



Decision and Reasons for Decision

Application Number: 210004

Applicant: Mr I Gifford

Respondent: Redland Shire Council

Decision Date: 29 January 2007

Catchwords: Personal affairs – identity of complainant

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Reasons for Decision

Background

1. The applicant seeks review of the decision of the Redland Shire Council (the Council) to refuse him access, under the *Freedom of Information Act 1992* (Qld) (FOI Act), to the name, address and telephone number of a person or persons who made a complaint to the Council about the applicant's use of mounted security cameras on his property.
2. By letter dated 15 October 2005, through his barrister Mr Leigh, the applicant applied for access to documents held by the Council in the following terms:
 1. *Any and all documents comprising or relating to the receipt, in any manner on or about September 2005, of information from any person(s) relating to complaints about access to or use of my property at or any other matter concerning me whatsoever including the siting and use of mounted security cameras on my property.*
 2. *Any and all documents comprising or relating to previous or subsequent information of any kind received by the Redland Shire Council from the same source of information as in paragraph 1.*
 3. *Any and all documents comprising or relating to the conduct of any inquiry, investigation, review or other considerations whatsoever, into the complaints or matters in paragraph 1.*
3. Mr G Meyers, FOI Decision Maker of the Council, advised the applicant by letter dated 3 May 2006, that four documents responsive to his application had been located. Mr Meyers decided to grant partial access to all four documents, subject to the deletion of some matter pursuant to section 44(1) of the FOI Act.
4. By letter dated 29 May 2006, the applicant applied for an internal review of Mr Meyers' decision and set out his submissions in support of his case for release of the matter claimed by the Council to be exempt under section 44(1) of the FOI Act.
5. Ms A Roseler, Internal Review Officer of the Council, made an internal review decision on 23 June 2005. Ms Roseler accepted the applicant's submissions regarding section 44(1) but decided that most of the matter in issue was exempt from disclosure under section 46(1)(b) of the FOI Act.
6. By letter dated 19 July 2006, the applicant applied for review by the Information Commissioner, under Part 5 of the FOI Act, of Ms Roseler's decision.

Steps taken in the external review process

7. Copies of the documents in issue were obtained and examined.
8. After examining the matter in issue and reviewing the submissions made in the applicant's internal review application, a staff member of this office contacted the applicant to convey the preliminary view that the matter in issue was *prima facie* exempt under section 44(1) of the FOI Act, subject to any relevant public interest considerations. In that telephone conversation the applicant advised that he had not received a copy of the documents reflecting Ms Roseler's internal review decision.

9. A staff member of this office then contacted the Council and requested that a copy of the documents reflecting the internal review decision be forwarded to the applicant. The preliminary view was also conveyed to the Council that while the matter in issue was not exempt under section 46(1)(b) of the FOI Act, it qualified for exemption under section 44(1). The Council advised that it was prepared to accept that the matter in issue was exempt under section 44(1) rather than section 46(1)(b).
10. Once the applicant had received a copy of the documents, subject to the deletion of the matter in issue, he forwarded further submissions as to the application of section 44(1) to the matter remaining in issue, by letter dated 10 October 2006.
11. By letter dated 6 November 2006 I advised the applicant that it was my preliminary view that the matter remaining in issue qualified for exemption from disclosure under section 44(1) of the FOI Act. I requested that if the applicant did not accept my preliminary view, he provide me with submissions in support of his case for release of the matter remaining in issue.
12. By letter dated 5 December 2006, the applicant advised that he did not accept my preliminary view, but declined to make any further submissions.
13. In making my decision in this matter, I have taken the following into account:
 - the documents in issue;
 - the applicant's FOI access application dated 15 October 2005, application for internal review dated 29 May 2006, and application for external review dated 19 July 2006;
 - Mr Meyers' initial decision dated 3 May 2006 and Ms Roseler's internal review decision dated 29 May 2006;
 - the applicant's letters dated 10 October 2006 and 5 December 2006;
 - file notes of telephone conversations between staff of this office and officers of the Council, between staff of this office and the applicant, and between staff of this office and the applicant's barrister, Mr Leigh.

Matter in issue

14. The matter remaining in issue in this review is the name, address and home telephone number of a person or persons who made a complaint to the Council regarding the applicant's use of mounted security cameras. In the four documents responsive to the applicant's application, the subject name and address appears three times and the home telephone number appears once.

