

## **Carter and James Cook University**

(S 210/00, 28 March 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 deleted.

### **REASONS FOR DECISION**

#### **Background**

3. The applicant, Professor Carter, was Head of the School of Earth Sciences ("the School") at James Cook University until mid-1998, and continues to be a staff member of the School. Following a restructure within the University, the School came under the aegis of the Faculty of Science and Engineering. In late 1999, in light of concerns regarding the administration of the School, the Executive Dean of the Faculty commissioned an external management consultant, Mr J Woodhams, to review aspects of the management of the School. Mr Woodhams produced a report entitled "Review of the Management in the School of Earth Sciences" ("the report").
4. The report was not disclosed to staff of the School. It was retained by the Executive Dean for management purposes. The applicant became aware that he was referred to in the report and, by letter dated 3 July 2000, applied to the University for access, under the FOI Act, to the report. By letter dated 31 August 2000, the principal officer of the University, Vice-Chancellor B Moulden, informed the applicant of his decision to refuse access to the report, relying on the ground of exemption provided for in s.40(c) of the FOI Act. The applicant then sought review by the Information Commissioner, under Part 5 of the FOI Act, of Professor Moulden's decision.

#### **External review process**

5. A copy of the report was obtained and examined. My office consulted Mr Woodhams, who indicated that it was a matter for the University to decide the extent of any disclosure of the report. He stated that he had not informed staff that they would be given access to the report, and that he had not disclosed the contents of the report.
6. Following consultations with my office, the University agreed to the disclosure to the applicant of large parts of the report, including the bulk of the recommended solutions, but maintained its objection to disclosure of significant passages.
7. By letter dated 5 October 2001, I informed the applicant of my preliminary view that all but a small amount of the matter remaining in issue qualified for exemption from disclosure to him under s.40(c) of the FOI Act. By e-mail dated 11 January 2001, the applicant indicated that he no longer sought access to comments on the staff member who was Head of School at the time of the report, but that he continued to seek access to matter about himself and about support staff in the School Office.
8. The matter remaining in issue is therefore:

- Page 2 - Section 1: All, except sentence previously disclosed.  
- Section 2: Final sentence.
- Page 3 - Section 3: All.
- Page 4 - Section 8: Final 8 words of fourth sentence.
- Page 5 - Solution 2: All, except matter previously disclosed.
- Page 6 - Solution 2: 13th-15th words of first sentence.  
- Solution 3: All words in the second sentence up to "management".  
- Solution 4: Last two sentences.
- Page 7 - Solution 7(c): First paragraph.

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

9. 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.*

10. I must decide:

- (a) whether any adverse effects on the management or assessment by the University 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
- (b) whether the adverse effects amount to a substantial adverse effect on the management or assessment by the University 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).

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.

11. The University objected to disclosure of the report for the following reasons:

- the report was commissioned by the Executive Dean as a management aid to assist in resolving a number of problems within the School. As such, the report was commissioned as a management tool, the release of which (in its original form) would jeopardise the University's attempts to manage its personnel, and would impact on the level of co-operation that University staff would provide in the future;
- the report gives frank assessments of some management staff and as this is the case, their ability to manage other university personnel would be adversely affected by the release of the assessments given in the report;

