OFFICE OF THE INFORMATION COMMISSIONER (QLD)	**)** **)**	S 79 of 1993 (Decision No. 95021)

Participants:

NKS
Applicant

- and -

QUEENSLAND CORRECTIVE SERVICES COMMISSION
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access to a psychiatric clinical note concerning the applicant contained on the applicant's medical file held by the respondent - application of s.44(3) of the *Freedom of Information Act 1992* Qld - whether disclosure to the applicant might be prejudicial to the physical or mental health or wellbeing of the applicant.

Freedom of Information Act 1992 Qld s.33(1)(b), s.44(2), s.44(3), s.44(3)(a), s.44(4), s.52(6)

"S" and The Medical Board of Queensland, Re (Information Commissioner Qld, Decision No. 94028, 12 October 1994, unreported)

DECISION

I set aside the decision under review, and in substitution for it, I decide that:

(a) the document in issue contains information of a medical or psychiatric nature concerning the applicant;

(b) disclosure of the document in issue to the applicant might be prejudicial to the mental health or wellbeing of the applicant (with the exception of those parts of the document to which the applicant has already been given access as explained in paragraph 13 of my reasons for decision); and

(c) access to the document in issue (with the exception of those parts of it to which the applicant has previously been given access) is not to be given to the applicant but is to be given instead to a qualified medical practitioner nominated by the applicant and approved by the principal officer of the respondent, in accordance with s.44(3) of the *Freedom of Information Act 1992* Qld.

Date of Decision: 30 June 1995

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F N ALBIETZ
INFORMATION COMMISSIONER

OFFICE OF THE INFORMATION COMMISSIONER (QLD)) S 79 of 1993
) (Decision No. 95021)

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NKS
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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access to a clinical note dated 20 July 1990 made by a psychiatrist, Dr P Edwards, concerning the applicant.

2. By letter dated 20 January 1993, the applicant applied to the Queensland Corrective Services Commission (the QCSC) for access to "my medical record book". The applicant was, and still is, a prisoner detained by the QCSC. An initial decision was made by the QCSC's FOI Co-ordinator, Ms P Cabaniuk, and conveyed to the applicant by letter dated 5 March 1993. Ms Cabaniuk decided to grant the applicant access to his medical file with the exception of one document, being the clinical note in issue in this case. Ms Cabaniuk determined that document to be exempt under s.41(1), s.42(1)(c) and s.46(1)(b) of the *Freedom of Information Act 1992* Qld (the FOI Act).

3. By letter dated 8 April 1993, the applicant applied for internal review of Ms Cabaniuk's decision, in accordance with s.52 of the FOI Act. The applicant subsequently forwarded to me an application for external review dated 30 April 1993, claiming that an internal review decision had not been made within the time limit specified in the FOI Act, and that the QCSC was therefore deemed to have made a decision affirming Ms Cabaniuk's refusal of access to the clinical note (see s.52(6) of the FOI Act).

4. The QCSC has informed me that the application for internal review, although dated 8 April 1993, was not received by Ms Cabaniuk until 16 April 1993, and that therefore an internal review decision made on behalf of the QCSC by Ms K Mahoney on 29 April 1993, and received on 30 April 1993 by the correctional centre in which the applicant was detained, was made within the 14 day time limit prescribed by s.52(6) of the FOI Act. It appears that the applicant purported to refuse acceptance of Ms Mahoney's internal review decision. It was returned with a hand-written notation by an official at the correctional centre that the envelope containing the internal review decision was opened by the applicant who then indicated that he would not accept the internal review decision, on the basis that the decision was outside the prescribed time for making that decision and that he had commenced an application for an external review in relation to the document in issue.

5. I do not propose to examine this dispute between the applicant and the respondent, since nothing really turns on it for the purposes of my review. Provided I have jurisdiction to undertake a review under Part 5 of the FOI Act (which I do in this case whether the decision under review is a deemed affirmation of Ms Cabaniuk's decision to refuse access, or a valid internal review decision by Ms Mahoney), I am empowered to make a fresh decision as to the correct application of the provisions of the FOI Act to any documents (or parts of documents) of the respondent agency or Minister, which fall within the

terms of the applicant's FOI access application and to which the applicant has been refused access under the FOI Act. In the course of a review under Part 5, the respondent agency or Minister may, in effect, abandon reliance on the grounds previously given in support of the decision under review, in whole or in part, whether by making concessions to the applicant (which mean that some matter is no longer in issue) or by arguing fresh grounds to support a refusal of access to matter in issue.

