

Scholz and Department of Public Works

(S 7/01, 5 February 2002, Assistant Information Commissioner Shoyer)

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

1. - 2. [These paragraphs removed.]

REASONS FOR DECISION

Background

3. By letter dated 10 July 2000, the applicant, a journalist with *The Courier-Mail*, applied to the Department of Public Works (the Department) for access, under the FOI Act, to the following information:

Re State Government Protective Security Service

Within the last five years—

- (a) Details of allegations of sexual misconduct, including harassment or assault, against members of the SGPSS by members of the public, SGPSS staff or other members of the public service;*
- (b) Details of allegations of any other form of misconduct, misappropriation of funds or misuse of expenses;*
- (c) Action taken against members accused of such misconduct;*
- (d) Action taken to prevent such incidents occurring in the future;*
- (e) Internal correspondence regarding such misconduct and corrective action;*
- (f) The amount of money spent on provision of security at the Magistrates Courts, both overall and at individual courthouses.*

4. By letter dated 13 September 2000, Ms P Cabaniuk of the Department decided to grant access to general departmental documents but found that documents relating to specific instances of misconduct qualified for exemption under s.40(c) and s.44(1) of the FOI Act, and that documents relating to money spent on the provision of security qualified for exemption under s.42(1)(g) and s.45(1)(c) of the FOI Act. The solicitors for the applicant sought internal review of Ms Cabaniuk's decision. By letter dated 16 November 2000, Mr J Scrivens of the Department affirmed Ms Cabaniuk's decision. By letter dated 11 January 2001, the applicant's solicitors sought review by the Information Commissioner, under Part 5 of the FOI Act, of Mr Scriven's decision.

External review process

5. Copies of the documents in issue were obtained and examined. In initial discussions with my staff, the applicant indicated that he did not seek access to matter which would identify complainants or subjects of investigation, including matter that would identify any specific incident through which a complainant or subject of complaint could be identified. However, initial attempts to negotiate a resolution on the basis that documents would be edited to anonymise them were rejected by the Department on the basis that disclosure of any of the matter in issue could identify a complainant or subject of complaint. By letter dated 3 April 2001, Assistant Information Commissioner Moss informed the Department of her preliminary view that the matter in issue in categories (a)-(e) could be edited in such a way as to effectively anonymise it, and that documents edited in that form would not qualify for exemption under s.40(c) or s.44(1) of the FOI Act. The Department did not accept Ms Moss's preliminary view and provided a written submission dated 30 April 2001 in support of its case.
6. Following consultations with third parties, the Department agreed to disclose matter concerning allegations against one staff member (who consented to disclosure), and the documents concerning money spent on the provision of security, edited in a form acceptable to the applicant. That matter is therefore no longer in issue in this external review.
7. That leaves in issue documents 1-8 and 13-41, which concern complaints of misconduct about two former staff members of the SGPSS. As I have noted above, the applicant does not seek access to matter that will identify a complainant or subject of complaint, or a particular incident. Nor does he seek access to a small amount of matter which, although it appears in the documents, relates to other issues. That matter (which has been identified in copies of documents previously provided to the Department under cover of Ms Moss's letter dated 3 April 2001, and in my letter to the Department dated 3 December 2001) is not in issue in this external review, and the Department need not provide access to it. However, the balance of the matter in documents 1-8 and 13-41 remains in issue and the Department contends that it is exempt matter under s.40(c) and s.44(1) of the FOI Act.
8. I should note that I have not attempted to consult with the staff who were the subject of complaints or any persons who made complaints. Section 74(1) of the FOI Act provides that, before starting a review, the Commissioner must take such steps as are practicable to inform another person, who the Commissioner considers would be affected by the decision subject to review, that the decision is to be reviewed. This issue was raised by the Department, which faced a similar requirement under s.51(1) of the FOI Act to take such steps as are reasonably practical to consult a person prior to granting access to matter the disclosure of which might reasonably be expected to be of substantial concern to the person. Given the anonymised form of the matter remaining in issue, I do not consider that

the persons referred to in the first sentence of this paragraph would be affected by the decision the subject of the review.

