

Smith and James Cook University

(S 126/98, 24 February 1999, 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.-4. These paragraphs deleted.

REASONS FOR DECISION

Background

5. The applicant, Mr Don Smith of Cardwell, is a member of the local Chamber of Commerce, which supports the development of the Port Hinchinbrook area as a tourist destination. There has been considerable opposition to the Port Hinchinbrook project, notably from the Friends of Hinchinbrook and the North Queensland Conservation Council. A prominent member of both groups is ----, a lecturer in the School of Law at the James Cook University of North Queensland (the University).
6. By letter dated 3 June 1998, the applicant sought access under the FOI Act from the University, to the following material:
 1. *All communication relating to the findings of a Student Union survey of Law students which was conducted in 1995, including the follow up arising from those findings (I understand from a former member of academic staff that this material was handled by Professors Golding and Hassall).*
 2. *All communication from 23 January 1998 including letters, briefings, memos, file notes, E-mail and faxes which relate to protest activity by [the lecturer] against the Port Hinchinbrook project.*
7. By letter dated 4 August 1998, the Vice-Chancellor of the University, Professor Moulden, informed the applicant that the University had located a number of documents responsive to the terms of his FOI access application, and was prepared to disclose some of those documents to the applicant. Professor Moulden deferred making a decision with respect to several other documents, because consultation was still taking place in accordance with s.51 of the FOI Act (those documents were subsequently disclosed to the applicant). Professor Moulden refused access to seven documents under s.41(1) of the FOI Act.
8. As the Vice-Chancellor is the principal officer of the University, internal review of Professor Moulden's decision was not available to the applicant. By letter dated 11

August 1998, the applicant applied to me for external review of Professor Moulden's decision to refuse access to those seven documents, which the applicant *"understood to stem from a survey of Law students at JCU by the Student Union in 1995, in response to widespread dissatisfaction from undergraduates"*.

External review process

9. Copies of the documents in issue (identified by the University as documents 3-9) were obtained and examined. They comprised letters and memoranda which were created following a decision by the University, in mid-1995, to engage the services of a consultant who would work with staff of the University's Department of Law (as its School of Law was then described) to improve the quality of their teaching and interactions with students. A review of the Department of Law, and a survey conducted by the University's Student Union, had identified concerns about the quality of teaching in the Department of Law.
10. Documents 3-9 refer to a number of persons who were, at that time, members of the academic staff of the Department of Law. Three of the staff members named in those documents are currently on the academic staff of the School of Law. I considered, from the context in which their names appeared, that it would be necessary to consult with those members of staff, as they could reasonably be expected to have substantial concerns at the disclosure of the information in question. However, as the applicant's FOI access application referred only to two current members of the staff of the School of Law, and did not seek access to information concerning the other members of staff named in documents 3-9, my office contacted the applicant to determine whether or not he required access to the names of any other member of staff.
11. The applicant advised my Office that he only required access to the names of [the lecturer] and [another academic], and that the names of any other members of the staff of the Department of Law could be deleted from any additional documents disclosed to him. There is no reference in documents 3-9 to [the other academic]. There are, however, several references to [the lecturer]. [The lecturer] was contacted by a member of my staff, and, having perused the references to himself in documents 3-8, informed this office that he had no objection to their disclosure to the applicant.
12. The consultant by or to whom the majority of documents 3-9 were written (Ms Yve Repin) was also contacted by a member of my staff. Ms Repin stated that she had no objection to the disclosure of those documents, subject to the deletion of the names of members of staff of the Department of Law.
13. The University subsequently agreed to give the applicant access to documents 3-8 (subject to the deletion of names of staff members other than [the lecturer]) and to the bulk of document 9, so that the only matter remaining in issue in this review is the following matter in document 9:

3. the fifth sentence in the second paragraph;
 4. the whole of the third and fourth paragraphs.
14. Although the decision of Professor Moulden was based on s.41(1) of the FOI Act, I considered that s.40(c) was also relevant. By letter dated 16 October 1998, I informed the applicant of my preliminary view that the matter remaining in issue in document 9 qualified for exemption under s.40(c) of the FOI Act.
 15. The applicant informed me that he did not accept my preliminary view, and lodged a submission dated 10 December 1998 in support of his case.
 16. I have considered that submission, along with the documents in issue, in making my decision. Given my finding in relation to s.40(c) below, I have not found it necessary to consider the application of s.41(1).

