

## **Hawck and Department of Training and Industrial Relations**

(S 150/96, 31 January 1997, Information Commissioner Albietz)

*(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 removed.]

### **REASONS FOR DECISION**

#### **Background**

5. By letter dated 20 June 1996, [the access applicant] made application to the Department of Training and Industrial Relations ("the Department") for access under the FOI Act to the following:
  - (a) all documentation relating to [the access applicant's] unsuccessful applications for a number of jobs advertised by the Department; and
  - (b) the content of claims made by the successful applicants for those jobs, including the addressing of selection criteria and interview questions and answers.
6. On 31 July 1996, the Department, under s.51 of the FOI Act, consulted Mr Hawck, who was the successful applicant for the position of Claims Supervisor - Division of Workers' Compensation, Ipswich, as to whether he objected to the release of nine pages relating to his application for that position. Mr Hawck objected "most strongly", stating that his application contained information which he believed to be personal and confidential, and that its release would cause him stress and concern. Mr Hawck stated that he may be willing to allow the access applicant to view the material (on the condition that Mr Hawck be present at any viewing), but under no circumstances would he consent to copies being released to any party.
7. On 23 August 1996, Mr R P Camm, the Department's FOI decision-maker, advised Mr Hawck that his decision was to grant access to Mr Hawck's job application material, subject to the deletion of matter concerning Mr Hawck's personal affairs, which was exempt under s.44(1) of the FOI Act. Mr Camm decided that references in the material to Mr Hawck's home telephone number, residential address and his signature, comprised information concerning Mr Hawck's personal affairs and should be exempt from disclosure to the applicant for access.
8. On 27 August 1996, Mr Hawck applied to the Department for internal review of Mr Camm's decision. Ms Anne Quinnell conducted the internal review and, by letter dated 3 September 1996, she affirmed Mr Camm's decision.

9. On 19 September 1996, Mr Hawck applied to me for external review, under Part 5 of the FOI Act, of Ms Quinnell's decision. He advised that he did not wish to take any active part in the review, but simply asked that I examine the documents and issue a determination. He stated that he wished to be advised of the outcome of my review, and whether or not a copy of his application was to be released, or permitted to be viewed only.

### **The matter in issue**

10. The documents to which [the access applicant] seeks access are nine pages relating to Mr Hawck's successful application for the position of Claims Supervisor, Division of Workers' Compensation, Ipswich. They are the application form which Mr Hawck completed (page 1) and his statement addressing the selection criteria for the position (pages 2-9).
11. As I mentioned, the Department decided that Mr Hawck's telephone number, residential address, and signature, were exempt matter under s.44(1) of the FOI Act. This part of the Department's decision was not challenged by [the access applicant]. This means that the information which the Department found to be exempt under s.44(1) of the FOI Act is not in issue in this external review, and will not be disclosed to [the access applicant]. My review relates to the remainder of pages 1-9 (which I will refer to as the matter in issue).

### **The external review process**

12. On 18 October 1996, the Assistant Information Commissioner wrote to [the access applicant], asking that he confirm that he wished to pursue access to the matter in issue. On 31 October 1996, [the access applicant] confirmed that he did.
13. On 13 November 1996, the Deputy Information Commissioner wrote to Mr Hawck to convey his preliminary view that the Department's decision was correct, and to explain his reasons for forming that view. The Deputy Information Commissioner invited Mr Hawck to either confirm his acceptance of that preliminary view, or, if he still wished to contend that the matter in issue was exempt, to provide a written submission and/or evidence in support of his contentions. Mr Hawck did not respond.

### **Exemption provisions**

14. In her decision, Ms Quinnell considered the application to the matter in issue of three exemption provisions: s.44(1), s.46(1)(a) and s.46(1)(b). Mr Hawck has not suggested or argued that any other exemption provision in the FOI Act may be applicable to the matter in issue.

### **Application of s.44(1) - Matter affecting personal affairs**

15. Section 44(1) of the FOI Act provides:

*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.*

16. In *Re Stewart and Department of Transport* (1994) 1 QAR 386 (a copy of which was provided to Mr Hawck), I stated that the phrase "personal affairs" has a well-accepted core meaning which includes:

1. family and marital relationships;
2. health or ill-health;
3. relationships with and emotional ties with other people;
4. domestic responsibilities or financial obligations.

Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, to be determined according to the proper characterisation of the information in question.

17. In *Re Stewart*, at pages 261-264, I went on to say that employment-related matters fall within the grey area, rather than within the core meaning of the phrase "personal affairs of a person". However, three cases decided by judges of the Federal Court of Australia have established that, ordinarily, information which concerns a person's work performance or capacity is not information which concerns that person's personal affairs, subject to the qualification that an assessment of work performance or capacity, or suitability for appointment or promotion, might contain some information which concerns a person's personal affairs, such as information falling within the core meaning described in paragraph 16 above.