6. I should observe, however, that there may be a more fundamental objection to the validity of Ms Mahoney's internal review decision than the alleged failure to observe time limits. Ms Mahoney did not affirm the claims for exemption made in Ms Cabaniuk's initial decision, but decided instead that access to the clinical note should be given in accordance with s.44(3) of the FOI Act. Subsections 44(3) and (4) provide as follows:

> ***44.*** *...*
>
> ***(3)*** *If -*
>
> *(a) an application is made to an agency or Minister for access to a document of the agency or an official document of the Minister that contains information of a medical or psychiatric nature concerning the person making the application; and*
>
> *(b) it appears to the principal officer of the agency or the Minister that the disclosure of the information to the person might be prejudicial to the physical or mental health or wellbeing of the person;*
>
> *the principal officer or Minister may direct that access to the document is not to be given to the person but is to be given instead to a qualified medical practitioner nominated by the person and approved by the principal officer or Minister.*
>
> ***(4)*** *An agency or Minister may appoint a qualified medical practitioner to make a decision under subsection (3) on behalf of the agency or Minister.*

7. On what I consider to be the proper construction of these provisions, Ms Mahoney was not authorised to make a decision under s.44(3) of the FOI Act. Section 44(3) states that the principal officer of an agency may direct that access to a document of the kind stipulated in s.44(3)(a) is to be given in the manner provided for by s.44(3), after the principal officer has formed the view that disclosure to the applicant might be prejudicial to the physical or mental health or wellbeing of the applicant. Section 44(4) provides that an agency may appoint a qualified medical practitioner to make a decision under s.44(3) on behalf of the agency. Ms Mahoney was not the principal officer of the QCSC, nor a qualified medical practitioner.

8. While s.33(1)(b) of the FOI Act makes general provision for the principal officer of an agency to direct another officer of the agency to deal with an FOI access application on behalf of the agency, I do not think s.44(3) is properly to be construed as though its specific references to the principal officer include another officer holding a direction from the principal officer under s.33(1)(b). Subsection 44(4) reinforces my view, since it contemplates the making of a special appointment of a person with particular qualifications and expertise appropriate to the kinds of decisions which may be made under s.44(3), as the alternative to the principal officer exercising the discretion conferred by s.44(3).

9. In my opinion, Ms Mahoney did not have authority to make a decision under s.44(3), and her internal review decision dated 24 April 1993 was of no legal effect. The decision under review is therefore the deemed affirmation, in accordance with s.52(6) of the FOI Act, of Ms Cabaniuk's decision to refuse access to the document in issue. As foreshadowed in paragraph 5 above, however, this has made little

practical difference to the review. The QCSC has not argued that the document in issue is exempt, and the only issue in the case, as presented to me by both participants, has been the application of s.44(3) to the clinical note.

The external review process

10. The QCSC has provided me with a copy of the clinical note in issue, which contains a psychiatric diagnosis of the applicant, together with observations recorded by Dr Edwards concerning his impressions of the applicant upon examination.

11. During the course of this external review, a statutory declaration from a psychiatrist concerning the clinical note, was forwarded to my office. The psychiatrist's identity, and the precise detail of this evidence, must remain confidential for reasons which relate to another external review still in progress. In a letter to the applicant dated 16 September 1993, the substance of the psychiatrist's evidence was paraphrased, so as to acquaint the applicant with the substance of evidence in support of the respondent's case. The relevant evidence of the psychiatrist concerning the clinical note can be paraphrased as follows:

> From the standpoint of the applicant's psychiatric health and wellbeing, the psychiatric clinical note dated 20 July 1990 should not be released to the applicant.
>
> It would be appropriate if the clinical note was released to a medical practitioner, and in this regard the visiting prison psychiatrist was recommended. If the visiting prison psychiatrist was unable to perform this task, then it would be appropriate for the document to be released to another psychiatrist; however, release to a general medical practitioner would not be appropriate because of the slim prospects of obtaining a general medical practitioner with an adequate knowledge of psychiatry.
>
> The clinical note contains a psychiatric diagnosis (together with other information) and there is a danger that the applicant may misunderstand the diagnosis that has been made. (An example was given of technical terms used in the document in issue which are prone to being misunderstood by lay persons.) There is a possibility that the applicant could come to some harm if the document was released to him, in the sense that he could experience depression once he examined the document. A psychiatrist should explain the diagnosis to the applicant.

