

Re LINDBERG and DEPARTMENT OF FAMILIES, YOUTH & COMMUNITY CARE

F N Albiez (Information Commissioner)

30 May 1997

*Freedom of Information — Refusal of access — Documents in issue ministerial briefing notes — Whether prepared for briefing a Minister in relation to a matter submitted to Cabinet — Application of s 36(1)(c) of the Freedom of Information Act 1992 (Qld) — Matter relating to considerations of Cabinet — Whether disclosure would involve disclosure of considerations of Cabinet — Application of s 36(1)(e) of the Freedom of Information Act 1992 (Qld) — Extract from Ministerial briefing note — Application of s 36(1)(g) of the Freedom of Information Act 1992 (Qld).*

*Freedom of Information — Refusal of access — Explanatory memorandum to Executive Council — Whether submitted to Executive Council — Application of s 37(1)(a) of the Freedom of Information Act 1992 (Qld) — Copy of an Executive Council Minute — Whether a copy of an official record of Executive Council — Application of s 37(1)(g), read with s 37(1)(d), of the Freedom of Information Act 1992 (Qld).*

*Freedom of Information Act 1992 (Qld), ss 28(1), 36(1), 36(1)(c), 36(1)(e), 36(1)(g), 36(2), 37(1), 37(1)(a), 37(1)(d), 37(1)(g), 37(2), 40(c), 43(1), 44(1), 46(1)(a), 76(2), 88(2), 87(1).*

*Freedom of Information Amendment Act 1993 (Qld).*

*Freedom of Information Amendment Act 1995 (Qld).*

The applicant, a former union officer, sought access pursuant to the *Freedom of Information Act 1992* (Qld) ("the FOI Act") to documents relating to an aborted inquiry established by the Department into the management of one of its Youth Centres. He was eventually granted access to some 40 of the 367 pages identified as coming within the terms of his request. Exemptions were claimed in respect of the remainder under ss 40(c), 43(1) and 44(1) of the Act.

During a protracted external review process many of the remaining documents were disclosed to the applicant, including those for which exemptions had been claimed on account of legal professional privilege under s 43(1) of the FOI Act. The applicant abandoned his pursuit of documents concerning third parties which the Department had claimed to be exempt under ss 44(1) or 40(c) of the FOI Act. The only documents remaining in issue were a number of Ministerial briefing notes, a handwritten note on one of them, an extract from a letter from the inquiry head to the Departmental head, an extract from a legal advice of the Crown Solicitor and an explanatory memorandum to the Executive Council together with a copy of the resulting Executive Council Minute.

The applicant argued that notwithstanding the width of the exemptions in ss 36 and 37 of the FOI Act covering Cabinet and Executive Council matter, they should not be applied where to do so would cover up unlawful conduct.

Held (affirming the exemptions claimed though on different grounds to those originally relied upon):

(1) That ss 36 and 37 of the FOI Act operate so as to confer exemption merely by membership of a defined class of matter — Cabinet matter and Executive Council matter respectively — irrespective of whether disclosure of the particular matter in issue would have any prejudicial consequences. Neither s 36(1) nor s 37(1) is qualified by a public interest balancing test so that in applying them, no account is to be taken of other public interest considerations that might favour disclosure in a particular case, for example, where disclosure would expose a crime or fraud. The existence of such considerations may, however, be relevant to the exercise of an agency's discretion under s 28(1) of the FOI Act to give access to matter that is otherwise exempt. (*Re Norman and Mulgrave Shire Council* (1994) 1 QAR 574 at 577, para 13 referred to.)

(2) That the application of ss 36 and 37 of the FOI Act turns on what are essentially questions of fact. An agency can establish that matter is exempt under s 36(1) or s 37(1) merely by proving the facts which bring the matter in issue within one of the defined classes which attract exemption. Here, the facts clearly brought the documents in issue within one or other of the defined classes.

(3) That although the substance of the Executive Council decision relevant to this case had become a matter of public record, the matter in issue concerning that decision remained exempt under s 37(1) of the FOI Act because it had not been "officially published by decision of the Governor in Council", as required by s 37(2).

*Observations:*

There is a need to amend ss 36(2) and 37(2) of the FOI Act to provide that ss 36(1) and 37(1) respectively do not apply to matter that has been published through any official channel of the Queensland Government. (See similar comments made in *Re Bealand and Department of Justice & Attorney General* ((1995) 3 QAR 26, at para 65-66.)

CASES CITED:

*Bealand and Department of Justice and Attorney-General, Re* (1995) 3 QAR 26.