Application of s.40(c) of the FOI Act

17. Section 40(c) of the FOI Act provides:

40. Matter is exempt matter if its disclosure could reasonably be expected to—

...

(c) have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; ...

unless its disclosure would, on balance, be in the public interest.

18. I considered the application of s.40(c) of the FOI Act in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293, *Re Murphy and Queensland Treasury & Ors* (1995) 2 QAR 744, *Re Shaw and The University of Queensland* (1995) 3 QAR 107, and *Re McCann and Queensland Police Service* (Information Commissioner Qld, Decision No. 97010, 10 July 1997, unreported). The focus of this exemption provision is on the management or assessment by an agency of the agency's personnel. If I am satisfied that any adverse effects could reasonably be expected to follow from disclosure of the matter in issue, I must then determine whether those adverse effects, either individually or in aggregate, constitute a substantial adverse effect on the management or assessment by the University of its personnel. For reasons explained in *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 (at pp.724-725, paragraphs 148-150), I consider that, where the Queensland Parliament has employed the phrase "substantial adverse effect" in s.40(c) of the FOI Act, it must have intended the adjective "substantial" to be used in the sense of grave, weighty, significant or serious.

19. In *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.339-341 (paragraphs 154-160), I analysed the meaning of the phrase "*could reasonably be expected to*", by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the *Freedom of Information Act 1982* Cth. In particular, I said in *Re "B"* (at pp.340-341, paragraph 160):

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.

20. The ordinary meaning of the word "expect" which is appropriate to its context in the phrase "could reasonably be expected to" accords with these dictionary meanings: "to regard as probable or likely" (Collins English Dictionary, Third Aust. ed); "regard as likely to happen; anticipate the occurrence ... of" (Macquarie Dictionary, 2nd ed); "Regard as ... likely to happen; ... Believe that it will prove to be the case that ..." (The New Shorter Oxford English Dictionary, 1993).
21. If I find that disclosure of the whole or any part of the matter in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by the University of its personnel, I must then consider whether disclosure of that matter would nevertheless, on balance, be in the public interest.

Substantial adverse effect

22. Document 9 is a letter from Professor A J Hassall (Deputy Vice-Chancellor, Humanities and Social Sciences) to Ms Repin, a consultant hired to assist in the improvement of the teaching performance of staff of the University's Department of Law. The segments of matter deleted from document 9 comprise comments on a number of members of the staff of the Department of Law (including [the lecturer]), which were provided to assist Ms Repin in her dealings with those staff members.
23. In my view, the engagement of Ms Repin was an aspect of the management (and perhaps also the assessment) of staff of the Department of Law. Ms Repin was engaged following the conduct of a Departmental review of, and a student evaluation of teaching within, the Department of Law, which raised matters of concern about the quality of teaching in the Department. The University was clearly taking action to address those concerns, by providing staff with the means to critically examine and improve their teaching methods, and, in some cases, their ability to relate to and interact with students.
24. The comments made by Professor Hassall in document 9, to assist Ms Repin in her dealings with staff, are of a sensitive nature. When contacted by a member of my

staff, Professor Hassall confirmed that he would not have wished those comments to be disclosed to the staff members discussed, let alone to members of the public. A note at the end of document 9 indicates that copies were sent to three persons besides Ms Repin, but all three recipients were senior officers of the University, whose positions would no doubt require that they be aware of the issues raised by Professor Hassall. Document 9 is headed "In Confidence", and it is clear from its contents that it was only intended to be read by Ms Repin and those persons already aware of the outcome of the student assessment of teaching in the Department of Law (described as "senior university personnel").

