

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

L 17 of 1993
(Decision No. 95017)

Participants:

GARY ALPERT
Applicant

- and -

BRISBANE CITY COUNCIL
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents in issue relate to building approvals for a home on land adjoining the applicant's land - whether the documents in issue comprise information concerning the personal affairs of the neighbouring landowners for the purposes of s.44(1) of the *Freedom of Information Act 1992 Qld* - whether disclosure of the information to the applicant would, on balance, be in the public interest.

FREEDOM OF INFORMATION - applicant challenging sufficiency of search by the respondent for requested documents - whether there are reasonable grounds for believing that the requested documents exist and are in the possession or under the control of the respondent - whether the search efforts made by the respondent to locate the requested documents have been reasonable in all the circumstances of the case.

Freedom of Information Act 1992 Qld s.44(1)

Robbins and Brisbane North Regional Health Authority, Re (Information Commissioner Qld, Decision No 94019, 19 August 1994, unreported)

Shepherd and Department of Housing, Local Government & Planning, Re (Information Commissioner Qld, Decision No. 94007, 18 April 1994, unreported).

Smith and Administrative Services Department, Re (1993) 1 QAR 22

Stewart and Department of Transport, Re (1993) 1 QAR 227

Woodyatt and Minister for Corrective Services, Re (Information Commissioner Qld, Decision No. 95001, 13 February 1995, unreported)

DECISION

I affirm the decision under review, being the decision made on behalf of the respondent by Mr R N Metcalfe on 30 July 1993.

Date of Decision: 15 June 1995

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F N ALBIETZ
INFORMATION COMMISSIONER

Participants:

GARY ALPERT
Applicant

- and -

BRISBANE CITY COUNCIL
Respondent

REASONS FOR DECISION

Background

1. Mr Alpert seeks review of the respondent's decision to refuse him access to documents relating to a building application for a domestic residence. The building application was lodged with the respondent by the owners of land adjoining a block of land which was owned by Mr Alpert at the time he made his application for access under the *Freedom of Information Act 1992* Qld (the FOI Act) (the land has subsequently been sold by Mr Alpert). In these reasons for decision, I will refer to the owners of the adjoining block as the "third parties". The documents in issue are claimed by the Brisbane City Council (the Council) to be exempt under s.44(1) of the FOI Act (the personal affairs exemption). Mr Alpert also claims that the Council has failed to locate and deal with all documents falling within the terms of his FOI access application.

2. On 8 June 1993, the Council received from Mr Alpert an application for access to documents relating to the property owned by the third parties, in the following terms:

In relation to the above property which borders on my property and with which we share a common retaining wall, I would like full access to all of the building application plans and such other documents, plans, requirements etc. that were filed in relation to the putting on of fill, building of the house and retaining wall on this property which is owned by [the third parties] ... Further in relation to this property, I also want all information that is available regarding the sub-divisional plans that were filed ... to split this land off from the original piece that it was part of.

Please note I would ask to see all formal applications, all correspondence from the Council as well as from the owners of Lot 2 [i.e., the third parties] and the original sub-dividers/developers and all Council diary notes of any meetings and/or verbal discussions.

3. By letter dated 3 July 1993, the Principal Officer of the Council, Mr R N Metcalfe, decided to grant Mr Alpert access to all material regarding the original subdivision of the land of which the third parties' property formed part, but refused access to what he described as the building application and building plans for the third parties' property, on the basis that this matter was exempt under s.44(1) of the FOI Act.

4. After examining the material which was released to him, Mr Alpert applied for review under Part 5 of the FOI Act in respect of the Principal Officer's decision. In that application for review dated

30 September 1993, Mr Alpert referred for the first time to his interest in documents relating to a swimming pool which had been constructed on the third parties' property. He also indicated that he was particularly interested in documents relating to the construction of the retaining wall which faced his property, saying:

I have subsequently learned from various sources that in relation to the retaining wall this information File "may be missing" but that "no-one is exactly sure" and that at the same time, there may not have been any approval for the retaining wall at all ever obtained ...

