

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 02/2004

Applications 565/03; 601/03; 602/03

Participants:

565/03

LOWER BURDEKIN NEWSPAPER COMPANY PTY LTD

Applicant

BURDEKIN SHIRE COUNCIL

Respondent

NEIL HANSEN

BATISTA COVOLO

TERRY CROSS

Third Parties

601/03

GARY BOWTELL

Applicant

BURDEKIN SHIRE COUNCIL

Respondent

LOWER BURDEKIN NEWSPAPER COMPANY PTY LTD

Third Party

602/03

TREVOR WILLIAMS

Applicant

BURDEKIN SHIRE COUNCIL

Respondent

LOWER BURDEKIN NEWSPAPER COMPANY PTY LTD

Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – total cost of salary packages for senior managerial officers of respondent Council – information concerning the personal affairs of the relevant officers – whether disclosure would, on balance, be in the public interest – application of s.44(1) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.44(1)
Local Government Act 1993 Qld s.534(g)

Asher and Department of State and Regional Development, Re [2002] VCAT 609
(6 August 2002)
Forbes and Department of the Premier and Cabinet, Re (1993) 6 VAR 53
Milthorpe and Mt. Alexander Shire Council, Re (1997) 12 VAR 105
*National Tertiary Education Industry Union (Murdoch Branch) and Murdoch University
& Ors, Re* [2001] WAICmr 1 (2 January 2001)
Pearce and Queensland Rural Adjustment Authority, Re (1999) 5 QAR 242
Richardson and Queensland Police Service, Re (2001) 6 QAR 125
Ricketson and Royal Women's Hospital, Re (1989) 4 VAR 10
Stewart and Department of Transport, Re (1993) 1 QAR 227
Summers and Cairns District Health Services, Re (1997) 3 QAR 479
*The Director-General, Department of Families, Youth and Community Care and
Department of Education and Ors, Re* (1997) 3 QAR 459
Wanless Wastecorp Pty Ltd and Caboolture Shire Council, Re (2003) 6 QAR 242
Willsford and Brisbane City Council, Re (1996) 3 QAR 368

DECISION

I decide to vary the decisions under review (identified at paragraphs 6-7 of my accompanying reasons for decision), in so far as they concern the five documents remaining in issue in this review (identified at paragraph 16 of my accompanying reasons for decision), by finding that the five words in the third line of Note 1 on each of the documents in issue qualify for exemption under s.44(1) of the *Freedom of Information Act 1992* Qld, but otherwise the documents in issue do not qualify for exemption from disclosure under s.44(1) of the *Freedom of Information Act 1992* Qld.

Date of decision: 24 February 2004

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G J SORENSEN
DEPUTY INFORMATION COMMISSIONER

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BURDEKIN SHIRE COUNCIL
Respondent

LOWER BURDEKIN NEWSPAPER COMPANY PTY LTD
Third Party

REASONS FOR DECISION

Background

1. The Lower Burdekin Newspaper Company Pty Ltd (the applicant), seeks review of a decision by the Burdekin Shire Council (the Council) refusing it access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to information relating to the salary packages of senior Council employees. Two of those Council employees, Mr Gary Bowtell and Mr Trevor Williams, have pursued 'reverse FOI' applications, objecting to the Council's decision to disclose, under the FOI Act, certain information relating to their salary packages.

