

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 96015
Application S 135/94

Participants:

FREDERICK ARTHUR RICHARDSON
Applicant

QUEENSLAND CORRECTIVE SERVICES COMMISSION
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to the termination by the respondent of the applicant's contract of employment with the respondent - whether documents comprise deliberative process matter falling within the terms of s.41(1)(a) of the *Freedom of Information Act 1992 Qld* - whether disclosure would, on balance, be contrary to the public interest - whether documents contain merely factual matter, not eligible for exemption under s.41(1) by virtue of s.41(2)(b) - application of s.41 of the *Freedom of Information Act 1992 Qld*.

Freedom of Information Act 1992 Qld s.27(4), s.41(1), s.41(1)(a), s.41(1)(b), s.41(2), s.41(2)(b), s.79, s.81

Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (1993) 1 QAR 60

Forbes and Department of the Premier and Cabinet, Re (1993) 6 VAR 53

Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade Development, Re (1993) 1 QAR 123

In the matter of a contract in writing between the Queensland Corrective Services Commission and Frederick Arthur Richardson (Supreme Court of Queensland, OS No. 545 of 1994, Derrington J, 25 August 1994, unreported)

Pemberton and The University of Queensland, Re (Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported)

Trustees of the De La Salle Brothers and Queensland Corrective Services Commission, Re (Information Commissioner Qld, Decision No. 96004, 4 April 1996, unreported)

DECISION

I vary the decision under review (being the respondent's deemed refusal of access to the documents falling within the terms of the applicant's FOI access application dated 23 June 1994) in so far as it concerns the matter in issue (as identified in paragraph 9 of my accompanying reasons for decision) by finding that the matter in issue is not exempt matter under the *Freedom of Information Act 1992* Qld.

Date of decision: 16 August 1996

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access, under the *Freedom of Information Act 1992 Qld* (the FOI Act), to certain documents relating to the respondent's termination, in 1994, of the applicant's contract of employment as Director, Consulting Services, with the respondent.
2. Following a review of the Queensland Corrective Services Commission (the QCSC) by the Public Sector Management Commission (the PSMC) in 1993, four senior executive positions in the QCSC, including the applicant's position, were abolished. New senior executive positions were advertised and the four people whose positions had been abolished were invited to apply for the new positions. Ultimately, the applicant decided not to apply for the new positions, and his contract of employment was eventually terminated by the QCSC.
A question then arose as to the amount of the residual contract remuneration to which the applicant was entitled, under the terms of his contract of employment, upon the termination by the QCSC of that contract.
3. The applicant's contract of employment was for an initial term of five years commencing on 1 August 1990. It contained a somewhat unusual clause (though one which appears to have been common in contracts entered into by the QCSC with its senior executives around that time) permitting either party to extend the term of the contract for a further period of five years from the expiration of the initial term (which would have expired on 31 July 1995), by giving notice in writing to the other party not less than 3 months prior to the expiration of the initial term. On its literal construction, this clause permitted the applicant to unilaterally extend the term of his contract of employment to 31 July 2000 by giving the QCSC written notice to that effect at any time between 1 August 1990 and 30 April 1995. The applicant

did just that, by written notice given to the QCSC on 23 March 1992. On 5 June 1992, the

QCSC wrote to the applicant denying the validity of his purported exercise of the option but giving no reasons to support its position.

4. Upon the termination by the QCSC of the applicant's contract of employment (on any ground other than misconduct or inefficiency on the part of the applicant), the applicant became entitled to a termination payment which, in brief terms, was to be an amount representing an appropriate percentage of his contractual remuneration (assessed by reference to factors specified in the contract) over the balance of the term of his contract. Thus, the applicant would have been entitled to a substantially larger termination payment if his contract of employment had been validly extended to 31 July 2000, rather than if 31 July 1995 had remained the operative expiry date of the contract. In litigation before the Supreme Court of Queensland, the applicant succeeded in obtaining a declaration to the effect that he had validly exercised the option to extend his contract of employment with the QCSC to

31 July 2000: see *In the matter of a contract in writing between the Queensland Corrective Services Commission and Frederick Arthur Richardson* (Supreme Court of Queensland, OS No. 545 of 1994, Derrington J, 25 August 1994, unreported).

5. In an FOI access application lodged with the QCSC on 23 June 1994, Mr Richardson applied for access to:

... all documents, notes or notations that relate to myself. This includes, but is not limited to, documents, minutes and decisions in possession or under the control of the Commission Board, Sub-Committees of the Board and the Minister's Office.

