

## **Burke and Gold Coast City Council**

(L 18/97, 17 November 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. - 3. [These paragraphs removed.]

### **REASONS FOR DECISION**

#### **Background**

4. By application form dated 6 March 1997, Mr Burke applied to the Gold Coast City Council (the Council) for access to "*all files relating to the Myola Court drain (Coombah) post 1995*". Miss B Webber, Freedom of Information Officer for the Council, decided to grant Mr Burke access to 499 documents without deletion of any matter. She also decided to refuse access to one line of information on page two of a six page document, on the basis that the deleted matter was exempt under s.41(1) and s.43(1) of the FOI Act, and to refuse access to 192 documents found to be wholly exempt under one or both of those provisions. The only explanation given by Miss Webber for her decision consisted of the following findings of fact:
  1. *The documents contain information which was provided by the Council's solicitor.*
  2. *The documents contain an opinion recorded in the course of deliberations on this matter.*
5. Mr Burke applied for internal review of Miss Webber's decision, but only in respect of the one line of information deleted from the document found to be partially exempt. By letter dated 24 June 1997, Mr A Beynon, Freedom of Information Internal Review Officer, affirmed Miss Webber's decision that the one line in issue was exempt matter, but Mr Beynon decided that the deleted matter was exempt under s.41(1) and s.48(1) of the FOI Act. Mr Beynon did not record any basis for his finding that the matter was exempt under s.41(1). As to s.48(1), he stated, "*... the document to which you refer should have formed part of the Council's file pertaining to a Criminal Investigation Commission matter and had been incorrectly filed on the General file.*" (I note that, irrespective of which file the document in issue may have been located on, it would have fallen within the terms of the applicant's initial FOI access application.)
6. Mr Burke then applied to me for external review, under Part 5 of the FOI Act, of Mr Beynon's decision.

## External review process

7. I obtained and examined the document containing the matter in issue. The document, which is six pages long, comprises minutes of a meeting between officers of the Department of Environment, the Department of Primary Industries and the Council. It is headed, "*Meeting Held GCCC Nerang Administration Centre, 10:00 AM Thursday 25 July 1996, Re Hansford Road Drainage Scheme and Myola Court Drain Extension*". The matter in issue is the last line of the fifth paragraph on page 2. It appears in the context of a discussion as to whether s.86(5) of the *Harbours Act 1955* Qld (which was, in fact, repealed on 1 July 1994: see *Transport Infrastructure Amendment Act 1994* Qld, s.15 and Schedule 2) limited the ability of the Council to approve relevant works.

8. Staff of my office consulted with the Council in an effort to clarify the Council's claim that the matter in issue was exempt under s.41(1) and s.48(1) of the FOI Act. In a letter dated 1 August 1997, Miss Webber wrote:

*I have spoken with the City Solicitor as to the current situation with the matter of the CJC investigation and he has advised that there is still litigation in progress and these minutes are tied in with a series of differing issues.*

*As these minutes should never have been released initially and a breach of the CJC Act has been committed, the matter would be compounded if the exempt material were to be released.*

9. By letter dated 25 August 1997, the Deputy Information Commissioner wrote to the Council, seeking clarification of the basis for Mr Beynon's internal review decision. The Deputy Information Commissioner informed the Council that neither of its decisions complied with the obligations imposed by s.34(2)(f) and (g) of the FOI Act, and s.27B of the *Acts Interpretation Act 1954* Qld, on an authorised FOI decision-maker, to provide a written statement of reasons for the agency's decision on access.

10. As to the possible application of s.41(1), the Deputy Information Commissioner indicated that the matter in issue appeared to be properly characterised as a statement of fact, which would not satisfy the requirements of s.41(1)(a). Even if it were to satisfy that requirement, it would be excluded from exemption by s.41(2)(b) of the FOI Act. He also indicated that he could see no basis for the application of s.48(1) to the matter in issue. In the event that the Council still wished to contend that the matter in issue was exempt, the Deputy Information Commissioner invited the Council to lodge any evidence or submissions on which it wished to rely to support its case. By letter dated 16 September 1997, Mr Beynon stated that the "*Council wishes to advise that it does not intend to lodge any submission and will await your final decision on this matter*".

