



## **Decision and Reasons for Decision**

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**Application Number:** 210025

**Applicant:** Mr P Honeysett

**Respondent:** Redland Shire Council

**Third Party:** Mr L and Mrs M Simmonds

**Decision Date:** 20 December 2006

### **Contents**

Background .....	2
Steps taken in the external review process .....	3
Matter in issue .....	4
Findings .....	4
Decision .....	8

## Reasons for Decision

### Background

1. Mr Honeysett seeks review of the Redland Shire Council's (the **Council**) decision to allow Mr and Mrs Simmonds to inspect documents relating to the building of a retaining wall on Mr Honeysett's land. Mr Honeysett and Mr and Mrs Simmonds are neighbours, although the documents relate to a wall that is not located on a shared boundary.
2. On 6 October 2005, the Redland Shire Council (the **Council**) received from Mr and Mrs Simmonds a freedom of information (FOI) application for access to documents relating to Mr Honeysett's property in the following terms:
  - geotechnical reports in respect of the filled area;
  - building approval in respect of the retaining wall;
  - survey details in respect of the filled area and retaining wall; and
  - engineers certificate in respect of the retaining wall.
3. However, the scope of this application was reduced in November 2005 to a document consisting of three pages relating to the slope of the retaining wall and details of the ground levels prior to construction of the retaining wall (Saunders and Associates letter dated 21 April 1992). This became the matter in issue of a related external review (application number 2006/F0150).
4. On 15 September 2006 I made a decision in respect of the matter in issue in review 2006/F0150 affirming the Council's decision of 14 February 2006 that the matter in issue was not exempt under section 44(1) of the *Freedom of Information Act 1992* (the **FOI Act**) and that access be provided to Mr and Mrs Simmonds by way of inspection.
5. Mr and Mrs Simmonds lodged a further FOI application dated 3 April 2006 stating:

*We are extremely concerned that the retaining wall at [deleted] may collapse when a house is built taking our pool with it. We would like a copy of the council approval (1992) and all engineers inspections including the final as mentioned in the attached letter dated 13/10/05 [see paragraph 34].*
6. On 13 September 2006 the Council advised this Office that although the second FOI application dated 3 April 2006 was phrased differently to the first FOI application dated 6 October 2005, it essentially covered the documents sought in the first application.
7. By letter dated 4 April 2006, the Council sought Mr Honeysett's views on the release of documents responsive to the Simmonds' FOI application, pursuant to third party consultation under section 51 of the FOI Act.
8. On 18 April 2006, Mr Honeysett lodged a notice of objection to the release of the information on the basis that the matter in issue related to his personal affairs and was exempt under section 44(1) of the FOI Act. In summary, Mr Honeysett submitted that it is not in the public interest to release the information because:
  - the retaining wall is not a shared boundary with Mr and Mrs Simmonds' property;

- Mr and Mrs Simmonds have been residents of the adjoining property for many years and have never raised any concerns about the retaining wall; and
  - the retaining wall is removed from the relevant road and is on private property with no permission for public access.
9. By letters dated 12 May 2006, the Council notified Mr Honeysett and Mr and Mrs Simmonds of its decision to release by way of inspection seven documents responsive to Mr and Mrs Simmonds' application:
1. Saunders and Associates (6 pages dated 21/4/92)
  2. Building Section (1 page dated 27/4/92)
  3. Building section (1 page dated 22/5/92)
  4. Saunders and Associates (4 pages dated 13/7/92)
  5. Building Section (1 page undated)
  6. Building Section (1 page undated)
  7. Building Section (1 page undated)
10. The Council decided that the documents contained matter considered to be personal affairs, however in this instance, the public interest in obtaining access to the documents (by inspection only) to ascertain what has been approved by Council is stronger than the public interest in protecting the privacy of the owners of the property.
11. By facsimile dated 10 June 2006 Mr Honeysett applied for an internal review of the decision on the same grounds as those expressed in his facsimile dated 18 April 2006 (see paragraph 8). He further submitted that given correspondence to date between the Council and Mr Simmonds, "*Mr Simmonds' public interest in the matter has been sufficiently responded to*".
12. By letter dated 7 July 2006 Ms Anne Roseler, Internal Review Officer, affirmed the Council's decision of 12 May 2006 and confirmed that access should be restricted to inspection only.
13. On 4 August 2006 Mr Honeysett applied for external review of the decision of 7 July 2006.

### **Steps taken in the external review process**

14. The matter in issue was obtained and examined. In a letter dated 28 August 2006 Mr and Mrs Simmonds requested participation in the review process.
15. On 19 October 2006 a member of this Office telephoned Mr Honeysett to express the preliminary view that the documents in issue were *prima facie* exempt under section 44(1) of the FOI Act however the public interest in government accountability weighs in favour of releasing the documents. This oral preliminary view was confirmed to Mr Honeysett in a letter dated 27 October 2006.
16. By facsimile dated 10 November 2006 Mr Honeysett advised that he disagreed with the preliminary view. However, during a telephone conversation with a member of this Office on 14 November 2006, Mr Honeysett advised that he recognised the public interest in ensuring government accountability and agreed to allow the Simmonds to view part of document 1 and documents 3 and 4 in their entirety (see paragraph 9 above identifying the list of documents). However, Mr Honeysett refused to allow disclosure of documents 5, 6 and 7.