6. The receipt of the applicant's FOI access application was acknowledged by the QCSC by letter dated 28 June 1994. However, no formal decision was made by the QCSC within the time period specified in s.27(4) of the FOI Act. By letter dated 8 September 1994 (by which time the Supreme Court proceedings had been resolved), Mr Richardson applied to me for review, under Part 5 of the FOI Act, of the QCSC's deemed refusal of his FOI access application (see s.79 of the FOI Act).

External review process

7. At the request of the Deputy Information Commissioner, the QCSC provided copies of the documents it considered to fall within the terms of the applicant's FOI access application, and identified those documents which it claimed to be exempt (in this regard, the QCSC relied upon s.41(1) and/or s.43(1) of the FOI Act).

8. A 'sufficiency of search' issue was raised by Mr Richardson during the course of the review. As a result of some further searches undertaken by the QCSC, a number of additional documents, which fell within the terms of Mr Richardson's FOI access application, were located. During the course of the review, the QCSC agreed to disclose to the applicant some matter which it had initially claimed to be exempt, and I authorised it to do so. The applicant also made a number of concessions, agreeing:

- not to pursue access to certain matter claimed by the QCSC to be exempt under s.43(1) (the legal professional privilege exemption) of the FOI Act;
- to pursue access only to those parts of the documents in issue which related to himself; and

- not to pursue access to matter which would identify the other individuals whose contracts were terminated (in documents where issues relating to all of the terminations were dealt with together).

9. As a result of the concessions made by the participants, only the matter described below remains in issue, with the QCSC claiming that it is exempt matter under s.41(1) of the FOI Act:

Document No.

Description

Documents initially located by the respondent

Document 1-2 Memorandum dated 11 February 1994 from Mr K Hamburger, Director-General of the QCSC, to Mr R Archer, then Chairman of the QCSC Staff Sub-Committee.

Folio 1 of this document has been released to the applicant. Folio 2 is claimed to be entirely exempt. In respect of folio 1A (which comprises the second page of the memorandum) only the following matter remains in issue:

- the last two sentences of the first paragraph on folio 1A;
- the paragraph numbered 6, except for the name appearing in the second last line of that paragraph; and
- the paragraph numbered 7, except for the fifth to ninth words in the second sentence and the two names appearing in the third sentence.

Document 3-4 Minutes of the QCSC Staff Sub-Committee meeting of 17 February 1994. Paragraphs numbered 3, 4, and 6 of document 3-4 are no longer in issue.

Document 5-6 Memorandum dated 22 February 1994 from Mr D H Willis, the Acting Secretary to the QCSC, to Mr Hamburger (the contents of which reproduce the text of the minutes contained in document 3-4). Paragraphs numbered 1, 2 and 4 of document 5-6 are no longer in issue.

Document 52 Letter dated 17 June 1994 from Mr P Coldrake of the PSMC to Mr Hamburger. The two names, other than the applicant's name, which appear in the first paragraph of the letter are no longer in issue.

Document 56-57 Copy of a letter dated 20 June 1994 from Professor P Weller, the then Chair of the QCSC Staff Sub-Committee, to the Honourable P J Braddy, the then Minister for Police and Minister for Corrective Services (hereinafter referred to as "the Minister"). The two names, other than the applicant's name, where they appear in the first paragraph of document 56-57 are no longer in issue.

- Document 61-62 Minutes of the QCSC Staff Sub-Committee meeting of 17 June 1994. The two names, other than the applicant's name, which appear in the paragraph numbered 2, and the heading to that paragraph, are no longer in issue.
- Document 78-79 This is a copy of document 56-57, and the same matter identified above is no longer in issue.
- Document 80-81 Memorandum dated 13 July 1994 from Mr Willis to Mr Hamburger (the contents of which reproduce the text of the minutes contained in document 61-62). The two names, other than the applicant's name, which appear in the second paragraph, and the heading to that paragraph, are no longer in issue.
- Document 96-100 Briefing note dated 22 February 1994 from Mr Archer to the Minister. The name and title which appear in the second sentence of the second sub-paragraph on folio 98 are no longer in issue. Also, the two names, other than the applicant's name, the monetary amounts opposite those two names, and the total monetary amount appearing in a table on folio 97 are no longer in issue.