2. By an FOI access application dated 13 June 2003, the applicant sought access to documentation detailing:
 - *the total salaries paid to Council's senior executive officers in the 2001/2002 financial year;*
 - *what proportion of Council senior executive officers' salaries were in relation to the overall operating costs of their departments; and*
 - *the figures for each individual senior executive officer's salary package, including superannuation and benefits for the 2001/2002 financial year.*
3. By letter dated 12 August 2003, Mr D Mulcahy, the Council's FOI decision maker, informed the applicant of his decision to grant access, under the FOI Act, to the requested information. However, Mr Mulcahy also informed the applicant that release of the information must be deferred, in accordance with s.52 of the FOI Act, until the affected Council officers had either exhausted, or elected not to pursue, the rights available to them under the FOI Act to seek review of Mr Mulcahy's decision.
4. On 9 September 2003, four Council officers - Mr Terry Cross, Mr Neil Hansen, Mr Trevor Williams and Mr Gary Bowtell – lodged applications for internal review of Mr Mulcahy's decision.
5. By letter dated 17 September 2003, Mr G Webb, the Council's Chief Executive Officer, informed the applicant that he had decided to vary Mr Mulcahy's decision by granting the applicant access to details of the cash and superannuation components of the salary packages for the Chief Executive Officer, the Director of Administrative Services, the Director of Works, the Director of Development and the Director of Environment and Health, but not details of the non-cash components which were salary sacrificed in those packages. Mr Webb also decided that no information about the salary packages of the Manager of Financial Services, the Manager of Information Technology and Communications, and the Manager, Waste and Waste Water, should be disclosed. (The positions of Manager are below those of Director in the Council's organisational structure.) Mr Webb relied on s.44(1) of the FOI Act to refuse access to the relevant salary package information.
6. By letter received in this Office on 25 September 2003, the applicant applied for review by the Information Commissioner, under Part 5 of the FOI Act, of Mr Webb's decision to refuse access to information concerning the non-cash components of the salary packages of the Directors, and to refuse access to information about the salary packages of the Managers.
7. By letters received in this Office on 14 October 2003, Mr Bowtell, Director of Development, and Mr Williams, Director of Works, applied for review by the Information Commissioner, under Part 5 of the FOI Act, of Mr Webb's decision to grant the applicant access to details of the cash and superannuation components of their salary packages.

External review process

8. Copies of the documents in issue (which are identified at paragraph 16 below) were obtained and examined.
9. During the course of the review, the Council's Chief Executive Officer and two of the four Directors withdrew their objections to disclosure of information relating to their respective salary packages. That matter is no longer in issue in this review.
10. By a letter to the Council dated 10 December 2003 (which the Council was asked to copy and provide to each of the affected Council officers), I conveyed my preliminary view that nearly all of the information contained in the five documents remaining in issue did not qualify for exemption under s.44(1) of the FOI Act. In the event that the Council or any of the relevant Council officers wished to maintain an objection to disclosure, I asked that they lodge written submissions and/or evidence in support of their case for exemption.
11. In an e-mail dated 17 December 2003, Mr Covolo (Manager of Information Technology and Communications) indicated that he did not want his individual salary package information to be disclosed, and would agree only to disclosure of that information in an aggregate context. In a letter dated 16 December 2003, Mr Hansen (Manager, Waste and Wastewater) stated that, while he did not agree with my preliminary view, he did not intend to contest it. I will proceed on the basis that Mr Covolo and Mr Hansen continue to object to disclosure of their salary package information. The Manager of Financial Services, Mr Cross, advised that he contested my preliminary view, and lodged a written submission (dated 24 December 2003) arguing a case for exemption under s.44(1).
12. The 'reverse FOI' applicants, Mr Bowtell and Mr Williams, advised that they contested my preliminary view and provided me with written submissions, substantially similar in content, dated 23 and 24 December 2003, respectively.
13. Copies of the submissions received from Mr Cross, Mr Bowtell and Mr Williams were forwarded to the applicant, with an invitation to lodge a submission in reply, but no further submission was received from the applicant.
14. The issue for determination in each of the external reviews is whether any of the salary package information contained in the documents in issue qualifies for exemption under s.44(1) of the FOI Act.
15. In making my decision in this case, I have taken into account the following material:
 - the contents of the documents in issue;
 - the applicant's FOI access application, and application for external review;
 - the applications for internal review lodged by Mr Cross, Mr Hansen, Mr Williams and Mr Bowtell, all dated 9 September 2003;

- the Council's initial and internal review decisions, dated 12 August 2003 and 17 September 2003, respectively;
- the applications for external review lodged by the 'reverse FOI' applicants, Mr Williams and Mr Bowtell, dated 14 October 2003;
- the Council's letter to the Information Commissioner dated 24 November 2003;
- the submission of Mr Bowtell dated 23 December 2003;
- the submission of Mr Williams dated 24 December 2003; and
- the submission of Mr Cross dated 24 December 2003.

