

Price and Department of Justice & Attorney-General

(S 132/99, 28 March 2002, Deputy Information Commissioner)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.-3. These paragraphs deleted.

REASONS FOR DECISION

Background

4. The applicant, Mr Ron Price, seeks review of the Department's decision to refuse him access to certain documents identified by the Department as falling within the terms of the applicant's FOI access application dated 12 December 1998. The Department claims that those documents are exempt from disclosure under s.43(1) of the FOI Act (the legal professional privilege exemption). The applicant also seeks review of the Department's decision to require payment of photocopying charges for the provision of access to copies of certain other documents. The applicant contends that those documents concern his personal affairs, and therefore that no photocopying charge is payable under s.7 of the FOI Regulation.
5. In his FOI access application dated 12 December 1998, the applicant sought access to a copy of a certificate of dismissal dated 4 July 1997 relating to the matter of *Brennan v Price*, heard in the Gatton Magistrates Court by Magistrate Hall on 26 May 1997, and to any documents related to the creation of that certificate. Following discussions and correspondence between the applicant and the Department, it was agreed to include within the terms of the applicant's FOI access application, documents created after 30 November 1997 concerning the matter of *Price v Brennan and Yorkston*.
6. By letter dated 19 April 1999, Ms Lynn Barratt of the Department provided the applicant with a schedule of the documents she had identified as falling within the terms of his FOI access application. Ms Barratt advised the applicant that she had decided to give him access to some documents, but to refuse access to others on the grounds that they were subject to legal professional privilege and therefore exempt from disclosure under s.43(1) of the FOI Act. In respect of those documents to which access was to be granted, Ms Barratt advised the applicant that, if he wished to obtain copies, a photocopying charge of 50c per page was payable.
7. By letter dated 24 April 1999, the applicant wrote to the Information Commissioner, seeking review of Ms Barratt's decision. By letter dated 13 May 1999, Assistant Information Commissioner Shoyer informed the applicant that the Information Commissioner did not have jurisdiction to deal with his application for review as he had not applied to the Department for internal review of Ms Barratt's decision, which he was

required to do under s.73(3) of the FOI Act. On 13 May 1999, the applicant faxed a copy of Assistant Information Commissioner Shoyer's letter to the Department with the following handwritten annotation appearing on the front page - "... *If necessary, this is my application for internal review ...*".

8. The Department did not respond to the applicant's facsimile. By letter dated 23 June 1999, the applicant again applied to the Information Commissioner for review of the Department's decision. By letter dated 8 July 1999, Assistant Information Commissioner Shoyer wrote to the Department to advise it that, the time limit for internal review specified by s.52(6) of the FOI Act having expired, the Department was deemed to have made a decision affirming Ms Barratt's decision. Assistant Information Commissioner Shoyer further advised that the Information Commissioner would review that deemed decision.

External review process

9. Copies of the documents to which the applicant had been refused access by the Department were obtained and examined, as were copies of those documents in respect of which the Department contended that a photocopying charge was payable by the applicant. As the result of negotiations between the Department and this office, the applicant was given access to some further documents, and those documents are no longer in issue in this review.
10. By letter dated 12 October 2001, Assistant Information Commissioner Moss informed the applicant of her preliminary view that some documents claimed by the Department to be exempt from disclosure under s.43(1) of the FOI Act, did not qualify for exemption under s.43(1). That preliminary view was also conveyed to the Department. In relation to the photocopying charge issue, Assistant Information Commissioner Moss informed the applicant of her preliminary view that, with the exception of five documents, which she considered could properly be characterised as documents concerning his personal affairs, the remainder of the documents in issue contained no information which could properly be characterised as information concerning the applicant's personal affairs, and that the Department was therefore entitled to require a charge for the provision of photocopies of those documents. (The Department accepted the preliminary view regarding the five documents mentioned above, and provided the applicant with copies of those documents at no charge.)
11. By letter dated 1 March 2002, Assistant Information Commissioner Moss advised the applicant that the Department had accepted her preliminary view that certain documents did not qualify for exemption under s.43(1) of the FOI Act, and had withdrawn its claim for exemption in respect of those documents. She also informed the applicant of her preliminary view that the remaining documents in issue qualified for exemption under s.43(1). In the event that he did not accept that preliminary view, the applicant was invited to provide written submissions and/or evidence in support of his case for disclosure. The applicant did not respond to that letter. Hence, it is necessary for me to finalise this matter by way of a written decision.

12. In making my decision in this matter, I have taken into account the following material:
1. the contents of the documents in issue;
 2. the applicant's FOI access application dated 12 December 1998; facsimile message to the Department dated 13 May 1999; and application for external review dated 23 June 1999; and
 3. the decision of Ms Barratt of the Department dated 19 April 1999.

Application of s.43(1) of the FOI Act

13. The documents which the Department claims are exempt from disclosure under s.43(1) of the FOI Act are listed in the First Schedule which is attached to, and forms part of, these reasons for decision*. Those documents relate to litigation between the applicant and the Queensland Police Service (QPS) in which Crown Law acted on behalf of the QPS.

