76(2) and s.87 of the FOI Act), was then provided to the applicant. The applicant provided his submission and comment on the evidence by a letter received on 27 June 1994.

Documents in Issue

10. The documents for which the QPS claims exemption are:
- A three page handwritten letter of objection to an application for a Standing Stall Licence headed "We Wish This Objection to Remain Anonymous", written by one of the third parties on behalf of both of the third parties and addressed to the QPS.
 - A three page typed letter of objection to the same application, headed in the same way, signed by one of the third parties and addressed to the Health Department, Beaudesert Shire Council.
 - Eight colour photographs depicting the stall operated by the applicant.

Relevant Provisions of the FOI Act

11. Section 44(1) of the FOI Act provides as follows:

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.

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

46.(1) Matter is exempt if -

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

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

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

The Evidence

13. The material parts of Sergeant Taylor's evidence, contained in paragraphs 2 and 4 of his statutory declaration executed on 9 May 1994, are as follows:

2. *On or about 27 November 1992, [Person 1] attended the North Tamborine Police Station and had a conversation with myself in relation to [the objection of Persons 1 and 2] to the granting of a Standing Stall Licence to Mr NEGUS.*

[Person 1] presented a hand written letter to me outlining ... objections to the stall. At the time of presenting this document and supporting photographs [Person 1] stated that [Person 1] wished [the] letter and objections to be treated with the utmost confidence and to that fact signed on the top of [the] letter "We wish this objection to remain anonymous".

At the time of accepting ... documentation I gave ... an assurance that the matter discussed and the supporting letter and photographs would be treated as confidential and contents not disclosed to any person outside the Police Service.

This assurance was given ... because of [Person 1's] concern that if the contents of [the] letter were disclosed to any member of the community it may cause neighbourhood disruption or even damage to [Person 1's] property or ridicule from the very tight knit community on Tamborine Mountain.

The community on Mount Tamborine is very close knit and supportive of local police. Should it ever become known within this community that the police had divulged confidential information supplied by a community member then I believe it would be very difficult to again gather information in relation to any matter either criminal or civil within this area.

...

This matter still remains the subject of confidence between local police and [Persons 1 and 2] even though the letter was originally lodged in November 1992.

Matters such as this must remain confidential in order that local police retain the trust of the community members who feel obligated to come forward with information which will assist the police.

This document supplied by [Persons 1 and 2] had no direct bearing on the decision not to grant the licence to Mr NEGUS, however it did bring to the notice of police the dangers which the stall could cause in relation to both vehicle and pedestrian traffic on Eagle Heights Road, Eagle Heights. The decision was taken bearing in mind the safety of the public in general.

...

4. *There was no conversation with Mr NEGUS in relation to the documents supplied by [Persons 1 and 2]. I have no knowledge as to how Mr NEGUS would have gleaned that there was a document complaint in relation to his stall.*

Police from this station received numerous verbal concerns in relation to the

stall being operated by Mr NEGUS. This was the reason police first established that the stall was being operated without a license and an official caution was issued to NEGUS to cease operating and make application for a Standing Stall Licence.

14. The material parts of the evidence of Person 1, contained in paragraphs 4 to 9 and 11 to 13 of Person 1's statutory declaration executed on 7 April 1994, are as follows:

4. *I recall that in or about November 1992, [Person 2] took some photographs of R J Negus' store together with photographs of vehicles which were at various times parked along the side of the road for the purpose of their passengers conducting business at R J Negus' store. ...*
5. *I recall that on or about 27 November 1992, I wrote the letter addressed to the Superintendent of Traffic at the North Tamborine Police Station which forms Annexure "A" to this declaration. That letter enclosed the photographs referred to in paragraph 4 of this declaration (photocopies of which form Annexure "C" to this declaration), together with a copy of a letter from [Person 2] and myself to the Health Department of the Beaudesert Shire Council dated 12 November 1992 (a copy of which is Annexure "B" to this declaration).*
6. *I do not recall exactly the time at which I attended the North Tamborine Police Station to deliver Annexure "A", "B" and "C". It is my opinion that it would have been immediately after writing the letter dated 27 November 1992. It was not a conscious decision as to why I took the letter in as opposed to posting it. I believe that I would have wanted to ensure that our identities would remain confidential and therefore wished to see the police officer in person to ensure that action was taken as soon as possible and that the letter went to the right person. I attended the police station on my own. I recall that there were other people also at the station and I waited for them to leave as I wanted to speak with an officer in private.*
7. *When I met Sergeant Taylor I explained to him that it was a private matter and he took me to a private room. I recall that I gave him the letter and stated that I wanted the letter to remain anonymous. He then read through the letter. I recall that Sergeant Taylor told me that Mr Negus had applied for a "Standing Stall Permit". Sergeant Taylor told me that they were looking to give him the permit. The permit was in respect of a fresh fruit, vegetable and flower store which Mr Negus had been running for approximately 18 months along the side of Eagle Heights Road in front of his property.*
8. *I recall that I had a discussion about the bike track along Eagle Heights Road with Sergeant Taylor This was brought up by myself. Sergeant Taylor indicated that they were looking into the matter. However he gave no indication as to whether Mr Negus was going to get the permit. His words were that he "would look at it".*

9. *I recall that at one stage during our conversation I pointed to the heading which appeared on the first page of Annexure "A", being "we wish this objection to remain anonymous" as a means of pointing out to Sergeant Taylor that [Person 2] and I wished our identities and the information we communicated to Sergeant Taylor to remain confidential.*

...

11. *I was concerned at the time I wrote the letter, which is Annexure "A" to this declaration, about the confidentiality of our identities ...*

12. *It was my intention that [Person 2's] and my identities remain confidential. I do not recollect whether I intended the contents of Annexure "A" and "B" to be confidential. ...*

13. *I believe that our identities and the information written should remain confidential because any information disclosed to R J Negus would enable him to determine that we were the authors of the letters. I believe, as we expressly stated, that Annexure "A" and "B" should remain confidential. As this was pointed out to Sergeant Taylor, I would never have expected them to be disclosed to R J Negus and would not have written them if they were not to remain confidential.*

15. Evidence was obtained from Person 2 which corroborates the statements made in paragraphs 4 and 5 of the statutory declaration of Person 1. Person 2 also gives evidence of a discussion which took place between Person 2 and Sergeant Taylor as follows:

7. *... I recall Sergeant Taylor advising me that none of the matters raised in Annexure "A" were relevant to his deliberations as to whether or not R J Negus should be granted a "Standing Stall Permit". I recall that Sergeant Taylor was dismissive of the matters which were raised in Annexure "A" and, on several occasions, he commented that the matters were not relevant to his considerations as he could "only apply the Traffic Act".*

...

10. *I recall that, at one stage during our conversation, I leaned over the counter and pointed to the heading which appeared on the first page of Annexure "A", being "we wish this objection to remain anonymous" as a means of pointing out to Sergeant Taylor that [Person 1] and I wished our identities and the information we communicated to Sergeant Taylor to remain confidential.*

11. *[Person 1] and I were concerned about the confidentiality of the information we provided Sergeant Taylor together with the confidentiality of our identities as we live in a very small community. It is on this basis that I felt there was a need for confidentiality. ...*

12. *In pointing out the heading to Sergeant Taylor, I wanted to ensure that when he was investigating our objection he would not go to R J Negus and advise him that [we] had objected to his application for the "Standing Stall Permit". I specifically pointed out the heading to avoid any thoughtless communication of our identities by the police to R J Negus.*

13. *After having the conversation with Sergeant Taylor on or about 27 November 1992, I had the expectation that [Person 1's] identity and my identity as the sources of the objections recorded in Annexure "A" would remain confidential. Further, I had the expectation that the nature of the objections raised in Annexure "A" would remain confidential. This expectation was based on the fact that Sergeant Taylor had made it very clear that none of the issues raised in Annexure "A" were relevant to his consideration of R J Negus' application.*

Applicant's Submission

16. In addition to the statements referred to above in the applicant's initial FOI access application and his internal review application, the applicant made submissions in a letter received by me on 27 June 1994, as follows:

1. *I was informed that there had been one complaint with a number of pages put into the police by the third party.*
2. *I was informed that the main complaints were sight pollution, and traffic.*
3. *I was informed that the complaint was signed.*

I refer to your letter of 25 May 1994. In Sergeant Taylor's statutory declaration of 9 May 1994:

"... letter were disclosed to any member of the community it may cause neighbourhood disruption or even damage to ... property or ridicule from the very tight knit community on Tamborine Mountain".

