

LOURIGAN AND BRISBANE CITY COUNCIL

(L 1/95, 14 May 1996, Information Commissioner Albietz)

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

1.-5. These paragraphs deleted.

REASONS FOR DECISION

Background

6. This is a 'reverse FOI' application by Mr Lourigan, who objects to a decision by the respondent, the Brisbane City Council (the Council), to give [the original access applicant] access under the FOI Act to a document written by Mr Lourigan.
7. In his FOI access application dated 4 September 1994, [the access applicant] sought access to a copy of letter/memorandum sent from Works Dept-City Lighting Office North to Works Dept Human Resources Co-ordinator concerning allegations of harassment and/or competence of [the access applicant] ... dated in August 1994".
8. The Council's Freedom of Information Officer, Mr P Wesener, identified one document as falling within the terms of [the access applicant's] FOI access application. It is a memorandum dated 8 August 1994 from Mr Lourigan to Ms Kerry Meehan (hereinafter referred to as the document in issue) which in essence asserts (by reference to a series of workplace incidents) that Mr Lourigan had been victimised by [the access applicant].
9. In accordance with s.51 of the FOI Act, Mr Wesener consulted Mr Lourigan about disclosure to [the access applicant] of the document in issue. Mr Lourigan objected to the disclosure of the document in issue, citing s.40(c) of the FOI Act, and continuing:

It should be noted that [the access applicant] has resigned from Council and he could make unsubstantiated defamatory comments to others about me without fear of disciplinary action.

Furthermore, if a copy of my memo is released to [the access applicant] and he elects to show others, it could deter other employees from lodging a complaint about victimisation and therefore undermine the integrity of the process.

10. By letter dated 28 October 1994, Mr Wesener informed Mr Lourigan of his decision to give [the access applicant] access to the document in issue, stating his reasons for decision as follows:

... I do not believe that the disclosure of the document could reasonably be expected to have a substantial adverse effect on the management or assessment by the Council of its personnel.

Whilst I recognise that it is in the Council's interest for employees to be able to submit reports of alleged misconduct or harassment by other employees and that such reports assist the organisation to manage its personnel, I also believe that the individuals, against whom the reports have been made, have a right to be informed of the allegations made against them and to respond to those allegations.

Whilst it could be argued that the release of such documents could have an adverse effect on the future supply of such information to the Council, I do not believe that the effect would be substantial. I also believe that it would be in the public interest/or the document to be released.

11. By application dated 24 November 1994, Mr Lourigan requested an internal review of Mr Wesener's decision, advancing the following additional grounds in support of his case for exemption:

... I made my complaint in confidence about another council officer expecting any investigation to remain internal.

This is no longer the situation as [the access applicant] has resigned from Council.

Releasing confidential documents to an "outsider" could be seen by other officers as a "breach of trust" and therefore have an adverse effect on confidence in the system.

12. Mr Neil Boge, Acting Director-Legal Services Branch, carried out the internal review of Mr Wesener's decision and, on 7 December 1994, affirmed that decision. More specifically, Mr Boge rejected Mr Lourigan's claim that the document in issue was exempt under s.40(c), saying that the release of the document could not:

... reasonably be expected to have an effect on the Council's relationship with its staff and its ability to manage that staff or assess its performance that is sufficiently serious or significant to warrant concern to a reasonable person.

13. Mr Boge considered Mr Lourigan's claims (in his application for internal review)

about confidentiality against the requirements for exemption under s.46(1)(b) of the FOI Act. Mr Boge said:

For a claim that a document is exempt under s.46(1)(b) to be upheld, it must first be established that -

- (a) the contents of the document are information of a confidential nature;*
- and*
- (b) the information in the document was communicated in confidence;*
- and*
- (c) the disclosure of the document could reasonably be expected to prejudice the future supply of like information.*

Certain details of what is contained in the document have already been disclosed to [the access applicant]. Requirement (a) can hardly then be met. Further, I do not consider requirement (b) can be met. While the author of the document may have hoped that certain aspects of the document might not be made known to certain persons, it is unrealistic to suggest that any proper action could be taken with respect to what is contained in the document if confidentiality of the information conveyed was intended to be preserved.

