



Decision and Reasons for Decision

Application Number: 210499

Applicant: Mr K and Mrs C Pflugrath

Respondent: 210499

Decision Date: 16 March 2009

Catchwords: **FREEDOM OF INFORMATION – section 25(5) of the FOI Act
– post-application documents - section 44(1) of the FOI Act
– personal affairs**

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REASONS FOR DECISION

Summary

1. For the reasons set out below, I find that:
 - under section 25(5) of the *Freedom of Information Act* 1992 (**FOI Act**), I do not have jurisdiction to review the decision under review in respect of documents 7 – 21
 - parts of documents 2, 4 and 23 are exempt from disclosure under section 44(1) of the FOI Act
 - documents 1, 22 and ER27 are exempt from disclosure under section 44(1) of the FOI Act.
2. The decision under review is varied.

Background

3. By letter dated 16 November 2007, received 19 November 2007 (**FOI Application**), the applicants applied to Cooloola Shire Council, now Gympie Regional Council (**Council**) for:

... all documentation relating to complaints made against [their] principal place of residence: 5 McMahon Lane Monkland, Qld, Lot 3 MPH 24179, Parish of Gympie and, complaints made about the residents, namely the Pflugrath Family.

and said:

[they] would like all copies of documents in regard to any complaint made between the period of 12 April 2006 and 16 November 2007. With special emphasis being placed upon recent complaints made on approximately 29 October 2007 & 12 November 2007. The latter being a noise complaint, with council attending 15 November 2007.

4. By letter dated 25 January 2008 (**Original Decision**), Mr Simon Graham notified the applicants that Council had identified 26 documents that related to the FOI Application and had determined to:
 - allow full access to 8 documents
 - allow partial access to 8 documents (on the basis that those documents contained some information which was exempt from disclosure under section 44 of the FOI Act)
 - refuse access to 10 documents (on the basis that those documents contained information which was exempt from disclosure under section 41 and section 44 of the FOI Act).
5. By letter dated 20 February 2008 (received by Council on 22 February 2008), the applicants requested internal review of the Original Decision (**Internal Review Application**).
6. By letter dated 26 March 2008, Mr Ken Mason advised the applicants of his decision (**Internal Review Decision**) to:
 - allow full access to 6 documents

- allow partial access to 6 documents (on the basis that those documents contained information which was exempt from disclosure under section 44 of the FOI Act)
 - allow partial access to 4 documents (on the basis that those documents contained information which was exempt from disclosure under section 44 and /or section 41 of the FOI Act)
 - refuse access to 10 documents (on the basis that those documents contained information which was exempt from disclosure under section 41 and section 44 of the FOI Act).
7. By letter to the Office of the Information Commissioner (**Office**) dated 22 April 2008 (received 30 April 2008), Mrs Christine Pflugrath requested external review of the Internal Review Decision (**External Review Application**).

Decision under review

8. The decision under review is the Internal Review Decision.

Steps taken in the external review process

9. By letter dated 26 May 2008, Council provided this Office with copies of the documents in issue and additional information relating to the applicants' further enquiries with Council regarding access to documents. Council provided additional copies of some of the documents in issue by letter dated 21 July 2008.
10. By telephone on 9 October 2008, Mrs Christine Pflugrath confirmed that she had made the External Review Application on behalf of both herself and Mr K Pflugrath. This Office received written confirmation from the applicants by facsimile on 10 October 2008.
11. By telephone on 20 and 21 October 2008, a staff member of this Office contacted Council to discuss issues relating to the scope of the external review and the application of section 44(1) of the FOI Act to particular matter in issue. As a result of these discussions, Council agreed to release a small amount of additional information that Council had previously claimed was exempt from disclosure.
12. In response to enquiries by this Office, by letter dated 22 October 2008, Council provided this Office with further information relating to third party consultation undertaken when Council initially considered the FOI Application.
13. Between October 2008 and January 2009, third party consultation was undertaken by this Office to ascertain views regarding the release of some of the matter in issue.
14. Following enquiries made by this Office during the course of this review, Council:
- clarified which information had already been provided to the applicants
 - located two additional documents relevant to the FOI Application
 - provided copies of those documents to this Office
 - provided Council's views about the release of those documents to the applicants.
15. During a telephone conversation with Council on 2 December 2008, a staff member of this Office:
- discussed matters relating to the review