12. The applicant's submission in response, dated 7 October 1993, rejected the evidence that disclosure of the clinical note to him would be prejudicial to his mental health or wellbeing. The applicant submitted that he had been aware of the general tone and content of the clinical note for approximately 6-8 months. The applicant enclosed a copy of a handwritten document dated 26 July 1990 made by a person described as a Nursing Manager (employed by the QCSC), which document was stamped to indicate that it had been released by the QCSC under the FOI Act. The Nursing Manager's note dated 26 July 1990 is not the same document as the clinical note, dated 20 July 1990, which is the document in issue. The Nursing Manager's note, however, contains two sentences which refer to a psychiatric assessment of the applicant, attributed to Dr Edwards. It appears that, having read the clinical note now in issue, the Nursing Manager included a brief reference to it in a document prepared for other administrative purposes. The applicant submitted that no harm would come to him from having access to the clinical note, because of the access that he had already obtained to the Nursing Manager's note. I should make clear, however, that there is other information in the clinical note of a medical or psychiatric nature concerning the applicant, to which no reference is made in the Nursing Manager's note.

13. During the course of this external review, I provided the QCSC with a copy of the applicant's letter dated 7 October 1993 (together with the copy of the Nursing Manager's note) and asked the QCSC if it

would be prepared to release part of the clinical note, in view of the contents of the Nursing Manager's note which had already been disclosed to the applicant. The QCSC agreed to give the applicant access to so much of the clinical note as contains the psychiatric diagnosis attributed to Dr Edwards in the Nursing Manager's note.

14. In relation to the remainder of the clinical note, however, the QCSC maintains its stance that s.44(3) of the FOI Act should apply. The psychiatrist who provided the evidence referred to in paragraph 11 above contacted my office and, with knowledge of the information that had been obtained by the applicant in the Nursing Manager's note, nevertheless expressed the opinion that the remainder of the clinical note could be expected to cause some harm to the mental health or wellbeing of the applicant, if released directly to him, in the sense that the applicant could suffer depression and/or some loss of self-esteem. The psychiatrist maintained the view that the remainder of the psychiatric note should be released to a psychiatrist who would be able to work through the issues raised in it with the applicant.

15. The QCSC also lodged a written submission dated 28 July 1994 in support of its case that the clinical note should only be released in accordance s.44(3) of the FOI Act. In response to the applicant's submission, the QCSC submitted that the Nursing Manager's note dated 26 July 1990 does not reflect the entire contents of the clinical note dated 20 July 1990, which goes into more depth and detail than the Nursing Manager's note. The QCSC submitted that there is no evidence to suggest that the applicant has ever seen the clinical note itself. The QCSC relied upon the opinion of the psychiatrist referred to in paragraph 14 above that the remainder of the clinical note should not be disclosed to the applicant because of the risk of prejudice to the applicant's mental health or wellbeing.

16. A copy of the QCSC's submission of 28 July 1994 (edited by deleting a small amount of matter claimed by the QCSC to be confidential) was provided to the applicant, and two opportunities were given to him to lodge a final submission in support of his case in this external review, but no response has been received from the applicant.

Application of s.44(3) of the FOI Act

17. In my reasons for decision in *Re "S" and The Medical Board of Queensland* (Information Commissioner Qld, Decision No. 94028, 12 October 1994, unreported), I made the following remarks (at paragraphs 12-13):

> *12. The terms of s.44(3) of the FOI Act are almost identical to the terms in which s.41(3) of the* Freedom of Information Act 1982 Cth (*the Commonwealth FOI Act) was framed, prior to its amendment by the* Freedom of Information Amendment Act 1991 Cth. *In its former terms, s.41(3) of the Commonwealth FOI Act was considered by Deputy President Smart QC (now His Honour Mr Justice Smart of the New South Wales Supreme Court) in the decision of the Commonwealth Administrative Appeals Tribunal in* Re K and Director-General of Social Security *(1984) 6 ALD 354. Deputy President Smart observed (at pp.356-7) that the provision raised these matters for consideration:*
>
> 1. Does the document in issue contain information of a medical or psychiatric nature concerning the applicant?
>
> 2. If the information were disclosed direct to the applicant is there a real and tangible possibility as distinct from a fanciful, remote or far-fetched possibility of prejudice to the physical or mental health or wellbeing of the applicant? This is what the words "might be prejudicial" mean. Wellbeing has a wide import and a phrase

"physical or mental health or wellbeing" indicates that a broad approach is to be taken. The general health, welfare and good of the person is to be considered.

