



Decision and Reasons for Decision

Application Number: 210240

Applicant: Ms L Sheridan

Respondent: South Burnett Regional Council

First Third Party: Mr S Gray

Second Third Party: Mr M Hunter

Third Third Party: Mrs I Crumpton

Fourth Third Party: Ms S Frank

Decision Date: 23 June 2008

Catchwords: **FREEDOM OF INFORMATION – section 44(1) of the *Freedom of Information Act 1992 (Qld)* – personal affairs – personnel records – employment affairs – whether disclosure of the matter in issue is in the public interest**

FREEDOM OF INFORMATION – section 42(1)(ca) of the *Freedom of Information Act 1992 (Qld)* – whether disclosure of the matter in issue could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation

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REASONS FOR DECISION

Summary

1. For the reasons set out below, I am satisfied that:
 - with the exception of the information that discloses the gross salary of former Murgon Shire Council employees, the documents and parts of documents that are characterised as category A matter qualify for exemption under section 44(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) as:
 - they concern the personal affairs of a person other than the applicant
 - there are no public interest considerations favouring disclosure which outweigh the privacy interests of the Council employees involved in this case
 - the documents and parts of documents that are characterised as category B matter and information contained in the category A matter that discloses the gross salary of Council employees:
 - does not qualify for exemption under 44(1) of the FOI Act as they concern the employment affairs of the relevant employees not their personal affairs
 - as they relate to Shane Gray – does not qualify for exemption under section 42(1)(ca) of the FOI Act.
2. This Office will forward a redacted copy of the relevant matter in issue to Murgon Shire Council to assist it in releasing the matter in issue to the applicant in accordance with this decision.

Background

3. By letter dated 22 March 2007, Kerin & Co Lawyers, on behalf of the applicant, applied to Murgon Shire Council (**Council**) under the FOI Act for access to a range of documents. The applicant specifically sought access to documents relating to:
 - the organisational structure of Council from 2000 to 2005
 - personnel documents for five individuals employed by Council.
4. By letter dated 25 May 2007, Mr P Hackshaw, CEO of Council advised the applicant that Council had located and reviewed the relevant documents responsive to her freedom of information application (**FOI Application**) and had decided that a number of documents were exempt from disclosure under section 44(1) and/ or section 42(1)(ca) of the FOI Act.
5. By letter dated 8 June 2007, the applicant requested external review of Council's decision.
6. During the course of this external review, Murgon Shire Council was amalgamated into the new South Burnett Regional Council in March 2008. Nanango Shire Council was also amalgamated into the new South Burnett Regional Council.

Decision under review

7. The decision under review is the decision of Mr Hackshaw dated 25 May 2007.¹

Steps taken in the external review process

8. By letter dated 15 June 2007, this Office wrote to Council to obtain copies of various documents relevant to the external review.
9. By letter dated 19 July 2007, Council provided this Office with the requested documents.
10. By letters dated 4 December 2007, I wrote to Mr Hunter, Mrs Crumpton and Ms Frank in order to:
 - notify them of the possible release of parts of the matter in issue to the applicant
 - consult with them regarding whether or not they objected to the relevant matter in issue being released
 - invite them to apply to participate in the review
 - advise them that it was my preliminary view that certain parts of the matter in issue that related to them were not exempt from disclosure under section 44(1) of the FOI Act as the information concerned their employment affairs and not their personal affairs.

I also enclosed a copy of the matter in issue as it related to them which was marked up to indicate which parts I considered were exempt from disclosure under section 44(1) of the FOI Act in accordance with my preliminary view. Those third parties were invited to provide a written response to this Office if they wished to object to the relevant information being released.

11. By letter dated 4 December 2007, I wrote to Mr Gray in order to:
 - notify him of the possible release of parts of the matter in issue to the applicant
 - consult with him regarding whether or not he objected to the relevant matter in issue being released
 - invite him to apply to participate in the review
 - advise them that it was my preliminary view that:
 - certain parts of the matter in issue that related to him were exempt from disclosure under section 44(1) of the FOI Act
 - the remainder of the matter in issue was not exempt from disclosure under sections 44(1) or 42(1)(ca) of the FOI Act.

I also enclosed a copy of the relevant matter in issue which was marked up to indicate which parts I considered were exempt under section 44(1) of the FOI Act in accordance with my preliminary view. Mr Gray was invited to provide a written response to this Office if he wished to object to the relevant information being released.

12. By letter dated 4 December 2007, I advised Council that it was my preliminary view that certain parts of the matter in issue were exempt from disclosure under section 44(1) of

¹ The external review applicant was not required to seek internal review by Council in this case as the initial decision was made by the principal officer, the CEO, of Murgon Shire Council – see section 52(3)(b) of the FOI Act.

the FOI Act but that the remainder of the matter in issue was not exempt from disclosure under sections 44(1) or 42(1)(ca) of the FOI Act. I invited Council to provide further submissions if it wished to contest my preliminary view and enclosed a copy of the matter in issue which was marked up to indicate which parts I considered were exempt from disclosure under section 44(1) of the FOI Act.

