



Decision and Reasons for Decision

Application Number: 210849

Applicant: TLN and TLP

Respondent: Fraser Coast Regional Council

Decision Date: 25 November 2009

Catchwords: **ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – Matter affecting personal affairs – where a person seeks access to information relating to permits for the applicants’ dogs – whether that information concerns the personal affairs of the applicants – whether the information is exempt from disclosure under section 44(1) of the *Freedom of Information Act 1992***

ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – Matter communicated in confidence – where a person seeks access to information relating to permits for the applicants’ dogs – whether disclosure of that information could reasonably be expected to prejudice the future supply of such information – whether the information is exempt from disclosure under section 46(1)(b) of the *Freedom of Information Act 1992*

ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – Matter relating to law enforcement or public safety – where a person seeks access to information relating to permits for the applicants’ dogs – whether disclosure of that information could reasonably be expected to endanger a person’s life or physical safety, result in a person being subjected to a serious act of harassment or intimidation, or prejudice the wellbeing of a cultural or natural resource or the habitat of animals or plants – whether the information is exempt from disclosure under sections 42(1)(c), 42(1)(ca) or 42(1)(j) of the *Freedom of Information Act 1992*

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REASONS FOR DECISION

Summary

1. For the reasons set out below, I am satisfied that the matter in issue in this review is not exempt from disclosure under sections 44(1), 46(1)(b) or 42(1)(c), (ca), or (j) of the *Freedom of Information Act 1992* (**FOI Act**).

Background

2. On 13 January 2009, Fraser Coast Regional Council (**Council**) received a freedom of information application requesting information relating to the application for keeping additional dogs at the applicants' address (**FOI Application**).
3. By letter dated 4 February 2009, Council provided the freedom of information applicant (**Original FOI Applicant**) with copies of certain documents which were identified as relating to the FOI Application. Some of the information in these documents was 'deleted', including an applicant's name and postal address, and the tag number, name and gender of each of the applicants' dogs. Information concerning the colour and breed of each of the applicants' dogs was released to the Original FOI Applicant.
4. In its letter to the Original FOI Applicant, Council advised that it was obtaining the views of a person under section 51 of the FOI Act regarding the release of information contained in another document and that access to that document would be withheld until the section 51 consultation was complete.
5. Council wrote to the applicants on 4 February 2009 to obtain their views about release of information contained in the permit application to keep additional dogs (**Permit Application**).
6. By email dated 16 February 2009, the applicants advised Council that in their view the information was exempt from disclosure under sections s44(1), 46(1)(b) and 42(1)(c), (ca) and (j) of the FOI Act.
7. By letter dated 27 February 2009 (**Original Decision**), Ms Langtry of Council provided the applicants with a copy of the Permit Application in the form she had decided to release to the Original FOI Applicant, deleting certain information which she determined was exempt from disclosure under the FOI Act.
8. By email dated 23 March 2009, the applicants applied to Council for internal review of the Original Decision (**Internal Review Application**) saying:

We therefore request Council to please suppress the following details:

 - i) *Age of the dog/s*
 - ii) *Colour of the dog/s*
 - iii) *Breed of the dog/s*
 - iv) *Desexed Y/N*
 - v) *the personal comment at the top left corner ...*
9. By letter dated 27 April 2009, Ms Desmond of Council advised the applicants that she had decided to affirm the original decision (**Internal Review Decision**).

10. By application dated 19 May 2009, the applicants applied to this Office for external review of the Internal Review Decision (**External Review Application**).