Documents in issue

16. The documents in issue consist of five pages (one for each of the five Council officers who have not withdrawn their objections to disclosure) which record:
- (a) the officer's position title;
 - (b) the total cost of the officer's "all inclusive salary package" in the 2001/2002 financial year (plus an explanatory footnote clarifying the components of the salary package);
 - (c) the total operating costs of the organisational unit for which that officer was responsible (taken from the 2001/2002 budget programme statements); and
 - (d) a percentage figure which represents item (b) as a percentage of item (c).

(I note that no figure is stated for items (c) and (d) in respect of the Manager of Information Technology and Communications.)

17. It appears that the documents in issue were created specifically in response to the applicant's FOI access application, in order to collate in a convenient format the information requested by the applicant. No doubt this had practical convenience for the Council as well as the applicant, enabling the Council to avoid having to process numerous source documents containing the requested information. Although an agency is not obliged by the terms of the FOI Act (apart from the circumstances provided for in s.30(1)(e)) to create a new document in order to provide information requested by an applicant, an agency can, with the concurrence of the applicant, choose to do so if there are advantages in doing so: see *Re Pearce and Queensland Rural Adjustment Authority* (1999) 5 QAR 242 at pp.247-249, paragraphs 4-10.

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

18. 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.

19. In *Re Stewart and Department of Transport* (1993) 1 QAR 227, at p.257 (paragraph 80), the Information Commissioner accepted that information about a person's income and personal financial position is information concerning that person's personal affairs. I accept that the figure representing the total cost to the Council of an officer's "all inclusive salary package", plus the information stated in an explanatory footnote, is information concerning that officer's personal affairs. (I will refer to that information as the item (b) information – see paragraph 16 above.)
20. The item (c) information (see paragraph 16 above) is merely information about the total operating costs of relevant organisational units of the Council. It does not concern the personal affairs of any individual and cannot qualify for exemption under s.44(1) of the FOI Act. However, the item (d) information, if disclosed together with the item (c) information, would enable the calculation of the value of an officer's "all inclusive salary package". Disclosure of the item (d) information would therefore disclose information concerning the personal affairs of the relevant Council officers.
21. It follows that the item (b) and item (d) information will qualify for exemption from disclosure under s.44(1) of the FOI Act, unless there are public interest considerations favouring its disclosure that have sufficient weight to warrant a finding that its disclosure would, on balance, be in the public interest.

Public interest balancing test – general observations

22. The public interest balancing test incorporated in s.44(1) is the same kind that appears in s.38, s.39(1), s.40, s.45(1)(c), s.46(1)(b), s.47 and s.49 of the FOI Act. In all of those provisions, satisfaction of the initial test for exemption means that there is a public interest consideration accepted by Parliament as weighing against disclosure of the relevant information. In the case of s.44(1), it is the public interest in protecting the privacy of information concerning the personal affairs of an identifiable individual.
23. A decision maker must allocate an appropriate weight to that public interest consideration telling against disclosure, having regard to the character and significance of the particular information in issue. Some kinds of information about an individual's personal affairs are deserving of greater weight than others, in terms of the relative importance of the privacy interest to be protected. For example, the Information Commissioner has observed that protection of the privacy of an individual's medical records is usually deserving of strong weight: see *Re Summers and Cairns District Health Services* (1997) 3 QAR 479 at p.484, paragraph 18. On the other hand, the privacy interest attaching to the identification of a person as a dog owner was held not to be a particularly strong one: see *Re Willsford and Brisbane City Council* (1996) 3 QAR 368 at p.374, paragraph 22.
24. Other factors may affect the weight to be accorded to the public interest consideration inherent in the satisfaction of the initial test for exemption under s.44(1). If the particular information in issue could be obtained with little difficulty from sources in the public domain, or has received publicity in the popular media (see *Re Richardson and Queensland Police Service* (2001) 6 QAR 125 at p.142, paragraph 40), and especially if the individual concerned has volunteered (or consented to) the public disclosure (see *Re The Director-General, Department of Families, Youth and Community Care and Department of Education and Ors* (1997) 3 QAR 459 at p.467, paragraph 22), that must logically reduce the weight that can sensibly be accorded to the protection of a privacy interest said to attach to the relevant information. This factor will frequently be relevant in the case of information about the salary package for jobs in public sector agencies, because that information is usually available from job advertisements placed in newspapers, government