13. On 5 December 2007, Mrs Crumpton advised a staff member of this Office by telephone that she accepted my preliminary view subject to the removal of some additional information under section 44(1) of the FOI Act.
14. On 17 December 2007, Mr Hunter also advised a staff member of this Office by telephone that he accepted my preliminary view subject to the removal of a small amount of additional information under section 44(1) of the FOI Act.
15. By letters dated 17 December 2007 and 3 January 2008, Council advised that it wished to contest my preliminary view and provided submissions in support of its case.
16. By letter dated 20 December 2007, Mr Gray advised that he wished to contest my preliminary view and provided submissions in support of his claim that the matter in issue as it related to him was exempt from disclosure under section 42(1)(ca) of the FOI Act.
17. By letter dated 21 January 2008, I advised the applicant that it was my preliminary view that certain parts of the matter in issue qualified for exemption under section 44(1) of the FOI Act but that the remainder of the matter in issue did not qualify for exemption under section 44(1) of the FOI Act. I invited the applicant to provide submissions to this Office in support of her case if she did not accept my preliminary view.
18. By letter dated 6 February 2008, Kerin & Co Lawyers, on behalf of the applicant, advised that the applicant did not accept my preliminary view and provided submissions in support of her case.
19. By letter dated 15 February 2008, I advised Mr Gray that it was my further preliminary view that there was insufficient information to support his claim that the matter in issue as it related to him was exempt from disclosure under section 42(1)(ca) of the FOI Act and I invited him to provide further submissions in support of his case.
20. By letter dated 10 March 2008, Mr Gray provided further submissions, including supporting documentation, in support of his claim that the matter in issue as it related to him was exempt from disclosure under section 42(1)(ca) of the FOI Act.
21. By letter dated 27 March 2008, I wrote to Mr Gray to clarify certain aspects of my preliminary view and to provide him a final opportunity to make specific submissions in support of his case. I provided Mr Gray with another copy of the matter in issue that related to him which was marked up to indicate which parts I considered were exempt from disclosure under section 44(1) of the FOI Act in accordance with my preliminary view.
22. No further submissions had been received from Mr Gray in support of his case at the date of this decision.
23. In making my decision in this review, I have considered the following:
 - the FOI Application dated 22 March 2007
 - the decision of P Hackshaw dated 25 May 2007

- the applicant's external review application dated 8 June 2007
- notes of conversations between staff members of this Office and parties in this review
- Council's submissions dated 17 December 2007 and 3 January 2008
- Mr Gray's submissions dated 20 December 2007 and 10 March 2008 and supporting documentation (including information provided in relation to other matters before this Office and referred to by Mr Gray in this review)
- the applicant's submissions dated 6 February 2008
- the matter in issue
- relevant provisions of the FOI Act and previous decisions of this Office.

Matter in issue

24. The matter in issue in this review (**matter in issue**) essentially comprises the personnel files of:
- Mr S Gray (239 folios)
 - Mr M Hunter (149 folios)
 - Ms S Frank (118 folios)
 - Mrs I Crumpton (24 folios).

Findings

25. Council claims that the matter in issue in this review is exempt from disclosure in its entirety under section 44(1) of the FOI Act and that the part of the matter that relates to Mr Gray is also exempt from disclosure under section 42(1)(ca) of the FOI Act.

Section 44(1) of the FOI Act

26. 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.*

27. In applying section 44(1) of the FOI Act, the first question to ask is whether disclosure of the matter in issue would disclose information concerning the personal affairs of a person other than the applicant for access. If that is the case, a public interest consideration favouring non-disclosure is established, and the matter in issue will be exempt, unless there are public interest considerations favouring disclosure which outweigh all public interest considerations favouring non-disclosure.
28. In *Stewart and Department of Transport*,² the Information Commissioner discussed in detail the meaning of the phrase 'personal affairs of a person' (and relevant variations) as it appears in the FOI Act.³ In particular, he said that information concerns the personal affairs of a person if it concerns 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:

² (1993) 1 QAR 227 (**Stewart**).

³ *Stewart* at paragraphs 79-114.

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

29. However, in *Stewart*, the Information Commissioner also decided that ordinarily, information which concerns an individual's work performance, or other work related matters does not concern a person's personal affairs.⁴
30. In a review of relevant authorities regarding the phrase 'personal affairs',⁵ the Information Commissioner specifically endorsed the following observations, concerning the application of the Victorian equivalent of section 44(1) in the employment context, made by Eames J of the Supreme Court of Victoria in *University of Melbourne v Robinson*:⁶

*The reference to the "personal affairs of any person" suggests to me that a distinction has been drawn by the legislature between those aspects of an individual's life which might be said to be of a private character and those **relating to or arising from** any position, office or public activity with which the person occupies his or her time.*

[emphasis added]

31. The Information Commissioner set out the general position regarding what constitutes personal affairs in the employment context in *Stewart* as follows:⁷

Many of the reported cases relate to assessments of a person's work capacity and performance, or vocational competence. There are also a number of cases, however, 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 at paragraphs 83 to 85 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.

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

Personal affairs

33. The matter in issue can be categorised as follows:

- leave applications, and statutory declarations in support
- payroll records (including correspondence from a health insurance fund to 'the pay officer')
- authorities to deduct funds
- documents relating to superannuation contributions
- records of leave accrual
- records of employees' purchasing of corporate uniforms
- documents containing medical information

⁴ *Stewart* at paragraphs 91-102.

⁵ *Pope and Queensland Health* (1994) 1 QAR 616 at paragraph 114.

⁶ [1993] 2 VR 177 at p 187.

⁷ *Stewart* at paragraph 92.

