



Decision and Reasons for Decision

Application Number: 210390

Applicant: Mr P Shaw

Respondent: Kilcoy Shire Council

Decision Date: 9 January 2008

Catchwords: **FREEDOM OF INFORMATION – section 44(1) of the *Freedom of Information Act 1992 (Qld)* – matter in issue concerns the terms of settlement of proceedings commenced by a third party against the respondent – whether matter in issue contains information concerning the personal affairs of the third party – whether disclosure of the matter in issue would, on balance, be in the public interest**

FREEDOM OF INFORMATION – section 22(a) of the *Freedom of Information Act 1992 (Qld)* – matter in issue comprises court documents filed with the Supreme Court of Queensland – whether applicant can reasonably get access to documents under another access scheme

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REASONS FOR DECISION

Summary

1. The three folios which relate to the relevant terms of settlement are exempt from disclosure under section 44(1) of the *Freedom of Information Act 1992* (Qld) (FOI Act) as they concern the personal affairs of a person and their disclosure, on balance, is not in the public interest.
2. The remaining six folios which are responsive to the applicant's freedom of information application (FOI Application) are matters of public record and are reasonably available to the applicant from the Supreme Court of Queensland. On this basis, access to these folios is refused under section 22(a) of the FOI Act.

Background

3. By application dated 22 August 2007, the applicant applied to the Kilcoy Shire Council (Council) under the FOI Act for access to:

all documents relating to Local Council Mutual Minute No 12/06B/07 (J. Lougheed vs Council)

4. By letter dated 23 August 2007, Council consulted a third party under section 51 of the FOI Act in relation to the release of the relevant information.
5. The third party objected to the release of the information and provided reasons for the objection.
6. By letter dated 7 September 2007, Ms C Gaedtke, FOI Co-ordinator, decided that the information sought could not be released to the applicant and explained that:

I have been unable to offer you confirmation of the amount that was settled in the matter of Lougheed vs. Council as I have been advised by Council's public liability insurer that the settlement is subject to a confidentiality clause, which prohibits public release of the information. The claim was settled out of Court and therefore there are no court transcripts which can be referred to.

7. By email dated 8 October 2007, the applicant sought internal review of Ms Gaedtke's decision.
8. By letter dated 30 October 2007, KL Timms, FOI Decision Maker, affirmed Ms Gaedtke's decision.
9. By email dated 26 November 2007, the applicant sought external review of KL Timms' decision.

Decision under review

10. The decision under review is the internal review decision of KL Timms dated 30 October 2007.

Steps taken in the external review process

11. By letters dated 28 November 2007 and 3 December 2007 this Office asked Council to provide copies of all documentation relevant to the review and the documents responsive to the FOI Application.
12. By letters dated 29 November 2007 and 12 December 2007, Council provided this Office with the requested documents.
13. On 19 December 2007, a staff member of this Office contacted the applicant and advised the preliminary view that:
 - three of the folios were exempt from disclosure under section 44(1) of the FOI Act
 - access should be refused to the remaining 6 folios under section 22(a) of the FOI Act.
14. By letter dated 2 January 2008, I communicated the preliminary view to the applicant in writing and invited the applicant, if he did not accept the preliminary view, to make written submissions in support of his case by 18 January 2008.
15. By email dated 5 January 2008, the applicant advised that he did not accept the preliminary view and provided submissions in support of his case.
16. In making this decision, I have taken the following into account:
 - the applicant's FOI Application dated 22 August 2007
 - Council's letter to the third party under section 51 of the FOI Act dated 23 August 2007
 - the third party's response to that letter dated 31 August 2007
 - Council's initial decision dated 7 September 2007
 - the applicant's internal review application dated 8 October 2007
 - Council's internal review decision dated 30 October 2007
 - the applicant's external review application dated 26 November 2007
 - the applicant's submissions dated 5 January 2008
 - relevant cases and legislation
 - the matter in issue.

Matter in issue

17. The matter in issue in this review comprises nine folios that can be categorised in the following manner:
 - three folios which relate to the terms of settlement of the relevant legal proceedings
 - six folios which comprise court documents filed in the Supreme Court of Queensland which relate to the relevant legal proceedings.

Findings

Section 44(1) of the FOI Act

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

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.*

19. Section 44(1) of the FOI Act requires consideration of the following issues:

- Would disclosure of the matter in issue reveal information concerning a person's personal affairs?
- If it would, the matter in issue is exempt¹ from disclosure unless there are public interest considerations favouring disclosure, which, on balance, outweigh the public interest considerations against disclosure.

20. I will examine each of these requirements below.

Personal affairs

21. In *Stewart and Department of Transport*², the Information Commissioner decided 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:

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

22. Whether or not matter contained in a document comprises 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.

Commencement and conduct of legal proceedings

23. The matter in issue contains details about the terms of settlement reached between Council and the relevant individual.

24. The Information Commissioner considered whether such information constitutes an individual's personal affairs in the decision of *Rees and Queensland Generation Corporation trading as Austa Electric*.³

25. In that case, the Information Commissioner decided that the commencement and conduct of an action for damages for personal injuries, by an individual acting in a

¹ Though it is not exempt merely because it concerns the personal affairs of the applicant (section 44(2) of the FOI Act).

² (1993) 1 QAR 227.