Findings

Section 44(1) of the FOI Act

15. Section 44(1) of the FOI Act provides as follows:

44 Matter affecting personal affairs

- (1) *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

16. In applying section 44(1) of the FOI Act, the first question to ask is whether disclosure of the matter in issue would disclose information concerning the personal affairs of a person other than the applicant for access. If that is the case a public interest consideration favouring non-disclosure is established, and the matter in issue will be exempt, unless there are public interest considerations favouring disclosure which outweigh all public interest considerations favouring non-disclosure.
17. In *Stewart and Department of Transport* (1993) 1 QAR 227, Information Commissioner Albietz discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations) as it appears in the FOI Act (see pp.256-267, paragraphs 79-114, of *Stewart*). In particular, he said that information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:
 - family and marital relationships;
 - health or ill health;
 - relationships and emotional ties with other people; and
 - domestic responsibilities or financial obligations.
18. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is a question of fact, to be determined according to the proper characterisation of the information in question.

Application of section 44(1) to the matter in issue

19. Information Commissioner Albietz has held that the fact that an individual (acting in his or her private capacity) has made a complaint to a government agency is properly to be characterised as information concerning that persons personal affairs (see *Byrne and Gold Coast City Council* (1994) 1 QAR 477).
20. In his correspondence to this office, and in telephone conversations with staff of this office, the applicant has made it clear that he believes that he knows the identity of the complainant/s. However, even if the applicant is correct in his belief, knowledge of a complainant's identity does not preclude a finding that the making of a complaint by that person concerns his or her personal affairs within the scope of section 44(1), although it may, in certain circumstances, be of relevance in the application of the public interest balancing test incorporated in section 44(1), which I will discuss below.
21. The only matter in issue is a name or names, address or addresses and home telephone number/s and I am satisfied that the matter in issue is information which would disclose the identity of a person or persons who made a complaint to Council and is therefore *prima facie* exempt under section 44(1).

Public Interest Balancing Test

22. Because of the way that section 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, and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue. The extent to which the scales are tipped will vary from case to case according to the relative weight of the privacy interests attaching to the particular information in issue and the particular circumstances of any given case. It therefore becomes necessary to examine

whether there are public interest considerations favouring disclosure, and if so, whether they outweigh all public interest considerations favouring non-disclosure.

23. The applicant contended, in his initial application dated 15 October 2005 and in telephone conversations with staff of this office, that the identity of the complainant or complainants had been disclosed to him by Mr Foley, an officer of the Council, in a telephone conversation on 19 September 2006. If it could be established that the identity of the complainant or complainants had, in fact, been revealed by the Council, it is arguable that the weight of the public interest in protecting the privacy of information concerning the personal affairs of the complainant/s is lessened.
24. I have reviewed the correspondence from the Council to the applicant following receipt of the complaint and the applicant's subsequent FOI application. I am satisfied that the Council has not disclosed to the applicant, the identity of the complainant/s in its correspondence.
25. In addition, a member of staff of this office contacted Mr Foley of the Council who advised that he does not recall at any time telling the applicant who the complainant/s were. Mr Foley advised that it is his general practice not to disclose the identity of complainants. The Council advertises on its website that when members of the public contact the Council with a request or complaint they can expect their personal details to be kept confidential. While I note here the difficulties which arise in relation to mutual understandings that information supplied to government agencies will be treated in confidence (see *McCann and Queensland Police Service* (1997) 4 QAR 30; *McEniery and Medical Board of Queensland* (1994) 1 QAR 349), the fact that it is the Council's policy, as far as possible, to keep the personal details of complainants confidential, lends weight to Mr Foley's statement that he would not generally disclose the identity of persons who make complaints to the Council.
26. I am not satisfied that the identity of the complainant/s has been revealed to the applicant by the Council, and I consider that the applicant's speculations remain just speculations. At any rate, even if it could be shown that the applicant was aware of the identity of the complainant/s, it would still be necessary to identify a public interest consideration favouring disclosure, which would outweigh the lessened public interest consideration favouring non-disclosure, to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

Public interest considerations favouring disclosure

Pursuit of a legal remedy

27. The applicant submits that it is necessary for him to have access to the matter in issue so that he may evaluate his legal options and in order to obtain evidence of the identity of the author or authors of the matter in issue in order to establish a claim against that person or persons. The applicant contends that the person or persons he suspects to be the complainant/s has carried out a continued course of harassment against him.
28. In *Willsford and Brisbane City Council* (1996) 3 QAR 376, Information Commissioner Albiez said (at paragraphs 16 and 17):

16. I consider that, in an appropriate case, there may be a public interest in a person who has suffered, or may have suffered, an actionable wrong, being permitted to obtain access to information which would assist the person to pursue any remedy which the law affords in those circumstances (cf. Re Cairns Port

Authority and Department of Lands (1994) 1 QAR 663 at pp.713-714, paragraphs 103-104; p.717, paragraph 120; and p.723, paragraph 142). The public interest necessarily comprehends an element of justice to the individual: see *Re Pemberton and The University of Queensland* (Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported) at paragraphs 178 and 190, and the cases there cited. Although the public interest I have described is one which would apply so as to benefit particular individuals in particular cases, I consider that it is nevertheless an interest common to all members of the community and for their benefit.

