



Decision and Reasons for Decision

Application Number: F6 & F10/14-15

Complainant: Ferg Ferguson (formerly known as Stephen Ferguson)

Respondent: Department of Education

Date of Decision: 18 August 2016

Hearing Number: 2 of 2016 – Supplemental Decision 1

Catchwords: FREEDOM OF INFORMATION – Refusal of access to information because it would be an unreasonable interference with a person's privacy (s56(1)(a)) – Application of the public interest test (s50(1)) – Meaning of personal information – Meaning of unreasonable interference

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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. This decision relates to two Complaints to the Information Commissioner made by Mr Ferg Ferguson (the 'Complainant') arising from the initial refusal by the Department of Education (the 'Respondent') to provide access pursuant to s 18 of the *Information Act* to government information the Complainant maintained was held by the Respondent. In a decision of the Information Commissioner, *Ferguson v Department of Education* (No 2 of 2016, 9 March 2016) (the 'original decision'), the Respondent was directed to grant access to the information requested by the Complainant unless, on inspection, it was determined by the Respondent that the information may be exempt in the public interest pursuant to Part 4 of the Act. Should such a determination be made, the records were to be provided to me as a delegate of the Information Commissioner pursuant to s 87(2)(e) of the Act, so that a determination as to whether access to the information should be provided pursuant to Part 3, Division 2 of the Act could be made.
3. The background facts relating to both complaints are set out in some detail in the original decision and will be repeated here only to the extent that they are relevant to this determination.
4. The complaints which were the subject of the original decision were as follows:
 - 4.1. Complaint F6/14-15 dated 7 December 2014 ('Complaint F6') arising from a decision on review dated 15 September 2014; and
 - 4.2. Complaint F10/14-15 dated 26 February 2015 ('Complaint F10') arising from a decision on review dated 26 February 2015.

Complaint F6

5. The Respondent has advised that, in compliance with the original decision, the yearly backup tapes for 2013 and 2014 were restored and the relevant records falling within the scope of the Complainant's request were retrieved. Thirty-six (36) pages were located as part of the retrieval process. Of the 36 pages retrieved, the Respondent determined that one page could be released to the Complainant in full, and 35 pages could be released to the Complainant with some content redacted.
6. The Respondent maintains that the content to be redacted is exempt under s 56(1)(a) of the *Information Act*, which provides that information may be

exempt under s 50 if disclosure of the information would be “an unreasonable interference with a person’s privacy”. In material provided to the office of the Information Commissioner in compliance with the original decision, the Acting Freedom of Information and Privacy Officer of the Respondent, stated:

The material contains personal and confidential information of identifiable individuals other than the applicant. I consider that disclosure of this information could reasonably be expected to be an unreasonable interference with the privacy of those individuals. They have not consented to the release of their information.

I considered the public interest in accountability and transparency, and in giving access to government information. I also considered the fact that disclosing the personal details of the other people would be a breach of their privacy. I do not find that the public interests in favour of disclosure would outweigh the public interests against disclosure, namely the unreasonable interference with the privacy of other individuals.

7. The Respondent has identified the information over which an exemption is claimed as follows:

Folios	Document Date	Description
1-2	4/11/13	Email
3-5	4/11/13	Email
6-8	5/11/13	Email
9-11	11/11/13	Email
12-15	12/11/13	Email
16-21	12/11/13	Email
22-25	18/11/13	Email
26-30	21/11/13	Email
31-36	24/11/13	Email

8. I have reviewed the emails. Without going into detail, the material over which an exemption is claimed relates to:
 - 8.1. the name and contact details of a person who sent a number of emails to the Chief Executive Officer (CEO) of the Respondent;
 - 8.2. personal information relating to that individual contained in the emails;

- 8.3. the name of another individual and some personal information relating to that person contained in an email dated 4 November 2013.
9. Further, some of the emails relate to employment matters relevant to the person sending the email, but which on their face appear to be unrelated to the Complaint. In particular, it is not at all clear how these emails fall within the scope of the Complainant's request, a topic to which I will return below.

Complaint F10

10. Through the retrieval process carried out by the Respondent relating to Complaint F10, 55 pages were located. Of the 55 pages retrieved, the Respondent has decided that 54 pages can be released to the Complainant in full and one page can be released with some content redacted.
11. The content redacted relates to the mobile number of an employee of the Respondent which appears in the employee's email signature. The basis of the claimed exemption is s 56(1)(a) of the *Information Act*. According to the Respondent, the named employee has since left the employ of the Respondent.