- the report is critical of some university personnel and some suggestions have been made for improvement. The disclosure of the report would therefore undermine attempts to improve the management at the School; and
  - the School is operating in a sensitive environment and disclosure of the full report would exacerbate the situation.
12. The applicant contended that the broad contents of the report are known. He said that the report contains negative comments about himself and support staff within the School ... [and] ... that natural justice required that they be allowed to answer adverse comments about themselves. He said that people who have criticisms should be prepared to make them public and be accountable for them.
13. The applicant objected to what he saw as management's selective references to, and misrepresentation of, the contents of the report, and defamatory rumours that have spread due to non-release of the report. He stated that he and support staff had been adversely effected by "the secrecy that surrounds the Review". He claimed that non-disclosure was having an adverse effect on management of University staff, which could be overcome by full disclosure. He contended that disclosure would enhance the accountability of executive management, improve industrial relations within the University, and improve morale within the School.
14. Before considering the individual requirements of s.40(c), I note that s.6 of the FOI Act provides:
- 6. If an application for access to a document is made under this Act, the fact that the document contains matter relating to the personal affairs of the applicant is an element to be taken into account in deciding:*
- (a) whether it is in the public interest to grant access to the applicant; and*
- (b) the effect that the disclosure of the matter might have.*
15. The bulk of the matter remaining in issue does not relate to the applicant's personal affairs. It is information about the applicant in an employment context: see *Re Ainsworth; Ainsworth Nominees Pty Ltd and Criminal Justice Commission; Others* (1999) 5 QAR 284 at paragraphs 132-133 and the cases cited there, as to the distinction between employment affairs and personal affairs under the FOI Act. However, I am satisfied that:
- (i) two similar references on the second and ninth lines of Section 1;
  - (ii) the matter in issue on page 6 - Solution 2; and
  - (iii) Solution 7(c);
- comprise information relating to the applicant's personal affairs.

**Substantial adverse effect**

16. The terms of reference for the review required Mr Woodhams to examine the operations of the support staff in the School, consult general and academic staff within the School and other senior staff of the University, in order to:

*Make recommendations to the Executive Dean on:*

- *An appropriate administrative structure for the administration in the School.*
  - *Further training, counselling or other assistance which should be provided to the staff of the School, if this appears desirable.*
  - *Any other actions which the Head of School and the Executive Dean might need to take to ensure appropriate service to the staff within the School.*
17. It is clear that the aim of the Executive Dean was to obtain a frank and independent assessment of what was a situation of considerable tension and conflict within the School. He did not seek individual assessments of staff in order to conduct performance reviews with staff. He wanted an overall assessment, with proposed solutions, so that he would be in a position to consider, and accept or reject, those proposals.
18. The bulk of the matter remaining in issue concerns the applicant. It records comments by staff about the applicant and opinions expressed by Mr Woodhams concerning the applicant.
19. The information provided by both the applicant and the University shows that the tension and conflict within the School has not abated. In the circumstances, I am satisfied that disclosure to the applicant of the segments of the report concerning him (with the exception of the passages discussed at paragraphs 22-23 below) could reasonably be expected to heighten that tension and conflict, thereby having an adverse effect on the management by the University of its personnel within the School. Given the existing circumstances, I am also satisfied that disclosure to the applicant of comments made by staff could reasonably be expected to lead staff involved in future reviews to be more guarded in their comments on colleagues, thereby limiting the supply of information for personnel management purposes, giving rise to an adverse effect on personnel management or assessment.
20. Further, except with respect to the small amount of matter referred to at paragraph 15 above, the consequences of disclosure are to be evaluated bearing in mind that there would be nothing to prevent further dissemination of information disclosed under the FOI Act (i.e., as it is sometimes said, as if disclosure were to the "world at large"): see *Re Pemberton and The University of Queensland* (1994) 2 QAR 293, at paragraphs 152-154. I am satisfied that disclosure to the 'world at large' of the matter concerning the applicant could reasonably be expected to damage the reputation of the University with students and the general public. I am satisfied that the prospect of heightened conflict within the workplace, and damage to the University's reputation, could also reasonably be expected to lead to staff, and advisers like the consultant, making more guarded (and, therefore, less useful) comments to management in the future, thereby giving rise to an adverse effect on staff management.
21. I am satisfied that, in the particular circumstances of this case, the combination of the above adverse effects could reasonably be expected to constitute a substantial adverse effect on the management or assessment by the University of its personnel. (In making

that finding, I have considered the application of s.6(b) to the matter referred to in paragraph 15 above.)

