

Watkins and Department of Tourism, Racing and Fair Trading

(S 287/00, 16 August 2001, Assistant Information Commissioner Shoyer)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.-2. These paragraphs deleted.

REASONS FOR DECISION

Background

3. This is a 'reverse FOI' application. By letter dated 22 March 1999, the FOI access applicants, ---- (to whom I will refer as 'the complainants'), complained to the Office of Fair Trading (the OFT) about interactions they had had with a real estate agent, Ms Watkins, and her husband, concerning the possible sale of land owned by the complainants. Staff of the OFT interviewed Ms Watkins and provided her with a copy of the written complaint. Ms Watkins responded to the complaint by a letter dated 23 October 1999, which enclosed a three page attachment. By letter dated 28 October 1999, the OFT informed the complainants that extensive inquiries had been conducted and that no breaches of the *Auctioneers and Agents Act 1971* Qld had been detected. The complainants then raised the possibility that there had been a breach of the *Fair Trading Act 1989* Qld but by letter dated 17 March 2000, the OFT informed the complainants that it considered that there was insufficient evidence to establish a breach of the *Fair Trading Act*.
4. By application dated 27 March 2000, the complainants sought access to "... *details of the information obtained from Ms. Watkins*". The OFT identified the letter dated 23 October 1999 and attachments as falling within the terms of the FOI access application. Ms Watkins was consulted in accordance with s.51 of the FOI Act and objected to disclosure of the documents. By letter dated 4 August 2000, Mr R Miskinis of the OFT informed Ms Watkins of his decision to grant access to the documents.
5. By application dated 1 September 2000, Ms Watkins sought internal review of Mr Miskinis' decision. By letter dated 13 October 2000, Ms G Foster of the OFT set aside Mr Miskinis' decision, in relation to lines 17 (the last two words) and 18-27 on the third page of the attachments, which she decided were exempt under s.44(1) of the FOI Act, but otherwise affirmed his decision. By letter dated 10 November 2000, Ms Watkins applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Ms Foster's decision to disclose the bulk of the letter and attachments.

External review process

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6. A copy of the letter dated 23 October 1999, and attachments was obtained and examined. There has been no challenge to Ms Foster's decision that certain matter on the third page of attachments is exempt under s.44(1) of the FOI Act, so that matter is not in issue in this external review. Nor is a small amount of matter in the attachments which would identify third parties who were interested in buying the complainants' property. The complainants were consulted and indicated that they did not wish to pursue access to that matter. (I have identified that matter in a letter to the OFT.) The matter remaining in issue comprises the balance of the letter and attachments.
7. A member of my staff liaised with Ms Watkins with a view to resolving the matter informally. However, when it became apparent that Ms Watkins maintained her objection to disclosure of any matter, I wrote to her on 9 May 2001, advising her of my preliminary view that the matter in issue did not qualify for exemption under the FOI Act, and requesting that, if she wished to contest that view, she lodge submissions in support of her case. By letter dated 15 June 2001, Ms Watkins lodged written submissions.
8. In making my decision in this review, I have taken into account the following:
 1. the contents of the letter and attachments
 2. Mr Miskinis' reasons for decision dated 4 August 2000
 3. Ms Watkins's internal review application dated 1 September 2000
 4. Ms Foster's reasons for her internal review decision dated 13 October 2000
 5. Ms Watkins external review application dated 10 November 2000
 6. Ms Watkins submissions dated 15 June 2001.
9. In her objections to disclosure of the matter in issue, Ms Watkins relied on s.45(1)(c) and s.46(1)(b) of the FOI Act. I will consider the application of both limbs of s.46(1) before moving on to consider the application of s.45(1)(c).

Application of s.46(1) of the FOI Act

10. 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.*

Section 46(1)(a)

11. The test for exemption under s.46(1)(a) must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind the agency not to disclose the information in issue. I am satisfied that there is an identifiable plaintiff (Ms Watkins) who would have standing to bring such an action for breach of confidence.
12. At paragraph 43 of the Information Commissioner's decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, he said that an action for breach of confidence may be based on a contractual or an equitable obligation. There is no material before me to suggest that Ms Watkins may be able to rely upon a contractual obligation of confidence in respect of the matter in issue. In relation to equitable obligations of confidence, the Information Commissioner indicated in *Re "B"* that there are five requirements, all of which must be established, to obtain protection in equity of allegedly confidential information:
 1. it must be possible to specifically identify the information, in order to establish that it is secret, rather than generally available information (see *Re "B"* at pp.303-304, paragraphs 60-63);
 2. the information in issue must have "the necessary quality of confidence"; i.e., the information must not be trivial or useless information, and it must have a degree of secrecy sufficient for it to be the subject of an obligation of conscience (see *Re "B"* at pp.304-310, paragraphs 64-75);
 - (c) the information must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see *Re "B"* at pp.311-322, paragraphs 76-102);
 - (d) disclosure to the applicant for access would constitute an unauthorised use of the confidential information (see *Re "B"* at pp.322-324, paragraphs 103-106); and
 - (e) disclosure would be likely to cause detriment to the confider of the confidential information (see *Re "B"* at pp.325-330, paragraphs 107-118).

