

Somerset and Queensland Police Service

(S 16/95, 11 April 1997, Information Commissioner Albietz)

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

1. - 4. [These paragraphs removed.]

REASONS FOR DECISION

Background

5. This application for external review under Part 5 of the FOI Act was made by [an agent] for Mr & Mrs Somerset. However, at a later stage in the course of the review, Mr and Mrs Somerset took over the conduct of their case in the review. After concessions made during the course of the review, two issues remain for my determination:
 - (a) the applicants seek access to some matter on folios 87 and 88 which has been claimed by the Queensland Police Service (the QPS) to be exempt matter; and
 - (b) the applicants challenge the sufficiency of search made by the QPS for documents falling within the terms of the applicants' FOI access application.
6. This case arises out of complaints made to the QPS by the applicants about conduct on behalf of a bank and several individuals, which was claimed by the applicants to be fraudulent conduct.
7. [the agent], on behalf of the applicants, lodged an FOI access application with the QPS dated 3 September 1994. This application was not processed within the "appropriate period" defined in s.27(7) of the FOI Act, and [the agent], on behalf of the applicants, applied to me, by letter dated 31 January 1995, seeking external review of the deemed refusal by the QPS to give the applicants access to the documents requested in the applicants' FOI access application (see s.79 of the FOI Act). I will not recite the terms of the FOI access application, but, in summary, the applicants sought access to documents held by the QPS concerning investigations by the QPS of the conduct claimed by the applicants to be fraudulent conduct.

External review process

8. I required the QPS to provide me with a schedule describing all documents claimed by the QPS to be exempt under the FOI Act. Ultimately, the QPS was prepared to give the applicants access to most of the matter considered by the QPS

to fall within the terms of the applicants' FOI access application. However, the QPS claimed some matter on folios 87-88 (comprising two pages of a memorandum from a Senior Sergeant Sybenga to the officer in charge of the Legal Section of the QPS) to be exempt under s.41(1) and s.44(1) of the FOI Act. (Some matter was also claimed by the QPS to be exempt under s.43(1) of the FOI Act, on the ground that it was subject to legal professional privilege; however, after the QPS provided further explanation to the applicants about this matter, [the agent], on behalf of the applicants, indicated (in a letter to my office dated 7 July 1995) that the applicants did not wish to pursue access to the matter claimed to be exempt under s.43(1) of the FOI Act.)

'Sufficiency of search' issue

9. I explained the principles applicable to 'sufficiency of search' cases in my decision in *Re Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464 at paragraphs 18 and 19, as follows:

18. *It is my view that in an external review application involving 'sufficiency of search' issues, the basic issue for determination is whether the respondent agency has discharged the obligation, which is implicit in the FOI Act, to locate and deal with (in accordance with Part 3, Division 1 of the FOI Act) all documents of the agency (as that term is defined in s.7 of the FOI Act) to which access has been requested. It is provided in s.7 of the FOI Act that:*

"document of an agency' or 'document of the agency'
means a document in the possession or under the control of
an agency, or the agency concerned, whether created or
received in the agency, and includes -

- and
- (a) a document to which the agency is entitled to access;
 - (b) a document in the possession or under the control of
an officer of the agency in the officer's official
capacity;"

19. *In dealing with the basic issue referred to in paragraph 18, there are two questions which I must answer:*

- (a) *whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency (as that term is defined in s.7 of the FOI Act);*