25. In *Re Pemberton*, I indicated that, in the application of s.40(c) of the FOI Act, the effects of disclosure must ordinarily be assessed as if disclosure were to the "world at large" (see pp. 365-366; paragraphs 152-154). The documents in issue are not appraisals of the performance of individual staff members. For the most part, they are comments on specific problems or issues that might arise in the consultant's dealing with staff. Such robust comments have a place in rapidly bringing an outside consultant "up to speed" in relation to problems she may face. However, if they were to be viewed by the staff concerned the potential for taking them out of context is great. Disclosure would have the potential to disrupt relationships between existing staff of the University.
26. In this case, the expedient of simply deleting names would not conceal the identities of the staff members, as the subject matter discussed would enable their identities to be ascertained.
27. In my view, disclosure would also have the potential to damage the reputation of the University and its staff with the general public. Further, in my view, managers recognising these two potential adverse effects could reasonably be expected to be inhibited in the future from providing such candid comments to consultants engaged to assist in management processes.
28. I do not suggest that disclosure of every comment by a manager will cause a substantial adverse effect. Commenting on staff performance to staff members is, after all, part of a manager's role. Comments and assessments conveyed to staff on their performance, even if they are harsh, have to be accepted as part of the management process. However, as I pointed out in *Re Pemberton* at p.365 (paragraph 152):

The task of constructively addressing shortcomings in staff performance has greater prospects of success through co-operative effort if details of the perceived shortcomings in performance, and the action plan to address them, remain confidential to the relevant managers and the staff member concerned.

29. The comments in issue were not made as a record of staff performance. They formed part of a brief letter to a consultant solely for the purpose of highlighting

potential issues in dealing with staff, of which the consultant should be aware. Professor Hassall considers that it would be prejudicial to the management by the University of its personnel if the matter in issue were disclosed to the relevant staff members. I consider that the cause for concern in that regard would be even stronger if the matter in issue were disclosed to the applicant under the FOI Act (i.e., with no restrictions on its further use or disclosure by the applicant).

30. When the adverse effects referred to above are aggregated, I am satisfied that disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the management by the University of its personnel.

Public interest balancing test

31. As I stated in *Re Pemberton* (at paragraph 117, p.348):

Satisfaction of the first element of s.40(c) (i.e., that disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by the agency of the agency's personnel) itself tilts the balance of public interest against disclosure of the matter in issue. One then looks to identify whether there are any other separate public interest considerations weighing in favour of (or against) disclosure, and if so, accords them appropriate weight in the further balancing process imported by the closing words of s.40.

32. I observed in *Re Pemberton* (at paragraph 134, p.357), that "*Universities occupy an important place in our society and receive large amounts of public funding to pursue functions intended to benefit the wider public interest*". There is clearly a public interest of substantial weight in the maintenance and promotion of effective, productive working relationships between members of the staff of the University, and between staff and senior management of the University. This public interest tells against disclosure of the matter remaining in issue, in order to protect the proper functioning of the management of University staff.
33. Against this, however, I recognise a public interest in the accountability of the University for the proper management of its staff. The applicant has relied on this public interest to support his case in favour of the disclosure of document 9 in its entirety.
34. The applicant, and other persons, have made complaints to the University concerning [the lecturer], who is well-known in North Queensland as an opponent of the Port Hinchinbrook development. The applicant has complained of [the lecturer's] conduct, and is concerned to investigate whether [the lecturer] has abused his position as a member of the staff of the Department and, subsequently, the School of Law to assist his protest activities. The applicant contends that the University has been aware for some considerable time of improper conduct by [the lecturer], but has not taken proper measures to censure or control that conduct. It is

apparently the applicant's intention, once he has gathered what he considers to be sufficient evidence, to lodge formal complaints with various authorities about the lack of accountability by the University for [the lecturer's] conduct.

35. In his submission dated 10 December 1998, the applicant argued that:

Our investigations into the [lecturer]/JCU Port Hinchinbrook protest issue has revealed what must be one of the worst examples of public administration in the state of Queensland in recent history.