14. In considering the public interest balancing test in relation to the application of s.46(1)(b), Mr Boge further stated:

The submission of reports by employees of the Council claiming misconduct or harassment by other employees of the Council is no doubt of concern to the Council and may assist the Council in its management of its staff. Disclosure of the contents of any such report may well mean that the future supply of the information to the Council in like reports is diminished.

It is, however, desirable that the persons adversely commented upon in such reports be given the opportunity to answer allegations made against them. This cannot be done if disclosure of such reports is prevented. In these circumstances, I think the disclosure of the material in the document would be, on balance, in the public interest.

15. By letter dated 5 January 1995, Mr Lourigan applied to me for external review under Part 5 of the FOI Act, of Mr Boge's decision.
16. The participants in this external review are:

- Mr Lourigan (the applicant);
- the Council (the respondent); and
- the original applicant for access to the document in issue who applied for, and

was granted, status as a participant in accordance with s.78 of the FOI Act.

Applicable Law

17. Section 21 of the FOI Act confers a legally enforceable right to be given access, under the FOI Act, to documents in the possession or control of an agency which is subject to the FOI Act. The Council is an agency subject to the FOI Act. The general right of access conferred by s.21 of the FOI Act is subject only to limitations to be found in the FOI Act itself, chief of which is s.28(1) of the FOI Act which provides:

28(1) An agency or Minister may refuse access to exempt matter or an exempt document.

18. Mr Lourigan's case that the document in issue is exempt matter under the FOI Act has been presented in terms of the exemptions contained in s.40(c) and s.46(1) of the FOI Act. Section 46(1) provides:

46(1) Matter is exempt matter if—

(a) its disclosure would found an action/or breach of confidence; or

(b) it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.

19. Section 40(c) of the FOI Act provides:

40 Matter is exempt matter its disclosure could reasonably be expected to—

...

(c) have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or

unless its disclosure would, on balance, be in the public interest.

Application of s.46(1) of the FOI Act

Evidence

20. I have taken into account all of the submissions made by the applicant and

respondent in this external review, but for the purposes of my decision, I will outline only the more persuasive evidence submitted to me.

21. In his application for external review dated 5 January 1995, the applicant stated his reasons for objecting to the release of the document in issue as:

1. *The complaint was made as a result of a work related issue and now that the person I complained about has resigned and left Council, there is not a problem and it should not be an issue to him either.*
2. *My memorandum was originally prepared for our grievance mediation officer to be used for a basis for resolving the problem and not to be embroiled in FOI matters.*
3. *I did agree to a conditional release of the document on the grounds that the document not be shown to any other person, period.*

Because the other party did not agree to this I now believe he may make copies and send them to others within Council who may be sympathetic to his views and continue his vendetta.

22. By letter dated 3 October 1995, I sought from the Council information as to the extent to which the document in issue had been disclosed to [the access applicant] and the circumstances in which the disclosure was made.

23. The Council in its letter to me dated 6 October 1995 advised of the details of the meeting which took place between Ms Kerry Meehan, Human Resources Co-ordinator, Department of Works, and [the access applicant], following Ms Meehan's receipt of the applicant's memorandum. Ms Meehan's recollection of relevant details of the meeting, as conveyed to me by the Council, was as follows:

- Upon receiving Mr Lourigan's memorandum, Ms Meehan, as Human Resources Coordinator, arranged a meeting with [the access applicant] to discuss the issues raised in the memorandum.
- At the meeting with [the access applicant], Ms Meehan gave [the access applicant] the memorandum to read so that he was aware of the nature of the complaint and would be in a position to comment on it. Ms Meehan, however, refused to give [the access applicant] a copy of the memorandum because it was addressed to her.
- After the meeting, Ms Meehan advised Mr Lourigan of her actions.
- Ms Meehan's actions were taken in an endeavor to mediate the difference of opinions between the officers concerned; however, mediation was not agreed to by either party.

24. The Council also provided this office with Mr Wesener's notes of a meeting on 11 October 1994 attended by Mr Wesener, Ms Meehan and Mr Lourigan regarding [the access applicant's] application for access under the FOI Act. The notes record

that, during the course of that meeting, the applicant indicated to those present that it had not been his intention for the memorandum to be treated confidentially.

Further, the applicant indicated that he was prepared to allow a copy of the document to be given to [the access applicant] subject to certain conditions.