## **Inadequacy of reasons for decision**

11. Section 34(2)(f) of the FOI Act requires that a notice of decision refusing access to a document must specify the reasons for the refusal. Section 27B of the *Acts Interpretation Act 1954 Qld* provides:

### ***Content of statement of reasons for decision***

**27B.** *If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression 'reasons', 'grounds' or another expression is used), the instrument giving the reasons must also—*

1. *set out the findings on material questions of fact; and*
2. *refer to the evidence or other material on which those findings were based.*

12. In addition, s.34(2)(g) of the FOI Act requires that a notice of decision given by an agency must specify details of any public interest considerations on which the decision was based.
13. In my decision in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 (at p.64, paragraph 6), I commented on the failure of many agencies to comply with these provisions following the commencement of the FOI Act:

*It is a matter of some concern for the general administration of the FOI Act that many agencies, and especially internal review officers, do not appear to be fully and adequately complying with the statutory obligations imposed on them by s.34(2) (in particular paras (f) and (g)) of the FOI Act, and s.27B of the Acts Interpretation Act 1954 Qld, in respect of the content of reasons statements ... I have on occasion exercised the discretion conferred on the Information Commissioner by s.82 of the FOI Act to require an agency to provide an additional statement of reasons where the statement provided to the applicant was inadequate for the purposes of satisfactorily progressing the conduct of my investigation and review. I could have done so in a great many more cases, if my only purpose was to ensure that decision makers fully comply with the statutory requirements in respect of the content of reasons statements.*

14. The two decisions made on behalf of the Council do not comply with the statutory obligation to provide a written statement of reasons for a decision refusing to give access to information requested in an application for access made under Part 3 of the FOI Act. Mr Beynon's internal review decision, in particular, did little more than state that it had been decided that the matter in issue was exempt under both

s.41(1) and s.48(1) of the FOI Act. It failed to provide adequate reasons explaining his decision, and it failed to disclose any meaningful consideration of the questions which must be addressed in the application of s.41(1) and s.48 of the FOI Act.

15. The problem has been compounded in this case by the failure of the Council to provide me with submissions or evidence to support Mr Beynon's decision, notwithstanding the concerns raised by the Deputy Information Commissioner in his letter dated 25 August 1997. Under s.81 of the FOI Act, the onus is clearly on the Council to satisfy me that Mr Beynon's decision was justified. The Council has made no real effort to do so, but still requires me to make a formal decision to resolve this application for review. I consider that such an approach is fundamentally alien to the spirit and objects of the FOI Act. If the Council considers that the matter in issue is exempt, then it is incumbent on it to properly explain the basis of its case and to provide submissions and evidence in support of its claims. If it does not consider the matter in issue to be exempt, then it should agree to disclose the matter to the applicant for access. I consider that it is totally inappropriate for an agency to waste the resources of my office, and cause delays to an applicant in obtaining access to matter (to which the applicant has a legal right of access, if the Council cannot prove it is exempt matter), merely by maintaining an objection to disclosure without putting forward a rational basis to support a finding that the matter in issue is exempt.

#### **Section 41(1) of the FOI Act**

16. Sections 41(1) and (2) of the FOI Act provide:

##### ***Matter relating to deliberative processes***

##### ***41.(1) Matter is exempt matter if its disclosure—***

(a) *would disclose—*

1. *an opinion, advice or recommendation that has been obtained, prepared or recorded; or*

2. *a consultation or deliberation that has taken place;*

*in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and*

(b) *would, on balance, be contrary to the public interest.*

##### ***(2) Matter is not exempt under subsection (1) if it merely consists of—***

(a) *matter that appears in an agency's policy document; or*

- (b) *factual or statistical matter; or*
- (c) *expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.*

17. A detailed analysis of s.41 of the FOI Act can be found in *Re Eccleston* at pp.66-72, where, at p.68 (paragraphs 21-22), I said:

21. *Thus, for matter in a document to fall within s.41(1), there must be a positive answer to two questions:*

(a) *would disclosure of the matter disclose any opinion, advice, or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, (in either case) in the course of, or for the purposes of, the deliberative processes involved in the functions of government? and*

(b) *would disclosure, on balance, be contrary to the public interest?*

22. *The fact that a document falls within s.41(1)(a) (ie. that it is a deliberative process document) carries no presumption that its disclosure would be contrary to the public interest. ...*

18. An applicant for access is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; an applicant is entitled to access unless an agency can establish that disclosure of the relevant deliberative process matter would be contrary to the public interest. In *Re Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (Information Commissioner Qld, Decision No. 96004, 4 April 1996, unreported), I said (at paragraph 34):

