

Decision on Publication

Application Number: F20/15-16

Complainant: Charlie Phillips

Respondent: Northern Territory Electoral Commission

Second Respondent: Foundation 51

Date of Decision: 8 September 2017

Hearing Number: 4 of 2017

Catchwords: FREEDOM OF INFORMATION
DECISION ON PUBLICATION

This page is left blank intentionally

Background

1. The matter currently under consideration is whether the written hearing decisions provided to the parties should be more widely published, including on the Information Commissioner's website.
2. The hearing of this matter has resulted in two decisions being handed down. The first decision (the First Decision) dated 7 July 2017 related to the preliminary question of the standing of the Second Respondent ('the Foundation 51 undertaking') or Foundation 51 Pty Ltd (deregistered) or Mr Graeme Lewis personally to be respondents in this matter
3. The background to this issue is that during the investigation process, the Commissioner's delegate (the Delegate) decided that F51 was a business, commercial or financial undertaking for the purposes of the *Information Act* (the Act) and granted them standing as a Second Respondent under section 30(7) of the Act. Mr Lewis was granted the right to speak on behalf of the undertaking. The Delegate's decision was challenged by the Complainant and dealt with at hearing as a preliminary issue. The result was the First Decision in which I found that none of those referred to in paragraph 2 above had standing and 'the Foundation 51 undertaking' was removed as a party.
4. The second decision dated 29 August 2017 (the Second Decision) related to the substantive issue-namely the refusal of the First Respondent on public interest grounds to provide the Complainant with certain government information on the basis that it was exempt under the *Information Act* (the Act). In that decision, all documents sought were examined in the light of the relevant exemption claimed and an order was made by me for their release in unredacted form to the Complainant.
5. Before a decision is made by me on the question of publication of these decisions, including on the Information Commissioner's website, submissions were sought from the parties as to any reason why they should not be published or, if published, whether any content should be redacted.
6. The Complainant and the First Respondent have advised that they have no objection to publication of the Decisions. In his response dated 30 August 2017, the Complainant commented as follows:

'It would be entirely consistent with the facts, law and reasoning in the Commissioner's decision for it to be published in full. (This would also be the case with respect to the preliminary decision on the standing of Mr

Lewis et al referenced in the substantive decision). Conversely, it might be argued that any redactions in the published version would not be consistent with the compelling reasoning articulated in the Commissioner's decision.'

7. As the 'Foundation 51 undertaking' was a Second Respondent with respect to the First Decision, its spokesperson, Mr Graeme Lewis, was given the opportunity to make submissions on whether the First Decision should be published.
8. On 1 Sept 2017- G Lewis' provided his response as follows:

Dear Sir/Madam,

Further to the below email, I herein register my objection to the publication, in any form, of the document which is described as the Preliminary Decision on Standing in the matter known as F20/15-16 - Phillips v NTEC & F51.

Described in the various emails as a "Preliminary" Decision on Standing, I have never been advised that it became a final decision. Had I been so advised, I would certainly have appealed the decision in the appropriate manner.

I am now advised that the entire matter has been finalised, and Parties, not including myself, have been so advised. The requested disclosure has been completed in favour of Phillips, with the subject documents and DVD's now in the hands of the aforesaid complainant.

Accordingly it is clear that the Commissioner has unilaterally rejected all of my submissions in this matter, and has found, finally, that I have no standing, as was foreshadowed in the Preliminary Decision on Standing. It surely follows naturally that, my submissions as a Party with no standing, and the detailed analyses by the Commissioner, as set out in the Preliminary Decision on Standing, does not in any way shape or form become a matter of Public Interest, such as should be disclosed in any way, and especially not on the website of the Commissioner.

I submit that the so-called Preliminary Decision on Standing sets out, quite correctly, an immense amount of material which was considered - again correctly- by the Commissioner. However much of the material set out and analysed, is and remains confidential, is not of any public interest, and should not be published in whole or in part, by the Commissioner.

It is acknowledged, of course, that rightly or wrongly, the complainant Phillips has now been provided with this Preliminary Decision on Standing, and neither the Commissioner nor I have any ability to control

or restrain whatever publication the Complainant might effect. Similarly of course, there is no restriction on what Phillips will do in relation to publication of the Information already provided to him.

If, as I am entitled to expect, the Commissioner rejects my submission that no part of the Preliminary Decision on Standing be published, I would require that all material described in detail being the property of Foundation 51 Pty Ltd be redacted. In particular, I refer to material described in Paragraphs 10, 11, and 12.

I respectfully submit herein, that in the manner of the description of the document as the "Preliminary Decision on Standing," giving the clear connotation that a final decision would be forthcoming, I have been denied any opportunity to test this decision in any appeal process. There is no doubt that I would have exercised any right of appeal that then existed. I submit that throughout the extended process in this matter, I have been seriously disadvantaged, to the extent of having been denied justice.

