

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

L 25 of 1993
(Decision No. 95018)

Participants:

REIN UKSI AND S JUNE UKSI
Applicants

- and -

REDCLIFFE CITY COUNCIL
Respondent

- and -

BRIAN ANTHONY COOK
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - "reverse FOI" application - documents in issue relate to complaints made by the applicants concerning damage to their property allegedly caused by the neighbouring property of the third party - applicants anticipate commencing litigation to assert their rights - whether documents in issue exempt under s.42(1)(d) of the *Freedom of Information Act 1992* Qld - observations on the meaning of the phrases "a person's fair trial" and "the impartial adjudication of a case".

FREEDOM OF INFORMATION - whether documents in issue exempt under s.43(1) of the *Freedom of Information Act 1992* Qld - whether documents subject to legal professional privilege - waiver of legal professional privilege.

FREEDOM OF INFORMATION - application of s.44 of the *Freedom of Information Act 1992* Qld where the matter in issue concerns the "shared personal affairs" of the applicants and the third party - whether disclosure of the matter in issue to the third party would, on balance, be in the public interest.

Freedom of Information Act 1992 Qld s.42(1)(d), s.43(1), s.44(1), s.51, s.52

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Bussey and Council of the Shire of Bowen, Re (Information Commissioner Qld, Decision No. 94010, 24 June 1994, unreported)

Byrne and Gold Coast City Council, Re (Information Commissioner Qld, Decision No. 94008, 12 May 1994, unreported)

GSA Industries (Aust) Pty Ltd and Brisbane City Council, Re (Information Commissioner Qld, Decision No. 94020, 25 August 1994, unreported)

McEniery and the Medical Board of Queensland, Re (1994) 1 QAR 349

Norman and Mulgrave Shire Council, Re (Information Commissioner Qld, Decision No. 94013, 28 June 1994, unreported)

Smith and Administrative Services Department, Re (1993) 1 QAR 22

Stewart and Department of Transport, Re (1993) 1 QAR 227

"T" and Queensland Health, Re (1994) 1 QAR 386

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DECISION

I affirm the decision under review, being the decision made on 2 December 1993 by Mr R Fennell on behalf of the respondent.

Date of Decision: 16 June 1995

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F N ALBIETZ
INFORMATION COMMISSIONER

Participants:

REIN UKSI AND S JUNE UKSI
Applicants

- and -

REDCLIFFE CITY COUNCIL
Respondent

- and -

BRIAN ANTHONY COOK
Third Party

REASONS FOR DECISION

Background

1. This is a "reverse-FOI" application by Mr and Mrs Uksi, who oppose the respondent's decision to give the third party, Mr Cook, access to a number of documents under the *Freedom of Information Act 1992 Qld* (the FOI Act). The documents in issue comprise part of the file the respondent brought into existence following complaints made by Mr and Mrs Uksi about damage to their property alleged to have been caused by unauthorised filling of land on, and discharge of storm water from, Mr Cook's neighbouring property.
2. On 3 September 1993, Mr Cook lodged his FOI access application with the Redcliffe City Council (the Council) requesting access to:

Copies of documents pertaining to property of 193 MacDonnell Road, Margate regarding complaints of dividing fence, water run-off allegations and any matters subject of complaint from owners/occupiers of 195 MacDonnell Road regarding my premises at No. 193.
3. Mr Cook is a co-owner and resident of the property situated at 193 MacDonnell Road, Margate. Mr and Mrs Uksi are the owners of the neighbouring property at 195 MacDonnell Road, Margate.
4. After receiving Mr Cook's FOI access application, the Council consulted with Mr and Mrs Uksi, in accordance with s.51 of the FOI Act. By letter dated 28 September 1993, Mr and Mrs Uksi argued that Mr Cook's application should be denied. However, the Council's FOI Co-ordinator, Mr B Holmes, decided on 26 October 1993 that Mr Cook was entitled to be given access under the FOI Act to the requested documents. On 18 November 1993, Mr and Mrs Uksi applied for internal review in accordance with s.52 of the FOI Act. On 2 December 1993, the Town Clerk, Mr R Fennell, affirmed the decision that Mr Cook was entitled to have access to the requested documents. On 20 December 1993, I received from Mr and Mrs Uksi an application for review under Part 5 of the FOI Act in respect of Mr Fennell's decision.
5. The history of the dispute between the applicants and Mr Cook is recorded in minutes of the

Council's Town Planning and Building Committee (the Committee), which are available for public inspection at the Redcliffe City Library, and the contents of which are known to the applicants and to Mr Cook.