Decision under review

11. The decision under review is the Internal Review Decision.

Steps taken in the external review process

12. A copy of the Permit Application was obtained from Council and reviewed.
13. In response to requests by this Office, Council provided this Office with information relating to permits generally and local government laws governing keeping of animals.
14. During a telephone conversation with an applicant on 12 October 2009, a staff member of this Office:
 - discussed procedural issues in the review
 - confirmed the matter in issue in the review.
15. During this conversation, the applicant also indicated the applicants' concern about:
 - the names of the dogs being released
 - the manner in which information about the dogs may be used.
16. During a telephone conversation with a staff member of this Office on 21 October 2009, Council confirmed that:
 - no part of the Permit Application had been released to the Original FOI Applicant at this stage
 - it was intended that an applicant's name not be released.
17. By letter dated 26 October 2009, I provided a written preliminary view to the applicants that the matter in issue in this review was not exempt from disclosure under sections 44(1), 46(1)(b), or 42(1)(c), (ca) or (j) of the FOI Act.
18. The applicants provided submissions in response by letter dated 4 November 2009.
19. By letter dated 11 November 2009, I wrote to the applicants to confirm matters discussed during a telephone conversation between an applicant and a staff member of this Office on 10 November 2009. In particular, I indicated that I:
 - had considered the issues raised in the applicants' submissions
 - remained of the view that the matter in issue did not meet the legal requirements for exemption from disclosure
 - sought to confirm whether the applicants wished to pursue the external review application.
20. By email dated 19 November 2009, the applicants asked me to issue a formal written decision in this review.
21. In reaching a decision in this external review, I have considered:
 - the Original Decision

- the Internal Review Application and the Internal Review Decision
- the External Review Application
- file notes of telephone conversations between a staff member of this Office and an applicant on 12 October 2009 and 10 November 2009
- a file note of a telephone conversation between a staff member of this Office and Council on 21 October 2009
- the applicants' submissions dated 4 November 2009
- the Permit Application and matter in issue
- the Hervey Bay City Council (Keeping and Control of Animals) Local Law No. 5 and the Hervey Bay City Council (Keeping and Control of Animals) Local Law Policy No. 5 (collectively, the **Local Laws**)
- relevant provisions of the FOI Act
- case law and previous decisions of this Office as referred to in this decision.

Matter in issue

22. The matter in issue in this review comprises:

- the colour and breed of the applicants' dogs
- the age, sex¹ and desexed status of the applicants' dogs
- a comment about the dogs appearing on two pages.

Findings

23. Section 21 of the FOI Act confers on persons a legally enforceable right to be given access under the FOI Act to documents of an agency and official documents of a Minister. This right of access is subject to other provisions of the FOI Act, in particular, section 28 of the FOI Act, which provides that an agency may refuse access to exempt matter or an exempt document, and the provisions of Part 3, Division 2 of the FOI Act, which set out those exemption provisions.
24. In the Internal Review Decision, Council determined that the matter in issue was not exempt from disclosure under the FOI Act.
25. Under section 81(2) of the FOI Act, if the decision under review is a disclosure decision², the participant in the application for review who opposes the disclosure decision has the onus of establishing that a decision not to disclose the document or matter is justified or that the commissioner should give a decision adverse to the person who wishes to obtain access to the document. The Internal Review Decision is a disclosure decision for the purposes of section 81(2) of the FOI Act.
26. The applicants submit that the matter in issue is exempt from disclosure under sections 44(1), 46(1)(b) and 42(1)(c), (ca) and (j) of the FOI Act.

The applicants' submissions

27. In summary, by letter dated 4 November 2009, the applicants submitted that:
- they do not accept my preliminary view
 - the matter in issue does identify them

¹ As confirmed with the applicant in my letter dated 26 October 2009.

² Section 81(3)(a) of the FOI Act defines a disclosure decision to mean a decision to disclose a document or matter contrary to the views of a person obtained under section 51 of the FOI Act.

- they comply with the relevant conditions of the permit
- they have a right to privacy (which includes their dogs)
- the Original FOI Applicant's motivations should be scrutinised
- disclosure of the matter in issue would prejudice the future supply of this type of information to government.

28. The applicants also raise issues about interactions with their neighbours.

Section 44(1) of the FOI Act

29. Section 44(1) of the FOI Act provides:

Matter affecting personal affairs

(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.*

30. Section 44(1) therefore requires me to consider the following questions in relation to the matter in issue:

- firstly, does the matter in issue concern the personal affairs of person/s (in this case, other than the Original FOI Applicant)? If so, a public interest consideration favouring non-disclosure of the matter in issue is established
- secondly, are there public interest considerations favouring disclosure of the matter in issue which outweigh all public interest considerations favouring non-disclosure of the matter in issue?

31. In *Stewart and Department of Transport (Stewart)*³ 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. In particular, he 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:

- family and marital relationships
- health or ill-health
- relationships and emotional ties with other people
- domestic responsibilities or financial obligations.

32. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, to be determined according to the proper characterisation of the information in question.

33. The Information Commissioner also noted in *Stewart* that for information to be exempt under section 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.⁴

34. In previous decisions of this Office, the Information Commissioner has decided that information that an identifiable individual is the registered owner of a dog is information concerning that person's personal affairs.⁵

³ (1993) 1 QAR 227. See in particular paragraphs 79 – 114.

⁴ At paragraph 81.

Findings of fact and application of the law to the matter in issue

35. I have considered the applicants' submissions that the matter in issue concerns their personal affairs. In particular, they maintain that:
- the characteristics of the dogs identify them
 - they have a right to privacy which includes the dogs.
36. I have also considered the following factors:
- the matter in issue consists of the colour, breed, age, sex, and desexed status of the dogs, and a comment about the dogs
 - the matter in issue appears in the context of some other information, including the property details where the dogs are housed, however, the applicants have not objected to disclosure of this information
 - information about the colour and breed of the dogs has already been released to the Original FOI Applicant
 - parts of the matter in issue are capable of observation by any member of the community, including the Original FOI Applicant.
37. On balance, I am satisfied that the matter in issue does not concern the applicants' personal affairs as:
- Council has decided the applicants' names are exempt from disclosure under the FOI Act and does not propose to release the applicants' name with the matter in issue
 - the matter in issue does not identify the applicants
 - while the applicants consider information about their dogs is 'private', the matter in issue does not constitute 'personal affairs of a person' as that term is used in section 44(1) of the FOI Act.
38. Accordingly, on the basis of the matters set out above, I am satisfied that:
- the matter in issue does not constitute the 'personal affairs of a person' other than the Original FOI Applicant for the purposes of section 44(1) of the FOI Act
 - it is therefore unnecessary to consider whether disclosure of the matter in issue would, on balance, be in the public interest
 - the matter in issue is not exempt from disclosure under section 44(1) of the FOI Act.

Section 46(1)(b) of the FOI Act

39. Section 46(1)(b) of the FOI Act provides:

46 Matter communicated in confidence

(1) *Matter is exempt if—*

(b) *it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to*

⁵ See *Willsford and Brisbane City Council* (1996) 3 QAR 368 at paragraph 12 – 13; *Gill and Brisbane City Council* (2001) 5 QAR 45.

prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.

40. For the matter in issue to be exempt under section 46(1)(b) of the FOI Act, *all* of the following requirements must be satisfied:

- the information consists of information of a confidential nature (first requirement)
- the information was communicated in confidence (second requirement)
- disclosure of the information could reasonably be expected to prejudice the future supply of such information (third requirement)
- the weight of the public interest considerations favouring non-disclosure equals or outweighs that of the public interest considerations favouring disclosure (fourth requirement).

41. The Information Commissioner considered this provision in *B and Brisbane North Regional Health Authority (B)*⁶ and commented that:

*Where persons are under an obligation to continue to supply such confidential information ... or persons must disclose information if they wish to obtain some benefit from the government (or they would otherwise be disadvantaged by withholding information) then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information. In my opinion, the test is not to be applied by reference to whether the particular confider whose confidential information is being considered for disclosure, could reasonably be expected to refuse to supply information in the future, but by reference to whether disclosure could reasonably be expected to prejudice the future supply of such information from a substantial number of the sources available or likely to be available to an agency.*⁷

42. In *Attorney-General v Cockcroft (Cockcroft)*⁸ which dealt with the interpretation of the phrase 'could reasonably be expected to prejudice the future supply of information' in the context of the section 43(1)(c)(ii) (business affairs) exemption contained in the *Freedom of Information Act 1982* (Cth), Bowen CJ and Beaumont J said:⁹

*In our opinion, in the present context, the words "could reasonably be expected to prejudice the future supply of information" were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act. It is undesirable to attempt any paraphrase of these words. In particular, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like. To construe s.43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based (see *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 62 ALR 321 per Gibbs CJ and Mason J).*

43. The Justices' interpretation of the phrase 'could reasonably be expected to' and the proposed line of inquiry, while made in the context of the business affairs exemption contained in Commonwealth freedom of information legislation, is relevant in the context of the exemption contained in section 46(1)(b) of the FOI Act.