³ (1996) 3 QAR 277 (*Rees*).

purely personal capacity, must properly be characterised as the personal affairs of the individual.⁴

26. The Information Commissioner went on to comment that:⁵

20. *Nor do I mean to convey that, where litigation or the pursuit of a legal remedy is properly to be characterised as being an individual's personal affair, any document or information connected with the litigation (or the pursuit of the legal remedy) is necessarily information which concerns the individual's personal affairs. The primary issue in the application of s.44(1) of the FOI Act is always the proper characterisation of the particular information in issue, i.e., what is the information about?*

21. *In the present case, the information in issue is about the settlement of the proceedings in the Commission, brought by the third party, in a purely personal capacity, to pursue a legal remedy, including the third party's choices as to the basis on which he was prepared to compromise his rights to pursue that legal remedy to the full extent permitted by the law. I consider that the documents in issue comprise information which is properly to be characterised as information concerning the personal affairs of the third party, and which is therefore prima facie exempt from disclosure, under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.44(1).*

[my emphasis]

27. After carefully reviewing the matter in issue, I am satisfied that the matter in issue:

- relates to the terms of settlement of legal proceedings brought by an individual in a purely personal capacity
- reveals the basis on which that individual was prepared to compromise his rights to pursue that remedy
- comprises information that is properly characterised as the personal affairs of that individual and is *prima facie* exempt from disclosure under section 44(1) of the FOI Act subject to the public interest balancing test.

Public interest balancing test

28. A public interest consideration favouring non-disclosure, that is, the public interest in the protection of personal privacy, is inherent in circumstances where matter is *prima facie* exempt from disclosure under section 44(1) of the FOI Act. The mere finding that disclosure of the matter in issue would disclose information concerning the personal affairs of a person other than the applicant must always tip the scales against disclosure of that matter. The extent to which the scales are tipped varies from case to case according to the relative weight of the privacy interests attaching to the particular information that disclosure of the matter in issue would disclose.

29. On this basis, I must:

- consider any public interest considerations favouring disclosure of the relevant matter in issue
- determine whether those public interest considerations outweigh the public interest in the protection of personal privacy and any other public interest considerations favouring non-disclosure of the matter in issue.

⁴ Rees at paragraph 18.

⁵ Rees at paragraphs 20 - 21.

Public interest considerations favouring disclosure

30. I am of the view that the public interest considerations favouring disclosure of the matter in issue are:
- the public interest in promoting openness and transparency in relation to the operations of government agencies
 - the public interest in government agencies being accountable for the conduct of their operations and the expenditure of their funds.

31. I note that the applicant submits that:

Reference is made to public interest and it is purely this issue that concerns me.

My understanding is that Councillor Lougheed is intending to stand in the upcoming re zoned council elections.

If this is the case I believe the constituents involved should be aware of the fact that this claim was made and the circumstances surrounding it. This would allow the voters to make their decision knowing these facts.

32. After careful review of these issues, it is my view that the considerations favouring disclosure of the matter in issue should be afforded considerable weight in this instance. Against these I must balance the public interest considerations favouring non-disclosure.

Public interest considerations favouring non-disclosure

33. A public interest in the protection of personal privacy is inherent in circumstances where matter is *prima facie* exempt from disclosure under section 44(1) of the FOI Act.
34. In some instances where legal proceedings have commenced, information that would ordinarily be characterised as an individual's personal affairs can become a matter of public record. Where information becomes a matter of public record, the public interest in the protection of personal privacy is likely to be significantly diminished.
35. In this case, there is some relevant information on the public record (as discussed below). However, on the information available to me, I am satisfied that information relating to the terms of settlement of the matter is not a matter of public record and is not recorded in any public document. As was the case in *Rees*⁶, the settlement of relevant proceedings was achieved through negotiation outside the formal court process and set out in an agreement between the parties, the terms of which include that details of the settlement are to remain confidential.
36. Taking into account the factors set out above, I am of the view that:
- disclosure of the matter in issue would constitute a significant incursion into the personal privacy of the individual whose personal affairs are contained in the relevant folios.
 - the public interest in the protection of personal privacy is a highly significant consideration that should be accorded very substantial weight.

⁶ *Rees* at paragraphs 22-23.

Where does the balance of public interest consideration lie?

37. After careful deliberation, I am satisfied that:

- the public interest considerations favouring disclosure of the matter in issue do not outweigh the public interest in the protection of personal privacy
- the matter in issue qualifies for exemption under section 44(1) of the FOI Act.

Section 22(a) of the FOI Act

38. Section 22(a) of the FOI Act provides:

22 Documents to which access may be refused

An agency or Minister may refuse access under this Act to—

- (a) *a document the applicant can reasonably get access to under another enactment, or under arrangements made by an agency, whether or not the access is subject to a fee or charge; or*

39. A staff member of this Office contacted the Civil Registry at the Supreme Court of Queensland and confirmed that, as a non-party to the proceedings and a general member of the public, the applicant is entitled to view and request a copy of court documents filed in the relevant legal proceedings. As the applicant was not a party to these proceedings, there will be a small fee involved.

40. As the six remaining folios are reasonably available to the applicant from the Supreme Court of Queensland, I am of the view that the applicant should be refused access to these folios in accordance with section 22(a) of the FOI Act.

Conclusion

41. For the reasons explained above, I am satisfied that:

- a) The three folios which relate to the relevant terms of settlement are exempt from disclosure under section 44(1) of the FOI Act as they concern the personal affairs of a person and their disclosure is, on balance, not in the public interest.
- b) The remaining six folios are matters of public record and are reasonably available to the applicant from the Supreme Court of Queensland. On this basis, access to these folios is refused under section 22(a) of the FOI Act.

DECISION

42. For the reasons set out above, I vary the internal review decision of KL Timms dated 30 October 2007.

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

F Henry
Assistant Commissioner

Date: 9 January 2008