22. There are exceptions to my general finding. The first sentence on page 3 refers to the applicant. The second sentence contains a general view regarding the restructuring. Notwithstanding concerns raised by the University that this might be construed as an adverse comment about the applicant, I am not satisfied that disclosure of either sentence could reasonably be expected to have an adverse effect on the University's management or assessment of its personnel. They appear to me to be simple statements of the change in position due to restructuring. I can see no basis on which they could reasonably be regarded as an adverse comment on the applicant. I find that the two sentences do not qualify for exemption under s.40(c) of the FOI Act.
23. The passage at the top of page 6, and the second sentence of Solution 7(c), contain essentially the same information. It records a statement made by the applicant to Mr Woodhams in the course of his review, rather than an opinion of Mr Woodhams or another staff member. I find that disclosure of this matter could not reasonably be expected to have an adverse effect on the management or assessment by the University of its personnel, and that it does not qualify for exemption under s.40(c) of the FOI Act. The University also suggested that the passages might qualify for exemption under s.44(1) of the FOI Act, and that disclosure might prejudice the mental or physical wellbeing of the applicant: see s.44(3). The matter cannot qualify for exemption under s.44(1) as it merely concerns the personal affairs of the applicant: see s.44(2). I am not satisfied, on the material before me, that there is any basis for the application of s.44(3).
24. The balance of the matter in issue consists of views expressed by support staff and opinions expressed by Mr Woodhams concerning the existing roles of support staff and proposals for improvement. Again, the comments by staff were expressed in an atmosphere of considerable tension and concern. The opinions of Mr Woodhams are again frank assessments aimed at informing the Executive Dean. In the circumstances that prevail, I am satisfied that disclosure to the applicant of this information (other than the matter discussed at paragraph 25 below) could reasonably be expected to have substantial adverse effects of the types discussed above on the management or assessment by the University of its staff.
25. The matter in issue in Solution 3 was quoted by Professor Moulden in a letter dated 27 September 2000, a copy of which was provided by the applicant. Given that the applicant has already had access to that information, I find that its further disclosure under the FOI Act could not reasonably be expected to have an adverse effect on the management or assessment by the University of its staff.

#### **Public interest balancing test**

26. There is a public interest in enhancing the accountability of the University for the way it manages its staff. However, the previous disclosure of parts of the report has revealed the steps followed by the reviewer and the bulk of his recommendations. It allows any person to raise issues with the University administration concerning what recommendations have, or have not, been adopted. I consider that the disclosure to date has largely satisfied the public interest in accountability.
27. As to the matter concerning the applicant, I accept that there is a public interest in the subject of adverse comments in agency documents having access to the comments. The weight of this consideration is increased when the subject of the comments has

continuing contact with the agency, as is the case here with the applicant continuing as a staff member of the school. However, I am not satisfied that there is any requirement to disclose the comments in order to accord natural justice to the applicant. While the applicant has complained of adverse comment and rumours arising from the report, I am not satisfied that the University has taken, or has ever proposed to take, any action detrimental to the applicant's rights or interests, based on any of the information remaining in issue, which might give rise to a legal requirement to disclose any of that information in order to accord procedural fairness.

28. In *Re Pemberton*, the Information Commissioner considered the application of s.40(c) to performance reports by University managers made for the purposes of promotion applications by the FOI access applicant. At paragraphs 197-198, he said:

*197. The particular promotion processes within the University that are now under consideration do not involve the selection of the best candidate from a field of applicants for a particular vacancy. Rather they involve a value judgment as to whether a particular candidate has achieved a standard of excellence in his or her contribution to the University, and to his or her academic discipline, that warrants recognition by the University with the reward of personal promotion. I accept what is said in paragraph 4 of Professor Wilson's statutory declaration (set out at paragraph 63 above) to the effect that personnel assessment practices must ensure that those academic staff who are contributing most to the fulfilment of the University's Mission are promoted, so that the University is able to retain them, and so that others will be encouraged to emulate their achievement. However, it seems to me that a promotion process of this kind ought to place at least equal emphasis on affording guidance to those who aspire to promotion, but are unsuccessful, as to how they need to improve their performance so as to make a contribution of sufficient distinction to warrant recognition through personal promotion. Assisting and guiding academic staff towards achieving their full potential in that regard is likely to reap benefits not only for individual academics but for the wider community. If the judgment can properly be made that disclosure of the contents of a particular report by a Head of Department, Dean of Faculty or Pro-Vice-Chancellor should be made to an unsuccessful candidate for promotion in the interests of providing guidance of this type (which I find to be the case in respect of disclosure to Dr Pemberton of documents 18, 19 and 20) then I think there will be a legitimate public interest in disclosure of the report to the subject of the report. A public interest consideration of this kind may be reduced in weight if the unsuccessful candidate has received sufficiently detailed feedback through counselling following the selection process, but I am satisfied that that did not occur in respect of Dr Pemberton and the selection processes for which documents 1, 18, 19 and 20 were created.*

*198. Dr Pemberton is a researcher (and teacher) in a field of science (molecular microbial genetics) where progressive research is capable of producing significant benefits for the wider community. His duties include supervising research undertaken by graduate students in his specialist field. If senior academics, of Professorial calibre, hold opinions to the effect that Dr Pemberton's work on behalf of the*

*University (and indirectly on behalf of the wider community) has shortcomings, or needs to be redirected or improved in some way in order for him to be assessed as having made a sufficiently distinguished contribution to the University, and his academic discipline, as to make him worthy of promotion to Professor, then I consider it to be not only in Dr Pemberton's personal interest, but in the wider public interest, that those opinions be conveyed to Dr Pemberton. Significant sums of public money are contributed to fund research of the kind in which Dr Pemberton is engaged, and to fund the employment of academics generally. It is in the public interest that academics and researchers direct their efforts in a way that optimises the benefit to the wider community from the investment it makes in the tertiary education sector and in scientific research.*

29. I consider that the report in issue in this case is quite different from the documents in issue in *Re Pemberton*. I explained at paragraph 17 above the general aims of the report. It is not an individual performance assessment document. I consider that there is a public interest in senior University managers being able to properly inform themselves concerning general management issues, so that they can make decisions about the best way to deal with those general issues, without necessarily having to disclose every comment regarding an individual, if disclosure of those comments could be expected to create tensions that would undermine the very attempts at personnel management that a report such as the one in issue was designed to assist.
30. I acknowledge a public interest in the applicant having access to matter that will assist him to consider and address perceived shortcomings in his performance. In this case, I note that the comments in issue are in general terms and do not relate to specific aspects of duties performed by the applicant. I am satisfied that, bearing in mind the particular circumstances of this case, and the context in which the matter in issue appears, the considerations favouring disclosure are not of sufficient weight to override the considerations favouring non-disclosure. I find that disclosure of the matter concerning the applicant would not, on balance, be in the public interest. (In making that finding, I have considered the application of s.6(a) to the matter referred to in paragraph 15 above.) The matter concerning the applicant therefore qualifies for exemption under s.40(c) of the FOI Act.
31. The other matter in issue (concerning the support staff) does not contain criticism of the applicant, so public interest considerations favouring disclosure to the particular FOI access applicant do not arise. However, the considerations favouring non-disclosure discussed above are still relevant. I find that disclosure of that matter to the applicant would not, on balance, be in the public interest, so that it is exempt matter under s.40(c) of the FOI Act.

### **DECISION**

32. I vary the decision under review (being the decision of Professor Moulden dated 31 August 2000 on behalf of the University) by finding that:
  - (a) the matter identified at paragraphs 22, 23 and 25 above does not qualify for exemption from disclosure to the applicant; but
  - (b) the balance of the matter in issue identified at paragraph 8 above is exempt from disclosure to the applicant under s.40(c) of the FOI Act.