Documents located in further searches

- Document 7 Briefing note and covering memorandum dated 11 July 1994 from Mr Hamburger to the Minister. The following matter from the briefing note is no longer in issue:
- the paragraph numbered 3;
 - the paragraph numbered 5, from the words "Ms Atkinson's advice" to the end of the paragraph;
 - the paragraph numbered 6;
 - the last fifteen words of the first sentence of the paragraph numbered 10(i);
 - the paragraph numbered 10(ii);
 - Appendix 1; and
 - Appendix 2.
- Document 25 A copy of the briefing note which forms part of document 7. The same matter identified in respect of document 7 is no longer in issue on document 25.

10. Both participants were given the opportunity to lodge evidence and written submissions in support of their respective cases. Under cover of a letter dated 10 May 1995, the QCSC lodged a written submission, and a statutory declaration by the QCSC solicitor, Ms K Mahoney. The statutory declaration related only to the s.43(1) exemption claims, which are no longer in issue. The QCSC also lodged a supplementary written submission, under cover of a letter dated 31 August 1995. Copies of the material lodged by the QCSC were supplied to Mr Richardson, who lodged a written submission dated 15 March 1996. By letter dated

19 March 1996, the QCSC was provided with a copy of Mr Richardson's submission and invited to lodge a reply to it. The QCSC did not take advantage of that opportunity.

The relevant statutory provision

11. Section 41 of the FOI Act 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.

(2) Matter is not exempt under subsection (1) if it merely consists of—

(a) matter that appears in an agency's policy document; or

(b) factual or statistical matter; or

(c) expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.

(3) Matter is not exempt under subsection (1) if it consists of—

(a) a report of a prescribed body or organisation established within an agency; or

(b) the record of, as a formal statement of the reasons for, a final decision, order or ruling given in the exercise of—

(i) a power; or

(ii) an adjudicative function; or

(iii) a statutory function; or

(iv) the administration of a publicly funded scheme.

The application of s.41(2) and s.41(1) of the FOI Act

12. Under s.41(2)(b) of the FOI Act, matter is not exempt under s.41(1) if it merely consists of factual or statistical matter: see *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at p.71, paragraphs 31-32. Much of the

matter remaining in issue is merely factual matter or records a formal decision of the QCSC Staff Sub-Committee, i.e., the formal outcome of a deliberative process, rather than any deliberation (or opinion, advice, *et cetera*, contributed to the deliberative process) which preceded the making of the formal decision. Applying the principles referred to in *Re Eccleston* at p.71 (paragraphs 31-32), and explained more fully in *Re Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 at pp.144-147 (paragraphs 49-58), I find that the following segments of the matter in issue comprise merely factual matter which, by virtue of s.41(2)(b), is not eligible for exemption under s.41(1) of the FOI Act:

Document No.	Description
<u>Documents initially located by the respondent</u>	
Document 1-2	The last two sentences of the first paragraph on folio 1A.
Document 3-4	All matter remaining in issue on this document.
Document 5-6	All matter remaining in issue on this document.
Document 56-57	Folio 57, except for the final paragraph on that folio. In the second paragraph on folio 56, the words commencing from "the Sub-Committee has decided" through to the end of that paragraph, and the signature block on folio 56.
Document 61-62	The main headings on folio 62, up to and including the heading to the paragraph numbered 2; plus, in the last paragraph on folio 62, the words commencing from "the Sub-Committee decided" through to the end of that paragraph. Folio 61.
Document 78-79	Folio 79, except for the final paragraph on that folio. In the second paragraph on folio 78, the words commencing from "the Sub-Committee has decided" through to the end of that paragraph, and the signature block on folio 78.
Document 80-81	The main headings, and the heading to the second paragraph, on folio 81; plus, in the last paragraph on folio 81, the words commencing from "the Sub-Committee decided" through to the end of that paragraph. Folio 80.
Document 96-100	Folio 100. Folio 99, except for that part of the third paragraph on folio 99 commencing from the words "In taking this decision" through to the end of that folio. The last ten lines of folio 98. Folio 97, except for the last two paragraphs of that folio. Folio 96, except for the first two lines of that folio.

releasing information concerning the deliberations of the QCSC in relation to the contract termination of senior QCSC officers. Rather, it is submitted that the public interest lies in favour of non-disclosure of such documents, as such deliberations are made as part of the effective operation of government.

