

**Office of the Minister for Employment, Training & Industrial Relations and
Department of Mines & Energy**

(S 204/00, 13 October 2000, 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 access applicant is a journalist who sought access to information held by the Department of Mines and Energy (the Department) regarding the approval of firework licences from 1 January 1999 until 1 June 2000. She has subsequently published an article concerning the death of a young woman in a fireworks-related incident. That fatality is the subject of a pending coronial inquiry.
5. By decision dated 14 July 2000, Mr S Findlay determined, on behalf of the Department, to grant the access applicant full access to all documents responsive to her request. Those documents included document 36, a memorandum dated 6 December 1999 from R Dwenger of the Office of the Minister for Employment, Training & Industrial Relations (the Minister's Office) to S Armstrong of the Department of Employment, Training & Industrial Relations (DETIR). That is the only document in issue in this review.
6. The Department did not consider it necessary to consult DETIR or the Minister under s.51(1) of the FOI Act, but the decision to disclose the document in issue did come to the attention of the Minister's Office by other means. By letter dated 1 August 2000, Mr D Wilson of the Minister's Office sought internal review of the decision to disclose document 36 to the access applicant. By internal review decision dated 14 August 2000, Mr R Hindley determined, on behalf of the Department, to affirm the initial decision. By letter dated 7 September 2000, the Minister's Office applied to me for review, under Part 5 of the FOI Act, of Mr Hindley's decision.

External review process

7. The Department provided me with a copy of document 36 and a member of my staff had discussions with the Chief Stipendiary Magistrate (in the absence of the Coroner) to ascertain whether there were any concerns about disclosure of document 36 prejudicing the pending coronial inquiry. My officer then had discussions with the Minister's Office, conveying the substance of the discussion with the Chief Stipendiary Magistrate, and the preliminary assessment that there did not appear to be any basis for finding that the matter in issue was exempt from disclosure to the access applicant under s.42(1)(a) of the FOI Act.

The Minister's Office indicated that it wished to proceed with this review, but did not wish to make any further written submissions.

8. There is a question as to whether I have jurisdiction to deal with this application for review. Section 71(1)(f)(i) and (ii) describe the circumstances in which I am empowered to review decisions on the application of a person who objects to a decision of an agency to disclose a document under the FOI Act:

71.(1) The functions of the commissioner are to investigate and review decisions of agencies and Ministers of the following kinds—

...

(f) decisions—

(i) to disclose documents contrary to the views of a person obtained under section 51; and

(ii) to disclose documents if an agency or Minister should have taken, but has not taken, steps to obtain the views of a person under section 51; ...

9. In this case, there was no consultation under s.51 of the FOI Act. In his internal review decision, Mr Hindley set out the reasons why the Department did not consider it necessary to consult under s.51. Section 71(1)(f)(i) cannot therefore form a basis for any power I have to conduct this review. On its face, s.71(1)(f)(ii) requires that, in order to be satisfied that I have jurisdiction, I must make a finding that the agency was required to consult under s.51 of the FOI Act. If there was no requirement under s.51, I have no power to review.

10. Section 51(1) provides:

51.(1) An agency or Minister may give access to a document that contains matter the disclosure of which may reasonably be expected to be of substantial concern to a government, agency or person only if the agency or Minister has taken such steps as are reasonably practicable to obtain the views of the government, agency or person concerned about whether or not the matter is exempt matter.

11. I note that s.52(7)(b)(i), concerning when a person is aggrieved for the purposes of making an internal review application, is framed in similar terms to s.71(1)(f)(ii). However, notwithstanding his position that the Department was not required to consult under s.51(1) of the FOI Act, Mr Hindley nevertheless treated the application by the Minister's Office as a valid application for internal review, and made the decision which is subject to external review.

12. I tend to the view that Mr Hindley's explanation of the reasons why the Department did not consult the Minister's Office under s.51 is adequate. Mere authorship of a document is not a sufficient ground to impose an obligation to consult under s.51. The test imposed by the words "may reasonably be expected" in s.51(1) of the FOI Act is an objective test. The Department was clearly in at least as good a position as the Minister's Office to consider general issues relating to the application of exemption provisions, such as the potential application of s.42(1)(a). The document does not appear to be of such a sensitive nature as to require consultation in terms of s.51. However, I consider that the simplest means to dispose of the issue is to deal with the substantive complaint of the Minister's Office, i.e., the contention that the matter in issue may be exempt from disclosure under s.42(1)(a) of the FOI Act.
13. Section 81 of the FOI Act provides that in a review under Part 5 of the Act, the agency which made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant. While the formal onus in this case therefore remains on the agency to justify its decision that the matter in issue is not exempt matter under the FOI Act, it can discharge that onus by demonstrating that any one of the necessary elements which must be established, to attract the application of each of the exemption provisions, is not made out. Consequently, the applicant for review must fail if I am satisfied that any element necessary to found the application of each exemption provision which it relies upon cannot be established. An applicant in a 'reverse-FOI case', while carrying no formal legal onus, must nevertheless, in practical terms, be careful to ensure that there is material before me sufficient to enable me to be satisfied that all elements of the exemption provisions relied upon are established.
14. In reaching my decision, I have taken into account the following:
 1. initial access application dated 6 June 2000;
 2. initial decision dated 14 July 2000;
 3. application for internal review dated 1 August 2000;
 4. internal review decision dated 14 August 2000;
 5. application for external review dated 7 September 2000;
 6. comments of the Chief Stipendiary Magistrate dated 19 September 2000;
 7. the contents of the document in issue.

Application of s.42(1)(a) of the FOI Act

15. Section 42(1)(a) of the FOI Act provides:

42.(1) Matter is exempt matter if its disclosure could reasonably be expected to—

- (a) prejudice the investigation of a contravention or possible contravention of the law (including revenue law) in a particular case; ...*

16. In order to find that matter is exempt under s.42(1)(a) of the FOI Act, it is necessary for me to be satisfied that disclosure of the matter in issue could reasonably be expected to prejudice the investigation of a contravention, or possible contravention, of the law in a particular case. In *Re McEniery and Medical Board of Queensland* (1994) 1 QAR 349, I said that the words "could reasonably be expected to" bear the same meaning in the context of s.42(1) as that which I explained in the context of considering the identical words in s.46(1)(b) of the FOI Act, at pp.339-341 (paragraphs 154-161) of my reasons for decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. In particular, I said at pp.340-341 (paragraph 160) of *Re "B"*:

... The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (eg, merely speculative/conjectural "expectations") and expectations which are reasonably based, ie, expectations for the occurrence of which real and substantial grounds exist.

17. I have examined the document in issue and a member of my staff has discussed the matter with the Chief Stipendiary Magistrate. The Minister's Office has merely raised the possibility that s.42(1)(a) might apply — it has not put forward any argument in support of the application of that provision. Based on my examination of the contents of the document in issue, I cannot discern any reasonable basis for expecting that disclosure of the contents of document 36 could prejudice the investigation of a possible contravention of the law in a particular case. There is nothing else in the material before me that indicates how disclosure of the matter in issue could reasonably be expected to prejudice the coronial inquiry into the fireworks-related fatality. I find that document 36 is not exempt from disclosure to the access applicant under s.42(1)(a) of the FOI Act.

DECISION

18. I affirm the decision under review (being the decision of Mr Hindley on behalf of the Department dated 14 August 2000).