



Decision and Reasons for Decision

Application Number: 210150

Applicant: Ray Saunders

Respondent: Department of Housing

Decision Date: 18 July 2007

Catchwords: **FREEDOM OF INFORMATION - section 42(1)(b) of the *Freedom of Information Act 1992 (Qld)* - matter relating to law enforcement or public safety - identity of a confidential source of information in relation to enforcement or administration of the law**

FREEDOM OF INFORMATION - section 44(1) of the *Freedom of Information Act 1992 (Qld)* - matter affecting personal affairs - personal details of complainants

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Reasons for Decision

Background

1. By application dated 1 September 2006, the applicant sought access to all documents on his personal file relating to his tenancy at a property in Wyandra St, Noosa Heads, Queensland, from the Department of Housing (Housing).
2. By letter dated 25 October 2006, Ms Kerrie Felsman, FOI Coordinator, Housing, informed the applicant of her decision to grant full access to 143 folios, partial access to three folios and to refuse access to three folios. Ms Felsman's decision to refuse access was on the basis that the folios contained matter which qualified for exemption under section 42(1)(b) and section 44(1) of the *Freedom of Information Act 1992* (Qld) (FOI Act).
3. In the documents released to the applicant pursuant to Ms Felsman's initial decision, the substance of a complaint made against the applicant in relation to his tenancy at the Wyandra St property was disclosed. The complaint related to music noise emanating from the applicant's property which was causing disturbance to nearby residents.
4. On 20 November 2006, the applicant sought internal review of Ms Felsman's decision. By letter dated 21 December 2006, Mr Brian Kelleher, A/Executive Legal Officer, Legal Services, Housing, affirmed Ms Felsman's decision to refuse access, to parts of three folios and three folios in their entirety, on the basis of section 42(1)(b) and section 44(1) of the FOI Act. Mr Kelleher also considered that the partially and fully exempt folios qualified for exemption under section 46(1)(b) of the FOI Act.
5. By letter dated 22 January 2007, the applicant applied to this Office for external review of Mr Kelleher's decision.

Steps taken in the external review process

6. Following receipt of the external review application, this Office engaged in negotiations with Housing with respect to folios 059-058. Housing initially refused access to these folios, in their entirety, as they were handwritten and Housing considered that disclosing the handwriting could reasonably be expected to enable the identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained. Accordingly, Housing found that these folios qualified for full exemption under section 42(1)(b) of the FOI Act.
7. By letter dated 9 March 2007, this Office sought Housing's consent to the partial release of folios 059-058 in a typed format to the applicant. On 13 March 2007, Housing agreed to release folios 059-058 to the applicant in a typed format subject to the deletion of certain matter pursuant to section 42(1)(b) and section 44(1) of the FOI Act. By letter dated 13 March 2007, this Office informed the applicant of the agreement reached with Housing as to folios 059-058 and requested that he contact Housing to obtain copies of these folios.
8. The matter disclosed to the applicant in the typed version of folios 059-058 comprised further details of the substance of the complaint against the applicant, namely, that the applicant was conducting a business teaching music from his property.
9. On 22 March 2007, the applicant phoned this Office and advised that he had received the typed version of folios 059-058 from Housing, but he wished to proceed with this

external review. During this conversation, a preliminary view was conveyed to the applicant regarding the application of section 42(1)(b) and section 44(1) of the FOI Act to the remaining matter in issue.

10. By letter dated 27 March 2007, Assistant Commissioner Gittins confirmed the oral preliminary view, which had been expressed to the applicant on 22 March 2007, that:
 - the matter remaining in issue in this review qualifies for exemption under section 42(1)(b) and section 44(1) of the FOI Act
 - no public interest considerations could be identified which, on balance, favoured disclosure of the matter considered to be exempt under section 44(1) of the FOI Act
 - public interest considerations are not relevant in determining whether matter is exempt under section 42(1)(b) of the FOI Act.
11. On 4 April 2007, the applicant phoned this Office to advise that he did not accept Assistant Commissioner Gittins' preliminary view and wished to proceed with this review.
12. By letter dated 30 May 2007, I informed the applicant of my preliminary view that:
 - a small amount of matter in issue in folio 067 did not qualify for exemption under the FOI Act
 - the matter remaining in issue in this review qualifies for exemption under section 42(1)(b) and section 44(1) of the FOI Act
 - segments of matter in folios 059-058 and 067-065 fall outside the scope of the applicant's FOI access application as they do not relate his tenancy at the Wyandra St property. Accordingly, I have no jurisdiction to deal with this matter in this external review and it does not form part of the matter in issue.
13. On 5 June 2007, I informed Housing of my preliminary view that a small amount of matter in folio 067 did not qualify for exemption under the FOI Act. Housing accepted my preliminary view with respect to this matter and agreed to release it to the applicant.
14. On 13 June 2007, I informed the applicant that Housing had accepted my preliminary view with respect to folio 067 and requested that he contact Housing to obtain a revised copy of this folio disclosing the additional matter.
15. By email to this Office dated 18 June 2007, the applicant advised that:
 - he had requested the revised copy of folio 067 from Housing
 - at this stage, he wished to contest my preliminary view dated 30 May 2007
 - he intended to obtain legal advice on the matter but was having difficulty finding a suitably qualified solicitor
 - he required an extension of time within which to respond to my preliminary view.
16. On 19 June 2007, a staff member of this Office phoned the applicant to advise that I had approved his request for an extension of time until Tuesday 3 July 2007 in light of the difficulty he was experiencing in obtaining legal advice.
17. On 2 July 2007, the applicant phoned this Office to advise that he:
 - had received legal advice on this matter
 - wished to contest my preliminary view

