

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 96014
Application S 121/93

Participants:

"EDH"
Applicant

GRIFFITH UNIVERSITY
Respondent

DR DIANNE LEWIS
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - doctoral thesis submitted to the respondent by the third party - third party requested, and the respondent agreed, that the thesis be received in confidence and restricted from public access for a period of five years - whether agreement enforceable as an equitable obligation of confidence binding on the respondent, having regard to public interest considerations raised by the applicant - application of s.46(1)(a) of the *Freedom of Information Act 1992 Qld*.

Freedom of Information Act 1992 Qld s.5(1)(a), s.5(1)(b), s.25, s.40(b), s.40(c), s.41(1)(a), s.45(1), s.45(1)(a), s.45(1)(c), s.45(3), s.46(1)(a), s.46(1)(b), s.46(2), s.46(2)(a), s.78

Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft (1986) 10 FCR 180; 64 ALR 97; 12 ALD 468

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279

Burns and Australian National University, Re (No.1) (1984) 6 ALD 193; 1 AAR 456

Cardwell Properties Pty Ltd & Williams and Department of the Premier, Economic and Trade Development, Re (Information Commissioner Qld, Decision No. 95019, 29 June 1995, unreported)

Esso Australia Resources Ltd & Ors v Plowman (1995) 69 ALJR 404, 128 ALR 391

Pemberton and The University of Queensland, Re (Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported)

Smith Kline and French Laboratories (Aust) Limited and Ors v Secretary, Department of Community Services and Health (1991) 28 FCR 291

DECISION

I set aside the decision under review, being the decision made on behalf of the respondent on 10 May 1993 by Professor R Holmes. In substitution for it, I decide that the matter remaining in issue in the review (after concessions made by the respondent and the third party), being the matter identified in paragraph 5 of my accompanying reasons for decision, is exempt matter under s.46(1)(a) of the *Freedom of Information Act 1992* Qld.

Date of decision: 30 July 1996

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F N ALBIETZ
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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse access to a doctoral thesis written by the third party, Dr Lewis, and held by the respondent. Dr Lewis' thesis is entitled: "Culture Change - Communication, Management and Effects: An empirical study of change in an Australian tertiary institution". The tertiary institution at which the empirical study was undertaken is referred to in the thesis as "ATISIA" (an acronym for Australian Tertiary Institution Somewhere In Australia), in order to assist Dr Lewis' efforts to comply with promises of anonymity/confidentiality given by Dr Lewis to persons who co-operated with her research. The respondent had agreed to a request by Dr Lewis that her thesis be restricted from public access for a period of five years from the date of its submission in 1992. The applicant was denied the opportunity to read Dr Lewis' thesis at Griffith University, and subsequently decided to pursue access to the thesis under the *Freedom of Information Act 1992 Qld* (the FOI Act). The applicant is employed by the tertiary institution at which Dr Lewis conducted the research, and was one of many persons who co-operated with Dr Lewis' research. I have not identified the applicant in these reasons for decision as that would assist identification of the institution at which Dr Lewis' research was conducted.
2. By letter dated 26 February 1993, Professor A C McAndrew informed the applicant of his decision, on behalf of Griffith University, to refuse access to Dr Lewis' thesis on the basis that it comprised exempt matter under s.45(1)(a), s.45(1)(c), s.46(1)(a), s.46(1)(b) and s.40(b) of the FOI Act. The applicant then applied for internal review, and on 10 May 1993 Professor R Holmes confirmed the initial decision that the entire thesis was exempt, relying upon the same exemption provisions as Professor McAndrew. By letter dated 6 July 1993, the applicant applied to me for review, under Part 5 of the FOI Act, of Professor Holmes' decision.

The external review process

3. After receipt of the applicant's application for external review, Dr Lewis' thesis was obtained from Griffith University and examined. Dr Lewis applied for, and was granted, status as a participant in this review, in accordance with s.78 of the FOI Act.
4. During the course of this external review, a lengthy process of negotiation and mediation was undertaken with the participants. This resulted in both Griffith University and Dr Lewis agreeing to the release of most of the thesis, leaving in issue only the few passages which are identified below. These passages contain information considered by Dr Lewis to be of such sensitivity to individuals who co-operated with her research, or of such sensitivity to the management of the tertiary institution at which her research was conducted, that Dr Lewis could not agree to its disclosure.
5. The matter which remains in issue comprises the following segments of Dr Lewis' doctoral thesis:

Chapter 6: Transformational Leadership Strategies: Staff Reactions 1983-1988

- the last paragraph on p.189 (except for the first sentence thereof)
- p.190, except for the last paragraph on that page
- the second bullet-point sub-paragraph of the second paragraph on p.219
- the last paragraph on p.219 (including the heading above it)
- pp.220-222 (inclusive)
- the last paragraph on p.227
- pp.228-233 (inclusive)

Chapter 9: Interpretation and Implications

- p.323, except for the first three lines on that page
 - p.324, except for the last paragraph on that page and the heading above the last paragraph.
6. Once the extent of the matter in issue had been reduced by negotiation, the participants were given the opportunity to lodge evidence and submissions in support of their respective cases in this external review. Each participant was then given the opportunity to reply to the submissions made by the other participants (in general, Griffith University and Dr Lewis lodged material jointly), and their replies were also exchanged.
 7. No party lodged formal evidence in the form of statutory declarations or affidavits, although statements of an evidentiary nature have been made in some of the letters and written submissions that have been forwarded to me, and exchanged between the participants. In the view I have taken of the matter, the crucial evidence has been a letter dated 12 June 1992 from Dr Lewis to the Chairman of the Higher Degrees Committee of Griffith University, and the University's response dated 18 November 1992.
 8. In the former letter, Dr Lewis requested that Griffith University accept her doctoral thesis on the basis that it be kept confidential for a period of five years (with a review of the need for any further period of restricted access to take place upon expiry of the initial five year

period), and explained her reasons for making that request. The University's response merely stated that Dr Lewis' request had been approved.

9. Copies of those letters were provided to my office by Griffith University and Dr Lewis on the basis that they were for my information and perusal only, and were not to be given to the applicant. Ordinarily, procedural fairness requires that evidence lodged by one party to a legal proceeding be made available to other parties. However, I considered it appropriate in this instance to accept Dr Lewis' letter to Griffith University on the basis that it not be disclosed to the applicant, since the letter itself discloses highly sensitive and confidential material by way of explanation of the reasons for Dr Lewis seeking confidential treatment of her doctoral thesis. Moreover, the applicant did not dispute that Dr Lewis and Griffith University had agreed that Dr Lewis' thesis be restricted from public access for five years. The applicant's case was put on the basis that the existence of public interest considerations identified by the applicant meant that the agreement as to confidential treatment of Dr Lewis' thesis should not be recognised as legally enforceable.
10. Ultimately, the position adopted by Griffith University and Dr Lewis was that the matter in issue was claimed to be exempt under s.40(c), s.45(3) and s.46(1)(a) of the FOI Act. In the view I have come to, it is necessary to deal only with the claim for exemption under s.46(1)(a) of the FOI Act.

Application of s.46(1)(a) of the FOI Act

11. Section 46 of the FOI Act provides:

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.*

12. In *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, 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 for 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 *Re "B"* at pp.296-297, paragraph 44). In this instance, there is an identifiable plaintiff, namely Dr Lewis, who would have standing to bring an action for breach of confidence.

13. There is no suggestion in the present case of a contractual obligation of confidence arising from the circumstances of the communication of the information in issue from Dr Lewis to Griffith University. 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 cumulative 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 *Re "B"* at pp.303-304, paragraphs 60-63);
 - (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 *Re "B"* at pp.304-310, paragraphs 64-75);
 - (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 *Re "B"* at pp.311-322, paragraphs 76-102);
 - (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 *Re "B"* at pp.325-330, paragraphs 103-106); 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 *Re "B"* at pp.325-330, paragraphs 107-118).
14. With respect to the first criterion, I am satisfied that the information which is claimed to be confidential (see paragraph 5 above) can be identified with specificity.
15. As to the second criterion, the matter in issue comprises information obtained by Dr Lewis during the course of her research, and critical/analytical views expressed by Dr Lewis on information she had obtained. In the submission made on behalf of Griffith University and Dr Lewis, dated 26 August 1994, it was submitted that the matter in issue is not common knowledge or publicly available, and that Griffith University and Dr Lewis have not done or said anything to anyone which would deprive the information of its inaccessibility or secrecy. It was submitted that apart from the applicant's request for access to the thesis, Griffith University has ensured that the thesis has had, and continues to have, restricted access as requested by Dr Lewis. I accept that this is so. The thesis will have been read by the examiners appointed by Griffith University to assess the thesis. Also, the thesis in draft form was disclosed by Dr Lewis to about a dozen people to obtain critical feedback before the

thesis was submitted in final form. These factors do not, in my opinion, deprive the matter in issue of "the necessary quality of confidence": see *Re "B"* at p.306, paragraph 71(b) and *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180. I am satisfied that the second criterion is established.