- provided Council with my preliminary view that the matter in issue in documents 24, 25, and 26 did not qualify for exemption under either section 41(1) or 44(1) of the FOI Act.
16. By letter dated 10 December 2008, Council responded to this preliminary view and other matters relating to the review.
 17. On 15 December 2008, a staff member of this Office again spoke with Council to discuss release of some matter in issue to the applicants.
 18. Following a telephone conversation with Council, by letter dated 20 January 2009, I wrote to Council to confirm matters relating to the documents in issue in this review and the outcomes of third party consultations. Council responded by letter dated 28 January 2009.
 19. By letter dated 4 February 2009, I wrote to the applicants:
 - notifying them that:
 - documents 3, 5, 6, 24, 25, 26 and ER28 were no longer in issue in this review because Council had agreed to give the applicants access to these documents in full
 - Council had agreed to release a small amount of additional information in document 23 that Council had previously claimed was exempt from disclosure
 - providing a preliminary view in relation to the remaining documents.
 20. The applicants provided submissions in response to the preliminary view during a telephone conversation with a staff member of this Office on 16 February 2009 and by facsimile received by this Office on 20 February 2009 (**Applicants' Submissions**). The Applicants' Submissions acknowledged that Council had agreed to release additional information, but maintained that they were entitled to access all of the documents relevant to their FOI Application in full.
 21. Accordingly, I have been required to reach a decision in this external review. In doing so, I have taken into account the following:
 - the FOI Application and Original Decision
 - the Internal Review Application and Internal Review Decision
 - the External Review Application
 - Council's verbal and written submissions recorded in file notes of telephone conversations with Council and correspondence received from Council (as set out above)
 - information obtained through third party consultations
 - the Applicants' Submissions
 - the matter in issue
 - the FOI Act
 - relevant case law and previous decision of this Office.

Matter in issue in this review

22. Having regard to the matters set out in paragraph 19, the matter remaining in issue in this review consists of matter in:
 - documents 1, 2, 4 and 7 - 23 which Council originally identified as responsive to the FOI Application

- an additional document located by Council during the course of this review, being a letter referred to as **ER27**.

Findings

23. Pursuant to section 21 of the FOI Act, a person has a legally enforceable right to be given access under the FOI Act to documents of an agency and official documents of a Minister. This right of access is subject to other provisions of the FOI Act, in particular, section 28 of the FOI Act, which provides that an agency may refuse access to exempt matter or an exempt document, and the provisions of Part 3, Division 2 of the FOI Act, which set out those exemption provisions.

Section 25 of the FOI Act

24. In the course of this review, I have considered the application of section 25(5) of the FOI Act to the matter in issue.
25. Section 25 of the FOI Act provides:

25 How applications for access are made

- (1) *A person who wishes to obtain access to a document of an agency or an official document of a Minister under this Act is entitled to apply to the agency or Minister for access to the document.*
- (2) *The application must –*
 - (a) *be in writing; and*
 - (b) *provide sufficient information concerning the document to enable a responsible officer of the agency or the Minister to identify the document; and*
 - (c) *state the address to which notices under this Act may be sent to the applicant; and*
 - (d) *if the application is being made on behalf of the applicant – state the name of the applicant and the name of the applicant’s agent.*
- (3) *The application is taken only to apply to documents that are, or may be, in existence on the day the application is received.*
- (4) *However, subsection (3) does not prevent an agency or Minister giving access to a document created after the application is received but before notice is given under section 34 (a **post-application document**)*
- (5) *If an agency or Minister gives a person access to a post-application document -*
 - (a) *no processing charge or access charge is payable in relation to the document; and*
 - (b) *the person is not entitled to a review under section 52 or part 5 in relation to a decision about the document made in relation to the application concerned.*
- (6) *The application for access to a document may not require an agency or Minister to search for the document from a backup system.*

(my emphasis)

26. The effect of this provision is that:

- freedom of information applications are taken to apply to documents of an agency that are, or may be, in existence on the day the application is received, however the agency may choose to give access to a document created after the application is received but before notice of a decision is given under section 34 (ie. the original decision)

- if the agency does give access to a document created after the application is received, the applicant is not entitled to either an internal review (under section 52 of the FOI Act) or an external review (under part 5 of the FOI Act) of a decision made about that document.