and if so,

(b) *whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.*

10. After examining documents that were released to the applicants, [the agent], on behalf of the applicants, suggested that further documents should exist in the possession or control of the QPS. For example, [the agent] referred to folio 84 (which had been released to the applicants) which contained a number of recommendations for further investigation to be carried out, including recommendations that certain persons be interviewed. [the agent] indicated that no statements or records of interview in respect of those persons were amongst the documents that the QPS released to the applicants, or were described in a schedule prepared by the QPS and forwarded to my office under cover of a letter dated 24 March 1995.
11. I asked the QPS to make inquiries of the police officers who had carriage of the investigation of the applicants' complaint, at various times. The responses from the officers concerned were forwarded to [the agent] under cover of the Deputy Information Commissioner's letter dated 19 October 1995.
12. In particular, it appears that the investigation of the applicants' complaints had passed through the hands of a number of police officers, the last of whom was Detective G G Murphy. It is clear from the documents released to the applicants (including folio 84) that other officers who had the carriage of the investigation at an earlier stage had taken the view that particular persons should be interviewed; however, those officers had not carried out those interviews prior to their transfer to other duties. Detective Murphy was the last of the police officers at Toowoomba who had responsibility for the conduct of the investigation, and it is fair to say that Detective Murphy took a different view of the matter (to that of his predecessors) after obtaining the transcript and judgment in respect of a civil action brought by the applicants in the Federal Court of Australia against the bank concerned. The applicants were unsuccessful in their civil action. Detective Murphy took the view that further investigation of the applicants' complaint was not warranted, and Detective Murphy did not take the steps which had been earlier recommended by other officers, but instead prepared a report for the Director of Prosecutions recommending that the investigation be terminated.
13. On 20 October 1995, the Assistant Information Commissioner conferred with the applicants and [their agent] about the applicants' concerns regarding the sufficiency of search by the QPS for documents falling within the terms of the applicants' FOI access application. As a result of that conference (and the applicants' letter to my office dated 18 December 1995), the applicants wished to focus on the investigations conducted by a Detective Sergeant Ruge, one of the officers who had carriage of the investigation prior to Detective Murphy. The applicants considered that it would have been Detective Sergeant Ruge who conducted the investigations

that the applicants thought must have occurred, such as the interviewing of witnesses/suspects, and the execution of search warrants.

14. On 6 March 1996, the Assistant Information Commissioner interviewed Detective Sergeant Ruge by telephone (since he was at that time stationed in Gladstone). Mrs Somerset participated in the conference by telephone conference connection, and the conference was also attended (in person) by [the agent], and a representative of the QPS FOI Unit.
15. During the course of the interview, Detective Sergeant Ruge indicated that he did have further documents in his possession, concerning the applicants' complaint, which documents had not been disclosed by the QPS up to that point in time, namely extracts from Detective Sergeant Ruge's Official Diary concerning his investigation of the applicants' complaint.
16. Detective Sergeant Ruge agreed that he had prepared a search warrant in order to obtain, from the Federal Court of Australia, the exhibits tendered in the civil trial referred to above. Detective Sergeant Ruge said that he travelled to Brisbane, for the purpose of executing the search warrant, but, while in Brisbane, was advised that a warrant could not be executed on a court. Detective Sergeant Ruge indicated that he was "99% sure the search warrant was destroyed". I find that it is more probable than not that all documentation concerning this warrant was destroyed.
17. Detective Sergeant Ruge also indicated that, during the course of his conduct of the investigation, it had been his intention to take out a warrant in order to obtain from the bank concerned, the personnel file of a particular employee. Detective Sergeant Ruge could not recall if he had in fact obtained the warrant, but, in any event, he was certain that any such warrant had not been executed by him. Detective Sergeant Ruge indicated that if such a warrant had been taken out, the complaint used to obtain the warrant would have remained with the Justice of the Peace who issued the warrant, and most probably this would have been a Justice of the Peace attached to the Toowoomba Magistrates Court. Since the applicants were only interested in obtaining information which set out the grounds for suspicion that the warrant would provide information of relevance to the investigation, Detective Sergeant Ruge agreed that if such a document existed, it would be in the possession or control of the Toowoomba Magistrates Court. The applicants indicated that they would make inquiries of the Toowoomba Magistrates Court for such documentation. (The applicants have not informed me of the outcome of those inquiries.)
18. Detective Sergeant Ruge also confirmed that he had not interviewed any suspects during his conduct of the investigation of the applicants' complaint. I am satisfied that this is correct. I have already noted that Detective Murphy took the view that no further investigation was warranted, after the failure of the applicants' civil action in the Federal Court. I am satisfied that no police officer interviewed any suspects, for the purposes of the investigation of the applicants' complaint.

