Smith and Queensland Corrective Services Commission

(S 200/93, 5 September 1997, Information Commissioner Albietz)

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

1. - 4. [These paragraphs removed.]

REASONS FOR DECISION

Background

5. By letter dated 22 July 1993, Mr Smith sought access, under the FOI Act to the "*file held in both my name and* [another person's] *name at Beenleigh and Head Office*" of the Queensland Corrective Services Commission (the QCSC). The application was signed by Mr Smith and also contains the signature of [the other person]. It is logically to be read as an application by Mr Smith for access to his files at the QCSC's Beenleigh Office and Head (Central) Office, and a request by [the other person] for access to her files at each of those QCSC offices. The QCSC has processed the application on that basis.

6. I consider that the QCSC was correct in doing so. Mr Smith has asserted at various stages in the course of pursuing his statutory rights of review that the FOI access application was a joint one by himself and [another person]. That assertion, however, has no substance in law. The QCSC did not hold files, responsive to the relevant FOI access application, in the name of both Mr Smith and [the other person]. The QCSC holds separate files concerning its supervision of probation orders in respect of Mr Smith, and [the other person], as separate individuals. It cannot correctly be argued, in any relevant legal sense, that those files concern the joint affairs of Mr and [the other person], such that a joint application for access by Mr and [the other person] was appropriate. The separate files pertaining to Mr Smith and [the other person] respectively concern the affairs of Mr Smith, and [the other person], as separate individuals. The QCSC's approach was correct, and I have continued it by treating Mr Smith's application for external review (which was not signed by [the other person]) as an application for review of the QCSC's decision to refuse Mr Smith access to some matter contained on the relevant QCSC files in the name of Mr Smith.

7. By letter to Mr Smith dated 21 September 1993, Ms Patricia Cabaniuk, the FOI Co-Ordinator of the QCSC, identified the following material as falling within the terms of Mr Smith's FOI access application:

    1. Central Office File in applicant's name - 141 pages
    2. Beenleigh Area Office File entitled "Offender Related Matters (General)" - 201 pages.

8. Ms Cabaniuk decided to grant access to both files with the following exceptions:

   3. Central Office File - partial access only was given to pages 5 and 120-122;
   4. Beenleigh Area Office File - partial access only was given to pages, 53-55, 69, 85, 92, 193-195; and access was wholly refused to pages 42, 59-60. A number of other pages (1-9, 31-39, 61-62, 72-78, 80-81, 107-108, 112-115, 133-148) were found to relate entirely to other persons and not to Mr Smith's FOI access. Access to those pages was also denied.

9. On 29 September 1993, Mr Smith applied for internal review of Ms Cabaniuk's decision, in accordance with s.52 of the FOI Act. The application for internal review was also signed by [the other person], and in it Mr Smith said: "The application dated 22 July 1993 was a joint request for a copy in full of all documents held at Beenleigh Head Office and Cleveland in the names of [the other person] and [B] Smith." However, for the reasons explained at paragraph 6 above, this assertion was, in my view, clearly mistaken.

10. By letter dated 25 October 1993, Mr GW Taylor, Internal Review Officer, informed Mr Smith that he had decided to affirm Ms Cabaniuk's initial decision.

11. By letter dated 5 November 1993, Mr Smith applied to me for external review, under Part 5 of the FOI Act, of Mr Taylor's decision. The application for external review was signed only by Mr Smith.

External review process

12. Copies of the documents in issue were obtained and examined.

13. By letter dated 22 March 1994, I wrote to Mr Smith and invited him to provide me with a written submission setting out all facts and arguments upon which he wished to rely to contend that the matter claimed to be exempt by the QCSC was not exempt matter under the FOI Act. I also raised the point that a number of pages of the Beenleigh Area Office File were considered by the QCSC to be irrelevant to Mr Smith's FOI request, and that examination of those same documents indicated that they related to other persons supervised by the QCSC's Beenleigh Office (i.e., other than Mr Smith and [the other person]). I asked Mr Smith to confirm that he did not wish to pursue access to those documents, given that there was no mention of either Mr Smith or [the other person] contained in them.