27. I have considered the application of section 25 to the matter in issue in this review.

28. In the FOI Application, the applicants sought access to:

... all documentation relating to complaints made against [their] principal place of residence: 5 McMahon Lane Monkland, Qld, Lot 3 MPH 24179, Parish of Gympie and, complaints made about the residents, namely the Pflugrath Family

and said:

[they] would like all copies of documents in regard to any complaint made between the period of 12 April 2006 and 16 November 2007. With special emphasis being placed upon recent complaints made on approximately 29 October 2007 & 12 November 2007. The latter being a noise complaint, with council attending 15 November 2007.

29. I have examined the documents in issue in this review and note the following:

- with the exception of document 22, dates on the documents in issue indicate when each document was either created or received by Council
- dates on the documents in issue indicate that each of documents 7 - 21 was either created or received by Council after the date the FOI Application was received
- dates appearing on documents 1, 2, 4, 23 and ER27 indicate that each of these documents was either created or received by Council prior to the date the FOI Application was received
- Council confirmed during the course of this review that:
 - each of documents 7 – 21 was created or received by Council after the date the FOI Application was received
 - document 22 was received by Council as an attachment to document 1 and was received by Council prior to the date the FOI Application was received.

Summary – application of section 25(5) of the FOI Act

30. Accordingly, on the basis that documents 7 – 21 were either created or received by Council after the date the FOI Application was received, I do not have jurisdiction to review the decision under review in respect of documents 7 – 21.

Section 44(1) of the FOI Act

31. In the decision under review, Council claimed:

- all of document 22 qualified for exemption from disclosure under section 41(1) and 44(1) of the FOI Act
- parts of documents 1, 2, 4 and 23 qualified for exemption from disclosure under section 44(1) of the FOI Act.

32. I have considered the application of section 44(1) of the FOI Act to documents 1, 2, 4, 22, 23 and ER27.

33. Section 44(1) of the FOI Act provides:

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.*

...

34. Section 44(1) therefore requires me to consider the following questions in relation to the matter in issue:

- firstly, does the matter in issue concern the personal affairs of person/s (other than the applicants) (**Personal Affairs Question**)? If so, a public interest consideration favouring non-disclosure of the matter in issue is established
- secondly, are there public interest considerations favouring disclosure of the matter in issue which outweigh all public interest considerations favouring non-disclosure of the matter in issue (**Public Interest Question**)?

Personal Affairs Question

What are personal affairs of a person?

35. In *Stewart and Department of Transport (Stewart)*¹, a previous decision of this Office, the Information Commissioner discussed in detail the meaning of the phrase 'personal affairs of a person' as it appears in the FOI Act. In particular, the Information Commissioner found 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
- domestic responsibilities or financial obligations.

36. 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.

Information which identifies a person

37. The Information Commissioner has previously considered whether a person's name constitutes their personal affairs. In *Stewart*,² the Information Commissioner noted that:

- a person's name, address and telephone number were matters falling into the 'grey area' rather than within the 'core meaning' of the phrase 'personal affairs of a person'
- such matter must be characterised according to the context in which it appears.³

¹ (1993) 1 QAR 227.

² See (1993) 1 QAR 227 at paragraphs 86 – 90.

³ See also paragraphs 21 – 23 of *Pearce and Queensland Rural Adjustment Authority; Various Landowners (Third Party)* (1999) 5 QAR 242, which discusses various authorities on this point.