19. Following the conference held on 6 March 1996, the QPS produced extracts from Detective Sergeant Ruge's Official Diary relating to the investigation of the applicants' complaint. My office authorised the QPS to give the applicants access to those extracts.
20. The applicants indicated that they also wished to obtain access to relevant entries from the Official Diaries of Detective Sergeant Stewart (who also had carriage of the investigation at one time) and Detective Murphy. The diary entries of Detective Murphy were located, and my office authorised the QPS to give the applicants access to those entries.
21. Detective Sergeant Stewart had resigned from the QPS on 25 February 1992; however, he was contacted by the QPS about the whereabouts of his Official Diaries and police notebooks. The response obtained by the QPS was that former Detective Sergeant Stewart did not have possession of those notebooks and diaries. He had resigned from the QPS whilst stationed at Toowoomba. The QPS informed me that the usual practice was for police officers to surrender their notebooks and diaries at the station where the officer completed his duties, that is, in the case of former Detective Sergeant Stewart, Toowoomba Police Station.
22. Searches were made for former Detective Sergeant Stewart's diaries and notebooks at Toowoomba Police Station and the Southern Police Region. It became clear that the records system at the Toowoomba Criminal Investigations Branch was in a fairly poor state. The notebooks and diaries of former Detective Sergeant Stewart could not be found at Toowoomba Station despite extensive searches for them. The QPS FOI Unit also examined former Detective Sergeant Stewart's personnel file in Brisbane, but no notebooks or diaries, nor reference to them, were found in that file.
23. Finally, the applicants referred to a memorandum prepared for the purposes of this external review by Detective Murphy, dated 22 May 1996, in relation to searches conducted by him for notebooks containing entries relevant to the applicants' complaint. The applicants noted that this memorandum indicates that Detective Murphy's involvement was "limited to an assessment of the complaint". The applicants contended that this indicates that a further document must exist, which records Detective Murphy's assessment of the applicants' complaint. This was put to the QPS for response, and the QPS confirmed (in a letter to my office dated 2 September 1996) that Detective Murphy's assessment was comprised in a report which had in fact been released to the applicants (folios 015-017). The response by the Director of Prosecutions to that report was in folios 007-013, the existence of which had also been disclosed to the applicants.
24. It is now necessary to answer the two questions posed in paragraph 19 of *Re Shepherd* (see paragraph 9 above). Firstly, I am satisfied that there are reasonable grounds to believe that additional documents concerning the QPS investigations

into the applicants' complaint must have existed in the possession or control of the QPS, at least at one time. The documents which I consider must have been in existence at one time comprise extracts from the Official Diary of former Detective Sergeant Stewart. I am also satisfied that documentation to support the issue of warrants intended to be executed at the Federal Court, and at the bank concerned (but neither of which were ever executed), must have existed in the possession or control of the QPS, at one time. I am also satisfied that such warrant documentation is no longer in the possession or control of the QPS, because it was either destroyed, or passed into the possession and control of the Toowoomba Magistrates Court. Moreover, I am satisfied that no statements or records of interview between police officers and any suspects (in respect of the applicants' complaint) exist, because no such interviews ever took place.

25. In relation to the second question posed by *Re Shepherd*, I am satisfied that the search efforts made by the QPS to locate the Official Diaries and notebooks of former Detective Sergeant Stewart, although fruitless, have been reasonable in all the circumstances of this case. I am also satisfied that the search efforts made by the QPS generally, for documents falling within the terms of the applicants' FOI access application, have been reasonable in all of the circumstances of this case.

Claim for exemption concerning folios 87 and 88

26. The matter in issue in this category is matter deleted from folios 87 and 88, being part of a memorandum by Senior Sergeant Sybenga dated 24 January 1990. Without disclosing the matter claimed to be exempt by the QPS, the matter can fairly be described as matter which adversely refers to two persons, in the context of an investigation into complaints of criminal wrongdoing. The QPS initially claimed the matter in issue to be exempt under s.41 and s.44(1) of the FOI Act, and later claimed that it is also exempt under s.42(1)(a) and s.42(1)(e) of the FOI Act.
27. Before I turn to consider the substance of the claim for exemption under s.41(1), I note that, in the final submission lodged by the QPS dated 20 January 1997, the QPS raised, for the first time in this review, an issue that folios 87 and 88 were outside the terms of the applicants' FOI access application dated 3 September 1994. It is extremely unfortunate that the QPS should raise such a point at so late a stage in the external review, given that in the schedule provided to my office under cover of a letter dated 24 March 1995, the QPS included folios 87 and 88 in a schedule of the documents which the QPS had identified as documents falling within the terms of the applicants' FOI access application.
28. In its final submission dated 20 January 1997, the QPS submitted that the applicants had made six very specific requests in their FOI access application, of which only item 1 was relevant to folios 87 and 88. Item 1 of the applicant's FOI access application sought access to the following documents:

All investigating detectives reports/running sheets relating to all allegations.