*The correct approach to the application of s.41(1)(b) of the FOI Act was analysed at length in my reasons for decision in Re Eccleston, where I indicated (see p.110; paragraph 140) that an agency or Minister seeking to rely on s.41(1) needs to establish that specific and tangible harm to an identifiable public interest (or interests) would result from disclosure of the particular deliberative process matter in issue. It must further be established that the harm is of sufficient gravity when weighed against competing public interest considerations which favour disclosure of the matter in issue, that it would nevertheless be proper to find that disclosure of the matter in issue would, on balance, be contrary to the public interest.*

19. Under s.41(2)(b) of the FOI Act, matter is not exempt under s.41(1) if it merely consists of factual or statistical matter: see *Re Eccleston* at p.71, paragraphs 31-32;

and *Re Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123, at pp.144-147, paragraphs 49-58.

20. In the initial decision on behalf of the Council, Miss Webber decided that the matter in issue was exempt under s.41(1) as it contained "*an opinion recorded in the course of deliberations on this matter*". The matter in issue comprises a record, in the minutes, of a statement by Dr Douglas Daines, the Council's Chief Executive Officer. The first part of the statement, which is not in issue, was that the applicant had sought to mount an argument that approval under s.86 of the *Harbours Act* was not required for a property development by the applicant's company. The second part of Dr Daines' statement, which comprises the matter in issue, records a plan which Mr Burke is alleged to have made which would avoid the need for approval. Whether or not Dr Daines' description is an accurate description does not alter the position that the statement he made was factual in character - it purports to relay, as a statement of fact, something which Mr Burke had said or done.
21. In his letter to the Council dated 25 August 1997, the Deputy Information Commissioner conveyed his opinion that the matter in issue was merely factual. The Council has made no response to the contrary. Based on my examination of the matter in issue in the context of the document in which it appears, I find that the matter in issue does not fall within the terms of s.41(1)(a) of the FOI Act, and further, that it merely consists of factual matter which is excluded from exemption under s.41(1) of the FOI Act, by virtue of s.41(2)(b) of the FOI Act.
22. Even if the Council had provided evidence which would overcome the hurdles discussed above, it would nevertheless be incumbent on it to establish that disclosure of the matter in issue would, on balance, be contrary to the public interest (the test imposed by s.41(1)(b) of the FOI Act). I note that there is actually, elsewhere in the minutes, another reference to the subject dealt with in the matter in issue. This reference has already been disclosed to the applicant without any apparent detriment to the public interest. The Council has made vague references to court proceedings and a Criminal Justice Commission investigation, which it has not backed up with any detailed explanation, or evidence of relevant facts and circumstances. There is nothing in the material before me that is capable of supporting a finding that disclosure of the matter in issue would be contrary to the public interest.
23. The Council has not satisfied me that the matter in issue meets the requirements of either s.41(1)(a) or s.41(1)(b). I find that the matter in issue is not exempt matter under s.41(1) of the FOI Act.

### **Section 48 of the FOI Act**

24. Section 16 of the FOI Act provides that, subject to s.48 of the FOI Act, the FOI Act is intended to operate to the exclusion of provisions of other enactments relating to non-disclosure of information. Section 48 of the FOI Act makes special provision in respect of a select group of statutory secrecy provisions:

***Matter to which secrecy provisions of enactments apply***

***48.(1) Matter is exempt matter if its disclosure is prohibited by an enactment mentioned in Schedule 1 unless disclosure is required by a compelling reason in the public interest.***

25. In his internal review decision, Mr Beynon referred to the entry for the *Criminal Justice Act 1989* Qld, which appears in Schedule 1 of the FOI Act, and stated that s.48 applied because the document containing the matter in issue "*should have formed part of Council's file pertaining to a Criminal Justice Commission matter and had been incorrectly filed on the General file*".
26. The only section of the *Criminal Justice Act* referred to in Schedule 1 of the FOI Act, is s.83. Section 83 relates to the use of information obtained by means of a listening device. I cannot see, and the Council has not provided any evidence to show, how the matter in issue could conceivably fall within the terms of s.83 of the *Criminal Justice Act*. I find that the matter in issue is not exempt matter under s.48(1) of the FOI Act.

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**DECISION**

27. I set aside the decision under review (being the decision made by Mr Beynon on behalf of the Council dated 24 June 1997). In substitution for it, I decide that the matter in issue (which is identified in paragraph 7 above) is not exempt matter under the FOI Act, and hence the applicant has a right to be given access to it under the FOI Act.