5. Mr Alpert's application for review therefore raises three issues for my consideration:
 - (a) whether documents relating solely to the swimming pool fall within the scope of his FOI access application;
 - (b) whether the Council has carried out sufficient searches to identify and deal with all documents which fall within the terms of his FOI access application; and
 - (c) whether the documents to which Mr Alpert has been refused access by the Council are exempt under s.44(1) of the FOI Act.

The external review process

6. The documents claimed by the Council to be exempt were obtained and examined. The documents consist of an application for building approval for a house, and ancillary documents including plans, amended plans and supplementary plans; the approval and conditions attached to it; correspondence between the Council and the third parties relating to the application; consultants' reports and reports of Council officers relating to the application and the progress of construction work.
7. I contacted the third parties to establish whether they objected to Mr Alpert obtaining access to the documents in issue and whether they sought to become participants in this application. The third parties wrote to me stating that they objected to release of the documents, and outlining the reasons for their objection, but indicated that they did not wish to become participants.
8. I also obtained further information from Council officers regarding the claim that the documents in issue are exempt and Mr Alpert's claim that further documents exist which fall within the terms of his FOI access application.
9. A member of my staff held a conference with Mr Alpert on 12 May 1994 to discuss the nature of the exemption claimed and the public interest factors which might be relevant to the operation of s.44(1) of the FOI Act in this case. On 31 May 1994, I wrote to the applicant advising him of my preliminary views in relation to the matters in issue in this review and inviting him, if he did not agree with those views, to provide me, by 24 June 1994, with any evidence and submissions he might wish to make in support of his application for review. No response was received. Despite further correspondence and telephone contact (in which Mr Alpert informed my staff that he wished to pursue access to the documents in issue, and intended to forward a submission) nothing further was received from Mr Alpert by the final deadline which I set for him to lodge a submission (7 November 1994).

Scope of the FOI access application

10. In his application for external review, Mr Alpert indicated that he wished to obtain access to

documents concerning a swimming pool which had been built on the third parties' property. As can be seen from paragraph 2 above, Mr Alpert's initial FOI access application did not refer to a swimming pool. While the original building application appears to have contemplated that a swimming pool might be built at some stage in the future (a swimming pool was included in site plans, but was clearly marked "not in this building application"), the approval granted by the Council did not relate to the construction of a swimming pool.

11. Insofar as documents relating to the original building application refer to a swimming pool, they fall within the terms of Mr Alpert's FOI access application. This has been accepted by the Council, and documents of this type referring to a swimming pool were considered in the Principal Officer's decision of 30 July 1993.
12. However, any documents which may have been created in the course of a separate building application for the construction of a swimming pool raise an entirely different question for my consideration. I cannot, on any fair reading of Mr Alpert's FOI access application, interpret it to include a request for documents relating to a separate building application for the construction of a swimming pool. My jurisdiction to review Mr Metcalfe's decision is limited to a review of his decision to refuse Mr Alpert access to documents falling within the terms of Mr Alpert's FOI access application dated 8 June 1993. It is not possible for an applicant to unilaterally extend the terms of an FOI access application at the external review stage: see *Re Robbins and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94019, 19 August 1994, unreported). I therefore find that I have no jurisdiction, in this review, to deal with Mr Alpert's request, in his application for review, for documents relating to the subsequent construction of a swimming pool on the third parties' property.