29. The QPS submitted that folios 87 and 88 fall outside the terms of this item, because those folios are documents from the QPS Legal Section, and they are not a report by an "investigating detective" within the terms of item 1.
30. I consider that this afterthought submission by the QPS adopts an unnecessarily restrictive reading of the terms of the applicants' FOI access application, in which I consider it was manifestly the applicants' intention to seek access to all reports relating to the investigation of their complaint to the QPS. Folios 87 and 88 are part of a report which was obviously prepared for the purposes of the investigation of the applicants' complaint, and comprises an analysis of the complaint and the information then to hand, albeit by an officer in the QPS legal section, but clearly for the purpose of assessing, and guiding, the progress of the QPS investigation. I consider that the QPS got it right the first time, and that folios 87 and 88 fall within the intended scope of the applicants' FOI access application.
31. Section 41(1) of the FOI Act, so far as relevant for present purposes, provides:

41.(1) Matter is exempt matter if its disclosure -

(a) would disclose -

(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or

(ii) a consultation or deliberation that has taken place;

in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and

(b) would, on balance, be contrary to the public interest.

32. A detailed analysis of s.41 of the FOI Act can be found in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.66-72, where at p.68 (paragraphs 21-22) I said that:

For matter in a document to fall within s.41(1), there must be a positive answer to two questions:

1. *would disclosure of the matter disclose any opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, (in either case) in the course of, or for the purposes of, deliberative processes involved in the functions of Government? and*

1. *would disclosure, on balance, be contrary to the public interest?*

The fact that a document falls within s.41(1)(a) (i.e., that it is a deliberative process document) carries no presumption that its disclosure would be contrary to the public interest.

33. I consider that the matter in folios 87 and 88 which is claimed by the QPS to be exempt under s.41(1) of the FOI Act, is 'deliberative process matter' falling within the terms of s.41(1)(a) of the FOI Act. The matter claimed to be exempt concerns Sergeant Sybenga's opinion as to the possible criminal liability of certain persons and his assessment of the direction which the police investigation should take. It is therefore necessary for me to consider the application of the public interest balancing test in s.41(1)(b) of the FOI Act.
34. I note in respect of this issue that the QPS lodged a submission dated 26 September 1995, in support of its claim for exemption. [the agent] provided to my office extracts from the Hansard of the Commonwealth House of Representatives, and the Senate, in relation to the applicants' dealings with the bank concerned, and the applicants also lodged a submission dated 18 December 1995 that concerns the application of the public interest balancing test contained within s.41(1).
35. At paragraph 34 of my decision in *Re Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (Information Commissioner Qld, Decision No. 96004, 4 April 1996, unreported), I indicated that the correct approach to the application of the public interest balancing test contained within s.41(1) of the FOI Act was that an agency or Minister seeking to rely on s.41(1) of the FOI Act needs to establish that specific and tangible harm to an identifiable public interest (or interests) would result from disclosure of the particular deliberative process matter in issue. It must further be established that the harm is of sufficient gravity that, when weighed against competing public interest considerations which favour disclosure of the matter in issue, it would nevertheless be proper to find that disclosure of the matter in issue would, on balance, be contrary to the public interest.
36. I am satisfied of the existence of public interest considerations which tell against disclosure of the matter remaining in issue in folios 87 and 88. I note that in *Re Gordon and Commissioner for Corporate Affairs* (1985) 1 VAR 114 at 117, Higgins J, sitting as the Presiding Member of the Victorian Administrative Appeals Tribunal, said:

I believe that there is a public interest in allowing investigators to canvass fully, issues particularly where there are breaches of the law involved. Where an agency is charged with the prosecution and investigation of serious breaches of the law, there is an important public interest which should protect documents which are used as the basis of that decision

making process. The officers ought to be given the freedom to canvass all possibilities and to make what are in fact subjective evaluations of individuals and fact situations, without fear that such comments, assessments and recommendations will go beyond the office or the agency itself. I do wish to stress the view that each case must depend upon its own facts but that where a law enforcement agency is involved, then I believe that a closer examination of the public interest is required than would otherwise be the case.