Requirement (c)

13. Determining the existence and scope of a legally enforceable duty of confidence requires an evaluation of the whole of the relevant circumstances including (but not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information and the circumstances relating to its communication, such as those referred to by a Full Court of the Federal Court of Australia in *Smith Kline and French Laboratories (Aust) Limited and Ors v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at pp.302-3: see *Re "B"* at pp.314-316.
14. Ms Watkins has not suggested that she was given an express assurance of confidentiality by OFT investigators. In her submission dated 15 June 2001, she said "*as I stated in the last paragraph of my letter ... dated 23 October 1999, the details I provided were for his (i.e., Department of Equity and Fair Trading) information only*". However, that statement is not consistent with the wording of the letter dated 23 October 1999. There is

nothing in the letter or the attachments which suggests that it was communicated on a confidential basis.

15. Nevertheless, an equitable obligation of confidence may arise from the circumstances surrounding communication of information. In that regard, Ms Watkins stated that the information she gave the OFT was confidential in nature as it pertained to her clients and was provided for the sole reason of the OFT being able to confirm the factual details of her explanation. In her application for external review, she stated that she believed the information she gave to the OFT was of a confidential nature between the OFT and herself to enable it to decide upon resolution of the complaint, and "*not for provision to anybody who might ask for it*".
16. In response to Ms Foster's finding that it was reasonably foreseeable that such information could be made available to the complainant, Ms Watkins stated:

I, of course, am a real estate agent, with only the general necessary knowledge of laws and regulations pertaining to real estate transactions, but do not feel that I should be expected to know all the fine points of law as they pertain to matters such as this - unlike persons say like yourselves who deal with these legal technicalities on a daily basis.

I believe that, should information such as an answer to a query from your Department (such as mine was) be likely to be distributed to somebody other than yourselves, then this factor should be made known to the person concerned at the time of your making your request for the details of a given situation. Only then do I feel that I could really be "reasonably expected" to know of such a possibility.

17. At the time she gave her written response, Ms Watkins clearly knew that she was under investigation by the OFT in relation to a complaint made by the complainants. The matter in issue was provided to the OFT in answer to that complaint. I do not consider that it is any technical or obscure legal point that would give rise to an expectation that the response to the complaint might be disclosed to the complainants. Rather, it is simply common sense to expect that in performing its functions the OFT would be likely to disclose information provided by the subject of complaint to the complainant in order to:

7. clarify or further pursue issues subject to investigation; or
8. keep the complainant informed of the progress of the investigation; or
9. where the investigation results in no formal action being taken, give an account of the investigation, and the reasons for its outcome, to the complainant.

[See *Re McCann and QPS* (1997) 4 QAR 30, at pp.53-54, paragraphs 56-58.]

18. The question which I have to consider in the present circumstances is not whether it was contemplated that the information would be available "*to anybody who might ask*" for it. I must consider whether there is any equitable obligation on the OFT not to disclose the matter in issue to the complainants. If the matter in issue contained sensitive business information

about clients of Ms Watkins, that might be one factor pointing towards an understanding of confidentiality as against the world at large. However, the complainants are already aware of the small amount of financial information contained in the matter in issue, which could not, in any event, be regarded as particularly sensitive, given that it is restricted to offers made for the particular property in question.

19. A subjective belief held by a provider of information is not sufficient to impose an equitable obligation of confidence on an agency. I find that the circumstances of communication of the matter in issue were not such as to fix the OFT with an equitable obligation of confidence not to disclose the information provided by Ms Watkins to the complainants. As the requirements listed at paragraph 12 above are cumulative, a finding that any one of them is not satisfied means that the matter in issue is not exempt under s.46(1)(a) of the FOI Act. I therefore find that the matter in issue does not qualify for exemption from disclosure to the complainants under s.46(1)(a) of the FOI Act.

Section 46(1)(b)

20. Matter will be exempt under s.46(1)(b) of the FOI Act if:
- (a) it consists of information of a confidential nature;
 - (b) it was communicated in confidence;
 - 1. its disclosure could reasonably be expected to prejudice the future supply of such information; and
 - (d) the weight of the public interest considerations favouring non-disclosure equals or outweighs that of the public interest considerations favouring disclosure.
[See *Re "B"* at pp.337-341; paragraphs 144-161.]

Communicated in confidence

21. Requirement (b) above is similar in nature to requirement (c) for the satisfaction of s.46(1)(a) of the FOI Act. For the reasons discussed at paragraphs 13-19 above, I find that there was no express or implicit mutual understanding that the information supplied by Ms Watkins would be kept confidential from the complainants. I therefore find that the matter in issue was not communicated in confidence for the purposes of s.46(1)(b).