Sufficiency of search

13. I have previously considered my jurisdiction, and powers on review, in respect of sufficiency of search issues in my decisions in *Re Smith and Administrative Services Department* (1993) 1 QAR 22 and *Re Shepherd and Department of Housing, Local Government & Planning* (Information Commissioner Qld, Decision No. 94007, 18 April 1994, unreported). In *Re Shepherd*, I said at paragraphs 18-19:

18. *It is my view that in an external review application involving 'sufficiency of search' issues, the basic issue for determination is whether the respondent agency has discharged the obligation, which is implicit in the FOI Act, to locate and deal with (in accordance with Part 3, Division 1 of the FOI Act) all documents of the agency (as that term is defined in s.7 of the FOI Act) to which access has been requested. It is provided in s.7 of the FOI Act that:*

"document of an agency' or 'document of the agency' means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes -

- (a) a document to which the agency is entitled to access; and
- (b) a document in the possession or under the control of an officer of the agency in the officer's official capacity;"

19. *In dealing with the basic issue referred to in paragraph 18, there are two*

questions which I must answer:

(a) *whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency (as that term is defined in s.7 of the FOI Act);*

and if so,

(b) *whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.*

14. In his application for external review, Mr Alpert referred to the possible existence of other documents which related to the retaining wall built on the third parties' property (see paragraph 2 above). In response to this assertion, Mr Metcalfe, in a letter dated 21 October 1993, stated:

At [the time Mr Alpert inspected those documents to which access was granted], it was explained to Mr Alpert that, apart from a reference to a retaining wall on the exempt building plans (which was originally interpreted as a brick wall solely within the [third parties'] property and not the subject retaining wall), no files or other documents regarding the retaining wall had been located.

15. Mr Metcalfe went on to state that, nevertheless, a further search was carried out by the Department of Development and Planning of the Council, for records which might relate specifically to the retaining wall and any additions thereto, but that no further documents were located.
16. Mr Metcalfe did, however, advise that a file had been mislaid which related to an application for approval of a fence which was built on the Group Title Subdivision of which the third parties' property formed a part. It may be that Mr Alpert misinterpreted a reference to this Minor Building Plan as being a reference to a missing file which fell within the terms of his application. Mr Metcalfe has indicated that it is highly unlikely that a file relating to construction of a fence on a Group Title Subdivision (which may or may not have been built on the third parties' property) would fall within the terms of Mr Alpert's FOI access application. I accept that it is unlikely that such a file would contain documents which fall within the terms of Mr Alpert's application and in any event I am satisfied that the Council has carried out all reasonable searches to locate the file.
17. I do not, therefore, consider that there are any reasonable grounds to believe that further documents exist which fall within the terms of Mr Alpert's FOI access application. I am further satisfied that the search efforts made by the Council to locate any further documents have been reasonable in all the circumstances.

Section 44(1) of the FOI Act

18. The Council has claimed that the documents in issue are exempt under s.44(1) of the FOI Act. Section 44(1) provides:

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

19. In my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, I identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations

thereof) as it appears in the FOI Act (see paragraph 79-114 of *Re Stewart*). In particular, I said that information concerns "the personal affairs of a person" if it relates to the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:

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

Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, based on a proper characterisation of the matter in question.

20. The documents in issue relate to the construction by the third parties of their home, including the construction of a retaining wall which it appears, on the evidence available to me, is situated wholly within the third parties' property, but very close to its boundary with the adjoining property formerly owned by Mr Alpert. The documents in issue are a record of the third parties' dealings with the Council and various consultants in obtaining necessary approvals for the construction of their home. As such, they seem to me to fall within that zone of domestic affairs which is central to the concept of "personal affairs".
21. When consulted by the respondent in accordance with s.51 of the FOI Act, the third parties, understandably, objected to disclosure of detailed plans of their home:

On receipt of the requested documents a person could discover the layout of the residence, particularly disclosing details of sleeping arrangements of our teenage daughters, storage of valuables, details of door and window locking devices, security alarm position and operation of same, electrical switchboard detailing the point of entry and distribution of power in the residence, along with other personal information.

22. I think there can be little doubt that this constitutes information concerning the personal affairs of the third parties, for the purposes of s.44(1) of the FOI Act, and it is difficult to conceive of circumstances in which the public interest might favour disclosure of information of this kind to an unrelated person. In his application for review, Mr Alpert seems to accept this, focussing on other parts of the documents in issue.

