

9.10.1995
S 201/95

23 November 2000

Dear Mr Price

RE: APPLICATION FOR EXTERNAL REVIEW OF A DEEMED REFUSAL OF ACCESS UNDER THE *FREEDOM OF INFORMATION ACT 1992 QLD* BY THE SURVEYORS BOARD OF QUEENSLAND

1. In this letter, I will communicate my formal decision under s.89 of the *Freedom of Information Act 1992 Qld* (the FOI Act), which finalises my review of the deemed decision of the Surveyors Board of Queensland (the Board) to refuse you access to documents sought in your FOI access application dated 9 October 1995.
2. In the reasons for decision which follow, I have explained why I have decided that you are not entitled to get access to the matter remaining in issue, because it is exempt from disclosure to you under s.46(1)(a) of the FOI Act, and why there are no reasonable grounds to believe that further documents, falling within the terms of your FOI access application dated 9 October 1995, exist as documents of the Board.

REASONS FOR DECISION

Background

3. This external review application was the first of several which the applicant, Mr Price, has made involving decisions (or deemed decisions) of the Board in response to his several FOI access applications. They appear to have stemmed from the Board's investigation and consideration of a complaint made by the applicant about surveys conducted by a surveyor, Mr S Dawson. Mr D S Parkinson was appointed by the Board to undertake that investigation, which included an interview with Mr Dawson, and the making of a report to the Board in accordance with the *Surveyors' Act 1977*. The Board wrote to the applicant informing him of the outcome of the investigation, which was that no further action would be taken against the surveyor. The applicant was dissatisfied with that outcome and, particularly, with Mr Parkinson's investigation. His access application included a request for documentation relating to the surveys by Mr Dawson, and the investigation by Mr Parkinson.

4. By letter dated 9 October 1995, the applicant applied to the Board for access "*to the file in regards to the investigation of the survey carried out by Scott Dawson which involved my property and others*" and to "*all documents relating to this investigation and the Special School that involved the Board during this time*". The applicant also sought access to the "first report" that was done by the investigating surveyor, and documents relating to Mr Dawson. He also stated that he required production of "documents relating to this file held with other persons or Departments".
5. (In the course of my review, the applicant asserted that his access application sought a part-transfer of the application to other agencies pursuant to s.26 of the FOI Act. The Deputy Information Commissioner wrote to the applicant on 29 September 1999 informing him that the access application contained no such request and that the applicant could not apply to one agency for access to documents and require that agency to obtain and process documents held by another agency (see *Re Price and Director of Public Prosecutions* (1997) QAR 157 at pp. 165-166, paragraphs 22-25). In any event, I have no jurisdiction to review an agency's decision not to part-transfer an access application lodged with it: see s.71 of the FOI Act.)
6. Mr Thompson of the Board wrote to the applicant on 6 November 1995, informing him that he was consulting third parties under s.51 of the FOI Act. However, by letter dated 24 November 1995, the applicant applied to me on the basis of a deemed refusal of access by the Board to documents sought by him. The Deputy Information Commissioner informed the applicant that his application for external review was premature and that the Board had advised that it would formulate its decision within the statutory timeframe. When the Board had not responded to the applicant by the end of the statutory timeframe, the applicant again applied to me, by letter dated 12 December 1999, for external review on the basis of a deemed refusal of access.
7. By letter dated 11 December 1995 (which it appears the applicant did not receive prior to making his application to me), Mr Thompson informed the applicant that the Board had decided to disclose to the applicant a number of documents falling within the scope of his access application, but to refuse him access to other documents relying upon several exemption provisions in the FOI Act. Mr Thompson also informed the applicant that there was no "first report" in existence. Accordingly, the Deputy Information Commissioner wrote to the Board authorising it to give the applicant access to the documents that it was prepared to disclose to him. Those documents included the Investigator's Report dated 21 October 1993.

External review process

8. The documents originally in issue were numerous, but have been significantly reduced through negotiations with the Board. Many of the matters the applicant has raised in his most recent correspondence concern the conduct of the original survey by Mr Dawson, the merits of the investigation by Mr Parkinson and subsequent action by the Board, all of which are outside the scope of this review.
9. The documents in issue were obtained and examined. The Board has agreed to regard audiotapes of four interviews conducted by Mr Parkinson as falling within the scope of the access application, although it had initially considered that only the transcripts of those interviews need be so treated. The Board provided me with a letter from a commercial firm engaged in making copies of audiotapes, to support its claim that one of those audiotapes (containing two interviews) was unable to be copied for sending to the

applicant due to technical problems. The applicant was invited to attend at the Board to listen to one of those interviews on the original audiotape but he has not done so. The

other record of interview (with Mr Dawson) on that audiotape is in issue in this review, as is the transcript of that same interview.

