

Veenstra and Department of Public Works & Housing
(S 163/96, 14 December 1998, Information Commissioner)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.-4. These paragraphs deleted.

REASONS FOR DECISION

Background

5. By application form received on 7 August 1996, the applicant sought access under the FOI Act to documents of the Department of Public Works and Housing (the Department) containing personal information about the applicant since he commenced work in October 1982.
6. By letter dated 23 September 1996, Mr Lynch of the Department informed the applicant that he had located 273 folios falling within the terms of the applicant's FOI access application. Mr Lynch decided to give the applicant access in full to 266 of the folios. However, Mr Lynch decided that parts of 2 of the folios (1 and 96) were exempt under s.44(1) of the FOI Act, and that the remaining five folios (12-16) were wholly exempt under s.44(1) and s.46(1)(b) of the FOI Act.
7. The applicant sought internal review of Mr Lynch's decision, which was conducted by Mr Grierson of the Department. In his decision dated 16 October 1996, Mr Grierson affirmed Mr Lynch's decision to refuse access to the matter identified above, but decided that folios 12-16 were exempt under s.41(1) and s.44(1) of the FOI Act. By letter dated 16 October 1996, the applicant applied to the Information Commissioner for review under Part 5 of the FOI Act, of Mr Grierson's decision.

External review process

8. Copies of the documents containing or comprising the matter in issue were obtained and examined. The documents relate to an investigation of complaints by the applicant that he was being discriminated against by staff of the Department, the discrimination having manifested itself in comments made about the applicant's Dutch ancestry. The documents are:

Folio	Description
1	Notes made in preparation for a feedback session with the applicant and another person. The deleted matter consists of notes relating to the

	feedback session with the other person. The deleted matter does not refer in any way to the applicant.
12-16	Handwritten notes by an investigator (Mr D Peries), recording interviews with various staff members in the course of investigation of the complaint.
96	Handwritten notes headed "Situation So Far". The deleted matter is the name of a person who was involved in a matter unrelated to the applicant's complaints.

9. The applicant has already been granted access to a report prepared by Mr Peries on the investigation (the Grievance Report). Comparison of folios 12-16 with the Grievance Report shows that the information recorded in a number of passages in folios 12-16 has already been disclosed to the applicant by disclosure to him of the Grievance Report. That matter (which does not disclose the identities of the staff members interviewed) is described in the following table:

Matter in Issue	Matter in Grievance Report
Folio 12:-lines 9-10	Folio 060:-sentence after the words ' <i>Stage Four</i> '
Folio 12:-lines 11-16	Folio 058:-second paragraph
Folio 12:-lines 19-20	Folio 061:-first sentence after the words ' <i>Stage Three</i> '
Folio 13:-lines 18-20	Folio 059:-last paragraph, second last sentence
Folio 15:-lines 1-4 & 7-8	Folio 062:-second paragraph
Folio 16:-lines 4-5	Folio 089:-third last paragraph, second sentence
Folio 16:-lines 12-15	Folio 062:-second paragraph, last two sentences

10. The Department has confirmed that it does not object to disclosure of the matter listed above from folios 12-16, and I have authorised its disclosure to the applicant. That matter is therefore no longer in issue in this external review.
11. After obtaining further information from the Department, I formed the view that, in addition to the exemption provisions discussed above, s.40(c) of the FOI Act may also be relevant to folios 12-16. In due course, I informed the applicant of my preliminary view that the matter in issue qualified for exemption under s.40(c) and/or s.44(1) of the FOI Act. It is clear from the responses of the applicant that he did not accept my preliminary views.
12. In making my decision, I have had regard to:
1. the documents in issue;
 2. the correspondence between the Department and the applicant concerning his initial and internal review applications;
 3. the applicant's application for external review dated 16 October 1996 and his letters dated 18 December 1997 and 5 October 1998;

4. a letter from the Department dated 9 January 1997;
5. a statutory declaration of Darryl Peries dated 27 May 1997; and
6. the Grievance Report.

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

13. 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.

14. I have considered the 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 Service* (Information Commissioner Qld, Decision No. 97010, 10 July 1997, unreported). The focus of this exemption provision is on the management or assessment by an agency of the agency's personnel. The exemption will be made out if it is established that disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of its personnel, unless disclosure of the matter in issue would, on balance, be in the public interest.
15. I analysed the meaning of the phrase "*could reasonably be expected to*", by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the *Freedom of Information Act 1982* Cth, in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.339-341, paragraphs 154-160. In particular, I said in *Re "B"* (at pp.340-341, paragraph 160):

The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.

