OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 97012
Application S 71/97

Participants:

A MEMBER OF THE LEGISLATIVE ASSEMBLY
Applicant

QUEENSLAND CORRECTIVE SERVICES COMMISSION
Respondent

A PRISONER
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - 'reverse FOI' application - whether document to which third party seeks access is excluded from the application of the *Freedom of Information Act 1992* Qld by s.11(1)(b) of that Act - document in issue a letter from a Member of the Legislative Assembly to the respondent, held in the files of the respondent.

FREEDOM OF INFORMATION - 'reverse FOI' application - letter from applicant to respondent conveying concerns about the possible grant of parole to the third party - whether letter communicated in confidence - whether disclosure could reasonably be expected to prejudice future supply of like information - application of s.46(1)(b) of the *Freedom of Information Act 1992* Qld - whether disclosure could reasonably be expected to prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety - whether any identifiable method or procedure - whether any prejudice to maintenance or enforcement of a method or procedure - application of s.42(1)(f) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.7, s.11(1), s.11(1)(b), s.11(1)(j), s.21, s.25, s.42(1)(e), s.42(1)(f), s.46(1)(b), s.52
Freedom of Information Act 1982 Cth s.37(2)(c)

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Beanland and Department of Justice and Attorney-General, Re (Information Commissioner Qld, Decision No. 95026, 14 November 1995, unreported)
Brack and Queensland Corrective Services Commission, Re (1994) 1 QAR 414
Byrne and Gold Coast City Council, Re (1994) 1 QAR 477
Orreal v Queensland Corrections Board (1995) 81 A Crim R 212
Parisi and Australian Federal Police, Re (1987) 14 ALD 11
Re Solomon [1994] 2 Qd R 97; (1992) 62 A Crim R 296
"T" and Queensland Health, Re (1994) 1 QAR 386
Thies and Department of Aviation, Re (1986) 9 ALD 454

DECISION

I find that the letter in issue is a document of an agency to which the *Freedom of Information Act 1992* Qld applies, and that the letter in issue is not exempt matter under the *Freedom of Information Act 1992* Qld. I affirm the decision under review (being the decision made on 15 April 1997 by Ms K Mahoney, on behalf of the respondent).

Date of decision: 25 July 1997

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. This is a 'reverse-FOI' application by a Member of the Legislative Assembly (whom I will refer to as "the MLA", since his identity as the author of the letter in issue is claimed to be exempt as confidential information) who objects to the respondent's decision to grant the third party access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to a letter written by the MLA to the Chairman of the respondent. The letter conveys concerns raised with the MLA by members of the public regarding the possible grant of parole to the third party. The MLA contends that s.11(1)(b) of the FOI Act excludes the letter in issue from the application of the FOI Act, or, in the alternative, that the letter comprises exempt matter under s.42(1)(f) and s.46(1)(b) of the FOI Act.

2. The third party is an inmate of a Queensland correctional centre. By application dated 10 December 1996, the third party sought access to numerous documents relating to him held by the Queensland Corrective Services Commission (the QCSC). By letter dated 4 March 1997, Ms P Cabaniuk, on behalf of the QCSC, advised the third party that she had located 263 pages falling within the terms of his FOI access application. Ms Cabaniuk decided that the third party should be granted access to the majority of those documents but refused him access to a number of other documents. The third party sought internal review, in accordance with s.52 of the FOI Act, of Ms Cabaniuk's decision to refuse him access to a number of documents on his Central Office Inmate File, including the letter in issue in this review.

3. The MLA was consulted during the course of the internal review. The MLA objected to the disclosure to the third party of the letter in issue on the basis that it was a letter written from the MLA's electorate office and that "*Electorate Office matters are exempt from FOI applications*". The internal review decision was made on behalf of the respondent by Ms K Mahoney on 15 April 1997. Ms Mahoney decided, *inter alia*, that the original letter from the MLA held on a QCSC file was a "document of an agency" which was subject to the application of the FOI Act, and that it was not exempt matter under the FOI Act.