gazettes or government websites, or is published in agency annual reports or financial statements. (I understand that the five objectors to disclosure in the present case have occupied their respective positions for extended periods, so that there has been no recent publication, through job advertisements, of the salary packages for their respective positions.)

25. When appropriate weight has been attributed to the public interest in protecting an individual's privacy in respect of the particular information in issue, any other public interest considerations telling for or against disclosure of that information must be identified and given appropriate weight. All of the identifiable public interests considerations telling in favour of disclosure must be weighed against all of the identifiable public interest considerations telling against disclosure, and a judgment made as to whether or not disclosure of the particular matter in issue would, on balance, be in the public interest.

Application of public interest balancing test to the matter in issue

26. In *Re Stewart*, at pp.257-258, the Information Commissioner observed:

It has been held, however, that there is a general public interest in seeing how the taxpayers' money is spent which is sufficient to justify the disclosure of the gross income payable from the public purse to the holder of a public office. This would not necessarily extend to income received by that person from other sources, nor to the net income received by that person, which is normally dependent on certain domestic relationships and/or income from other sources, nor even to the form in which the person elects to take non-salary components of a total income package - see [Re Ricketson and Royal Women's Hospital (1989) 4 VAR 10, and Re Forbes and Department of the Premier and Cabinet (1993) 6 VAR 53].

27. Information about the gross salary paid to an employee of a government agency has a dual character. It is both information about the income of an identifiable individual (and hence information concerning that individual's personal affairs) and information about the cost of having the duties of the relevant position performed for the benefit of the public. Governments fund their operations by imposts on the public of one kind or another. In a representative democracy, elected representatives are accountable to the electors for decisions made in respect of raising and spending public funds. The public has a strong, legitimate and abiding interest in having access to sufficient information to enable scrutiny of whether funds raised by government are expended efficiently and effectively in furtherance of the wider public interest. This extends to scrutiny of whether the public is obtaining value for money from performance of the duties of particular positions for which a government has decided to allocate funding. This public interest is even stronger in the case of senior officers who have responsibility for devising and/or implementing strategic and operational plans, and delivering key performance outcomes.
28. I consider that there is a strong public interest consideration favouring disclosure to any interested member of the public, of information as to the total cost in salary and related expenses of any job for which a government decides to allocate funding, and that it is even stronger in the case of senior management positions of the kind under consideration in the present case. The same public interest considerations would apply in favour of informing the public of the total costs of having services performed for the public by private sector service-providers (see *Re Wanless Wastecorp Pty Ltd and Caboolture Shire Council* (2003) 6 QAR 242 at p.283, paragraphs 145-148), or the total costs of a government agency retaining a private sector consultant to provide expert services not able to be performed by its own pool of employed staff.

Guidance from other jurisdictions

29. When considering similar issues under similar exemption provisions, other Australian tribunals have favoured the view that public interest considerations of the kind referred to in paragraphs 26-28 above outweigh the privacy interests of a public sector employee in respect of information as to the total amount of his/her salary package. In addition to the two Victorian cases cited in the passage from *Re Stewart* quoted at paragraph 26 above, Deputy President McNamara of the Victorian Civil and Administrative Tribunal has made findings to that effect in *Re Milthorpe and Mt. Alexander Shire Council* (1997) 12 VAR 105, and in *Re Asher and Department of State and Regional Development* [2002] VCAT 609 (6 August 2002). In the latter case, a Miss Appleby, Chief Executive of Tourism Victoria, argued that she had been assured that her remuneration package would be treated confidentially, and she regarded her remuneration as a personal and private matter which it was inappropriate to disclose. Deputy President McNamara observed (at paragraphs 18-19):

