

Tregeagle and Gold Coast City Council

(L 34/00, 18 October 2000, Deputy 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.-3. These paragraphs deleted.

REASONS FOR DECISION

Background

4. The applicant, Mr Tregeagle, seeks review of the decision by the Gold Coast City Council (the GCCC) to refuse him access, under the FOI Act, to documents covered by the terms of an FOI access application dated 18 January 2000, which sought: "*.. a complete copy of the Geological and associated reports carried out on the road reserve and adjoining allotments at Dalton Road, Ingleside. We also request under the Act all relevant assessment reports pertaining to this report and all relevant materials.*"
5. By letter dated 15 March 2000, the GCCC informed the applicant of its decision to refuse him access to all identified documents, relying upon s.43(1) of the FOI Act. The documents identified by the GCCC as being responsive to the FOI access application comprise two two-part reports prepared by Geoff Maiden Partners Pty Ltd, and a report by SMEC Australia Pty Limited.
6. By letter dated 20 March 2000, the applicant sought internal review of the decision. By letter dated 15 May 2000, Mr Geoffrey Bolster affirmed the initial decision. Mr Bolster informed the applicant of his right to apply to the Information Commissioner for external review. The procedure for seeking such a review was set out on an attachment to the internal review decision letter dated 15 May 2000. However, it was not until 9 August 2000 that my office received from the applicant an application for external review of Mr Bolster's decision.
7. By letter dated 15 August 2000, I provided the applicant with a copy of *Re Young and Workers' Compensation Board of Qld* (1994) 1 QAR 543, in which the Information Commissioner had discussed the principles applicable to the exercise of the discretion conferred on the Information Commissioner by s.73(1)(d) of the FOI Act, and invited him to lodge evidence and/or submissions in support of a case that the discretion conferred by s.73(1)(d) of the FOI Act should be exercised in his favour.
8. In reply, the applicant lodged a written submission dated 31 August 2000. That submission made it clear that the applicant did not seek to raise 'sufficiency of search' issues on external review, but wished to challenge the GCCC's claim that the reports relating to geotechnical and geological stability of five properties in Dalton Road,

Tallebudgera Valley, qualified for exemption under s.43(1) of the FOI Act. The applicant supplemented his submission with the provision of further information by telephone and by facsimile on 14 and 18 September 2000.

9. From the evidence provided by the applicant in support of his case for an extension of time, it is apparent that Part 1 of the first two-part report prepared by Geoff Maiden Partners Pty Ltd had previously been forwarded to the applicant by the GCCC, under cover of a letter dated 17 March 1999.
10. Accordingly, by letter dated 25 September 2000, the Assistant Information Commissioner informed the GCCC that the applicant was able to show a reasonably arguable case, with reasonable prospects of success, of satisfying the Information Commissioner that at least one of the documents to which the applicant has been refused access does not qualify for exemption under s.43(1) of the FOI Act. The GCCC was, therefore, invited to address the two other key considerations identified in *Re Young*, namely, the extent of delay in applying for external review, and possible prejudice to the GCCC.
11. In reply, the GCCC lodged a written submission dated 11 October 2000, which opposed the grant of an extension of time.

Application of s.73(1)(d) of the FOI Act

1. Section 73(1)(d) of the FOI Act provides:

73.(1) An application for review must—

...

(d) be made—

(i) within 60 days; or

(ii) if the application is for review of a decision referred to in section 71(1)(f)(i)—within 28 days;

from the day on which written notice of the decision is given to the applicant, or within such longer period as the commissioner allows (whether before or after the end of that period).

13. In *Re Young*, the Information Commissioner set out the principles which apply to the exercise of the discretion conferred by s.73(1)(d) of the FOI Act. At paragraph 22 of *Re Young*, the Information Commissioner identified the key considerations as:
 - (a) the extent of the delay in applying for review and whether the applicant has an acceptable explanation for the delay;

- (b) the balance of fairness, having regard to any prejudice that would be occasioned to the applicant by a refusal to grant an extension of time compared with any substantial prejudice that would be occasioned to the respondent or to third parties by the grant of an extension of time; and
- (c) the merits of the substantive application for review: i.e., whether it raises genuine issues and discloses a reasonably arguable case, with reasonable prospects of success, in respect of one or more of the documents in issue; or whether it would be futile to permit the application to proceed because it is apparent that the applicant lacks any grounds of substance for challenging the decision under review and has no reasonable prospects of success.

Extent of delay

- 14. The statutory time period for making an application for external review of a decision refusing access to documents is set by s.73(1)(d) of the FOI Act at 60 days. The application for external review was made approximately 25 days after the 60 day period expired.
- 15. In the applicant's written submission, dated 31 August 2000, he said:

The delay in my application has been caused by my time being taken up by Court action with the [GCCC] (unrelated to this issue) which we subsequently won [personal information deleted]. As a result of all this I overlooked the time limit for my application for External Review.