4. By letter dated 7 May 1997, the MLA applied to me for review, under Part 5 of the FOI Act, of Ms Mahoney's decision that the third party should be given access to the letter in issue.

External review process

5. The letter in issue was obtained and examined. It is a brief letter, some four sentences in length, which conveys concerns raised with the MLA by members of the public about the possible grant of parole to the third party. The letter does not contain the names of any persons who raised concerns, nor any other information by which those persons could be identified.

6. In a letter to the MLA dated 16 May 1997, I discussed the application of s.11(1)(b) of the FOI Act which relevantly provides that the FOI Act does not apply to a Member of the Legislative Assembly (see paragraph 9 below for the full text of the provision). I then conveyed to the MLA my preliminary view that s.11(1)(b) of the FOI Act does not apply so as to exclude from the application of the FOI Act a document which was created by or on behalf of a Member of the Legislative Assembly, once that document comes into the possession of an agency which is subject to the FOI Act, such as the QCSC. I also provided the MLA with an extract from the FOI Act setting out the exemption provisions contained in Part 3, Division 2, and invited him to notify me of any exemption provisions he considered to be applicable to the letter in issue. In concluding my letter, I said:

> *If you wish to contend that the FOI Act does not apply to your letter, and/or to contend that it is exempt matter under one or more provisions of the FOI Act, I invite you to lodge a written submission and/or evidence in support of your contentions. Any written submission should set out the material facts and circumstances, any legal arguments, and (if relevant) any public interest considerations relied upon in support of your contentions. Any evidence should be in the form of sworn affidavits or statutory declarations, which annex as exhibits any relevant documentary evidence.*

7. The MLA responded, objecting to disclosure of the document in issue on the following grounds:

   - *Section 11(1)(b) in that I am a Member of the Legislative Assembly;*
   - *Section 42(1)(f) because I was acting in the matter to protect public safety;*
   - *Section 46(1)(b) because my supply of confidential information may cease if this letter is released.*

8. The MLA did not provide any more detailed submissions, or any evidence, in support of his case in this review.

Relevant provisions of the FOI Act

9. The following provisions of the FOI Act are referred to in my reasons for decision.

Definitions

7. *In this Act—*

...

*"**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;

Act does not apply to certain bodies etc.

11.(1) *This Act does not apply to—*

...

(b) the Legislative Assembly, a member of the Legislative Assembly, a committee of the Legislative Assembly, a member of a committee of the Legislative Assembly, a parliamentary commission of inquiry or a member of a parliamentary commission of inquiry; …

Right of access

21. *Subject to this Act, a person has a legally enforceable right to be given access in accordance with this Act to—*

(a) documents of an agency; and

(b) official documents of a Minister.

Matter relating to law enforcement or public safety

42.(1) *Matter is exempt matter if its disclosure could reasonably be expected to—*

…

(f) prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety; ...

Matter communicated in confidence

46.(1) *Matter is exempt if—*

…

(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.

Application of s.11(1)(b) of the FOI Act

10. Under s.21 of the FOI Act, a person has (subject to the Act) a legally enforceable right to be given access to "documents of an agency". It is clear that the QCSC is an agency subject to the FOI Act and that the letter in issue falls within the definition of "document of an agency", contained in s.7 of the FOI Act, since it is a document in the possession of the QCSC, having been received in that agency.