25. However, I note that despite receiving a copy of the Council's submission in this regard, the applicant continues to maintain that the document was provided to Ms Meehan with the intention that it be treated confidentially.

Application of s.46(1) to the document in issue

26. In my decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1) of the FOI Act. The test for exemption under s.46(1)(a) is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of an agency or Minister faced with an application, under s.25 of the FOI Act, for access to the information in issue (see *Re "B"* at pp.296-7, paragraph 44). In this instance, the applicant would necessarily be the hypothetical plaintiff.
27. To found an action in equity for breach of confidence, there are five cumulative criteria which must be satisfied:
 - (a) it must be possible to specifically identify the information in issue, in order to establish that it is secret, rather than generally available information (see *Re "B"* at pp.303-304, paragraphs 60-63);
 - (b) the information in issue must possess "the necessary quality of confidence"; i.e., the information must not be trivial or useless information, and it must possess a degree of secrecy sufficient for it to be the subject of an obligation of conscience, arising from the circumstances in or through which the information was communicated or obtained (see *Re "B"* at pp.304-310, paragraphs 64-75);
 - (c) the information in issue must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see *Re "B"* at pp.311-322, paragraphs 76-102);
 - (d) it must be established that disclosure to the applicant for access under the FOI Act would constitute a misuse, or unauthorised use, of the confidential information in issue (see *Reba"* at pp.322-324, paragraphs 103-106); and
 - (e) it must be established that detriment is likely to be occasioned to the original confider of the confidential information in issue if that information were to be disclosed (see *Re "B"* at pp.325-330, paragraphs 107-118).

28. On the evidence presented, there is no dispute that [the access applicant] was shown the document in issue and given the opportunity to read it at the meeting with Ms Meehan. Therefore, the contents of the document in issue are not confidential information *vis-à-vis* [the access applicant]. The second criterion set out above is not satisfied. Therefore, the document in issue is not exempt from disclosure to [the access applicant] under s.46(1)(a) of the FOI Act.
29. In *Re "B"* (at pp.337-341), I also considered the issues involved in the interpretation and application of s.46(1)(b) of the FOI Act. In order to establish the *prima facie* ground of exemption under s.46(1)(b), three cumulative requirements must be satisfied:
 - (a) the matter in issue must consist of information of a confidential nature;
 - (b) that was communicated in confidence;
 - (c) the disclosure of which could reasonably be expected to prejudice the future supply of such information.
30. If the *prima facie* ground of exemption is established, it must then be determined whether the *prima facie* ground is displaced by the weight of identifiable public interest considerations which favour the disclosure of the particular information in issue.
31. Application of the first requirement for exemption under s.46(1)(b) calls for a consideration of the same matters that would be taken into account by a court in determining whether, for the purpose of satisfying the second criterion of the equitable action for breach of confidence, the information in issue has the requisite degree of relative secrecy or inaccessibility (see *Re "B"* at p.137, paragraph 148). Since, as I have found at paragraph 28 above, the contents of the document in issue are not confidential information *vis-à-vis* [the access applicant], the document in issue does not qualify for exemption under s.46(1)(b) of the FOI Act.
32. I should point out, however, that my finding that the document in issue is not exempt from disclosure to [the access applicant] under s.46(1) of the FOI Act should not be taken to mean that the document would not be exempt from disclosure to other persons who might seek access to it under the FOI Act (assuming the document to be confidential *vis-à-vis* those other persons). Agency grievance procedures (of the kind Mr Lourigan's memorandum seems to have been intended to invoke) generally proceed on the express or implicit understanding that information conveyed to the participants in the grievance procedure, for the purposes of the grievance procedure, is to remain confidential to the participants. (I note, however, that I have not sought evidence from the Council as to the terms of formal grievance procedures established for its staff, since it was not necessary evidence in the context of this case).

33. The situation which has arisen with respect to the document in issue in this case is somewhat similar in nature to that considered in *Re Shaw and The University of Queensland; L'Estrange (Third Party)* (Information Commissioner Qld, Decision No. 95032, 18 December 1995, unreported) in respect of the document identified in my reasons for decision in that case at document 1. My comments in paragraph 19 of *Re Shaw* are also relevant to the application of s.46(1) in the present case, and my comments in paragraphs 20-25 of *Re Shaw* may also be of interest to the participants in this case. I will forward a copy of *Re Shaw* to each participant in this case together with those reasons for decision.