6. The minutes of the meeting of the Committee on Wednesday 28 July 1993, so far as relevant, state:

By letter received 10 May 1993, the neighbours of the abovementioned property who reside at 195 MacDonnell Road, Margate, requested the Council to address an alleged build up of soil adjacent the common side boundary fence. This was inspected by Council officers and a notice was sent requiring the property owners at 193 MacDonnell Road to remove the fill within a specified time.

The complaint also referred to roofwater that was discharged onto the ground surface on the western side of the dwelling aggravating the situation when the soil fill against the common side boundary fence became saturated in heavy rain.

The roof water drainage was unable to be discharged at the MacDonnell Road channel because of the fall of the land.

The property at 193 MacDonnell Road was approved and built in the late 1960s and had approximately 1.0 metre clearance from the dwelling wall to the western common side boundary. The rear of the property adjacent to the western side boundary was developed with an inground swimming pool with a concrete surround.

...

7. The minutes record that Council's normal requirements for dealing with a rainwater discharge problem were considered impractical having regard to particular features of Mr Cook's property, and the recommendation of the Committee was that no further action be taken in relation to the matter.
8. On 8 September 1993, the matter was again considered by the Committee, following further representations made by Mr and Mrs Uksi. So far as relevant, the minutes for that Committee meeting state:

By letters received 20 and 24 August 1993, the owners of 195 MacDonnell Road, Margate, requested the Council to further consider their situation with regard to the overland flow problem and the soil fill against the common side boundary fence towards the rear of 193 MacDonnell Road.

The owners of 193 MacDonnell Road were served a notice dated 17 June 1993, requiring them to remove the existing soil fill between their concrete pool surround and the A/C sheeted common dividing fence. A further inspection on 8 July 1993, revealed that the soil fill had not been removed from adjacent to the rear fence.

The owners of 195 MacDonnell Road were directed by letter dated 17 June 1993, to carry out repair work to an existing unroofed pergola and bring the structure into conformity with the Standard Building By-laws by lodging the appropriate building application and obtaining the required building approval.

Mr and Mrs Uksi further complained that discharge from the roofwater down pipes on the western side of the property at 193 MacDonnell Road (supported by a report

from a structural engineer) may be contributing to the failure in the clay masonry support wall of the unroofed pergola.

9. The Minutes record that the Committee recommended that Mr Cook be informed that the Council intended to take no further action with regard to the notice dated 17 June 1993 requiring the removal of existing soil fill. Other recommendations took the form of suggestions made to the owners of the respective properties as to ways in which the complaint made by the applicants could be remedied.
10. The procedures of the Council in relation to meetings of the Committee are described, in the Council's written submission to me for the purposes of this review, as follows:

I advise that any correspondence referring to a matter being placed before the Town Planning and Building Committee is usually presented to the meeting to enable full and frank discussions to be conducted and thus any decision reached is based on all available facts. There is no indication that the complaint submitted by Mr and Mrs Uksi was handled any differently. I also advise that Redcliffe City Council committee meetings are open to the public to attend and observe the processes of local government decision- making. Whilst both meetings where this subject was discussed would have been open, records are not kept whether in fact there were any persons in the public gallery or not.

However, the matter is contained within the minutes of the Redcliffe City Council and, as such is on the public record. Moreover, as indicated above, the general practice is to discuss all aspects of matters before the committee and, had Mr Cook or any other person been in the public gallery for the meetings referred to, he or those other persons, along with the Committee, would have been provided with a narration of the facts and circumstances surrounding the complaint by Mr and Mrs Uksi.

