

Guille and James Cook University

(S 49/01, 29 June 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. The applicant, Mr Howard Guille, is the Queensland Secretary of the National Tertiary Education Union (the Union), which includes among its members academic staff of the James Cook University (the University). In October 1999, the Union was representing a lecturer in the University's School of --, [the lecturer], in a dispute with University management in relation to grievances of [the lecturer], and a disciplinary matter. As part of that process, the applicant wrote two letters to the University, dated 6 October and 26 October 1999 (the documents in issue). Those letters were among a number of documents which the University's FOI decision-maker, Ms Samantha Milton, decided were not exempt from disclosure to an FOI access applicant, ---- (the access applicant). Ms Milton informed the applicant of her decision by letter dated 22 December 2000.
4. By letter dated 27 December 2000, the applicant applied for internal review of Ms Milton's decision to grant access to the documents in issue. The former Registrar of the University, Mr Robin Gilliver, informed the applicant by letter dated 24 January 2001 that he had decided to affirm Ms Milton's decision to grant access to the documents in issue.
5. By letter dated 20 February 2001, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Mr Gilliver's decision.

External review process

6. The applicant contends that the documents in issue are exempt from disclosure under s.40 of the FOI Act (apparently relying on subsections (c) and (d)), as well as under s.41(1) and s.44(1) of the FOI Act. Copies of the documents in issue were obtained and examined and, by letter dated 22 May 2001, I informed the applicant of my preliminary view that the documents in issue did not qualify for exemption from disclosure to the access applicant. I also advised the applicant that, if nothing

was received from him by 18 June 2001, I would act on the basis that the applicant accepted my preliminary views.

7. By letter dated 22 May 2001, I also wrote to [the lecturer], in relation to this and other reviews, seeking to establish whether he objected to the disclosure of the documents in issue. I requested [the lecturer] to advise me, by no later than 18 June 2001, whether he objected to the disclosure of the documents in issue to the access applicant, and invited him, if he did object, to lodge submissions and evidence in support of his case. As nothing was received from [the lecturer] by that date, I wrote to him again by letter dated 20 June 2001, informing him that unless I received advice to the contrary by 28 June 2001, I would act on the basis that he did not object to the disclosure of the documents in issue. Nothing has been received from [the lecturer].
8. I had also written to the University, concerning a number of related reviews. In a telephone conference with a member of the staff of this Office on 29 May 2001, the University advised that it now contended that the signatures on the two documents in issue were exempt from disclosure under s.44(1) of the FOI Act. That advice was confirmed by the University in a letter dated 12 June 2001. However, the University still considered that the balance of the documents was not exempt from disclosure.
9. In reaching my decision, I have had regard to the following documents:
 1. the contents of the documents in issue;
 2. the applicant's letter to the University dated 12 December 2000, and his internal review application dated 27 December 2000;
 3. Ms Milton's initial decision dated 22 December 2000;
 4. Mr Gilliver's internal review decision dated 24 January 2001; and
 5. the applicant's external review application dated 20 February 2001.

Application of s.40 of the FOI Act

10. Section 40(c) and (d) of the FOI Act provide:

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;*
- (d) have a substantial adverse effect on the conduct of industrial relations by an agency;*

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

Section 40(c)

11. In determining whether s.40(c) of the FOI Act applies, I must determine:
 1. whether any adverse effects on the management or assessment by an agency of its personnel could reasonably be expected to follow from disclosure of the matter in issue. There must be expectations for which real and substantial grounds exist (see *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, at pp.339-341 (paragraphs 154-160); and, if so
 2. whether the adverse effects amount to a substantial adverse effect on the management or assessment by an agency of its personnel. The phrase "substantial adverse effect" is meant to relate to grave, weighty, significant or serious effects (see *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663, at pp.724-725, paragraphs 148-150).
12. If those requirements are satisfied, I must then consider whether the disclosure of the matter in issue would nevertheless, on balance, be in the public interest.
13. In a letter to the University dated 12 December 2000, the applicant stated:

The disclosure of these documents would reasonably be expected to have a substantial adverse effect on the management or assessment of the University's personnel given the likelihood that both the Union and its members would be discouraged from raising issues of concern if they believed that the resulting correspondence would be available to other persons. ...

The issues raised were made for the good of the University as well as for our member. The matters were raised to ensure that the University carries out its functions in the best manner possible.

Accordingly, if the documents were disclosed, it would be reasonably expected to have a substantial adverse effect on the management or assessment by the Agency of the Agency's personnel in that it would stop persons (or the Union acting in their behalf) from bringing practices, policies or behaviour (about which staff might be concerned) to the attention of the University authorities.