... I believe it is quite unreasonable for access to be refused on this information because "it affects the personal affairs of this owner" and as it has been explained to me would be invading his privacy and cause concern to the individual regarding the release of information on his physical surroundings. It should be noted in the case of the retaining wall and the fill area (swimming pool complex), this area is open to public view and the height of the wall, the swimming pool and fill area is certainly not a "secret" which this person has to retain his privacy for. Indeed, one would assume that if this has been done properly, that the approval for the wall and the fill area merely confirms and is an exact copy of the details that are plainly in sight for the public to see anyway.

I do appreciate that the actual building plans for this person's house do involve a

somewhat different situation regarding the interior of the house and whether or not this person has a bidet in every bathroom and where his bedrooms are. Again, certainly this could easily be overcome for his concern for privacy and security by releasing the information on the exterior of the house regarding its position and height.

23. I do not accept that the fact that aspects of the exterior construction of a residence are in public view detracts from the proper characterisation of documents concerning the construction of the residence as comprising information concerning the personal affairs of the owners who reside in it. On the other hand, where construction work on a property is liable to affect, or has affected, the amenity of the property of neighbouring landowners, it is certainly arguable that there may be public interest considerations which favour disclosure of relevant documents to neighbouring landowners who may be, or have been, affected.
24. This may have been a relevant issue in the present case insofar as Mr Alpert asserts that construction of the retaining wall on the third parties' property has had an adverse effect on the amenity of the property which he owned at the time of lodgment of his FOI access application. However, I do not need to deal with this issue for two reasons.
25. The first is that the Council, having been alerted by Mr Alpert to his particular interest in the construction of the retaining wall, has made additional searches and inquiries to locate any documents in its possession or control which deal with the construction of the retaining wall. It was unable to locate any such documents. The details of the Council's searches and inquiries were explained in a letter to me from Mr Metcalfe dated 21 October 1993. They were confirmed in the course of follow-up inquiries made by members of my staff with officers of the Council. I am satisfied that there are no reasonable grounds for believing that Council has possession or control of any documents regarding the retaining wall apart from incidental references on the building plans, which in my opinion are exempt under s.44(1) of the FOI Act.
26. The second reason is that, within six months of lodging his FOI access application, Mr Alpert had sold the land adjoining the third parties' property, to a corporation apparently engaged in construction and development. Mr Alpert is no longer a neighbouring landowner whose interests may be affected to a degree sufficient to warrant consideration of whether the public interest balancing test incorporated in s.44(1) might favour disclosure to him of relevant documents (if they existed). I note in this regard that, when exercising my jurisdiction under Part 5 of the FOI Act, I am to apply the relevant provisions of the FOI Act in light of the material facts and circumstances as they exist at the time I come to make a decision: see *Re Woodyatt and Minister for Corrective Services* (Information Commissioner Qld, Decision No. 95001, 13 February 1995, unreported) at paragraph 35.
27. During the course of the review, Mr Alpert raised a number of additional public interest considerations said to favour disclosure to him of relevant documents, which it is necessary for me to briefly address.
28. In his application for external review, Mr Alpert made the following statement in support of his claim that he should be granted access to the documents in issue:

I should further point out, however, that I do believe that any concern for privacy in this case is now more than overridden by the need for there to be full information available on this matter because of what seems to be numerous discrepancies on what is alleged to have been approved and not approved. As accountability and the ensuring of equal treatment for all in dealing with Government bodies is one of the main objects of the FOI Act, I do believe it is important that all of this information

be released.