- required a further extension of time within which to provide submissions in response to my preliminary view due to personal reasons.
18. On 2 July 2007, a staff member of this Office phoned the applicant to advise that I had approved his request for an extension of time until Friday 6 July 2007.
19. By letter dated 2 July 2007, and received by this Office on 4 July 2007, the applicant:
- contested my preliminary view dated 30 June 2007
 - provided submissions and evidence in support of his challenge to my preliminary view.
20. In making my decision in this external review, I have taken the following material into account:
- applicant's initial FOI application dated 1 September 2006
 - initial decision of Ms Felsman dated 25 October 2006
 - application for internal review dated 20 November 2006
 - internal review decision of Mr Kelleher dated 21 December 2006
 - application for external review dated 22 January 2006
 - documents in issue
 - written correspondence exchanged between this Office, the applicant and Housing during the course of this review
 - file notes of telephone conversations between this Office, the applicant and Housing during the course of this review
 - applicant's submissions dated 2 July 2007 in response to my preliminary view and supporting documentation, including affidavits, statutory declarations and certain folios released in full to the applicant by Housing
 - relevant sections of the FOI Act and applicable caselaw.

Matter remaining in issue in this review

21. In the course of processing the applicant's FOI application and conducting this review, the applicant has been given access to the bulk of the information falling within the terms of his FOI access application, including the substance of the complaint in folios 059-058 (typed version) and 067-065.
22. The table below lists the documents which contain matter remaining in issue in this review:

Folio No.	Description	Exemptions claimed under the FOI Act	Full or partial exemption
005:059-058	Letter to Housing from complainants dated 28 May 2001 (typed version)	Section 42(1)(b) and section 44(1) Part out of scope	Partial
005:067-065	Letter to Housing from complainants dated 29 June 2001	Section 42(1)(b) and section 44(1) Part out of scope	Partial (067,065) Full (066)
005:085	Small Claims Tribunal Notice of Hearing	Section 42(1)(b) and section 44(1)	Partial

23. In his submissions dated 2 July 2007, the applicant states that he has no interest in any 'out of scope' information that does not concern him or his tenancy. Accordingly, the matter contained in folios 067, 066, 065 and the typed version of folios 059-058 which falls outside the scope of the application is not in issue in this review.

Findings

Section 42(1)(b) of the FOI Act

24. This section provides as follows:

42 Matter relating to law enforcement or public safety

(1) Matter is exempt matter if its disclosure could reasonably be expected to-

...

(b) enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained; or...

25. In order for matter to qualify for exemption under section 42(1)(b) of the FOI Act, the following three elements must be established (see *McEniery and Medical Board of Queensland* (1994) 1 QAR 349, at pp.356-357, paragraph 16) (*McEniery*):

- a confidential source of information;
- the information which the confidential source has supplied (or is intended to supply) must relate to the enforcement or administration of the law; and
- disclosure of the matter in issue could reasonably be expected to—
 - enable the existence of a confidential source of information to be ascertained; or
 - enable the identity of the confidential source of information to be ascertained.

26. Section 42(1)(b) is an exemption provision aimed at ensuring that members of the public are not discouraged from cooperating with agencies engaged in the enforcement or administration of the law, by providing information which might assist such agencies to perform their functions more effectively. The importance which Parliament attaches to this is apparent from the fact that section 42(1)(b) is not qualified by a public interest balancing test. This means that in the application of section 42(1)(b), no account is taken of public interest considerations which might favour disclosure of information which otherwise satisfies the test for exemption under section 42(1)(b).