*Little and Department of Natural Resources, Re* (1996) 3 QAR 170.

*Norman and Mulgrave Shire Council, Re* (1994) 1 QAR 574.

*Ryman and Department of Main Roads, Re* (1996) 3 QAR 416.

30 May 1997

THE INFORMATION COMMISSIONER

Background

1. The applicant seeks review of the respondent's decision to refuse him access, under the *Freedom of Information Act 1992* (Qld) (the FOI Act), to documents and parts of documents held by the respondent. The respondent has agreed to give the applicant access to most of the matter that was in issue at the commencement of my review. The matter remaining in issue comprises six pages claimed to be entirely exempt, and three other pages claimed to be partly exempt, under ss 36(1) or 37(1) of the FOI Act.

2. In late 1989, the respondent received, from a staff union representative, a number of written complaints by staff about the management of the John Oxley Youth Centre (the Youth Centre). The respondent established an inquiry headed by a retired Magistrate, Mr N Heimer, to investigate the complaints. Subsequently, in early 1990, after questions were raised about the basis for the appointment of Mr Heimer, it was decided that the inquiry should cease and that the documents

created in the course of the inquiry (the "Heiner documents") should be destroyed. Some time after these events, the former manager of the Youth Centre was retrenched under redundancy arrangements. The arrangements for redundancy included what has been described as an ex gratia payment.

3. The applicant, Mr Lindeberg, is a former union officer who represented the manager of the Youth Centre. Mr Lindeberg has questioned the legality and the appropriateness of:

- the destruction of the Heiner documents;
- the ex gratia payment; and
- the return of the original written complaints to the Union, and the destruction by the respondent of copies of the complaints.

4. In his FOI access application dated 28 June 1994, Mr Lindeberg sought access to some 20 categories of documents, all of which related in some way to the first two matters listed above. The initial decision on behalf of the respondent was made by Ms J Hughes, who identified 367 pages as falling within the terms of the FOI access application. Ms Hughes decided that 25 pages were exempt matter under s 43(1) of the FOI Act, and that the remaining 342 pages were exempt matter under s 46(1)(a) of the FOI Act.

5. Mr Lindeberg applied for internal review of Ms Hughes' decision, in accordance with s 52 of the FOI Act. The internal review decision was made by Mr D A C Smith on 20 December 1994. Mr Smith decided that the applicant could be given access to approximately 40 of the 367 pages identified by Ms Hughes, and that a further 26 pages did not fall within the terms of the initial FOI access application. Mr Smith found that the remaining documents in issue were exempt under ss 40(c), 43(1) or 44(1) of the FOI Act.

6. By letter dated 27 December 1994, Mr Lindeberg applied to me for external review, under Pt 5 of the FOI Act, of Mr Smith's decision. In his application for review, Mr Lindeberg raised concerns about the legality of the destruction of the Heiner documents. Mr Lindeberg suggested that there was prima facie evidence that offences of obstructing justice, and destruction of evidence, had been committed, and that Mr Smith's decision that matter was exempt under s 43(1) could not be maintained in light of that evidence.

#### External review process

7. The external review process in respect of this case, and related external review applications made by Mr Lindeberg, has been protracted, involving numerous steps of negotiation with, and clarification of claims made by, the various participants and other affected persons. Those steps have resulted in Mr Lindeberg obtaining the vast majority of the documents originally in issue, although, no doubt, not as soon as he would have wished. I do not consider it necessary to include in these reasons for decision a detailed account of the steps in the review process. I should note, however, that during the course of the review, consultations were undertaken with the former manager of the Youth Centre, who confirmed that he had no objection to the disclosure, to Mr Lindeberg, of the matter in issue.

8. Some time after the commencement of this external review, the State government commissioned two independent counsel, Mr A J H Morris QC and Mr E J C Howard, to report on allegations made by Mr Lindeberg and other

persons. Their report (the Morris Report), which was tabled in Parliament in October 1996, contained extracts from, or copies of, a number of the documents in issue. My office thereafter negotiated the disclosure of a number of documents referred to in the Morris Report, and the Attorney-General subsequently waived legal professional privilege in all documents remaining in issue which the respondent had contended were exempt matter under s 43(1) of the FOI Act (the legal professional privilege exemption).