It is reasonable to expect that Mrs Uksi was, and is, familiar with the procedures of the Council, since in a letter to me dated 22 February 1994 Mrs Uksi describes herself as having been an Alderman of the Council for 12 years. The applicants have been provided with the Council's final submission, and have not contested the accuracy of the statements in the above extract.

The documents in issue

11. The documents in issue are listed below in chronological order, and numbered for ease of reference in these reasons for decision:
 1. letter, R and S J Uksi to the Town Clerk of the Council, dated 7 May 1993;
 2. letter, Town Clerk of the Council to Mr and Mrs Uksi, dated 17 June 1993 (together with hand-written notes at the foot of this document);
 3. report by a firm of civil, structural engineers to Mr and Mrs Uksi dated 27 July 1993 (the engineers' report);
 4. hand-written page containing figures and markings, describing the dimensions of both properties (undated);
 5. note of telephone conversation between a Council officer and Mrs Uksi, dated 6 August 1993;

6. letter, Town Clerk to Mr and Mrs Uksi, dated 11 August 1993;
7. letter, Mr and Mrs Uksi to the Acting Town Clerk of the Council, dated 19 August 1993 (also containing a number of hand-written notes of various dates between 24 August 1993 and 31 August 1993);
8. letter, Mr and Mrs Uksi to the Acting Town Clerk of the Council, dated 23 August 1993;
9. letter, Town Clerk of the Council to Mr and Mrs Uksi, dated 28 September 1993.

The external review process

12. In their application for external review, the applicants summarised the history of their dispute with Mr Cook and the Council, and concluded:

In our opinion, Redcliffe City Council has very deliberately opted to abrogate its responsibilities in this matter and, again in our opinion, is quite obviously doing everything possible to avoid taking what has been the standard action over many years under similar circumstances.

...

It is highly likely that we will have to resort to litigation before any fair and just finalisation of the matter will be achieved.

Should litigation be necessary, release of the documents and letters relating to this matter and held by Redcliffe City Council, could prejudice our case and cause us a denial of natural justice.

13. The applicants have not specifically nominated in writing the exemption provisions which they contend are applicable to the documents in issue. However, at a conference convened by a member of my staff on 2 February 1994, attended by the applicants and Mr Holmes of the Council, the applicants stated their objections to disclosure of the documents in issue, and it was ascertained that reliance is placed on s.42(1)(d) (prejudice to a person's fair trial or the impartial adjudication of a case), s.43(1) (legal professional privilege) and s.44(1) (the personal affairs exemption) of the FOI Act. On 9 February 1994, I wrote to the applicants conveying my preliminary views on the application of s.42(1)(d) and s.43(1) of the FOI Act, and inviting them to lodge a written submission on the application of s.44(1) to the documents in issue. The applicants responded by letter dated 22 February 1994, making it clear, by contesting the preliminary views expressed in my letter dated 9 February 1994, that they continued to assert the application of s.42(1)(d) and s.43(1). The applicants did not respond to my invitation to lodge a further submission dealing with the application of s.44(1).
14. Written submissions were also lodged by the Council (dated 11 April 1994) and by Mr Cook (dated 12 April 1994), both of which addressed the application of s.44(1) of the FOI Act.
15. During the course of this external review, the applicants consented to the release to Mr Cook of correspondence (and draft correspondence) between the Council and Mr Cook. The applicants also consented to disclosure to Mr Cook of the minutes of the Committee meetings referred to in paragraphs 6-9 above, since they agreed that those minutes were documents available to any member of the public. During the course of this external review, a number of documents consisting of plans for proposed construction of swimming pools and residences were found attached to the copy of the engineers' report (document 3 described in paragraph 11 above) supplied to me by the

Council. The Council subsequently advised in September 1994 that these documents, and a number of photographs and the hand-written document which is document 4 described in paragraph 11 above, were misdescribed as being part of the engineers' report, and were in fact documents which had been placed on the relevant file by the Council, for the purpose of processing the applicants' complaints. Mr Cook agreed that he did not wish to obtain documents which were plans of work to be constructed on the applicants' property, and these documents are not in issue. The applicants consented to the release to Mr Cook of a number of photographs taken by Council officers of Mr Cook's own premises. However, the applicants did not consent to the release of document 4 since they considered that this document concerns their own premises, as well as Mr Cook's premises.

