

## OFFICE OF THE INFORMATION COMMISSIONER (QLD)

**Decision No. 97019**  
**Application S 146/94**

### **Participants:**

GAIL NAOMI BURKE  
**Applicant**

DEPARTMENT OF FAMILIES, YOUTH AND COMMUNITY CARE  
**Respondent**

GORDON VIRGO KING  
**Third Party**

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - deferral of access - circumstances in which the *Freedom of Information Act 1992* Qld permits a decision to defer access - allegations of misconduct against director of a youth service - whether information concerning the business or professional affairs of that person - whether disclosure could reasonably be expected to have an adverse effect on business or professional affairs - application of s.45(1)(c) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - deferral of access - allegations of misconduct against director of a youth service - whether information concerning the director's personal affairs - application of public interest balancing test - public interest in improving systems and procedures for the safety of children placed in care - public interest in the accountability of the respondent, and of community service organisations funded by government, for the performance of child welfare/child protection functions - application of s.44(1) of the *Freedom of Information Act 1992* Qld.

*Freedom of Information Act 1992* Qld s.21, s.31, s.42(1)(b), s.42(1)(d), s.44(1), s.45(1)(c), s.51, s.51(2)(e)

*Cannon and Australian Quality Egg Farms Limited, Re* (1994) 1 QAR 491  
*Griffith and Queensland Police Service, Re* (Information Commissioner Qld, Decision No. 97013, 15 August 1997, unreported)  
*"NHL" and the University of Queensland, Re* (Information Commissioner Qld, Decision No. 97001, 14 February 1997, unreported)  
*Pope and Queensland Health, Re* (1994) 1 QAR 616  
*Stewart and Department of Transport, Re* (1993) 1 QAR 227

## DECISION

1. I set aside the decision under review (which is identified in paragraph 4 of my accompanying reasons for decision).
2. In substitution for it, I decide that—
  - (a) the name of, and other identifying references to, the youth referred to in the three folios in issue which are mentioned in paragraphs 14 and 45 of my accompanying reasons for decision, comprise exempt matter under s.44(1) of the *Freedom of Information Act 1992* Qld; but
  - (b) otherwise, the matter in issue is not exempt from disclosure under the *Freedom of Information Act 1992* Qld, and the applicant has a right to be given access to it in accordance with s.21 of the *Freedom of Information Act 1992* Qld.

Date of decision: 19 December 1997

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F N ALBIETZ  
INFORMATION COMMISSIONER

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## **REASONS FOR DECISION**

### **Background**

1. The applicant applied to me for review of the respondent's decision to defer (on account of the pending trial of the third party) the grant of access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to certain documents concerning the third party and the Cairns Anglican Youth Service. During the course of my review (and following the third party's trial and acquittal), the respondent agreed to give the applicant access to the documents in issue. However, the third party has maintained an objection to disclosure on the basis that the documents in issue comprise exempt matter under the FOI Act, and I am obliged to rule on that exemption claim. The applicant is a journalist employed by the Australian Broadcasting Corporation (the ABC), and has been represented throughout my review by the ABC's Legal and Copyright branch. The third party is a former Anglican Minister, who has been represented throughout my review by Messrs Bowen Lagois, solicitors.
2. By letter dated 15 April 1994, the applicant sought access under the FOI Act to:

*... all files from 1982 held by the former Department of Family Services on the Cairns Anglican Youth Shelter - also known as St John's Youth Shelter. I'd also like any subsequent files held by the Divisions of Protective Services and Juvenile Justice and the Community Services Development on the Youth Shelter and any other material held in regard to Gordon Virgo King - a former Director of the Cairns Anglican Youth Shelter. The request is for all files from Brisbane, Townsville and Cairns offices.*