9. Mr Lindeberg has indicated that he does not wish to pursue access to some information concerning third parties which the respondent contended was exempt matter under ss 44(1) or 40(c) of the FOI Act. That matter is no longer in issue. The matter remaining in issue (adopting the identifying page references used in the decision under review) comprises:

- (a) page 1 — points for the Minister re oral Cabinet submission, undated (plus handwritten note dated 19 January 1990);
- (b) pages 56-57 — letter dated 19 January 1990, from Mr Heiner to the then Acting Director-General of the respondent, of which one sentence (a quoted extract from page 1, ie, document (a) above) is in issue;
- (c) pages 65-67 — briefing to the Minister re Cabinet submission, undated;
- (d) pages 249-250 — explanatory memorandum to Executive Council dated 30 January 1991, and record of an Executive Council Minute dated 7 February 1991; and
- (e) page 337 — the second page of a legal advice dated 9 May 1991 from the Crown Solicitor to the then Director-General of the respondent, of which one short segment is in issue.

10. In a letter dated 27 March 1997, Mr Lindeberg made submissions as to why he should be granted access to two of the pages in issue (pp 249-250). I will discuss Mr Lindeberg's submissions below.

#### Relevant legislative provisions

11. The relevant parts of ss 36 and 37 of the FOI Act provide:

Cabinet matter

36. (1) Matter is exempt matter if —

- (c) it was prepared for briefing, or the use of, a Minister or chief executive in relation to a matter —
  - (i) submitted to Cabinet; or
  - (ii) that is proposed, or has at any time been proposed, to be submitted to Cabinet by a Minister; or
- (e) its disclosure would involve the disclosure of any consideration of Cabinet or could otherwise prejudice the confidentiality of Cabinet considerations or operations; or

- (g) it is a copy of or extract from, or part of a copy of or extract from, matter mentioned in paragraphs (a) to (f).

(2) Subsection (1) does not apply to matter officially published by decision of Cabinet.

Executive Council matter

37. (1) Matter is exempt matter if —

...

(a) it has been submitted to Executive Council; or

...

(d) it is, or forms part of, an official record of Executive Council; or

...

(e) it is a copy of or extract from, or part of a copy of or extract from, matter mentioned in paragraphs (a) to (f).

(2) Subsection (1) does not apply to matter officially published by decision of the Governor in Council.

12. I have discussed the application of s 36 of the FOI Act, in its present form, in a number of cases, eg, *Re Bealand and Department of Justice and Attorney-General* (1995) 3 OAR 26; *Re Little and Department of Natural Resources* (1996) 3 OAR 170; *Re Rymun and Department of Main Roads* (1996) 3 OAR 416. I have been critical of the unnecessarily broad reach of ss 36 and 37, following amendments made to those provisions in November 1993 by the *Freedom of Information Amendment Act 1993* (Qld), and again in March 1995 by the *Freedom of Information Amendment Act 1995* (Qld): see *Re Bealand* at paras 69-72; Information Commissioner (Qld), Annual Report 1994/95, paras 3.43-49; Information Commissioner (Qld), Annual Report 1995/96, paras 3.24-3.29. However, in a review under Pt 5 of the FOI Act, I must, of course, apply the law as enacted by the Queensland Parliament. Although Mr Lindberg's relevant access application was made prior to the amendments to ss 36 and 37 effected by the *Freedom of Information Amendment Act 1995* (Qld), those amendments were expressed to apply retrospectively (see s 110 of the FOI Act and paras 44 and 55-56 of *Re Bealand*) and I must apply ss 36 and 37, as now in force, to the matter remaining in issue.

13. The application of ss 36 and 37 of the FOI Act turns on what are essentially questions of fact. Those provisions operate so as to confer exemption merely by membership of a defined class or category, irrespective of whether disclosure of the particular matter in issue would have any prejudicial consequences. An agency can establish that matter is exempt under ss 36(1) or 37(1) merely by proving the facts which bring the matter in issue within one of the defined classes or categories which attract exemption. Moreover, neither ss 36(1) nor 37(1) is qualified by a public interest balancing test, which means that no account is to be taken, in the application of those provisions, of other public interest considerations which might favour (even overwhelmingly favour) disclosure of particular matter which might fall within one of the defined classes or categories of exemption in ss 36(1) or 37(1).

14. The respondent possesses a discretion under s 28(1) of the FOI Act to give access to matter which is exempt matter under ss 36(1), 37(1), or any other exemption provision in the FOI Act: see *Re Norman and Mulgrave Shire Council* (1994) 1 OAR 574 at 577 (para 13). The existence of public interest considerations favouring disclosure of matter which is otherwise exempt under ss 36(1) or 37(1) may be relevant to the exercise of that discretion.