14. By letter dated 14 April 1994, Mr Smith confirmed that he no longer wished to pursue access to those documents on the Beenleigh Area Office File that had been identified as being irrelevant to himself and [the other person]. In my view, those documents did not fall within the terms of the relevant FOI access application in any event. Those documents are therefore not in issue in this review. Apart from the confirmation referred to, Mr Smith did not attempt to provide any comprehensive submission in support of a case that the remainder of the matter in issue was not exempt matter under the FOI Act. After examining the matter in issue in light of the reasons for decision given by Ms Cabaniuk and Mr Taylor, I did not consider it necessary to obtain further evidence or submissions from the QCSC.

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

15. 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.*

16. Section 44(1) is relied upon by the QCSC in respect of the majority of the information in issue, being pages 5 and 120 of the Central Office File and pages 42, 53, 55, 59-60, 69, 85, 92 and 193 of the Beenleigh Area Office File. The basis of the claim for exemption was that the information in issue concerns the personal affairs of persons other than Mr Smith.

17. 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.

18. 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 the relevant variations of that phrase) 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 relates to the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:

5. family and marital relationships;
6. health or ill-health;
7. relationships with and emotional ties with other people; and
8. domestic responsibilities or financial obligations.

19. 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.

20. In *Re Stewart*, I explained that the central concept of the phrase "information concerning the personal affairs of a person" is that of information concerning the private aspects of a person's life. I also endorsed (at p.257, paragraph 80, of *Re Stewart*) the finding by Jones J (President) of the Victorian Administrative Appeals Tribunal in *Re Lapidos and Office of Corrections (No. 2)* (Victorian AAT, Jones J, 19 February 1990, unreported) to the effect that information concerning what happens to a prisoner while in prison is information

concerning the prisoner's personal affairs. In *Re Bennett and QCSC* (Information Commissioner Qld, Decision No. 95029, unreported), I found that information concerning discretionary parole conditions imposed on a former prisoner was information concerning the personal affairs of the former prisoner. The matter in issue in the present case comprises information concerning supervision of the probation of a person other than Mr Smith. I find that it must properly be characterised as information concerning the personal affairs of a person other than Mr Smith. There is also some information on page 5 of the Central Office File, and on page 92 of the Beenleigh Area Office File, that concerns the medical health of a person other than Mr Smith. That information clearly falls within the core meaning of "personal affairs" described in paragraph 18 above. I am satisfied that all of the matter claimed by the QCSC to be exempt under s.44(1) is properly to be characterised as information concerning the personal affairs of a person other than Mr Smith, and hence that it is *prima facie* exempt from disclosure to Mr Smith under s.44(1) of the FOI Act.

21. In my letter to him dated 22 March 1994, Mr Smith was invited to provide me with submissions addressing the issue of the application of s.44(1), and other provisions of the FOI Act, to the information in issue. However, the only material received from Mr Smith in that regard was his letter dated 14 April 1994, referred to in paragraph 14 above, in which he stated that he no longer wished to pursue access to those pages of the Beenleigh Area Office File that had been identified as falling outside the terms of his FOI access application.

22. On the material available to me in both this matter and in Mr Smith's related matter (application for review no. S 24/93) in which my reasons for decision dated 8 August 1997 have already been given, I am not satisfied that it would be proper to rely upon [the other person's] signature to the original application for access, and to the application for internal review, as a consent to disclosure to Mr Smith of any information which concerns her personal affairs.

23. I have already indicated in paragraph 6 above that I consider that the QCSC was correct in treating the FOI access application dated 22 July 1993, which was signed by both Mr and [the other person], as separate applications whereby Mr Smith and [the other person] each sought access to information held by the QCSC which concerned them, as separate individuals. I should add that it is clear from my examination of the matter claimed to be exempt from disclosure to Mr Smith under s.44(1), that it concerns the personal affairs of [the other person], and cannot in any relevant sense be said to concern the joint affairs, or joint personal affairs, of Mr Smith and [the other person].

