

Queensland Police Service and Department of Education

(S 114/97, 30 January 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.-5. These paragraphs deleted.

REASONS FOR DECISION

Background

5. This external review commenced as a 'reverse FOI' application by the Queensland Police Service (the QPS) against the respondent's decision to disclose certain matter to the applicant for access, ---. During the course of my review, the QPS withdrew its objection to the disclosure to [the access applicant] of the matter in issue, but a third party has maintained an objection to disclosure of the matter in issue, and it is necessary for me to rule on that objection.
6. [The access applicant] lodged an FOI access application dated 9 May 1997 for documents held by the Department of Education (the Department) including (so far as relevant for the purposes of this external review):

All files held by the Education Department in relation to my son, ---.
7. The Department sought the views of the QPS in relation to the disclosure to [the access applicant] of a memorandum dated 1 October 1996 from Detective Sergeant Waugh to the District Officer, --- Police Station (the document in issue). The document described two incidents which occurred at the school attended by [the access applicant's son], involving [the son] and two teachers. The QPS claimed that the names of the two teachers were exempt matter, initially relying upon s.41(1) of the FOI Act.
8. In her initial decision made on behalf of the Department on 3 July 1997, Ms Lone Keast decided that the names of the teachers were not exempt matter under the FOI Act.
9. By letter dated 4 July 1997, the QPS applied for internal review of Ms Keast's decision, arguing that the teachers' names were exempt matter under s.41(1), and also under s.40(c), of the FOI Act.

10. In his internal review decision made on behalf of the Department on 31 July 1997, Mr Parsons decided that the names of the teachers were not exempt matter under s.41(1) or s.40(c) of the FOI Act.
11. By letter dated 5 August 1997, the QPS applied to me for review, under Part 5 of the FOI Act, of Mr Parsons' decision, again contending that the teachers' identities were exempt matter under s.41(1) and s.40(c) of the FOI Act.

External review process

12. During the course of the external review, [the access applicant] applied, in accordance with s.78 of the FOI Act, to be a participant in this external review, and that application was granted.
13. I obtained from the Department a copy of the document in issue, together with the record of consultations made by the Department in processing [the access applicant's] FOI access application. The latter revealed that one of the teachers whose identity was claimed by the QPS to be exempt matter did not object to disclosure of his name to [the access applicant]. This was conveyed to the QPS, which then withdrew its objection to the disclosure to [the access applicant] of the identifying references to that teacher which appear in the document in issue.
14. By letters dated 28 August 1997 and 2 October 1997, I respectively conveyed to the QPS, and to the teacher whose name remained in issue, my preliminary view that the identifying references to the latter which appear in the document in issue are not exempt matter under s.41(1) or s.40(c) of the FOI Act.
15. The QPS responded by lodging a written submission dated 30 September 1997 in support of claims for exemption under s.41(1) and s.40(c) of the FOI Act. A copy of that submission was forwarded to the teacher whose identity remained in issue, and I gave that teacher the opportunity to also lodge evidence and submissions in support of a case for exemption.
16. In October 1997, the Criminal Justice Commission (the CJC), as a result of consultations with the QPS undertaken in the course of processing an access application to the CJC made by [the access applicant], became aware of this external review and contacted my office. The CJC forwarded to my office a copy of a letter to [the access applicant] dated 18 December 1996, from the Chief Officer of the Complaints Section in the Official Misconduct Division of the CJC. The text of that letter provided [the access applicant] with information as to the outcome of the CJC's investigation into a complaint made by [the access applicant], which concerned the same issues as are dealt with in the document in issue, but (significantly for present purposes) the CJC's letter to [the access applicant] contained no deletion of the name of the teacher whose name remains in issue in the present review.