⁶ (1994) 1 QAR 279.

⁷ *B* at paragraph 161.

⁸ (1986) 10 FCR 180.

⁹ *Cockcroft*, at 190.

44. Accordingly, the phrase *'could reasonably be expected to'* in this context requires a consideration of whether the expectation that disclosure of the matter in issue could prejudice the future supply of such information to government, is reasonably based.
45. However, it is not necessary for a decision-maker *'to be satisfied upon a balance of probabilities'* that disclosing the document will produce the adverse effect.¹⁰

Findings of fact and application of the law to the matter in issue

46. I have carefully considered the applicant's submissions, in particular that:
- the Permit Application did not mention that the personal information could be accessed under FOI
 - should people become aware that anyone can apply under FOI to access others' personal application, it would prejudice the future supply of that type of information to government
 - the applicants will not provide full information to any government department in the future, unless it is absolutely necessary.
47. I note that Council is subject to the Local Laws which govern the registration of animals and the circumstances in which permits may be approved to keep additional animals. The Local Laws provide for:
- the circumstances in which a permit is required
 - Council to have regard to certain criteria for granting permits
 - certain permit conditions to apply, including that a permit applies only to the particular dogs identified in the application.
48. Having regard to the comments of the Information Commissioner in *B*, I am satisfied that:
- disclosure of the matter in issue could not reasonably be expected to prejudice the future supply of such information as community members will continue to supply such information to Council if they wish to obtain the benefit of a permit to keep additional dogs in accordance with the Local Laws¹¹
 - the third requirement of the test set out in paragraph 40 is not met (rendering it unnecessary for me to consider the other requirements of the test)
 - the matter in issue is not exempt from disclosure under section 46(1)(b) of the FOI Act.

Section 42(1)(c), (ca) and (j) of the FOI Act

49. Section 42(1)(c), (ca) and (j) of the FOI Act provide:

Matter relating to law enforcement or public safety

- (1) *Matter is exempt matter if its disclosure could reasonably be expected to -*
...
(c) *endanger a person's life or physical safety; or*

¹⁰ Having regard to the comments of Shepherd J in *Cockroft*, at 196.

¹¹ See *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at paragraph 161.

- (ca) result in a person being subjected to a serious act of harassment or intimidation; or
- ...
- (j) prejudice the wellbeing of a cultural or natural resource or the habitat of animals or plants.

50. In order for me to be satisfied that the requirements of section 42(1)(c), (ca) or (j) of the FOI Act are met, I am required to consider whether the expectation that disclosure of the matter in issue could cause the harm or prejudice contemplated by those subsections, is reasonably based.¹²

Findings of fact and application of the law to the matter in issue

51. I have considered the applicants' submissions, including:

- that the Original FOI Applicant may be 'vindictive'
- that the Original FOI Applicant's reasons for seeking information should be scrutinised
- matters relating to interactions with their neighbours and other supporting material provided.

52. Relevantly I note that:

- the matter in issue in this review consists of the colour, breed, age, sex, and desexed status of the applicants' dogs, and a comment about the dogs
- the colour and breed of the dogs has already been released to the Original FOI Applicant
- some of the matter in issue is capable of observation by any member of the community.

53. While I acknowledge that disclosure of the matter in issue is of concern to the applicants, in the circumstances I am not satisfied that disclosure of the colour, breed, age, sex or desexed status of the applicants' dogs, or a comment about the dogs, could reasonably be expected to:

- endanger a person's life or physical safety
- result in a person being subjected to a serious act of harassment or intimidation
- prejudice the wellbeing of a cultural or natural resource or the habitat of animals or plants.

54. Accordingly, I find that the matter in issue is not exempt from disclosure under either section 42(1)(c), (ca), or (j) of the FOI Act.

DECISION

55. I affirm the decision under review by finding that the matter in issue is not exempt from disclosure under either section 44(1), 46(1)(b) or 42(1)(c), (ca) or (j) of the *Freedom of Information Act 1992*.

¹² Having regard to the comments of Bowen CJ and Beaumont J in *Attorney-General v Cockcroft* (1986) 10 FCR 180 discussed above at paragraphs 42 - 45.

56. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

F Henry
Assistant Commissioner

Date: 25 November 2009