However, in a review under Pt 5 of the FOI Act, the Information Commissioner is specifically deprived of the discretionary power possessed by Ministers or agencies (under s 28(1) of the FOI Act) to permit access to exempt matter: see s 88(2) of the FOI Act. The only issue for my determination in the present review is whether the matter in issue is exempt matter under the FOI Act.

#### Application of s 36(1) of the FOI Act

*Pages 1 and 65-67*

15. I considered the correct approach to the interpretation and application of s 36(1)(c) in *Re Little*, at paras 13-38 (see also *Re Rymun* at paras 13-37). Where matter has not been submitted to Cabinet, nor prepared for that purpose, it may qualify for exemption under s 36(1)(c) if it was prepared for briefing, or the use of, a Minister or chief executive in relation to a matter submitted to Cabinet, or proposed by a Minister to be submitted to Cabinet.

16. I am satisfied, from my examination of them, that page 1 and pages 65-67 were clearly prepared for the sole purpose of briefing a Minister. Page 1 is headed "Points for Minister ...". It relates directly to a matter which I am satisfied was submitted to Cabinet. Pages 65-67 were also clearly prepared for the sole purpose of briefing a Minister. The document is addressed to the Minister and relates directly to a Cabinet submission which I am satisfied came before Cabinet. I find that pages 65-67, and the printed text on page 1, comprise exempt matter under s 36(1)(c) of the FOI Act.

17. There is also a handwritten note on page 1. The note refers to a matter considered by Cabinet.

I am satisfied that disclosure of the note would involve disclosure of a consideration of Cabinet. I find that the handwritten note on page 1 is exempt matter under s 36(1)(e) of the FOI Act.

*Page 337*

18. The sentence containing the only matter in issue on page 337 reads as follows: "The previous Government, in [matter deleted], laid down guidelines for Public Servants and other Crown employees in respect of civil proceedings generally." The applicant has been given access to that sentence and to a copy of the guidelines referred to in it. I had difficulty in understanding why the respondent had decided to exercise its discretion so as to claim exemption for what I consider is innocuous matter, and I asked the respondent to explain the basis of its claim for exemption. The nature of the claim for exemption, and the respondent's submission in respect of it, were such that it was impossible to put them to the applicant for response, without disclosing matter claimed to be exempt (see ss 76(2) and 87(1) of the FOI Act).

19. The respondent has submitted that it is not evident, from the information already released on page 337, that the guidelines related to the Cabinet process in any way. The respondent conceded, however, that the very act of claiming exemption under s 36 for the deleted matter indicates that it necessarily relates to the Cabinet process in some way. As I understand its submission, the respondent is asserting that if it were not able to delete the matter now in issue, it may have been necessary to refuse access to a much larger segment of information. That would be an extraordinary result given that the relevant guidelines have been widely circulated in Queensland government agencies, to my knowledge, for more

than a decade. It may nevertheless be correct given the extraordinarily overwide reach of the s 36 exemption in its present form. If the deletion of a small amount of relatively innocuous matter permits the disclosure of a large segment of substantive matter, then the respondent's approach deserves endorsement. I find that the matter deleted from page 337 is exempt matter under s 36(1)(c) of the FOI Act.

#### Pages 56-57

20. The one sentence (spanning pp 56-57) which is claimed to be exempt matter, is a quoted extract from page 1. I have already found that the printed text on page 1 is exempt matter under s 36(1)(c). I find that the sentence in issue on pages 56-57 is exempt matter under s 36(1)(g), as it is an extract from matter which is exempt matter under s 36(1)(c).

#### Application of s 37(1) of the FOI Act

##### Page 250

21. Page 250 is an Explanatory Memorandum signed by a Minister and the then Director-General of the respondent. Its presentation to Executive Council resulted in the passage of an Executive Council Minute (which is page 249, dealt with below). I am satisfied that page 250 has been submitted to Executive Council, and I find that it is exempt matter under s 37(1)(a) of the FOI Act.

##### Page 249

22. Page 249 is a copy of a sealed Executive Council Minute. I am satisfied that it is a copy of an official record of Executive Council (see s 37(1)(d) of the FOI Act), and I find that it is exempt matter under s 37(1)(g) of the FOI Act.

#### No public interest exception

23. In his letter dated 27 March 1997, Mr Lindeberg argued that if certain information (of which he listed three instances) is included in pages 249-250:

... then, because of evidence available to the contrary, such a document emanating from the Department of Family Services and Aboriginal and Islander Affairs with subsequent support from Cabinet on Monday 4 February 1991 would be of a deliberate false and misleading nature as to render the Governor in Council approval, by signature of His Excellency The Honourable Sir Walter Campbell AC QC, Governor of Queensland, taken upon the assurance of certain of his Queensland Ministers of the Crown at that meeting on Thursday 7 February 1991, as unlawful.

