Supplementary Decision and Reasons for Decision

Application Number:	**F6/14-15**
Complainant:	**Ferg Ferguson (formerly known as Stephen Ferguson)**
Respondent:	**Department of Education**
Date of Decision:	**3 October 2016**
Hearing Number:	**2 of 2016 – Supplemental Decision 2**
Catchwords:	**FREEDOM OF INFORMATION - Disclosure of name of Third Party an unreasonable interference with privacy (s56(1)(a))**

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Reasons for Decision

1. This is a determination under s 114 of the *Information Act*. I hold a delegation under s 128 of the Act to exercise the powers and functions of the Information Commissioner to conduct a hearing in accordance with Part 7, Division 2, and to make a determination of the complaint in accordance with s 114.
2. On 18 August 2016, I made a determination in respect of Application Number F6/14-15 in *Ferguson v Department of Education* (No 2 of 2016). The background facts are set out in some detail in that decision, and will not be repeated here.
3. In that decision I directed that the disclosure of the name of the person who sent emails to employees of the Respondent dated 4 and 12 November 2013, and the information contained in the email signature of that individual in those emails, would not, on the information then before me, be an unreasonable interference with that individual's privacy within the meaning of s 56(1)(a) of the *Information Act*. The same applied to the name of the recipient of the email sent by the Chief Executive Officer (CEO) dated 11 November 2013.
4. I also directed that the Respondent notify the individual that sent the emails (the 'third party') that the Respondent had been directed to release the personal information referred to above, and that the third party be informed of their rights enumerated in s 30(5) and (6) of the *Information Act*.
5. Such notification occurred on 30 August 2016, and on 28 September 2016, the third party strongly objected to the release of any part of the emails of 4 and 12 November 2013, and to the release of the third party's personal information contained in the email sent by the CEO dated 11 November 2013. The bases of the third party's objections can be summarised as follows:
    5.1. the emails were private and confidential and the third party did not intend them to be shared;
    5.2. the disclosure of emails would cause stress; and
    5.3. the third party, for medical reasons which were disclosed to the Office of the Information Commissioner, now has little or no memory of writing the emails, or of the content of the emails.

Decision

6. Dealing first with the substance of the emails of 4 and 12 November 2013, and in particular the matter of confidentiality, it was noted in *Schubert v Director-General, Department of Environment and Conservation* [2006] NSWADT 296 at [29] that, "[t]he relevant time at which confidentiality of the

document must be assessed is the time that the information was obtained". As noted in my earlier decision, "there is no indication on the face of the emails of 4 and 12 November 2013 that the sender considered the information in the emails to be confidential": *Ferguson v Department of Education* (No 2 of 2016) at [19]. Further, as the third party now has little or no memory of writing the emails, I give little weight to the assertion made when release is imminent that the emails were intended to be private and confidential.

7. As is evident from the content of the emails, the third party, in that party's professional capacity, was giving advice to the Respondent on a matter of public importance; namely, strike action by teachers. The third party may not have been aware at the time of writing the emails that correspondence received by the Respondent would be subject to the disclosure provisions of the *Information Act*. This does not negate the fact, however, that, prima facie, the document in its entirety must be disclosed unless an exemption applies: *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606 at 625.
8. In the circumstances of this case, disclosure of the substance of the emails would not be an unreasonable interference with the privacy of the third party within the meaning of s 56(1)(a) of the *Information Act*. It follows, therefore, that the substance of the emails should be disclosed subject to the redacting of the personal information referred to in [22]-[24], and as directed at [32.6], of my decision in *Ferguson v Department of Education* (No 2 of 2016).
9. I am now persuaded, however, that the third party's name and contact details should not be disclosed. Based on the information provided by the third party, I am now of the view that the release of the third party's name, and the personal information contained in the email signature appearing in the emails of 4 and 12 November 2013, would be unreasonable. In *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at [51], the Administrative Appeals Tribunal of Australia stated that:

   > *Whether a disclosure is "unreasonable" requires … a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance*.

10. Taking into account the fact that the third party does not consent to disclosure, the emails contain the third party's email address and contact information, and the release of such information would cause stress to the third party, I find that in the circumstances of this case disclosure of such personal information would be "an unreasonable interference with a person's privacy" within the meaning of s 56(1)(a) of the *Information Act*. Further, the fact that emails were written almost three years ago lessens the current relevance of the information. Finally, given that the substance of the emails

are to be disclosed (subject to the redactions discussed above), no public interest would be achieved through the release of the third party's personal information.

Conclusion

11. My decision regarding Complaint F6 is as follows.
    11.1. The Respondent is directed to redact the name, email address and information contained in the email signature, of the sender prior to providing access to the emails of 4 and 12 November 2013.
    11.2. The Respondent is directed to redact the name of the sender of the emails of 4 and 12 November 2013 referred to in the email of the CEO dated 11 November 2013.
    11.3. Subject to the redacting of the personal information referred to in [22]-[24], and as directed at [32.6], of my decision in *Ferguson v Department of Education* (No 2 of 2016), and the redacting of the personal information referred to in [11.1]-[11.2] above, access should be provided to the emails of 4, 11 and 12 November 2013.

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Les McCrimmon

Delegate of the Commissioner

3 October 2016