18. *The total remuneration paid to senior public officers has been, and continues to be, a matter of public concern and public debate. The Authorities referred to above [Re Ricketson, Re Forbes, Re Milthorpe] indicate that the fact that the taxpayers ultimately meet the remuneration gives them a legitimate interest in this matter, even although it is one that is clearly a matter relative to the personal affairs of the officers themselves. ...*

19. *... The applicant's apparent purpose, namely to use this remuneration package figure as part of the public debate as to remuneration levels and appointment policies of the senior executive levels of the Victorian Public Service, seems to be a proper and reasonable one for a State politician. Ms Appleby holds a significant office under the State government and as one of the Government's more highly paid officers the expenditure on her remuneration is a matter of some significance to the taxpayers. In my view, disclosure of her total remuneration package would not be unreasonable.*

Deputy President McNamara made the same finding in respect of the remuneration package of a Director of an organisational unit in the respondent Department.

30. In *Re National Tertiary Education Industry Union (Murdoch Branch) and Murdoch University; Ors* [2001] WAICmr 1 (2 January 2001), the Western Australian Information Commissioner had to decide whether disclosure of information relating to the salary amounts, bonuses and benefits payable under the remuneration packages of several senior officers (including Divisional heads) of Murdoch University would, on balance, be in the public interest. In finding that the balance of public interest favoured disclosure of the cost of the total salary package, and the nature of benefits or bonuses payable, the Commissioner observed (at paragraphs 67-68 and 70):

67. *... I recognise that there is a public interest in the accountability of the agency for the expenditure of public monies*

68. *I recognise that there is a public interest in the public receiving value for its money spent on public education, especially in the present climate of financial restrictions. I agree with the Tribunal in Re Ricketson and Re Forbes that the public is entitled to know how much of its money is*

received in salary and entitlements by senior public officers for performing functions on behalf of the public and that such information is the subject of legitimate public interest and discussion.

...

70. I agree with the views expressed by the Tribunal in those cases to which I have referred that, in general, the public interest is served by disclosing the totality of the remuneration and also that it is in the public interest for the public to know the components comprising that total, but not the amount of the individual benefits and bonuses which make up the salary package.

31. The trend of decision-making in other Australian tribunals reinforces my view that, absent exceptional circumstances, public interest considerations of the kind referred to at paragraphs 26-28 above will usually be determinative in favour of disclosure of information of the kind in issue in the present case.

Contentions of the objectors

32. Mr Bowtell, Mr Williams, and Mr Cross provided submissions in virtually identical terms. They seek to support the public interest in maintenance of the privacy of their salary information and to counter the public interest considerations favouring disclosure. In summary, their submissions raise the following points in favour of non-disclosure:

- (a) the public interest in protecting the privacy of the officers;
- (b) disclosure will result in adverse effects for the officers and their families (one officer commented that there had been remarks made to him within the community about his family's 'privileged' status) and will have a negative effect on the officers' relationship with the community, particularly in the context of a small rural community;
- (c) unlike employees of State Government Departments, officers in local government in small communities do not have relative anonymity;
- (d) disclosure will impact upon the officers' ability to perform effectively their functions;
- (e) disclosure will not enhance the accountability of the Council or its officers for the performance of their official functions and will not lead to more informed public debate on the matter because disclosure will not alter the contractual arrangements under which officers are remunerated.

33. I acknowledge the concerns of the Council officers and appreciate their interest in maintaining good relations with members of the community on both an official and personal level. However, I am not satisfied that any reasonable basis has been explained for an expectation that disclosure of the total salary packages of Council officers would have a negative effect on their relationship with the community, or adversely affect their ability to perform their functions. The submissions merely contain assertions to that effect without satisfactory explanation as to how or why that would be likely to occur. I accept that in smaller regional communities, the identities of local government officers are likely to be known to a larger proportion of the communities they serve. That might marginally increase the weight of their privacy interest in information of the kind in issue, but not, in my view, to an extent that outweighs the public interest considerations favouring disclosure that have been outlined above.

