

'HFF' and Queensland Rail

(S 218/01, 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 an employee of Queensland Rail. Queensland Rail received a complaint from a member of the public (to whom I will refer as "the complainant") alleging that, on ... 2000, a Queensland Rail vehicle, which was being driven erratically and unsafely by the applicant, ... struck and damaged the complainant's car.
4. Queensland Rail investigated the complaint, and concluded that it was probable that the applicant had caused the damage to the complainant's car by his poor or unsafe driving of a Queensland Rail vehicle. Queensland Rail subsequently paid the company which employed the complainant, and owned the damaged vehicle, the cost of repairing that damage, without admitting liability.
5. The applicant maintained that he did not hit the complainant's car, and that the complainant had been the one driving in an unsafe manner. The applicant lodged a grievance, on 3 October 2000, in relation to the investigation of the complainant's allegations, which was dealt with by Mr T Drake, Queensland Rail's Group General Manager, Infrastructure Services. By letter dated 3 November 2000, Mr Drake informed the applicant that:
 1. it was highly probable that the Queensland Rail vehicle driven by the applicant had damaged the complainant's car;
 2. the investigation of the allegations had been fundamentally sound, although action would be taken to address certain conduct by officers involved in the investigation; and
 3. he did not intend to take any disciplinary action against the applicant, but would be placing a memo on the applicant's file.
6. In a further letter, also dated 3 November 2000, Mr Drake informed the applicant that *"whilst there remains some conjecture over the manner in which the incident occurred, there is no doubt that a problem occurred whilst you were in charge of a QR vehicle. I do not intend to take this matter any further, but you are advised this*

letter will be placed on your record for future reference should you be involved in incidents of a similar nature".

7. The applicant was not satisfied with Mr Drake's determination, and lodged a further grievance (through his union) on 6 November 2000 with Queensland Rail's General Manager, Employee Relations, Mr M Goode. On 4 December 2000, as no response had been received from Mr Goode, the applicant lodged a further grievance with the Chief Executive Officer of Queensland Rail. A grievance was also lodged with the Minister's office by the applicant's union.
8. In a meeting with the CEO on 8 May 2001, the applicant asked to be told the complainant's name, but that request was refused. The applicant then applied, by way of a Queensland Rail FOI application form dated 22 May 2001, for "*[a]ll documentation (including files, statements, witness reports, investigation reports, damage reports, photographs, photocopies, facsimiles, diary notes, post-it-notes, emails, annotations, minutes of meetings and invoices for repairs paid by QR) in relation to [the incident in question]*".
9. By letter dated 20 July 2001, Queensland Rail's FOI Co-ordinator, Ms N Schoorl, informed the applicant that she had located two files, containing a total of 338 pages of documents, and had decided to release 304 pages to him in full. Ms Schoorl also decided that 10 pages were exempt in full, under s.40(c), s.42(1)(c), s.44(1) and s.46(1)(b) of the FOI Act, and that parts of a further 24 pages were exempt under s.44(1) of the Act.
10. By letter dated 6 August 2001, the applicant applied for internal review of Ms Schoorl's decision. The internal review was conducted by Mr M Goode (to whom the second of the applicant's grievances about the investigation of the complaint against him had been addressed). Mr Goode informed the applicant, by letter dated 22 August 2001, that he had decided to disclose some additional matter, but otherwise to affirm Ms Schoorl's decision with respect to the balance of the matter which she had found was exempt (including the identities of the complainant and of a witness who had provided a statement to Queensland Rail). Mr Goode also responded to other matters raised by the applicant (including the identities of the authors of certain internal documents, and additional documents which the applicant believed should be held by Queensland Rail).
11. By letter dated 15 October 2001, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Mr Goode's decision.

External review process

12. Copies of the documents containing the matter in issue were obtained and examined.
Following a meeting between a member of my staff and Queensland Rail on 23

November 2001, Queensland Rail agreed to disclose some additional segments of matter to the applicant.