14. Section 43(1) of the FOI Act provides:

43(1) Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.

15. Following the judgments of the High Court of Australia in *Esso Australia Resources Ltd v Commission of Taxation* (1999) 74 ALJR 339, the basic legal tests for whether a communication attracts legal professional privilege under Australian common law can be summarised as follows:

4. Legal professional privilege attaches to confidential communications between a lawyer and client (including communications through their respective servants or agents) made for the dominant purpose of -

(a) seeking or giving legal advice or professional legal assistance; or

(b) use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.

5. Legal professional privilege also attaches to confidential communications between the client or the client's lawyers (including communications through their respective servants or agents) and third parties, provided the communications were made for the dominant purpose of use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.

16. I have reviewed the contents of the documents listed in the attached First Schedule*. Based upon my examination of those documents, I am satisfied that each comprises a confidential communication between the QPS and Crown Law (and/or Counsel retained by

Crown Law to represent the QPS), that was made either for the dominant purpose of seeking or giving legal advice or professional legal assistance, or for the dominant purpose of use, or obtaining material for use, in litigation that had commenced, or was reasonably anticipated, at the relevant time.

17. Accordingly, I find that the documents listed in the attached First Schedule* are subject to legal professional privilege, and comprise exempt matter under s.43(1) of the FOI Act.

Payment of photocopying charge

18. The documents in respect of which the Department contends that a photocopying charge is payable for the provision of copies, are listed in the Second Schedule which is attached to, and forms part of, these reasons for decision*.

19. Prior to amendments which came into force on 23 November 2001, sections 7 and 8 of the FOI Regulation provided:

7.(1) An applicant must pay a charge for access to a document that does not concern the applicant's personal affairs.

(2) A charge is not payable for access to a document that concerns the applicant's personal affairs.

8. The charge for giving access to a document by providing a photocopy of the document in A4 size is the amount calculated at the rate of 50c for each page of the copy.

20. The amended sections 7 and 8 of the FOI Regulation still impose a charge for the provision of access by way of a photocopy of a document, if the document does not concern the applicant's personal affairs, although the copying charge has been reduced from 50c per A4 page to 20c per A4 page.

21. In *Re Stewart and Department of Transport* (1993) 1 QAR 227, 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 (see pp.256-257, paragraphs 79-114, of *Re Stewart*). In particular, the Information Commissioner 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:

1. family and marital relationships;
2. health or ill health;
3. relationships and emotional ties with other people; and
4. domestic responsibilities or financial obligations.

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.

22. In *Re Rees and Queensland Generation Corporation trading as AUSTRAL ELECTRIC* (1996) 3 QAR 388, the Information Commissioner explained the factors that may be relevant in deciding, in each case, whether or not information can properly be characterised as information concerning the personal affairs of a person involved in litigation. At paragraphs 19-20, the Information Commissioner stated:

19. I do not mean to convey that any involvement by an individual in litigation, or the pursuit of a legal remedy, is necessarily a personal affair of the individual. I consider, for example, that the commencement and conduct of legal action, by an individual who carries on a trade, business or profession, to recover money owed in respect of goods or services provided, should properly be characterised as the individual's business or professional affairs. On the other hand, I would regard the commencement and conduct of an action for damages for personal injuries, by an employee injured at work, as a personal affair of the injured employee, notwithstanding that it occurred in the course of the performance of the employee's duties of employment.

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?

23. I have examined the documents listed in the attached Second Schedule*. While I acknowledge that most of them contain a reference to the applicant's name as a party to the relevant litigation (and that the nature of the litigation and the applicant's involvement in it is an aspect of his personal affairs), I do not consider that those mere references in the documents are sufficient to characterise them as documents concerning the applicant's personal affairs. Otherwise, the documents contain no information about the applicant's personal affairs. I consider that those documents are properly to be characterised as documents concerning the conduct and administration of the relevant litigation by Crown Law (and by Counsel appointed by Crown Law), on behalf of Crown Law's client, the QPS.
24. Accordingly, I find that the documents listed in the attached Schedule 2* cannot properly be characterised as documents concerning the applicant's personal affairs, and that the applicant must therefore pay the photocopying charge required under the FOI Regulation if he wishes to obtain access by way of the provision of photocopies of those documents.

DECISION

25. I affirm those parts of the decision under review (which is identified in paragraph 8 above), by which it was decided that:

1. the documents listed in the First Schedule attached to these reasons for decision* comprise exempt matter under s.43(1) of the FOI Act; and
- (b) the documents listed in the Second Schedule attached to these reasons for decision* cannot properly be characterised as documents concerning the applicant's personal affairs, and that the applicant must therefore pay the photocopying charges required under the FOI Regulation if he wishes to obtain access by the provision of photocopies of those documents.

* Schedules not included