

Estimates Committee 2004 Questions Taken On Notice

(22/06/2004 to 01/10/2004)

Date: 22/06/2004 Output: 1.0 Public
Employment
Sub Output:
Subject: Release of employee records outside the public sector

From: Ms Jodeen Terese CARNEY to Honourable Syd STIRLING
Minister for Employment Education and Training

Question: 2-5
Minister, you are aware, as the responsible minister, that under the Public Sector (Employment and Management) Act, employee records are not be released to persons outside the public sector, and that there are employee instructions to that effect made under section 16 of the act, in particular Employment Instruction No 10. Why, then, were personnel records of one former public servant and one current public servant released to a private legal practice for the purpose of legal proceedings in about April this year?

Answer:
Answered On: 08/07/2004
Answer: Question 2-5

Answer:

Section 16 of the Public Sector Employment and Management Act (the Act) provides that the Commissioner for Public Employment (the Commissioner) may make rules to be known as Employment Instructions. Such Employment Instructions are to be consistent with the Act.

Employment Instruction Number 10 (the EI), made by the Commissioner, covers "Employee Records" and details the information kept in relation to employees employed under the Act and procedures in relation to those records.

Through the EI, the Commissioner has delegated the responsibility for record keeping to each Chief Executive Officer (CEO). The EI provides, inter alia, that CEOs shall:

- record the required details for each employee employed in their agency;
- establish procedures to enable employees to access their records and to obtain a copy of the records;
- ensure all records are maintained in a secure and confidential area; and
- establish systems and procedures regarding the authority for access to and the availability of employee records. Access to employee records

should only be on a 'need to know' basis or for official purposes.

Section 7 of the EI covers access to records by persons outside the public sector and provides:

A Chief Executive Officer shall not release information contained on an employee's record to persons outside the Public Sector unless:

- the employee has consented in writing to the release of the information and the release of the information would not be detrimental to the Public Sector;
- the Chief Executive Officer, at his or her discretion, agrees to the release of certain information in a situation where the employee is physically unable to consent to its release (through medical or physical incapacity, or if the employee is deceased); or
- there is a legal requirement to provide the information, in which case the Attorney-General's Department should be consulted before any information is released unless formal instructions or directions have been provided by the Attorney General's Department."

Turning to the question of the release of personal records, this relates to legal proceedings which are on foot between a former employee of Parks and Wildlife (P&W), 'the applicant', and P&W, as a result of injuries allegedly sustained by the applicant whilst performing services for P&W. P&W, through the Solicitor for the Northern Territory, engaged a private law firm as its legal representative for the purpose of the litigation.

During the course of the proceedings the P&W's legal representative, for legal purposes, accessed the personnel files of 2 witnesses to be called on behalf of the applicant, namely the applicant's spouse who is a former employee ('X') of P&W and a current employee ('Y') of P&W engaged at the same location at which the injury was allegedly sustained at the time of the incident involving the applicant.

P&W were under a legal obligation to put all its relevant files, including personnel files, in the hands of its legal representative and to discover all documents in its custody which were relevant to the proceeding. The personnel files of X and Y contained a number of documents in that category.

I am advised it was appropriate for P&W to put the personnel files in the hands of its legal representative for the purpose of discovery. In acting for P&W, their legal representative stands in the shoes of the Solicitor for the NT and as a consequence is entitled, and in fact obligated, to inspect all potentially relevant documents (including the personnel files) in the custody of P&W and to provide discovery of documents relevant to the issues in dispute.

I am also advised that P&W's legal representatives' access to the

personnel files for the purpose of legal proceedings does not constitute a breach of Employment Instruction 10. It is not correct to infer that P&W providing their legal representatives with access to the personnel files constituted release to “persons outside the public service”. In terms of its legal engagement, P&W’s legal representative was not “outside the public service” any more than the Solicitor for the NT would be were it acting directly for P&W.

In addition, clause 7 of Employment Instruction 10 provides an exemption to the non-disclosure provisions “where there is a legal requirement to provide the information”. The obligations relating to discovery in the legal proceedings on foot clearly invoke the exemption clause with the result the disclosure to P&W’s legal representative was entirely appropriate and not in breach of the Employment Instruction.