29. Mr Alpert expanded on this submission in discussions with members of my staff in the course of this external review. The factors which he asserted give rise to a public interest in disclosure to him of the documents in issue are summarised below:
- The construction of a large retaining wall near the boundary of his property adversely affected the sale price of his property. Disclosure of the documents in issue would allow him to assess the prospects of success in a legal action to recover the loss he claims to have suffered in the sale of his property.
 - Mr Alpert has a continuing business relationship with the corporation which purchased his property and therefore has an interest in taking action which would benefit the new owners of the property. Access to the documents in issue would allow him to take such action.
 - There is a public interest in detecting whether offences have been committed in the illegal erection or extension of the retaining wall. Access to the documents in issue would assist him in establishing whether this is the case and in reporting any offence to the relevant authorities.
 - There is a public interest in ensuring public safety and the retaining wall at its present height constitutes a risk to safety of persons who may approach the retaining wall.
30. As to the first point raised above, I recognise that, in an appropriate case, there may be a public interest in an individual who has suffered an actionable wrong obtaining access to relevant information concerning the actionable wrong. However, in the circumstances of the present case it is by no means clear to me that Mr Alpert has suffered an actionable wrong. I raised my concern with Mr Alpert in a letter dated 31 May 1994, but he has not taken the opportunity to provide any evidence or submission to support his case in this regard. In the circumstances, I do not feel able to give any weight to a public interest consideration of this kind.
31. As to the second point raised by Mr Alpert, I note that he has provided no evidence or details of a business relationship with, or of action that might be taken to benefit, the new owners of the property. I have also sighted a letter dated 3 February 1994 to the Council from the corporation which purchased Mr Alpert's property, stating that the corporation has no objection to the retaining wall as it presently stands. In these circumstances, I do not feel able to give any credence or weight to this claimed public interest consideration.
32. As to the third and fourth points raised above, I acknowledge that there is a significant public interest in bringing to the notice of public authorities situations where offences have been committed, and situations where there is potential danger to members of the public. However, it is clear from my examination of the documents in issue that there is no information in them, the disclosure of which would further the public interest in the manner suggested. To the extent that there may have been, as alleged by Mr Alpert, construction work undertaken without the lodgment of proper documentation or the seeking of required approvals, Mr Alpert's actions have already resulted in Council officers investigating the retaining wall and the circumstances of its construction. In that sense, Mr Alpert's inquiries have already achieved their end and the public interest in Mr Alpert being able to raise these matters with the Council has been satisfied.
33. However, I recognise that on another level there is a public interest in enhancing public scrutiny of the Council to ensure the accountability of local government. In this case there are two relevant Council activities in which there is a public interest in allowing public scrutiny. The first is the public interest in ensuring that the Council has acted properly in granting building approvals and in

the inspection of building work carried out pursuant to those approvals. The second is whether the Council has taken appropriate action in relation to subsequent investigation of claims by Mr Alpert that there may have been a breach of Council bylaws and that the retaining wall presents a potential danger. With regard to the first Council activity, there is nothing in the documents in issue to indicate that the Council acted improperly in granting building approvals. While there remains a public interest in disclosure of documents relating to this activity, I do not consider that it is sufficient in the circumstances of this case to outweigh the *prima facie* public interest in the non-disclosure of information concerning the personal affairs of the third parties. With respect to the Council's investigation of Mr Alpert's complaint, none of the documents in issue deal with this matter. All the documents in issue relate to the original building approval sought by the third parties. The Council's investigations have been prompted by Mr Alpert's FOI access application, but documents detailing the results of those investigations do not fall within the terms of his FOI access application.

34. Having considered all the factors put forward by Mr Alpert in favour of disclosure of the documents in issue, I find that they do not outweigh the *prima facie* public interest in non-disclosure of information concerning the personal affairs of the third parties. I am therefore satisfied that the documents in issue are exempt under s.44(1) of the FOI Act.

Conclusion

35. I find that there are no reasonable grounds to believe that the Council has failed to locate and deal with all documents falling within the terms of Mr Alpert's FOI access application, and I affirm Mr Metcalfe's decision dated 30 July 1993 that the documents in issue are exempt under s.44(1) of the FOI Act.

F N ALBIETZ
INFORMATION COMMISSIONER