9. In making my decision, I have taken into account the following:
1. the contents of the matter in issue;
 2. initial access application dated 10 July 2000;
 3. initial decision dated 13 September 2000;
 4. application for internal review dated 11 October 2000;
 5. internal review decision dated 16 November 2000;
 6. application for external review dated 11 January 2001;
 7. Department's submissions dated 30 April 2001.

Application of s.40(c) of the FOI Act

10. Section 40(c) of the FOI Act provides:

40. Matter is exempt matter if its disclosure could reasonably be expected to—

...

(c) have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; ...

unless its disclosure would, on balance, be in the public interest.

11. I must determine:

1. whether any adverse effects on the management or assessment by an agency of its personnel could reasonably be expected to follow from disclosure of the matter in issue. There must be expectations for which real and substantial grounds exist (see *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, at pp.339-341 (paragraphs 154-160); and
2. whether the adverse effects amount to a substantial adverse effect on the management or assessment by an agency of its personnel. The adjective "substantial" in the phrase "substantial adverse effect" means grave, weighty, significant or serious (see *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663, at pp.724-725, paragraphs 148-150).

12. If those requirements are satisfied, I must then consider whether disclosure of the matter in issue would nevertheless, on balance, be in the public interest.
13. The documents in issue clearly relate to staff disciplinary processes of the Department, which I accept are an aspect of the management or assessment by the Department of its personnel.

Substantial adverse effect

14. By virtue of s.81 of the FOI Act, the onus is on the Department to justify its decision. The Department's submissions are represented by the following statements, in its submission dated 30 April 2001:

(a) Confidential treatment of material such as that under consideration is more likely to promote full and frank reporting by other SGPSS staff or persons outside the SGPSS of suspected misconduct, and thereafter open and unrestricted cooperation with investigations into suspected misconduct or breaches of discipline. Such confidential treatment will thereby assist the SGPSS in the more effective management and assessment of its officers.

(b) The serious potential for generating animosity between staff members and the compromise of effective working relationships within the Department, were the documents to be released without restriction.

(c) The serious potential for adverse consequences for the effective security and protection of government buildings and properties, were the documents to be released unconditionally.

15. The Department's submissions amount to a class claim for documents relating to the disciplinary process. They do not focus on the particular matter in issue in this case. The Information Commissioner has, on a number of occasions, recognised the distinction between those few exemptions which permit a class claim, and those that do not. For example, in *Re Quest Community Newspapers and Queensland Police Service* (Information Commissioner Qld, S 178/94, 8 February 2000, unreported), at paragraph 22, he said:

The QPS submissions amount, in effect, to a class claim for exemption, i.e., that all police disciplinary documents should be exempt matter under the FOI Act. The FOI Act does contain some provisions which confer exemption merely by reference to whether documents fall within a defined class, e.g., the Cabinet documents exemption (s.36(1)). However, the FOI Act contains no provision conferring exemption on documents relating to police disciplinary processes. Accordingly, my decision must be based on an assessment of whether a particular document, or segment of matter in

issue, satisfies the tests for exemption under the particular exemption provisions relied upon by the QPS.

(See also *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, at paragraphs 131, 149 and 192; and the Commonwealth Administrative Appeals Tribunal decision of *Re Bartlett and Department of Prime Minister and Cabinet* (1987) 12 ALD 659, at p.662.)