37. I note that Higgins J was not describing a class of documents which ought to qualify for exemption from disclosure, and appropriate emphasis must be given to Higgins J's qualification that each case must depend on its own facts. However, I accept that the cautionary note sounded by Higgins J was appropriate in respect of opinions, advice *et cetera* expressed by investigators about the progress and direction of an investigation while it is still on foot (such as whether a complaint has substance, whether a complaint should be investigated, how it should be investigated, the veracity and reliability of other persons and evidence in the light of information gathered during the course of an investigation), this being material of a kind which could, if disclosed in certain cases, or at an inappropriate stage of the investigation process in most cases, be contrary to the public interest.
38. The matter remaining in issue affords a good illustration of why Higgins J was correct to sound the note of caution set out in the extract from *Re Gordon* which is quoted above. In the matter remaining in issue in folios 87 and 88, the author expresses views prejudicial to certain persons on the basis of information obtained in an investigation that was then at a preliminary, or at least incomplete, stage. Those views were not the views ultimately arrived at by the QPS (which decided to terminate the investigation) or by the Director of Public Prosecutions, who informed the applicants that a prosecution against the persons complained about by the applicants was unlikely to succeed. In fact, the persons identified as suspects were not interviewed by the police, and the views expressed in the matter in issue were not tempered by a consideration of any explanations that could be offered by the suspects. With the benefit of oversight of the entire investigative process, I believe that disclosure of the matter in issue would misrepresent the position finally taken by the QPS and the Director of Public Prosecutions as to the criminal liability of the persons adversely referred to in the matter in issue, and that disclosure would be unfair to those persons. I consider that the public interest favours protection of an individual from the disclosure of tentative or unproven opinions or theories concerning possible criminal conduct by the individual.
39. On the other hand, there are a number of public interest considerations which tend to favour disclosure.
40. The applicants referred to, and enclosed, documents such as the extracts from Hansard which concerned the alleged fraudulent behaviour on the part of the bank concerned. Certainly, I accept that there is a public interest in disclosure of

information which concerns conduct on the part of a bank which is said to be fraudulent, although I consider that this public interest depends on the veracity of the information in issue.

41. There is a public interest in enhancing the accountability of the QPS by enabling members of the public to establish the extent to which the QPS investigates and deals with complaints made to it. I also consider that there is a public interest in a particular complainant being able to establish the extent of the investigations undertaken by the QPS in response to his or her complaint. This is particularly so where the complainant is especially affected by the alleged offence which led to the complaint, e.g., where the person complains of personal injury or loss of property.
42. The applicants have already been given considerable information as to the nature and progress of the investigation of their complaint. In respect of the particular matter which remains in issue in folios 87 and 88, I consider that the public interest considerations which favour non-disclosure clearly outweigh those which tend to favour disclosure, and I am satisfied that disclosure would, on balance, be contrary to the public interest.
43. I find that the matter claimed by the QPS to be exempt in folios 87 and 88 is exempt matter under s.41(1) of the FOI Act. I do not need to consider the application of the other exemption provisions relied upon by the QPS.

Decision

44. I set aside the decision under review, being the deemed refusal of access by the QPS to all documents falling within the terms of the applicant's FOI access application. I note that the QPS has already agreed to give the applicants access to all matter falling within the terms of the relevant FOI access application which the QPS has been able to locate (and that I have authorised the QPS to give the applicants access, accordingly), with the exception of the matter in folios 87 and 88 which is claimed by the QPS to be exempt matter. I find that the matter in folios 87 and 88, access to which has been withheld from the applicants, is exempt matter under s.41(1) of the FOI Act.
45. In respect of the 'sufficiency of search' issue raised by the applicants, I find that the QPS has located and dealt with all documents in its possession or control, which fall within the terms of the applicants' FOI access application, and which are capable of being located by reasonable searches and inquiries.