Given the University's inability or unwillingness after all of this time and in the face of substantive evidence to prosecute [the lecturer] for the extent of his wrongdoings, it is now patently clear that an external remedy for the situation is the only hope of seeing the law and standards of accountability upheld. Hence the need for us to engage you as Ombudsman before going on if necessary to the Government with your findings to force accountability upon the University.

For me to accurately define the problem, it is essential that I have access to Document 9 which is likely to show the degree to which the University thought that [the lecturer] was a problem employee, and that steps should have been taken at an early stage, in the University's and the public's interests, to stop him from causing the damage that followed.

.....

It goes without saying that the public interest demands that such a mess never be allowed to happen again. And the only way that this can be assured and the necessary corrective action taken is by firstly accurately defining the problem, and exposing the failures that have occurred which not only allowed [the lecturer's] political campaign to happen in the first place, but allowed it to go on for so long in the knowledge that [the lecturer] had stepped well over the 'line'. Access to documents such as Document 9 is fundamental to this process.

36. The applicant stated, in his submission dated 10 December 1998, that he had been informed, by a former member of the academic staff of the University, that document 9 "*clarifies whether the University (Professor Hassall) was of the view that [the lecturer] needed counselling ... because of "attitude and performance" reasons...*".
37. Having examined document 9, I am satisfied that the applicant has misunderstood (or has been misled concerning) the nature and seriousness of the comments made by Professor Hassall concerning [the lecturer]. There is only one sentence in the matter in issue in document 9 which refers to [the lecturer] (the second sentence in the fourth paragraph), and that sentence does not refer to, or imply, any

wrongdoing on the part of [the lecturer]. It is, like the remainder of the matter in issue in document 9, more in the nature of information provided to assist Ms Repin in rapidly coming to terms with the staff with whom she would be called on to interact. I regard the comment by Professor Hassall concerning [the lecturer] as sensitive, not because it reveals or implies any wrongdoing by [the lecturer], but because Professor Hassall has, of necessity, been particularly frank in expressing certain views (about [the lecturer] and other members of staff of the Department of Law mentioned in document 9) for Ms Repin's benefit.

38. The applicant claimed in his submission dated 10 December 1998 that "*if [the lecturer] had been identified in some way as a problem employee, and if JCU managers had exercised due care and diligence in handling the situation, the damage that followed could have more than likely been avoided*". However, the matter remaining in issue in document 9 is not a commentary on the general performance of the staff of the Department of Law named in that document (including [the lecturer]). Ms Repin was not engaged to deal with problems which the University might have been experiencing in the general management of its staff, or with difficulties caused by any external activities in which they might engage. Rather, she was engaged to address perceived deficiencies in the teaching methods, and interactions with students, of a number of members of the staff of the Department of Law, and the comments in document 9 were made in furtherance of this purpose.
39. I note that, contrary to the applicant's apparent belief that the matter remaining in issue is primarily criticism of [the lecturer], it appears from my perusal of that matter that other members of staff of the Department of Law were in greater need of counselling and professional assistance than [the lecturer]. Comments concerning those members of staff comprise the bulk of the matter in issue in document 9.
40. Given the nature of the matter remaining in issue in document 9, I am not satisfied that the public interest in the accountability of the University for the management of its staff, or for any alleged misconduct of [the lecturer], could be significantly furthered by the disclosure to the applicant of the matter in issue. When weighed against the apprehended substantial adverse effect from its disclosure, I am not satisfied that disclosure of the matter remaining in issue in document 9 would, on balance, be in the public interest. I therefore find that the matter remaining in issue in document 9 is exempt matter under s.40(c) of the FOI Act.

DECISION

41. I vary the decision under review (being the decision made by Professor Moulden, on behalf of the University, on 4 August 1998) by finding that the following matter in document 9 is exempt matter under s.40(c) of the FOI Act:

5. the fifth sentence in the second paragraph, and

6. the third and fourth paragraphs.