3. In his initial decision on behalf of the respondent, Mr Van Jeppesen decided to give the applicant access to 141 folios identified as falling within the terms of the applicant's FOI access application, subject to the deletion from eight of those folios of identifying references to confidential sources of information, which were found to be exempt matter under s.42(1)(b) of the FOI Act. (Those deletions are not in issue in this external review.)  
Mr Jeppesen identified 23 of the 141 folios as documents the disclosure of which was likely to be of concern to the third party, and in respect of which he was obliged to defer his decision to grant access, in order to give the third party an opportunity to pursue the statutory rights of review available under the FOI Act (see s.51(2)(e) of the FOI Act).
4. The third party applied for internal review of Mr Jeppesen's decision, objecting to disclosure of some of the documents which concerned him. The internal review decision on behalf of the respondent was made by Mr D A C Smith on 5 August 1994. Mr Smith affirmed Mr Jeppesen's decision in respect of the matter found to be exempt under s.42(1)(b) of the FOI Act. Mr Smith also found that the matter which was the subject of the third party's application for internal review comprised information concerning the personal affairs of the third party, for the purposes of s.44(1) of the FOI Act. Mr Smith decided that disclosure of that information would, on balance, be in the public interest, were it not for the fact that the third party was awaiting trial in the District Court on five indictments, and any widespread publicity of the matter in issue could prejudice a fair trial. (For that reason also, Mr Smith expressed the view that s.42(1)(d) of the FOI Act might be applicable.) Mr Smith framed his decision in the following terms:

*Taking all these matters into account, I have reached the following conclusions—*

- (a) *the decision made by [Mr Jeppesen] is correct and ... I agree that although the matter in question is matter that would disclose information concerning the personal affairs of a person its disclosure would however on balance, be in the public interest.*
- (b) *there may be a public interest in deferring disclosure until after the five indictments presently before the District Court in relation to Mr King have been finalised by the Court process. Once this occurs there is no public interest argument in my view supporting a conclusion that the matter is exempt matter and there is no remaining argument that s.42(1)(d) applies.*

*A delay in release of the information would not seem to prejudice the interests of the applicant and it would remove any possibility that disclosure of the information by this agency to a representative of the media could reasonably be expected to be a link in the chain of an action which could be prejudicial to a person's fair trial.*

...

#### *DECISION*

*The original decision is affirmed with the following modification relating to the timing of release of documents.*

*The matter in question comes within s.44(1) of the FOI Act in that it is matter concerning the personal affairs of the person. The public interest considerations are balanced in favour of disclosure with the temporary reservation that there are five matters presently before the District Court in relation to Mr King. Once these matters are finalised, that public interest objection no longer applies. Nor then would the matter be exempt pursuant to s.42(1)(d) of the Act.*

*The material should be prepared for release to the applicant and should be released immediately the matters currently before the District Court are finalised.*

5. By letter dated 5 October 1994, a solicitor for the ABC, acting on behalf of the applicant, applied to me for review, under Part 5 of the FOI Act, of Mr Smith's decision.
6. During the course of my review, the third party was acquitted of the charges against him, with the result that the respondent and the applicant both now contend for disclosure of the matter in issue, against the third party's objection that it is exempt matter. Since Mr Smith's decision to defer access is, in practical terms, no longer in issue, I will make some brief observations about it in this segment of my reasons for decision.
7. While Mr Smith's decision to defer access had much to commend it as a practical compromise between the open government principles which the FOI Act was designed to promote, and the third party's interest in obtaining a fair trial, I do not consider that the provisions of the FOI Act afforded any legal authority for a decision to defer access in the relevant circumstances. The only power conferred on agencies, by the FOI Act, to defer access to a requested document arises in the limited circumstances specified in s.31 of the FOI Act, which clearly were not applicable in the present case. If Mr Smith had formed the view that disclosure of the matter in issue (at the time he was required to make his internal review decision) could reasonably have been expected to prejudice the third party's pending District Court trial, then, in my opinion, the legally correct course of action was to decide that the matter in issue was exempt matter under s.42(1)(d), and/or s.44(1), of the FOI Act, but to invite the applicant to lodge a fresh FOI access application for the same matter after the third party's trial was finalised.

#### **External review process**

8. The documents in issue were obtained and examined.
9. The third party's trial proceeded in February 1995, with the third party being acquitted of the charges against him. In March 1995, the Assistant Information Commissioner conducted a telephone conference with the third party's solicitor, in order to ascertain whether the third party was prepared to consent to the disclosure of some of the information previously claimed by him to be exempt matter under the FOI Act.
10. The third party consented to disclosure of some information, including information which concerned the subject of charges upon which the third party had previously been convicted. I authorised the respondent to give the applicant access under the FOI Act to that information, which accordingly is no longer in issue in this review.

11. The matter in respect of which the third party has maintained an objection to disclosure consists of information which falls into three broad categories, namely, information which—
- (a) refers to the third party adversely, in reference to conduct which (if proven to the standard of criminal proof) would involve a criminal offence, but which has never been the subject of a criminal charge;
  - (b) was the subject of the charges in respect of which the third party was acquitted in 1995; and
  - (c) refers to the third party adversely, but not in reference to conduct which would involve a criminal offence.