Further the release of these documents would not be in the public interest because:

1. *it would stop persons from bringing issues of concern and possibly issues of inefficient, unfair, or unprofessional activities to the attention of the University authorities;*
 2. *it would discourage persons from being full and frank in raising such matters through the proper channels and thus hinder the investigation and resolution of such matters;*
 3. *the matters have been dealt with through the proper channels with all appropriate persons having the right to respond to the concerns and therefore it would not be in the public interest to raise these matters again.*
14. In his external review application, the applicant focussed on the damage that might be caused by disclosure of an unproven allegation against [the lecturer]. He indicated that the documents formed part of "*sensitive and confidential negotiations between the highest Union Officer in Queensland (in regard to industrial matters) and the most senior executive officer of the University.*"
15. There are similarities between the documents in issue and a document that was considered in the Information Commissioner's decision in *Re Chambers and Department of Families, Youth and Community Care; Gribaudo (Third Party)* (1999) 5 QAR 16. At paragraphs 42-44 of *Re Chambers*, the Information Commissioner stated:
1. *The major concern of both the Department and Ms Gribaudo [the Union officer whose statement was in issue] appears to be directed towards the potential for disclosure of information provided by staff members in general, and junior officers who have grievances in particular. However, the source of information in this case was a union officer. The document in issue does not support Ms Gribaudo's claim that the information in it was provided to her in confidence by the complainant. The document in issue contains concerns raised by Ms Gribaudo about Ms Gribaudo's interactions with management, including the applicant.*
43. *As I indicated at paragraph 32 above, it is only to be expected that in dealing with grievances by staff members there will, from time to time, be disagreements between union officials and management as to how a grievance should be dealt with. It is not surprising that a union official, when providing information to grievance investigators, may be critical of aspects of the performance of managers. I do not consider that disclosure of the information provided by Ms Gribaudo to the applicant would be likely to make her, or any other union officer, less likely to perform their duties by highlighting areas in which they consider that management performance has been lacking. Nor do I consider that disclosure of the document in issue, which merely highlights a union officer's*

concerns about the way in which management has dealt with an employee's grievances, could reasonably be expected to cause officers of the Department, or of the Public Trust Office, to refrain from making grievances or providing information to grievance investigators in the future.

44. *Given the nature of the information in issue, and the fact that it comes from a union officer, I am not satisfied that its disclosure could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency (whether it be the Department or the Public Trust Office) of its personnel. I therefore find that the matter in issue is not exempt from disclosure to the applicant under s.40(c) of the FOI Act.*
16. I have carefully examined the documents in issue in this case. They almost entirely refer to procedural issues concerning [the lecturer's] grievances, or procedural issues concerning potential action by the University against [the lecturer]. There is limited discussion of [the lecturer's] grievances and no indication of the nature of any allegations against him. I am satisfied that disclosure of the particular documents in issue could not reasonably be expected to discourage staff members from raising issues of concern with their employers or Union representatives in a full and frank manner. Further, I am satisfied that their disclosure could not reasonably be expected to dissuade Union officers from carrying out their duties by putting to employers any concerns that they, or staff they represent, may have concerning procedures adopted by management, or other issues. There may be cases where the particular matter in issue would justify such a finding but this is not such a case.
17. I find that disclosure of the documents in issue could not reasonably be expected to have an adverse effect on the management or assessment by the University of its personnel. I therefore find that the documents in issue do not qualify for exemption from disclosure under s.40(c) of the FOI Act.

Section 40(d)

18. The possible application of s.40(d) was only raised by the applicant in his external review application. He has not lodged submissions or evidence which specifically address its application.
19. The correct approach to s.40(d) of the FOI Act is explained in *Re Murphy and Queensland Treasury & Ors* (1995) 2 QAR 744, at pp.794-798. The focus of this exemption is on the conduct of industrial relations by the relevant agency. The exemption will be made out if it is established that disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the conduct of industrial relations by the University, unless disclosure would, on balance, be in the public interest.

20. On the material before me, I can find nothing to justify a finding that disclosure of the particular documents in issue could reasonably be expected to have a substantial adverse effect on the conduct of industrial relations by the University. I find that the documents in issue do not qualify for exemption from disclosure under s.40(d) of the FOI Act.

Application of s.41(1) of the FOI Act

21. Section 41(1) of the FOI Act provides:

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

(a) would disclose—

(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or

(ii) 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.

22. A detailed analysis of s.41 of the FOI Act can be found in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.66-72, where, at p.68 (paragraphs 21-22) the Information Commissioner 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. ...

23. There is some question as to whether the documents in issue can be characterised as falling within s.41(1)(a) of the FOI Act. They are representations from an external

Union Officer. It is not immediately obvious that they would satisfy s.41(1)(a) of the FOI Act. Further, some of the matter in issue is merely factual matter which is excluded from the operation of s.41(1) by virtue of s.41(2)(b). Nevertheless, I will consider the application of the public interest balancing test with respect to all of the matter in issue.