24. Even if it were proper to rely on [the other person's] signature on the FOI access application, and the application for internal review, as a consent to disclosure to Mr Smith of information concerning [the other person's] personal affairs, the consequences for the application of the FOI Act to the matter in issue would be two. Firstly, such a consent would be relevant to the exercise of the discretion which an agency possesses, by virtue of s.28(1) of the FOI Act (see *Re Norman and Mulgrave Shire Council* (1994) 1 QAR 574 at p.577, paragraph 13), to disclose information to a particular access applicant notwithstanding that it is technically exempt matter under the FOI Act. (My views as to how agencies should ordinarily exercise that discretion, when dealing with personal affairs information, are indicated in parentheses in paragraph 176 at p.344 of *Re "B" and Brisbane North Regional Authority* (1994) 1 QAR 279.) However, in a

review under Part 5 of the FOI Act, the discretion which agencies possess by virtue of s.28(1) of the FOI Act is denied to the Information Commissioner by the terms of s.88(2) of the FOI Act which provides:

> ...
>
> *(2) If it is established that a document is an exempt document the* [Information Commissioner] *does not have power to direct that access to the document is to be granted.*

25. My decision-making function, therefore, is confined to determining whether the matter to which the applicant has been refused access is, or is not, exempt matter under relevant provisions of the FOI Act.

26. The second consequence of a person freely giving consent to the disclosure, to an applicant for access under the FOI Act, of information concerning the first person's personal affairs, is to significantly reduce the weight to be accorded to the public interest in protecting the privacy of the first person in respect of the relevant information, at least in so far as disclosure to the particular applicant for access is concerned. In such a case, that would mean that the public interest in protecting an individual's privacy (which is inherent in the satisfaction of the test for *prima facie* exemption under s.44(1) of the FOI Act) would carry little weight on the side of the scales favouring non-disclosure of the relevant information, against which are to be balanced any public interest considerations favouring disclosure of the relevant information.

27. However, because of the way in which s.44(1) of the FOI Act is worded and 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 weight of the privacy interest attaching to particular information 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. Thus, consent by a person to disclosure of information concerning that person's personal affairs is not sufficient in itself to support a finding that the information is not exempt matter under s.44(1). There must, in addition, be at least one identifiable public interest consideration telling in favour of disclosure of the information in issue, which is sufficiently strong to warrant a finding that disclosure of the information in issue would, on balance, be in the public interest.

28. In the present case, I cannot discern (and the applicant has not referred me to) any public interest considerations which favour disclosure to the applicant of the matter in issue which is identified in paragraph 16 above, being information which concerns the personal affairs of persons other than the applicant. Having examined it, I do not consider that its disclosure would further, in any substantial way, the public interest in accountability of the QCSC for its management of the community corrections system.

29. I therefore find that there are no public interest considerations favouring disclosure of the matter in issue identified in paragraph 16 above which are sufficient to outweigh the public interest

favouring non-disclosure which is inherent in the satisfaction of the test for *prima facie* exemption under s.44(1). Hence I find that the matter in issue identified in paragraph 16 above is exempt matter under s.44(1) of the FOI Act.

30. In relation to information contained on pages 5 of the Central Office File and page 92 of the Beenleigh Area Office File, the QCSC also claimed an exemption under s.42(1)(b) of the FOI Act. At page 5 of the initial decision, Ms Cabaniuk stated that part of that information was provided by another government agency and was considered to be a confidential source of information. I have some reservations as to the application of s.42(1)(b) in that regard, but I need not explore the issue since I am satisfied that the same matter is exempt under s.44(1) of the FOI Act.

Application of s.46(1)(a) of the FOI Act

31. Section 46(1)(a) of the FOI Act provides:

> ***46.(1)*** *Matter is exempt if—*
>
> *(a) its disclosure would found an action for breach of confidence... .*

32. The QCSC has claimed that certain matter on page 122 of the Central Office file, and pages 55 and 195 of the Beenleigh Area Office File is exempt under s.46(1)(a) of the FOI Act. In each instance, the matter is identical. In both the initial and internal review decisions made on behalf of the QCSC, the matter was described as information communicated in confidence by [the other person].

33. In *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(a) of the FOI Act. The test for exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency or Minister faced with an application, under s.25 of the FOI Act, for access to the information in issue (see *Re "B"* at pp.296-297, paragraph 44). I am satisfied that, in the circumstances of this application, there is an identifiable plaintiff ([the other person]) who would have standing to bring an action for breach of confidence.