18. In *Re Williams and Registrar of the Federal Court of Australia* (1985) 8 ALD 219, the Commonwealth Administrative Appeals Tribunal (AAT) examined the equivalent exemption provision in the Commonwealth FOI Act, which provided as follows:

*A document is an exempt document if its disclosure under the Act would involve unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).*

19. The relevant passage from the Commonwealth AAT's decision in *Re Williams* states as follows:

*Document 16 is in a different category from all the other documents referred to in Mr Howard's affidavit. It is a document relating to the successful applicant, Mr Curtis. He has since been appointed to the position and the fact of his application must now be taken as public knowledge. This cannot be said of the remainder of the applications. For Mr Curtis, the entitlement to anonymity has passed. It is now known that he applied, that he must previously have intended to*

*leave his former position, and that he intended to pursue a career in circumstances different from his previous employment.*

20. In *Re Dyki and Federal Commissioner of Taxation* (1990) 22 ALD 124, the Commonwealth AAT held:

*The two successful candidates have since been appointed to the advertised positions and their new status has entered the public domain. I am satisfied that it is both in the public interest and reasonable that promotions must not only be just, but seen to be just. It follows that those applications, having achieved their aim, are opened up to public scrutiny and their authors' claim to promotion is henceforth in the public domain. It follows that the applicants' claim to privacy must be deemed to have been abandoned, if only because it is public knowledge that they applied for promotions and were successful. Thus, the job applications for the two successful candidates have lost whatever entitlement to anonymity that they had (subject to deletion of matters adjudged to be purely personal)...*

*With respect to the two successful candidates, I am satisfied that the information concerning personal affairs can be excised and the applications made available... The statement in support of application is purely and simply an individual's own assessment of work capacity and performance... This document does not concern the personal affairs of an aspirant for promotion.*

21. It is to be noted from the above case extracts, as well from my decision in *Re Baldwin and Department of Education and Others* (Information Commissioner Qld, Decision 96008, 10 May 1996, unreported), a copy of which the Deputy Information Commissioner forwarded to Mr Hawck, that a distinction is drawn according to whether or not a job applicant has been successful. If the person was unsuccessful, the fact that he or she has applied for a position of employment is information which concerns the person's personal affairs, within the meaning of s.44(1). If the applicant is successful, however, that person's employment in the new position will become, in effect, a matter in the public domain (and in the case of an appointment to a government agency, a matter of public record) and the fact that the person applied for the position can no longer be regarded as information about a private aspect of the person's life.
22. The basis for this distinction can be most easily explained by recognising that s.44(1) relates to two types of information. The first type is information which concerns the personal affairs of a person. The second type is information which does not, of itself, concern the personal affairs of a person but the disclosure of which may, because of its context, reveal some information about a person's personal affairs.
23. A statement addressing selection criteria will not ordinarily fall within the first type of information because it relates to employment matters rather than being about the personal aspects of a person's life (see the second last sentence of the passage from *Re Dyki* quoted at paragraph 20 above). However, if the fact that a person has applied for a position has not been made known, the disclosure of parts of his or her statement addressing the

selection criteria which identify the applicant, would disclose information about the personal affairs of the applicant, i.e., that he or she has applied for the position. A statement addressing selection criteria by an unsuccessful applicant for a position will therefore be *prima facie* exempt, notwithstanding that, on its face, it does not contain information concerning the personal affairs of the applicant.

24. However, once the fact of a person having applied for a job is made public by his or her appointment to the position, disclosure of his or her statement addressing the selection criteria will not reveal anything about the personal affairs of the appointee, and so there will no longer be a basis on which a claim for exemption under s.44(1) can be mounted.
25. I have examined the matter in issue and can find nothing which, on its face, could be regarded as information concerning Mr Hawck's personal affairs. The Department has deleted from the documents in issue a small amount of matter which concerns Mr Hawck's personal affairs, and which is not in issue in this external review. I am satisfied that the remainder of the matter does not concern Mr Hawck's personal affairs and is not exempt from disclosure under s.44(1).
26. I note Mr Hawck's submission that information contained in his application for a position should not be made available to a member of the public, but, as should be apparent from the cases which I have referred to above, there has been a significant amount of deliberation on this point and a definite distinction has been drawn between personal affairs and employment-related matters.