Relevant law

12. An exemption based on an unreasonable interference with a person's privacy (s 56(1)(a) of the *Information Act*) is a basis on which government information may be exempt under s 50 of the Act. Section 50(1) is contained in Part 4, Division 3 of the Act and provides that, "Government information mentioned in this Division is exempt only if it can be shown that, in the particular case, it is not in the public interest to disclose the information".
13. When deciding whether it is, or is not, in the public interest to disclose the redacted information,
- ... the Tribunal is not charged with the task of deciding what assessment of the public interest is to be preferred. Its task is to answer the statutory question: are there reasonable grounds for the claim that disclosure would be contrary to the public interest.*¹
14. What constitutes an unreasonable interference with a person's privacy is not defined in the *Information Act*. Guidance as to what factors need to be considered in determining whether disclosure is 'unreasonable' can be gleaned from the corresponding provision in the *Freedom of Information Act 1982* (Cth), s 47F.
15. While the focus of s 47F(1) is on 'unreasonable disclosure' and the focus of s 56(1)(a) of the *Information Act* is on 'unreasonable interference', judicial consideration of, and commentary pertaining to, what constitutes

¹ *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 243 at 443-444 (per Hayne J).

unreasonable disclosure in the context of the Commonwealth legislation does inform the approach to interpreting 'unreasonable interference' within the context of s 56(1)(a). As is noted at [6.127] of the *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (the 's 93A Guidelines'), "[t]he personal privacy exemption [s 47F] is designed to prevent the unreasonable invasion of third parties' privacy".

16. 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.

17. Other factors that have been identified as relevant to a determination of whether disclosure is unreasonable in all the circumstances were identified at [6.131]-[6.132] of the s 93A Guidelines:

- is the author of the document identifiable;
- do the documents contain third party personal information;
- would the release of the documents cause stress to the third party;
- whether no public interest would be achieved through release;
- whether the information is common or would result in serious consequences;
- whether the information was obtained covertly, in confidence, or using information gathering powers;
- the current relevance or age of the information; and
- whether the information would shed light on the workings of government.

Decision

Complaint F6

18. Dealing first with Complaint F6, I find that the disclosure of the name of the person who sent the 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 be an unreasonable interference with that individual's privacy within the meaning of s 56(1)(a) of the *Information Act*. The same applies to the name of the recipient of the email sent by the CEO dated 11 November 2013.

19. In reaching this decision I have taken into account the factors referred to at [16]-[17] above. The factors of particular importance to my decision are as follows:
- the emails of 4 and 12 November 2013 appear to have been sent to the Respondent in the normal course of the sender's business;
 - the Respondent has not identified any serious consequences to the sender of the emails should the information referred to in [18] above be released;
 - while the Respondent has designated all of the email correspondence in all the folios under consideration to be 'confidential', 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; and
 - the information in the sender's emails over which the Respondent is not claiming an exemption relates to matters of public importance; namely, strike action by teachers. It would appear that the author of the emails of 4 and 12 November 2013 was providing advice to the Respondent in the individual's professional capacity. There is a public interest in knowing from whom the Respondent was receiving advice on the issue of strike action by teachers.
20. Unfortunately, I do not know whether the individual who wrote the emails of 4 and 12 November 2013 objects to the information being released, or whether such release would cause stress to the sender or the third parties referred to in the emails. As has been noted above, the Respondent indicated that the individuals have not consented to the release of their information. While technically this is correct, it must be noted that no attempt was made by the Respondent to ascertain whether such individuals consented to the release. It was the Respondent's view that, as it was claiming an exemption over some of the information contained in the folios to be released, it had no obligation under s 30 of the *Information Act* to consult with the individual who wrote the emails of 4 and 12 November 2013, or with the third parties referred to in those emails.
21. Based on the decision I have reached as outlined in [18] above, the Respondent's obligations under s 30 are now enlivened. It should notify the sender of the emails that it has been directed to release the personal information referred to in [18] above, and that the sender of the emails has the rights enumerated in s 30(5) and (6) of the *Information Act*. The personal information should not be released until the 30-day period mentioned in s 30(5) has expired, or a complaint to the Information Commissioner has been made by the sender of the 4 and 12 November 2013 emails. In the event such a complaint is made, it will be a matter for the Information Commissioner to determine what directions should be given regarding release of the information.