12. The solicitors acting on behalf of the third party have contended that all of that matter is exempt matter under s.44(1) and s.45(1)(c) of the FOI Act. Since the applicant wished to press for access to all of that matter, I issued directions to the participants in relation to the preparation and lodgement of evidence and/or written submissions in support of their respective cases. The following evidence and written submissions have been received from the participants:

On behalf of the third party

- written submission dated 23 June 1995
- affidavit of John Edward Magoffin (the third party's solicitor) dated 23 June 1995
- points of reply (to the evidence and submission of the applicant) dated 10 October 1995

On behalf of the applicant

- written submission dated 11 August 1995
- affidavit of Gail Naomi Burke sworn 11 August 1995.

13. The respondent affirmed the position set out in the decisions by Mr Jeppesen and Mr Smith that the matter in issue was not exempt (the reasons for deferral of access being no longer applicable), but did not wish to lodge additional evidence or submissions to support its decision.
14. On 22 May 1996, the respondent informed me that, in the course of processing an unrelated FOI access application, an additional three folios relating to the third party, and falling within the terms of the applicant's FOI access application, had been located. The respondent indicated that some matter which would identify another person (i.e., a person who was not a participant in this review) was exempt under s.44(1) of the FOI Act, but otherwise it was prepared to disclose the additional documents to the applicant. However, the third party has objected to disclosure of the additional documents on the same basis as for the other documents in issue.
15. One of the documents in issue, an internal memorandum dated 10 November 1983 (which is numbered for identification purposes as folio 32), attributes certain information to Inspector (then Sergeant) Metcalfe of the Queensland Police Service. My staff consulted Inspector Metcalfe as to whether he objected to disclosure of the information attributed to him. In a letter to my office dated 4 November 1997, Inspector Metcalfe indicated that he had no

objection to disclosure of that information to the applicant. However, it is appropriate that I repeat the caution stated in Inspector Metcalfe's letter to my office. Inspector Metcalfe stated that he had no recollection of a conversation, outlined in the fourth paragraph of the memorandum, that is recorded as having occurred between the then Sergeant Metcalfe and the author of the memorandum. Inspector Metcalfe stated that the author of the memorandum may have received that information from another person, and mistakenly attributed it to him.

16. The respondent has provided me with copies of the correspondence exchanged, in the course of consultations under s.51 of the FOI Act, with the Anglican Diocese of North Queensland, which did not object to disclosure of the documents that were proposed for deferred release to the applicant.
17. In my opinion, the decisions by both the respondent, and the Anglican Diocese of North Queensland, to support disclosure of the documents in issue, do them considerable credit, especially since the documents in issue open to public scrutiny some aspects of the administration of schemes for the protection/welfare of young persons at risk, which, with the benefit of hindsight, some members of the public might regard as having involved questionable judgment, or lack of thorough inquiry where thorough inquiry ought to have been undertaken. The improvement of public administration (including supervision of the administration by community service organisations of grants from public funds) through the prophylactic effect of enhanced accountability, is one of the primary objects which the FOI Act aims to secure, and I commend the respondent and the Anglican Diocese of North Queensland for the stance they have taken in this case.

**Application of s.45(1)(c) of the FOI Act**

18. Section 45(1)(c) of the FOI Act provides:

*45.(1) Matter is exempt matter if—*

...

(c) *its disclosure—*

- (i) *would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and*
- (ii) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;*

*unless its disclosure would, on balance, be in the public interest.*

19. The claim for exemption is made by the third party on the basis that disclosure of the matter in issue would adversely affect the third party's business or professional affairs. I set out my observations on the correct approach to the interpretation and application of s.45(1)(c) of the FOI Act in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, at pp.516-523 (paragraphs 66-88).