- documents containing details of enterprise bargaining agreements as they relate to particular individuals
- documents showing whether employees have applied for worker's compensation
- tax file number declarations
- employee details forms, that is, containing names, addresses, home phone numbers and bank account details
- police certificates
- correspondence from the Australian Services Union (including subscription rates)
- correspondence regarding negotiations for private use of Council's vehicle
- employment contract negotiations
- certificates of achievement, membership and qualifications
- information relating to professional development and training
- documents regarding fringe benefits tax relating to components of an individual's salary package
- correspondence regarding ambulance subscriptions
- termination/resignation forms
- action/record sheets for motions passed at meetings
- letters of resignation
- letters from Council accepting resignations
- references
- letters from Council regarding review of grading
- letters confirming offers of employment
- successful applications for employment with Council, including resumes
- position descriptions
- job advertisement
- meeting minutes
- employment contracts
- correspondence to and from the Commissioner for Children and Young People
- employment histories
- correspondence to and from Queensland Police Service regarding weapons licence.

34. Some of the matter in issue does not fall within any of the categories listed above. That matter in issue can be categorised as follows:

- blank leave form
- records of safety induction
- memo to payroll regarding new employee
- re-induction training attendance list
- executive salary scale.

Category A matter - personal affairs

35. Specifically, I am satisfied that the following categories of documents (**category A matter**) are properly categorised as information concerning the employees' personal affairs:

- leave applications, and statutory declarations in support
- payroll records (including correspondence from a health insurance fund to 'the pay officer')
- authorities to deduct funds
- documents relating to superannuation contributions
- records of leave accrual

- records of employees' purchasing corporate uniforms with personal funds
 - documents containing medical information
 - documents containing details of enterprise bargaining agreements as they relate to particular individuals
 - documents showing whether individual employees have applied for worker's compensation
 - tax file number declarations
 - employee details forms, that is, containing names, residential addresses, home phone numbers and personal bank account details
 - police certificates
 - correspondence from the Australian Services Union (including subscription rates) on a specific employee's file
 - correspondence regarding negotiations for private use of Council's vehicle
 - employment contract negotiations
 - certificates of achievement, membership and qualifications
 - documents regarding fringe benefits tax relating to components of an individual employee's salary package
 - correspondence regarding ambulance subscriptions on a specific employee's file
 - information contained in other documents that details personal relationships, feelings, health matters and personal interests outside work (such as hobbies and sporting interests).
36. I am satisfied that personal details such as employees' home addresses, home telephone numbers and marital status where they appear in the matter in issue can also properly be categorised as personal affairs information.
37. As was discussed in the authorities I have cited above, generally, information which relates to the employment of an individual cannot be exempt under section 44(1) of the FOI Act, as it does not concern the personal affairs of that individual. However, in previous decisions, the Information Commissioner has decided that personnel records relating to such matters as an individual's sick leave, annual leave, reasons for requesting a transfer of position and similar material may contain information concerning an employee's personal affairs.⁸
38. For example, in *Rynne and Department of Primary Industries*⁹ this Office considered that disclosure of time sheets indicating the variable hours worked by a person, and payroll information indicating the income of a person would disclose information concerning that person's personal affairs.
39. The Information Commissioner has also decided that the fact that someone has made an application for employment is information that concerns that person's personal affairs.¹⁰ However, if the application is successful, the person's employment in the new position becomes, in effect, a matter in the public domain (and in the case of an appointment to a government agency, a matter of public record). The fact that the person applied for the position can no longer be regarded as information about a private aspect of the person's life or as information concerning that person's personal affairs under section 44(1) of the FOI Act. Accordingly, with some exceptions, documentation relating to the application process for successful applicants does not generally qualify for exemption under section 44(1).

⁸ *Stewart* at paragraph 93.

⁹ (Unreported, Queensland Information Commissioner, 11 January 2002).

¹⁰ *Baldwin and Department of Education and Ors* (1996) 3 QAR 251.

40. Additionally, information regarding an individual's education and educational qualifications is ordinarily categorised as personal affairs information. However, documents which relate to in-house training or professional development which occurs in the course of a public servant's duties may not be categorised as the employee's personal affairs.
41. The matter in issue in this review includes references to qualifications the Council employees have independently attained, and also to the completion of training and other courses which occurred in the course of previous employment. I consider that the information which discloses courses of study undertaken or qualifications gained by the employees, independent of their employment, concerns their personal affairs. I consider, however, that the information which records the professional development and training courses undertaken in the course of employment concerns the employees' employment affairs.
42. I also consider that the signatures of the Council employees on documents that are their individual personnel records, is information that concerns their personal affairs. Such signatures include their signature on their applications for employment, applications for leave and forms setting out details of those people as a new employee.
43. In my view, information that would reveal the fact that an employee is a member of a particular health fund and their financial contribution to the fund is information concerning that person's personal affairs as it relates to their personal choices they have made about the insurance coverage for their and their family's health, and related financial obligations, and therefore falls within the core meaning of the phrase 'personal affairs'.
44. I consider that information that would reveal the fact that an employee has decided to be a union member is information concerning the employee's personal affairs. For that reason, I also consider that information relating to the union subscription rates appearing on an employee's file is categorised as information relating to personal affairs as the release of that information, as part of the personnel records, would reveal which Council employees have chosen to be a union member, including the amount the employees have deducted from their pay.
45. Similarly, I am satisfied that correspondence regarding ambulance subscriptions is characterised as personal affairs information as its disclosure would reveal which employees were subscribers and therefore how employees have chosen to have their income applied.
46. I consider that the remaining category A matter, including, for example, information concerning how the employees otherwise choose to apply their income, whether they choose to be a member of the social club, and details of particular employees' superannuation, also concerns the private aspects of the employees' lives and can be categorised as information concerning their personal affairs.

