



Decision and Reasons for Decision

Application Number: 210094

Applicant: L and J Darglish

Respondent: Department of Natural Resources and Water

Decision Date: 24 January 2007

Catchwords: Application for extension of time in which to lodge external review application – section 73(1)(d) of the *Freedom of Information Act 1992* – merits of substantive application for review regarding sections 36, 44(1) and 50(c) of the *Freedom of Information Act 1992* – application refused

Contents

Background	2
Application for extension of time in which to make an application for external review.....	4
Decision	10

Reasons for Decision

Background

1. The applicants seek an extension of time, under section 73(1)(d) of the *Freedom of Information Act 1992* (Qld) (FOI Act), in which to make an application for external review of the internal review decision of the Department of Natural Resources and Water (DNRW) to refuse to grant them access to documents they sought in an FOI access application dated 2 April 2006.
2. By application dated 2 April 2006, the applicants sought access, under the FOI Act, to:

Background material used to determine KRA 71 (State Planning Policy for Protection of Extractive Resources – draft), including but not limited to:

1. *Extractive Resource,*
2. *Extractive Resource Description,*
3. *Significance,*
4. *Separation Area,*
5. *Special Considerations,*
6. *Environmental Considerations, and*
7. *Impact on neighboring properties.*

Including any paper or material thing on which there is writing, marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and any disc, tape or other article or any material from which sounds, images, writing or messages are capable of being reproduced.

Any paper or material thing on which there is writing, marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and any disc, tape or other article or any material from which sounds, images, writing or messages are capable of being reproduced that either directly or indirectly makes reference to 451 West Mt Cotton Rd and/or 122 Fabian Rd and/or the owner of the properties either during the drafting of, or subsequent to the release of, the State Planning policy for Protection of Extractive Resources – draft.

With respect to KRA 71, any material that has been produced subsequent to the release of the draft State Planning policy for protection of Extractive Resources, including but not limited to:

1. *Extractive Resource,*
2. *Extractive Resource Description,*
3. *Significance,*
4. *Separation Area,*
5. *Special Consideration,*
6. *Environmental Considerations, and*
7. *Impact on neighboring properties.*

Including any paper or material thing on which there is writing, marks, figures, symbols or perforations having a meaning for a person qualified

to interpret them; and any disc, tape or other article or any material from which sounds, images, writing or messages are capable of being reproduced.

Any paper or material thing on which there is writing, marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and any disc, tape or other article or any material from which sounds, images, writing or messages are capable of being reproduced that either directly or indirectly makes reference to the decision making process that lead to the decision not to directly notify owners of properties affected by the State Planning policy for Protection of Extractive Resources – draft.

Any paper or material thing on which there is writing, marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and any disc, tape or other article or any material from which sounds, images, writing or messages are capable of being reproduced that either directly or indirectly makes reference to the response to be given to enquiries and/or variation and/or clarification of such response, relating to the assessment made by the EPA of KRAs included in the State Planning policy for Protection of Extractive Resources – draft.

3. By letter dated 4 August 2006, Mr Rob Zubrinich, Manager, Administrative Review of DNRW, decided to grant the applicants access to the folios located subject to the deletion of matter exempted under sections 36, 44 and 50 of the FOI Act.
4. By letter dated 21 August 2006, the applicants applied for internal review of Mr Zubrinich's decision.
5. By letter dated 26 September 2006, Mr Ken Davies, Director, Executive and Administrative Services, affirmed Mr Zubrinich's decision.
6. By letter dated 3 November 2006, the applicants applied to this office, under Part 5 of the FOI Act, for external review.
7. By telephone conversation on 7 November 2006, staff of this office contacted DNWR to obtain samples of the documents said by DNRW to contain exempt matter.
8. By letter dated 15 November 2006 I advised the applicants that their application for external review was made outside the timeframe provided by section 73(1)(d) of the FOI Act. I advised the applicants that they could, if they wished to do so, apply to the Information Commissioner for an extension of time pursuant to section 73(1)(d) in which to make their application for external review. I also advised the applicants of the principles to be considered in deciding whether or not to grant an extension, as considered in the matter of *Re Young and Workers' Compensation Board of Qld* (1994) 1 QAR 543 (*Re Young*), and asked that they provide me with submissions relevant to those principles, in the event that they sought an extension of time.
9. By letter dated 29 November 2006 the applicants provided submissions as to why an extension should be granted.

Application for extension of time in which to make application for external review

10. Section 73(1)(d) of the FOI Act provides:

73 Applications for review

(1) *An application for review must—*

...