17. After obtaining the CJC's permission to do so, the Deputy Information Commissioner wrote to the QPS, and to the teacher whose name remains in issue, forwarding copies of the CJC's letter to [the access applicant] dated 18 December 1996, and inviting them to reconsider their claims for exemption. By letter dated 19 November 1997, the QPS withdrew its objection to disclosure of the matter in issue. However, the teacher whose name remains in issue has maintained an objection to disclosure of his identity to [the access applicant], although that teacher did not lodge evidence or submissions in support of the objection to disclosure.
18. I will briefly deal with those exemption provisions that have been referred to in correspondence between the participants in this review as arguably affording grounds for exemption of the matter in issue, i.e., s.41(1), s.40(c) and s.44(1) of the FOI Act. I am satisfied that there are no other exemption provisions in the FOI Act which could arguably apply to the matter in issue.

Application of s.41(1) of the FOI Act

19. Section 41(1) and s.41(2) of the FOI Act provide:

41.(1) Matter is exempt matter if its disclosure—

(a) would disclose—

(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or

(ii) a consultation or deliberation that has taken place;

in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and

(b) would, on balance, be contrary to the public interest.

(2) Matter is not exempt under subsection (1) if it merely consists of—

(a) matter that appears in an agency's policy document; or

(b) factual or statistical matter; or

(c) expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.

20. A detailed analysis of s.41 of the FOI Act can be found in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.66-72, where, at p.68 (paragraphs 21-22), I said:

21. Thus, for matter in a document to fall within s.41(1), there must be a positive answer to two questions:

- (a) would disclosure of the matter disclose any opinion, advice, or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, (in either case) in the course of, or for the purposes of, the deliberative processes involved in the functions of government? and*
- (b) would disclosure, on balance, be contrary to the public interest?*

22. The fact that a document falls within s.41(1)(a) (i.e., that it is a deliberative process document) carries no presumption that its disclosure would be contrary to the public interest. ...

21. An applicant for access is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; an applicant is entitled to access unless an agency (or third party) can establish that disclosure of the relevant deliberative process matter would be contrary to the public interest. In *Re Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (Information Commissioner Qld, Decision No. 96004, 4 April 1996, unreported), I said (at paragraph 34):

The correct approach to the application of s.41(1)(b) of the FOI Act was analysed at length in my reasons for decision in Re Eccleston, where I indicated (see p.110; paragraph 140) that an agency or Minister seeking to rely on s.41(1) needs to establish that specific and tangible harm to an identifiable public interest (or interests) would result from disclosure of the particular deliberative process matter in issue. It must further be established that the harm is of sufficient gravity when weighed against competing public interest considerations which favour disclosure of the matter in issue, that it would nevertheless be proper to find that disclosure of the matter in issue would, on balance, be contrary to the public interest.

22. Under s.41(2)(b) of the FOI Act, matter is not exempt under s.41(1) if it merely consists of factual or statistical matter: see *Re Eccleston* at p.71, paragraphs 31-32; and *Re Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123, at pp.144-147, paragraphs 49-58.
23. From my examination of the document in issue, it is plain that the name of the teacher whose identity remains in issue appears most frequently in passages

comprising merely factual matter, being passages which are excluded from eligibility for exemption under s.41(1), by s.41(2)(b) of the FOI Act. In my opinion, only part 9 of the document in issue consists of matter which falls within the terms of s.41(1)(a) of the FOI Act. The name of the teacher whose identity remains in issue is set out in part 9 of the document in issue, but I note that the QPS did not at any stage assert that the whole of part 9 was exempt matter under s.41(1) - only the name of the teacher whose identity is in issue. Even within part 9 of the document in issue, it is my view that a person's name, considered as a discrete segment of matter in issue, does not fall within the terms of s.41(1)(a) of the FOI Act.