Application of s.43(1) of the FOI Act

16. Section 43(1) of the FOI Act provides as follows:

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

17. The grounds on which a document attracts legal professional privilege at common law are fairly well established in Australian law. I have referred to them in my decisions in *Re Smith and Administrative Services Department* (1993) 1 QAR 22, *Re Norman and Mulgrave Shire Council* (Information Commissioner Qld, Decision No. 94013, 28 June 1994, unreported), and *Re GSA Industries (Aust) Pty Ltd and Brisbane City Council* (Information Commissioner Qld, Decision No. 94020, 25 August 1994, unreported). For present purposes, it will be sufficient by way of introduction to note the following extract from *Re Smith* (at paragraph 82):

... The nature and scope of legal professional privilege at common law has been the subject of consideration by the High Court of Australia in a number of recent cases. A concise summary of the general principles which can be extracted from those High Court judgments is contained in the decision of Mr K Howie, Member of the Victorian Administrative Appeals Tribunal, in Re Clarkson and Attorney-General's Department, (1990) 4 VAR 197, at p. 199:

"The nature of legal professional privilege has been closely examined by the High Court in a number of decisions, in particular *Grant v Downs* (1976) 135 CLR 674, *Baker v Campbell* (1983) 153 CLR 52, *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, and *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.

From these decisions, the following principles emerge:

(1) To determine whether a document attracts legal professional privilege consideration must be given to the circumstances of its creation. It is necessary to look at the reason why it was brought into existence. The purpose why it was brought into existence is a question of fact.

(2) To attract legal professional privilege the document must be brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings. Submission to legal advisers for advice means professional legal advice. It includes the seeking or giving of advice. Use in legal proceedings includes anticipated or pending litigation.

(3) The reason for legal professional privilege is that it promotes the public interest. It assists and enhances the administration of justice by facilitating the representation of clients by legal advisers. There are eloquent statements of the importance of this public interest in each of the cases referred to above.

...

(6) A client may waive legal professional privilege: see in particular the *Maurice* case.

(7) Some vigilance is necessary to ensure that legal professional privilege is not successfully invoked to protect from production documents that do not properly fall within its ambit. Otherwise the important public purposes it is intended to serve will be undermined."

18. As I read their letter dated 22 February 1994, the applicants appear to be submitting, in effect, that legal professional privilege applies to:

- (a) the engineers' report (document 3 referred to in paragraph 11 above); and
- (b) all correspondence between the applicants and the Council subsequent to the Council's letter of 17 June 1993.

19. The applicants' submission sets out the history of the handling of the complaint made by the applicants to the Council. It is the applicants' submission that a crucial date was 24 June 1993, on which date the Council's letter to the applicants dated 17 June 1993 (being document 2 referred to in paragraph 11 above) was received by the applicants. The applicants submit that it was not until that time that they realised that the subject of the complaint may well result in litigation "*before any fair and impartial resolution to the then rapidly escalating situation would be achieved ...*". Their submission continued as follows:

It was at this point on 24/6/93 - (not when we lodged our complaint to Council on 7/5/93) - that we recognised the need to obtain professional advice on both the structural and legal aspects of our position with a view to preparing the correct steps in the lead-up to probable litigation.

Therefore the structural engineering report dated 27/7/93, was not - nor could it have been - obtained for the purpose of LODGING the complaint with Redcliffe City Council. [I note that this sentence specifically responds to a preliminary view conveyed in my letter to the applicants dated 9 February 1994 that at least one purpose for obtaining the engineers' report was to support the making of a complaint to Council, and hence the "sole purpose test" to attract the application of legal professional privilege could not be satisfied.]