17. On 15 November 2006, the Council advised that it agreed with this Office's view that two pages in document 1 and the whole of document 2 do not fall within the scope of the Simmonds' FOI application and therefore do not fall within scope of this external review.
18. On 16 November 2006 Mr Honeysett agreed to release document 6 and again submitted that documents 5 and 7 are exempt from release under section 44(1) of the FOI Act.
19. By letter dated 7 December 2006 Mr Honeysett was provided with the opportunity to respond by 19 December 2006 to my preliminary view that:
  - document 5 (subject to the deletion of certain information) is **not** exempt from disclosure under section 44(1) of the FOI Act; and
  - document 7 **is** exempt from disclosure under section 44(1) of the FOI Act.
20. On 7 December 2006, the Council was advised of the above preliminary view and accepted the preliminary view. On 19 December 2006 Mr Honeysett advised this Office that he did not agree with the preliminary view but did not wish to provide any further submissions.

### **Matter in issue**

21. The effect of my decision on 15 September 2006 in external review 2006/F0150 was that the Simmonds would have the opportunity to inspect three pages in document 1 sought under this review (see paragraph 9 above for list of documents). The three pages therefore do not form part of this review. Of the pages remaining in document 1, Mr Honeysett agreed to release one page and the remaining pages are out of scope. Document 1 is therefore no longer in issue in this review.
22. Document 2 is out of scope and Mr Honeysett agreed to allow the Simmonds to inspect documents 3, 4 and 6.
23. The matter remaining in issue in this review consists of documents 5 and 7.

### **Findings**

#### ***Section 44(1) of the FOI Act***

24. Section 44(1) provides that:

#### **44 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.*

#### ***Application of section 44(1) of the FOI Act***

25. In applying section 44(1) of the FOI Act, the first question to ask is whether disclosure of the matter in issue would disclose information concerning the personal affairs of a person other than the applicant for access. If that is the case a public interest consideration favouring non-disclosure is established, and the matter in issue will be

exempt, unless there are public interest considerations favouring disclosure which outweigh all public interest considerations favouring non-disclosure.

26. In *Re Stewart and Department of Transport* (1993) 1 QAR 227 (***Re Stewart***), the former 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 (see pp.256-267, paragraphs 79-114, of *Re Stewart*). 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; and
  - domestic responsibilities or financial obligations.
27. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is a question of fact, to be determined according to the proper characterisation of the information in question.
28. The Council advises that document 7 is what it calls the 'building envelope' or 'envelope'. It contains details relating to the approval of the retaining wall and in practice is used as the physical cover for approval documents. The Council advises that document 5 is a photo copy of the envelope reduced to A4 size which was used by Council officers responsible for assessment of the development application to record notes about the assessment. The Council advises that document 5 was inside document 7 and both documents form part of the approval of the retaining wall.
29. On the information available to me, it is my preliminary view that the matter in issue:
- falls within the category of domestic affairs, which is central to the concept of 'personal affairs' (see *Re Alpert and Brisbane City Council* (1995) 2 QAR 618 – ***Re Alpert***); and
  - is *prima facie* exempt from disclosure under section 44(1) of the FOI Act, subject to public interest considerations.
30. Because of the way that section 44(1) of the FOI Act is structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always tip the scales against disclosure of that information (to an extent that will vary from case to case according to the relative weight of the privacy interests attaching to the particular information in issue in the particular circumstances of any given case), and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue. It is therefore necessary to examine whether there are public interest considerations favouring disclosure, and if so, whether they outweigh all public interest considerations favouring non-disclosure.

