



Decision and Reasons for Decision

Application Number: 210083

Applicant: Murphy Schmidt Solicitors

Respondent: Department of Justice and Attorney-General

Decision Date: 30 March 2007

Catchwords: **FREEDOM OF INFORMATION – Section 44(1) and 44(2) of the *Freedom of Information Act 1992* (Qld) – Video and inextricably interwoven personal affairs – public interest to pursue legal remedy – *Stewart and Department of Transport* (1993) 1 QAR 227 – *Willsford and Brisbane City Council* (1996) 3 QAR 368**

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Reasons for Decision

Background

1. The applicant seeks review of the internal review decision of Ms Kaye McKemmish of the Department of Justice and Attorney-General (JAG), dated 16 October 2006, to not release the hotel security video (Video) to the applicant as it qualifies for exemption from disclosure under section 44(1) of the *Freedom of Information Act 1992* (Qld) (FOI Act).
2. On 16 December 2005 the applicant made a freedom of information application to JAG requesting a copy of all documents held by the Department of Public Prosecutions (DPP) regarding the assault the applicant's client at the Manly Hotel on 2 October 2004, including the Video (FOI Application).
3. It is my understanding that:
 - an offender was subsequently convicted and sentenced to a term of imprisonment in relation to the assault captured on the Video; and
 - the applicant seeks access to the Video in order to assess whether its client is able to commence civil proceedings in relation to the assault.
4. JAG sought the views of third parties to whom disclosure of the relevant information may be a substantial concern in accordance with section 51 of the FOI Act. This involved contacting the offender and the Manly Hotel (Hotel).
5. The Hotel advised JAG on 30 June 2006 that it had no objection to release of the Video to the applicant.
6. The offender's mother advised JAG on 10 July 2006 that the offender objected to release of the Video.
7. On 25 July 2006 JAG made an initial decision in relation to the applicant's FOI Application to release the Video to the applicant. In summary, the initial decision concluded that:
 - the Video was prima facie exempt from disclosure under section 44(1) of the FOI Act because it contains personal affairs information of persons other than the applicant's client;
 - the issue is whether there are any public interest considerations which would outweigh the prima facie non-disclosure of the Video; and
 - there was a public interest consideration that on balance favoured disclosure of the Video to the applicant, namely the applicant's right to pursue a legal remedy or to evaluate whether a legal remedy is available or worth pursuing.
8. The offender applied for internal review of the initial decision on 21 August 2006 and reasserted his objection to the release of the Video to the applicant.
9. Ms McKemmish of JAG carried out an internal review of the initial decision and informed the offender of her decision by letter dated 16 October 2006. Ms McKemmish overturned the original decision and decided that the Video was exempt from disclosure under section 44(1) of the FOI Act on the basis that:

- the Video contains personal affairs information which renders it prima facie exempt from disclosure under section 44(1) of the FOI Act, unless it is in the public interest to disclose the Video;
- images of general Hotel staff in the context of the assault, concern their personal affairs (more specifically, some staff are identifiable and some appear to be young people in their late teens);
- the personal affairs of the applicant's client and other people on the Video are inextricably interwoven and it is not practicable to sever all other personal affairs information from the Video;
- release under FOI is in effect release to the world;
- JAG have not had the opportunity to consult with patrons and Hotel staff in relation to the release of the Video to the applicant; and
- the public interest in protecting the privacy of Hotel staff and/or patrons outweighs the public interest in disclosing the Video to assist the applicant pursue a legal remedy, or evaluate whether a legal remedy is available or worth pursuing.

10. By letter dated 24 October 2006, the applicant applied to this Office for external review of Ms McKemmish's decision under Part 5 of the FOI Act.

Steps taken in the external review process

11. The applicant's external review application was received by this Office on 26 October 2006.
12. On 1 November 2006, this Office asked JAG to provide it with copies of the FOI Application and the application for internal review. JAG was also provided with a copy of the applicant's external review application at this time.
13. On 7 November 2006, JAG provided this office with the requested documentation and a copy of the Video.
14. A staff member of this Office and I carefully considered the documentation and Video provided.
15. Third parties who were likely to be concerned by release of the Video and who it was reasonably practicable to contact to obtain their views were identified. These were the Hotel, the offender and the security company engaged by the Hotel at the time of the assault (Third Parties).
16. By separate letters dated 14 February 2007, I advised JAG and the Third Parties that:
 - it was my preliminary view that the Video was not exempt from disclosure under section 44(1) of the FOI Act on the basis that the public interest considerations favouring disclosure outweigh the public interest considerations favouring non-disclosure;
 - if they did not accept my preliminary view, each party had until 28 February 2007 to lodge written submissions and/or evidence in support of their case; and
 - if I did not hear from them by 28 February 2007 I would assume that they accepted my preliminary view.
17. I also invited each of the Third Parties to become participants in the external review under section 78 of the FOI Act if they so wished by advising me in this regard by

28 February 2007. I indicated that if I did not hear from them by 28 February 2007 I would assume that they did not wish to participate in the external review.