We submit that the chronological sequence of letters and events clearly demonstrates that the doctrine of legal professional privilege has been established absolutely in relation to this report, the author of which would be called as a professional witness should the matter proceed to a court of law.

Under normal circumstances a copy of this report would not even be in Council's

possession. It was during a subsequent telephone conversation with David Kay (Town Planner/Building Surveyor) when I learned that Council's decision was to take no further action regarding disposal of roof water drainage, that I mentioned the report and its source. David asked if he could have a copy as it would assist him in preparing a further report to Council. I agreed to his request as a courtesy to him and, as our legal advice was to make a further submission to Council, it seemed logical to also include and refer to the engineering report as part of that submission.

We now further submit to you that all correspondence between ourselves and Council, subsequent to Council's letter dated 17/6/93, occurred as a result of legal advice given to us relating to the necessary steps to follow in the lead-up to probable litigation.

20. The applicants have not supplied me with evidence (e.g. copies of the legal advice given to them "relating to the necessary steps to follow in the lead-up to probable litigation" or the instructions given to the firm of engineers) which might confirm that the sole purpose of the bringing into existence of the engineers' report was for use in anticipated litigation, and exclude the possibility of multiple purposes, including submission to Council in support of their complaint and demand that the Council take formal action against Mr Cook.

21. Nevertheless, I am prepared to assume this point in the applicants' favour, since it is clear that, if legal professional privilege attached to the engineers' report when it was brought into existence, the privilege has been waived in respect of the copy of the engineers' report which was forwarded to the Council under cover of the applicants' letter to Council dated 23 August 1993.

22. In *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at p.487, Mason J. said:

The limiting effect of legal professional privilege on the availability of evidence otherwise relevant is confined, inter alia, by the doctrine of waiver. A litigant can of course waive his privilege directly through intentionally disclosing protected material. He can also lose that protection through a waiver by implication. An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege.

23. In the same case, Gibbs CJ said (at p.480-1):

Like every privilege properly so called, [legal professional privilege] can be waived, although only by the person entitled to claim it, that is the client, and not the client's legal representative.

24. The evidence available to me establishes that there has been a waiver of privilege by an intentional disclosure on the part of the client (i.e. the applicants) entitled to claim legal professional privilege in respect of the engineers' report. The applicants' submission (see paragraph 19 above) states that the applicants had been given legal advice to make a further submission to Council, and it seemed logical to also include and refer to the engineering report as part of that submission. My examination of that further submission to Council (contained in the applicants' letter to Council dated 23 August 1993) discloses that the engineers' report was expressly supplied to Council to support the applicants' request that Council reconsider its decision to take no further action on the applicants' complaint. The letter contains no suggestion of, or attempt to impose, any obligation of confidence with respect to the Council's use of the engineers' report. Furthermore, the letter asserts that both the owners of 193 MacDonnell Road (one of whom is Mr Cook) and the Council were individually and collectively responsible for causing, and/or contributing to the cause of, damage to the applicants' property. This indicates that the litigation then in contemplation by the applicants

- included action against the Council.
25. Any privilege which may have attached to the copy of the engineers' report which is in the possession of the Council, has been waived through its intentional disclosure by the applicants to the Council, and it would not be privileged from production in a legal proceeding on the ground of legal professional privilege. I am satisfied that it is not an exempt document under s.43(1) of the FOI Act.
26. The final sentence of the extract from the applicants' submission quoted at paragraph 19 above asserts that all correspondence between the applicants and the Council subsequent to Council's letter dated 17 June 1993 (i.e., documents 6, 7, 8 and 9 identified in paragraph 11 above) occurred as a result of legal advice given to the applicants, and is subject to legal professional privilege. Though the applicants' argument, taken literally, asserts that legal professional privilege applies to all correspondence *between* the applicants and the Council after the nominated date, I think the applicants must have intended to refer to all correspondence *from* the applicants *to* the Council. In any event, there is no possible basis on which the Council's letters to the applicants (documents 6 and 9) could attract legal professional privilege.
27. I accept that the correspondence from the applicants to the Council (documents 7 and 8) was prepared following legal advice given to the applicants. However, this does not clothe such documents with the protection of legal professional privilege. Clearly, the correspondence forwarded by the applicants to the Council did not comprise confidential communications between client and legal adviser, nor was the correspondence brought into existence for the sole purpose of use in anticipated legal proceedings. Examination of documents 7 and 8 makes it clear that they were brought into existence for the purpose of persuading the Council to take action on the applicants' complaint against Mr Cook. Documents 7 and 8 are in no stronger position than letters of demand threatening legal action, which are not protected by the doctrine of legal professional privilege. In my opinion, documents 7 and 8 fall into a like category of documents to the one to which Dawson J referred in *Attorney-General (N.T.) v Maurice* at p. 496:

... a letter to the other side in litigation which is drafted in a solicitor's office may be privileged before it is sent because it may reveal confidential communications between the solicitor and his client. Once it is sent, however, it ceases to be confidential and there is no privilege in it, not because privilege in the document is waived, but because no privilege attaches to it.

... Legal professional privilege exists to secure confidentiality in communications between a legal adviser and his client but it can have no application in relation to a document the purpose of which is to communicate information to others.

28. The applicants did not assert that documents 1, 2, 4 and 5 are subject to legal professional privilege and, having examined them, I am satisfied that there is no possible basis on which they could attract legal professional privilege. I am satisfied that none of the documents in issue is exempt under s.43(1) of the FOI Act.

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

29. The first suggestion of a claim for exemption under s.42(1)(d) was made in the applicants' letter to the Council's FOI Co-ordinator dated 28 September 1993, in which the applicants submitted:

If litigation becomes the appropriate action, release of these documents could prejudice our case and/or subject us to denial of natural justice.

30. This claim was repeated in the applicants' application for external review. During the course of this external review, it was pointed out to the applicants that if litigation did ensue, then there was every likelihood that the documents in issue would be liable to be disclosed to the other parties to that litigation, namely Mr Cook (and the other owner of the premises at 193 MacDonnell Road) and the Council. The applicants responded to this suggestion in their final submission by saying:

Under the above circumstances we believe that these documents should only be released to the applicant's [i.e. Mr Cook's] solicitor if and when he/she files under the normal process of discovery preceding any litigation; and further, any release of the documents to the applicant prior to that time would constitute a denial of natural justice to ourselves.

31. Disclosure of the documents in issue to Mr Cook would not constitute a denial of natural justice, according to the meaning of that phrase when used as a legal term of art. Indeed, it would promote natural justice, and the possibility of a resolution of the dispute without resort to litigation, if the specifics of the applicants' complaint against Mr Cook were made known to him. It is in the interests of the community generally if disputes of this nature can be resolved without resort to litigation.
32. The issue for my determination, however, is whether any of the documents in issue contain exempt matter under s.42(1)(d) of the FOI Act, which provides:

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

...

(d) *prejudice a person's fair trial or the impartial adjudication of a case;*

33. In previous cases which required consideration of the words "could reasonably be expected to" in the context of s.42(1) of the FOI Act (see *Re McEnery and the Medical Board of Queensland* (1994) 1 QAR 349 and *Re "T" and Queensland Health* (1994) 1 QAR 386), I said that those words bear the same meaning as that which I explained (in the context of considering the identical words in s.46(1)(b) of the FOI Act) at paragraphs 154-161 of *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. In particular, I said at paragraph 160 of *Re "B"*:

... 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.

34. I think it is fairly clear, according to their natural meaning, that the words "a person's fair trial" in s.42(1)(d) do not refer to a civil suit between parties, but to the trial of a person charged with a criminal offence. These words do not apply to the kind of litigation which the applicants have in contemplation, i.e. a civil suit against Mr Cook and perhaps also the Council.
35. The words "impartial adjudication of a case" are broad enough to refer to any kind of case, involving a dispute between parties, which is to be formally adjudicated by an impartial decision-maker. The words certainly extend to a civil suit of the kind the applicants have in contemplation. However, I am unable to see any reasonable basis for an expectation that disclosure of the documents in issue could prejudice the impartial adjudication of such a case. It is difficult to conceive of how their disclosure could have any impact at all on the impartiality of the adjudication

of such a case. Certainly, a document such as the engineers' report is the kind of document which a court would compel the applicants to disclose to Mr Cook in the course of preparations for hearing, in the interests of a fair hearing of the issues.