Remainder of the information redacted by the Respondent

22. As to the remainder of the personal information contained in the emails of 4 and 12 November 2013² that the Respondent maintains is exempt from disclosure, I agree with the Respondent's decision that such information should be redacted. The disclosure of the personal information relating to the sender in the first paragraph of the email of 4 November 2013 is irrelevant to the substantive information being relayed by the sender to the Respondent in the email. The same applies to the personal information contained in the fourth paragraph of the sender's email of 12 November 2013.
23. In the 4 November 2013 email, the sender also makes reference to a named third party, and expresses personal opinions regarding that third party. In the absence of express consent of the third party to the release of such information, I am not prepared to assume that the information is such that the third party would wish to have it disclosed without consent. Finally, redacting the personal information relating to the third party can be done without adversely affecting the substantive content of the email which, as has been noted above, does address matters of public interest.
24. I also agree with the Respondent's decision not to release the redacted information in the following documents:
- the email dated 18 November 2013 and the email response from the CEO dated 20 November 2013;
 - the email dated 21 November 2013; and
 - the email dated 24 November 2013.
25. My reasons are as follows:
- given the personal content of the emails, it is likely that the person to whom such information relates would not wish to have such information released without consent;
 - the information contained in the emails does not appear to fall within the scope of the Complainant's request; and
 - given the content of the emails, it reasonably can be assumed that the emails were sent in confidence.
26. In conclusion, I find that disclosure of the personal information referred to in [22]-[24] above "would be contrary to the public interest because its disclosure would have a prejudicial effect ... on the private ... interests of persons in respect of whom information is held".³ The release of such

² In other words, the personal information in the emails of 4 and 12 November 2013 other than that referred to in [18] above.

³ *Information Act*, s 3(1)(ii).

information would be an unreasonable interference with a person's privacy (s 56(1)(a) of the *Information Act*), and there are reasonable grounds for the Respondent's claim that disclosure would not be in the public interest pursuant to s 50(1) of the Act.

Complaint F10

27. As has been noted above, the redacted content pertaining to Complaint F10 relates to the mobile number of a former employee of the Respondent. The mobile number appears in the former employee's email signature. Based on the information provided by the Respondent, the mobile is a personal mobile number rather than a work number.
28. Information that simply allows an individual to be contacted, such as a mobile number, is not, of itself, "government information from which a person's identity is apparent or is reasonably able to be ascertained" within the definition of 'personal information' in the *Information Act* (s 4). However, as the Australian Law Reform Commission noted in its report, *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108) at [6.61]:

As information accretes around a point of contact and it becomes possible to link that information to a particular individual and to target that individual – for example, with advertising material – the information becomes 'personal information' within the meaning of the [Privacy Act 1988 Cth then in force (2008)⁴].
29. This reasoning applies with equal force to the meaning of 'personal information' in the *Information Act*. Given the context in which the mobile number appears in the email of 17 October 2013, it is possible to link the mobile number to a particular individual and, therefore, it is personal information within the meaning of the Act.
30. I agree with the decision of the Respondent to redact the mobile number contained in the email of 17 October 2013. I accept the Respondent's submission that the person to whom the mobile number relates is no longer employed by the Respondent, and that the number relates to a personal mobile phone. In the circumstances, the release of the mobile number would not shed light on the workings of the Respondent and no public interest in the release of the mobile number can be demonstrated.
31. Consequently, I find that the release of the mobile number referred to in the email of 17 October 2013 would be an unreasonable interference with a person's privacy (s 56(1)(a) of the *Information Act*), and that there are

⁴ The definition of 'personal information' in the *Privacy Act 1988* (Cth) was amended in 2012 by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth), s 36.

reasonable grounds for the claim that disclosure would not be in the public interest pursuant to s 50(1) of the Act.

Conclusion

- 32. My decision regarding Complaint F6 is as follows:
 - 32.1. The Respondent is directed to disclose the name, email address and information contained in the email signature of the sender of the emails of 4 and 12 November 2013;
 - 32.2. The Respondent is directed to disclose 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;
 - 32.3. Before the information referred to in [32.1]-[32.2] is disclosed, the Respondent should notify the sender of the emails of 4 and 12 November 2013 that the Respondent has been directed to release the personal information referred to in [32.1]-[32.2] above, and that the sender of the emails has the rights enumerated in s 30(5) and (6) of the *Information Act*;
 - 32.4. The Respondent should not disclose the personal information referred to in [32.1]-[32.2] above until the 30-day period mentioned in s 30(5) has expired, or a complaint to the Information Commissioner has been made by the sender of the emails of 4 and 12 November 2013 as provided for in s 30(6) of the *Information Act*;
 - 32.5. In the event such a complaint is made, it will be a matter for the Information Commissioner to determine what directions, if any, should be made regarding release of the information referred to in [32.1]-[32.2];
 - 32.6. The remainder of the personal information referred to in [22]-[24] above is exempt from disclosure pursuant to s 50(1) of the *Information Act*;

- 33. With respect to Complaint F10, the mobile number referred to in the email of 17 October 2013 is exempt from disclosure pursuant to s 50(1) of the *Information Act*.

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Les McCrimmon
Delegate of the Commissioner
18 August 2016