16. The ordinary meaning of the word "expect" which is appropriate to its context in the phrase "could reasonably be expected to" accords with these dictionary meanings: "to regard as probable or likely" (Collins English Dictionary, Third Aust. ed); "regard as

likely to happen; anticipate the occurrence ... of" (Macquarie Dictionary, 2nd ed); "Regard as ... likely to happen; ... Believe that it will prove to be the case that ..." (The New Shorter Oxford English Dictionary, 1993).

17. If I am satisfied that any adverse effects could reasonably be expected to follow from disclosure of the matter in issue, I must then determine whether those adverse effects, either individually or in aggregate, constitute a substantial adverse effect on the management or assessment by the Department of its personnel. For reasons explained in *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 (at pp.724-725, paragraphs 148-150), I consider that, where the Queensland Parliament has employed the phrase "substantial adverse effect" in s.40(c) of the FOI Act, it must have intended the adjective "substantial" to be used in the sense of grave, weighty, significant or serious.
18. If I find that disclosure of the whole or any part of the matter in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by the Department of its personnel, I must then consider whether disclosure of that matter would nevertheless, on balance, be in the public interest.

Submissions and evidence of the participants

19. Folios 12-16 are handwritten notes made by Mr Peries in the course of his investigation of the applicant's grievances. Each folio represents a record of an interview that Mr Peries had with a staff member of the Department other than the applicant. In his statutory declaration, Mr Peries described the circumstances of those interviews in the following terms:

Folios 016-012 are my notes of interview with staff members made during the course of the grievance investigation. I advised each of those staff members that their comments would remain confidential. It is my usual practice to give an express undertaking that information provided during the course of grievance investigations will remain confidential. Where appropriate, interviewees are advised that the requirements of procedural fairness may require all or part of an interview to be disclosed to a given person. As it was not considered necessary, no such advice was given to the various staff members interviewed in regard to Mr Veenstra's allegations.

These interview notes were used to formulate my investigation report.

Given my express undertaking to the various interviewees that confidence would be maintained I strongly object to the release of the subject documents to Mr Veenstra. In my view, departmental employees would be less likely to fully co-operate with grievance investigators if it was likely that express undertakings of confidentiality would be overridden (except where procedural fairness requirements demand it) and if confidential

matter could be made public and potentially be used by a party to an action in a court of law or in the Anti-Discrimination Tribunal.

20. The applicant's submissions did not address the elements of s.40(c) of the FOI Act. Essentially, the arguments of the applicant were that:
 7. his name and character had been slurred and slandered and it was only fair that he see his entire file in order to find out the extent of the slanderous comments;
 8. he should have the chance to respond to any allegations made against him; and
 9. the information might well directly affect his racial discrimination case.
21. Before proceeding to consider the elements of s.40(c), I should point out that folios 12-16 do not contain any slur on the name or character of the applicant. They do not contain any allegation of wrongdoing against the applicant. They are responses by staff members to the allegations made by the applicant. I also note that the applicant's racial discrimination case has now been finalised.

Substantial adverse effect

22. The uncontradicted evidence before me is that each of the persons interviewed was given an undertaking by Mr Peries that information provided to Mr Peries would be kept confidential. In many cases, particularly in cases involving proposed disciplinary action against a person, any understanding of confidentiality of information provided by staff would be conditional on its possible use for the purposes of further investigation, or the requirements of procedural fairness (for a discussion of conditional understandings of confidentiality see paragraphs 47-51 of *Re McCann*). In some cases it may well be unreasonable for a staff member who provides information to believe that any of the information he or she has provided could be kept confidential, if the functions of the agency are to be performed in an appropriate manner. Indeed, within the Queensland public service, s.15 and s.16 of the *Public Service Regulation 1997* Qld already place significant limitations on any potential understanding of confidentiality in respect of information provided about the performance of a fellow public servant (see paragraphs 51-54 of *Re Holt; Reeves and Education Queensland; Others* (Information Commissioner Qld, Decision No. 98004, 20 April 1998, unreported)). (In this case, the applicant cannot avail himself of s.16(2) of the *Public Service Regulation* as he is no longer a public service employee.)
23. However, where undertakings of confidentiality have been given and accepted in good faith, for the purpose of securing co-operation with an investigation, it is important that they be honoured so far as possible, though they may be overridden by the legal requirements of procedural fairness in certain circumstances. I am prepared to accept that any unwarranted breach of an undertaking of confidence given and accepted in good faith could reasonably be expected to have a substantial adverse effect on the management or assessment by the Department of its personnel, through the apparent breach of trust involved, and perhaps also by making it difficult to obtain full co-operation in similar investigations in the future.