34. There is no suggestion in the present case of a contractual obligation of confidence arising in the circumstances of the communication of the information in issue from [the other person] to the QCSC. Therefore, the test for exemption under s.46(1)(a) must be evaluated in terms of the requirements for an action in equity for breach of confidence, there being five criteria which must be established:

(a) it must be possible to specifically identify the information in issue, in order to establish that it is secret, rather than generally available information (see *Re "B"* at pp.303-304, paragraphs 60-63);

(b) the information in issue must possess "the necessary quality of confidence"; i.e. the information must not be trivial or useless information, and it must possess a degree of secrecy sufficient for it to be the subject of an obligation of conscience, arising from the circumstances in or through which the information was communicated or obtained (see *Re "B"* at pp.304-311, paragraphs 64-75);

1. the information in issue must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see *Re "B"* at pp.311-322, paragraphs 76-102);

(d) it must be established that disclosure to the applicant for access under the FOI Act would constitute a misuse, or unauthorised use, of the confidential information in issue (see *Re "B"* at pp.322-324, paragraphs 103-106); and

(e) it must be established that detriment is likely to be occasioned to the original confider of the confidential information in issue if that information were to be disclosed (see *Re "B"* at pp.325-330, paragraphs 107-118).

I will consider in turn each of the five elements set out above.

Specific identification of the confidential information for which protection is sought

35. The information which is claimed to be confidential can be identified with specificity. It consists of a record of information provided to the QCSC by [the other person], which has been recorded on page 122 of the Central Office file, and pages 55 and 195 of the Beenleigh Area Office File (and which was deleted from the copies of those pages to which Mr Smith was given access under the FOI Act).

The "necessary quality of confidence"

36. I have examined the matter in issue and I find that it possesses the "necessary quality of confidence". I am satisfied that the information is not trivial, that it is not known to Mr Smith, and that it has the requisite degree of secrecy/inaccessibility to satisfy this criterion.

Receipt of the information in such circumstances as to import an obligation of confidence

37. At p.318 (paragraph 89) of *Re "B"*, I said:

> 89. *The Federal Court in* Smith Kline & French *accepted that equity may impose an obligation of confidence upon a defendant having regard not only to what the defendant actually knew, but to what the defendant ought to have known in all the relevant circumstances. In cases decided under s.45(1) of the Commonwealth FOI Act (prior to its 1991 amendment) the Federal Court had*

> *consistently held that the determination of whether information was provided in circumstances importing an obligation of confidence is essentially a question of fact, which depends upon an analysis of all the relevant circumstances, and it is not necessary for there to have been an express undertaking not to disclose information; such an obligation can be inferred from the circumstances: see* Department of Health v Jephcott *(1985) 9 ALD 35; 62 ALR 421 at 425;* Wiseman v Commonwealth of Australia *(Unreported decision, Sheppard, Beaumont and Pincus JJ, No. G167 of 1989, 24 October 1989);* Joint Coal Board v Cameron *(1989) 19 ALD 329, at p.339.*

38. I am satisfied that the nature and sensitivity of the information communicated by [the other person], and the circumstances relating to its communication, are such as to fix the QCSC with an equitable obligation of conscience not to use the information in a way that was not authorised by [the other person].

Actual or threatened misuse of the confidential information

39. I am satisfied that disclosure of the matter in issue would constitute an unauthorised use of the information. It is clear that [the other person] intended and expected that the information in issue would be used by the QCSC only in the management and supervision of her probation, and that it would not be conveyed to any other person.

Detriment to the confider of the confidential information

40. With regard to the fifth criterion, I am satisfied that disclosure of the matter in issue would cause detriment to [the other person] of one or more of the types described at pp.326-327, paragraph 111, of my decision in *Re "B"*. There, I stated that it was not necessary to establish that a threatened disclosure of confidential information would cause detriment in a financial sense, but that detriment could also include embarrassment, a loss of privacy, fear, or an indirect detriment, for example, that disclosure of the information may injure some relation or friend.

41. In the circumstances of the present case, no occasion arises to consider the application of any of the defences to an action in equity for breach of confidence, that are discussed in *Re "B"* at pp.330-335, paragraphs 119-134. I am satisfied that disclosure of the matter in issue identified in paragraph 35 above would found an action for breach of confidence owed to [the other person], and I therefore find that it is exempt under s.46(1)(a) of the FOI Act.

Application of s.41(1) and 46(1)(b) of the FOI Act

42. Section 41(1) provides:

> ***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.

Section 46(1)(b) and s.46(2) provide:

***46.(1)** Matter is exempt if—*

…

(b) it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.

***(2)** Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless its disclosure would found an action for breach of confidence owed to a person or body other than -*

(a) a person in the capacity of—

(i) a Minister; or

(ii) a member of the staff of, or a consultant to, a Minister; or

(iii) an officer of an agency; or

(b) the State or an agency.