10. In the course of a related external review application (no. S 27/97), now finalised, it appeared that some of the documents which the Board was prepared to disclose to the applicant were identical, or virtually identical, to some of the documents that were claimed to be exempt by the Board in this review. The Board agreed to give the applicant access to those documents and was authorised to do so.
11. I then informed the Board of my preliminary view that a considerable number of the documents in issue did not qualify for exemption under the FOI Act. I also wrote to Mr Dawson to ascertain whether he continued to object to the disclosure of documents concerning him. Mr Dawson responded that he maintained his objection, and referred particularly to the audiotape and transcript of interview with Mr Parkinson. Mr Parkinson has provided me with a statutory declaration setting out his investigation process, including the circumstances surrounding his interview with Mr Dawson.
12. After some additional correspondence to clarify which documents remained in issue, the Board agreed to provide the applicant with access to almost all of the matter that was originally in issue. After consultation with other agencies that might be affected by disclosure, the Board was authorised to give the applicant access to those documents. However, the Board maintained its claim that documents concerning the training of Board investigators (including some documents which concerned the Queensland University of Technology (QUT) and the Queensland Police Service (QPS)), the audiotape and transcript of interview with Mr Dawson, a letter from Mr Dawson to the Board, and parts of some other documents, comprised exempt matter under the FOI Act. Both QUT and the QPS informed this office that they did not object to the disclosure of documents concerning them and, after some further consultation with the Board, it was agreed that the applicant be given access to those documents. Towards the end of the review process, and following discussions with Mr Thompson of the Board, the Board agreed to disclose further matter to the applicant. That matter is no longer in issue.
13. The Board also refused access, relying upon s.22(a) of the FOI Act, to documents such as plans, maps, certificates of title and identification surveys, most of which appear on a file provided to the Board by the then Department of Geographic Information. The Department of Natural Resources (DNR) also objected, on the same basis, to the disclosure to the applicant of the Department of Geographic Information documents. The Assistant Information Commissioner wrote to the applicant providing him with a schedule of documents in respect of which s.22(a) of the FOI Act was relied upon, and set out information necessary for assisting the applicant to obtain copies of those documents from the DNR.
14. By letter dated 29 September 1999, the Deputy Information Commissioner informed the applicant of his preliminary view that the matter now remaining in issue qualifies for exemption under s.46(1)(a) of the FOI Act, and provided him with a copy of Mr Parkinson's statutory declaration. The applicant has demanded to know why other exemption provisions initially relied upon by the Board (such as s.42(1)(c) of the FOI Act) were not considered by the Deputy Information Commissioner in forming his preliminary view. As has been explained to the applicant, the Deputy Information Commissioner's views on the application of s.46(1)(a) meant that those other exemption provisions did not require consideration. The applicant then responded contesting the refusal of access to documents in reliance upon s.22(a) of the FOI Act, raising again the matter of a "first report" done by Mr Parkinson, rejecting the statutory declaration evidence provided by

Mr Parkinson, and demanding affidavit evidence instead. He also raised other issues concerning the whereabouts of certain documents and records of conversation which, if they existed, would appear to fall within the scope of his access application.