13. By letter dated 25 March 2002, Assistant Information Commissioner Barker informed the applicant of her preliminary view that two of the documents in issue in this review were outside the scope of his FOI access application dated 22 May 2001. Assistant Commissioner Barker also informed the applicant of her preliminary view that some of the matter remaining in issue qualified for exemption from disclosure under s.40(c) or s.44(1) of the FOI Act. The applicant did not accept the Assistant Commissioner's preliminary view in respect of those exemptions, and lodged a detailed submission in response, dated 12 April 2002, in support of his case for disclosure of all but a small amount of the matter identified in the Assistant Commissioner's letter dated 25 March 2002. (The matter to which the applicant no longer seeks access solely concerns other employees of Queensland Rail, and is no longer in issue in this review.)
14. By letter dated 15 April 2002, Assistant Commissioner Barker informed Queensland Rail of her preliminary view that some documents and parts of documents in issue in this review did not qualify for exemption from disclosure under s.40(c), s.44(1), or s.46(1)(b) of the FOI Act. By letter dated 22 April 2002, Queensland Rail advised that it accepted that preliminary view, and was prepared to disclose that matter to the applicant.
15. Throughout this review, the applicant has been particularly anxious to learn the identities of the complainant and of the witness who provided a statement in support of the complaint. The applicant apparently suspects that they might be persons known to him, and believes they have made a false complaint which Queensland Rail should not have accepted. Although the complainant has objected to the disclosure of his/her identity to the applicant, both the complainant and the company which employed him/her and owned the damaged vehicle have agreed to the disclosure to the applicant of those segments of matter in issue which identified the company and the car (subject to the deletion of any matter that would identify the complainant, the witness, or the other persons in the complainant's car).
16. The applicant has been given access to the additional matter (to the disclosure of which Queensland Rail and the third parties no longer object), and that matter is no longer in issue in this review.

Matter remaining in issue

17. The matter remaining in issue in this review is of two types:
 1. identifying matter in respect of the complainant and the witness, which appears on pages 34, 35, 36, 39, 56, 57, 69, 70, 71, 110, 111, 112, 113, 117, 124, 125, 182 and 183;

2. a small amount of matter concerning Queensland Rail employees who were involved in the investigation of the complaint, which appears on pages 70 and 104.
18. In making my decision on that matter I have taken into account:
1. the contents of the documents containing the matter in issue;
 2. Ms Schoorl's initial decision and Mr Goode's internal review decision, dated 22 May 2001 and 22 August 2001 respectively;
 3. the submission which accompanied the applicant's external review application dated 15 October 2001; and
 4. the applicant's submission dated 12 April 2002.

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

19. 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.

20. 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.
21. 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. 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.

22. In *Re Stewart* at pp.259-261 (paragraphs 86-90), the Information Commissioner noted that a person's name, address and telephone number must be characterised according to the context in which they appear. He also made the following observations at p.258, paragraph 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 where the applicant sought disclosure of the names and medical history (clearly "personal affairs" information) of intellectually handicapped children who had been the subject of a Health Commission inquiry. Rowlands J (President) held that the applicant's interest in the documents, and the privacy of the children, could both be accommodated by substituting letters of the alphabet for the children's names.

23. The identifying matter in issue in this review includes the names and telephone numbers of several third parties. Its disclosure would identify not only the complainant, but also the passengers in the complainant's car, one of whom provided a witness statement to Queensland Rail. Although the car was owned by the company which employed the complainant, the complainant was on his/her way home at the time of the incident on The other persons in the complainant's vehicle were a family member and friends.
24. In *Re Stewart* (at p.268, paragraph 119), the Information Commissioner decided that the fact that Mr and Mrs Stewart had lodged complaints, in a personal capacity, with a government department, and with the Parliamentary Commissioner for Administrative Investigations, was information concerning their personal affairs. In the later decision of *Re Byrne and Gold Coast City Council* (1994) 1 QAR 477, the Information Commissioner decided that the fact that a citizen, acting in a personal capacity, made a complaint (in that case, to an elected representative) about a matter of concern was information concerning that citizen's personal affairs, within the terms of s.44(1) of the FOI Act (see, in particular, at p.487, paragraphs 26-27, and pp.488-490, paragraphs 33-38; and for another illustration see *Re Morris and Queensland Treasury* (1995) 3 QAR 1 at paragraphs 28-32).
25. I am satisfied that the complainant and the witness were acting in their capacities as private citizens, and that the complainant was exercising a citizen's privilege to complain to Queensland Rail about a matter with which Queensland Rail had the power to deal (allegedly dangerous driving by an employee in a Queensland Rail vehicle, which caused damage to the complainant's car). I am also satisfied that the

other passengers were travelling for private purposes. I find that disclosure of their identities would disclose information concerning their personal affairs, and hence that the identifying information in issue is *prima facie* exempt from disclosure under s.44(1) of the FOI Act.