Documents subject of the complainant's requests were handed to him today, ensuring that any right I may have had to appeal this matter to the Supreme Court is now ineffective. All I have left to consider is a referral to the Ombudsman, and I shall investigate my rights to do so. You may care to assist me in my considerations.'

Consideration of Issues

9. Mr Lewis makes two main submissions in his objection to publication of the First Decision:

- that he thought that the First Decision was not a final decision on the preliminary matter of standing and that he has therefore been denied the opportunity to appeal the decision; and
- that the First Decision contains confidential material and it is not in the public interest that it be published.

That the First Decision is a Preliminary Decision and Justice has been Denied:

10. Mr Lewis submits that he has been denied natural justice because he did not know that the First Decision was a final decision because it was 'described in various emails as a "Preliminary" Decision on Standing'.

11. On the balance of probabilities, I find this submission difficult to accept for several reasons as follows:

On 29 August 2016, after the compulsory mediation had been unsuccessful in settling the matter, I made directions for hearing titled "**Information Commissioner Directions for Hearing.**" They read:

Under Part 7, Division 2 of the Information Act, the Information Commissioner has the power to give directions in relation to the hearing of a complaint.

The Information Commissioner gives the following directions in relation to the above complaint:

1-By Friday 30 September 2016, the first and second respondent must lodge with the Information Commissioner any written submissions and evidence on which they rely in support of their case; and all parties must provide details of any matter that requires consideration as a preliminary issue.

2-The complainant must by Friday 14 October 2016 lodge with the Information Commissioner any written submissions and evidence on which he relies in support of his case.

3-The first and second respondent must by Friday 21 October 2016 lodge with the Information Commissioner any Reply.

4-Written evidence must be in the form of a sworn affidavit or statutory declaration.

5-A party that lodges written evidence must take all reasonable steps to ensure that all witnesses are available to give evidence at any oral hearing.

6-Any party that contends that an oral hearing is necessary or desirable must, by no later than one week after the date for Reply, notify the Information Commissioner, and explain the reasons for requesting an oral hearing.

7-Any party that seeks to examine a witness at an oral hearing must, by no later than one week after the date for Reply, notify the Information Commissioner, and explain the reasons for requesting the opportunity to examine the witness.

12. Although the timetable for submissions was later extended on two occasions, the content of the Directions did not change. They made it clear that the parties were preparing for hearing, including identifying any matters that required consideration by me as a preliminary issue. As a result, the Complainant's submissions received in response to the Directions and served on the Second Respondent identified the standing of Foundation 51 as a preliminary issue. I accepted that submission.

13. On 11 January 2017, I sent an email to Mr Lewis (for the then Second Respondent) copied to the other parties, covering a number of issues raised by him. Part of that email outlines the steps taken by me to ensure that Mr Lewis understood the importance of his submissions on the question of standing and to ensure that he had time to prepare them properly. My email stated:

Re: 'Standing Issues'

My concerns about your standing as a party in this matter are not frivolous. They are based on the fact that I will need to consider carefully whether you have standing as a 'business, commercial or financial undertaking' under section 30(1)(d)(ii) of the Information Act. At the time Ms Norrington gave her view that you had standing under that provision, she did so with the thought that Foundation 51 Pty Ltd would be reinstated. Apart from your assertion that the company will be reinstated and some preliminary enquiries made, I have no evidence that this is in fact the case and several months have gone by with, it appears, no attempt by anyone to reinstate it. This will be one of the matters I will need to consider in reaching a decision on this issue.

Re: A Timeframe for Reply

I intend to give you 4 weeks (until 8 February 2017) to provide your reply. You have liberty to apply for an extension of time by email providing the grounds for any such request. I am open to submissions on all issues that are relevant to the fair hearing of this matter...'

14. Mr Lewis submits that he was misled by the fact that some emails from the Information Commissioner's Office were titled "Preliminary Decision on Standing". I note that the First Decision itself is titled differently in two places on the cover page. At the top it states: 'Preliminary Decision on Standing'. Underneath at the commencement of the Reasons for Decision is the title in bold: '**Decision on Preliminary Issue of Standing.**'
15. It is my view that little can be read into the differences in wording – particularly as other correspondence and documents made it abundantly clear to Mr Lewis and to the other parties that the two descriptions were essentially referring to the same thing.
16. The 'Reasons for Decision' in the First Decision clearly set out the issues being considered and their significance to the hearing process. Paragraph 1 of the Reasons for Decision begins:

1. The hearing in this matter relates to a complaint made by Mr Charlie Phillips (the Complainant) to the Information Commissioner regarding the refusal of the Northern Territory Electoral Commission (the First Respondent) on public interest grounds to provide the Complainant with certain government information.