Category B matter – employment affairs

47. Accordingly, I am satisfied that the types of documents listed below, except any parts of those documents that are category A matter, relate purely to the employment affairs of those individuals and therefore are not exempt from disclosure under section 44(1) of the FOI Act:
 - termination/resignation forms
 - action/record sheets for motions passed at meetings

- letters of resignation
- letters from Council accepting resignations
- references
- letters from Council regarding review of grading
- letters confirming offers of employment
- successful applications for employment with Council, including resumes
- position descriptions
- job advertisement
- meeting minutes
- employment contracts
- correspondence from the Commissioner for Children and Young People
- employment histories
- correspondence to and from Queensland Police Service regarding weapons licence to perform required duties for Council employees
- information relating to professional development and training undertaken in the course of employment
- blank leave form
- records of safety induction
- memo to payroll regarding new employee
- re-induction training attendance list
- executive salary scale.

48. I will refer to this matter as category B matter.

Public interest balancing test

49. Due to the way that section 44(1) of the FOI Act is worded and structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always tip the scales against disclosure of that information, and must decisively tip the scales if there are no public interest considerations which favour disclosure of the matter in issue.
50. Accordingly, I must consider whether there are sufficient public interest considerations to outweigh the privacy interests attaching to the matter which I consider concerns the personal affairs of Council employees.
51. I acknowledge that there is a general public interest in information held by government being accessible and this public interest consideration favours disclosure. However, I consider this general public interest carries less weight when the matter in issue constitutes personal information concerning individuals (as is the case in this review), rather than information held by the government about the government. Accordingly, I am of the view that this public interest consideration carries less weight than it might in other circumstances.

Remuneration of Council employees

52. In previous decisions of the Information Commissioner and in other jurisdictions, it has been held that:
- there is a general public interest in seeing how taxpayers' money is spent
 - that public interest is sufficient to justify disclosure of the gross income payable from the public purse to the holder of a public office.

53. In the decision in *Lower Burdekin Newspaper Company Pty Ltd and Burdekin Shire Council; Hansen, Covolo and Cross (Third Parties)*¹¹ the Deputy Information Commissioner said:

Information about the gross salary paid to an employee of a government agency has a dual character. It is both information about the income of an identifiable individual (and hence information concerning that individual's personal affairs) and information about the cost of having the duties of the relevant position performed for the benefit of the public. Governments fund their operations by imposts on the public of one kind or another. In a representative democracy, elected representatives are accountable to the electors for decisions made in respect of raising and spending public funds. The public has a strong, legitimate and abiding interest in having access to sufficient information to enable scrutiny of whether funds raised by government are expended efficiently and effectively in furtherance of the wider public interest. This extends to scrutiny of whether the public is obtaining value for money from performance of the duties of particular positions for which a government has decided to allocate funding. This public interest is even stronger in the case of senior officers who have responsibility for devising and/or implementing strategic and operational plans, and delivering key performance outcomes.

54. In *Stewart* however, the Information Commissioner also said that this public interest would not necessarily extend to income received by the holder of public office received from other sources, nor to the net income of that person, which is normally dependent on certain domestic relationships or income from other sources. Nor would the public interest consideration extend to the form in which the person elects to take non-salary components of a total income package.¹²
55. Accordingly, I consider that there is a significant public interest in releasing the total amount of remuneration received by each of the Council employees, where those amounts appear in the matter in issue but there is no identifiable public interest in releasing further details of the salary packages of the employees.
56. Therefore I am satisfied that information which discloses the gross salary of the Council employees does not qualify for exemption under section 44(1) of the FOI Act.
57. By letter dated 6 February 2008, Kerin & Co Lawyers, on behalf of the applicant, made submissions on the public interest considerations relating to three categories of documents.

Documents showing whether employees have applied for worker's compensation

58. In relation to documents showing whether employees have applied for worker's compensation, the applicant submits:

We believe that it is in the public interest for the public to monitor whether Council is successful in its duty of care at an internal level to employees, as if it is not then this impairs Council's functions of ensuring effective administration and service to the community. Council's duty is to serve the public in the day to day functions of its local boundaries. This duty is impaired if Council is failing in its duty to its employees.

Council's duty of care to its employees includes maintaining adequate workplace health and safety procedures. Whether these procedures are being adhered to or are effective can be monitored by the public by access to workers compensation applications. It is our submission that those applications will not contain personal information if it is blanked out

¹¹ (2004) 6 QAR 328 at paragraph 27.

¹² *Stewart* at paragraph 80.

and that it will merely contain information showing the cause and type of complaint made for compensation. It is also quite likely that applications for compensation will not go to a person's personal information but rather to the actual working environment at Council.

59. I have carefully considered the applicant's submissions and the relevant matter in issue. I note that there are recognised public interests in facilitating the accountability of government generally and promoting openness and transparency of government which, in my view, are relevant considerations in the circumstances.
60. The relevant matter in issue relates to whether the new employees to Council had applied for workers compensation in their *previous employment* and, in my view, does not:
- provide any insight as to whether Murgon Shire Council discharged its duty of care to employees
 - satisfy the public interests in facilitating the accountability of government or promoting openness and transparency of government.
61. On that basis, I am not satisfied that there are any public interest considerations favouring disclosure of the relevant matter in issue that outweigh the privacy interests of Council employees.