24. In respect of the application of s.41(1)(b) of the FOI Act, I am not satisfied that disclosure of the matter in issue would, on balance, be contrary to the public interest. In circumstances where [the access applicant] has already obtained authorised access to a report by the CJC that names the teacher (whose name remains in issue) in the context of giving an official account of a CJC investigation (into the same matters that are dealt with in the document in issue, I can see no relevant harm that would be occasioned by disclosure of the matter in issue in this review. It is significant in this regard that both the CJC report and the QPS report make no findings of wrongdoing on the part of the teacher whose name remains in issue. I do not consider that the public interest in fair treatment of the teacher warrants non-disclosure of the matter in issue in circumstances where there are no findings adverse to the teacher, and the fact that complaints against the teacher were investigated is already well-known to [the access applicant] (who lodged the complaints) and is recorded in an official account of the CJC investigation which has already been supplied to [the access applicant].
25. I might add that I consider that there was nothing untoward in the CJC providing [the access applicant] with an account of its investigation into the complaints lodged by [the access applicant], and the outcome of that investigation. Indeed, I consider that there is a relevant public interest consideration telling in favour of disclosure in that regard (see *Re Godwin and Queensland Police Service* (Information Commissioner Qld, Decision No. 97011, 11 July 1997, unreported) at paragraphs 51-56).
26. I therefore find that the matter in issue is not exempt matter under s.41(1) of the FOI Act.

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

27. 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; or

...

unless its disclosure would, on balance, be in the public interest.

28. The correct approach to the application of s.40(c) of the FOI Act was explained in *Re Murphy and Queensland Treasury & Ors* (1995) 2 QAR 744 at p.778 (paragraphs 93-95) and p.781 ff. Section 40(c) focuses on substantial adverse effects on the management, by an agency, of that agency's own personnel. Before it withdrew its objection to disclosure of the matter in issue, the QPS argued quite forcefully that the identity of the teacher was exempt matter under s.40(c) of the FOI Act. I remain surprised that the QPS considered that it was in a better position than the Department to judge whether disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the management, by the Department, of the Department's own personnel. At no stage has the Department claimed that the matter in issue is exempt matter under s.40(c) of the FOI Act. The teacher whose identity remains in issue has been given the opportunity to lodge evidence and submissions in support of a case for exemption under s.40(c), but has not done so.
29. For essentially the same reasons given at paragraphs 24-25 above, I am not satisfied that disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the management by the Department of its personnel. [The access applicant] is the person who made the complaint to police against the teachers concerned, and [the access applicant] is therefore fully aware of the existence of the complaint and the names of the two teachers who are the subject of the complaint and investigation. I am unable to accept that disclosure of a report that exonerates the teachers could reasonably be expected to have a substantial adverse effect in the terms of s.40(c) of the FOI Act. I find that the matter in issue is not exempt matter under s.40(c) of the FOI Act.

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

30. 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.

31. The QPS expressly eschewed reliance on s.44(1) as a basis for exemption of the matter in issue, and the teacher whose identity remains in issue did not expressly place reliance on s.44(1) of the FOI Act. However, I will briefly explain, for the

benefit of the teacher, why s.44(1) cannot be relied upon to exempt the matter in issue.

32. 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.
33. In my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, 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 (see pp.256-267, paragraphs 79-114, of *Re Stewart*). In particular, I 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 essentially a question of fact, to be determined according to the proper characterisation of the information in question.

34. The document in issue comprises information concerning the conduct of a teacher which occurred during the course of the performance by the teacher of his duties of employment. At paragraph 51 of my reasons for decision in *Re Griffith and Queensland Police Service and Thorpe* (Information Commissioner Qld, Decision No. 97013, 15 August 1997, unreported), I held that conduct of a public sector employee which occurs in the course of performing his or her employment duties is properly to be characterised as part of the employee's employment affairs, rather than his or her personal affairs, even in respect of conduct alleged or proven to involve misconduct or a breach of discipline. I hasten to add that, far from finding that the teachers concerned were guilty of misconduct or a breach of discipline, the document in issue exonerates them. I am satisfied that the matter remaining in issue cannot be properly characterised as information which concerns the personal affairs of the teacher whose identity remains in issue, and the matter in issue does not therefore qualify for exemption under s.44(1) of the FOI Act.

DECISION

35. I affirm the decision of Mr Parsons dated 31 July 1997 that the matter in issue is not exempt matter under the FOI Act.