17. The mere assertion by an applicant that information is required to enable pursuit of a legal remedy will not be sufficient to give rise to a public interest consideration that ought to be taken into account in the application of a public interest balancing test incorporated into an exemption provision in the FOI Act (cf. *Re Alpert and Brisbane City Council* (Information Commissioner Qld, Decision No. 95017, 15 June 1995, unreported) at paragraph 30). On the other hand, it should not be necessary for an applicant to prove the likelihood of a successful pursuit of a legal remedy in the event of obtaining access to information in issue. It should be sufficient to found the existence of a public interest consideration favouring disclosure of information held by an agency if an applicant can demonstrate that -

- (a) loss or damage or some kind of wrong has been suffered, in respect of which a remedy is, or may be, available under the law;
- (b) the applicant has a reasonable basis for seeking to pursue the remedy; and
- (c) disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.

29. Information Commissioner Albietz continued at paragraph 18:

18. The existence of a public interest consideration of this kind would not necessarily be determinative – it would represent one consideration to be taken into account in the weighing process along with any other relevant public interest considerations (whether weighing for or against disclosure) which are identifiable in a particular case. On the other hand, it would ordinarily be true to say (to the extent that a decision-maker under the FOI Act is able to make an objective assessment of these matters from the material put forward by an applicant to establish (a), (b) and (c) above) that the greater the magnitude of the loss, damage or wrong, and/or the stronger the prospects of successfully pursuing the available remedy in respect of the loss, damage or wrong, then the stronger would be the weight of the public interest consideration favouring disclosure which is to be taken into account in the application of a public interest consideration favouring disclosure which is to be taken into account in the application of a public interest balancing test incorporated in an exemption provision of the FOI Act.

30. The applicant asserts that the requirements set out in *Willsford* are met in this case. In his letter dated 10 October 2006, the applicant's barrister, Mr Leigh, contended:

Mr Gifford's application clearly satisfies the Willsford test in that:

- (i) *Mr Gifford has suffered loss or damage (particularly severe psychological harm) as a direct result of the material sought by this application;*

- (ii) *Mr Gifford has a remedy which is available under the law – in particular damages for breach of right to privacy – vide District Court decision of Skoien J in Grosse v Purvis [2003] QDC 151 which involved an action based on harassment, nuisance and invasion of privacy;*
- (iii) *Mr Gifford has a reasonable basis for seeking to pursue the remedy. It is contended that previous similar acts of harassment outlined earlier in this submission and the gratuitous and vilifying language used in the present material give rise of a reasonable basis for Mr Gifford to seek to pursue the remedy.*
- (iv) *Before Mr Gifford can pursue the remedy, or to evaluate whether a remedy is available or worth pursuing he is faced with the legal hurdle of having to show prima facie evidence of the identity of the writers of the harassing material. Unless the Redland Shire Council material is provided in toto so that the name and the address of the writer is identifiable, Mr Gifford has no other avenue available to him to establish a prima facie claim against identifiable writers. It is submitted that in Mr Gifford's present case it is, on balance, in the common interest of all members of the community and for their benefit that there be an element of justice to the individual (paraphrasing the words of Willsford para 16). It is also submitted that it is not in the public interest that the deliberately vilifying language on the part of the writers of the material in this case should be afforded or rewarded with the protection of personal anonymity.*

31. The applicant has provided an account of the various incidents which he asserts have been carried out by the person/s who he believes made the complaint which contains the matter in issue in this review. I agree that if the applicant's statements regarding various incidents set out in his verbal and written submissions are true, he has certainly been the subject of some highly inappropriate actions and those actions may have caused him some loss or damage in the form of psychological harm. In addition, the applicant may have found the language used and the allegations made in the letter of complaint offensive and I consider this could also result in some psychological harm to the applicant.
32. The applicant contends that there is a civil action for damages for breach of right to privacy available to him. The case of *Grosse v Purvis* [2003] QDC 151, cited by the applicant has been the subject of some academic discussion as it remains, as far as I am aware, the only instance in Australia where an action for damages for breach of right to privacy has been successfully pursued. It may, nonetheless, be available to the applicant.
33. I am not prepared to find, however, that the applicant has a reasonable basis for seeking to pursue the remedy he asserts is available to him, or that the disclosure of the information held by the agency would assist the applicant to pursue the remedy.
34. The documents which contain the matter in issue in this review consist of one letter written to the Council regarding the applicant's use of mounted security cameras on his property, a record of the Council's inquiries and its response to the complainant/s. No action was taken by the Council in respect of the complaint. From the material before me, it does not appear that the Council contacted the applicant as a result of