16. While those cases discussed the application of the 'deliberative process' exemption, s.40(c) is of the same nature in that respect. There is no basis for 'blanket' exemption of documents or matter. There will be cases where disclosure of information, or the identity of an informant who gave information on the basis of an understanding of confidentiality, could give rise to a substantial adverse effect on the management by the Department of its personnel. However, each case must be judged on its own merits, and, on the material before me, I do not consider that there is any reasonable basis for expecting that any of the adverse effects suggested by the Department could follow from disclosure of the particular matter remaining in issue (which, as I have noted above, has been reduced - by concessions on the part of the applicant - to an anonymised form).
17. As to the submission quoted in paragraph 14(a) above, I am not satisfied that disclosure of the matter in issue to the applicant in its edited form could reasonably be expected to enable any person to ascertain the identity of any subject of complaint or complainant, let alone prejudice full and frank reporting of allegations of misconduct in the future. The names of complainants and subjects of complaint are not in issue in this external review. There may be cases where particular incidents have such notoriety, or unusual features, that disclosure of details of the incident could reasonably be expected to enable a person to identify the complainant or the subject of complaint. However, there is nothing before me to establish that the incidents recorded in the documents in issue have any unusual or notorious element that would mean that their disclosure could reasonably be expected to enable the identity of any complainant or subject of complaint to be ascertained.
18. The Department argued that disclosure of the particular buildings where the incidents took place, and the identities of the supervisors of the subjects of complaint, or the officers who investigated the complaint, could allow a person to identify the complainants or subjects of complaint. It may be that a detailed analysis of the personnel records of the SG PSS could narrow the number of former staff who might have been the subject of complaint. It may also be that the applicant could approach staff of the SG PSS, who might or might not be willing to hazard a guess as to the identity of one or both of the subjects of complaint. However, speculation of this nature does not give rise to a reasonable expectation, and the Department has not put forward any evidence which would support a reasonable expectation that the subjects of complaint could be identified. There is

even less basis for an expectation that any of the complainants could be identified if the matter in issue were disclosed in its edited form.

19. On the material before me, I am not satisfied that disclosure of the particular information remaining in issue (given its anonymised form) could reasonably be expected to make any person less likely to make a complaint, or provide full and frank information relating to a complaint, in the future.
20. As to the submission quoted in paragraph 14(b) above, the officers concerned are no longer employed by the Department. The documents do not themselves suggest that the investigation of the allegations gave rise to any dispute between other staff of the Department. I am not satisfied that, even if the identities of the complainants or subjects of complaint could be ascertained from the matter in issue, disclosure could reasonably be expected to give rise to an adverse effect of the nature contended for by the Department. In any event, I am satisfied that the documents have been edited in such a way as to anonymise them.
21. As to the submission quoted in paragraph 14(c) above, I am not satisfied that this amounts to an adverse effect on the management or assessment by the Department of its personnel, within the terms of s.40(c). If there were evidence to support this claim, the adverse effect would not be of the kind stipulated in s.40(c) of the FOI Act. In any event, the Department has provided no evidence to support this claim, and I can see no basis on which disclosure of the particular matter in issue could reasonably be expected to have an adverse effect of the kind suggested by the Department.
22. I am not satisfied that disclosure of the particular matter in issue could reasonably be expected to have an adverse effect on the management or assessment by the Department of its personnel, let alone a substantial adverse effect, and, accordingly, I find that the matter in issue does not qualify for exemption under s.40(c) of the FOI Act.

Public interest balancing test

23. Given my finding above, it is not necessary for me to consider the application of the public interest balancing test in detail. However, I would note that there is a significant public interest in enhancing the accountability of the Department for the way in which it deals with complaints, whether in the nature of complaints of harassment or other work-related misconduct. This public interest does not necessarily require disclosure of every document relating to the handling of complaints. It may well be that provision of statistics regarding complaint handling, or anonymised summaries of how individual complaints were dealt with, would substantially satisfy this public interest. Indeed, this was an approach suggested by the applicant but rejected by the Department on the basis that it would require the production of a new document, something that cannot be required under the FOI Act.

