



Decision and Reasons for Decision

Application Number: 210677

Applicant: Mr B Stanford

Respondent: Crime and Misconduct Commission

Decision Date: 22 May 2009

Catchwords: **FREEDOM OF INFORMATION – section 50(c)(i) of the *Freedom of Information Act 1992* – whether disclosure would infringe the privileges of Parliament**

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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 exempt from disclosure under section 50(c)(i) of the *Freedom of Information Act* 1992 (**FOI Act**).

Background

2. By email dated 1 October 2008 (**FOI Application**) the applicant applied to the Crime and Misconduct Commission (**CMC**) as follows:

This is a request under the Freedom of Information Act for documents pertaining to Brendan Stanford from the Crime and Misconduct Commission. These documents include all correspondence from the CMC to the Queensland Police Service. All documents from the QPS to the CMC. Documents sent to the Parliamentary Crime and Misconduct Commission from the CMC with regard to a complaint made by Brendan Stanford. [other documents concerning the applicant]

3. By letter dated 8 October 2008 (**Original Decision**), Mr Russell Kenzler, FOI Coordinator CMC, issued a notice to the applicant advising the applicant that:
 - he had dealt with the FOI Application as a request for documents created since the applicant's similar freedom of information application in December 2007
 - he was unable to locate any documents concerning the applicant sent by the CMC to the Parliamentary Crime and Misconduct Committee (**PCMC**)
 - he had decided to give the applicant access to 39 documents (comprising 108 pages).
4. By email dated 14 October 2008, the applicant requested internal review of the Original Decision that no documents concerning the applicant, sent by the CMC to the PCMC, could be located. The applicant provided further information relating to the existence of documents sent from the CMC to the PCMC.
5. On receipt of the applicant's email, the CMC undertook a further search for documents and identified an additional three documents (comprising five pages) to which the CMC refused to grant access under section 50(c)(i) of the FOI Act. The CMC treated the applicant's request as a general enquiry and issued an amended notice to the applicant on 17 October 2008 (**Amended Original Decision**).
6. By email dated 30 October 2008, the applicant requested internal review of the Amended Original Decision to refuse access to documents under section 50(c)(i) of the FOI Act (**Internal Review Application**).
7. By email dated 10 December 2008, the applicant applied to the Office of the Information Commissioner (**Office**) for external review of 'documents deemed to be exempt under parliamentary privilege by the crime and misconduct commission' (**External Review Application**).

Decision under review

8. Under section 52(6) of the FOI Act, if on internal review, an agency does not decide an application and notify the applicant of the decision within 28 days after receiving the

application, the agency's principal officer is taken to have made a decision at the end of the period affirming the original decision.

9. As no decision was notified to the applicant within 28 days of the CMC receiving the Internal Review Application, the decision under review is the decision of CMC's principal officer affirming the Amended Original Decision.

Steps taken in the external review process

10. Preliminary inquiries were made with the CMC.
11. By letters dated 16 December 2008, Acting Assistant Commissioner Jefferies notified the parties that the application for external review had been accepted. Acting Assistant Commissioner Jefferies also invited the applicant to provide submissions regarding the release of documents to him.
12. Not having received submissions from the applicant, by letter dated 21 January 2009, Acting Assistant Commissioner Jefferies:
 - provided the applicant with a preliminary view that the matter in issue in this review was exempt from disclosure under section 50(c)(i) of the FOI Act
 - invited the applicant to make submissions in respect of the preliminary view.
13. By letter to the Office dated 4 February 2009 (received 12 February 2009), the applicant:
 - requested an extension of time in which to make submissions in response to the preliminary view
 - indicated that the first point of his submissions would be the third party consultation process which had not been undertaken when the FOI Application was considered by the CMC.
14. By letter dated 12 February 2009, Acting Assistant Commissioner Jefferies:
 - granted the applicant an extension of time in which to provide further submissions
 - responded to the applicant's submissions relating to the third party consultation process, indicating that the obligation to take steps to obtain views from relevant third parties under section 51 of the FOI Act¹ did not arise in this case because the CMC did not propose to disclose the documents.
15. By letter dated 10 March 2009, Acting Assistant Commissioner Jefferies provided the applicant with a further extension of time in which to provide submissions.
16. By letters dated 3 March 2009 (received 12 March 2009), 16 March 2009 (received 23 March 2009) and 1 April 2009 (received 14 April 2009) the applicant provided information which the applicant considered was relevant to the conduct of his external reviews with the Office.