11. Section 11(1) of the FOI Act lists persons or bodies to whom or to which the FOI Act does not apply, either generally, or in respect of specified functions performed by specified persons or bodies. (Section 11(1)(j) is the only exception in this regard, since it applies to every agency, as defined in the FOI Act, in respect of a defined class of documents, i.e., documents received from Commonwealth agencies whose functions concern national security. I note, however, that the material difference in the wording and effective operation of s.11(1)(j), when contrasted to all other sub-paragraphs of s.11(1) of the FOI Act, reinforces the views
I express below.) Section 11(1) of the FOI Act operates so as to exclude the persons or bodies listed in its various sub-paragraphs from the obligations imposed on agencies by the FOI Act (*viz*, to publish certain documents and information in accordance with Part 2 of the FOI Act; to deal with applications for access to documents, made in accordance with s.25 of the FOI Act, in the manner prescribed under Part 3 of the FOI Act; to deal with applications for amendment of information relating to the personal affairs of the applicant in the manner prescribed under Part 4 of the FOI Act) either generally, or in respect of specified functions performed by specified persons or bodies. Thus, if the third party had applied in writing to the MLA, requesting access under the FOI Act to the MLA's office copy of the letter now in issue, s.11(1)(b) of the FOI Act would have entitled the MLA to refuse the request on the ground that the MLA was excluded from the application of the FOI Act.

12. However, s.11(1) does not operate so as to exclude documents from the application of the FOI Act merely because they were created by, or relate to, a person or body listed in s.11(1).
(I made a comment to this effect in respect of documents relating to a committee of the Legislative Assembly in my reasons for decision in *Re Beanland and Department of Justice and Attorney-General* (Information Commissioner Qld, Decision No. 95026, 14 November 1995, unreported), at paragraph 49.) There are many persons and organisations to whom or to which the FOI Act does not apply, e.g., private individuals and private corporations. However, when private individuals or private corporations send correspondence to government agencies which are subject to the FOI Act, that correspondence becomes subject to the application of the FOI Act. The general objects of the FOI Act include enhancing scrutiny and accountability of government agencies in respect of their operations generally, including (subject to the protections afforded by the exemption provisions contained in Part 3, Division 2 of the FOI Act) their dealings with private individuals and private corporations. The same treatment should logically extend to dealings by government agencies with persons or bodies listed in s.11(1) of the FOI Act (except for the Commonwealth agencies with national security functions listed in s.11(1)(j) of the FOI Act, given the clear indication to the contrary in the wording of s.11(1)(j) of the FOI Act).

13. I consider that a document which answers the description of a "document of an agency", as that term is defined in s.7 of the FOI Act, is not excluded from the application of the FOI Act merely because it was created by (or relates to) a person or body named in s.11(1)(b) of the FOI Act. I therefore find that the letter in issue, which is in the possession of the QCSC, is subject to the application of the FOI Act. It remains for me to consider whether or not the letter is exempt matter under the FOI Act, pursuant to either of the two exemption provisions on which the MLA relies.

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

14. In *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at p.337 (paragraph 146), I indicated that, in order to establish the *prima facie* ground of exemption under s.46(1)(b) of the FOI Act, 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.

    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.

15. The contents of the letter in issue are not known to the third party and have the requisite degree of secrecy/inaccessibility to satisfy the first element of the test for exemption under s.46(1)(b) of the FOI Act.

16. As to the second element of the test for exemption under s.46(1)(b), I said in *Re "B"* (at pp.338-339, paragraph 152):

> *152. I consider that the phrase "communicated in confidence" is used in this context to convey a requirement that there be mutual expectations that the information is to be treated in confidence. One is looking then for evidence of any express consensus between the confider and confidant as to preserving the confidentiality of the information imparted; or alternatively for evidence to be found in an analysis of all the relevant circumstances that would justify a finding that there was a common implicit understanding as to preserving the confidentiality of the information imparted.*