The third party is claiming here that if their identities are released to me that I could commit criminal acts against them. This is a very serious accusation to make against me.

I was advised by Sergeant Taylor to put into the Freedom of Information department to obtain the names, and address and complaints submitted by the third party.

I ask that because of the evidence that you release to me the name, and address, and nature of complaint of both of the third parties.

Application of s.46(1)(a)

17. In *Re "B" and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported), I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(a) of the FOI Act. The test of exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency or Minister faced with an application, under s.25 of the FOI Act, for access to the information in issue (see paragraph 44 in *Re "B"*). I am satisfied that, in the circumstances of this application, there are identifiable plaintiffs (Persons 1 and 2) who would have standing to bring actions for breach of confidence.

18. There is no suggestion in the present case of a contractual obligation of confidence arising in the circumstances of the communication of the information in issue from Persons 1 and 2 to the QPS. Therefore, the test for exemption under s.46(1)(a) must be evaluated in terms of the requirements for an action in equity for breach of confidence, there being five criteria which must be established:
- (a) it must be possible to specifically identify the information in issue, in order to establish that it is secret, rather than generally available information (see paragraphs 60-63 in *Re "B"*);
 - (b) the information in issue must possess "the necessary quality of confidence"; i.e. the information must not be trivial or useless information, and it must possess a degree of secrecy sufficient for it to be the subject of an obligation of conscience, arising from the circumstances in or through which the information was communicated or obtained (see paragraphs 64-75 in *Re "B"*);
 - (c) the information in issue must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see paragraphs 76-102 in *Re "B"*);
 - (d) it must be established that disclosure to the applicant for access under the FOI Act would constitute a misuse, or unauthorised use, of the confidential information in issue (see paragraphs 103-106 in *Re "B"*); and
 - (e) it must be established that detriment is likely to be occasioned to the original confider of the confidential information in issue if that information were to be disclosed (see paragraphs 107-118 in *Re "B"*).
19. With respect to the first criterion set out in the preceding paragraph, I am satisfied that the information supplied by Persons 1 and 2, which is claimed to be confidential information (as recorded in the documents in issue), can be identified with specificity.
20. With regard to the second criterion, Mr Negus is aware that there is a written objection. He states that he has been advised that the main complaints were "sight pollution" and traffic. On the other hand, the evidence of Sergeant Taylor is that he has had no conversation with Mr Negus in relation to the documents supplied, and that numerous verbal complaints were made in relation to the stall. It may be that Mr Negus has been informed of the general substance of complaints without being advised of the specific nature of the objection contained in the documents in issue.
21. In each case, I find that the information recorded in the documents in issue is not trivial and has the requisite degree of secrecy to invest it with the "necessary quality of confidence", so as to satisfy the second criterion. The documents in issue include information which would reveal the identities of Persons 1 and 2. This information is also, in my opinion, eligible for protection as confidential information under s.46(1)(a) of the FOI Act, given the circumstances of this case. Those circumstances are, in material respects, similar to those encountered in *G v Day* [1982] 1 NSWLR 24, which is authority for the proposition that although a person's identity is ordinarily not information which is confidential in quality, the connection of a person's identity with the imparting of confidential information can itself be secret information capable of protection in equity (see paragraph 137 of my decision in *Re "B"*).