18. On 21 February 2007, a partner of the Hotel, advised a staff member of this Office that the Hotel:
 - consents to the release of the Video to the applicant; and
 - does not wish to become a participant in the external review.
19. I had no response to my letters dated 14 February 2007 from either the offender or the security company.
20. On 27 February 2007 I received a letter from JAG advising that it did not agree with my preliminary view but that it did not intend to make further submissions in relation to the external review.
21. In making my decision in this matter, I have taken the following into account:
 - the matter in issue;
 - the applicant's FOI Application;
 - the applicant's external review application dated 24 October 2006, including reports from a doctor and occupational therapist in relation to the injuries arising from the assault;
 - the offender's application for internal review dated 21 August 2006;
 - Section 51 consultation notices to the Hotel and the offender from JAG dated 27 June 2006;
 - the Hotel's response to JAG's section 51 consultation notice dated 30 June 2006;
 - the initial decision dated 25 July 2006 and Ms McKemmish's internal review decision dated 16 October 2006;
 - file notes of telephone conversations between staff of this Office and:
 - the Department;
 - the applicant; and
 - Third Parties; and
 - relevant case law and legislative provisions.

Matter in issue

22. The matter in issue in this review is the Video.

Findings

Relevant sections of the FOI Act

23. Section 21 of the FOI Act sets out:

21 *Right of access*

Subject to this Act, a person has a legally enforceable right to be given access under this Act to—

- (a) documents of an agency; and*
- (b) official documents of a Minister.*

24. Section 44 (1) and (2) of the FOI Act are as follows:

44 Matter affecting personal affairs

- (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.*
- (2) *Matter is not exempt under subsection (1) merely because it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to a document containing the matter is being made.*

Section 44(1) of the FOI Act

25. The Information Commissioner considered the application of section 44(1) of the FOI Act in the decision of *Williamson and Queensland Police Service; 'A' (Third Party)* (2005) 7 QAR 51 (Williamson) at paragraph 15:

In applying s.44(1) of the FOI Act, the first question to ask is whether disclosure of the matter in issue would disclose information concerning the personal affairs of a person other than the applicant for access. If that is the case a public interest consideration favouring non-disclosure is established, and the matter in issue will be exempt, unless there are public interest considerations favouring disclosure which outweigh all public interest considerations favouring non-disclosure.

26. The case of *Stewart and Department of Transport* (1993) 1 QAR 227 (*Stewart*) provides a detailed discussion of what constitutes personal affairs for the purposes of the FOI Act (see paragraphs 79 to 114).

27. In particular, the Information Commissioner indicates at paragraphs 79 and 80 of *Stewart* that:

79. *What I described in paragraph 18 above as the core meaning of the term "personal affairs", which is agreed upon by all external review authorities, would comprise the elements referred to with approval by Full Courts of the Federal Court in *News Corporation Ltd v NCSC* and in *Department of Society Security v Dyrenfurth*, namely –*

1. *affairs relating to family and marital relationships;*
2. *health or ill-health;*
3. *relationships with and emotional ties with other real people;*
4. *domestic responsibilities or financial obligations.*

80. *Some further examples of matters which have been held in decided cases to fall within the meaning of the phrase "personal affairs of a person", and which I consider to have been correctly decided for the reasons given by the relevant tribunal in each case are as follows (the list is meant to be illustrative, rather than exhaustive, of matters which I consider clearly fall within the meaning of the phrase "personal affairs" in the Queensland FOI Act):*

- *a person's signature (as distinct from a person's name)*
- *the mention of a person's name in police records (or in agency records of a comparable nature) in association with some possible wrongdoing...*
- *a person's income...and personal financial position...(It has been held, however, that there is a general public interest in seeing how the taxpayers' money is spent which is sufficient to justify the disclosure of the gross income payable from the public purse to the holder of a public office....)*

- *information supplied by a prospective tenant for the purpose of obtaining a residential lease of premises...*

28. The Information Commissioner also sets out matters that clearly fall outside the meaning of 'personal affairs of a person' at paragraphs 81 to 85. In particular the Information Commissioner refers to *Anderson and Australian Federal Police* (1986) 4 AAR 414 at p.433 to 444 where Deputy President Hall states:

In my view, the fact that a document may refer to a person by name does not necessarily mean that the document relates to that person's 'personal affairs'...In my view, acts, matters or things done by a person in a representative capacity on behalf of another person, body or organisation, would not normally be said to relate to that person's 'personal affairs'. In such cases, the document does not relate to the person's personal affairs because there is no relevance between the information contained in the document and any matter personal to the applicant...

29. The general position in *Stewart* about what constitutes personal affairs in the employment context is that:

- there are some matters which are incidental to the relationship of employee and employer which may concern the employee's personal affairs (paragraph 92);
- there is a distinction to be drawn between matters that relate to an employee as an individual such as an employee's personnel records relating to sick leave or annual leave which may constitute personal affairs versus matters that involve an employee as an agent or representative of the employer which do not constitute personal affairs (paragraph 92 and 93); and
- the usual principle is that information as to work capacity and performance of a person is not personal affairs, subject to a limited number of exceptions (paragraphs 101 to 102).