¹ Section 51(1) of the FOI Act provides:

An agency or Minister may give access to a document that contains matter the disclosure of which may reasonably be expected to be of substantial concern to a government, agency or person only if the agency or Minister has taken such steps as are reasonably practicable to obtain the views of the government, agency or person concerned about whether or not the matter is exempt matter.

17. During telephone conversations with the CMC on 30 March 2009 and 31 March 2009, staff members of the Office clarified matters relating to the scope of the FOI Application and the documents comprising the matter in issue.
18. In reaching a decision in this external review, I have taken into account the following:
- the FOI Application and Original Decision
 - the applicant's email to the CMC of 14 October 2008
 - the Amended Original Decision
 - the Internal Review Application
 - the External Review Application
 - the applicant's letters to the Office dated 4 February 2009, 3 March 2009, 16 March 2009 and 1 April 2009
 - the character of the matter in issue
 - the provisions of the following Acts referred to in this decision, the:
 - FOI Act
 - *Constitution of Queensland Act 2001*
 - *Parliament of Queensland Act 2001*
 - *Acts Interpretation Act 1954*
 - *Crime and Misconduct Act 2001*
 - case law and previous decisions of the Office as referred to in this decision.

Scope of FOI Application

19. In the FOI Application, the applicant applied for, amongst other things:

... Documents sent to the Parliamentary Crime and Misconduct Commission from the CMC with regard to a complaint made by Brendan Stanford ...

20. In response to Mr Kenzler's Original Decision indicating that he was unable to locate any documents concerning the applicant sent by the CMC to the PCMC, the applicant wrote on 14 October 2008 saying:

... This is a request for internal review for documents concerning Brendan Stanford that were sent to the Parliamentary Crime and Misconduct Committee. It is stated that there are no documents 'concerning' myself at the cmc which were sent to the PCMC. To clarify a complaint was sent to the PCMC regarding [a staff member's] dealings with me on 4 July 2006 and I received a response from the PCMC, Minister Nolan, I do believe. Hence it is my understanding that the PCMC requested documents regarding this and although with the use of semantics these may not be documents 'concerning' me directly, but rather [the staff member] some of those documents would have surely mentioned me. This is a request for those documents.

21. In the Amended Original Decision, the CMC identified three documents which in the CMC's view responded to the applicant's request for documents as stated in his email of 14 October 2008. The CMC appears to have interpreted the applicant's request for documents broadly, to relate to correspondence between the CMC and the PCMC in relation to his complaint, and not restricted to correspondence from the CMC to the PCMC. In the Amended Original Decision, the CMC claimed all three documents were exempt from disclosure under section 50(c)(i) of the FOI Act.

22. The External Review Application requests an external review of:

... documents deemed to be exempt under parliamentary privilege ...

23. I am of the view that the CMC and the applicant have impliedly agreed to expand the scope of the FOI Application to relate to correspondence *between* the CMC and the PCMC relating to the complaint, not merely the correspondence *from* the CMC to the PCMC. This is the basis on which the matter in issue in this review has been determined.

Matter in Issue

24. The matter in issue in this review therefore comprises three documents (five pages), consisting of:
- a letter from the PCMC to the CMC dated 15 February 2007 attaching correspondence from the applicant (2 pages)
 - a letter from the PCMC to the CMC dated 20 April 2007 (1 page)
- (collectively the **Category A Matter**)
- a letter from the CMC to the PCMC dated 15 March 2007 (2 pages) (**Category B Matter**).

Relevant law

25. Under section 21 of the FOI Act, a person has 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.
26. The CMC claims the matter in issue is exempt from disclosure under section 50(c)(i) of the FOI Act.

