

'WLS'and Queensland Rail

(S 203/01, 31 October 2002, Deputy Commissioner Sorensen)

(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 ... is employed as a driver by Queensland Rail. In ... 2000, allegations were made to Queensland Rail that the applicant was using drugs both at work and elsewhere. The allegations were contained in a memo from another driver acting in a supervisory capacity (whose identity is known to the applicant). The author of the memo stated that he had received that information from several third parties, whose identities are not known to the applicant.
4. Queensland Rail excluded the applicant from the workplace on ... and began an investigation into the allegations. The exclusion ended [8 days later], but for various reasons the applicant did not return to the workplace. Queensland Rail obtained a medical report on the applicant ..., and concluded that the allegations of drug use were not substantiated.
5. The applicant submitted a workers compensation claim, dated 6 June 2002, contending that his incapacity (major depression) was caused by false allegations made against him, and the manner in which Queensland Rail dealt with them. Queensland Rail investigated the applicant's claim and, in a report dated 11 July 2000, the investigating officer (Mr D Round) recommended that the claim be accepted.
6. By way of an application form dated 1 March 2001, the applicant sought access to "*information regarding complaints and allegations and all other information about [the applicant] pertaining to using drugs on and off the job*". The applicant set out in detail the types of documents to which he required access.
7. By letter dated 24 May 2001 Ms N Schoorl, Queensland Rail's Acting FOI Co-ordinator, informed the applicant that she had located five files and some loose papers, totalling 688 documents, which fell within the terms of the applicant's FOI access application dated 1 March 2001. Ms Schoorl granted the applicant access in full to 648 documents (although 36 were to be released to the applicant's nominated medical practitioner in accordance with s.44(3) of the FOI Act) and to parts of a further 12 documents. She refused access to 28 documents. The documents and parts of documents to which Ms Schoorl refused access were claimed to be exempt under s.42(1)(b), s.44(1) or s.46(1)(b) of the FOI Act.

8. By letter dated 18 June 2001, the applicant sought internal review of Ms Schoorl's decision. The internal review decision was made on 11 July 2001 by Mr M Goode, Group Manager, Corporate Services. Mr Goode upheld Ms Schoorl's decision with respect to two documents, but varied it with respect to the remaining 38 documents and released additional matter to the applicant. By letter dated 11 September 2001, the applicant sought review by the Information Commissioner, under Part 5 of the FOI Act, of Mr Goode's decision to refuse him access to the remaining matter.

External review process

9. Copies of the documents containing the matter in issue were obtained and examined. Following a meeting on 23 November 2001 between a member of my staff and representatives of Queensland Rail, Queensland Rail indicated that it was prepared to disclose some additional segments of matter. In a letter dated 5 December 2001, Queensland Rail confirmed that it was prepared to release some documents in full, and release additional segments of matter from several other documents. It also amended its claim for exemption in respect of the matter remaining in issue in six documents, which it contended was exempt matter under s.40(1)(a) [sic] of the FOI Act.
10. By letter dated 5 April 2002, Assistant Information Commissioner Barker authorised Queensland Rail to disclose the additional matter to the applicant. Assistant Commissioner Barker also informed Queensland Rail of her preliminary view that, while some segments of the matter remaining in issue qualified for exemption from disclosure under s.40(c), s.42(1)(b) or s.44(1) of the FOI Act, none of the matter in issue qualified for exemption under s.40(a) (there is no s.40(1)(a) in the FOI Act).
11. Queensland Rail advised, by letter dated 22 April 2002, that it wished to contest Assistant Commissioner Barker's preliminary view. However, in a further letter dated 21 May 2002, Queensland Rail advised that it agreed to accept Assistant Commissioner Barker's preliminary view, while noting that the exemption provision it had intended to claim in its letter dated 5 December 2001 was s.41(1)(a) rather than s.40(a).
12. By letter dated 4 June 2002, Assistant Commissioner Barker informed the applicant that Queensland Rail was prepared to disclose some additional matter to him and that, in her preliminary view, the matter then remaining in issue qualified for exemption from disclosure under s.40(c) or s.44(1) of the FOI Act. The applicant was invited to lodge a submission in response by 26 June 2002. In a telephone conversation on that date, the applicant requested an extension of time (for family reasons) in which to lodge a submission. The date for lodgment was extended to 8 July 2002, and the applicant was advised that he could make oral submissions, or rely on information already provided to this office in previous telephone conversations. Nothing further has been received from the applicant.

Matter remaining in issue in this review

13. The matter remaining in issue in this review can be divided into three categories:

- (a) the whole of p.250 (of which p.251 is a copy) and segments of matter on pp.247 (of which p.248 is a copy), 249, 254, 264 and 267 of the applicant's Personnel file, and segments of matter on pp.55 and 60 of an Occupational Health Nurse (OHN) file (which are copies of pp.254 and 267 respectively of the Personnel file), which would identify the third parties who raised concerns about the applicant's performance of his duties as a Queensland Rail employee (that matter comprises the names of the third parties and a small amount of information which would enable the applicant to identify them);
- (b) segments of matter on pp.244 and 245 (of which p.246 is a copy) of the Personnel file, and pp.50 and 52 of the OHN file (which are copies of each other, and of p.244 of the Personnel file) which refer to prescription medication used by a third party; and
- (c) the name of another FOI access applicant, on p.1 of a loose document described as a file note.

