

## **Kennedy and Building Services Authority**

(S 119/01, 7 December 2001, 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. - 2. [These paragraphs removed.]

### **REASONS FOR DECISION**

#### **Background**

3. This is a 'reverse FOI' application made by Thynne & Macartney, solicitors, on behalf of Mr Anthony Kennedy.
4. By letter 1 December 2000, solicitors for the FOI access applicant, ----, applied to the Building Services Authority (the BSA) for access to documents concerning any charges or complaints of professional misconduct made against Mr Kennedy. Mr Kennedy is an accredited building certifier who approved a development application for a building permit for extensions to be carried out to [the access applicant's] home at the Gold Coast. The Gold Coast City Council (the Council) considered that the approval had been incorrectly given, and required modifications to the building plans. The Council also lodged a complaint to the BSA about Mr Kennedy's performance, in this instance, of his work as an accredited building certifier.
5. The BSA identified certain documents as falling within the terms of [the access applicant's] FOI access application. It consulted with Mr Kennedy concerning disclosure of those documents. Mr Kennedy's solicitors advised the BSA that their client objected to disclosure of the documents on the grounds that they were exempt under s.42(1)(d), s.43(1) and s.44(1) of the FOI Act.
6. However, Ms Ealding of the BSA decided (on 29 March 2001) that the documents did not qualify for exemption from disclosure to [the access applicant]. Mr Kennedy sought internal review of Ms Ealding's decision. The internal review was conducted by Mr Jennings of the BSA. By letter dated 27 April 2001, Mr Jennings advised that he had decided to affirm Ms Ealding's decision.
7. By letter dated 18 May 2001, Mr Kennedy's solicitors applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Mr Jennings' decision.

#### **External Review Process**

-

8. Copies of the documents in issue were obtained and examined. The documents relate to the complaint which was made to the BSA by the Council regarding Mr Kennedy's actions in approving the development application for [the access applicant's] home.
9. During the course of the review, Mr Kennedy abandoned his claims that the documents in issue were exempt under s.43(1) and s.44(1) of the FOI Act (claims which clearly had no substance, in my view), but continued to claim that the documents in issue were exempt from disclosure under s.42(1)(d) of the FOI Act. Mr Kennedy's solicitors lodged material in support of that claim by letters dated 26 June 2001 and 6 July 2001. By letter dated 10 July 2001, Assistant Information Commissioner Moss communicated to Mr Kennedy's solicitors her preliminary view that the documents in issue did not qualify for exemption under s.42(1)(d) of the FOI Act. That preliminary view was not accepted, and Mr Kennedy's solicitors lodged further material in support of his case by letter dated 3 August 2001.
10. In reaching my decision, I have taken into account all of the material referred to in the preceding paragraph, together with Mr Kennedy's applications for internal review and external review, and the contents of the documents in issue.

**Application of s.42(1)(d) of the FOI Act to the documents in issue**

11. The documents in issue are:

1. letter of complaint dated 2 August 2000 from the Council to the BSA with attached documents;
2. letter dated 15 August 2000 from the BSA to Mr Kennedy advising of receipt of the complaint and requesting a response;
3. letter dated 23 August 2000 from Mr Kennedy to the BSA responding to the complaint;
4. letter dated 20 October 2000 from the BSA to Mr Kennedy advising of the outcome of the complaint; and
5. letter dated 20 October 2000 from the BSA to the Council advising of the outcome of the complaint.

12. Section 42(1)(d) of the FOI Act provides:

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

*...*

*(d) prejudice a person's fair trial or the impartial adjudication of a case; ... .*

13. The application of s.42(1)(d) largely turns on the test imported by the phrase "*could reasonably be expected to*", which requires a reasonably based expectation, i.e., an expectation for which real and substantial grounds exist, that disclosure of the particular matter in issue could have the specified prejudicial consequences. A mere possibility, speculation or

conjecture is not enough. In this context "*expect*" means to regard as likely to happen. (See *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.339-341, paragraphs 154-160, and the Federal Court decisions referred to there.)

14. During the course of the review, Mr Kennedy's solicitors advised that [the access applicant] had instituted proceedings against Mr Kennedy in the Magistrates Court at Southport, claiming damages for breach of contract and negligence in relation to Mr Kennedy's actions in assessing and deciding the development application for extensions to [the access applicant's] house. A copy of the Statement of Claim was provided to me. Mr Kennedy's solicitors argued that the issuance of the Magistrates Court proceedings supported their contention that it would be inappropriate to disclose to [the access applicant] the documents in issue, as such disclosure could reasonably be expected to prejudice the impartial adjudication by the Magistrates Court of the allegations made against Mr Kennedy.
15. The Information Commissioner considered the application of s.42(1)(d) in *Re Uksi and Redcliffe City Council* (1995) 2 QAR 629 at paragraphs 32-35, observing (at paragraphs 34-35):