Paragraph 3 continues:

3. The focus of this preliminary decision is whether Foundation 51 Pty Ltd or 'the Foundation 51 undertaking' (the current Second Respondent) or Mr Graeme Lewis should be accepted as valid respondents whose submissions and evidence should be considered by me when making a final decision on the release of documents to the Complainant.

The First Decision concludes at paragraphs 57 and 58:

57. On the evidence before me, none of the following are found to have standing as respondents in this matter:

- a) Foundation 51 Pty Ltd;*
- b) 'the Foundation 51 Undertaking' or*
- c) Graeme Lewis as an individual.*

'The Foundation 51 undertaking' is removed as a party to the proceedings.

58. The hearing between the Complainant and the First Respondent will proceed as a hearing on the papers to consider the substantive issue i.e. a review of the decision of the First Respondent to refuse release of the specified documents to the Complainant. A decision on these matters is expected to be released in the near future.

17. The above documentary history demonstrates the steps taken to ensure the parties, and in particular Mr Lewis, fully understood the hearing process and the manner in which issues were going to be addressed. My email to him dated 11 January 2017 not only made it very clear that the question of the Second Respondent's standing was a live issue but also provided him with more time to make submissions. The First Decision made it clear that Foundation 51 in any form was no longer a party to the hearing. Paragraph 58 of the First Decision specifically stated that the hearing would 'proceed' as opposed to 'commence' to consider the substantive issues.
18. Finally, well over 30 days elapsed between the making of the First Decision (7 July 2017) and the Second Decision (29 August 2017) to allow Mr Lewis (on behalf of Foundation 51 or in his own right) the opportunity to appeal the First Decision to the Supreme Court on a question of law if he so wished. He did not do so. I do not consider that there is any basis for Mr Lewis to claim a denial of natural justice.

That the First Decision contains confidential material and it is not in the public interest to publish.

19. It is accepted practice that if a hearing is to be conducted in public, the decision and the reasons for that decision should be available to the public. It follows the ordinary rule that the activities of tribunals involved in the exercise of judicial or quasi-judicial power are to be conducted publicly unless needs dictate otherwise.
20. This practice is displaced by the express provisions of the *Information Act*. Under section 123(1) of the Act, a hearing is closed to the public unless the Commissioner orders otherwise¹. Noting that the Act covers external reviews of FOI requests and complaints of privacy breaches, the hearings are generally closed to the public so as to protect personal or confidential information during the hearing process. In this matter, no parties sought the opportunity to make oral submissions or to have a public hearing. Instead, the hearing was undertaken by the Commissioner in private by considering the

¹ Noting the date of receipt of the complaint by the Information Commissioner, the relevant legislative provisions that apply to this application are those in the Information Act prior to the amendments introduced in the Information Amendment Act (No. 2) 2015 (Act No. 29, 2015) and commenced on 1 May 2016.

contents of the hearing brief including the documents in dispute, written submissions and sworn statements of evidence from the parties.

21. In circumstances where a hearing is closed, it does not necessarily follow that, the reasons for the decision cannot be published. It is my view that I have discretion to publish my reasons for decision subject to two conditions:

- the publication of the decision must not render the proceedings nugatory or disclose material that should properly be kept private; and
- the parties to the hearing should be given the opportunity to make submissions in relation to the broader publication of the decision should they wish to do so. Should one of the parties object to that proposal, it falls on me as the hearing Commissioner to decide whether the objection is well founded.

22. Noting that the Act contemplates that the Commissioner may direct the conduct of a hearing in public, and that this necessarily implies the publication of the decision, it cannot be said that s148 (the confidentiality offence provision) operates to preclude entirely the publication of decisions. It is my view that if I determine that publication is appropriate in the circumstances, then such publication is outside the scope of s148 by application of subsection 148(3)(a)(i) or alternatively it is impliedly authorised by the Act.

23. The first condition for me to consider in this matter is whether the publication of the First Decision would render the proceedings nugatory or disclose material that should properly be kept private. Mr Lewis (on behalf of the Second Respondent) submits that publication will disclose confidential information and he objects to its release. There is no objection to publication of this Decision by the First Respondent or the Complainant.

24. The First Decision dealt with the question of whether Foundation 51 Pty Ltd (deregistered), a 'Foundation 51 undertaking' or Mr Lewis personally had standing as Respondents. Apart from the DVDs, paragraphs 10, 11 and 12 of the Decision identified the documents using the same general descriptions given to them by the First Respondent in his Schedule of Documents. This Schedule was attached to the original letter of refusal sent by the First Respondent to the Complainant so the descriptions were already known to the Complainant.