15. The Deputy Information Commissioner wrote to the applicant on 15 October 1999 informing him that the issue of the "first report" had been dealt with a number of times and that, insofar as the applicant contested the application of s.22(a) to the documents obtainable from the DNR, unless he provided submissions disclosing a reasonably arguable case that s.22(a) of the FOI Act did not apply, I would proceed on the basis that those documents are no longer in issue. The applicant was further advised that he should provide his submissions and/or evidence concerning the documents remaining in issue by the given deadline.
16. Further inquiries were made of the Board concerning the existence of documents mentioned by the applicant. The Board responded by letter dated 15 December 1999 that it did not have any further documents falling within the terms of the access application. The Assistant Information Commissioner wrote to the applicant advising him of his preliminary view that the Board has conducted all reasonable searches for documents falling within the terms of the access application.
17. The applicant has not provided any written submissions or evidence to support his contentions that the matter remaining in issue is not exempt under s.46(1)(a) of the FOI Act, or that s.22(a) of the FOI Act does not apply to certain documents. Nor has he provided any arguments or evidence supporting a case that additional documents, responsive to the terms of his FOI access application dated 9 October 1995, exist in the possession or control of the Board. In accordance with the Deputy Information Commissioner's letter dated 15 October 1999, I will not consider the application of s.22(a) of the FOI Act, except to confirm that the relevant documents clearly attract the application of s.22(a).
18. In making my decision, I have taken into account the material before me including the documents in issue in this and related applications for external review, correspondence received from the participants, and material which the applicant provided to this office in March 1999 as representing submissions and evidence relating to all of his reviews before me. He has not, however, made any specific submissions directed at the issues raised concerning the Board's claim for exemption under s.46(1)(a) of the FOI Act.

'Sufficiency of search' issue

19. The applicant has claimed that the Board had in its possession or control documents concerning the following (other than those to which he has previously had access):
 - records of conversations between Mr Parkinson and agencies such as the Queensland Police Service or the Criminal Justice Commission in relation to the investigation of the applicant's complaint;
 - records of conversations between Mr Parkinson and Mr Easthaugh or other persons in relation to the investigation of the applicant's complaint;
 - a survey done by Mr Parkinson relating to that investigation;
 - records of any conversations between the Board and the Department of Lands or Department of Water Resources or the Gatton Shire Council concerning an alleged alteration to the applicant's boundary;
 - diary records and notes of Mr Parkinson concerning the investigation;

- record of discussion between Mr Keilar of the Board and Mr Bell (a potential interviewee).

20. As I indicated in *Re Smith and Administrative Services Department* (1993) 1 QAR 22 (pp.27-42, paragraphs 12-61) and in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 (pp.499-500, paragraphs 14-15), I have jurisdiction to conduct an external review where an applicant who applies to an agency for access to documents complains that the searches and inquiries undertaken by the agency to locate requested documents have been inadequate.
21. I explained the principles applicable to 'sufficiency of search' cases in *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464 (pp. 469-470, paragraphs 18 and 19) as follows:
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.*
22. Further inquiries were made of the Board as to whether it had in its possession or control any of the above documents referred to by the applicant. The Board advised in writing that it has provided the applicant with access to all documents in its possession or control falling within the terms of his access application, other than those claimed to comprise exempt matter. The Board stated that no survey was carried out by Mr Parkinson during, or as part of, the investigation, and the results of his field inspection were included in his Report. Mr Thompson of the Board advised that Board members rarely keep records of their telephone discussions, and there is no such record in existence of any discussion between Mr Keilar and Mr Bell. Mr Thompson has said that if there was such a discussion, it would only have been done to set up the interview with Mr Parkinson, and other matters of a preliminary nature.

23. Mr Parkinson has previously informed this Office that he did not consider it necessary to make any record of conversation with Mr Easthaugh.
24. In relation to any diary records, field notes or other working notes, *et cetera*, held by Mr Parkinson, I held in *Re Price and Nominal Defendant* (1999) 5 QAR 80 (at paragraphs 55-57) that an agent's handwritten notes are, in the words of MacKinnon LJ in *Leicestershire County Council v Michael Farraday and Partners, Limited* [1941] 2 KB 205 at pp.215-216, "*documents which [the agent] has prepared for his own assistance in carrying out his expert work, not documents brought into existence by an agent on behalf of his principal, and therefore, they cannot be said to be property of the principal.*" That principle is applicable in the case of Mr Parkinson, who was engaged by the Board to exercise his professional skill and judgment in investigating the applicant's complaint to the Board, and providing a report to the Board. Any diary records, field notes or other working notes compiled by Mr Parkinson would not be "documents of the agency" for the purposes of s.7 of the FOI Act, and, in all likelihood, would not have been retained by Mr Parkinson in any event.
25. The applicant has not provided me with any evidence or material to support his assertion that further documents of the kind outlined above exist as documents in the possession or control of the Board.
26. I am satisfied that the Board has conducted all reasonable searches for documents falling within the scope of the applicant's access application. I am satisfied by the Board's explanation as to why some documents (such as the alleged survey done by Mr Parkinson) do not exist, and have never existed as documents of the Board. I find that there are no reasonable grounds to believe that further documents, falling within the terms of the applicant's access application dated 9 October 1995, exist in the possession or control of the Board.