#### **Application of s.46(1) - Matter communicated in confidence**

27. Section 46(1) of the FOI Act provides:

*46.(1) Matter is exempt if -*

- (a) *its disclosure would found an action for breach of confidence; or*
- (b) *it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*

#### **(a) Application of s.46(1)(a)**

28. I note from Ms Quinnell's decision that she discussed the five criteria which must be satisfied for protection in equity of allegedly confidential information. I formulated these criteria in my decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (a copy of which has previously been forwarded to Mr Hawck).

29. I have reviewed Ms Quinnell's reasons for rejecting the application of s.46(1)(a), as well as Mr Hawck's submissions in support of the application of that provision. There is no evidence before me of any explicit undertaking by the Department that it would keep the matter in issue confidential. However, an obligation to keep matter confidential may, in an appropriate case, be implied from the circumstances in which the information was supplied.
30. In the case of a job application made by a person outside the Department, there might well be reasons why an applicant might wish to provide his or her application on a confidential basis, e.g. the applicant might wish to conceal the fact of the application from his or her current employer. However, this would not appear to apply in Mr Hawck's case, because he was already an employee of the Department, seeking a permanent position.
31. In any event, I do not consider that any understanding of confidentiality which would be likely to be implied in such circumstances would extend beyond the time that the successful applicant was appointed to the position. In determining whether the Department would be bound by an obligation of confidence not to disclose a job application, it will be necessary to consider all relevant factors, one of which will be the uses to which the Department, in the exercise of its functions, must be expected to put the information.
32. Until such time as a decision on appointment is made (and even after that time for unsuccessful applicants) the uses to which an application are likely to be put are generally limited to the selection process. However, once an appointment is made, the application of the successful applicant will form part of the ongoing personnel records of the agency and must be available for the agency to perform its functions, including its accountability functions in relation to the appointment of the successful applicant. In such circumstances it seems likely that if equity were to impose an obligation of confidence on the Department prior to an appointment being made, that obligation would only extend, in the case of the successful applicant for the position, until such time as he or she was appointed to the position.
33. On the material before me, I am satisfied that equity would not now impose an obligation on the Department to refrain from disclosing Mr Hawck's successful job application to an applicant under the FOI Act.

**(b) Application of s.46(1)(b)**

34. The three cumulative requirements which must be satisfied to find that matter is *prima facie* exempt under this provision are as follows:
  - (1) the matter must consist of information of a confidential nature;
  - (2) the matter was communicated in confidence; and

- (3) disclosure of the matter could reasonably be expected to prejudice the future supply of such information.

If these requirements are satisfied, it is then necessary to consider whether disclosure of the documents in issue would, on balance, be in the public interest.

35. As to point (2), for the reasons discussed above in relation to s.46(1)(a), I am satisfied that any understanding of confidence would not have extended beyond the time at which Mr Hawck was appointed to the position.
36. As to point (3), I do not consider that, even if requirements (1) and (2) were satisfied, the disclosure of the matter in issue could reasonably be expected to prejudice the future supply of such information to the Department. I do not accept that someone who is genuinely interested in an advertised position, who believes that he or she has the skills and experience appropriate for the position, and who truthfully and accurately details those skills and experience in applying for the job, would in any way be deterred from applying for the job simply because his or her application may be open to public scrutiny, after appointment to the position. In my opinion, that would only deter applicants from overstating their abilities or being less than truthful about their skills, which is a positive rather than negative outcome.
37. It is therefore my view that neither requirement (2) nor requirement (3) is satisfied in the case of the matter in issue, and that it is therefore not exempt matter under s.46(1)(b).
38. As to the public interest test contained in this section, I agree with the Department's position that the public interest is promoted by ensuring that members of the public can verify that appointments to the public service are made equitably, and based upon the respective merits of the applicants.

### **Copyright**

39. As to the last point raised in Mr Hawck's application for review - that the access applicant be permitted only to view the matter in issue - I observe that if any of the matter in issue is a document in respect of which Mr Hawck is entitled to assert copyright, he may be entitled to insist that the Department give access under the FOI Act in a manner that does not infringe his copyright. An assertion that a person owns copyright in a particular document held by a government agency cannot, however, defeat the general right of access (conferred by s.21 of the FOI Act) to any information contained in a particular document which is not exempt matter under the FOI Act.
40. In a review under Part 5 of the FOI Act, it is my function to determine whether or not the matter in issue is exempt matter under the FOI Act. Any issue relating to copyright and the form of access which an agency can or should permit in respect of

non-exempt matter, is an issue which must be taken up directly with the relevant agency.

### **DECISION**

41. For the reasons set out above, I affirm the decision under review, being the decision of Ms Anne Quinnell dated 3 September 1996, by which it was found that the matter in issue was not exempt matter under the FOI Act.