In relation to the document referred to as page 52 - Letter from the Chair of the PSMC to the Director-General, QCSC dated 17 June 1994, it is submitted that such document clearly discloses advice in relation to the negotiations and the consultation process between the PSMC and the QCSC at the deliberative stage. The document refers to matters which were by no means final, but rather open to negotiation. Further, the document refers to a series of sensitive discussions covering a number of issues with numerous possible solutions.

15. The applicant has made the following submissions in response:

The QCSC, when arguing against the release of the documents on public interest grounds, raises three issues in general. The QCSC advances no proof in any of these cases as to the consequences of release and talks in general terms only. The issues raised by the QCSC have been dealt with at some length in the decision [Re Eccleston].

In [Re Eccleston at pp.73-74] the then Attorney General's second reading speech is quoted ... in which he says in part:

"The assumption that information held by government is secret unless there are reasons to the contrary is to be replaced by the assumption that information held by government is available unless there are reasons to the contrary."

This implies to me that the onus of providing proof of any adverse effects of the release of the information rests with the Government agency in question. This the QCSC has failed to do.

The three general arguments advanced are:

- 1. impeding the proper flow of information between public servants and the Minister. (QCSC submission page 5, and QCSC further submission page 16);*
- 2. protecting the integrity of the deliberation process which requires a frank exchange of views. (QCSC submission page 5, and QCSC further submission page 17); and,*
- 3. personal interest of applicant only and not public interest in general. (QCSC submission page 5, and QCSC further submission page 17).*

The first two of the QCSC arguments against release would appear to fit the Howard criteria (a) and (c) [see Re Eccleston at p.98].

1. *Impeding the proper flow of information between public servants and the Minister.*

The QCSC gives no insight into how the release of documents would advance this argument against release. The Information Commissioner dealt with this point in [Re Eccleston at pp.102-103].

2. *Protecting the integrity of the deliberation process which requires a frank exchange of views.*

Again the QCSC advances no proof and again the Information Commissioner addressed the point in [Re Eccleston at pp.106-107], where he stated that arguments of the nature advanced by the QCSC "should be disregarded unless a very particular factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative process communications of a like kind, and that tangible harm to the public interest will result from that inhibition".

3. *Personal interest of applicant only and not public interest in general.*

The only argument advanced by the QCSC is "that the public interest lies in favour of non-disclosure of such documents, as such deliberations are made as part of the effective operation of government". This is a broad statement and no proof is offered. The documents I requested relate to matters dealing with myself personally and must, obviously, be of interest to myself personally. I would however argue that the documents have a much wider interest than just myself. ...

The Queensland Government has made it clear that due process and natural justice are available to employees of Government, in particular through the establishment of Public Sector Management Commission (PSMC) guidelines. The QCSC operates under its own Act of Parliament and has not, in the past, been bound by the guidelines issued by the PSMC or other agencies. The QCSC has, however, introduced guidelines of its own that mirror those issued in the Public Sector generally, but these did not relate to contract staff. There has been no external mechanism made available to place under scrutiny the application of those guidelines. This scrutiny is available in the Public Service. (This situation changed after July 1994). The appointment, pay, conditions and termination of contract employees rested with the QCSC Board and there is no obligation for the QCSC Board to follow any guidelines in relation to contract staff.

In the 1994/95 Annual Report of the QCSC, page 2 it states

Core Values

In the management of the QCSC activities, before taking any action, a decision is assessed in the light of:

Is it in the public interest?
Is it fair, reasonable and just to all parties?
Is it consistent?
Will it stand public scrutiny?

If the decision regarding myself as contained in the documents in question were made using the stated core values of the QCSC, then, for their release to be opposed on the grounds that it is not in the public interest, is surprising to say the least. It also avoids any public scrutiny of the decision making process and consequently any accountability.

The documents in question certainly have a wider interest than myself personally and include contract staff and other staff of the QCSC and all major stakeholders of the QCSC. It would enable interested people to evaluate the decision making process of the QCSC against its stated core values. It would either make people question other decision making processes conducted in secret or give people reassurance in the process, depending on the information released. It would hold the decision making body of the QCSC (non elected representatives of the community, subject to no merit selection process themselves) accountable for their actions. It would also place their actions in future under public scrutiny and lead to better decision making in general.