Section 50(c)(i) of the FOI Act

27. Section 50(c)(i) of the FOI Act provides:

50 Matter disclosure of which would be contempt of Parliament or contempt of court

Matter is exempt matter if its public disclosure would, apart from this Act and any immunity of the Crown—

...

(c) *infringe the privileges of—*

(i) *Parliament; or*

...

28. The word 'Parliament' is not defined in the FOI Act but is defined under section 36 of the *Acts Interpretation Act 1954* as follows:

Parliament means –

- (a) *for Queensland – the Sovereign and the Legislative Assembly; or*
- (b) *for another State – the State's legislature.*

29. Section 50(c)(i) of the FOI Act therefore requires me to consider whether the public disclosure of the matter in issue would infringe the privileges of the Legislative Assembly (and the Sovereign).

Parliamentary privilege

30. The author of '*Parliamentary Privilege*' writes:²

The term 'parliamentary privilege' is commonly used to refer to the special rights and powers possessed by individual houses of a parliament and the various protections accorded by law to members of a parliament and other participants in parliamentary proceedings. These protections include an immunity from legal liability for things said or done in the course of parliamentary proceedings. The special powers possessed by houses of a parliament include a power to require the attendance of persons to give evidence or produce documents, and to delegate that power to a committee of members of the house. Other special powers of a house may include a power to suspend, or even expel, a member of the house and a power to impose penalties on persons whom the house adjudges to have engaged in conduct in contempt of the house or in breach of parliamentary privileges.

The special rights, powers and immunities collectively known as parliamentary privileges serve one essential purpose, that being to enable houses of parliament and their members to carry out their functions effectively.

31. The immunity of parliamentary proceedings from external examination is a fundamental pillar of Westminster-style parliaments. An important reason for the privilege is that '*...a member of Parliament should be able to speak in Parliament with impunity and without any fear of the consequences.*'³
32. In Queensland, statutory provisions have been enacted in respect of parliamentary privilege. In particular, section 9 of the *Constitution of Queensland Act 2001* provides that:

9 Powers, rights and immunities of Legislative Assembly

- (1) *The powers, rights and immunities of the Legislative Assembly and its members and committees are –*
- (a) *the powers, rights and immunities defined under an Act; and*
 - (b) *until defined under an Act – the powers, rights and immunities, by custom, statute or otherwise, of the Common House of Parliament of the United Kingdom and its members and committees at the establishment of the Commonwealth.*
- (2) *In this section –*
- rights*** *includes privileges*

33. Further, the *Parliament of Queensland Act 2001* provides for, amongst other things, the powers, rights and immunities of the Legislative Assembly. Again, in the *Parliament of Queensland Act 2001*, 'rights' is defined to include privileges.

² Campbell, Enid (2003) '*Parliamentary Privilege*' The Federation Press, page 1.

³ *Sankey v Whitlam* (1978) 142 CLR 1 at 35 (Gibbs CJ) in the context of a discussion relating to Article 9 of the *Bill of Rights 1688* which declared '*That the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.*'

34. Specifically, section 8 of the *Parliament of Queensland Act 2001* provides:

8 Assembly proceedings can not be impeached or questioned

- (1) *The freedom of speech and debates or proceedings in the Assembly can not be impeached or questioned in any court or place out of the Assembly.*
- (2) *To remove doubt, it is declared that subsection (1) is intended to have the same effect as article 9 of the Bill of Rights (1688) had in relation to the Assembly immediately before the commencement of the subsection.*