43. The QCSC has claimed that certain matter on page 121 of the Central Office File, and pages 54 and 194 of the Beenleigh Area Office File, is exempt under both s.41(1) and s.46(1)(b) of the FOI Act. In each instance, the matter is identical. In both the initial and internal review decisions made on behalf of the QCSC, the matter was described as the case note author's subjective opinion and advice communicated in confidence.

44. The matter now under consideration comprises an opinion and advice about the supervision of Mr Smith recorded in a case note made by a QCSC officer. I consider that the matter falls within the terms of s.41(1)(a) of the FOI Act. It comprises opinion/advice recorded for the purposes of the deliberative processes involved in the functions of government, namely deliberative processes pertaining to the management and supervision of a person subject to a

probation order (see *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp. 70-71, paragraphs 27-30).

45. At paragraph 140 (p.110) of my decision in *Re Eccleston* and at paragraph 34 of my decision 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 indicated that the correct approach to the application of the public interest balancing test contained within s.41(1) of the FOI Act was that an agency or Minister seeking to rely on s.41(1) of the FOI Act 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 that, when weighed against competing public interest considerations which favour disclosure of the matter in issue, it would nevertheless be proper to find that disclosure of the matter in issue would, on balance, be contrary to the public interest.

46. In the initial decision, Ms Cabaniuk stated:

> *If inadequate reports and case notes are furnished because Community Correctional Officers are loathe to report fully and state their frank opinions and recommendations because those reports or case notes could be obtained by the offender, the administration of the probation system, and thereby the law, would be prejudiced. It is important for Community Corrections to have as much information as possible about an offender and therefore a need to guarantee officers that subjective opinion and recommendation provided will remain confidential. If it is known that such comments were made available to offenders, then the quality of these reports would be affected and this, in turn, would impinge on the operation of the probation system.*
>
> ...
>
> *It is in the public interest to assist the offender as far as possible. It is also in the public interest that the probation system operates effectively. To do so, it requires a full and frank flow of information from officers so that decisions are in the public interest.*

47. I am satisfied of the existence of public interest considerations which tell against disclosure to Mr Smith of the matter identified in paragraph 43 above. I consider that case officers need to be able to record candid assessments of persons subject to community corrections orders, for the benefit and guidance of other QCSC officers involved in, or in making decisions with respect to, the management and supervision of persons subject to community corrections orders. Where disclosure of such candid assessments to the subject of assessment would be likely to prejudice or compromise a case officer's ability to effectively manage and supervise the subject of the assessment, there would exist a sufficient basis (subject to the relative weight of any competing public interest considerations which favour disclosure) to support a finding that disclosure of such an assessment would be contrary to the public interest, in terms of s.41(1)(b) of the FOI Act. I find that to be the case with respect to the matter identified in paragraph 43 above.

48. On the other hand, there are a number of public interest considerations which tend to favour disclosure.

49. There is a public interest in enhancing the accountability of the QCSC by enabling members of the public to scrutinise the methods used in, and the effectiveness of, the QCSC's management and supervision of persons subject to probation orders. I also consider that there is a public interest in a particular offender (such as Mr Smith in this case) being able to ascertain the procedures under which he or she is managed and supervised while on probation, and to ensure that any information that might be recorded about him or her in case notes *et cetera* between officers managing his or her probation is accurate, particularly where it might affect the terms of his or her probation.

50. Mr Smith has already been given considerable information as to the nature and progress of his probation and his term of probation has been served.

51. In respect of the particular matter in issue identified in paragraph 43 above, I consider that the public interest considerations which favour non-disclosure clearly outweigh those which tend to favour disclosure, and I am satisfied that disclosure would, on balance, be contrary to the public interest. I therefore find that the matter in issue identified in paragraph 43 above is exempt matter.

52. In light of the above conclusion, it is not strictly necessary for me to consider the application of s.46(1)(b) of the FOI Act. I note, however, that since the matter in issue identified in paragraph 43 above is matter of a kind mentioned in s.41(1)(a) of the FOI Act, and is information supplied by a person in the capacity of an officer of the QCSC, it is excluded from exemption under s.46(1) of the FOI Act by the terms of s.46(2) of the FOI Act: see *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at p.292, paragraphs 35-36.

Decision

53. For the foregoing reasons, I affirm the decision under review.