Application of s.40(c)

34. The terms of s.40(c) are set out at paragraph 19 above. The focus of this exemption provision is on the management or assessment by an agency of the agency's personnel. The exemption will be made out if it is established that disclosure of the document in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by the Council of its personnel, unless disclosure of the document in issue would, on balance, be in the public interest.
35. The phrase, "could reasonably be expected to", has the same meaning in s.40(c) of the FOI Act as it does in s.46(1)(b) of the FOI Act, which meaning was explained in *Re "B"* at pp.339-341, paragraphs 154-161. In particular, I stated at pp.340-341 (paragraph 160), that the words call for the decision-maker to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative, conjectural expectations and expectations which are reasonably based, i.e., expectations for the occurrence of which real and substantial grounds exist).
36. I have previously considered the meaning of the adjective "substantial" in the phrase "substantial adverse effect" contained within s.40(c), and expressed the view that it is used in the sense of "grave, weighty, significant or serious" (see *Re Cairns Port Authority and Department of Lands; Cairns Shelfco, Third Party*, (1994) 1 QAR 663 at pp.724-725; paragraphs 147-150).
37. In the Council's internal review decision, Mr Boge found that:
- while it might be accepted that disclosure of the document could have some adverse effect on the Council's relationship with its staff and its ability to manage that staff or assess its performance, I do not consider the document could reasonably be expected to have an effect on the Council's relationship with its staff and its ability to manage that staff or assess its performance that is sufficiently serious or significant to warrant concern to a reasonable person.*
38. I do not consider that the prospect of disclosure of this work-related complaint to

the subject of the complaint could reasonably be expected to have a substantial adverse effect on the management or assessment by the Council of its personnel, especially where the subject of the complaint ([the access applicant]) has already been given the opportunity to read the complaint.

39. I am prepared to accept, however, that the task of constructively addressing staff problems, of the kind which arose between Mr Lourigan and [the access applicant], has greater prospects of success through co-operative effort if the process remains confidential to those involved in the staff dispute. In *Re Pemberton and The University of Queensland* (Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported) at paragraph 154, I said:

... Section 40 [of the FOI Act] is an exemption provision of a kind where it is ordinarily proper in assessing the relevant prejudicial effects of disclosure of the matter in issue, to have regard to the effects of disclosure on persons other than just the particular applicant for access under the FOI Act. (I say "ordinarily", for the reasons explained at paragraph 165-172 below).

40. It is not necessary that I consider whether this is an appropriate case for departure from the ordinary approach, or whether (applying the ordinary approach) a substantial adverse effect on the management or assessment by the Council of the Council's personnel could reasonably be expected. It is sufficient that I state my finding that, applying the principles explained in *Re Pemberton* at paragraphs 164-193, I am satisfied that disclosure of the document in issue to [the access applicant] would, on balance, be in the public interest. [The access applicant's] involvement in, and concern with, the information in the document in issue gives rise to a public interest in his having access to what is recorded about him. This, allied with the public interest in the fair treatment of an individual (against whom allegations damaging to employment reputation and career prospects have been made) is sufficient to justify a finding that disclosure of the document in issue to [the access applicant] would, on balance, be in the public interest.
41. I am satisfied that the document in issue is not exempt from disclosure to [the access applicant] under s.40(c) of the FOI Act.
42. Finally, I note that Mr Lourigan has expressed concerns about threats of defamation action against him conveyed in letters from [the access applicant's] solicitors. I do not think this affects the question of disclosure of the document in issue under the FOI Act. I would be surprised if the threatened defamation action relates to alleged defamatory statements contained in the document in issue in this review. If, as appears to me to have been the case, the document in issue was forwarded by Mr Lourigan with the intent of invoking the Council's workplace grievance procedures, I should have thought that the defence of qualified privilege was available to Mr Lourigan in respect of any defamatory statements contained in the

document in issue. But in any event, given that the document in issue has previously been identified to [the access applicant], and read by him, [the access applicant] would have no difficulty (whether by subpoena or other curial process) in compelling the production of that document to a court dealing with an action for defamation. Disclosure of the document in issue to [the access applicant] under the FOI Act could not, in my opinion, disadvantage Mr Lourigan any further with respect to any threatened defamation action based on statements in the document in issue

DECISION

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