Correspondence from the Australian Services Union

62. In relation to correspondence from the Australian Services Union, the applicant submits:

It is in the public interest to ascertain whether Council is managing its staff in an appropriate manner. Obviously it will depend on the content of each item of correspondence to the Australian Services Union as to whether it will fall within the public interest exception. We would suggest that any correspondence which includes complaints made about the conditions of working with the Council, bullying, intimidation or harassment, or poor work practices goes to the actual working environment at Council and not to a person's personal affairs.

63. I have carefully considered the applicant's submissions and the relevant matter in issue. The applicant's submissions on this point are relevant to public interests in facilitating the accountability of government generally and promoting openness and transparency of government.
64. The relevant matter in issue relates to union membership, including the associated fees paid by individual employees and, in my view, does not:
- provide any insight as to whether there have been complaints made to the Australian Services Union about Council or enable someone to ascertain whether Council is managing its staff in an appropriate manner
 - satisfy the public interests in facilitating the accountability of government or promoting openness and transparency of government.
65. On that basis, I am not satisfied that there are any public interest considerations favouring disclosure of the relevant matter in issue that outweigh the privacy interests of Council employees.

Certificates of achievement, membership and qualifications

66. In relation to certificates of achievement, membership and qualifications, the applicant submits:

We submit that it is in the public interest to know whether Council employees have the necessary qualifications to occupy their roles in public office. This is particularly important for employees who are in a Supervisory and/or Managerial positions. It is important for the public to know as this ensures an open and accountable local government and reduces the opportunity for corruption in the form of nepotism.

67. I have carefully considered the applicant's submissions and the relevant matter in issue. The applicant's submissions on this point are also relevant to public interests in facilitating the accountability of government generally and promoting openness and transparency of government. As I have noted above, I consider:

- information which discloses courses of study undertaken or qualifications gained by the employees, independent of their employment, concerns their personal affairs (and is *prima facie* exempt from disclosure subject to the public interest balancing test)
- information which records the professional development and training courses undertaken in the course of employment concerns the employees' employment affairs (and is not exempt from disclosure under section 44(1) of the FOI Act).

68. Therefore, I will now consider whether there are any public interest considerations favouring disclosure of information which discloses courses of study undertaken or qualifications gained by the employees independent of their employment.

69. In accordance with my discussion above, I am satisfied that the categories of documents listed immediately below concern the employment affairs of Council employees and should be released to the applicant:

- job advertisements
- position descriptions
- successful applications of employees to Council, including resumes
- references
- letters confirming offers of employment
- employment histories
- information relating to professional development and training

except to the extent that they contain some information that concerns another person's personal affairs as set out at paragraphs 35 - 46 above.

70. In my view, the public interests in facilitating the accountability of government and promoting openness and transparency of government, especially in relation to government recruitment processes, are satisfied by providing access to information falling within those categories listed above and, in my view, the applicant has been provided with sufficient information to determine whether Council employees have the necessary qualifications to occupy their roles in government.

71. In my view, disclosure of information concerning courses of study undertaken or qualifications gained by the employees independent of their employment, would not further either the public interest in facilitating the accountability of government generally or the public interest in promoting openness and transparency of government to the extent necessary to override the public interest in protecting the privacy of an individual

in this case. Consequently, I am unable to identify any public interest considerations favouring disclosure of the relevant matter in issue that are of sufficient weight to outweigh the privacy interests of Council employees.

72. In relation to the remaining categories of documents, I am unable to identify any public interest considerations sufficient to justify their disclosure and I note that the applicant has not made submissions on those remaining categories of documents.

Conclusion regarding the application of section 44(1) of the FOI Act

73. For the reasons set out above, I find that:

- with the exception of the information which discloses the gross salary of Council employees as it appears in the matter in issue, the documents and parts of documents that are characterised as category A matter qualify for exemption under section 44(1) of the FOI Act as:
 - they concern the personal affairs of a person other than the applicant
 - there are no public interest considerations favouring disclosure which outweigh the privacy interests of the Council employees involved in this case
- the documents and parts of documents that are characterised as category B matter do not qualify for exemption under 44(1) of the FOI Act as they concern the employment affairs of the relevant employees and not their personal affairs.

Section 42(1)(ca) of the FOI Act

74. Council claims that the remaining matter in issue as it relates to Mr Gray is exempt from disclosure under section 42(1)(ca) of the FOI Act. As set out above, I have already found that the category A matter, except for information disclosing gross salary of Council employees, is exempt from disclosure under section 44(1) of the FOI Act. It is therefore only necessary to consider whether the category B information would be exempt from disclosure under section 42(1)(ca) of the FOI Act.

75. Section 42(1)(ca) of the FOI Act provides that:

42 Matter relating to law enforcement or public safety

(2) *Matter is exempt if its disclosure could reasonably be expected to—*

...

(ca) *result in a person being subjected to a serious act of harassment or intimidation.*

76. Section 42(1)(ca) is a relatively new exemption in the FOI Act that commenced operation on 31 May 2005. There is no equivalent exemption in other Australian jurisdictions to provide guidance regarding the phrase 'serious act of harassment or intimidation'.

77. The phrase 'could reasonably be expected to' requires a decision-maker to discriminate between expectations that are merely speculative or conjectural and reasonably based expectations—that is, expectations for which real and substantial grounds exist.¹³

¹³ *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at paragraphs 154-160.