17. The MLA has provided no evidence that the letter was communicated on the basis of an express mutual understanding that the information in it would be treated in confidence, nor pointed to any circumstances from which it could reasonably be inferred that there existed an implicit mutual understanding that the information in the letter would be treated in confidence. The letter is not marked in any way that might have indicated to its recipient that the author desired that the letter be treated in confidence. Given the nature of the letter, the MLA must have intended that the information provided in the letter would be considered by any community corrections board that was required to make a decision as to whether or not the third party should be granted parole. Depending on whether a community corrections board regarded the contents of the letter as significant in respect of a decision as to whether or not to grant the third party parole, the board might be obliged by law to inform the third party of the substance of the information conveyed in the letter in issue: see, for example, *Orreal v Queensland Community Corrections Board* (1995) 81 A Crim R 212 at p.216; *Re Solomon* [1994] 2 Qd R 97 at p.108. In such circumstances, it is difficult to see how the MLA, or the QCSC (with its knowledge and experience of the applicable law), could reasonably have understood or expected that the substance of the letter was to be treated in confidence as against the third party. As I have indicated above, the letter does no more than pass on concerns expressed to the MLA by members of the public, who are not named in the letter or identifiable from its contents. It is difficult for me to see any threat of detriment to identifiable individuals that could conceivably result from disclosure to the third party of the letter in issue, and which might afford sufficient grounds for a finding that

there existed an implicit mutual understanding that the letter would be treated in confidence. I am not satisfied that the letter in issue was communicated in confidence, and since the second of the cumulative requirements for exemption under s.46(1)(b) is not established, I find that the letter in issue is not exempt matter under s.46(1)(b) of the FOI Act.

18. In *Re Brack and Queensland Corrective Services Commission* (1994) 1 QAR 414, I considered the application of s.46(1)(b) to a note of a telephone call from a member of the public wishing to report threats made by a prisoner. On the basis of statutory declarations from the person who supplied the information and an officer of the QCSC, I found, in the particular circumstances of that case (including the sensitive nature of the information supplied, and evidence of an express assurance from the QCSC officer that the information would remain confidential), that the information recorded in the note was communicated in confidence. In the case presently before me, however, there is no evidence sufficient to support a finding that there existed a mutual understanding between the MLA and the QCSC that the letter in issue would be treated in confidence.

19. With respect to the third requirement of s.46(1)(b), in Re "B" at pp.339-341 (paragraphs 154-160) I analysed the meaning of the phrase "could reasonably be expected to", by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the Freedom of Information *Act 1982* Cth. In particular, I said in *Re "B"* (at pp.340-341, paragraph 160):

> *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.*

20. The ordinary meaning of the word "expect" which is appropriate to its context in the phrase "could reasonably be expected to" accords with these dictionary meanings: "to regard as probable or likely" (Collins English Dictionary, Third Aust ed); "regard as likely to happen; anticipate the occurrence ... of" (Macquarie Dictionary, 2nd ed); "Regard as ... likely to happen; ... Believe that it will prove to be the case that ..." (The New Shorter Oxford English Dictionary, 1993).

21. The MLA suggests that "my supply of confidential information may cease if this letter is released". At p.341 (paragraph 161) of *Re "B"*, I indicated that the third element of the test for exemption under s.46(1)(b) is not to be considered by reference to whether the particular confider, whose confidential information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice the future supply of such information from a substantial number of the sources available or likely to be available to an agency.

22. There is nothing before me to support such a finding, other than the indication given by the MLA which is conditioned by his use of the word "may". Given the nature of the letter in issue, which is couched in terms as brief and anonymous as one could possibly make such a letter while still conveying some meaningful information, I do not consider that disclosure of the letter could reasonably be expected to inhibit a substantial number of members of the public, or Parliamentary representatives, from supplying information to the QCSC in the future. *Re Brack* provides an illustration of a case in which sensitive information supplied to

the QCSC by a member of the public qualified for exemption under s.46(1)(b) of the FOI Act, but each case must be considered on its merits and the case before me has little in common with *Re Brack*. I consider that members of the public would recognise the need to consider each case individually and could not reasonably be expected to cease to provide information to the QCSC if the letter now in issue were disclosed under the FOI Act.

23. I am not satisfied that the third of the cumulative requirements for exemption under s.46(1)(b) has been satisfied, and this constitutes an additional basis for finding that the letter in issue is not exempt matter under s.46(1)(b) of the FOI Act.