16. Turning to the third criterion set out above, the question of whether a legally enforceable duty of confidence is owed depends on an evaluation of the whole of the relevant circumstances including (but not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and the circumstances relating to its communication, such as those referred to by a Full Court of the Federal Court of Australia in *Smith Kline and French Laboratories (Aust) Limited and Ors v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at pp.302-303: see *Re "B"* at p.316 (paragraph 84) and pp.314-316 (paragraph 82).
17. Based on my examination of the correspondence referred to in paragraphs 7-8 above, I consider that Griffith University, having expressly agreed (after considering Dr Lewis' request, and her explanation of her reasons for making the request) to accept Dr Lewis' thesis on the basis that (apart from limited disclosure for assessment purposes) the thesis remain confidential for five years, was bound in conscience to honour that agreement, unless, having regard to other relevant circumstances, equity would not require that the agreement be enforced as an equitable obligation of confidence.
18. The applicant has pointed to a number of public interest considerations which are claimed to militate against recognition of the agreement between Dr Lewis and Griffith University as an obligation of confidence binding on the University. Some of the applicant's arguments require attention having regard to the recognition by the High Court of Australia in *Esso Australia Resources Ltd & Ors v Plowman* (1995) 69 ALJR 404, 128 ALR 391 of a "public interest exception" that may affect the question of whether enforceable obligations of confidence should be imposed on government agencies, in respect of information relevant to the performance of their functions, at the suit of parties outside government who have purported to disclose the information to government agencies in confidence. I discussed the consequences of the *Esso* case, for the application of s.46(1)(a) of the FOI Act, in *Re Cardwell Properties Pty Ltd & Williams and Department of the Premier, Economic and Trade Development* (Information Commissioner Qld, Decision No. 95019, 29 June 1995, unreported) at paragraphs 51-61.
19. One of the arguments relied on by the applicant in this regard is not, in my opinion, sustainable. The applicant submitted that disclosure of the matter in issue is relevant to the treatment of the applicant, by the senior management of the tertiary institution described in Dr Lewis' thesis as ATISIA, in respect of an incident in which the applicant was falsely accused, by a student, of misconduct. The applicant sought to invoke the principle recognised in *Re Burns and Australian National University* (No.1) (1984) 6 ALD 193 (at p.197), and endorsed by me in *Re Pemberton and The University of Queensland* (Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported) at paragraphs 164-193, to the effect that, in an appropriate case, an applicant's involvement in, and concern with, particular information may be of such a nature as to give rise to a public interest in that applicant obtaining access to the particular information. This, however, is not an appropriate case for the application of that principle. The matter remaining in issue does not involve or concern the applicant. The applicant has been given assurances to that effect,

and has accepted them, but maintains that the matter in issue concerns motives, actions and strategies of senior management at ATISIA of the very kind which had deleterious consequences when applied to the applicant's case. In my opinion, that is simply too remote to enable the applicant to rely on the principle which I endorsed in *Re Pemberton* at paragraphs 164-193.

20. The applicant has also invoked two more soundly based public interest considerations. The first relates to the accountability of Griffith University in respect of assessing post-graduate theses, and the public interest in research subsidised by public funding being available to the community. It is summarised in the following extracts from the applicant's submissions:

I believe that public interest must be expected in matters of university administration which allow the conduct of research theses at taxpayer expense only then to have publication embargoed - especially when, as in this case, there is no suggestion of commercial confidentiality or such matters as, for example, exposure of matters of aboriginal sensitivity. (Applicant's submission dated 12 April 1995)

For a university to restrict, and in fact prohibit, access to a PhD thesis is not only contrary to a university's mission of disseminating knowledge but also is contrary to making it open and accountable. (Applicant's submission dated 13 November 1994)

21. The applicant also submits that there is a public interest in disclosure of information which assists in the accountability of publicly-funded bodies such as the tertiary institution referred to in Dr Lewis' thesis as ATISIA. The applicant's submissions in this regard are as follows:

Throughout the submissions made by Griffith University and Dr Lewis, it has been claimed that release of the information would compromise the career prospects and status of certain individuals mentioned in the thesis and the reputation of the institution on which the research was done, and also that Griffith University would be seen in a poor light if it was to allow the release of such information. It is submitted that none of these arguments is sufficient to establish that it is not in the public interest to release the information. If the information is of such a sensitive nature as to possibly lead to such serious consequences, it would appear in the public interest to make the information known to the public in view of the fact that the relevant institutions are publicly funded bodies. The public have a right to know that their money is used properly. I submit that it is in the public interest to have public institutions - and especially Universities - run in an open and accountable manner. It has long been accepted that one of the best methods of keeping an institution accountable is to make it open to public scrutiny and it is to be noted that government reforms in the tertiary sector since 1988 have been to make universities more accountable to public pressures.