20. I do not accept that the third party had business affairs in the requisite sense. He was not engaged in a business undertaking carried on in an organised way for the purpose of obtaining profits or gains (see *Re Cannon* at pp.518-519, paragraph 73); rather he was an employee of a community service organisation. In any event, the matter in issue does not comprise information concerning the business affairs of the third party - it is not information relating to matters of a business nature (see *Re Cannon* at pp.516-518, paragraphs 67-72).
21. It was submitted on behalf of the third party that comment about whether he was an appropriate person to hold the office that he held, constitutes information relating to the third party's professional affairs. I specifically considered the meaning of the term "professional affairs", as it appears in the context of s.45(1)(c), in *Re Pope and Queensland Health* (1994) 1 QAR 616. At p.625 (paragraph 29) of *Re Pope*, I stated my view that the words "professional affairs", in the context of s.45(1)(c), were intended to cover the work activities of persons who are admitted to a recognised profession, and who ordinarily offer their professional services to the community at large for a fee, i.e., to the running of a professional practice for the purpose of generating income. Although divinity/theology has traditionally been regarded as one of the learned professions, it would not be covered by the meaning of the phrase "professional affairs" which I consider was intended in the context of s.45(1)(c) of the FOI Act.
22. Whether there is scope for s.45(1)(c) to extend to information concerning the professional affairs of a minister of religion is not (for the reasons which follow) an issue which I need to determine in this case. Assuming that the third party, who was formerly an Anglican minister, had "professional affairs" for the purposes of s.45(1)(c) of the FOI Act, I do not consider that disclosure of the matter in issue could reasonably be expected to have an adverse effect on the third party's "professional affairs". It is apparent from the documents in issue, and from documents to which the applicant has been given access, that after being charged with a number of offences on 21 February 1993, the third party was removed from his position at the Cairns Anglican Youth Service and subsequently had his Ministry withdrawn by the Anglican Church. Since the third party has been removed from his profession, I do not accept that he has professional affairs which are capable of being adversely affected by disclosure of the matter in issue.
23. I find that none of the matter remaining in issue qualifies for exemption under s.45(1)(c) of the FOI Act.

#### **Application of s.44(1) of the FOI Act**

24. Section 44(1) of the FOI Act provides:
- 44.(1) Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*
25. In applying s.44(1) of the FOI Act, one must first consider whether disclosure of the matter in issue would disclose information that is properly to be characterised as information concerning the personal affairs of a person. If that requirement is satisfied, a *prima facie* public interest favouring non-disclosure is established, and the matter in issue will be exempt, unless there exist public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure, so as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.



26. In my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, I identified the various provisions of the FOI Act which employ the term "personal affairs" and discussed in detail the meaning of the phrase "personal affairs of a person", and relevant variations thereof, in the FOI Act (see pp.256-267, paragraphs 79-114, of *Re Stewart*). In particular, I said that information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life, and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well-accepted core meaning which includes:

- affairs relating to family and marital relationships;
- health or ill-health;
- relationships with and emotional ties with other people; and
- domestic responsibilities or financial obligations.

Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, to be determined according to the proper characterisation of the information in question.

27. At p.257 (paragraph 80) of *Re Stewart*, I endorsed the principle that the mention of a person's name in police records, or in agency records of a comparable nature, in association with some alleged or possible (but still unproven) wrongdoing, was information concerning that person's "personal affairs" (but see the qualification, in respect of wrongdoing by a public servant in the course of performing his or her duties of employment, that I expressed in *Re Griffith and Queensland Police Service* (Information Commissioner Qld, Decision No. 97013, 15 August 1997, unreported) at paragraphs 43-53).
28. Most of the matter in issue is properly to be characterised as information concerning the third party's personal affairs, since it concerns allegations of wrongdoing on the part of the third party, and/or it concerns the third party's alleged sexual conduct (*cf. Re "NHL" and The University of Queensland* (Information Commissioner Qld, Decision No. 97001, 14 February 1997, unreported) at paragraph 29).
29. Some of the matter claimed to be exempt is not eligible for exemption under s.44(1) of the FOI Act because it relates solely to the third party's work performance/employment affairs, and does not stray into the realm of personal affairs, namely:
- grants and subsidies YSAP file 4633.1, folio 168, the second paragraph
  - CSD-SAAP service file 500253SVC, folio 57, paragraph 3, the last line, the second and third last words
  - CSD-SAAP service file 500253SVR, folio 217, the matter claimed to be exempt in the second paragraph on that page.
30. That matter does not qualify for exemption under s.44(1) of the FOI Act, nor (for the reasons explained at paragraphs 20-22 above) does it qualify for exemption under s.45(1)(c) of the FOI Act.
31. With respect to the balance of the matter in issue, which I have found comprises information concerning the third party's personal affairs, I must consider the application of the public interest balancing test incorporated in s.44(1) of the FOI Act (see paragraph 25 above).