78. Accordingly, in order to determine whether matter is exempt from disclosure under section 42(1)(ca) of the FOI Act, I must examine whether there are real and substantial grounds for the expectation that disclosure of the matter in issue would *'result in a person being subjected to a serious act of harassment or intimidation'*.
79. A recent decision of this Office¹⁴ indicated that the question to be asked is whether there are real and substantial grounds to expect that disclosure of the matter in issue would result in a person being subjected to a serious act of harassment (repeated or consistent conduct which torments or disturbs) or intimidation (conduct designed to make a person fearful or overawed). In that decision Assistant Commissioner Corby decided that it was not reasonable to expect that disclosure of the matter in issue could result in a serious act of harassment or intimidation, particularly as the applicant was already generally aware of the content of the matter in issue.
80. I consider that the questions I should ask, in order to determine if the matter in issue is exempt from disclosure because its release could reasonably be expected to result in a serious act of harassment or intimidation, are as follows:
- a) On an objective consideration of all relevant evidence, are there real and substantial grounds to expect that disclosure of the matter in issue would result in a person being subjected to:
 - i) harassment, that is, repeated or persistent conduct which torments or disturbs
 - ii) intimidation, that is, conduct designed to make a person fearful or overawed?
 - b) If a) is answered in the affirmative, on an objective consideration of all relevant evidence, are there real and substantial grounds to expect that such harassment or intimidation would result in:
 - i) substantial harm to property
 - ii) substantial harm to the mental well-being of a hypothetical reasonable person (including fear of harm to person or property)
 - iii) substantial alterations in a hypothetical reasonable person's living and/or work arrangements?

Council's submissions

81. In its decision dated 25 May 2007, Council did not detail specific reasons for deciding that the matter in issue as it relates to Mr Gray was exempt under section 42(1)(ca) of the FOI Act. It appears that Council's decision regarding section 42(1)(ca) was based solely on the objections raised by Mr Gray when he was consulted in accordance with section 51 of the FOI Act.
82. I note that Council was invited to make specific submissions in response to my preliminary view letter dated 4 December 2007. By letter dated 17 December 2007 Council responded to my preliminary view and submitted generally that:
- there have been numerous applications made under the FOI Act relating to the third parties in this review

¹⁴ *Price and Queensland Police Service* (Unreported, Queensland Information Commissioner, 29 June 2007).

- this has put considerable pressure on the third parties and consequently, they have suffered personal harassment and property damage.

83. Council did not provide specific submissions or provide evidence to support these general submissions. A staff member of this Office contacted Council on 2 January 2008 to raise this matter with Council and provide an opportunity for Council to elaborate on these submissions. Council responded by letter dated 3 January 2008 and advised that it had nothing further to provide by way of additional submissions, but repeated its assertion that it contested my preliminary view.

Mr Gray's submissions

84. By letters dated 20 December 2007 and 10 March 2008, Mr Gray provided submissions and supporting documentation to this Office in support of his case that the relevant matter in issue as it relates to him is exempt from disclosure under section 42(1)(ca) of the FOI Act.

85. I have carefully considered those submissions and information provided in relation to other matters currently before this Office that relate to the issues raised, or referred to, in Mr Gray's submissions in this review.

86. Mr Gray's submissions to this Office can be summarised as follows:

- There is currently a police investigation into threats made against the safety of Mr Gray's family and other Council staff.
- There have been approximately 16 applications under the FOI Act seeking access to information about Mr Gray and as a result of Council's decisions relating to the applicant, Mr Gray and his family are in fear of significant harassment and are concerned about their personal safety.
- Complaints about Mr Gray have been made to the Minister for Local Government and the Local Government Department.
- The website www.bunyawatch.com is being used to vilify Council, Mr Gray and other members of Council (certain relevant entries from that website were provided to this Office).
- The release of the matter in issue in this review will lead to further harassment of Mr Gray and his family.

Analysis

87. In considering the application of section 42(1)(ca) of the FOI Act to the category B matter relating to Mr Gray, the following matters are critical:

- a) the FOI Act requires that, to find that section 42(1)(ca) applies, it is not sufficient to merely establish that intimidation or harassment could reasonably be expected to result from disclosure, but that it be **serious** intimidation or harassment,¹⁵ and

¹⁵ And therefore that the parties, particularly the agency, have sufficiently justified the decision that the requisite elements are met.

- b) the nature of the particular documents in issue is such that **disclosure** of those **particular documents** could reasonably be expected to have the required effect.

88. In relation to b), in this case, it is particularly relevant that:

- I have found that information that I consider concerns Mr Gray's personal affairs is exempt from disclosure under section 44(1) of the FOI Act and will not be disclosed to the applicant in any event
- the category B matter relates to Mr Gray's employment affairs and does not include matter that also concerns his personal affairs
- the category B matter relates to Mr Gray's previous employment at Murgon Shire Council and does not relate to the matter involving Mr Gray and the applicant at Nanango Shire Council, which the concerns raised in this review relate to
- some of the documents¹⁶ within the category B matter are documents that are publicly available on the Nanango Council website and it is necessary to consider how disclosure of those documents under the FOI Act in relation to this FOI Application could be a disclosure that could have the required effect under section 42(1)(ca) of the FOI Act.

89. In relation to the last point in paragraph 87, I raised this issue in my letter to Mr Gray dated 27 March 2008 as I considered it difficult to see how disclosure under the FOI Act of documents that were already publicly available could be a disclosure that could have the required effect under section 42(1)(ca) of the FOI Act. I advised Mr Gray that, as certain documents were publicly available, it was necessary for Mr Gray to specifically identify which particular documents, or parts of documents, he believed the disclosure of which could reasonably be expected to result in him, or any other individual being subjected to a serious act of harassment or intimidation. Further, that he clearly attribute specific reasons for his concerns regarding the disclosure of the specific document or text in question as they relate to the test in section 42(1)(ca) of the FOI Act. Mr Gray did not respond to that letter and therefore did not direct me to consider specific documents, and submissions about particular documents, in this review.