36. I am not satisfied that any of the documents in issue contain matter that is exempt matter under s.42(1)(d) of the FOI Act.

Application of s.44 of the FOI Act

37. In conference with a member of my staff on 3 February 1994, the applicants argued that information contained in the documents in issue concerned their personal affairs and was nobody else's business. They have not, however, taken the opportunity to make a formal submission on the application of s.44 of the FOI Act to the documents in issue. Both Mr Cook and the Council addressed the application of s.44 in their written submissions, and I have referred to relevant parts of those submissions below.

38. Sections 44(1) and 44(2) of the FOI Act provide as follows:

44.(1) Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.

(2) Matter is not exempt under subsection (1) merely because it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to a document containing the matter is being made.

39. In my reasons for decision in *Re Stewart and Department of Transport* (Information Commissioner Qld, Decision No. 93006, 9 December 1993, unreported), I identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and the relevant variations of that phrase) as it appears in the FOI Act (see paragraphs 79-114 of *Re Stewart*). In particular, I said that information concerns the "personal affairs of a person" if it relates to the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:

family and marital relationships;

health or ill-health;

relationships with and emotional ties with other people; and

domestic responsibilities or financial obligations.

40. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, based on a proper characterisation of the matter in question.
41. The information contained in the documents in issue concerns the applicants' complaint to Council about the manner in which certain work and structures on Mr Cook's residential property is claimed to affect the amenity of, and a structure on, the applicants' residential property, and to affect the dividing fence between the two properties.
42. I consider that the matter in issue is properly to be characterised as information which concerns the

personal affairs of both the applicants and Mr Cook. No doubt the making of the complaint to Council by the applicants is in itself a personal affair of the applicants: see *Re Byrne and Gold Coast City Council* (Information Commissioner Qld, Decision No. 94008, 12 May 1994, unreported) at paragraphs 32-33. However, the identity of the applicants as persons who have complained to Council is well known to Mr Cook (the identity of the applicants as complainants and the substance of their complaint have become matters of public record in the manner noted at paragraphs 6-9 above) and deletion of identifying details as in *Re Byrne* would be futile.

43. I analysed the considerations applicable to matter which concerns "shared personal affairs" in my decision in *Re "B"* at paragraphs 172-178. All of that analysis is relevant for present purposes, but I will repeat only what I said in paragraph 176:

176. Thus, if matter relates to information concerning the personal affairs of another person as well as the personal affairs of the applicant for access, then the s.44(2) exception to the s.44(1) exemption does not apply. The problem here arises where the information concerning the personal affairs of the applicant is inextricably interwoven with information concerning the personal affairs of another person. The problem does not arise where some document contains discrete segments of matter concerning the personal affairs of the applicant, and discrete segments of matter concerning the personal affairs of another person, for in those circumstances:

- (a) the former will fall within the s.44(2) exception;*
- (b) the latter will be exempt under s.44(1) (unless the countervailing public interest test applies to negate the prima facie ground of exemption); and*
- (c) s.32 of the FOI Act can be applied to allow the applicant to have access to the information concerning the applicant's personal affairs, by the provision of a copy of the document from which the exempt matter has been deleted.*

Where, however, the segment of matter in issue is comprised of information concerning the personal affairs of the applicant which is inextricably interwoven with information concerning the personal affairs of another person, then:

- (a) severance in accordance with s.32 is not practicable;*
- (b) the s.44(2) exception does not apply; and*
- (c) the matter in issue is prima facie exempt from disclosure to the applicant according to the terms of s.44(1), subject to the application of the countervailing public interest test contained within s.44(1).*

44. Having examined the documents in issue, I consider that there is a small amount of matter, comprising the second, third, fourth, fifth and sixth paragraphs of document 3 (the engineers' report) which should probably be characterised as information which concerns the personal affairs of the applicants only. It describes the nature of the damage to a structure situated on the applicants' property and the steps required to rectify the problem. This is *prima facie* exempt matter under s.44(1) of the FOI Act, subject to the application of the countervailing public interest test incorporated within s.44(1).