26. 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.
27. The applicant has been given access to the letter of complaint and to the witness statement, and to details of the actions taken by Queensland Rail in investigating and pursuing the complaint. He has also been given the registration number of the complainant's car, and the name and address of the company which employs the complainant. The complainant's car was registered to that company, although it was used and, on the day in question driven home by, the complainant. Payment for the damage alleged to have been caused by the applicant was made to the company.
28. In correspondence with Queensland Rail, and in telephone conversations and correspondence with this office, the applicant has argued that he required access to the names of the complainant and the witness so that he could determine whether those persons were known to him, and whether they had intentionally made false statements for a malicious purpose.
29. The complainant has advised this office that s/he was unaware of the applicant's identity, and did not recognise his name. There is nothing in the matter in issue in this review, or in the documents which have been disclosed to the applicant, to indicate that the complainant was known to the applicant or to Queensland Rail, or that the company which employs the complainant has had any dealings with Queensland Rail. As to the witness, s/he was aged 15 at the time of the incident, and is known to, but not related to, the complainant. Again, there is nothing to indicate that the witness knows, or is known to, the applicant, or had any reason to make a false statement concerning the incident in question.
30. I recognise a public interest in allowing persons who have been the subjects of allegations of wrongdoing - such as dangerous or drunken driving - to fully and properly defend themselves against those allegations if they believe them to be incorrect. In her letter dated 25 March 2002, however, Assistant Commissioner Barker advised the applicant of her preliminary view that the applicant had already

been given sufficient opportunities to do so by Queensland Rail, and been given access to all details of the incident of ..., including the descriptions of the incident given by the complainant and the witness, apart from identifying information in respect of the complainant and the witness. There have since been investigations into Queensland Rail's handling of the complaint, in the course of which (in the Assistant Commissioner's preliminary view) the applicant would have had further opportunities to raise any matters which he believes were not fully considered by Queensland Rail in its original investigation of the complaint.

31. The applicant disputed that view in his submission dated 12 April 2002. The applicant argued that:

... I was not allowed to fully and properly defend myself. When I defended myself so vigorously some officers were caught by surprise and their efforts were then directed to avoiding embarrassment and criticism by continuing to hold me responsible. This extended to ignoring, without justification, statements supplied voluntarily by two other employees who described how they were responsible for the damage/rub mark on the Queensland Rail vehicle involved in the incident.

*It is also quite incorrect to infer that Queensland Rail initiated an enquiry into their handling of the complaint or that I **would** have had the opportunity to raise any matters I believed **were not fully considered** by Queensland Rail. The investigation to which you refer was a prime example of Caesar investigating Caesar and it became necessary for my representative trade union to intervene and refer the matter to the Minister's office.*

32. The applicant's submission does not persuade me that he has not been given sufficient opportunities to put his own version of events to Queensland Rail in the course of the various investigations which have been carried out. It appears, from the applicant's own submission, that he has made vigorous representations to Queensland Rail and to the responsible Minister, has lodged evidence in support of his contention that he did not damage the complainant's car, and has enlisted the support of his union to make further representations. Queensland Rail has not accepted the applicant's denial of responsibility for the damage, but it is up to Queensland Rail to make its own assessment of the available evidence in that regard. I note that the only action taken against the applicant by Queensland Rail was the placement on his file of a reminder of his responsibilities when driving Queensland Rail vehicles.
33. The small amount of information to which the applicant has not been given access would not, in my view, enable the applicant to put anything further before Queensland Rail which might alter its view about the merits of the complaint in respect of the applicant's driving. The identities of the complainant, the witness, and the other passengers (who did not provide statements) are already known to Queensland Rail, which has taken steps to satisfy itself that it was reasonable to

accept their version of the incident on Whether the conclusions drawn by Queensland Rail were reasonable or correct is not a matter for this office to determine.

34. I am not satisfied that disclosure of the identities of the complainant, the witness and the other passengers would advance the public interest in the accountability of Queensland Rail for its management of complaints or grievances, nor that there are any other public interest considerations favouring disclosure to the applicant which outweigh the public interest in maintaining the privacy of information concerning the personal affairs of persons other than the applicant.
35. I therefore find that matter which would identify the complainant, the witness and the other passengers is exempt matter under s.44(1) of the FOI Act.