34. I cannot accept the contention summarised at point (e) in paragraph 32 above. Disclosure of the matter in issue clearly would enhance the accountability of the Council, and lead to more informed public debate, by providing accurate information as to the cost to ratepayers of the performance of the duties of the relevant positions. The fact that remuneration levels may not be able to be varied during the term of a current contract does not make the information any less of a legitimate subject for scrutiny and debate by interested members of the community.
35. I note also the comment made in submissions that the remuneration packages for senior positions in outlying rural communities reflect the difficulty in attracting appropriately qualified and experienced personnel. Mr Cross stated that a real comparison of position duties between local governments (which the applicant has indicated it proposes to undertake) cannot be made simply by comparing position titles. That is because, Mr Cross submitted, duties and functions of persons with the same title differ between Councils, and any particular remuneration package may not take into account enterprise bargaining outcomes or productivity increases. This is a fair point to make by way of contribution to any public debate or discussion over the level of remuneration of senior officers of the Council, but it does not amount to a public interest consideration telling against disclosure.
36. In his internal review decision, Mr Webb referred to various provisions of the *Local Government Act 1993* Qld relating to the definition of "senior executive officers", and to the fact that the Act makes provision for disclosure of allowances paid to elected officials, but contains no provision about disclosure of remuneration arrangements for senior executive officers. Mr Webb argued:

It is my assessment that if the legislators that drafted the Local Government Act 1993 considered it appropriate to publicly disclose the salary packages for Senior Executive Officers, this requirement would have been enshrined in the legislation, similarly to the disclosure requirements for elected members in respect of meeting attendances and annual allowances through publication in annual reports. There is no similar provision ... for disclosure of Senior Executive Officers' remuneration arrangements.

Mr Bowtell and Mr Williams made similar comments in their submissions, asserting that they are not holders of "public office" (a term which they seem to apply to persons elected to office). However, the fact remains that they are public servants whose income is paid from public funds.

37. Section 534(g) of the *Local Government Act 1993* Qld provides that local government annual reports must contain particulars of the total remuneration and total superannuation contributions paid or provided to each of its councillors during the year. There is no comparable provision regarding senior executive employees of local government. I do not think there is any particular significance in this. In my view, it is drawing a long bow to suggest that it indicates that Parliament has decided that the public interest does not require disclosure of the total cost of remuneration packages of senior executive officers in local government. In any event, one of the basic purposes of the FOI Act is to give interested citizens the opportunity to seek out information which governments *have not* made publicly available, and to test whether there are lawful grounds for withholding such information under the terms of the FOI Act.

38. I am not satisfied that the submissions of the Council officers have made out a case for the existence of any additional public interest consideration favouring non-disclosure, apart from protection of their privacy interests, which may have more weight than usual in the case of officers living in, and serving, a small rural community. However, in my view, it is still clearly outweighed by the public interest considerations favouring disclosure that have been outlined above.

Findings

39. I consider that the balance of public interest favours disclosure of the gross cost of the salary and benefits paid to the Council officers. The public interest does not require disclosure of whether or not a particular officer elected to take any of the non-cash benefits available under the Council's salary packaging arrangements; e.g., whether a particular officer elected to sacrifice salary for private use of a Council-leased vehicle. Therefore, the affected Council officers may, if they wish, insist on deletion of the third line of the footnote (Note 1) appearing on each of the documents in issue, disclosure of which would reveal whether the officer elected to salary sacrifice for a vehicle.
40. However, I find that disclosure of the remainder of the information in the documents in issue would, on balance, be in the public interest, and hence that it does not qualify for exemption under s.44(1) of the FOI Act.

Conclusion

41. For the foregoing reasons, I decide to vary the decisions under review (which are identified at paragraphs 6-7 above) by finding that, apart from the five words in the third line of Note 1 on each of the documents in issue, the documents in issue do not qualify for exemption from disclosure under s.44(1) of the FOI Act.
42. I have made this decision as a delegate of the Information Commissioner's powers, under s.90 of the FOI Act.

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G J SORENSEN
DEPUTY INFORMATION COMMISSIONER