the complaint. The applicant advised a member of staff of this office that he became aware of the complaint as a result of a conversation with a neighbour.

35. The effect of releasing the matter in issue would consequently be to reveal to the applicant, the identity of the person/s who wrote to the Council complaining about the applicant's use of mounted security cameras in one particular instance, in respect of which the Council took no action.
36. The applicant's barrister, in his submission dated 10 October 2006, states that the facts that give rise to a reasonable basis for the applicant to pursue the stated remedy are '*...the previous similar acts of harassment outlined earlier in this submission and the gratuitous and vilifying language used in the present material...*'. As I have outlined, the effect of releasing the matter in issue would be to identify the author of a single letter of complaint. It would not assist the applicant by providing evidence of any previous acts of harassment, or anything other than the fact that the complainant/s had made a complaint to the Council.
37. I have mentioned that the case of *Grosse v Purvis* [2003] QDC 151 is the first and as yet, only case in Australia which has accepted that there is an actionable tort for invasion of privacy. It should be noted that there remains differing judicial opinion as to whether the tort is available (see *Kalaba v Commonwealth* [2004] FCA 763 at paragraph 6). However, in *Grosse v Purvis* Senior Judge Skoien identified what he considered to be the essential elements for establishing a cause of action for invasion of privacy. He said at paragraph 444:

It is not my task nor my intent to state the limits of the cause of action nor any special defences other than is necessary for the purposes of this case. In my view the essential elements would be:

- (a) a willed act by the defendant,*
- (b) which intrudes upon the privacy or seclusion of the plaintiff,*
- (c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities,*
- (d) and which causes the plaintiff detriment in the form of mental psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.*

38. I accept that the language used and the allegation made in the letter of complaint is unfavourable to the applicant. I am not persuaded, however, that a letter of complaint written to the Council, which the applicant was not initially aware of, and in respect of which no action was taken, could constitute an act of intrusion on the privacy or seclusion of the applicant.
39. As I have outlined, the effect of disclosing the matter in issue to the applicant would reveal only the fact that the complainant/s wrote a letter of complaint to the Council regarding security cameras on the applicant's property. The applicant has stated that along with the letter of complaint, he would rely on the previous acts of harassment alleged to have been committed in order to establish his claim for damages for invasion of privacy. As I have mentioned, releasing the identity of the author/s of the letter of complaint would not assist in establishing the identity of those alleged to have committed the previous acts of harassment, and I have already noted that the letter of complaint would not constitute an invasion of the applicant's privacy. Accordingly, release of the matter in issue would not assist the applicant to pursue the course of action he has stated he wishes to undertake.

40. Accordingly, I am not satisfied that a public interest consideration exists in assisting the applicant to pursue a legal remedy, as set out in *Willsford*. Even if it could be shown that a public interest consideration of that kind was present in this case, it is not necessarily determinative and must be balanced against any other relevant public interest considerations.

Malicious complaints

41. The applicant submits that it is not in the public interest that the complainant or complainants in this case should be afforded the protection of anonymity. I acknowledge that a process whereby confidentiality of identity is extended to complainants (when the complaint can be properly investigated without disclosing identity), can provide the means by which malicious complaints can be made. However, in general, Australian law places more importance on encouraging the flow of information to law enforcement and regulatory agencies, even though some people may have to endure an agency investigation of false and malicious allegations. Some agencies, such as the police, have been given power to take action against people who make false and malicious allegations, as distinct from a mistaken allegation made in good faith. The law favours the agency, rather than the affected person, taking appropriate action in these cases. That potential annoyance to the subjects of such complaints must be measured against the prejudice that the alternative approach could cause to the flow of information from the public, on which the Council relies to carry out its functions.
42. At paragraph 64 of *McEniery and Medical Board of Queensland* (1994) 1 QAR 349, Information Commissioner Albietz referred with approval to the decision of the Victorian Administrative Appeals Tribunal in *Re Richardson and Commissioner for Corporate Affairs* (1987) 2 VAR 51, which was concerned with the Victorian equivalent of section 42(1)(b) of the Queensland FOI Act. In *Re Richardson*, the applicant sought access to a file note which recorded information that had been provided by a confidential source in relation to the applicant's activities as a director of a company in liquidation. The applicant argued that the substance of the matter contained in the file note was libelous and that he proposed seeking legal redress. The applicant's argument was in the following terms:

...it could not be in the public interest to protect a source of false information but rather it is in the public interest to protect persons like myself from having false accusations made against them.