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

36. 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.

37. 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.

38. The balance of the matter in issue comprises the names of three Queensland Rail employees, and a reference (of less than five lines) to advice to be given to one of those officers in relation to certain conduct. It appears that all three officers were advised that certain aspects of their conduct in connection with the investigation of the complaint were less than appropriate. There is no suggestion, in the material before me, that Queensland Rail considered that those officers had been guilty of anything more serious than an error of judgment in their handling of certain aspects of the investigation of the complaint. The applicant has been given access to some details of the advice given to those officers, and is therefore aware of the action taken by Queensland Rail in response to those aspects of his grievance about the conduct of the investigation, and the actions of those officers.

Substantial adverse effect?

39. In *Re Pemberton*, the Information Commissioner discussed the application of s.40(c) to matter recording assessments of employee performance and suggestions for improvement (in that case, in the context of referees' reports made for the purpose of considering a promotion application). At p.365, paragraph 152, the Information Commissioner stated:

52. ... The task of constructively addressing shortcomings in staff performance has greater prospects of success through co-operative effort if details of the perceived shortcomings in performance, and the action plan to address them, remain confidential to the relevant managers and the staff member concerned.

40. Disclosure to the 'world at large' of information of this type could reasonably be expected to be viewed by Queensland Rail staff as a breach of trust by management, and is not likely to create a co-operative atmosphere where shortcomings, or errors of judgment, in carrying out duties can be acknowledged and addressed. This is particularly so where the officers involved may become the subject of further complaints about matters which have been investigated and dealt with by Queensland Rail in what it considered an appropriate manner.
41. These potential adverse effects also give rise to a reasonable expectation that some managers who are called on to assess the conduct of staff, or their performance of their duties, may be less frank in recording their views and actions, which would be prejudicial to proper accountability by managers for their staff.

42. I am satisfied that disclosure of the matter in issue on pp.70 and 104 could reasonably be expected to have a substantial adverse effect on the management by Queensland Rail of its personnel.

Public interest balancing test

43. Matter which was similar in nature to the matter in issue in this case was discussed by Assistant Information Commissioner Shoyer in *Re McCaffrey and James Cook University* (S 106/99; S 177/99, 20 November 2001, unreported). At paragraphs 28 and 30, the Assistant Information Commissioner said:

28. *In summary, I recognise a public interest in agencies being able to manage their staff in a manner that promotes a co-operative approach to staff improvement and development. That public interest is enhanced by promoting an environment in which frank assessments of the abilities of academic staff can be freely obtained and communicated to the subjects of those assessments for the purpose of improving teaching performance. The availability of comments of this nature to every member of the public under the FOI Act would not promote such an environment.*

44. I have already considered the public interest in the accountability of Queensland Rail for the investigation of complaints and grievances in relation to s.44(1) (see paragraphs 30-34 above). I am not persuaded that disclosure of the small amount of matter in issue on pp.70 and 104 would assist the applicant to better understand, or to challenge, Queensland Rail's reasons for finding it probable that he was responsible for the damage to the complainant's car. Almost all of the information relating to the applicant's grievance has already been disclosed to him and, in my view, the disclosure of that material goes a considerable way towards addressing any accountability concerns the applicant has.

45. I am satisfied that disclosure of the matter in issue on pp.70 and 104 would not, on balance, be in the public interest, and that that matter therefore qualifies for exemption from disclosure under s.40(c) of the FOI Act.

DECISION

46. I affirm that part of the decision under review (being the decision made on behalf of Queensland Rail by Mr Michael Good dated 22 August 2001) which relates to the identities of the complainant and the witness by finding that the matter in issue on pages 34, 35, 36, 57, 110, 111, 112, 113, 117, 124, 125, 182 and 183 is exempt matter under 44(1) of the FOI Act.
47. I vary the decision under review by finding that:

- (a) the matter in issue on pages 39 and 56 is exempt matter under s.44(1) of the FOI Act;
- (b) the matter in issue on pp.69 and 71 is exempt matter under s.44(1) of the FOI Act;
- (c) the matter in issue on p.70 which would identify the complainant is exempt matter under s.44(1) of the FOI Act, and the balance of the matter in issue on p.70 is exempt matter under s.40(c) of the FOI Act; and
- (d) the matter in issue on p.104 is exempt matter under s.40(c) of the FOI Act.

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