(d) *be made within 28 days from the day on which written notice of the decision is given to the applicant, or within such longer period as the commissioner allows.*

11. The principles which apply to the exercise of the discretion to extend time for lodging an application for review were considered by Information Commissioner Albietz in *Re Young*. At paragraph 22 of that decision, Commissioner Albietz identified the key considerations as:

- (a) *the extent of the delay in applying for review and whether the applicant has an acceptable explanation for the delay;*
- (b) *the balance of fairness, having regard to any prejudice that would be occasioned to the applicant by a refusal to grant an extension of time compared with any substantial prejudice that would be occasioned to the respondent or to third parties by the grant of an extension of time; and*
- (c) *the merits of the substantive application for review: i.e., whether it raises genuine issues and discloses a reasonably arguable case, with reasonable prospects of success, in respect of one or more of the documents in issue; or whether it would be futile to permit the application to proceed because it is apparent that the applicant lacks any grounds of substance for challenging the decision under review and has no reasonable prospects of success.*

Extent of and explanation for the delay

12. Section 73(1)(d) requires that any application for external review in this case should have been lodged by 26 October 2006, such that the application for external review was 13 days late. This is a relatively short period.
13. By way of explanation for the delay, the applicants stated in their submission dated 26 November 2006 that they were sent documents in multiple lots requiring a lot of reading. The applicants also stated that DNRW took five months in giving them the documents. In my view, the fact that there was a delay on the part of the agency in making its initial decision and the fact that there were a lot of documents for the applicants to read did not affect the applicants' ability to apply external review within the required 28 days. I note that the applicants made their internal review request within the required 28 days, even though they were not at that stage in full receipt of all the documents.
14. In my view, although the delay in applying for external review was relatively short, the applicants have not provided me with a reasonable explanation for the delay.

Prejudice to other parties

15. I do not consider that any substantial prejudice would be suffered by DNRW, were the applicants to be granted an extension of time. As discussed by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 at page 350, the mere absence of prejudice to the respondent is not enough to justify the grant of an extension.
16. Although the applicants have not identified any prejudice that would be occasioned to them by a refusal to grant an extension, it is clear that if an extension is not granted, the applicants will not be entitled to have the internal review decision externally reviewed.
17. However, in view of the fact that no explanation has been given for the delay and in view of the merits of the applicant's substantive application, the fact that the applicant will not be entitled to have the internal review decision externally reviewed does not of itself justify granting the extension of time.

Merits of the substantive application

18. In applying the third principle articulated in *Re Young*, my task is to consider the merits of the substantive application for review, including whether the applicant has grounds of substance for challenging the decision under review with respect to one or more documents.
19. As stated above, staff of this office asked DNWR to provide me with copies of some of the documents claimed to be exempt or containing segments of matter claimed to be exempt. I have now examined the sample documents provided. I am of the view that the matter claimed to be exempt by DNRW may be sorted into four categories, as considered below.

Category 1

20. The first category consists of matter exempted under section 44(1) of the FOI Act, comprising the private addresses and telephone numbers of persons who made submissions to DNRW.
21. By telephone conversation on 12 December 2006, Mr L Daghish advised staff of this office that the applicants were not seeking access to personal affairs matter, such as names, addresses and contact details of other persons, appearing on the folios in issue.
22. Accordingly, that matter is not in issue, and I have not considered it in this decision.

Category 2

23. These documents consist of matter DNRW claims to be exempt under section 36 of the FOI Act.
24. Section 36 of the FOI Act provides:

36 Cabinet matter

- (1) *Matter is exempt matter if—*

- (a) *it has been submitted to Cabinet; or*
 - (b) *it was prepared for submission to Cabinet and is proposed, or has at any time been proposed, by a Minister to be submitted to Cabinet; or*
 - (c) *it was prepared for briefing, or the use of, a Minister or chief executive in relation to a matter—*
 - (i) *submitted to Cabinet; or*
 - (ii) *that is proposed, or has at any time been proposed, to be submitted to Cabinet by a Minister; or*
 - (d) *it is, or forms part of, an official record of Cabinet; or*
 - (e) *its disclosure would involve the disclosure of any consideration of Cabinet or could otherwise prejudice the confidentiality of Cabinet considerations or operations; or*
 - (f) *it is a draft of matter mentioned in paragraphs (a) to (e); or*
 - (g) *it is a copy or extract from, or part of a copy of or extract from, matter mentioned in paragraphs (a) to (f).*
25. Information Commissioner Albietz has discussed the application of section 36 of the FOI Act, in its present form, in a number of cases, e.g., *Re Beanland and Department of Justice and Attorney-General* (1995) 3 QAR 26; *Re Little and Department of Natural Resources* (1996) 3 QAR 170; *Re Ryman and Department of Main Roads* (1996) 3 QAR 416; and *Re Lindeberg and Department of Families, Youth & Community Care* (1997) 4 QAR 14.
26. The application of section 36 of the FOI Act turns on what are essentially questions of fact. Those provisions confer exemption merely by membership of a defined class or category, irrespective of whether disclosure of the particular matter in issue would have any prejudicial consequences. An agency can establish that matter is exempt under section 36(1) merely by proving the facts which bring the matter in issue within one of the defined classes or categories. Moreover, section 36(1) is not subject to a public interest balancing test, which means that no account is to be taken, in the application of those provisions, of other public interest considerations which might favour (even overwhelmingly favour) disclosure of particular matter which falls within one of the defined classes or categories of exemption in section 36(1).
27. Having examined samples of documents claimed to be exempt under section 36(1), I consider that the applicants do not have a reasonably arguable case in relation to this category of documents. The documents are Ministerial briefing notes in relation to a matter that, on the face of the documents, was proposed to be submitted to Cabinet by a Minister, in accordance with section 36(1)(c)(ii) of the FOI Act.

Category 3

28. The third category of documents consists of matter the disclosure of which would infringe the privilege of Parliament. Section 50 of the FOI Act provides that:

50 Matter disclosure of which would be contempt of Parliament or contempt of court

Matter is exempt matter if its public disclosure would, apart from this Act and any immunity of the Crown

...

- (c) *infringe the privileges of*
 (i) *Parliament; or ...*

29. The laws of Parliamentary privilege are to be found in:

- the *Constitution of Queensland 2001*, section 9; and
- the *Parliament of Queensland Act 2001* (principally Chapter 2).

30. Section 8 of the *Parliament of Queensland Act 2001* is the most significant source of privilege for present purposes. It provides:

8 Assembly proceedings can not be impeached or questioned

- (1) *The freedom of speech and debates or proceedings in the Assembly can not be impeached or questioned in any court or place out of the Assembly.*
- (2) *To remove doubt, it is declared that subsection (1) is intended to have the same effect as article 9 of the Bill of Rights (1688) had in relation to the Assembly immediately before the commencement of the subsection.*

31. The meaning of "proceedings in the Assembly" is set out in section 9(1) and section 9(2) of the *Parliament of Queensland Act 2001*:

9 Meaning of "proceedings in the Assembly"

- (1) *"Proceedings in the Assembly" include all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee.*
- (2) *Without limiting subsection (1), "proceedings in the Assembly" include—*
- (a) *giving evidence before the Assembly, a committee or an inquiry; and*
- (b) *evidence given before the Assembly, a committee or an inquiry; and*
- (c) *presenting or submitting a document to the Assembly, a committee or an inquiry; and*

- (d) *a document tabled in, or presented or submitted to, the Assembly, a committee or an inquiry; and*
- (e) *preparing a document for the purposes of, or incidental to, transacting business mentioned in paragraph (a) or (c); and*
- (f) *preparing, making or publishing a document (including a report) under the authority of the Assembly or a committee; and*
- (g) *a document (including a report) prepared, made or published under the authority of the Assembly or a committee.*

32. Accordingly, the central issue for consideration under section 50(c)(i) of the FOI Act is whether the preparation of the exempt matter was an act done for the purposes of, or incidental to, transacting business of the Assembly.

33. In *Halsbury's Laws of England* 4th Ed. Vol. 34 para. 1486, the following observations are made:

An exact and complete definition of 'proceedings in Parliament' has never been given by the courts of law or by either House. In its narrow sense the expression is used in both Houses to denote the formal transaction of business in the House or in committees. It covers both the asking of a question and the giving of written notice of such question, and includes everything said or done by a member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business.

In its wider sense 'proceedings in Parliament' has been used to include matters connected with, or ancillary to, the formal transaction of business. A select committee of the Commons ... stated in its report that it would be unreasonable to conclude that no act is within the scope of a member's duties in the course of parliamentary business unless it is done in the House or a committee of it and while the House or committee is sitting.

34. In *Attorney General of Ceylon v De Livera* [1963] AC 103 at 121, the Judicial Committee of the Privy Council, in reviewing the scope of the protection of privilege in the UK, observed:

It is impossible to regard [a Member's] only proper functions as a Member as being confined to what he does on the floor of the House itself. In particular, in connection with his approaches to or relations with ministers whether or not on behalf of one of his own constituents it is recognised that his functions can include actions other than the mere putting down and asking of a parliamentary question.