38. In the decision of *Byrne and Gold Coast City Council (Byrne)*⁴ (where the matter in issue concerned a complaint made by a local resident to the local Alderman about the length of grass on public land), the Information Commissioner found that the fact that a person made a complaint to an elected representative about a matter of concern to them, was information concerning that person's personal affairs.⁵ In reaching this conclusion, the Information Commissioner stated at paragraph 33:

In my opinion the making of that complaint was a personal affair of the third party ... [who] was acting in the capacity of a private citizen exercising a citizen's privilege to make a private approach to an elected representative about a matter of concern.

39. More specifically in *Byrne*, the Information Commissioner decided that the fact of making a complaint is to be distinguished from the substance of the complaint, which may or may not itself comprise information concerning the personal affairs of the complainant so as to qualify for exemption under section 44(1) of the FOI Act.⁶
40. Importantly, in *Stewart*, the Information Commissioner stated:

For information to be exempt under s.44(1) of the FOI Act, it must be information which identifies an individual or is such that it can readily be associated with a particular individual. Thus deletion of names and other identifying particulars or references can frequently render a document no longer invasive of personal privacy, and remove the basis for claiming exemption under s.44(1).⁷

Application to documents 1, 2, 4, 22, 23 and ER27

41. I have examined the documents in issue in this review, and considered the circumstances in which the matter in issue was received or created by Council. In this regard I note the following:
- broadly speaking, the documents in issue relate to complaints made in respect of activities undertaken at the applicants' property, and records of action undertaken by Council in relation to those complaints
 - the matter in issue in each document consists of one or more of the following: a name, address, telephone number, or other information which identifies or could identify a complainant
 - documents 1, 22 and ER27 contain a complainant's handwriting
 - given the nature of the complaints, and the small community in which the applicants and complainant resided at the time, it is possible that the applicants could identify the complainant in each case on the basis of:
 - the complainant's handwriting
 - other information contained in the documents.

Documents 1, 22 and ER27

42. Having considered documents 1, 22 and ER27, I am satisfied that in relation to each document:
- the complainant may be identified by their handwriting and other information contained in each document

⁴ (1994) 1 QAR 477.

⁵ Likewise, in *Stewart*, the Information Commissioner noted that the fact that the applicant had lodged complaints with a government department was a matter concerning their personal affairs.

⁶ (1994) 1 QAR 477 at paragraph 36.

⁷ *Stewart*, see paragraph 81.

- to disclose the identity of the complainant would disclose the personal affairs of a person other than the applicants
- the whole of each document is exempt from disclosure under section 44(1) of the FOI Act, subject to the application of the public interest balancing test.

Documents 2, 4 and 23

43. Having considered documents 2, 4 and 23, I am satisfied that:

- parts of these documents identify a complainant
- to disclose those parts of the documents would disclose the personal affairs of a person other than the applicants
- the parts of each document which concern the personal affairs of a person other than the applicants are exempt from disclosure under section 44(1) of the FOI Act, subject to the application of the public interest balancing test.

44. I am satisfied that the following parts of each document concern the personal affairs of a person other than the applicants:

Document	Personal affairs information
2	The words in the second bullet point following the word 'lodged'
4	The words between the words 'advised' and 'of' in the first line of the first bullet point
23	In the typed section: <ul style="list-style-type: none"> • the words between the words 'Rd.' and 'is' on the first line In the handwritten section: <ul style="list-style-type: none"> • the words between 'to' and '4.00pm' in the first bullet point • two words in the centre of the page which identify a complainant

Public Interest Question

45. Because of the way in which section 44(1) of the FOI Act is worded, the finding that matter concerns the personal affairs of persons other than an applicant must always tip the scales against disclosing that matter. The extent to which the scales are tipped varies from case to case according to the relative weight of the privacy interests attaching to the particular matter in issue.
46. Accordingly, as I am satisfied that documents 1, 22 and ER27 in their entirety and parts of documents 2, 4 and 23 concern personal affairs information of a person other than the applicants, it is necessary for me to consider whether there are public interest considerations that favour disclosure of that information which outweigh the public interest in protecting personal privacy and any other public interest considerations that favour not disclosing the information.

Public interest arguments favouring disclosure

Applicant's submissions

47. I have considered the Applicants' Submissions. In summary, the applicants submit that they seek access to the matter in issue because the applicants have:

- been treated unfairly by Council and Council did not show impartiality in dealing with the complaints
- suffered threats, intimidation, and financial and emotional distress arising out of the circumstances
- a right to confront untrue and vicious rumours and allegations.