35. Section 9 of the *Parliament of Queensland Act 2001* relevantly provides:

9 Meaning of proceedings in the Assembly

- (1) **Proceedings in the Assembly** include all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee.
- (2) Without limiting subsection (1), **proceedings in the Assembly** include—
 - (a) giving evidence before the Assembly, a committee or an inquiry; and
 - (b) evidence given before the Assembly, a committee or an inquiry; and
 - (c) presenting or submitting a document to the Assembly, a committee or an inquiry; and
 - (d) a document tabled in, or presented or submitted to, the Assembly, a committee or an inquiry; and
 - (e) preparing a document for the purposes of, or incidental to, transacting business mentioned in paragraph (a) or (c); and
 - (f) preparing, making or publishing a document (including a report) under the authority of the Assembly or a committee; and
 - (g) a document (including a report) prepared, made or published under the authority of the Assembly or a committee.
- (3) Despite subsection (2)(d), section 8 does not apply to a document mentioned in subsection (2)(d) -
 - (a) in relation to a purpose for which it was brought into existence other than for the purpose of being tabled in, or presented or submitted to, the Assembly or a committee or an inquiry; and
 - (b) if the document has been authorised by the Assembly or the committee to be published....
- (4) If the way in which a document is dealt with has the effect that –
 - (a) under an Act; or
 - (b) under the rules, orders, directions or practices of the Assembly;

the document is treated, or accepted, as having been tabled in the Assembly for any purpose, then, for the purposes of this Act, the document is taken to be tabled in the Assembly.

- (5) *For this section, it does not matter what the nature of the business transacted by a committee is or whether the business is transacted under this Act or otherwise.*

36. The Schedule to the *Parliament of Queensland Act 2001* provides:

Assembly means the Legislative Assembly
committee means a committee of the Assembly, whether or not a statutory committee

Judicial consideration

37. In *Rowley v O'Chee*,⁴ the Queensland Court of Appeal considered a comparable provision in section 16 of the *Parliamentary Privileges Act 1987* (Cth), along with Article 9 of the *Bill of Rights 1688*, the modern formulation of which was stated to provide:

*that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.*⁵

38. McPherson JA considered the meaning of the word 'impeach' used in Article 9 of the *Bill of Rights 1689* and suggested that:

- the best and surest mode of construing an instrument is to read it in the sense which would have been applied when it was drawn up⁶
- the phrase 'ought not to be impeached' was a reference to not being impeded, hindered or prevented, not being detrimentally or prejudicially affected, or impaired.⁷

39. Accordingly, McPherson JA suggested that reading article 9 of the *Bill of Rights 1689* with section 16(2) of the *Parliamentary Privileges Act 1987* (Cth) lead to the following:

*... preparation of a document for purposes of or incidental to the transacting of the business of a House is not to be impeded, hindered or prevented (first meaning); or is not to be detrimentally or prejudicially affected, or impaired (second meaning).*⁸

40. The nature of the privilege conferred by section 8 and 9 of the *Parliament of Queensland Act 2001* was considered in *Erglis v Buckley (No. 2)*⁹ in which the Queensland Court of Appeal considered the status of a letter supplied to a Minister which was subsequently read and tabled in Parliament. McPherson JA, with whom the other justices agreed, cited the trial judge with approval noting that:

*for the privilege to be attached to a document, a member, or his or her agent, must in some way appropriate the document to proceedings in Parliament by doing some act with respect to the document for purposes of, or incidental to, transacting parliamentary business*¹⁰

⁴ [2000] 1 Qd R 207.

⁵ See page 218 per McPherson JA, citing Davies JA in *Laurance v Katter* [2000] 1 Qd R 147 at 202.

⁶ Citing Brennan J in *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 322 – 323.

⁷ At pages 222 – 223, cited with approval in *Erglis v Buckley* [2004] 2 Qd R 599.

⁸ At pages 222 – 223.

⁹ [2006] 2 Qd R 407.

¹⁰ At paragraph 30. See also paragraphs 99 – 100 of the judgment of Jerrard JA.

and went on to say that the acts of composing, typing, printing and sending the letter to the Minister were brought into the assembly's proceedings when the Minister undertook to read the proposed letter in the assembly.¹¹

41. Considering documents which were letters sent by, or documents received from, other persons or sources and subsequently retained by Senator O'Chee, McPherson JA, in *Rowley v O'Chee* said:

Generally, it seems to me that if documents like these came into the possession of Senator O'Chee and he retained them with a view to using them, or the information they contain, for the purpose of Senate questions or debate on a particular topic, then it can fairly be said that his procuring, obtaining or retaining possession of them were 'acts done ... for purposes of or incidental to the transacting of the business' of that House. Although 'acts done' is not specially apt to describe what happens when a possibly unsolicited document arrives through the mail or by other forms of communication, a member who becomes aware that the document has arrived and elects to keep it for purposes of transacting business of a House, may properly be said to have done an 'act' or 'acts' for purposes of, or incidental to, the transacting of that business.¹²

Public disclosure

42. Matter is exempt under section 50(c)(i) of the FOI Act if its *public disclosure* would infringe the privileges of Parliament.
43. It was observed in *Sharples and Queensland Police Service*¹³ that:

The test for exemption under s.50 is worded in different terms to other exemption provisions. Most exemption provisions use the words "Matter is exempt if its disclosure ...". However, s.50 uses the words "if its public disclosure ...". This imports a different test. In particular, the test imposed by the words "public disclosure" in s.50 appears to negate the possibility of taking into account the effect of a limited waiver of privilege for the benefit of a particular individual, where that individual is the applicant for access to a document under the FOI Act ... It appears that only an intentional general waiver of parliamentary privilege (most commonly, through tabling, or other authorised publication, of a document) may be taken into account in the application of s.50 of the FOI Act ...

44. Accordingly, even in cases where there has been a limited disclosure to an individual of matter over which section 50(c)(i) of the FOI Act is claimed, it is still open to conclude that the *public disclosure* of that matter would infringe the privileges of Parliament.
45. Section 50(c)(i) of the FOI Act does not require me to determine whether public disclosure of the matter in issue would itself impeach or question proceedings in the Assembly. Rather, I am required to determine whether public disclosure of the matter in issue would *infringe* the privileges of Parliament, which include the privilege set out in section 8(1) of the *Parliament of Queensland Act 2001*, being that proceedings in the Assembly cannot be impeached or questioned.
46. In *Ainsworth; Ainsworth Nominees Pty Ltd and Criminal Justice Commission; A (Third Party); B (Third Party)*¹⁴ the Information Commissioner said that:

An unauthorised disclosure of 'proceedings in Parliament' will constitute an infringement of the privileges of Parliament, and hence, if the matter in issue can properly be

¹¹ See paragraphs 31 – 32.

¹² [2000] 1 Qd R 207, 221.

¹³ (Unreported, Queensland Information Commissioner, 7 December 2001) at paragraph 20.

¹⁴ (1999) 5 QAR 284 at paragraph 59.

characterised as a 'proceeding in Parliament', it will be exempt matter under s50(c)(i) of the FOI Act, unless its public disclosure has been authorised by Parliament or by the PCJC.

47. Therefore, if a document falls within the meaning of the term 'proceedings in the Assembly' set out in section 9 of the *Parliament of Queensland Act 2001*, then section 8 of the *Parliament of Queensland Act 2001* applies to that document and to release that document, other than in accordance with parliamentary processes,¹⁵ would infringe the privileges of parliament.

Submissions of participants

CMC's submissions

48. The CMC provided the applicant with reasons for decision when it issued the Amended Original Decision. In those reasons, the CMC indicates that:
- the purpose of section 50(c)(i) of the FOI Act is to exempt from disclosure documents relating to Parliament's power to regulate its own proceedings
 - this power is regarded as a necessary incident to Parliament's functions
 - the PCMC is a standing committee of the Legislative Assembly and is therefore entitled to all the privileges enjoyed by the Assembly
 - an unauthorised disclosure of 'proceedings in the Assembly' will constitute an infringement of the privileges of the Assembly
 - each of the documents has been either presented to the PCMC or made under the authority of the PCMC and is a proceeding in the Assembly for the purposes of sections 8 and 9 of the *Parliament of Queensland Act 2001*
 - each of the documents fall within the terms of Standing Order 209(2)¹⁶ so that their unauthorised disclosure would be a breach of the Standing Order and infringe the privileges of Parliament
 - neither the PCMC nor the Parliament has authorised the disclosure of the Category A Matter or the Category B Matter.