(Where segments of matter are in issue on particular documents, the balance of each document has been disclosed to the applicant.)

14. Queensland Rail contends that the matter in category(a) is exempt from disclosure under s.42(1)(b) of s.46(1)(b) of the FOI Act, and that the category (b) and (c) matter is exempt under s.44(1) of the FOI Act.

15. In making my decision I have taken into account:

- 1. the contents of the documents containing the matter remaining in issue, and also the matter which has already been disclosed to the applicant;
- 2. Ms Schoorl's initial decision dated 24 May 2001;
- 3. Mr Goode's internal review decision dated 11 July 2001; and
- 4. information provided by the applicant in telephone conversations with staff of this office.

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

16. 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.

17. The Information Commissioner explained and illustrated the correct approach to the interpretation and application of s.40(c) of the FOI Act in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293; *Re Murphy and Queensland Treasury & Ors* (1995) 2 QAR 744; *Re Shaw and The University of Queensland* (1995) 3 QAR 107 and *Re McCann and Queensland Police* (1997) 4 QAR 30. In considering whether matter qualifies for exemption under s.40(c) of the FOI Act, I must determine:

1. whether any adverse effect(s) 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
- (b) whether the adverse effect(s) 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 effects (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 the disclosure of the matter in issue would nevertheless, on balance, be in the public interest.

18. Management of staff performance, which includes taking action if there are concerns about the performance or behaviour of a member of staff, is an aspect of the management by an agency of its personnel. The documents which contain the matter in issue in this review indicate that the applicant's performance and behaviour were of concern to other Queensland Rail staff (to whom I will refer as 'third parties'). Several third parties felt obliged to bring their concerns to the attention of Queensland Rail management (including speculation by third parties as to whether the applicant may have been inappropriately using drugs) in the hope that it might take action to correct what they considered to be poor, or even dangerous, performance.

Substantial adverse effect

19. I have examined the category (a) matter which could identify third parties, and have formed the view that disclosure of that matter could reasonably be expected to inhibit Queensland Rail staff, who had genuine concerns about the work performance, behaviour or health of a fellow-worker, from reporting those concerns to management. Ms Schoorl stated, in her decision dated 24 May 2001, that Queensland Rail employees are actively encouraged to report misconduct or possible misconduct. Complaints made, or

concerns raised, by employees might not always be justified, even if they are made in good faith. They might not result in action being taken by Queensland Rail against any person. The fact remains, however, that most employees are reluctant to provide information, even if it is their duty to do so, if they are afraid of reprisals or of damaging working relationships with their fellow-workers by doing so. Whether or not such fears are reasonably based in any particular case, they are a deterrent to employees providing Queensland Rail with information which is necessary to monitor and manage the performance of its staff.

20. Mr Goode stated, in internal review decision, that "*QR actively encourages its employees to report this type of information to enable investigation. This can only be successfully achieved on the understanding that all information received will be confidential. I believe that disclosure of this document [referring specifically to p.250 of the Personnel file, which is a statement by a third party] would contradict this assurance*".
21. It may not always be possible for staff to convey to management concerns about the work performance, behaviour or health of another staff member, on the basis that the identity of the informant, or the information supplied, will be kept confidential. In some cases, one or both may have to be disclosed if management is to take proper steps to deal with the information, in accordance with the legal requirements of procedural fairness. Considerations of the kind discussed in *Re McEniery and the Medical Board of Queensland* (1994) 1 QAR 349 at paragraphs 27-33 and paragraph 50 would also be relevant in these contexts, according to the circumstances of the particular case. In some circumstances information supplied to management may be capable of independent verification (e.g., by independent investigation, or by a medical examination), and the identity of the original source could be treated in confidence. Generally speaking, with informants of this type, it would often be understood and accepted on both sides that it was desirable for the identity of the source of information to be treated in confidence so far as possible, although the need to observe legal requirements in taking appropriate action on the information conveyed may override the understanding of confidence in particular circumstances.
22. I am satisfied that the present case is one in which it was proper for the informants and the management of Queensland Rail to have understood that identifying information in respect of the informants should be treated in confidence so far as possible, and I am also satisfied that no circumstances arose (in the course of management subsequently taking appropriate action in respect of the information supplied about the applicant) that required any departure from that understanding of confidence in respect of the matter remaining in issue. I am satisfied that to now disclose the matter in issue under the FOI Act could reasonably be expected to have a substantial adverse effect on the management by Queensland Rail of its personnel, through the breach of trust that would be involved, and the inhibiting effect it would have on the willingness of staff to report concerns about fellow employees in future cases.