22. The force of this submission stems from the fact that (unlike probably the vast majority of post-graduate theses submitted to Australian universities) the subject matter of Dr Lewis' thesis is such that its disclosure would have the effect of enhancing public knowledge and understanding of aspects of the operation of a publicly-funded tertiary institution. Its disclosure would serve key objects recognised in the FOI Act: see s.5(1)(a) and s.5(1)(b) of the FOI Act. I do not share the applicant's indifference, evident in the above passage, to the

prospect of detriment to individuals who co-operated with Dr Lewis' research on the basis of promises that their identities would not be disclosed. Otherwise, I consider that the applicant has raised public interest considerations of substantial weight. Had Dr Lewis and Griffith University not made extensive concessions during the course of the review, I may well have found that public interest considerations of the kind raised by the applicant tell against confidential treatment for the whole of Dr Lewis' thesis. I note in this regard that Dr Lewis' initial request to Griffith University for confidential treatment of her thesis makes clear that she was mainly concerned about the consequences of disclosure of particular segments of the thesis. It does not appear that any consideration was given at that time to asking for confidential treatment of parts only of her thesis. Perhaps there was concern that the integrity of the work would be compromised for a reader by the withholding of parts of the thesis. However, during the course of this review, and taking account also of the passage of time since the events dealt with in the thesis, Dr Lewis has taken the opportunity to refine, to the bare minimum, those segments of her thesis in respect of which she retains real concern for the detrimental consequences of disclosure.

23. I consider that the extent of the disclosure agreed to by Dr Lewis and Griffith University during the course of the review, leaving in issue only a few highly sensitive passages of the thesis, has generally been sufficient to neutralise the public interest concerns raised by the applicant (in the sense that those public interest concerns have been adequately served by the extent of the disclosure agreed to by Dr Lewis and Griffith University). I should note also that I accept the University's argument that the public interest in the availability of research subsidised by public funding must, in appropriate cases, be tempered by practical considerations relating to the need for researchers to be able to promise anonymity to individuals in order to secure their full co-operation in certain kinds of research.
24. Having regard to all the relevant circumstances, I consider that Griffith University is bound by an equitable obligation of confidence not to use or disclose the matter remaining in issue, in a way that is not authorised by Dr Lewis, for the duration of the period covered by the agreement referred to in paragraph 17 above. I am satisfied that the third criterion set out in paragraph 13 above is established.
25. The fourth criterion set out at paragraph 13 above concerns actual or threatened misuse of the confidential information. It is clear from Dr Lewis' pursuit of her objection to any disclosure to the applicant of the matter remaining in issue, that this criterion is satisfied.
26. Finally, with regard to the fifth criterion set out at paragraph 13 above, I observed in *Re "B"* (at pp.326-327, paragraph 111) that it was not necessary to establish that a threatened disclosure of confidential information would cause detriment in a financial sense, but that detriment could also include loss of social amenities, 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 of the matter remaining in issue would cause detriment to Dr Lewis of one or more of these kinds.
27. Finally, I note that s.46(2) does not apply to the matter in issue, so as to exclude it from eligibility for exemption under s.46(1)(a). Neither the thesis as a whole, nor the matter remaining in issue, can be properly characterised as deliberative process matter falling within the terms of s.41(1)(a) of the FOI Act. In addition, it appears clear that Dr Lewis wrote the thesis in a private capacity, i.e., as a post-graduate student, and not in any capacity, such as that of an officer of an agency, mentioned in s.46(2)(a) of the FOI Act.

Conclusion

28. Having regard to the foregoing reasons, I consider it appropriate that I set aside the decision under review. In substitution for it, I decide that the matter remaining in issue in this review, as identified in paragraph 5 of these reasons for decision, is exempt matter under s.46(1)(a) of the FOI Act.

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F N ALBIETZ
INFORMATION COMMISSIONER