

Henderson and Department of Education

(S 121/96, 22 July 1997, Information Commissioner)

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

1.-5. These paragraphs deleted.

REASONS FOR DECISION

Background

6. This is a 'reverse FOI' application by Mrs Henderson, who objects to the decision of the respondent to give [the original access applicant] access under the FOI Act to documents relating to aspects of Mrs Hendersons' employment with the Department of Education (the Department). The documents in issue are all sourced from the applicant's personnel file and were generated in the course of the Department carrying out its routine administrative functions.
7. By application dated 22 March 1996, [the access applicant] applied to the Department for access, under the FOI Act, to *"all documents including computer records etc re: Mrs Henderson (wife of)"*. On 25 March 1996, Ms L Keast of the Department clarified with [the access applicant] that he was seeking access to material which included the applicant's personnel file.
8. By letter to the applicant dated 30 April 1996, Ms Keast initiated consultation with the applicant, pursuant to s.51 of the FOI Act, as to whether the applicant objected to disclosure under the FOI Act of documents from the applicant's personnel file.
9. By letter dated 2 May 1996, the applicant lodged an initial objection to disclosure. By letter dated 16 May 1996, the applicant's solicitors, Messrs A W Bale and Son, claimed that s.43(1) and s.50(a) of the FOI Act "apply to the subject documents, which form part of the disclosable evidence *inter partes* in the above cause [L D Henderson (Plaintiff) - Writ 808 of 1994]".
10. That submission did not reach Ms Keast before she made a decision (notified to the applicant and [the access applicant] by letters dated 20 May 1996) to give [the access applicant] full access to 146 folios, partial access to 100 folios, and to refuse access to 33 folios. All of the matter to which [the access applicant] was refused access was found by Ms Keast to be exempt matter under s.44(1) of the FOI Act. [The access applicant] has not sought review of Ms Keast's decision, so none of the matter found by Ms Keast to be exempt under s.44(1) of the FOI Act is in issue in this review.

11. By letter dated 17 June 1996, the applicant applied to the Department for internal review of Ms Keast's decision. In his internal review decision, communicated to the applicant by letter dated 1 July 1996, Mr Patrick Parsons, Manager, Administrative Law and Legislative Operations, addressed the application of s.43(1) and s.50(a) of the FOI Act (which had been raised in the letter dated 16 May 1996 from the applicant's solicitors), but he found that those provisions were inapplicable, and he affirmed Ms Keast's decision. By application dated 29 July 1996, Mrs Henderson applied to me for external review, under Part 5 of the FOI Act, of Mr Parsons' decision.

The external review process

12. The documents in issue were obtained from the Department and examined. The documents concern the applicant's employment with the Department, and are sourced from the applicant's personnel file.
13. By letter dated 19 August 1996, I invited [the access applicant] to apply, in accordance with s.78 of the FOI Act, to become a participant in this external review, as he was a person whose interests might be affected by this review. By letter dated 12 September 1996, [the access applicant] applied to be a participant in the review. I informed [the access applicant], by letter dated 24 September 1996, that I had decided to grant his application, under s.78(3) of the FOI Act, to be a participant in this review.
14. By letter dated 20 March 1997, Mr Sammon, Assistant Information Commissioner, asked the applicant to confirm that the only grounds she relied upon for objecting to the disclosure of the documents in issue were s.43(1) and s.50(a) of the FOI Act, and further, to advise my office of the then-current status of Supreme Court Action No.808 of 1994. The applicant has made no response to the first of those requests, and, by letter dated 6 June 1997, has stated her refusal (on legal advice) to respond to the second of those requests.
15. I wrote to the applicant on 13 May 1997, stating:

By letter dated 20 March 1997, the Assistant Information Commissioner, Mr G Sammon, asked you to confirm whether or not s.43 and s.50 of the [FOI Act] were the only grounds of exemption that you seek to rely on to support your case that the documents in issue are exempt matter under the FOI Act. ...Since you have not supplied the information requested in Mr Sammon's letter to you dated 20 March 1997, I have assessed the documents in issue in light of the grounds for exemption under s.43(1) and s.50(a) of the FOI Act. If you wish to make a case that the documents in issue are exempt on a different basis, you may do so by lodging evidence and/or written submissions in accordance with the opportunity extended to you on page 3 of this letter.

I then conveyed to the applicant my preliminary views that the matter in issue was not exempt matter under s.43(1) or s.50(a) of the FOI Act. I went on to say: "... if you wish to contend that the documents in issue are exempt matter under the FOI Act, I am now extending to you the opportunity to lodge a written submission and/or evidence in support of your case.". I directed that any evidence or written submissions on which the applicant wished to rely to support her case be lodged no later than **16 June 1997**.

16. No evidence or written submissions were lodged by, or on behalf of, the applicant by 16 June 1997. In a letter to the applicant dated 20 June 1997, I said:

... Procedural fairness requires that I give you a reasonable opportunity to present your case to me on the issues for determination in this review. I have already done that, and you have failed to take advantage of the opportunity.