48. An applicant's reasons for seeking access to documents under the FOI Act are not usually relevant, however, they may assist in identifying public interest considerations favouring disclosure of the matter in issue. The Applicants' Submissions identify the following public interest considerations favouring disclosure of the matter in issue:

- disclosure of information about how government functions are conducted can enhance the accountability of agencies in the performance of their functions
- obtaining information about the nature of complaints made, and the steps taken by the Council to address those complaints is of particular relevance and concern to the applicants giving rise to a justifiable 'need to know'.⁸

Weight of public interest considerations favouring disclosure

49. Having reviewed the documents (or parts of documents) which Council has already decided or agreed to release to the applicants in response to the FOI Application, I note that:

- in the course of investigating complaints, Council provided the applicants with verbal and written information relating to the nature of the complaints made and the applicants have had an opportunity to respond to those complaints
- while there is a general public interest in enhancing the accountability of Council for its investigation of, or action taken in response to, complaints, in this case the investigation by Council can be scrutinised without the identity of persons who provided information to Council being disclosed because the information which Council has already decided or agreed to release to the applicants sets out the allegations made and the actions of Council in response
- the information which Council has decided or agreed to release to the applicants (essentially, that information which does not concern the personal affairs of others) is sufficient to address the public interest considerations of accountability and the applicants' justifiable need to know the information.

50. Accordingly, in these circumstances, I find that little weight can be given to these public interest considerations which favour disclosure of the matter in issue.

Public interest arguments favouring non-disclosure

51. I consider that there are principally two public interest considerations favouring non-disclosure of the matter in issue. These are:

- the inherent public interest in protecting personal privacy if the matter in issue concerns the personal affairs of a person other than the applicant (**Privacy Interest**)
- the public interest in safeguarding the flow of information to agencies which will allow agencies to deal properly with complaints made to them (**Flow of Information**)⁹

⁸ See *Pemberton and The University of Queensland* (1994) 2 QAR 293, paragraphs 164 – 193.

Privacy Interest

52. As indicated above, there is an inherent public interest in protecting personal privacy if the matter in issue concerns the personal affairs of a person other than the applicant. An appropriate weight must be allocated to that interest, having regard to the character and significance of the particular matter in issue.¹⁰
53. Ordinarily, the weight to be accorded to the privacy interest in matter relating to the identities of persons providing information to Council in these circumstances is relatively high, unless that information has been treated in such a way as to reduce the weight of the privacy interest. For instance, if matter in issue could be obtained with little difficulty from sources in the public domain, or has received publicity in the media, and in particular, where an individual has volunteered (or consented to) the public disclosure of information, the weight that can be sensibly accorded to the protection of a privacy interest must be reduced.¹¹

Documents 1, 2, 4, 22 and 23

54. I am satisfied that the weight to be given the public interest consideration relating to the privacy interest inherent in the personal affairs information contained in these documents is relatively high.

Document ER27

55. On the basis of the information provided by Council, it is my understanding that the information contained in document ER27 has been treated in a way which may arguably reduce the weight of the privacy interest in that information. In particular I note that:
- a person wrote a letter to Council about a matter of concern
 - an elected representative of Council tabled that letter in an open Council meeting
 - the content of that letter was set out in an official Council minute which is accessible to the public.
56. On the other hand, I also note that:
- it is not the usual practice of Council to table letters of this type in an open Council meeting, or for the content of such letters to be set out in Council minutes which are accessible to the public
 - to my knowledge, that information has not had wide publication
 - the person who authored the letter:
 - did not themselves act in such a manner so as to publicise that information¹²
 - would have had a reasonable expectation that their identity would not have been disclosed¹³

⁹ See *Gifford and Redland Shire Council* (Unreported 29 January 2007) at paragraph 49.

¹⁰ See *Lower Burdekin Newspaper Company Pty Ltd and Burdekin Shire Council; Hansen, Covolo and Cross (Third Parties)* (2004) 6 QAR 328 at paragraph 23.