35. The operation of Article 9 of the Bill of Rights, as extended by the Commonwealth equivalent to section 9 of the *Parliament of Queensland Act 2001* (namely section 16 of the *Parliamentary Privileges Act 1987* (Cth)) was considered by the Queensland Court of Appeal in *O'Chee v Rowley* (1997) 142 FLR 1. The defendant, a Senator,

resisted the production of certain documents in defamation proceedings on the ground of Parliamentary privilege. Allowing for the impact of section 16(2) of the *Parliamentary Privileges Act 1987* (Cth), McPherson JA (Moynihan J concurring) restated Article 9 as follows:

That [... acts done ... for the purposes of or incidental to the transaction of the business of a House] ought not to be impeached or questioned in any court or place out of Parliament.

36. Then, in stating the effect of paragraph (c) of section 16(2) of the *Parliamentary Privileges Act 1987* (Cth), McPherson JA stated a further version of Article 9 applicable to the preparation of documents as follows:

The preparation of a document for purposes of or incidental to the transacting of any ... business (of a House) shall not be impeached or questioned in any court or place out of Parliament.

37. McPherson JA also considered the meaning of the word "impeached" in Article 9, having observed that it was not easy to see how requiring production of documents could be said to involve "questioning" the Senator on his preparation of them. After collecting a number of dictionary meanings, including meanings contemporary in 1688, his Honour expressed the view that the "impeachment" limb of Article 9 requires that "*preparation of a document for purposes of or incidental to the transacting of the business of a House is not to be impeded, hindered or prevented (first meaning); or is not to be detrimentally or prejudicially, affected or impaired (second meaning)*".

38. Describing the prospective operation of the privilege, his Honour said:

Only the more courageous individuals are prepared to speak their minds knowing full well they will suffer for it afterwards. It is equally to the cause of parliamentary freedom of speech and debate in future that art. 9 of the Bill of Rights is directed. Suffering pains and penalties for exercising a right or freedom is calculated to have a deterrent impact on the next occasion on which the right or freedom falls to be exercised. Section 16(2) of the Parliamentary Privileges Act recognises that the immunity extends to preparing documents and, more generally, to other acts for purposes of or incidental to the transacting of House business. There must (one may hope) be few parliamentarians who do not at some time in their careers take steps to assemble or record information in writing for purposes of or incidental to transacting business in the House by using it in debate, at question times, or in other parliamentary proceedings. ...

... requiring Senator O'Chee to produce for inspection documents of the kind listed in section B of his affidavit, for which Parliamentary privilege is claimed, has an obvious potential to deter him and other parliamentarians from preparing or assembling documentary information for future debates and questions in the House. ...

... By s.16(2) of the Parliamentary Privileges Act proceedings in parliament include the preparation of a document for purposes of or incidental to the transacting of any business of a House. More generally, such proceedings include all acts done for such purposes, together with any acts that are incidental to them. Bringing documents

into existence for such purposes; or, for those purposes, collecting or assembling them; or coming into possession of them, are therefore capable of amounting to 'proceedings in Parliament'. Senator O'Chee has sworn that, in relation to the documents in section B of his affidavit, he did such things for those purposes. To order him to produce those documents would be to hinder or impede the doing of such acts for those purposes. ...

39. The documents in issue in this matter are Parliamentary briefs. I have examined a sample from those documents, and it is apparent that it was prepared by officers of DNRW for use by the Minister in an appearance in Parliament. The document is headed "Parliamentary Brief" and contains details of the relevant topic, a recommended response and relevant background information. I am of the opinion that the matter in issue would qualify for exemption under section 50(c)(i) of the FOI Act. I consider that the applicants do not have a reasonably arguable case in relation to this category of documents.

Category 4

40. The fourth category consists of documents that fell outside the scope of the applicants' FOI access application dated 2 April 2006. Ms Sharron Campbell of DNRW advised staff of this office that the matter claimed to be outside the scope of the applicants' application related to KRA 72, not KRA 71 as the applicants requested in their FOI access application.
41. Having examined the wording of the applicants' FOI access application, I agree with Mr Davis' internal review decision that such matter would fall outside the scope of the applicant's FOI access application and they are therefore not entitled to obtain access to it under the FOI Act.

Decision

42. For the reasons set out above, I consider it appropriate to decline to exercise the discretion conferred on me by section 73(1)(d) of the FOI Act to allow a longer period of time for the applicant to make an application for review, under Part 5 of the FOI Act, of DNRW's decision to refuse access to the documents sought by the applicants' application to DNRW dated 2 April 2006.
43. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

M Gittins
Assistant Information Commissioner

Date: 24 January 2007