I am prepared to give you one further opportunity...

*I direct that you inform me in writing as soon as possible, but no later than **27 June 1997**, whether or not you withdraw your application for review dated 29 July 1996 (my ref. no. S 121/96).*

In the event that you do not withdraw your application for review, I direct that you lodge any evidence or written submissions on which you wish to rely to support your case in this review, as soon as practicable, but in any event, no later than 4 July 1997.

The applicant did not comply with either of those directions, the result being that her application for review has not been withdrawn, but she has lodged no evidence or written submissions (apart from her application for review dated 29 July 1996) in support of a case that the matter in issue is exempt matter under the FOI Act.

The application of s.43(1) of the FOI Act

17. Section 43(1) of the FOI Act provides:

43.(1) Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.

The grounds on which a document attracts legal professional privilege are fairly well settled in Australian law. In broad terms, legal professional privilege attaches to confidential communications between lawyer and client for the sole purpose of seeking or giving legal advice or professional legal assistance, and to confidential communications made for the sole purpose of use in litigation (for a more detailed analysis of relevant principles, see *Grant v. Downs* (1976) 135 CLR 674, *Baker v. Campbell* (1983) 153 CLR 52, *Attorney-General (NT) v. Kearney* (1985) 158 CLR

500, *Attorney-General (NT) v. Maurice* (1986) 161 CLR 475, *Waterford v. Commonwealth of Australia* (1987) 163 CLR 54, *Trade Practices Commission v. Sterling* (1979) 36 FLR 244).

18. One of the general principles expounded by the High Court in its decisions concerning legal professional privilege is that in order to determine whether a document attracts the privilege, it is necessary to examine the circumstances of the creation of the document (see *Grant v Downs* (1976) 135 CLR 674). The document must have been brought into existence for the sole purpose of seeking or giving legal advice (or professional legal assistance), or for the sole purpose of use in legal proceedings, i.e., anticipated or pending litigation.

19. In its internal review decision, the Department described the documents in issue as having been

created for the purposes of the Department's administration of its human resource policies and obligations and your [i.e., the applicant's] access to the benefits of those policies and obligations ...

20. From my examination of the documents in issue, I am satisfied that the Department's description is correct. None of the documents in issue was brought into existence for the purpose of obtaining professional legal advice, or for use in anticipated or pending litigation. Therefore, I am satisfied that none of the documents in issue qualifies for exemption under s.43(1) of the FOI Act.

The application of s. 50(a) of the FOI Act

21. Section 50(a) of the FOI Act provides:

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

(a) be in contempt of court;

...

22. In the applicant's application for external review dated 29 July 1996, the applicant said in part:

... any release of these documents prior to the disposal of Supreme Court Writ 808 of 1994 involving the agency and its employees, will constitute a release of the documents to the world at large and therefore to any witness likely to be subject to cross-examination. That release would prejudice the conduct of a fair trial, and possibly facilitate a contempt of those proceedings.

23. The rationale for proceedings for contempt of court is the protection of the effective administration of justice. The publication of material which tends to interfere with,

or which is intended to interfere with, the fair trial of particular pending criminal or civil proceedings may constitute a contempt.

24. I cannot see how disclosure of the documents in issue to [the access applicant] would tend to interfere with the fair trial of the pending action, and the applicant has provided no evidence or detailed submissions explaining how she perceives that could occur. I am not satisfied that disclosure of the documents in issue would tend to influence witnesses or potential witnesses in the evidence that they would give to the court, in a manner that would interfere with the fair trial of the pending action. Even if potential witnesses were to obtain knowledge of the documents in issue, being information from the applicant's personnel file held by the Department, that information, in my assessment, is of such an innocuous and uncontentious character that it could neither influence a potential witness, nor disadvantage the applicant's case before the Supreme Court.
25. The FOI Act is often relied upon by parties to litigation to obtain documents from government agencies. Use of the FOI Act is frequently an adjunct to the normal discovery and inspection processes. If the applicant's contention were correct, any document of a government agency would be exempt from disclosure under the FOI Act, if it was relevant to litigation that had commenced. This, in my view, is clearly not contemplated by the FOI Act generally (see *Re Sobh* [1994] 1 VR 41; (1993) 65 A Crim R 466, per Brooking J at pp.475-476) nor by s.50(a) of the FOI Act in particular.
26. I am satisfied that the matter in issue is not exempt matter under s.50(a) of the FOI Act. There are no other exemption provisions in the FOI Act which might apply so as to make the matter in issue exempt matter under the FOI Act. I note, in particular, that all matter in the applicant's personnel file which could arguably qualify for exemption under s.44(1) of the FOI Act, was found (in Ms Keast's initial decision on behalf of the Department) to be exempt from disclosure to [the access applicant] under s.44(1), and hence is not in issue in the present review.

DECISION

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