

## **Claes and Queensland Rail**

(S 10/98, 4 September 1998, Information Commissioner)

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

1.-4. These paragraphs deleted.

### **REASONS FOR DECISION**

#### **Background**

5. The applicant, Mr Claes, is employed by the Coal and Minerals Group of Queensland Rail, at Pring Station. In late April 1997, following an altercation which occurred between the applicant and another officer of Queensland Rail at Pring Station, there was an investigation which resulted in the applicant's being excluded from duty for several weeks. The other officer, ---- (whom I will refer to as the "third party") was not excluded from duty, but was required to attend a disciplinary interview.
6. By letter dated 28 October 1997, the applicant applied to Queensland Rail for documents relating to the incident, including his personal file, his disciplinary file, and any other relevant documents about him held by the Coal and Minerals Group of Queensland Rail at Pring, Mackay or Rockhampton.
7. By letter dated 23 December 1997, Mr Peter Carden, FOI Co-ordinator, Queensland Rail, informed the applicant that he had decided to grant access to most of the requested documents, subject to the deletion of certain matter which would identify third parties who had provided information and statements to the investigating officers. Mr Carden also advised the applicant that there had been an objection to the release of certain documents by the third party, but that he had decided that those documents were not exempt from disclosure to the applicant. In accordance with the provisions of s.51(2) of the FOI Act, Mr Carden advised the applicant that access could not be granted to those documents until the expiration of the prescribed period (of 28 days) within which the third party could apply for an internal review of Mr Carden's decision.
8. By letter dated 2 January 1998, the third party applied for internal review of Mr Carden's decision. Queensland Rail's Acting FOI Internal Review Officer, Mr John Gibson, informed the applicant, by letter dated 14 January 1998, that he had decided to vary Mr Carden's decision in respect of the documents to the release of which the third party had objected, as Mr Gibson considered them to be exempt from disclosure under s.46(1)(b) of the FOI Act.

9. By an application dated 19 January 1998, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Gibson's decision to exempt those documents which had been the subject of the third party's internal review application.

**External review process**

10. I obtained from Queensland Rail copies of the documents in issue. They are pages 165-171 of File RMO 4323, described by Queensland Rail as an 'industrial relations' file. The applicant has already been granted access to the majority of documents on that file, subject to the deletion of certain matter found to be exempt (i.e., matter which would identify the sources of the information in the documents). The documents in issue may be described as:

Page	Description of document
166-167	Report by [the 3rd party], dated 29 April 1997, on the incident at Pring Station on 28 April 1997
165	Information to be added to the report described above, dated 30 April 1997
171	Copy of p.165 with short handwritten notation
168-170	Record of interview between investigating officers and [the 3 <sup>rd</sup> party], dated 2 May 1997

11. Following examination of those documents, further information was sought in relation to the policies adopted by Queensland Rail in respect of (a) the investigation of workplace incidents which could lead to disciplinary measures, and (b) disclosure, to the parties involved, of documents relating to investigations of this type. Queensland Rail forwarded to my office copies of the following documents:

1. Discipline Guidelines (made under the Employee Relations Policy)
2. Statement by Train Management Improvement Officer L A Gwynne, of Coal and Minerals Operations at Jilalan (one of the two officers assigned to investigate the altercation between the applicant and the third party)

Queensland Rail has not made any formal submissions, but I have taken into account the reasons for decision given by Mr Carden and Mr Gibson.

12. The third party, having become aware that the applicant had sought review, contacted my office on 2 February 1998 to discuss his concerns about disclosure of the documents in issue to the applicant. He subsequently provided a letter, dated 7 February, in support of his objections to the release of the documents in issue. This letter reflected the arguments used by Mr Gibson in support of his internal review decision, as well as outlining previous workplace and other incidents which caused the third party to be concerned at the possible consequences of disclosure of any

matter to the applicant. The third party also stated that he (and other employees at Pring Station) only co-operated with the investigation to which the documents in issue relate after being assured that any information they gave to the investigating officers would be treated in confidence, and would not be released to the applicant.

13. By letter dated 29 May 1998, the Assistant Information Commissioner informed the applicant of his preliminary view that the documents in issue were exempt from disclosure under s.40(c), and possibly also under s.46(1)(b), of the FOI Act. The applicant was invited to make a submission in support of his contention that he should be granted access to the documents, and he responded by letter dated 1 June 1998.

#### **Application of s.40(c) of the FOI Act**

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

*40. Matter is exempt matter if 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; ...*

...