Application of s.42(1)(f) of the FOI Act

Requirements of the provision

24. I have previously discussed the application of s.42(1)(f) in my decision in *Re Byrne and Gold Coast City Council* (1994) 1 QAR 477, at pp.483-484, paragraphs 18-20. In order to find that matter is exempt matter under s.42(1)(f), I must be satisfied that the following criteria have been met:

    (a) that there exists an identifiable method or procedure;
    (b) that it is a method or procedure for protecting public safety;
    (c) that the method or procedure is lawful (see pp.389-391, paragraphs 10-15, of *Re "T" and Queensland Health* (1994) 1 QAR 386); and
    (d) that disclosure of the particular matter in issue could reasonably be expected to prejudice the maintenance or enforcement of the method or procedure.

25. Although corresponding exemption provisions have rarely been considered in other Australian jurisdictions, the Commonwealth AAT has twice discussed the scope of the words "public safety" in s.37(2)(c) of the *Freedom of Information Act 1982* Cth, an exemption provision which roughly corresponds to s.42(1)(f) of the Queensland FOI Act: see *Re Thies and Department of Aviation* (1986) 9 ALD 454, at p.466, and *Re Parisi and Australian Federal Police* (1987) 14 ALD 11, at pp.17-18. Given the view I have come to below, it is unnecessary for me to consider the precise ambit of the words "public safety" in s.42(1)(f) of the Queensland FOI Act.

26. As to the fourth requirement set out above, I indicated in *Re Byrne* at p.484 (paragraph 20) that, in contrast with s.42(1)(e), s.42(1)(f) does not refer to prejudice to the "effectiveness" of a lawful method or procedure, but to prejudice to the "maintenance or enforcement" of a lawful method or procedure. I indicated that, even if disclosure of matter in issue would result in fewer people using a procedure, that in itself would not involve a prejudice to the maintenance of the procedure - the procedure would still remain in place.

Application to the letter in issue

27. In this case, the MLA has not specifically identified any method or procedure for the protection of public safety that could reasonably be expected to suffer relevant prejudice, in terms of s.42(1)(f) of the FOI Act. The MLA has indicated that protection of public safety was the motivating factor in supply of the information in issue, but the motive of the supplier is not a relevant factor in considering the application of s.42(1)(f).

28. As to the first requirement set out in paragraph 24 above, it is difficult to identify any method or procedure which might suffer relevant prejudice, in terms of s.42(1)(f). It may be arguable that the parole system itself can be properly described as a method or procedure for protecting public safety, but that is not an issue on which I need to express a considered view, because, even assuming that the parole system does answer that description, there is no reasonable basis for expecting that disclosure of the letter in issue could prejudice the maintenance or enforcement of the parole system.

29. In this case, all that has happened from the point of view of the QCSC is that it has retained on file an unsolicited letter written on behalf of some unidentified members of the public. I expect that, in their decision-making processes, community corrections boards would take account, amongst other relevant considerations, of possible risks to the safety of individuals or to public safety generally. Perhaps, therefore, it is possible to characterise the fact that the QCSC is (apparently) prepared to accept and consider unsolicited information from a member of the public (or an MLA acting in a representative capacity), supplied with the aim of persuading a community corrections board to refuse parole to an individual prisoner, as a method or procedure for protecting public safety within the terms of s.42(1)(f) of the FOI Act.

30. Assuming that to be the case, I am still not satisfied that disclosure of the letter in issue could reasonably be expected to prejudice the maintenance or enforcement of such a method or procedure. It cannot be said that the voluntary supply of information, and the acceptance of it by the QCSC, amounts to an enforceable method or procedure, so there could be no prejudice to enforcement. Nor could disclosure of the letter in issue reasonably be expected to prejudice the maintenance of such a method or procedure. The channel of communication to the QCSC of unsolicited information of the kind in issue would remain open.

31. I find that the letter in issue is not exempt matter under s.42(1)(f) of the FOI Act.

Conclusion

32. I find that the letter in issue is a document of an agency to which the FOI Act applies, and that it is not exempt matter under the FOI Act. I therefore affirm the decision under review.

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F N ALBIETZ
INFORMATION COMMISSIONER