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

27. The Board claims that part of a letter from Mr Dawson to the Board dated 5 January 1994 (page 055), the transcript of interview between Mr Parkinson and Mr Dawson (pages 056-069), and the audiotape of that interview, are exempt matter under s.46(1)(a) of the FOI Act.

46.(1) Matter is exempt if—

(a) *its disclosure would found an action for breach of confidence;...*

28. I discussed the requirements to establish exemption under s.46(1)(a) in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. The test for exemption 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 the agency faced with an application, under s.25 of the FOI Act, for access to the information in issue. I am satisfied that there is an identifiable plaintiff (Mr Dawson) who would have standing to bring an action for breach of confidence.

29. In *Re "B"*, I indicated that there are five cumulative criteria that must be satisfied in order to establish a case for protection in equity of allegedly confidential information:
- (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 *Re "B"* 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).
30. In terms of the first criterion above, I am satisfied that the information comprising the matter in issue can be identified specifically as an audiotape and transcript of an interview between the investigator appointed by the Board (Mr Parkinson) and Mr Dawson, dated 11 October 1993, and "item 5" in a letter from Mr Dawson to the Board dated 5 January 1994.

Necessary quality of confidence

31. In relation to the second criterion above, I find that the matter in issue retains the necessary quality of confidence and is not trivial or useless information. It does not consist of generally available information, nor information that would be known to the applicant. The Board sent a letter to the applicant, dated 16 December 1993, summarising the outcome of the Board's investigation of his complaint against Mr Dawson, and he has had access to Mr Parkinson's Investigation Report, dated 21 October 1993, which gave considerable details of the investigation carried out by Mr Parkinson. That Report contains considerably more detail than is revealed in the matter in issue. The comments provided by Mr Dawson during that interview comprising the matter in issue are summarised briefly in the Report. There are some direct quotations from Mr Dawson reproduced in the Report that appear to have come from other information gathered by Mr Parkinson rather than from Mr Dawson at the interview.
32. The matter deleted from Mr Dawson's letter records information supplied to the Board concerning background to the applicant's complaint against him, and was not directly related to the issues that the Board was required to determine in handling that complaint. Again, I consider that that matter has the necessary quality of confidence to qualify as confidential information.

Equitable obligation of conscience

33. Mr Parkinson has provided a statutory declaration made on 17 September 1999 that sets out his recollection of the circumstances of his interview with Mr Dawson.
34. Mr Parkinson states that he cannot now recall whether or not he gave Mr Dawson an express assurance of confidentiality concerning his answers given during that interview. Any comments of that nature would have been preliminary to the interview and prior to the tape recorder being switched on. Thus, it is not possible to check whether an express assurance of confidential treatment was given, by referring to the audiotape or the transcript. However, even if it cannot be established that an express assurance of confidential treatment was given, the circumstances attending the communication of the information in issue may have been such as to impose an equitable obligation of confidence on Mr Parkinson and the Board. The relevant law was explained in *Re "B"* at p.518 (paragraphs 89-90), as follows:
89. *The Federal Court in Smith Kline & French accepted that equity may impose an obligation of confidence upon a defendant having regard not only to what the defendant actually knew, but to what the defendant ought to have known in all the relevant circumstances. In cases decided under s.45(1) of the Commonwealth FOI Act (prior to its 1991 amendment) the Federal Court had consistently held that the determination of whether information was provided in circumstances importing an obligation of confidence is essentially a question of fact, which depends upon an analysis of all the relevant circumstances, and it is not necessary for there to have been an express undertaking not to disclose information; such an obligation can be inferred from the circumstances: see Department of Health v Jephcott (1985) 9 ALD 35; 62 ALR 421 at 425; Wiseman v Commonwealth of Australia (Unreported decision, Sheppard, Beaumont and Pincus JJ, No. G167 of 1989, 24 October 1989); Joint Coal Board v Cameron (1989) 19 ALD 329, at p.339.*
90. *It is not necessary therefore that there be any express consensus between confider and confidant as to preserving the confidentiality of the information imparted. In fact, though one looks to determine whether there must or ought to have been a common implicit understanding, actual consensus is not necessary: a confidant who honestly believes that no confidence was intended may still be fixed with an enforceable obligation of confidence if that is what equity requires following an objective evaluation of all the circumstances relevant to the receipt by the confidant of the confidential information.*
35. In his statutory declaration, Mr Parkinson states that he would have given Mr Dawson the impression that what Mr Dawson told him would be kept confidential, except insofar as Mr Parkinson had to make a report to the Board for its consideration.
36. Section 53B(2) of the *Surveyors Act 1977* states that the investigator must give the Board a written report on the investigation, but makes no provision regarding the confidentiality of the investigation. However, the letter from the Board dated 3 August 1993, appointing Mr Parkinson to investigate the applicant's complaint requested that the investigation be conducted "while maintaining confidentiality". In his letter responding to consultation from my Office, Mr Dawson has stated that he "*understood that the interview with the Investigator was given in strictest confidence.*"