22. With regard to the third criterion, I stated at paragraph 84 of my decision in *Re "B"* that this determination requires an evaluation of the whole of the relevant circumstances. In evaluating the relevant circumstances surrounding the communication of information in this case, I have had regard to the documents themselves, the evidence referred to above, the circumstances surrounding the imparting of the information in issue, the purposes for which that information was given, and the purposes for which it must reasonably have been expected that the information would be used.
23. The letter of objection itself and one of the attachments to the letter were both headed "We Wish This Objection to Remain Anonymous". In addition, Sergeant Taylor's evidence is that he gave an assurance that the documents in issue would be treated as confidential, and the contents not disclosed to any person outside the QPS. Both Person 1 and Person 2 have given evidence that it was their intention that the information in the documents in issue be kept confidential.
24. In paragraph 139 of my decision in *Re "B"*, I explained that there may be cases where the seeking and giving of express assurances of confidentiality will not be sufficient to constitute a binding obligation for the purposes of s.46(1)(a). I also referred in *Re "B"* (at paragraphs 92-93) to the special considerations which apply where persons outside government seek to repose confidences in a government agency, i.e. account must be taken of the uses to which the government agency must reasonably be expected to put that information, in order to discharge its functions.
25. I do not consider that it was unreasonable for either of the third parties or Sergeant Taylor to expect that the QPS could carry out its functions under s.118 of the *Traffic Regulation* without having to disclose to Mr Negus the detail of the objection, or the identities of the third parties. In this case, the information was such that, if it was relevant to the application, it could be independently verified by the QPS's own investigation. Sergeant Taylor has indicated that the documents in question served the purpose of bringing possible problems to the notice of the police rather than having a direct bearing on the decision not to grant a licence to Mr Negus. While the third parties no doubt hoped that the QPS would act on their objection, they did not seek redress from Mr Negus, or the taking of action by the QPS, of a kind which would require disclosure of the information given to the QPS, or their identities. In the circumstances of this case, I am satisfied that the information was communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in an unauthorised way.
26. As to the fourth criterion identified in paragraph 18 above, I find that disclosure of the documents in issue under the FOI Act would constitute an unauthorised use of that information. The information was supplied with the expectation that it would be used by the QPS only for the limited purpose of considering Mr Negus' application for a standing stall licence. The third parties specifically objected to the disclosure of that information to Mr Negus, and have made clear (during the course of this review) their continued objection to disclosure to Mr Negus.
27. I am also satisfied that disclosure to the applicant of the documents in issue would cause detriment to both Person 1 and Person 2 (see the fifth criterion identified in paragraph 18 above). In paragraph 111 of my decision in *Re "B"* I stated that it was not necessary to establish that a threatened disclosure of the matter in issue would cause detriment in a financial sense, but that detriment could also include embarrassment, a loss of privacy, fear, or an indirect detriment, for example, that disclosure of the information may injure some relation or friend. I am satisfied that disclosure to the applicant of the documents in issue would cause detriment to Persons 1 and 2 of one or more of the kinds mentioned above.

28. In the circumstances of the present case, no occasion arises to consider the application of any of the defences to an equitable action for breach of confidence discussed in my decision of *Re "B"* at paragraphs 119-134.
29. I am satisfied that s.46(2) of the FOI Act does not apply in the circumstances of this case, because neither Person 1 nor 2 falls within the terms of paragraph (a) or (b) of s.46(2). As I have found that disclosure would found actions for breach of confidence owed to Persons 1 and 2, s.46(2) does not apply, even if the matter in issue is matter of a kind mentioned in s.41(1)(a) of the FOI Act.
30. I am satisfied that disclosure of the documents in issue would found an action for breach of confidence, and that they comprise exempt matter under s.46(1)(a) of the FOI Act. As I have found the documents in issue to be exempt under s.46(1)(a), it is not necessary for me to consider the alternate grounds for exemption put forward by the QPS on the basis of s.44(1) and s.46(1)(b) of the FOI Act.

Conclusion

31. I find that the documents in issue, described in paragraph 10 above, are exempt under s.46(1)(a) of the FOI Act, and I affirm the decision under review.

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F N ALBIETZ
INFORMATION COMMISSIONER