¹¹ See *Lower Burdekin Newspaper Company Pty Ltd and Burdekin Shire Council; Hansen, Covolo and Cross (Third Parties)* (2004) 6 QAR 328 at paragraph 24.

¹² See paragraph 34 of *Byrne*.

¹³ See further *Monks and Logan City Council* (Unreported, 16 November 1999) where in relation to comments supplied to Council by individuals, the Information Commissioner said at paragraph 33: ‘I consider that the individuals who completed comment sheets ought reasonably to have expected that

- the weight to be given to the public interest in a person's privacy is ordinarily quite high in these circumstances.

57. Accordingly, I am satisfied that some weight should be accorded the privacy interest in the matter in issue in document ER27.

Flow of information

58. A further public interest consideration favouring non-disclosure of the matter in issue, is the public interest in safeguarding the flow of information from members of the public concerning possible breaches of the law, which allows agencies, such as Council, to deal properly with complaints made to them.¹⁴ As the Assistant Commissioner said in *Kinder and Department of Housing*:¹⁵

Those essential public interests include ensuring that government agencies do not suffer any unwarranted hindrance to their ability to perform their important functions for the benefit of the wider Queensland community, as a result of any unwarranted inhibition on the supply of information from citizens, on whose co-operation and assistance government agencies frequently depend.

59. Members of the public would be less likely to provide such information to agencies if there was a possibility that information as to their identity would be disclosed to a person about whom a complaint was made.

60. I am therefore satisfied that the weight to be given to this public interest consideration (in relation to documents 1, 2, 4, 22, 23 and ER27) is relatively high.

Public interest considerations - summary

61. I have weighed the public interest considerations which favour disclosure and favour non-disclosure of the personal affairs information.

62. Whilst I acknowledge that there are a number of public interest considerations which favour disclosure, and that the relative weight of the privacy interest attaching to the matter in document ER27 has been reduced, I consider that the documents or parts of documents which Council has already decided or agreed to release to the applicants provide the applicants with sufficient information to satisfy the public interest considerations favouring disclosure.

63. I am satisfied that the weight of the public interest considerations which favour non-disclosure of the matter in issue, including the privacy interest of persons whom provide information, and the free flow of that information to Council, continue to outweigh those public interest considerations in favour of disclosure of the matter in issue.

their comments might be disclosed in a public forum, whether in whole or in a summarised form ... however, I do not consider that they would have (or ought reasonably to have) expected disclosure of information about their identities in the same way'.

¹⁴ *Gifford and Redland Shire Council* (Unreported, 29 January 2007).

¹⁵ (Unreported, 12 March 2002) at paragraph 31.

Summary – application of section 44(1) of the FOI Act

64. I am satisfied that:
- parts of documents 2, 4 and 23 are exempt from disclosure under section 44(1) of the FOI Act
 - documents 1, 22 and ER27 are exempt in their entirety from disclosure under section 44(1) of the FOI Act.
65. Because I am satisfied that document 22 is exempt from disclosure under section 44(1) of the FOI Act, I have not been required to consider whether document 22 is exempt under section 41(1) of the FOI Act.
66. I note that Council is prepared to provide the applicants with a typed version of part of documents 1 and ER27. This will allow some matter in documents 1 and ER27 to be released to the applicants.
67. However, I am satisfied that the following matter continues to be exempt under section 44(1) of the FOI Act:
- name, address and telephone number
 - comments which could be attributed to the author.
68. This is because:
- the information identifies the author of the respective document
 - the fact of a person having made a complaint is that person's personal affairs
 - the public interest balancing test favours non-disclosure of that information.

DECISION

69. I find that:
- under section 25(5) of the FOI Act, I do not have jurisdiction to review the decision under review in respect of documents 7 – 21
 - parts of documents 2, 4 and 23 are exempt from disclosure under section 44(1) of the FOI Act
 - documents 1, 22 and ER27 are exempt from disclosure under section 44(1) of the FOI Act.
70. The decision under review is varied.
71. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

V Corby
Assistant Commissioner
Date: 16 March 2009