



Decision and Reasons for Decision

Application Number: 210455

Applicant: IJK

Respondent: Department of Public Works

Decision Date: 23 June 2008

Catchwords: **FREEDOM OF INFORMATION – section 22(a) of the *Freedom of Information Act 1992 (Qld) – Public Service Regulation 2007 (Qld) – employer direction restricting disclosure of information***

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REASONS FOR DECISION

Summary

1. In summary I affirm the decision of the Department of Public Works (DPW) to refuse the applicant access to the documents sought, under section 22(a) of the *Freedom of Information Act 1992 (Qld)* (FOI Act), on the basis that the applicant can access these documents under the *Public Service Regulation 2007 (Qld)*.

Background

2. By letter dated 22 October 2007 to the DPW (FOI Application) the applicant sought access under the FOI Act to a number of documents from an Investigation Report dated 11 May 2006.
3. In a decision dated 16 January 2008 (Initial Decision) the DPW refused the applicant access to the documents within the scope of the FOI Application under sections 28A and 22(a) of the FOI Act.
4. By letter dated 18 January 2008 (Internal Review Application) the applicant indicated that he accepted the DPW's decision in respect of the documents to which he was refused access under section 28A of the FOI Act but sought internal review of the DPW's decision in respect of the application of section 22(a) of the FOI Act.
5. In a decision dated 14 February 2008 (Internal Review Decision) the DPW affirmed the Initial Decision in respect of the application of section 22(a) of the FOI Act.
6. By letter dated 7 March 2008 (External Review Application) the applicant sought external review of the Internal Review Decision.

Decision under review

7. The decision under review in this external review is the Internal Review Decision of Mr B Backhouse, Director Legal Services, DPW, dated 14 February 2008.

Steps taken in the external review process

8. In letters dated 20 March 2008 I indicated to both parties that the decision at paragraph 7 above would be reviewed and asked the DPW to provide documents and information relevant to the review, including copies of the documents to which the applicant was refused access.
9. The documents and information requested at paragraph 8 above were received by this Office on 14 April 2008.
10. By letter dated 1 May 2008 I communicated to the applicant a preliminary view that the DPW was entitled to refuse the applicant access to the documents in issue under section 22(a) of the FOI Act. I also indicated to the applicant that if he did not accept the preliminary view he was to provide submissions to this Office by 16 May 2008.
11. By letter dated 6 May 2008 the applicant provided submissions in support of his case.
12. In reaching my decision I have taken the following into account:

- FOI Application, Internal Review Application and External Review Application
- Initial Decision and Internal Review Decision
- the applicant's submissions dated 6 May 2008
- DPW internal email dated 14 February 2008 confirming that the documents in issue were released to the applicant on 17 December 2007 under the Regulation
- relevant case law, decisions of this Office and legislation
- the documents in issue.

Documents in issue

13. The documents in issue in this review are a letter and interview summary from a DPW Complaint Investigation Report dated 11 May 2006 (Report).

Findings

Section 22(a) of the FOI Act

14. Section 22 of the FOI Act provides that an agency may refuse access to a document in a number of circumstances, including as follows:

22 Documents to which access may be refused

An agency or Minister may refuse access under this Act to—

- (a) *a document the applicant can reasonably get access to under another enactment, or under arrangements made by an agency, whether or not the access is subject to a fee or charge...*

15. The Information Commissioner has previously noted that section 22(a) of the FOI Act is designed to ensure that more specialised schemes for accessing documents are not overridden by the access regime provided for in the FOI Act.¹

Another enactment

16. For the purposes of the FOI Act an 'enactment' is an Act or a statutory instrument.²
17. An instrument is any document.³
18. A statutory instrument is defined in section 7 of the *Statutory Instruments Act 1992* (Qld) (SI Act) which relevantly provides that:

7 Meaning of statutory instrument

(1) A **statutory instrument** is an instrument that satisfies subsections (2) and (3)

(2) *The instrument must be made under—*

- (a) *an Act; or*
(b) *another statutory instrument; or*
(c) *power conferred by an Act or statutory instrument and also under power conferred otherwise by law.*

...

¹ *JM and Queensland Police Service* (1995) 2 QAR 516 at paragraph 24.

² Section 7 of the FOI Act.

³ Section 6 of the SI Act.

(3) *The instrument must be of 1 of the following types—*

- a regulation

...

19. The *Public Service Regulation 2007* (Qld) (PS Regulation) meets the requirements of section 7 of the SI Act because it is:
- an instrument made under an Act⁴
 - a regulation.
20. Accordingly, I am satisfied that the PS Regulation is 'another enactment' for the purposes of section 22(a) of the FOI Act.