Police investigation into threats

90. Mr Gray submits that there is currently a police investigation into threats made against the safety of his family and other Council staff. However, Mr Gray did not provide the specific details of the threats for my consideration in this review, including who made the threats.
91. Threats made against the safety of a person to whom documents relate is a serious matter and is clearly a relevant consideration in determining the application of section 42(1)(ca) of the FOI Act. It would appear likely that the threats made against the safety of Mr Gray and his family could be considered to be an act of intimidation.
92. However, the nature of the category B matter relating to Mr Gray is such that it is also particularly relevant in this case that Council and Mr Gray have not established how disclosure of that specific information could reasonably be expected to result in a serious act of harassment or intimidation under section 42(1)(ca) of the FOI Act, even in a context where serious threats have been made.
93. On the information available to me, I am not satisfied that the police investigation into threats against the safety of Mr Gray and his family, provides a basis to conclude that

¹⁶ Folios 3-5 and 31-32: Extracts of Council Meeting Minutes.

disclosure of the specific information contained in the category B matter relating to Mr Gray could reasonably be expected to result in a *serious* act of harassment or intimidation under section 42(1)(ca) of the FOI Act. Even if it could be established that disclosure of the specific information in issue could reasonably be expected to result in an act of intimidation or harassment, it would still be necessary to establish that it be a *serious* act of harassment or intimidation. Given the nature of the specific information in issue, I consider it would be difficult to establish such an effect.

94. In summary, I consider that there are insufficient submissions and evidence before me to find that I am satisfied that section 42(1)(ca) of the FOI Act is established on the basis of the submission regarding a police investigation into threats.

Numerous applications under the FOI Act

95. Mr Gray submits that there have been approximately 16 applications under the FOI Act seeking access to information about him. Mr Gray did not detail how making numerous applications under the FOI Act for documents relating to Mr Gray amounts to a *serious* act of harassment or intimidation in the circumstances.
96. The FOI Act provides for a person to apply for access to documents held by government. Access to documents held by government is a right provided for in the FOI Act, subject to specific exceptions and exemptions, such as the exemption relating to personal affairs matter contained in section 44(1) of the FOI Act, set out above.¹⁷ I note that the FOI Act also provides for specific constraints on repeat applications, such as contained in section 29B.
97. Even if it were the case that the making of numerous applications under the FOI Act for information about Mr Gray constituted an act of harassment or intimidation that was considered a *serious* act of harassment or intimidation, it is necessary to establish that disclosure of the particular category B information regarding Mr Gray in this review could reasonably be expected to result in a serious act of harassment or intimidation.
98. On the information available to me, I am not satisfied that the act of making a number of applications under the FOI Act, provides a sufficient basis for finding that disclosure of the particular category B matter regarding Mr Gray in this review could reasonably be expected to result in a *serious* act of harassment or intimidation under section 42(1)(ca) of the FOI Act.

Concerns of significant harassment of Mr Gray's family

99. Mr Gray submitted that as a result of the Nanango Shire Council's decision relating to Ms Sheridan, he and his family are in fear of significant harassment including concerns about personal safety. In doing so, I understand that Mr Gray is referring to the decision of Nanango Shire Council to terminate the applicant's employment and subsequent disputes between Nanango Shire Council and the applicant, and concerns raised by both parties, and their employees and people associated with them, in relation to incidents related to that matter. I note Mr Gray also provided information to show connections between the applicant and other individuals whose actions he had expressed concerns about. I refer also to Mr Gray's submission discussed above regarding a police investigation into threats to the safety of him and his family.
100. In support of his submissions Mr Gray provided supplementary material and referred to other material available to me. I have carefully considered all the material before me in

¹⁷ See section 21 of the FOI Act.

relation to this matter. My reasons set out above in relation to the submissions regarding the police investigation into threats to the safety of Mr Gray and his family are also relevant here.

101. As set out above, the nature of the specific documents being considered here is particularly important. As set in paragraph 87:
- I have found that information that I consider concerns Mr Gray's personal affairs is exempt from disclosure under section 44(1) of the FOI Act and will not be disclosed to the applicant in any event
 - the category B matter relates to Mr Gray's employment affairs and does not include matter that also concerns his personal affairs
 - the category B matter relates to Mr Gray's previous employment at Murgon Shire Council and does not relate to the matter involving Mr Gray and the applicant at Nanango Shire Council, which the concerns raised in this review relate to.
102. I consider that the nature of the category B matter relating to Mr Gray is such that it is also particularly relevant in this case that Council and Mr Gray have not established how disclosure of that specific information could reasonably be expected to result in a serious act of harassment or intimidation under section 42(1)(ca) of the FOI Act, even in a context such as that outlined in paragraph 99.
103. On the information available to me, I am not satisfied that that disclosure of the specific information contained in the category B information relating to Mr Gray could reasonably be expected to result in a *serious* act of harassment or intimidation under section 42(1)(ca) of the FOI Act on the basis of Mr Gray's submission in this respect.