Prejudice to future supply of information

22. The phrase "*could reasonably be expected to*" requires a reasonably based expectation, namely, an expectation for which real and substantial grounds exist. A mere possibility, speculation or conjecture is not enough. In this context "*expect*" means to regard as likely to happen. (See *Re "B"* at pp.339-341, paragraphs 154-160, and the Federal Court decisions referred to there.)
23. Ms Watkins contended that if she had known that the documents in issue would be disclosed to the complainant she would have been likely to have formatted and worded them differently. At paragraph 161 of *Re "B"*, the Information Commissioner stated:

Where persons are under an obligation to continue to supply such ... information (e.g. for government employees, as an incident of their employment; or where there is a statutory power to compel the disclosure of the information) or persons must disclose information if they wish to obtain some benefit from the government (or they would otherwise be disadvantaged by withholding information) then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information. In my opinion, the test is not to be applied by reference to whether the particular [supplier] whose ... information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of the sources available or likely to be available to an agency.

24. I note that the OFT has the power to compel the disclosure of information in the course of investigations: see for example s.88B of the *Fair Trading Act* and s.94 of the *Auctioneers and Agents Act*. However, even if that were not the case, it is in the interests of business people like Ms Watkins to provide a full and adequate response to any complaint made concerning them, both in order to explain why there has been no breach of relevant legislation, and in order to explain why nothing has been done that warrants reconsideration of their suitability to hold an occupational license. In those circumstances, I do not consider that disclosure of the matter in issue could reasonably be expected to prejudice the supply of relevant information in response to complaints from a substantial number of subjects of complaint.
25. Perhaps disclosure would encourage some subjects of investigation to think more carefully about the precise wording they use in future responses. However, this is different from withholding substantive information necessary for the OFT to carry out its functions and, if it did have that effect, may well improve the quality of information provided to the OFT in the future: see the comments of the Information Commissioner in the context of the deliberative process exemption at pp.106-107, paragraphs 132-134 of *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60. I find that requirement (c) of s.46(1)(b) is not satisfied.

Public interest balancing test

26. In his initial decision, Mr Miskinis identified public interest considerations favouring disclosure as the public interest in enhancing the accountability of the OFT for the way in which it conducts investigations, and the public interest in complainants having explained to them the reasons why the OFT decided not to take further action on their complaint. In that regard, it appears that to date the complainants have been informed of the course and outcome of the investigation in only the briefest and most general of terms. I also note that, to the extent that the matter in issue concerns the personal affairs of the complainants, they are assisted by s.6 of the FOI Act.

27. Even if the preceding elements of this exemption were established, I consider that disclosure of the matter in issue to the complainants would, on balance, be in the public interest.

28. I find that the matter in issue does not qualify for exemption from disclosure to the complainants under s.46(1)(b) of the FOI Act.

Application of s.45(1)(c) of the FOI Act

29. Section 45(1)(c) of the FOI Act provides:

45.(1) Matter is exempt matter if—

...

(c) its disclosure—

(i) would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and

(ii) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;

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

30. The correct approach to s.45(1)(c) is explained in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at pp.516-523 (paragraphs 66-88). Matter will be exempt under s.45(1)(c) if:

(a) the matter in issue is information concerning the business, professional, commercial or financial affairs of a person (including a company or agency); and

(b) disclosure of the matter in issue could reasonably be expected to have either of the following effects:

(i) an adverse effect on the business, professional, commercial or financial affairs of the person, which the information in issue concerns; or

(ii) prejudice to the future supply of such information to government;

unless disclosure of the matter in issue would, on balance, be in the public interest.

Adverse effect/prejudice to the future supply

31. I discussed the question of whether disclosure could reasonably be expected to prejudice the future supply of information at paragraphs 22-25 above. For the reasons stated there, I find that this limb of the exemption is not satisfied.
32. With regard to adverse effect, in her letter to the OFT dated 31 July 2000, Ms Watkins argued that the matter in issue was exempt under s.45(1)(c), "*being information which could conceivably damage my business standing in the community, should it be released*". She lodged no other material on that point. The suggestion that disclosure could "conceivably" damage Ms Watkins business standing, is not sufficient to establish a reasonable expectation of adverse effect (as to 'reasonable expectation', see paragraph 22 above). The matter in issue summarises the history of contact between Ms Watkins and the complainants and provides Ms Watkin's response to the complaint. I have examined the matter in issue. I do not consider that there is anything in it the disclosure of which could reasonably be expected to have an adverse effect on Ms Watkin's business, professional, commercial or financial affairs.

Public interest balancing test

33. Even if I had been satisfied that there was a reasonable expectation of some adverse effect on the business, professional, financial or commercial affairs of Ms Watkins, I believe that the public interest considerations favouring disclosure to the complainants (see paragraph 26 above) would outweigh the *prima facie* public interest consideration favouring non-disclosure raised by the satisfaction of paragraphs (i) and (ii) of s.45(1)(c), so that the matter in issue would not qualify for exemption from disclosure to the complainants.
34. On the material before me, I am satisfied that the matter in issue is not exempt from disclosure to the applicant under s.45(1)(c) of the FOI Act.

DECISION

35. I affirm the decision under review (being the decision of Ms G Foster on behalf of the respondent dated 13 October 2000) so far as it relates to the matter remaining in issue in this external review described at paragraph 6 above.