24. Mr Lindeberg then went on to make similar claims based on the possible inclusion of two further pieces of information and the possible omission of five pieces of information from pages 249-250. He stated:

Under normal circumstances section 37(1) would appear inviolate, however, neither Cabinet nor Governor in Council are immune from access/discovery if when tested against proper legally defined standards they indicate an offence. That principle is well established and settled in law.

Mr Lindeberg contended that he therefore has "an absolute claim to access" pages 249-250.

25. Where an exemption provision in the FOI Act contains a public interest balancing test, evidence that disclosure of matter in issue would expose a crime or fraud would be likely to give rise to one or more public interest considerations favouring disclosure of the matter in issue, notwithstanding that it is claimed by an agency to be exempt under that exemption provision. However, as I have explained at para 13 above, neither s 36(1) nor s 37(1) incorporates a public interest balancing test. I can see nothing in the terms of those provisions which would justify the implication of a public interest exception. Even if the documents in issue were to contain evidence of a crime or fraud (and I do not suggest that they do), I would still be obliged to find that they satisfy the relevant tests for exemption laid down by Parliament in the terms of s 37 of the FOI Act.

#### Need for amendment of s 36(2) and s 37(2)

26. This case has again highlighted an absurd anomaly caused by the present wording of ss 36(2) and 37(2) of the FOI Act, which afford the only exceptions to the operation of s 36(1) and s 37(1), respectively, of the FOI Act. I first drew attention to the anomaly in *Re Bealand* at paras 65-66, in connection with an agency's claim that 100 pages of material that had been disclosed to Mr Russell Cooper MLA, in his capacity as a member of a budget estimates committee of the Queensland Parliament, was nevertheless exempt from disclosure to Mr Cooper, in the capacity of an applicant for access under the FOI Act.

27. Cabinet or the Governor in Council will sometimes turn their attention to authorising official publication of their decisions or of material put before them for consideration, and make a decision as to the manner and/or timing of official publication. However, it is also frequently the case that material that is technically exempt matter under ss 36(1) or 37(1) of the FOI Act (eg, through having been submitted to Cabinet or Executive Council) is published through official channels (eg, through a Ministerial press statement, through inclusion in answers to Parliamentary questions (with or without notice), through tabling in Parliament, or through release of a Green Paper) without Cabinet or the Governor in Council ever having been asked to turn their attention to, or ever having made a formal decision about, official publication of that material. Generally, there is nothing untoward about such publication, which may occur weeks, months or years after any sensitivity attending consideration of a matter by Cabinet, or the Governor in Council, has dissipated.

28. In the present case, the substance of the decision made by the Governor in Council on 7 February 1991, which is recorded in page 249, has become a matter of public record through a Ministerial statement to Parliament some four years later. However, the matter in page 249 remains exempt under s 37(1) of the FOI Act, because it has not been officially published by decision of the Governor in Council. To my mind, it is absurd that publication of information through an official channel of the Queensland government should not constitute a sufficient exception to the application of ss 36(1) and 37(1) of the FOI Act.

29. I have previously expressed my views on the need for amendments to ss 36 and 37 of the FOI Act (see the references in para 12 above). In addition to those views, I feel it is necessary to respectfully suggest that Parliament give consideration to amending ss 36(2) and 37(2) of the FOI Act so that they read as follows:

(2) Subsection (1) does not apply to matter officially published by government.

30. That wording would ensure that FOI access was not available in respect of Cabinet or Executive Council matter that was published only by virtue of an unauthorised leak, and it would not affect the ability of Cabinet or Executive Council to control the dissemination of sensitive information where Cabinet or Executive Council desires that control, but it would remove the present anomaly that permits agencies and Ministers to claim exemption under ss 36(1) and 37(1) of the FOI Act in respect of information that has been released into the public domain through official channels of the Queensland government.

### Conclusion

31. I vary the decision under review, so far as it concerns the matter listed below, by finding that:

- (a) pages 65-67, and the printed text on page 1, are exempt matter under s 36(1)(c) of the FOI Act;
- (b) the handwritten note on page 1, and the passage deleted from page 337, are exempt matter under s 36(1)(e) of the FOI Act;
- (c) the sentence deleted from pages 56-57 is exempt matter under s 36(1)(g) of the FOI Act;
- (d) page 250 is exempt matter under s 37(1)(a) of the FOI Act; and
- (e) page 249 is exempt matter under s 37(1)(g) of the FOI Act.

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