Applicant's submissions

49. In his correspondence of 3 March 2009, 16 March 2009 and 1 April 2009, the applicant provided information relating to the following:
- complaints he made about the conduct of a CMC staff member
 - other freedom of information access and amendment applications he has made.
50. The applicant did not provide any submissions relating to the application of section 50(c)(i) of the FOI Act to the matter in issue.

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

51. I have considered the participants' submissions and the application of the law to the matter in issue in this review, and I make a number of observations.

¹⁵ For instance, Part 5 of the *Parliament of Queensland Act 2001* provides for the publication of parliamentary records in accordance with that Part.

¹⁶ Standing Order 209(2) provides '*The evidence taken by a committee or sub-committee and documents presented to it, and proceedings and reports of it, which have not been reported to the House, shall not, unless authorised by the House or the committee, be disclosed or published to any person other than a member or officer of the committee.*'

The PCMC

52. The Schedule to the *Parliament of Queensland Act 2001* provides that a committee means a committee of the Assembly, whether or not a statutory committee.
53. The PCMC is not a statutory committee under the *Parliament of Queensland Act 2001*.¹⁷ However, section 291 of the *Crime and Misconduct Act 2001*¹⁸ provides:

291 Establishment of parliamentary committee

A committee of the Legislative Assembly called the Parliamentary Crime and Misconduct Committee is established.

54. I am therefore satisfied that:
- the PCMC is a committee of the Legislative Assembly (that is, Parliament) which is established under the *Crime and Misconduct Act 2001*
 - sections 8 and 9 of the *Parliament of Queensland Act 2001* apply to the PCMC.

Category A Matter

55. Section 9(2)(g) of the *Parliament of Queensland Act 2001* provides that 'proceedings in the Assembly' includes:

(g) *a document (including a report) prepared, made or published under the authority of the Assembly or a committee.*

'Proceedings in the Assembly' also includes all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee.¹⁹

56. A 'document' includes any paper or other material on which there is writing.²⁰

57. I am satisfied that:
- the Category A Matter consisting of correspondence from the PCMC to the CMC are documents prepared or made under the authority of the PCMC and are therefore proceedings in the Assembly
 - the copy of correspondence written by the applicant was appropriated to proceedings in the Assembly by attaching it to the letter of 15 February 2007 for purposes of, or incidental to, transacting business of the PCMC
 - there has been no authorised disclosure of the Category A Matter.

Category B Matter

58. Section 9(2)(c) of the *Parliament of Queensland Act 2001* provides that 'proceedings in the Assembly' includes:

(c) *presenting or submitting a document to the Assembly, a committee or an inquiry;*

¹⁷ The Statutory committees are established under section 80 of the *Parliament of Queensland Act 2001*.

¹⁸ See Chapter 6, Part 3.

¹⁹ Section 9(1) of the *Parliament of Queensland Act 2001*.

²⁰ Definition of **document**, s36 *Acts Interpretation Act 1954*.

59. I am satisfied that:

- the Category B Matter consists of a document which was presented or submitted to the PCMC
- there has been no authorised disclosure of the Category B Matter.

Conclusion – application of the law to the matter in issue

60. I am satisfied that:

- both the Category A Matter and Category B Matter fall within the meaning of ‘proceedings in the Assembly’ under section 9 of the *Parliament of Queensland Act 2001*
- the Category A Matter and Category B Matter cannot be impeached or questioned in any court or place out of the Assembly under section 8(1) of the *Parliament of Queensland Act 2001*
- there has been no authorised disclosure of the Category A Matter or the Category B Matter
- the unauthorised public disclosure of the Category A Matter and/or the Category B Matter other than in accordance with parliamentary processes, would infringe the privileges of parliament
- the Category A Matter and Category B Matter is exempt from disclosure under section 50(c)(i) of the FOI Act.

DECISION

61. I find that the matter in issue in this review is exempt from disclosure under section 50(c)(i) of the *Freedom of Information Act 1992*.

62. The decision under review is affirmed.

Julie Kinross
Acting Information Commissioner

Date: 22 May 2009