16. I find myself in agreement with the general thrust of the applicant's submissions. While I appreciate that the QCSC's submissions were lodged at a time before 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) was published, the QCSC's submissions in respect of the s.41(1)(b) public interest balancing test in the present case, evidence the same shortcomings as its submissions in *Re De La Salle Brothers*, as to which I commented (at paragraphs 34-35 of *Re De La Salle Brothers*):
34. *The correct approach to the application of s.41(1)(b) of the FOI Act was analysed at length in my reasons for decision in Re Eccleston, where I indicated (see p.110; paragraph 140) that an agency or Minister seeking to rely on s.41(1) 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.*
35. *The QCSC's case, however, is vague and unsubstantiated by evidence. While there is certainly a public interest in the effective working of government, the QCSC has not explained precisely how disclosure of the matter in issue would harm that public interest. The vague suggestion that disclosure "would impede the proper flow of information between public servants and the Minister" appears to be an attempt to restate the 'candour and frankness argument', in respect of*

which I made the following comments in Re Eccleston at pp.106-107 (paragraphs 132-134):

132. I consider that the approach which should be adopted in Queensland to claims for exemption under s.41 based on the third *Howard* criterion (i.e., that the public interest would be injured by the disclosure of particular documents because candour and frankness would be inhibited in future communications of a similar kind) should accord with that stated by Deputy President Todd of the Commonwealth AAT in the second *Fewster* case (see paragraph 129 above): they should be disregarded unless a very particular factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative process communications of a like kind, and that tangible harm to the public interest will result from that inhibition.
 133. I respectfully agree with the opinion by Mason J in *Sankey v Whitlam* that the possibility of future publicity would act as a deterrent against advice which is specious or expedient or otherwise inappropriate. It could be argued in fact that the possibility of disclosure under the FOI Act is, in that respect, just as likely to favour the public interest.
 134. Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest. If the diminution in previous candour and frankness merely means that unnecessarily brusque, colourful or even defamatory remarks are removed from the expression of deliberative process advice, the public interest will not suffer. Advice which is written in temperate and reasoned language and provides justification and substantiation for the points it seeks to make is more likely to benefit the deliberative processes of government. In the absence of clear, specific and credible evidence, I would not be prepared to accept that the substance or quality of advice prepared by professional public servants could be materially altered for the worse, by the threat of disclosure under the FOI Act.
17. The respondent has failed to discharge the onus (imposed on it by s.81 of the FOI Act) of establishing the existence of public interest considerations favouring non-disclosure that would justify a finding that disclosure of the deliberative process matter remaining in issue would, on balance, be contrary to the public interest. Having examined the matter remaining in issue, I consider that it contains no information the disclosure of which, at this time, could harm the public interest. Matters relating to the termination of the applicant's contract of employment have now been resolved, and the information in issue is not of such a nature that its disclosure could prejudice the respondent's ability to conduct negotiations in the event that a similar situation occurred again in the future. As to the 'frankness and candour' argument,

I am not satisfied that the substance or quality of deliberative process matter prepared by officials of the respondent (or any other agency) would be materially altered for the worse, if the matter remaining in issue were to be disclosed.

18. I note that the applicant has a special interest in the matter in issue that could be taken into account in applying s.41(1)(b), in accordance with the principles explained in *Re Pemberton and The University of Queensland* (Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported) at paragraphs 164-193. However, the public interest would favour disclosure of much of the information in issue to any interested member of the public. In particular, documents 7 and 25, in which the Director-General of the respondent accounted to the then Minister for how contracts of senior executives in the QCSC came to have a provision permitting a senior executive to unilaterally extend the term of the contract for a further period of five years (see paragraphs 3-4 above) and the extent of the QCSC's possible exposure in that regard, contain information the disclosure of which would further the accountability of the QCSC for its use of public funds in payment of salary and entitlements to senior public servants performing functions on behalf of the public (*cf. Re Forbes and Department of the Premier and Cabinet* (1993) 6 VAR 53 at p.60).
19. I find that none of the matter claimed by the QCSC to be exempt under s.41(1) of the FOI Act is exempt matter under that provision.

Conclusion

20. For the foregoing reasons, I vary the decision under review (being the respondent's deemed refusal of access to the documents falling within the terms of the applicant's FOI access application dated 23 June 1994) in so far as it concerns the matter in issue identified in paragraph 9 above, which matter, I find, is not exempt matter under the FOI Act.

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F N ALBIETZ
INFORMATION COMMISSIONER