Application of section 42(1)(b) of the FOI Act

27. The matter remaining in issue which is subject to Housing's exemption claim under section 42(1)(b) of the FOI Act is contained in folios 059-058 (typed version), 067, 065 and 085 (section 42(1)(b) matter).

28. I have carefully considered the section 42(1)(b) matter and am satisfied that it comprises:

- the identities of complainants to the Department in respect of the applicant
- information relating to the complainants that could reasonably be expected to enable those persons to be identified.

29. I am also satisfied that:

- the relevant complaint was made on a confidential basis given the circumstances surrounding the imparting of the information by the complainants to Housing

- the information was provided by the complainants in connection with Housing's discharge of its responsibilities under sections 102 and 170 of the *Residential Tenancies Act 1994* (Qld) (RT Act) and sections 20.2 and 45.3(b) of the *State Tenancies Agreement* made between the applicant and Housing, and is therefore, in relation to the enforcement or administration of the law.
30. In his letter dated 2 July 2007, the applicant made submissions in support of his contention that the section 42(1)(b) matter does not qualify for exemption. Specifically, the applicant submitted that:
- he believes he knows the identities of the complainants due to various incidents that occurred during his residence at the Wyandra St property
 - the complaints were malicious, dishonest, defamatory and an attack on the applicant's character
 - if the Small Claims Tribunal (SCT) application by Housing had proceeded, the complainants would have been required to present as witnesses to attest to their complaints, thereby revealing their identities and the full substance of their complaints.
31. Further, in support of his submissions, the applicant provided this Office with the following documents:
- affidavit of Reginald Brown (tenant of Wyandra St property) sworn 23 September 2001
 - affidavit of Barrie Wall (tenant of Wyandra St property) sworn 21 September 2001
 - statutory declaration of the applicant dated 24 May 2007
 - letter from applicant to Housing dated 10 July 2001 (folios 069-068)
 - SCT claim filed by Queensland Housing Commission dated 12 September 2001 (folios 084-082).
32. With respect to the applicant's submission that he already knows the identity of the complainants, I note that section 42(1)(b) of the FOI Act will not apply where the identity of an information provider is known, or can be easily discovered in some other way. However, if the identity of the information provider otherwise qualifies for confidential treatment, the FOI Act does not operate to confirm or deny an applicant's suspicions where there has been no confirmation of identity from the information provider or an official source.
33. With respect to the applicant's submission that the complaints were malicious, dishonest, defamatory and an attack on the applicant's character, these are not relevant considerations in the application of section 42(1)(b) of the FOI Act
34. The applicant also submits that the complainants would have been required to reveal their identities in the SCT hearing by appearing as witnesses and hence, the information provided by them to Housing was not communicated in confidence. In this regard, the applicant contends that:

In demanding my eviction, according to the [Residential Tenancies Act 1994 (Qld)] the complainants must have been prepared to present witness in court, to their claims of noise, disturbance, harassment, and unreasonable behaviour (ie: Objectional [sic] Behaviour) contained in complaints 059-058 and 067-065; and thus reveal their identities and the detail of their claims in the process.

That understanding is clearly reflecting [sic] in [Housing's] Urgent Application to the court for Warrant of Possession (see docs 084-082 attached) where they alleged Objectional

[sic] *Behaviour (S170)*; and claimed that 'Tenants in the complex continued to complain about the activities of Mr Saunders ...' and 'Queensland Housing will present witness to attest to the behaviour of this tenant'.

35. I acknowledge that in folio 082 (page 3 of the SCT application), Housing stated that it would '*...present witness to attest to the behaviour of this tenant*'. However, the application does not state who these witnesses would be or whether the complainants would appear as witnesses. In the application, Housing also stated that '*...an officer from this department responded to an advertisement place on the notice board of a local shopping centre, where Mr Saunders offered lessons in his unit*'. In the circumstances, I consider it likely that this officer was to appear as a witness at the SCT hearing. There is no other information before me as to the identity of any additional witnesses which Housing proposed to call prior to the discontinuation of the SCT proceedings.
36. Housing's application to the SCT was made pursuant to section 170 of the RT Act. This section provides:

170 Application for termination for tenant's objectionable behaviour

- (1) *The lessor may apply to a tribunal for a termination order because the tenant—*
- (a) *has harassed, intimidated or verbally abused—*
- (i) *the lessor or lessor's agent; or*
- (ii) *a person occupying, or allowed on, premises nearby; or*
- (b) *is causing, or has caused, a serious nuisance to persons occupying premises nearby.*
- (2) *An application under this section is called an application made because of **objectionable behaviour**.*

37. There is no requirement under the RT Act for complainants to appear as witnesses in proceedings relating to objectionable behaviour.
38. Based on the matter set out above and having carefully considered the applicant's submissions, I find that the section 42(1)(b) matter qualifies for exemption from disclosure under that section of the FOI Act.