3. If there is a real and tangible possibility of such prejudice the decision-maker is called upon to exercise his discretion whether to direct that access which would otherwise be given to the applicant should be given to a medical practitioner nominated by him. In the exercise of such discretion the decision-maker should consider the nature and extent of any real and tangible possible prejudice and the likelihood of it occurring. A number of situations could arise:

   (a) The possible prejudice may be small and not such as to justify giving a direction.

   (b) The possible prejudice may be sufficient to be of concern, but not major concern. In such a case if the likelihood of such prejudice eventuating was small, the decision-maker may not give a direction.

   (c) The possible prejudice, if it eventuated, may be great but the likelihood of it occurring may be small. In such a case the gravity of possible consequences might prove decisive in exercising the discretion whether to give a direction.

   In the exercise of his discretion the decision-maker has to carefully consider all the circumstances and balance the relevant factors.

13. I consider that this passage should be accepted and applied in Queensland as correctly stating the general approach to be taken by decision-makers when considering the application of s.44(3) of the FOI Act.

18. Those parts of the clinical note which remain in issue contain professional observations made by Dr Edwards after examining the applicant. I am satisfied that this is information of a medical or psychiatric nature concerning the applicant, so that the requirements of s.44(3)(a) of the FOI Act are satisfied.

19. The next question which I have to determine is whether the release of the balance of the clinical note to the applicant might be prejudicial to his physical or mental health or wellbeing. The applicant asserts that disclosure would not cause him any harm as he has already received a diagnosis attributed to Dr Edwards. However, the evidence from the psychiatrist referred to in paragraphs 11 and 14 above, and my examination of the clinical note, has persuaded me that there is a real and tangible possibility (as distinct from a fanciful, remote or far-fetched possibility) of prejudice to the applicant's mental health or wellbeing if the applicant were to be given access to the balance of the clinical note remaining in issue. With the assistance of the psychiatrist's evidence referred to above, my assessment of the nature of the possible prejudice and the likelihood of its occurrence is such that I consider it preferable that the discretion conferred by s.44(3) of the FOI Act be exercised, and that access to those parts of the clinical note remaining in issue not be given to the applicant, but be given instead to a qualified medical

practitioner nominated by the applicant and approved by the principal officer of the QCSC (or by a qualified medical practitioner appointed by the QCSC under s.44(4) of the FOI Act).

20. The psychiatrist's evidence is that the qualified medical practitioner to whom access to the clinical note is to be given should be a psychiatrist, and I think that would be the preferable course. A decision by a principal officer (or a s.44(4) appointee) to withhold approval of a medical practitioner nominated by the applicant in accordance with s.44(3), should not be taken without good cause. Unless an agency is prepared to be generous, the expense of a consultation with the approved medical practitioner to whom access is given in accordance with s.44(3) must be borne by the applicant for access. To force the applicant to bear the greater expense (and, depending on how far the applicant lives from a place where consultation with an appropriate specialist can take place, the greater inconvenience) of a consultation with a specialist rather than a general practitioner can be a significant burden to an applicant. The guiding consideration must, however, be the interests of the physical or mental health or wellbeing of the applicant for access. If the principal officer (or s.44(4) appointee) is satisfied that considerations of that nature require that access be given to a specialist in a particular field of medicine, the principal officer (or s.44(4) appointee) is entitled to withhold approval until the applicant nominates a suitable specialist in the relevant field.

Conclusion

21. I set aside the decision under review, and in substitution for it, I decide that:

(a) the document in issue contains information of a medical or psychiatric nature concerning the applicant;

(b) disclosure of the document in issue to the applicant might be prejudicial to the mental health or wellbeing of the applicant (with the exception of those parts of the document to which the applicant has already been given access, as explained in paragraph 13 of my reasons for decision); and

(c) access to the document in issue (with the exception of those parts of it to which the applicant has previously been given access) is not to be given to the applicant but is to be given instead to a qualified medical practitioner nominated by the applicant and approved by the principal officer of the respondent (or s.44(4) appointee), in accordance with s.44(3) of the FOI Act.

F N ALBIETZ
INFORMATION COMMISSIONER