25. The content of the DVDs were described in the First Decision in general terms. Further, in the Second Decision, I decided that all documents sought should be released in full to the Complainant on the basis that they were not exempt

under section 57 of the Act. I also considered that there were no privacy or confidentiality grounds that required their exemption or redaction.

26. In these circumstances, I do not accept Mr Lewis' submission that the mere description of the documents in the First Decision is confidential information which would render the proceedings nugatory or disclose material that should properly be kept private.

27. Mr Lewis has also raised concerns about the intentions of the Complainant regarding publication of the information provided through the FOI process. Although a Complainant's intentions are generally irrelevant, I draw Mr Lewis' attention to Section 152(2) of the Act which provides that:

The provision of access to government information to a person by a public sector organisation in compliance with a requirement under this Act is not taken to be an authorisation or approval of the publication of the information by the person who is provided with access to it.

28. It remains the responsibility of the Complainant to obtain his own advice to ensure that he uses the documents received through FOI for lawful and defensible purposes.

29. Finally, there are public interest reasons that favour the publication of the First Decision. The Objects of the Act at section 3 state:

3. Objects

(1) *The objects of this Act are:*

(a) *to provide the Territory community with access to government information by*

:

(i) making available to the public information about the operations of public sector organisations and, in particular, ensuring that rules and practices affecting members of the public in their dealings with public sector organisations are readily available to persons affected by those rules and practices; and

(ii) creating a general right of access to information held by public sector organisations limited only in those circumstances where the disclosure of particular information would be contrary to the public interest because its disclosure would have a prejudicial effect on essential public interests or on the private and business interests of persons in respect of whom information is held by public sector organisations; and

(b) *to protect the privacy of personal information held by public sector organisations by:*

(i) providing individuals with a right of access to, and a right to request correction of, their personal information held by public sector organisations, and
(ii) establishing a regime for the responsible collection and handling of personal information by public sector organisations; and
(iii) providing remedies for interference with the privacy of an individual's personal information; and

(c) to establish an independent officeholder, the Information Commissioner, to oversee the freedom of information and privacy provisions of this Act; and

(d) to promote efficient and accountable government through appropriate records and archives management by public sector organisations.

(2) This Act is intended to strike a balance between competing interests by giving members of the Territory community a right of access to government information with limited exceptions and exemptions for the purpose of preventing a prejudicial effect on the public interest as described in subsection (1)(a)(ii).

30. In consideration of the Objects of the Act and in particular sections 3(a)(i) and (ii), 3(b) and 3(2) of the Act, I have formed the view that there are good reasons favouring publication of the First Decision.
31. There is a clear public interest in the subject matter of this particular FOI complaint, including the relationship between the Country Liberal Party and Foundation 51, its status as a related entity and the public discussion surrounding political donations generally.
32. Leading on from this, it is important for the public to understand my reasoning in finding that Foundation 51 was not a legitimate party to these proceedings and in deciding that the documents sought were not exempt under section 57 of the Act. This is an occasion where the FOI process will benefit from transparency.
33. Further, there is value in the public and FOI practitioners understanding the FOI process, including my decision-making. Few FOI complaints result in a final hearing as most are settled. This means that there is a lack of jurisprudence in this area and there is a benefit to the public in providing final decisions where appropriate.
34. Finally, noting the findings in the Second Decision, I do not consider that release of the First Decision in its current form will interfere with commercial confidentiality or a person's privacy.

35. In light of the reasoning above and noting my earlier comments regarding the application of section s148 of the Act, I consider that the public interest favours the publication of the First Decision without redaction. I also consider that there is no benefit in de-identifying the parties to the Decision as the circumstances of the matter are too well known for it to be de-identifiable. Further, this is a case where there may be some benefit in having the parties identified in the public interest so as to provide transparency and lead to a better understanding of the decisions made in this matter.

36. As regards the Second Decision, I note that the parties (i.e. the Complainant and the First Respondent) do not object to publication of the decision. For the reasons outlined above favouring the release of the First Decision, I consider that the Second Decision should also be released. I again refer to my earlier comments regarding the application of section 148 of the Act and I consider that publication of my unredacted Decision in identifiable form in this particular matter is done for the administration of this Act. Any attempt to de-identify the parties in this matter would be futile in any event. The documents identified and discussed in the Second Decision are not exempt and there appears to be no good reason not to identify them in general terms in the published Decision. Further, it is important that the public understands my reasoning in ordering their release on the grounds that they are not exempt.

Decision

37. For the reasons outlined above, I consider that the First Decision, the Second Decision and my Decision on Publication should be made publicly available, including on the Information Commissioner’s Website.

.....

Brenda Monaghan
Information Commissioner
8 September 2017