- 16. While the extent of the delay in applying for external review does weigh against the applicant, I consider that he has offered a reasonable explanation for the delay, given the exigencies of shifting a family residence, and I do not think the extent of the delay should be accorded any substantial or decisive weight in telling against a favourable exercise of the discretion conferred by s.73(1)(d).

Prejudice to other parties

- 17. In its written submission dated 11 October 2000, the GCCC submitted that an extension of time being granted to the applicant would place "*an unreasonable cost and absorption of staff time as Council intends to defend its stance of legal privilege attaching to these documents*", and also submitted that no injustice would occur to the applicant should the discretion not be exercised. I note that there has been no suggestion of any prejudice to third parties if an extension of time were granted.
- 18. I do not accept that any substantial prejudice would be caused to the GCCC by granting an extension of time. The GCCC would not be exposed to any resource costs in defending its decision that it would not have faced if the application for review had been lodged within 60 days, or that it would not face if the applicant now lodged a fresh FOI access application for the same documents (and I note that there is nothing in the scheme

of the FOI Act which would prevent him from doing so) and observed the applicable time limits that would allow him to obtain external review by the Information Commissioner, as of right. Nevertheless, it would still be inappropriate to exercise the discretion to extend time in favour of the applicant, if he had no reasonable prospect of successfully challenging the GCCC's decision that the documents in issue are exempt under s.43(1) of the FOI Act.

Merits of the application for review

19. The GCCC refused the applicant access to the documents in issue under s.43(1) of the FOI Act, which provides:

43.(1) Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.

20. The s.43(1) exemption turns on the application of those principles of Australian common law which determine whether a document, or matter in a document, is subject to legal professional privilege. In brief terms, legal professional privilege attaches to confidential communications between lawyer and client made for the dominant purpose of seeking or giving legal advice or professional legal assistance, and to confidential communications made for the dominant purpose of use, or obtaining material for use, in pending or anticipated legal proceedings: see *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 74 ALJR 339.
21. I have obtained and examined copies of the documents in question, which comprise two two-part reports prepared by Geoff Maiden Partners Pty Ltd, and a report by SMEC Australia Pty Limited. In a letter dated 11 September 2000, the GCCC maintains that the first two-part report was obtained "*pursuant to an Order of the Planning and Environment Court made 12 March 1999*", and that the second two-part report was "*also commissioned in anticipation of further legal proceedings*". Of the report by SMEC Australia Pty Limited, the GCCC says that it "*was commissioned to review the findings of all the Maiden reports and as such, it is considered that privilege attached to these documents also*".
22. The GCCC continues to maintain that Part 1 of the first two-part report qualifies for exemption, notwithstanding that it was sent to the applicant by the GCCC on 17 March 1999. The GCCC does not accept that sending this document to the applicant involved a waiver of legal professional privilege (assuming legal professional privilege attached to the document in the first place). I have obtained and examined a copy of the letter dated 17 March 1999 sent to the applicant by the GCCC, and there is nothing on the face of the letter to indicate that the applicant's use of the report forwarded with the letter was to be limited or restricted in any way. The letter contains no reference to proceedings in the Planning and Environment Court, nor to an Order dated 12 March 1999. Not only does the letter enclose a copy of Part 1 of the report, but it also states:

Part 2 of the report shall address the failed section of crib wall and shall be provided when available.

23. In its written submission dated 11 October 2000, the GCCC stated that the two-part reports were "verbally" requested by Mr Jeremy Wagner for the GCCC on 9 March 2000. This would seem to be at odds with the GCCC's contention in its earlier letter, dated 11 September 2000, that the reports were obtained pursuant to an order of the Planning and Environment Court made 12 March 1999.
24. The five reports in issue will attract legal professional privilege if they comprise confidential communications to the GCCC or its solicitors made for the dominant purpose of use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communications, and if privilege in the communications has not been waived.
25. From my examinations of the reports and the material provided by the GCCC to date, I consider that there is substantial doubt that the reports were created for the dominant purpose of use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the relevant time. In respect of one of the reports, the material before me strongly suggests that any privilege that might have attached to the report has been waived.
26. It is not necessary, at this stage, for the applicant to demonstrate that his substantive application for review will be successful, only that he has a reasonably arguable case with reasonable prospects of success. On the material presently available to me, I am satisfied that he does. It is possible that the GCCC can adduce evidence to establish that each of the reports attracted, and still retains, legal professional privilege. It will have the opportunity to do so during the course of dealing with the applicant's substantive application for review.
27. On the material presently available to me, I consider that the merits of the substantive application for review are such that I should exercise the discretion conferred by s.73(1)(d) of the FOI Act in favour of the applicant, notwithstanding the extent of his delay in applying for external review.

Decision

28. I decide to exercise the discretion conferred by s.73(1)(d) of the FOI Act in favour of extending the time for the applicant to lodge a valid application for review of Mr Bolster's decision, on behalf of the GCCC, dated 15 May 2000.