23. Maintaining proper and safe work practices, and satisfactory relations within the workplace, are important parts of Queensland Rail's personnel management functions. The disclosure of matter which could inhibit the capacity of management to monitor the former, and damage working relationships, could reasonably be expected to have a substantial adverse effect on the management by Queensland Rail of its personnel. I find that the test for *prima facie* exemption under s.40(c) is satisfied.

Public interest balancing test

24. Satisfaction as to a reasonably apprehended substantial adverse effect raises a *prima facie* public interest in not disclosing the matter in issue. Queensland Rail also has a duty, set out in its policy document "Alcohol and Other Drugs" – known as SAFEPOL14 - "*to set the arrangements for the management of risks associated with alcohol and other drugs in the workplace*". The policy relevantly states that:

It is QR's policy that workers will not be affected by alcohol or other drugs when they:

- 1. Sign on for work;*
- 2. Are on duty;*
- 3. Are on-call or are required to provide professional safety-related advice and give safety-related instructions when not on duty; and*
- 4. Are acting on behalf of QR but executing functions or duties at the request of a principal contractor or third party operator.*

... This will enable QR to meet its legal and community obligations.

25. If Queensland Rail cannot rely on employees to report poor or dangerous performance of their duties by colleagues, including the possible use of drugs which affect performance, it will not be able to meet its obligations under the above policy. I am satisfied that there is a strong public interest in Queensland Rail successfully meeting its obligations under that policy, in addition to its obligations under both statute and the common law to maintain a safe workplace environment.
26. In the applicant's favour is the public interest in an employee, about whom negative or unproven information has been given to management, having the opportunity to examine and respond to that information. There is also a public interest in the accountability of Queensland Rail for the proper management of its employees, and proper use of its disciplinary processes. Disclosure of information which would help employees to understand the reasons for investigation or discipline by Queensland Rail and, if necessary, to seek redress for unfair treatment, would advance that public interest.
27. In view of the disclosure to the applicant by Queensland Rail of additional matter in the course of this review, however, I am satisfied that the applicant has been given access to the substance and/or the details of the third parties' concerns, of the incidents

which gave rise to those concerns (including the bulk of the memo which brought the matter to the attention of Queensland Rail management), and of Queensland Rail's investigation of those concerns.

28. Having investigated the third parties' concerns, Queensland Rail found no evidence to support the suggestion that the applicant had used drugs which affected his work performance adversely. There is nothing in the matter in issue in this review to indicate that Queensland Rail took any disciplinary action against the applicant as a result of information received from third parties, apart from the applicant's temporary exclusion from the workplace during Queensland Rail's investigation. The only action recommended in the matter in issue was a positive one, by Mr Round, for the applicant's early return to work.
29. I am not satisfied that the public interest considerations favouring disclosure to the applicant of the matter remaining in issue are strong enough to outweigh the public interest considerations telling against disclosure that have been discussed above. Therefore, I find that the category (a) matter is exempt matter under s.40(c) of the FOI Act.

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

30. 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 other than the applicant for access. 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.
31. 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*). In particular, the Information Commissioner said that information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:
1. family and marital relationships;
 2. health or ill health;
 3. relationships and emotional ties with other people; and
 4. domestic responsibilities or financial obligations.

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.

32. I am satisfied that the category (b) and (c) matter relates solely to the personal affairs of individuals other than the applicant. The category (b) matter concerns the use by another Queensland Rail employee (one of the third parties) of prescription medication. That person had been interviewed by Queensland Rail in relation to the allegation that the applicant may have used drugs and, during that interview, disclosed his/her own use of medication prescribed by a doctor.
33. The category (c) matter consists solely of the name of another Queensland Rail employee who had made an FOI access application. It appears in a file note of discussions about the disclosure of medical files and reports under the FOI Act. The other applicant had applied for his/her own files before the applicant made the request which is the subject of this review, and that earlier application had nothing to do with the applicant's request.
34. Because of the way that s.44(1) of the FOI Act is worded and structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always tip the scales against disclosure of that information (to an extent that will vary from case to case according to the relative weight of the privacy interests attaching to the particular information in issue in the particular circumstances of any given case), and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue. It therefore becomes necessary to examine whether there are public interest considerations favouring disclosure, and if so, whether they outweigh all public interest considerations favouring non-disclosure.
35. I can identify no public interest which would be served by the disclosure to the applicant of the category (b) or (c) matter. That matter would not tell the applicant anything about the reasons for Queensland Rail's investigation, or how that investigation was carried out. I therefore find that the public interest in maintaining the privacy of the two people to whom the category (b) and (c) matter relates is not outweighed by any countervailing public interest considerations, and that that matter qualifies for exemption from disclosure under s.44(1) of the FOI Act.

DECISION

36. I decide to vary the decision under review, by finding that:
1. the category (a) matter, described at paragraph 13 above, is exempt matter under s.40(c) of the FOI Act; and
 2. the category (b) and (c) matter, described at paragraph 13 above, is exempt matter under s.44(1) of the FOI Act.