Access to the documents in issue under the PS Regulation

21. Regulation 14 of the PS Regulation sets out the requirements for public service employee access to their employee record.
22. Both parties to this external review agree that the applicant has already received copies of the documents in issue under the PS Regulation.⁵
23. Notwithstanding that the applicant has accessed the documents in issue under the PS Regulation the applicant seeks access to the documents in issue under the FOI Act for the reasons outlined in the Internal Review Application, External Review Application and his submissions of 6 May 2008.

The applicant's submissions

24. The applicant submits that the context in which he made the FOI Application is as follows:
- at the time the Report was prepared he did not receive a full copy of the Report and therefore did not have an opportunity to answer the allegations against him
 - the Report is untrue and it has damaged his career, reputation and personal life
 - because of the Report he was transferred from his chosen career and position under section 79(2) of the *Public Service Act 1996* (Qld)
 - he subsequently received a copy of the Report with the documents in issue removed
 - after he lodged the FOI Application he was advised that his application would be dealt with under the PS Regulation
 - he subsequently received copies of the documents in issue
 - the documents in issue were provided under cover of letter from Mr Rivers, General Manager of Project Services, in which Mr Rivers states (DPW Direction) that:

I would also like to take this opportunity to remind you that you have previously been directed to keep this matter confidential, and not to discuss it with any third parties, including any Departmental employees, contractors or clients, other than members of

⁴ See section 118 of the *Public Service Act 1996* (Qld) which provides that the Governor in Council may make regulations under the PS Act.

⁵ In the External Review Application the applicant indicates that he received a letter from the DPW on 20 December 2007 enclosing copies of the documents in issue which were released to him under the Regulation. A DPW internal email dated 14 February 2008 indicates that copies of the documents in issue were released to the applicant under the Regulation on 17 December 2007.

your immediate family, your union representative, your professional advisors, the investigator and members of Human Resources. In light of the additional information which has now been provided to you, I wish to reiterate this direction and remind you that failure to observe these directions may render you liable for disciplinary action.

- the DPW has refused to withdraw the DPW Direction.

25. The applicant also submits that:

- he requested the documents under the FOI Act because the DPW Direction 'renders the documents that [he received] under these Public Service Regulations useless' because he cannot approach third parties to prove his innocence, whereas, if he is provided with the documents under the FOI Act his rights cannot be taken away from him to discuss this matter with third parties
- receiving the documents in issue under the Regulation, accompanied by the letter from Mr Rivers takes away his rights under the FOI Act to have the documents amended and his right to defend himself as a public servant and as an Australian citizen
- as an Australian citizen he has a right to defend himself under the Australian Constitution against allegations that have been lodged against him, as action has been taken by the Department over this matter
- he has been attempting to obtain justice in relation to this matter for more than two years and because of Government red tape, time delays and obstructions he has not been afforded natural justice
- the public servants involved are failing to understand that you have freedom of speech in this country.

The DPW Direction

26. The DPW Direction allows the applicant to disclose the documents in issue only to those persons specified in the direction. Notwithstanding any other statutory or policy basis for imposing such a direction, at common law an employee has a general duty to obey their employer's lawful and reasonable directions.⁶ I note that directions such as the DPW Direction are not uncommon in workplace investigations.

27. I also note that the DPW Direction is concerned with the use of information. However, both the FOI Act and Regulation 14 of the PS Regulation are concerned with access to information rather than the use of that information. Accordingly, notwithstanding how the documents in issue are accessed by the applicant, it is the DPW Direction which restricts the applicant's use of the information. This means that it is immaterial whether the documents in issue are accessed under the PS Regulation or the FOI Act because the restricted use complained of by the applicant is imposed by the DPW Direction.

28. In this external review I am required to decide whether I am satisfied that the DPW is entitled to refuse the applicant access to the documents in issue under the FOI Act on the basis that the applicant can reasonably access the documents in issue under another enactment or under arrangements made by an agency. I am satisfied that the:

- applicant can and has accessed the documents in issue under another enactment, that is, the PS Regulation
- DPW was entitled to refuse the applicant access to the documents in issue under section 22(a) of the FOI Act.

⁶ Such a term is implied into the contract of employment; *R v Darling Island Stevedore & Lighterage Co Ltd; Ex parte Halliday and Sullivan* (1938) 60 CLR 601 at 621-2.

DECISION

29. I affirm the decision under review being the decision of Mr B Backhouse dated 14 February 2008.
30. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

Assistant Commissioner Henry

Date: 23 June 2008