Complaints to the Minister for Local Government and the Local Government Department

104. Mr Gray submits that complaints have been made about him to the Minister for Local Government and the Local Government Department and that the release of any information relating to him will further the applicant's cause in continuing the harassment which is causing significant stress to him and his family. Mr Gray did not provide any further detail on the nature of these complaints and their connection to the applicant.
105. However, generally I note that it is not unusual for members of the community to express opinion and views to elected members and government departments, including complaints. It is therefore necessary for Mr Gray to establish why the complaints made could be considered to be intimidation or harassment in the specific circumstances in order to justify an exemption under section 42(1)(ca) of the FOI Act. Further, the issues relating to the disclosure of the specific information in the category B matter have also not been addressed.
106. In the absence of specific submissions and evidence in this respect, I am not satisfied that the making of complaints in these circumstances would constitute a serious act of harassment as contemplated by section 42(1)(ca) of the FOI Act or that the disclosure of the specific information contained in the category B matter relating to Mr Gray could reasonably be expected to result in a serious act of harassment or intimidation under section 42(1)(ca) of the FOI Act.

Website

107. Mr Gray has submitted that the website www.bunyawatch.com is being used to vilify Council, Mr Gray and other members of Council. I have carefully reviewed the website Mr Gray has referred me to, including printouts of earlier entries on the website provided by Mr Gray.
108. The material is a collection of entries by various individuals on a range of matters. Some of the material can be attributed to specific authors, however other material does not even have a codename. I note that on the information available to me, it is not clear that the applicant has made any relevant entries on the website. Some of the entries refer to the applicant and Mr Gray, including specific entries on dispute processes relating to the termination of employment by Council. The material essentially expresses personal opinion and comment regarding the matter set out at paragraph 99 above involving the applicant and Nanango Shire Council, and Mr Gray as CEO of that Council.
109. I acknowledge that some comments within the material are unfavourable and unpleasant to people, including Mr Gray. Some of the material is also directed at Mr Gray, including a specific entry titled 'go leigh go' dated 11 April 2007 that does not bear any author name as follows:
- I have been asked by leigh to let you all know she hasn't given up, she will be collecting information to use for her march to justice. If the minister, ombudsman, local member, the cmc won't help her she'll have to do it herself. don't give up leigh we all love you. By the way she has asked that bunyawatchers stick with her. Also she needs help to keep the pressure on. don't be afraid to keep the pressure on. don't be afraid to call the mongrels that did this to her. night time is best. especially the ceo.*
110. In my view the above quoted entry could be considered to be intimidation and, if readers of the website did act on this statement and contact Mr Gray in the manner encouraged on the website, harassment. In this respect, I note in particular the reference to calling Mr Gray at night, which infers calls to him outside normal business hours and therefore in his personal time including when he would be at home.
111. I note that, as set out above, the specific information contained in the category B matter does not include any information that concerns Mr Gray's personal affairs, including residential contact details or information about his family or personal activities.
112. In this review in applying section 42(1)(ca) of the FOI Act, it is also necessary to consider evidence that indicates a connection with the matter in issue. Another website entry dated 19 May 2007 by 'Pearl' was also provided by Mr Gray and is relevant in this respect. The entry is titled 'NSC CEO – Naming the names of the "IN"' and lists a number of people, including those to which the matter in issue in this review relates, employed by Nanango Shire Council, their positions and previous employment at Murgon Shire Council. It questions the integrity of merit selection processes in relation to the employment of these officers and makes inferences about connections with others.
113. The specific information in the category B matter is personnel records for Murgon Shire Council, not Nanango Shire Council. Disclosure will not reveal that the relevant people mentioned in the website entry and personnel records worked for Murgon Shire Council, this fact has already been disclosed or confirmed by the Council's decision in response to the FOI Application, if not previously through another means. Disclosure

also will not show that a proper merit process was not conducted in the appointment of relevant employees to Nanango Shire Council, as the category B matter relates only to personnel records for the period of employment at Murgon Shire Council. Therefore the nature of the specific information in the category B matter is again particularly relevant in relation to this submission.

114. Therefore, for the reasons set out above, I am not satisfied that there is sufficient evidence in this instance to find that disclosure of the category B matter as it relates to Mr Gray could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation under section 42(1)(ca) of the FOI Act.

Conclusion regarding the application of section 42(1)(ca) of the FOI Act

115. In summary, I have carefully considered Mr Gray's submissions on each specific issue set out above and Mr Gray's submissions as a whole. I am not satisfied that those submissions provide sufficient evidence to conclude that the specific information contained with the category B matter as it relates to Mr Gray is exempt from disclosure under section 42(1)(ca) of the FOI Act, especially in light of the nature of the category B matter, as I have discussed above. Therefore, I find that the category B matter as it relates to Mr Gray is not exempt from disclosure under section 42(1)(ca) of the FOI Act.

DECISION

116. For the reasons set out above, I vary the initial decision of Mr Hackshaw dated 25 May 2007 by finding that:

- with the exception of the information which discloses the gross salary of Council employees, the documents and parts of documents that are characterised as category A matter qualify for exemption under section 44(1) of the FOI Act as:
 - they concern the personal affairs of a person other than the applicant
 - there are no public interest considerations favouring disclosure which outweigh the privacy interests of the Council employees
- the documents and parts of documents that are characterised as category B matter and information contained in the category A matter that discloses the gross salary of Council employees:
 - does not qualify for exemption under 44(1) of the FOI Act as they concern the employment affairs of the relevant employees not their personal affairs
 - as they relate to Shane Gray – does not qualify for exemption under section 42(1)(ca) of the FOI Act.

117. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

First Assistant Commissioner Rangihaeata

Date: 23 June 2008