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

15. I have considered the application of s.40(c) of the FOI Act in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293, *Re Murphy and Queensland Treasury & Ors* (1995) 2 QAR 744, *Re Shaw and The University of Queensland* (1995) 3 QAR 107, and *Re McCann and Queensland Police Service* (Information Commissioner Qld, Decision No. 97010, 10 July 1997, unreported). 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 matter in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of its personnel, unless disclosure of the matter in issue would, on balance, be in the public interest.
16. 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 *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.339-341, paragraphs 154-160. 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.*

17. 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).
18. If I am satisfied that any adverse effects could reasonably be expected to follow from disclosure of the matter in issue, I must then determine whether those adverse effects, either individually or in aggregate, constitute a substantial adverse effect on the management or assessment by Queensland Rail of its personnel. For reasons explained in *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 (at pp.724-725, paragraphs 148-150), I consider that, where the Queensland Parliament has employed the phrase "substantial adverse effect" in s.40(c) of the FOI Act, it must have intended the adjective "substantial" to be used in the sense of grave, weighty, significant or serious.
19. If I find that disclosure of the whole or any part of the matter in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by Queensland Rail of its personnel, I must then consider whether disclosure of that matter would nevertheless, on balance, be in the public interest.

### **Substantial adverse effect?**

20. It is clear from the applicant's submission that there is considerable tension within the workplace at Pring Station. On the evidence before me, I consider that disclosure of further matter relating to the altercation between the applicant and the third party would do nothing to lessen that tension and that it could reasonably be expected to heighten the tension, with a consequent deterioration in workplace relations.
21. The achievement and maintenance of satisfactory relations within the workplace is an aspect of the personnel management functions of Queensland Rail. Disclosure of matter which would increase tension, would have an adverse effect on the personnel management functions of Queensland Rail. Given the height which tensions have reached in this case, I consider that adverse effect could reasonably be expected to be a substantial one.
22. In addition, Mr Gibson decided (in making his internal review decision that the documents in issue are exempt because their release would constitute a breach of

confidence), that release of the documents in issue could reasonably be expected to have a substantial adverse affect on the future conduct of disciplinary investigations and, by extension, on the implementation of Queensland Rail's Disciplinary Guidelines. I accept that staff disciplinary processes are an aspect of the management or assessment by an agency of its personnel, and the investigation and disciplinary action which followed the incident at Pring Station were a part of that process.

23. I have examined Queensland Rail's Disciplinary Guidelines, which are made under the agency's Employee Relations policy. The Guidelines specify that confidentiality should be maintained during the disciplinary process, and it is clear that the officers who investigated the altercation between the applicant and the third party made every effort to do so. Queensland Rail has also provided a memorandum from one of the investigating officers, which states in part:

*At the commencement of the investigation it became apparent to the investigating team that there existed a definite lack of co-operation from Qld Rail staff to freely express information regarding the altercation between Drivers Claes and [the 3<sup>rd</sup> party].*

*..... At the commencement of most of the interviews, assurance was given to the staff that information contained in their statements would be treated in strict confidence.*

*In the case of one Driver he was quite adamant he would not sign a statement and only agreed to submit some information when assured by the investigating team this information would be kept confidential.*

24. The third party has stated that the information he provided was given in confidence to the investigating officers, and that he was informed that any information given during the course of the investigation would be treated as confidential.
25. In my view, it is not a wise practice for an investigator to give a blanket promise of confidentiality to a witness or prospective witness, since the common law requirements of procedural fairness may dictate that the critical evidence to support a disciplinary charge (and, apart from exceptional circumstances, the identity of its provider) be disclosed to a person who formally contests the charge.
26. In writing the letters and taking part in the interview, the third party ought to have anticipated that the information he provided might have resulted in disciplinary proceedings against him and/or the applicant. Further, the third party ought to have appreciated that if, for example, action were to be taken to dismiss the applicant, the information the third party had provided would have to be put to the applicant, in order to allow him to respond. In my view, any assurance or understanding of confidentiality could not have been unconditional.

27. It appears, however, that there was scope for a conditional understanding that the information provided by the third party would not be disclosed unless it was necessary to disclose the documents to the applicant, in the course of disciplinary proceedings against him. I discussed conditional understandings of confidentiality in *Re McCann*. At paragraph 48 of *Re McCann*, I said that:

*However, I consider that cases will occur, where.....the source's identity and/or evidence are not required to be disclosed (cf. Re McEniery at p.364, paragraph 33). Factors of the kind referred to in paragraph 38 above (and especially the vulnerability of a source to intimidation, harassment, recrimination, or threats to a source's livelihood or personal safety) may be evident, and may warrant a finding that there existed an implicit mutual understanding between a source of information and a law enforcement agency to the effect that the identity of the source, and/or the information supplied by the source, would be treated in confidence so far as practicable, consistent with the use of that information for the purpose of the agency's investigation and the prosecution of any charges stemming from the investigation.*