24. However, in the absence of such statistics or summaries, I consider that there is a significant public interest in disclosing information relating to the handling of complaints by the Department. This consideration must be balanced against the public interest in the effective operation of the agency, and in the fair treatment of complainants, subjects of complaint, and sources who provide information for the purposes of any investigation. This may mean, as in this case, that an elaborate editing process needs to be undertaken in an effort to reconcile the competing public interest considerations as far as possible. While the Department is correct in stating that it is not required under the FOI Act to produce a statistical or summary document when it receives an FOI access application, I note that s.14 of the FOI Act provides that the FOI Act is not intended to prevent or discourage the publication of information. In cases where a journalist or other member of the community is seeking access to general information of a statistical or summary kind about performance issues, I would commend the exploration of alternatives, including the creation of a new document, if it means that information can be presented in general terms which satisfy the applicant and which avoid the requirement for detailed decision-making in respect of numerous documents. (I note that this approach was adopted by the respondent agency in *Re Pearce and QRAA* (1999) 5 QAR 242; see, in particular, at paragraphs 4-5 and 10.)
25. In the absence of other means of satisfying the public interest consideration identified at the start of the preceding paragraph, I would find that disclosure of the matter in issue would, on balance, be in the public interest.
26. I will also briefly comment on the contention by the Department that a lack of pre-existing controversy concerning the matters, and the availability of policy material, weighed against disclosure of the matter in issue. The public interest in enhancing the accountability of agencies does not arise merely in the presence of some controversy. Disclosure of policy information is clearly in the public interest as it sets out the generally stated approach of the Department. However, disclosure of information about individual cases can be equally important because it shows the way in which the Department actually approaches cases, and gives information about whether, and how, the Department implements its policies.

Application of s.44(1) of the FOI Act

27. Section 44(1) of the FOI Act provides:

44.(1) Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.

28. In applying s.44(1) of the FOI Act, the first question to ask is whether disclosure of the matter in issue would disclose information concerning the personal affairs of a person. If that is the case, a public interest consideration favouring non-disclosure

is established, and the matter in issue will be exempt, unless there are public interest considerations favouring disclosure which outweigh all public interest considerations favouring non-disclosure.

29. 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*). 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.
30. In *Re Stewart* at p.258 (paragraph 81), the Information Commissioner said:
 81. *For information to be exempt under s.44(1) of the FOI Act, it must be information which identifies an individual or is such that it can readily be associated with a particular individual. Thus deletion of names and other identifying particulars or references can frequently render a document no longer invasive of personal privacy, and remove the basis for claiming exemption under s.44(1). This is an expedient (permitted by s.32 of the Queensland FOI Act) which has often been endorsed or applied in reported cases: see, for example, Re Borthwick and Health Commission of Victoria (1985) 1 VAR 25 ...*
31. In this case, the deletion of identifying matter from the documents in issue (see paragraphs 7 and 17-18 above) means that the documents do not disclose information concerning the personal affairs of any complainant or subject of complaint. The test for *prima facie* exemption under s.44(1) requires that disclosure of the matter in issue "would" disclose information concerning the personal affairs of persons other than the applicant for access. I am satisfied that there is nothing in the matter remaining in issue (given its anonymised form) that would disclose information concerning the personal affairs of any identifiable individual. I am therefore satisfied that none of the matter in issue qualifies for exemption under s.44(1) of the FOI Act.
32. While it is unnecessary to canvass the issue in the present case, I draw the attention of the Department to the difficulties of characterising matter relating to a disciplinary process arising out of the performance by a public servant of his/her duties of employment as information concerning that individual's personal affairs, as explained by the Information Commissioner in *Re Griffith and Queensland Police Service* (1997) 4 QAR 110, at pp.124-127, paragraphs 42-53.

DECISION

33. I set aside the decision under review (being the decision made on behalf of the Department by Mr J Scrivens dated 16 November 2000) and in substitution for it, I

decide that the matter remaining in issue described at paragraph 7 above does not qualify for exemption from disclosure to the applicant under the FOI Act.