*I think it is fairly clear, according to their natural meaning, that the words "a person's fair trial" in s.42(1)(d) do not refer to a civil suit between parties, but to the trial of a person charged with a criminal offence. These words do not apply to the kind of litigation which the applicants have in contemplation, i.e. a civil suit against Mr Cook and perhaps also the Council.*

*The words "impartial adjudication of a case" are broad enough to refer to any kind of case, involving a dispute between parties, which is to be formally adjudicated by an impartial decision-maker. The words certainly extend to a civil suit of the kind the applicants have in contemplation. However, I am unable to see any reasonable basis for an expectation that disclosure of the documents in issue could prejudice the impartial adjudication of such a case. It is difficult to conceive of how their disclosure could have any impact at all on the impartiality of the adjudication of such a case. Certainly, a document such as the engineers' report is the kind of document which a court would compel the applicants to disclose to Mr Cook in the course of preparations for hearing, in the interests of a fair hearing of the issues.*

16. I am satisfied that the words "impartial adjudication of a case" extend to the civil suit which has been brought by [the access applicant] against Mr Kennedy. In support of Mr Kennedy's case that disclosure of the documents in issue could reasonably be expected to prejudice the impartial adjudication of that case, Mr Kennedy's solicitors have submitted:
  1. disclosure of the BSA's findings in respect of the complaint would pre-empt any decision made by the court in respect of the matters in issue between him and [the access applicant];

2. it is reasonable to expect that the Court would accord greater weight to the BSA's finding in respect of the complaint, than to Mr Kennedy's response to the complaint.
17. In my view, the documents in issue are clearly relevant to the causes of action pleaded in [the access applicant's] statement of claim against Mr Kennedy. If [the access applicant] were to obtain access to the documents in issue under the FOI Act, he might seek to tender them in evidence at the hearing of his action, and/or, they might lead him to additional evidence that he could seek to tender at that hearing. In other words, he would be placed in the same position as if he had obtained the documents pursuant to the disclosure/discovery procedures, or the non-party discovery procedures (which would be available against the BSA and the Council), in the Uniform Civil Procedure Rules. Those curial procedures are clearly available to [the access applicant] (although Mr Kennedy's solicitors asserted in a letter to my office dated 3 August 2001 that the documents in issue "are not discoverable by our client given that they are not in our client's possession, power or control" - I merely observe that the material before me discloses that documents 1, 2 and 4 were sent by the BSA to Mr Kennedy, and document 3 originated with Mr Kennedy, such that they were at one time in Mr Kennedy's possession, power or control). The documents in issue are not subject to legal professional privilege, and I can discern no ground of public interest immunity, or other objection to disclosure, which could even conceivably be successfully taken in respect of these documents. Disclosure of the documents in issue under the FOI Act could not reasonably be expected to prejudice the impartial adjudication of the case, any more than would their disclosure under the curial procedures that are clearly available to [the access applicant].
18. More importantly, however, I consider that there is simply no reasonable basis for expecting that disclosure to [the access applicant] of the documents in issue, under the FOI Act, could result in impartial adjudication by the magistrate who presides at the trial of [the access applicant's] case against Mr Kennedy. [the access applicant] may seek to tender the documents at the trial, but there is no reasonable basis for expecting that the presiding magistrate would not rule impartially on any objection to the documents being admitted into evidence. Nor (assuming the documents were admitted into evidence) is there any reasonable basis for expecting that the presiding magistrate would not impartially assess their value as probative evidence, and the proper weight to be accorded to such probative evidence, in light of the totality of the evidence put before the magistrate, including any evidence put on behalf of Mr Kennedy challenging the reliability, fairness or probative value of any of the material in the documents in issue.
19. That the documents may contain relevant evidence which might ultimately assist [the access applicant] to establish a cause of action against Mr Kennedy in a trial before a judicial officer cannot constitute a reasonable basis for expecting prejudice to the impartial adjudication of the case. There is no valid analogy to be drawn, in these circumstances, with the legal principle under which evidence may be withheld from a jury in a criminal trial on the basis that the prejudicial effect of the evidence exceeds its probative value.

20. I am not satisfied that disclosure of the documents in issue could reasonably be expected to prejudice the impartial adjudication of [the access applicant's] case against Mr Kennedy. I therefore find that the documents in issue do not qualify for exemption under s.42(1)(d) of the FOI Act.

### **DECISION**

21. I affirm the decision under review (being the decision dated 27 April 2001 by Mr Jennings of the BSA) that the documents in issue (identified in paragraph 11 above) do not qualify for exemption under the FOI Act. [the access applicant] is therefore entitled to be given access to those documents under the FOI Act.