In many cases where grievance investigators require the full co-operation of third party employees to fairly and effectively resolve and/or investigate complaints arising in the workplace, the efficacy of the grievance resolution and investigation process could be impaired, if information is disclosed in breach of undertakings of confidence given to the information-providers.

Public interest balancing test

24. Once a finding is made that disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by the Department of its personnel, the matter in issue is *prima facie* exempt, unless public interest considerations favouring disclosure are sufficient to outweigh public interest considerations favouring non-disclosure.
25. The applicant's arguments favouring disclosure of the documents in issue are summarised at paragraph 20 above. I have already indicated that the matter in folios 12-16 does not in any way represent a slurring or slandering of the applicant's name or character. Nor does it raise allegations against the applicant. The applicant has indicated that his racial discrimination case has been finalised.
26. I recognise that there is a public interest in disclosure of matter which will show how the Department deals with grievances of staff members. I also recognise that there may be a public interest in an applicant having access to information which affects or concerns the applicant to such a degree as to give rise to a justifiable "need to know" which is more compelling than for other members of the public (see *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp. 368-377, paragraphs 164-193). However, in this case, the applicant has already been given access to the Grievance Report of the investigator into his complaints. The investigator has included information in the Grievance Report which is also recorded in folios 12-16, where he considered that necessary for the purposes of making his report. (That information is the information identified at paragraph 9 which has already been disclosed to the applicant). The applicant has therefore been given access to a considerable amount of information concerning the investigation.
27. In those circumstances, I do not consider that there are public interest considerations favouring disclosure of folios 12-16 which are sufficiently strong to outweigh the public interest favouring non-disclosure which is inherent in the satisfaction of the test for *prima facie* exemption under s.40(c) of the FOI Act. I therefore find that folios 12-16 (apart from the matter in them which has already been disclosed to the applicant) comprise exempt matter under s.40(c) of the FOI Act.

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

28. 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.

29. In applying s.44(1) of the FOI Act, one must first consider whether disclosure of the matter in issue would disclose information that is properly to be characterised as information concerning the personal affairs of a person. If that requirement is satisfied, a *prima facie* public interest favouring non-disclosure is established, and the matter in issue will be exempt, unless there exist public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure, so as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.
30. In my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227 (a copy of which is enclosed for your consideration), I identified the various provisions of the FOI Act which employ the term "personal affairs" and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act. In particular, I said that information concerns the "personal affairs of a person" if it relates to 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:
 10. family and marital relationships;
 11. health or ill health;
 12. relationships with and emotional ties to other people; and
 13. domestic responsibilities or financial obligations.
31. Whether or not information concerns an individual's personal affairs is essentially a question of fact, to be determined according to the proper characterisation of the information in question.
32. The matter deleted from folio 1 refers specifically to an individual's recovery from ill health. It does not refer to the applicant in any way. Likewise, the matter deleted from folio 96 is the name of another person, who has been mentioned merely incidentally, but in such a context that the mention conveys information that the person was subjected to an assessment of fitness to return to work. I consider that this matter concerns the personal affairs of the persons named. It is therefore *prima facie* exempt from disclosure to the applicant. The matter does not mention the applicant, and I can see no public interest considerations of significant weight favouring disclosure of the matter to the applicant. I therefore find that the matter deleted from folios 1 and 96 is exempt matter under s.44(1) of the FOI Act.

DECISION

33. My decision is similar to Mr Grierson's internal review decision in that I have found the matter in issue to be exempt. However, as the basis for my decision is different from Mr Grierson's decision, I will vary the decision under review (being the decision made by Mr Grierson on behalf of the Department dated 1 October 1996) by finding that:
 14. folios 12-16 (except for the matter in those folios which is described in paragraph 9 above) comprise exempt matter under s.40(c) of the FOI Act; and
 15. the matter deleted from folios 1 and 96 is exempt matter under s.44(1) of the FOI Act.