28. In the final outcome of the disciplinary proceedings, it appears that disclosure to the applicant never became necessary, according to the management practices adopted by Queensland Rail. It is therefore reasonable for the third party to expect that the information he provided would not be disclosed to the applicant, as disclosure did not become necessary for the purposes of action taken against the applicant.
29. As an employer, Queensland Rail could direct employees to answer questions relevant to the conduct of its business. However, the reporting and proper investigation of incidents of physical altercations between staff raises particularly difficult management issues for most agencies, as the persons who were involved in, or witnesses to, the altercation are frequently unwilling to provide statements for fear of further violence or reprisals, or becoming caught up in a souring of relations in the workplace. Whether or not these fears are reasonably based in the particular case, they are a powerful deterrent to co-operation with investigators or management. In such cases, employees are more likely to co-operate fully if they are assured that the statements or evidence they provide will be treated as confidential by the agency, unless disclosure is necessary for the purposes of disciplinary proceedings. It is evident that this occurred in the investigation of the altercation involving the applicant and the third party, with explicit guarantees of confidentiality being given by the investigating officers.
30. If information given in confidence were subsequently disclosed, in circumstances not required for the disciplinary processes of Queensland Rail, and particularly to a person from whom it was explicitly agreed it would be kept confidential, I accept that it could reasonably be expected to have a substantial adverse effect on the management or assessment by Queensland Rail of its personnel, through the

apparent breach of trust involved, and by making it difficult to obtain full co-operation in similar investigations in the future (i.e., investigations in circumstances where it is appropriate to promise confidentiality in order to obtain co-operation).

31. Considering the two adverse effects identified at paragraphs 29 and 30 above, I find that disclosure of the documents in issue could reasonably be expected to have a substantial adverse effect on the management and assessment by Queensland Rail of its staff.

### **Public interest balancing test**

32. The establishment of a substantial adverse effect raises a *prima facie* public interest favouring non-disclosure of the documents in issue. It is clearly in the public interest that good working relations be maintained within Queensland Rail. Further, Queensland Rail has a duty, both as an employer and as a provider of services to the public, "*to ensure the good health and safety of all persons at the workplace, including employees, customers and the general public*" (Discipline Guidelines "Attachment A", p.29). There is a public interest in Queensland Rail successfully meeting its obligations under this policy, in addition to its obligations under both statute and the common law to maintain a safe workplace environment.
33. I acknowledge that there is a public interest in a person, who is the subject of adverse information held by a government agency, having the opportunity to examine and respond to information given against him. I am, however, informed by Queensland Rail that the substance of the allegations against the applicant was made known to him at the time of the investigation and disciplinary action, although not in a form which would enable the applicant to identify individual sources of information.
34. The applicant has argued that he requires access to the documents in issue in order to understand why Queensland Rail took action against him (by excluding him from duty) and not against the third party. The applicant has also claimed that Queensland Rail failed to act on his reports of harassment by the third party and other employees at Pring Station; that Queensland Rail failed to take prior harassment into account when investigating the altercation between the applicant and the third party at Pring Station on 28 April 1997; and that he was not accorded fair treatment in relation to this incident.
35. As an employer, Queensland Rail is under an obligation to deal fairly and equitably with its employees, and to ensure the proper management and application of statute and common law requirements affecting the employer-employee relationship. This responsibility includes the proper application of disciplinary processes, and the prevention of workplace harassment and intimidation. There is a significant public interest in the accountability of Queensland Rail with respect to its employee management and disciplinary processes, and in the provision of information which

will enable employees to understand and, if necessary, to pursue available avenues for redress of grievances if they are concerned about unfair treatment.

36. I am not persuaded, however, that the material in the documents in issue will serve either of those purposes. Although the documents in issue have not been disclosed to the applicant, Queensland Rail has advised that the substance of the information in them was put to the applicant during the investigation, and that he was aware of the allegations against him. He has also seen the statements of other persons who were present at the time, and who witnessed parts of the incident in respect of which he was disciplined. The documents in issue do not contain information about any other incident involving the applicant and the third party (except for a brief reference to a previous incident, made in the applicant's presence during the altercation). Neither do they contain any information about alleged previous workplace harassment by or of the applicant (the applicant had complained that during the investigation he was not permitted to explain his actions by reference to previous harassment by the third party and other employees at Pring Station), or about the treatment by Queensland Rail of the applicant's concerns. I do not believe that they will assist the applicant's understanding of the disciplinary process, or of the response by Queensland Rail to his claims of harassment by other employees, including the third party.
37. On the material before me, I am not satisfied that the public interest considerations which favour disclosure of the matter in issue are sufficiently strong to outweigh the public interest in avoiding a substantial adverse effect of the kind contemplated in s.40(c). I therefore find that the documents in issue are exempt matter under s.40(c) of the FOI Act.

#### **Section 46(1)(b) of the FOI Act**

38. In his internal review decision, Mr Gibson determined that the documents in issue were exempt from disclosure under s.46(1)(b) of the FOI Act. Given my findings in relation to s.40(c), I do not propose to give detailed consideration to the application of s.46(1)(b), although it is certainly arguable, in my view, that all or parts of the documents in issue are exempt matter under s.46(1)(b) of the FOI Act.

#### **DECISION**

39. I vary the decision under review (being the decision of Mr J Gibson, on behalf of Queensland Rail, dated 14 January 1998). I find that the matter in issue (described at paragraph 10 above) is exempt matter under s.40(c) of the FOI Act.