**Evidence/submissions on the application of the public interest balancing test in s.44(1)**

32. The solicitors for the third party advanced a number of arguments as to why it was not in the public interest for the information concerning the personal affairs of the third party to be disclosed.

In summary, they were—

- while they relate to a period when the third party was the Director of the Cairns Anglican Youth Service, the allegations were not proven;
- references in the matter in issue to rumours and unsubstantiated allegations, are clearly speculative and should not be disclosed;
- the third party was tried and acquitted in respect of charges that related to a period when the third party was Director of the Cairns Anglican Youth Service; to disclose the basis for rumours or allegations would give those rumours and allegations greater credit than they deserve in circumstances where the allegations were not believed by the jury at trial;
- in the affidavit of John Edward Magoffin (the third party's solicitor) dated 23 June 1995, it was submitted that some of the allegations contained in the matter in issue are hearsay comments made following discussions between a Departmental officer and Sergeant Metcalfe. Sergeant Metcalfe did not give evidence at any of the court proceedings against the third party, and the allegations that he made were not relied upon by the prosecution. On that basis, it was submitted that those allegations are unreliable and it would not be in the public interest that they be disclosed. It was also submitted that other matter in issue contains hearsay allegations that were not given in evidence in court proceedings against the third party.

33. The affidavit of Gail Naomi Burke, sworn 11 August 1995, summarised the history of criminal charges laid against the third party, and annexed newspaper clippings, and transcripts of radio news reports, about those charges. At paragraph 10 of her affidavit, Ms Burke deposed to the fact that the third party was in charge of a State-funded youth facility (referring to the Cairns Anglican Youth Service) for about ten years, despite a previous conviction for indecent dealing with a boy under the age of 14. Paragraph 13 of her affidavit referred to the position of the respondent agency in relation to the allegations made against the third party, and in particular referred to folio 37 of the documents in issue:

*13. Disclosure of the documents could assist me to find out how much the Department knew about the complaints against Mr King, and how many complaints there were. I refer to folio 37 which includes comments by a Paul Ban and a Detective Metcalfe. I am aware that Detective Metcalfe was a serving Police Officer at Babinda, which is where the first charge against Mr King in Queensland originated. The charge against Mr King was laid in 1993, yet it would appear that Detective Metcalfe had suspicions about King prior to that date. Full disclosure of that document may assist in establishing what became of Detective Metcalfe's concerns, and whether they led to further investigations.*

34. At paragraph 17 of her affidavit, Ms Burke adopted the public interest arguments, in favour of disclosure of the matter in issue, that were set out in Mr Smith's internal review decision dated 5 August 1994, as follows:

*(i) The documents relate to an issue that has received wide publicity in the media;*

- (ii) *The documents relate to [the third party's] role as Director of the Cairns Anglican Youth Service which was funded by the State Government;*
- (iii) *The documents raise issues in relation to the circumstances of the funding of the Cairns Anglican Youth Service;*
- (iv) *The community should be kept informed of Government operations, including in particular, the rules and practices followed by Government in its dealings with members or agencies in the community;*
- (v) *The public interest is served by promoting open discussion of public affairs and enhancing government's accountability.*

35. Those five points were also adopted in the written submissions dated 11 August 1995, made on behalf of Ms Burke, which were largely directed to the application of the public interest balancing test in s.44(1) of the FOI Act. Paragraph 1.1 of those submissions referred to the third party's history of criminal offences of a sexual nature involving minors, the first involving a conviction in Western Australia in 1956. It was submitted that the extent to which the Department took account of that history in relation to the third party's continuing association with state-funded youth services was a matter going directly to the public interest in favour of disclosure. The submissions on behalf of Ms Burke continued as follows:

1.2 *As Ms Burke indicates in her affidavit, at paragraphs 11, 12, 13, 14, 15 and 16, the material already released provides some evidence that the Department may have been remiss in the handling of this particular case (that is, Mr King's position in relation to a number of Cairns youth services). Disclosure of the documents in full would be likely to assist Ms Burke, or anyone else who had access to the documents, in investigating this issue.*

1.3 *We submit that the public interest in this matter being more fully explored is essentially self-evident. The two main issues may be summarised as follows:*

(a) *the accountability of the Department in relation to this matter, and in particular whether the Department has taken steps to ensure that adequate safeguards are in place in relation to Mr King's involvement with State-funded youth services, what this may indicate about the Department's approach to similar sensitive cases, and what safeguards may be called for in the future.*

(b) *Mr King's suitability for similar roles in relation to youth services in the future, whether in Cairns or elsewhere.*

...