Section 44(1) of the FOI Act

39. Section 44(1) provides:

44 Matter affecting personal affairs

- (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.*

40. In applying section 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 other than the access applicant. If that is the case, a public interest consideration favouring non-disclosure of the information is established, and the information in issue will be exempt, unless there are public interest considerations favouring disclosure, which outweigh all public interest considerations favouring non-disclosure.

41. In *Stewart and Department of Transport* (1993) 1 QAR 227 (*Stewart*), the Information Commissioner discussed in detail the meaning of the phrase 'personal affairs of a person' as it appears in the FOI Act (see pp.256-257, paragraphs 79-114 of *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:
- family and marital relationships
 - health or ill health
 - relationships and emotional ties with other people
 - domestic responsibilities or financial obligations.
42. Whether or not information 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.

Application of section 44(1) of the FOI Act

43. The matter remaining in issue which is subject to Housing's exemption claim under section 44(1) of the FOI Act is contained in folios 059-058 (typed version), 067-065 and 085 (section 44(1) matter). The section 44(1) matter comprises:
- personal details of the complainants, including address details and signatures
 - information relating to the physical state of health of the complainants
 - details of the complainants' emotional concerns as they relate to the complaint.
44. Following analysis of the section 44(1) matter, I am satisfied that this matter falls squarely within the core meaning of 'personal affairs' as set out in *Stewart* because it comprises information about family relationships, health issues and emotional concerns of the complainants and other individuals as they relate to the complaint. Accordingly, I find that this matter is *prima facie* exempt from disclosure pursuant to section 44(1) of the FOI Act.

Public interest balancing test

45. Because of the wording and structure of section 44(1) of the FOI Act, the mere finding that information concerns the personal affairs of a person other than the applicant for access, must always tip the scales against disclosure of that information (to an extent that will vary from case to case according to the relative weight of the privacy interests attaching to the particular information in issue in the particular circumstances of any given case), and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue. It therefore becomes necessary to examine whether there are public interest considerations favouring disclosure, which outweigh all identifiable public interest considerations favouring non-disclosure, such as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.
46. In his submissions dated 2 July 2007, the applicant contends that the following public interest considerations are relevant to this review:
- natural justice and procedural fairness
 - opportunity for an individual to dispute and defend adverse allegations made against them

- potential for the exempt matter to assist him in pursuit of legal action against the complainants
 - accountability of government agencies in the management of complaints to ensure that individuals are treated fairly by departments
 - the need to correct inaccurate and misleading information on his tenancy file.
47. I acknowledge that these considerations may be relevant in certain cases and in some circumstances, may tip the scales in favour of disclosure of personal affairs information. However, after careful examination of the section 44(1) matter, I am satisfied that disclosure of this matter:
- would not assist the applicant to pursue further legal remedies against the complainants
 - does not establish that Housing acted unfairly in its handling of the complaint.
48. The applicant's submission that he should be given an opportunity to correct inaccurate and misleading information on his tenancy file is beyond the scope of this review. This review is limited to a review of Housing's decision to refuse access to documents under Part 3 of the FOI Act.
49. In summary, after carefully weighing up the public interest considerations set out above, I am satisfied that:
- the public interest in protecting the privacy of the complainants' personal information outweighs the public interest considerations favouring disclosure of the section 44(1) matter
 - the section 44(1) matter qualifies for exemption under this section of the FOI Act.

Section 46(1)(b) of the FOI Act

50. I note that in the internal review decision, Mr Kelleher also relied upon section 46(1)(b) of the FOI Act in refusing access to documents in issue in this review. This section provides:

46 Matter communicated in confidence

(1) *Matter is exempt if—*

...

(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.*

51. Given that the substance of the complaint has been disclosed to the applicant and my findings in respect of section 42(1)(b) and section 44(1) of the FOI Act, it is unnecessary for me to consider the application of section 46(1)(b) of the FOI Act to the matter remaining in issue in this review.

Decision

52. I vary the internal review decision of Mr Kelleher dated 21 December 2006 and find that the matter remaining in issue in folios 059-058 (typed version), 067-065 and 085 qualifies for exemption under section 42(1)(b) and section 44(1) of the FOI Act.

53. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

F Henry
Assistant Commissioner

Date: 18 July 2007