24. I consider that there is a public interest in enhancing the accountability of the University for the decisions it makes concerning staff management and discipline. The documents in issue do not disclose the deliberations of University management with respect to the issues raised, but they do record submissions that were put before University management in that regard. Clearly, disclosure of submissions and material put before University management would enable a more informed understanding and assessment of the way in which the University handled the issues, and the reasons why it dealt with them in the way it did.
25. But in any event, an applicant for access is not required to show that disclosure of deliberative process matter would be in the public interest; an applicant is entitled to access unless an agency can show that disclosure of the particular deliberative process matter would be contrary to the public interest. I have commented on the submissions of the applicant at paragraphs 15-16 above. While there may be cases where the content of particular documents in issue gives rise to public interest considerations favouring non-disclosure based on considerations identified by the applicant, I am satisfied that there are no public interest considerations favouring non-disclosure of the documents in issue in this case. I therefore find that disclosure would not, on balance, be contrary to the public interest.
26. I find that the documents in issue do not qualify for exemption from disclosure under s.41(1) of the FOI Act.

Application of s.44(1) of the FOI Act

27. 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.
28. In applying s.44(1) of the FOI Act, the first question to ask is whether disclosure of the matter in issue would disclose information concerning the personal affairs of a person. If that is the case a public interest consideration favouring non-disclosure is established, and the matter in issue will be exempt, unless there are public interest considerations favouring disclosure which outweigh all public interest considerations favouring non-disclosure.
29. In *Re Stewart and Department of Transport* (1993) 1 QAR 227, the Information Commissioner discussed in detail the meaning of the phrase "personal affairs of a

person" (and relevant variations) as it appears in the FOI Act (see pp.256-257, paragraphs 79-114, of *Re Stewart*). In particular, the Information Commissioner said that information concerns the "personal affairs of a person" if it concerns 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:

1. family and marital relationships;
 2. health or ill health;
 3. relationships and emotional ties with other people; and
 4. domestic responsibilities or financial obligations.
30. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is a question of fact, to be determined according to the proper characterisation of the information in question.
31. To the extent that they refer to [the lecturer], the documents in issue relate to his employment affairs, and do not contain any information which is of a personal nature. In *Re Pope and Queensland Health* (1994) 1 QAR 616, after reviewing relevant authorities (at pp.658-660), the Information Commissioner expressed the following conclusion at p.660 (paragraph 116):

Based on the authorities to which I have referred, I consider that it should now be accepted in Queensland that information which merely concerns the performance by a government employee of his or her employment duties (i.e., which does not stray into the realm of personal affairs in the manner contemplated in the Dyrenfurth case) is ordinarily incapable of being properly characterised as information concerning the employee's "personal affairs" for the purposes of the FOI Act.

32. The general approach evidenced in this passage was endorsed by de Jersey J (as he then was) of the Supreme Court of Queensland in *State of Queensland v Albietz* [1996] 1 Qd R 215, at pp.221-222.
33. In reviewing relevant authorities in *Re Pope*, the Information Commissioner had specifically endorsed the following observations, concerning s.33(1) (the personal affairs exemption) of the *Freedom of Information Act 1982* Vic, made by Eames J of the Supreme Court of Victoria in *University of Melbourne v Robinson* [1993] 2 VR 177 at p.187:

The reference to the "personal affairs of any person" suggests to me that a distinction has been drawn by the legislature between those aspects of an individual's life which might be said to be of a private character and those relating to or arising from any position, office or public activity with which the person occupies his or her time [emphasis added].

34. I find that no part of the documents in issue concerns the personal affairs of [the lecturer].
35. Likewise, the applicant's name does not qualify for exemption under s.44(1), as the applicant wrote the documents in issue in his official capacity as Queensland Secretary of the Union. However, the Information Commissioner found in *Re Stewart* (at p.257, paragraph 80) that the form of a person's signature, as distinct from a person's name, was information concerning the personal affairs of the person. I find that the signatures of the applicant (on the second page of the letter dated 6 October 1999), and of another person on behalf of the applicant (on the second page of the letter dated 26 October 1999), qualify for exemption from disclosure under s.44(1) of the FOI Act. I can identify no public interest consideration favouring disclosure of the signatures.

DECISION

36. For the reasons given above, I vary the decision under review (being the decision made on behalf of the University by Mr Gilliver on 24 January 2001) by finding that the signatures on the documents in issue are exempt from disclosure under s.44(1) of the FOI Act, but that the remaining matter in the documents in issue does not qualify for exemption from disclosure under the FOI Act.