1.5 *Also relevant to the argument that the public interest favours disclosure is the fact that the charges against Mr King have already attracted considerable public attention, as annexures "A" and "B" to Ms Burke's affidavit indicate. The thrust of Mr King's case for exemption is that no matters have been proven against him, and consequently he should be allowed to quietly slip back into the community, without further reflection*

*upon the matters of public concern. This approach takes no account of the long history of prior convictions, or of the public interest and concern already generated by the charges against him. It also runs counter to the basic principles underlying the Freedom of Information Act 1992. As some of the allegations against Mr King are already in the public arena, there is a strong public interest in exploring the history of these and similar allegations, so that the community is fully informed of the matters in issue. As noted at paragraph 1.4 above, this is particularly important given Mr King's prior convictions.*

36. The submissions on behalf of Ms Burke then referred to paragraph 96 of my decision in *Re Pope and Queensland Health* (1994) 1 QAR 616, which I have reproduced below:

96. *It is possible to envisage circumstances in which the public interest in fair treatment of individuals might be a consideration favouring non-disclosure of matter comprising allegations of improper conduct against an individual where the allegations are clearly unfounded and damaging, and indeed might even tell against the premature disclosure of matter comprising allegations of improper conduct against an individual which appear to have some reasonable basis, but which are still to be investigated and tested by a proper authority. In this case, however, I am dealing with a report into allegations of improper conduct against an individual, the report having been made by an independent investigator who has allowed the subject of the allegations a reasonable opportunity to answer adverse material. The weight to be accorded to public interest considerations (in the nature of fair treatment of individuals) which might favour non-disclosure of such a report must be judged according to the circumstances of each case. If allegations against an individual are found, on investigation, to lack any reasonable basis, and they involve no wider issues of public importance (such as whether proper systems and procedures are being followed in government agencies), the public interest in fair treatment of the individual might carry substantial weight in favour of non-disclosure (on the basis that the unsubstantiated allegations ought not to be further disseminated, even though accompanied by an exoneration). However, the public interest in accountability of government agencies and their employees (for the manner in which they expend public funds to carry out their allocated functions in the public interest) will generally always be in issue in such situations. In particular, there is a clear public interest in ensuring that allegations of improper conduct against government agencies and government employees, which appear to have some reasonable basis, are properly investigated, and that appropriate corrective action is taken where individuals, systems or organisations are found to be at fault, and that there is proper accountability to the public, in respect of both process and outcomes, in this regard. Each case must be judged on its own merits, and I consider that the weight of relevant public interest considerations (of the kind discussed in this paragraph) clearly favours disclosure of the Seawright Report.*  
(my underlining)

37. The submission on behalf of Ms Burke, in relation to the issues raised in the above-quoted paragraph from *Re Pope*, was put in these terms:

1.7 *While the above quote is not quite on all fours with the present situation, since Mr King was employed by government-funded youth agencies rather than an employee of the government itself, nevertheless it supports our contention that concerns must arise when there have been complaints against a person with a long history of proven sexual offences against minors, who is in charge of youth services funded by the government. That is, the accountability of the Department is in question, through its action or inaction in relation to Mr King, especially given its responsibility to the clients of the youth services.*

*There is a clear public interest in finding out whether the allegations against Mr King were properly investigated - for instance, did the Department know about Mr King's prior convictions? There is also the question of whether the Department considered taking appropriate corrective action. If insufficient action was taken, it may be concluded that certain individuals within the Department, or systems within the Department, were at fault.*

38. The respondent was provided with Ms Burke's affidavit, and the submissions made on her behalf, and given the opportunity to lodge submissions in support of any case it wished to put in this review. The respondent briefly indicated that its view was that the decision to release the documents in issue should stand.
39. In response to the evidence and submissions lodged on behalf of the applicant, the solicitors for the third party lodged points of reply dated 10 October 1995. The focus of those points of reply was that the third party had not been convicted of any offence relating to the period in which he was Director of the Cairns Anglican Youth Service. In relation to paragraph 96 of *Re Pope* (set out above), the third party's solicitors referred to an issue raised by the applicant about the third party being permitted to work for a government-funded youth agency while having a previous conviction for a sexual offence against a minor, but reiterated that it must be remembered that the allegations made against the third party at the time when he was Director of the Cairns Anglican Youth Service were not substantiated, concluding:

*Regrettably we believe that the exoneration of Mr King by the verdict of not guilty will not be properly respected by the applicant on the basis of the material we have seen thus far.*

#### **Conclusion on the application of the public interest balancing test incorporated in s.44(1)**

40. The public interest considerations telling for and against disclosure of the matter in issue in this case are rather finely balanced. Weighing against disclosure is the public interest in the fair treatment of the third party, and in the protection of his privacy interests, in respect of allegations of wrongdoing which have not been proven in a court of law. Some of them have never been raised in court proceedings, while some of them have been the subject of criminal charges of which the third party was acquitted by a jury. While those court proceedings attracted publicity and involved information adverse to the third party entering the public domain (which might be considered to have reduced the weight of the third party's privacy interest in respect of that particular information), that consideration is counter-balanced to a degree by the public interest in treating the applicant fairly by not promoting any wider dissemination of allegations of wrongdoing of which he has been acquitted.

41. These public interest considerations telling against disclosure ordinarily carry substantial weight, and if there were no wider issues of public importance involved, they would point to a finding in favour of non-disclosure. In the present instance, however, I find the case made out in the applicant's evidence and written submissions persuasive in favour of a finding that disclosure of the matter in issue would, on balance, be in the public interest.
42. Protection of the welfare of children in care, and 'at risk' children, is one of the more important responsibilities of the State, and the respondent agency is primarily responsible for undertaking that function and responsibility. In addition to discharging that function through its own staff, the respondent enters into funding arrangements with community service organisations, such as the Cairns Anglican Youth Service, whereby public funds are advanced to organisations which are active in child welfare/child protection. The respondent has a duty to ensure that public funds advanced to community service organisations are properly targeted to achieve the objects for which the funds were advanced, and to ensure that the public funding is deployed efficiently and effectively, to achieve the desired outcomes. It is trite to say that the desired outcomes would not include advancing funds for the employment of a youth care worker with proclivities to make sexual advances to youths in care.
43. Disclosure of the matter in issue would serve the public interest in accountability for the discharge, on behalf of the community, of the important function of child welfare/child protection; in particular, whether proper systems and procedures were being followed in that regard. The matter in issue illustrates a dilemma faced by officers of the respondent in how to deal with a history of allegations of improper conduct against the third party (many of them being uncorroborated allegations by 'at risk' youths, who could not always be regarded as reliable sources). It raises the difficult question of whether it was proper or sufficient for the respondent to adopt the position that it must treat the third party as innocent until proven guilty in a court of law to the criminal standard of proof, or whether it was incumbent on the relevant officers of the respondent to make more thorough inquiries of their own, and to make their own decision, on the balance of probabilities, as to whether it was appropriate to advance public funds to a child welfare/child protection organisation managed by the third party.
44. Disclosure of the matter in issue would further the public interest in accountability for the performance by the State, and state-funded community organisations, of the responsibilities they undertake with respect to child welfare/child protection. Disclosure would further the public interest in promoting informed public scrutiny and debate on what are issues of considerable importance and community concern, and could thereby assist efforts to ensure the safety of children placed in care. In my view, these public interest considerations outweigh the public interest considerations (referred to in paragraph 40 above) which tell against disclosure of the matter in issue, and warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.
45. I need to make one reservation in that regard. In the additional three folios discovered by the respondent during the course of the review (see paragraph 14 above), I find that the identifying references to a youth are clearly exempt matter under s.44(1) of the FOI Act as claimed by the respondent (there being no public interest in the disclosure of the identity of that youth, which would outweigh the public interest in protecting his privacy through deletion of his identity). Otherwise, I find that disclosure of the matter in issue would, on balance, be in the public interest, and hence that it is not exempt matter under s.44(1) of the FOI Act.

## **Conclusion**

46. For the foregoing reasons, I set aside the decision under review, and in substitution for it I decide that—

- (a) the name of, and other identifying references to, the youth referred to in the three folios mentioned in paragraphs 14 and 45 above, comprise exempt matter under s.44(1) of the FOI Act; but

- (b) otherwise, the matter in issue is not exempt from disclosure under the FOI Act, and the applicant has a right to be given access to it in accordance with s.21 of the FOI Act.

F N ALBIETZ  
**INFORMATION COMMISSIONER**