37. There are situations in which a mutual understanding of confidence may be limited because the person providing the information should have reasonably expected that the Board would or may need to disclose details of the investigation in order to give a proper account to the complainant of the manner in which it carried out its statutory functions in relation to the complaint, the outcome of the complaint, and the reasons for that outcome. Mr Thompson of the Board has confirmed that the Board's usual practice is to advise the complainant in writing of the results of an investigation. The applicant was so advised by letter dated 16 December 1993. Mr Dawson must be taken to have understood that his answers may be relevant to the Investigation Report made by Mr Parkinson for the Board's consideration and that the applicant (as the complainant) would have to be given an account of the Board's conclusions on the investigation. However, subject to an exception for any disclosure considered necessary on that account, Mr Dawson could reasonably have understood, and expected, that his comments during the interview with the investigator would be kept confidential. Mr Thompson has informed a member of my staff that the transcript of interview does not form part of the Investigation Report, to which the applicant has had access.
38. I am satisfied that the circumstances attending the interview, particularly the previous relationship between the applicant and Mr Dawson that gave rise to his complaint and the instructions regarding confidentiality provided to Mr Parkinson in his letter of appointment, were such as to warrant a finding that information provided by Mr Dawson through Mr Parkinson to the Board was received under an equitable obligation of confidence, subject to an implicit exception permitting disclosure to the extent considered necessary for Mr Parkinson to make his Report and recommendations to the Board, and for the Board to give a summary of outcome to the complainant.
39. As for the item deleted from Mr Dawson's letter, I consider it was supplied subject to a similar qualified understanding of confidentiality. As the information was not directly related to the matters that the Board was required to investigate in handling the complaint, there would be no reason or requirement for the Board to provide the applicant with that information in order to give a proper account to him of its investigations into his complaint.
40. I find that the third criterion set out at paragraph 29 above is satisfied.

Unauthorised use of information

41. Mr Dawson has objected to the disclosure to the applicant of the information remaining in issue. I therefore find that the disclosure to the applicant of the matter remaining in issue would be an unauthorised use of that information, in accordance with the fourth criterion set out above.

Detriment to original confider

42. At pp. 326-327 (paragraph 111) of *Re "B"*, I explained, by reference to relevant authorities, that detriment is fairly easily established. It is not necessary to establish that a threatened disclosure of confidential information would cause detriment in a financial sense; detriment can also include embarrassment, a loss of privacy, or fear (whether or not soundly based) of some other negative consequence. I find that disclosure of the matter in issue to the applicant would cause detriment to Mr Dawson of one or more of the kinds mentioned above.

43. I therefore find that all five of the criteria necessary to found an action in equity for breach of confidence are established, and that the audiotape and transcript of interview (pages 056-069) and item 5 of Mr Dawson's letter dated 5 January 1994 (page 055), qualify for exemption under s.46(1)(a) of the FOI Act.

DECISION

44. I vary the decision under review, by finding that the matter remaining in issue (identified at paragraph 27 above) is exempt matter under s.46(1)(a) of the FOI Act.
45. I also find that there are no reasonable grounds to believe that further documents falling within the terms of the applicant's FOI access application dated 9 October 1995 exist in the possession or control of the Board.
46. This finalises application for review no. S 201/95. I will forward a copy of this letter to the Board for its reference.

Yours faithfully

F N ALBIETZ
INFORMATION COMMISSIONER