**Public interest consideration – accountability of the Council**

31. Facilitating the accountability of government (including local government) is a public interest consideration recognised by section 4 of the FOI Act. The question in this case is whether disclosure of the matter in issue would allow interested members of the public a better understanding of action taken by Council and enable them to better scrutinise and assess the Council's performance. I must determine whether disclosure of the matter in issue would materially enhance this public interest consideration to an extent that warrants it being accorded significant weight in favour of disclosure.
32. In *Re Alpert* at paragraph 33, the Information Commissioner recognised that there is a public interest in enhancing public scrutiny of the Council to ensure the accountability of local government. Of relevance to this case, he found there was a public interest in ensuring that the Council has acted properly in granting building approvals and in the inspection for building work carried out pursuant to those approvals (although it wasn't made out on the facts in *Re Alpert*).
33. During the previous external review (2006/F0150), the parties made submissions that are applicable to the matter in issue in this review.
34. The Council advised the Simmonds in a letter of 13 October 2005 that: the subject wall has been approved by Council; inspections were carried out by a qualified engineer throughout the process; and it was determined that the wall was constructed in accordance with its drawings.
35. By email dated 9 June 2006, Mr Honeysett submitted that "*Mr Simmonds enquiries [of the Council to determine whether the proper approvals were carried out and obtained] have already achieved their end by having council review its documentation and internal processes and confirm the appropriateness of the construction.*"
36. However, the Simmonds submitted on 5 July 2006 that:
- the Council has not disclosed to what standard the initial approval of the retaining wall was given;
  - there was no evidence of a final inspection; and
  - the Council has not produced the survey results showing the actual natural ground level (NGL) and he is concerned that the fill-in is being treated as the NGL which:
- "is contrary to the Council's own regulation and to the relevant building standards. It must also be in the public interest to know what levels are being utilised as NGL....it is appropriate that I be given access to sufficient information to be able to obtain independent verification from an appropriate expert that the Council's approval of the retaining wall and assessment of NGL have been properly obtained."*
37. I note the Council's advice that the information it provided to Mr and Mrs Simmonds in October 2005 did not:
- include specific details relating to the approval such as the height of the wall, the depth of the concrete in-fill, back-fill density and boulder density; and
  - provide details regarding the structural analysis for the consulting engineers.

38. The Council has also confirmed that:
- the retaining wall was inspected by the design engineer on three separate occasions; and
  - correspondence with Mr and Mrs Simmonds in October 2005 only satisfied a small element of the public interest consideration favouring disclosure to neighbouring landowners to ensure that Council acted properly in granting the relevant building approval and inspecting the relevant work.
39. On 16 November 2006, Mr Honeysett advised this Office that the information which he agreed to release is sufficient to satisfy this public interest consideration. Specifically, he pointed to parts of document 4 as containing all the relevant information contained in documents 5 and 7.
40. Upon my inspection of document 5, I have identified two notes written by Council officers raising questions about structural and drainage issues and expressing concerns about the engineer's examination of the site.
41. By letter dated 7 December 2006, I expressed my preliminary view to Mr Honeysett that on the information available to me:
- the information set out in document 5 is integral to the approval process for the retaining wall as it includes information about the Council's conduct during the approval process and is relevant to determining whether the Council appropriately discharged its responsibilities;
  - the information in the Council file note is not available in any other document that Mr Honeysett has agreed to release by way of inspection to the Simmonds;
  - the majority of document 5 would afford the Simmonds a better understanding of action taken by Council and would materially enhance the public interest in government accountability.
42. However, I also advised my preliminary view that:
- some of the information in document 5 would not materially enhance the public interest in government accountability because the information would not enable the Simmonds to better scrutinise the Council's performance in carrying out its duties;
  - the release of document 7 to the Simmonds would not increase the Simmonds' understanding of action taken by Council because the relevant information it contains is contained in document 5; and
  - release to the Simmonds of document 7 would not materially enhance this public interest consideration.
43. Mr Honeysett advised that he did not agree with my preliminary view, however he chose not to make any further submissions in support of his case. The Council accepts this preliminary view.

### **Conclusion**

44. On the evidence available to me, I am satisfied that:
- the matter in issue is properly characterised as Mr Honeysett's personal affairs; and

- there is a *prima facie* public interest in the non-disclosure of information concerning Mr Honesett's domestic affairs in respect of the retaining wall located on his property.
45. I have also carefully considered the public interest considerations favouring disclosure of the matter in issue and weighed these considerations against Mr Honeysett's privacy interests.
46. In relation to document 5, on the evidence available to me, I am satisfied that the strong public interest considerations favouring disclosure of the majority of the information are sufficient to outweigh Mr Honeysett's privacy interests, on the grounds that disclosure of the majority of the information:
- may afford Mr and Mrs Simmonds a better understanding of action taken by Council; and
  - enable Mr and Mrs Simmonds to better scrutinise and assess the Council's performance in relation to the construction and assessment of the retaining wall.
47. However, I am satisfied that document 7 and parts of document 5 would not materially enhance the public interest in government accountability and do not therefore outweigh the public interest considerations favouring non-disclosure of document 7 and parts of document 5.
48. On the basis of the information available to me and the matters set out above, I am satisfied that the majority of document 5 **is not** exempt from disclosure under section 44(1) of the FOI Act, however document 7 **is** exempt from disclosure under section 44(1) of the FOI Act. I note that the Council's original decision dated 12 May 2006 on the Simmonds' FOI application was to release the documents by way of inspection only.

## Decision

49. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.
50. I vary the decision under review (being the decision dated 7 July 2006 by Ms Anne Roseler) by finding that:
- document 5 (subject to the deletion of certain information) is not exempt from disclosure under section 44(1) of the FOI Act; and
  - document 7 is exempt from disclosure under section 44(1) of the FOI Act;

and that access to the parts of the documents that are not exempt is to be provided by way of inspection.

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**F Henry**  
**Assistant Information Commissioner**

**Date: 20 December 2006**