45. The rest of the matter in issue is properly to be characterised as information concerning the personal affairs of Mr Cook which is inextricably interwoven with information concerning the personal affairs of Mr and Mrs Uksi, which means that:
- (a) severance in accordance with s.32 is not practicable;
 - (b) the s.44(2) exception does not apply; and
 - (c) the matter in issue is *prima facie* exempt from disclosure to Mr Cook according to the terms of s.44(1), subject to the application of the countervailing public interest test incorporated within s.44(1).

When considering the application to this matter of the countervailing public interest test in s.44(1), Mr Cook, as the applicant for access under the FOI Act to the documents in issue, is entitled to whatever assistance can be obtained from s.6 of the FOI Act which provides:

6. If an application for access to a document is made under this Act, the fact that the document contains matter relating to the personal affairs of the applicant is an element to be taken into account in deciding -

- (a) *whether it is in the public interest to grant access to the applicant;*
and
- (b) *the effect that the disclosure of the matter might have.*

46. The Council submitted that the public interest is served by making available information which provides evidence that a public authority has made a just and lawful ruling, and that there is a public interest in an individual having access to documents concerning his or her personal affairs. The Council considered the interests of the applicants, and submitted that disclosure of the documents in issue would cause no detriment to the rights of Mr and Mrs Uksi, since Mr Cook was aware of the applicants' identities as the complainants to the Council (so that disclosure which would identify the complainants is not an issue in this case) and release of the documents would have no effect on the rights of the applicants to pursue litigation.
47. Mr Cook's concise submission on the application of the public interest balancing test is that he should be entitled to gain information concerning serious allegations made against him to a government authority.
48. I accept that the considerations raised by both the Council and Mr Cook are valid and entitled to be given appropriate weight. Moreover, in the particular circumstances of this case, I consider that the public interest favouring non-disclosure which is inherent in satisfaction of the test for *prima facie* exemption under s.44(1), carries less weight than usual because the substance, and much of the detail, of the information which concerns the personal affairs of the applicants has become a matter of public record (in the manner explained at paragraphs 6-9 above). In forwarding their complaints and supporting evidence to Council, the applicants were seeking to have their complaints acted upon in their favour by the government agency charged by Parliament with attending to such matters (i.e. the Council). In the particular circumstances of this neighbourhood dispute (there being no factors present which might attract the application of exemption provisions contained in s.42(1) of the FOI Act; *cf. Re Bussey and Council of the Shire of Bowen*, Information Commissioner Qld, Decision No. 94010, 24 June 1994, unreported), there is a legitimate public interest in a party complained against knowing the details of the complaint. When these considerations are weighed with the public interest (given special recognition in s.6 of the FOI Act) in Mr Cook having access

to information which concerns his personal affairs, I am satisfied that disclosure to Mr Cook of the matter in issue which concerns the personal affairs of both Mr Cook and the applicants would, on balance, be in the public interest.

49. In respect of the small amount of matter identified in paragraph 44 above, which concerns the personal affairs of the applicants only, Mr Cook cannot obtain any assistance from s.6 of the FOI Act. The other considerations identified above, however, also apply to this information. Since this information describes the nature of damage to the applicants' property, in respect of which the applicants assert that Mr Cook is liable to compensate them, and in light of the applicable considerations identified above, I consider that disclosure of this information to Mr Cook would, on balance, be in the public interest.
50. In summary, I am not satisfied that any of the matter in issue is exempt matter under s.44(1) of the FOI Act.

Conclusion

51. I am not satisfied that any of the matter in issue is exempt matter under the FOI Act, and I therefore affirm the decision under review.

F N ALBIETZ
INFORMATION COMMISSIONER