SUPREME COURT OF QUEENSLAND

File No 6344 of 2001
[2001] QSC 325

BETWEEN:

PAUL WHITTAKER

Applicant

AND:

INFORMATION COMMISSIONER

First Respondent

AND:

AUDITOR-GENERAL OF QUEENSLAND

Second Respondent

MOYNIHAN J – REASONS FOR JUDGMENT

DELIVERED ON:	7 September 2001
HEARING DATE:	21 August 2001
ORDER:	**Application dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – ACCESS TO INFORMATION – FREEDOM OF INFORMATION LEGISLATION – EXEMPTION FROM LEGISLATION – OTHER DOCUMENTS AND MATTERS – Where information about debts by Members of Parliament for the use of parliamentary catering facilities was gathered as part of an audit – whether that information is exempt from protection under the *Financial Audit and Administration Act* 1977 and disclosure required due to a compelling reason in the public interest s 39(2) of the *Freedom of Information Act* 1992.
COUNSEL:	K A Barlow for the Applicant R V Hanson QC for the Second Respondent
SOLICITORS:	Thynne & Macartney Solicitors & Notaries for the Applicant Solicitor for the Information Commissioner for the First Respondent Crown Solicitor for the Second Respondent

[1] The applicant seeks the judicial review of a decision of the Information Commissioner upholding the Auditor-General's decision not to release certain

information. The grounds are that the Commissioner either misinterpreted or misapplied s 39(2) of the *Freedom of Information Act* 1992.

[2] It was accepted that the relevant information was "protected information" in terms of s 92 of the *Financial Audit and Administration Act* 1977 and so exempt from disclosure unless "disclosure is required by a compelling reason in the public interest"; *Freedom of Information Act* s 39(2).

[3] In the course of an audit the Auditor-General identified long standing debts by Members of Parliament for the use of the parliamentary catering facilities. This was raised in his report. The report, however, did not identify the members in question and the applicant sought access to information which would do that.

[4] Section 39(2) of the *Freedom of Information Act* provides:-

> "Matter is also exempt matter if its disclosure is prohibited by the *Financial Administration and Audit Act* 1977, s 92 unless disclosure is required by a compelling reason in the public interest."

There is no definition of a "compelling reason" in the Act.

[5] The Information Commissioner appeared to abide the order of the Court. It was submitted for the Auditor-General that whether there was "a compelling reason in the public interest" was a matter of the ordinary English meaning of the phrase. Since that was a matter of fact and there was no error of law it was contended there was hence no reviewable decision. Not surprisingly the applicant took a different approach.

[6] There are numerous authorities justifying the proposition that whether established facts fall within an enactment properly construed is a matter of law. On the other hand when words in a statue are used according to the common understanding, whether it is reasonable to hold that facts fall within them may be a question of fact; *Hope v Bathurst City Council* (1980) 144 CLR 1 per Mason J at 7; *Brutus v Cozens* [1973] AC 854.

[7] The phrase "a compelling reason in the public interest" appears twice in the Act and may be contrasted with the test imposed by other sections. That is whether disclosure "would, on balance, be in the public interest"; s 39(1), 38, 40, 42(2)(b), 44(1), 45(1)(c), 47(1), 49. It is convenient, in the light of these differences, to dispose of two arguments advanced by the applicant.

[8] It may be accepted that s 39(2) became law following the Queensland Law Reform Commission Report No 46, which undertook a review of the exemption provisions of the *Freedom of Information Act*. The Law Reform Commission Report spoke of concerns that the audit process might be prejudiced by premature disclosure to persons being audited with consequent prejudice to further action. It was submitted for the applicant that such concerns did not arise here and since s 39(2) is intended to balance the competing interests of confidentiality on the one hand and the community's right of access to information, the Commissioner erred.

[9] Two difficulties arise in making such use of the Report. First, to have recourse to the report it has to be demonstrated that the phrase is ambiguous or obscure. I am

not persuaded it is. Secondly, the Law Reform Commission recommended the "unless its disclosure would, on balance, be in the public interest" test. Parliament deliberately adopted a different, more stringent test which omits any reference to balance.

[10] The applicant also relied on a number of decisions by Inquiry Officers of the Ontario Information and Privacy Commission of Canada. Extracts of the decisions are part of the applicant's outline. They are identified as Orders P-982, M-710, P-1398 and P-1467 and can be found at http://www.ipc.on.ca. These can only be persuasive and there are a number of difficulties in their application to the Queensland legislation. The test uniformly imposed by the Ontario statute is where "a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption". It will be immediately apparent that by way of comparison with the Queensland Act the Ontario statute expressly requires a balancing exercise. In any event the decisions appear to equate "compelling public interest" with "strong public interest". No doubt they may be relevant but even in the context of the Ontario legislation it is doubtful whether they are determinative. For the reasons canvassed the Ontario decisions do not appear applicable.

[11] It should not be overlooked that the exception to exemption under s 39(2) is qualified by disclosure being "required" by a "compelling reason". The ordinary meaning of "required" denotes an imperative. The test imposed by the section is a strong one expressed in plain language, not requiring a balancing of competing interests. It is too explicit to be read down by the general purposes in s 5 of the *Freedom of Information Act*.

[12] The difficulty imposed by the explicit language of the section is highlighted by some aspects of the applicant's submissions. It was submitted that the Commissioner was correct in deciding there was a public interest in Members of Parliament being accountable in respect of long term debts, but incorrect in rejecting that public interest as a compelling reason for disclosing the information. The weight to be given to a particular factor is a factual issue. It was also submitted that not to disclose the information did not serve the public interest in the accountability of Members of Parliament to the public, who it was said determine whether they should remain in office, to report only in global terms on the debts, without naming any Members. That would appear to somewhat overstate the factors relevant to determining the public interest.

[13] The Commissioner in my view did not err in law in construing s 39(2) as requiring

> "one or more identifiable public interest considerations favouring disclosure which are so compelling (in the sense of forceful or overpowering) as to require (in the sense of demand or necessitate) disclosure in the public interest."

and it is not unreasonable to conclude the test is not satisfied in the present case.

[14] The applicant also submitted on the one hand that the Commissioner erred by taking into account an irrelevant consideration, namely the purpose for which the information was collected, and on the other hand he failed to take into account a

relevant consideration: that the Auditor-General regarded the outstanding accounts a matter of public significance. It is true that the Tribunal's reasons recited the former as a matter of narrative but it goes no further than that. By the same token it is true that the Auditor-General's letters indicate he thought the issue of the outstanding accounts to be significant. The letters however also indicate that he did not regard it as sufficiently significant to justify naming the debtors. That view was open.

[15] The application is dismissed.