43. The Tribunal said as follows in response to the applicant's submissions:

This argument may appear attractive when one only considers those who maliciously supply false information which they know to be untrue. However, when consideration is given to the case of a person who, in good faith, supplies information which is subsequently found on investigation to be inaccurate or mistaken, the difficulties inherent in such a construction become apparent. The legislation is clearly designed to protect the identity of informers and does not differentiate between the good, the bad or the indifferent. The freedom of information legislation related to the provision of information in a documentary form in the hands of government agencies but is not concerned, as such, with the veracity of information contained in a document except under Part V of the Act which provides for the amendment of inaccurate personal records ...

44. I am not prepared to accept that there is a valid public interest consideration in revealing the identity of the complainant or complainants in this case, on the basis that the privacy of malicious complainants should not be protected.

Accountability of the Council

45. I accept that there is a general public interest in enhancing the accountability of Council for its investigations of, or actions taken in response to complaints. The nature of the complaint in this case, however, was such that it could be investigated by the Council without the identity of the complainant becoming relevant. This is not a case where having access to the identifying details of the complainant/s would materially further an assessment of whether the Council had acted reasonably in its investigation of or response to the complaint, or assessing the effectiveness of the Council in carrying out its investigations. The information so far disclosed, about the substance of the complaint and the manner in which the Council dealt with it, is more apt to satisfy that public interest than disclosure of the identity of the complainant or complainants.
46. I am satisfied that the public interest in facilitating the accountability of the Council is not deserving of any weight in this case.

Public interest considerations favouring non-disclosure

Privacy interests of the complainant/s

47. As noted previously, given the terms in which section 44(1) of the Act is framed, the mere finding that matter comprises information concerning the personal affairs of a person is enough to raise a public interest consideration telling in favour of non-disclosure of the matter. Satisfaction of the initial test for exemption in section 44(1) means that there is a public interest consideration accepted by Parliament as weighing against disclosure of the information and I consider that ordinarily the privacy interests of persons choosing to make complaints to regulatory agencies such as the Council, (where it is possible to investigate the complaint without revealing identifying information), are relatively strong.
48. I am not satisfied that the identity of the complainant/s has been revealed so as to reduce the privacy interests attaching to the matter in issue and I do not consider that there are any other factors which would reduce the weight accorded to the privacy interests of the complainant/s. I have discussed above the applicant's contention that the complainant/s in this case should not be afforded the protection of anonymity. However, I consider that the privacy interests of the complainant/s are still deserving of weighty consideration in this case.

Flow of information to government

49. A weighty public interest consideration telling against disclosure of the identity of the complainant or complainants is safeguarding the free flow of information from members of the public concerning possible breaches of the law by not unduly inhibiting co-operation with the investigation of complaints. While I acknowledge there are many occasions where government bodies such as the Council must account to the community for how effectively they are performing their functions, as I have set out above, it is my view that the release of the matter in issue would not assist in this regard. Consequently, I have accorded relatively significant weight to the public interest in safeguarding the free flow of information to government.

Conclusion

50. Having carefully considered the public interest considerations raised by the applicant, as well as other relevant public interest considerations, I find that disclosure to the applicant in this case would not, on balance, be in the public interest. I do not consider that any of the public interest arguments in favour of disclosure (noted in paragraphs 40, 44 and 46 above) succeed in this case. Consequently, the inherent public interest in protecting the privacy interests of the complainant/s and the public interest in protecting the flow of information to government, are not outweighed.
51. The matter remaining in issue comprises information concerning the personal affairs of a person or persons other than the applicant and the balance of the public interest lies in favour of non-disclosure of the matter in issue. The matter in issue is exempt from disclosure under section 44(1) of the FOI Act.

Decision

52. Since I have applied an exemption provision not relied on in the decision under review, I decide to vary the decision under review (being the decision of Ms A Roseler, Internal Review Officer, dated 23 June 2006) by deciding that the matter in issue in this review is exempt under section 44(1) of the FOI Act.
53. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992*.

V. Corby
Assistant Information Commissioner

Date: 29 January 2007