Relevant matter – the Video

30. After carefully considering the information available to me, including the Video I find that the Video:

- contains information concerning the applicant's client and the offender;
- does not identify the vast majority of patrons, Hotel staff and security staff that can be seen on the Video;
- potentially identifies some Hotel and/or security staff and two ambulance paramedics; and
- potentially identifies one patron who is clearly over the age of 18 and is best described as a bystander merely observing the aftermath of events.

Disclosure of Personal Affairs

31. The next issue for determination is whether disclosure of the above information within the Video would disclose personal affairs information in accordance with section 44 of the FOI Act. In determining what constitutes personal affairs in the Video I have carefully considered the reasoning in *Stewart* as set out above.

The applicant's client and the offender

32. Given the nature of the footage involving criminal conduct by the offender, against the applicant's client, I find that disclosure of this part of the Video would disclose information concerning the personal affairs of the applicant's client and the offender.

Unidentifiable patrons and Hotel and security staff

33. I find that disclosure of footage of unidentifiable patrons and hotel and security staff would not disclose information concerning personal affairs as these parties are unidentifiable.

Potentially identifiable Hotel, security staff and/or ambulance paramedics

34. I find that disclosure of footage of Hotel staff, security staff and ambulance paramedics who are potentially identifiable would not disclose personal affairs information. This is consistent with the approach adopted by the Information Commissioner in *Stewart*, at paragraph 83 and 84, that information involving the identity of officers and employees of an agency performing their employment duties was not information concerning their personal affairs.

Potentially identifiable patron

35. I find that disclosure of footage of a potentially identifiable patron:
- may disclose information concerning the personal affairs of that person for the purposes of the FOI Act; and
 - it is not reasonably practicable to consult with this patron about the disclosure of the Video to the applicant.

Personal affairs information

36. On the basis of the above, I find that:
- the only personal affairs information that may be disclosed if the Video is disclosed is that concerning:
 - The applicant's client and the offender; and
 - the potentially identifiable patron (Personal Affairs Information); and
 - this Personal Affairs Information is prima facie exempt matter under section 44(1) of the FOI Act.

Section 44(2) of the FOI Act

37. As set out above, matter will not be exempt under section 44(1) of the FOI Act if the matter relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to a document containing the matter is being made.
38. The Information Commissioner established in '*B' and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at paragraph 176 that:

Where...the segment of matter in issue is comprised of information concerning the personal affairs of the applicant which is inextricably interwoven with information concerning the personal affairs of another person, then:

- (a) severance in accordance with s.32 is not practicable;
- (b) the s.44(2) exception does not apply; and

- (c) *the matter in issue is prima facie exempt from disclosure to the applicant according to the terms of s.44(1), subject to the application of the countervailing public interest test contained within s.44(1).*

39. On this basis I find that:

- the Personal Affairs Information is shared personal affairs information and is inextricably interwoven; and
- the section 44(2) exception does not apply.

Public Interest

40. In accordance with section 44(1) of the FOI Act, the prima facie exempt Personal Affairs Information may only be disclosed to the applicant if its disclosure would, on balance, be in the public interest.
41. It is therefore necessary to consider whether disclosure to the applicant of the Personal Affairs Information is on balance in the public interest.
42. As set out above, the Williamson decision is authority for the proposition that the presence of personal affairs information means that there is a public interest consideration favouring non-disclosure.
43. Accordingly, the Personal Affairs Information may only be disclosed to the applicant if the public interest considerations favouring disclosure outweigh the public interest considerations favouring non-disclosure.
44. In the present case, the public interest consideration favouring disclosure is the pursuit of a legal remedy. In the decision of *Willsford and Brisbane City Council* (1996) 3 QAR 368 (*Willsford*), the Information Commissioner found at paragraph 17 that:

The mere assertion by an applicant that information is required to enable pursuit of a legal remedy will not be sufficient to give rise to a public interest consideration that ought to be taken into account in the application of a public interest balancing test incorporated into an exemption provision in the FOI Act. On the other hand, it should not be necessary for an applicant to prove the likelihood of a successful pursuit of a legal remedy in the event of obtaining access to information in issue. It should be sufficient to found the existence of a public interest consideration favouring disclosure of information held by an agency if an applicant can demonstrate that -

- (a) *loss or damage or some kind of wrong has been suffered, in respect of which a remedy is, or may be, available under the law;*
- (b) *the applicant has a reasonable basis for seeking to pursue the remedy; and*
- (c) *disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.*

45. The Information Commissioner goes on to state in *Willsford* at paragraph 18 that:

The existence of a public interest consideration of this kind would not necessarily be determinative - it would represent one consideration to be taken into account in the weighing process along with any other relevant public interest considerations (whether weighing for or against disclosure) which are identifiable in a particular case. On the other hand, it would ordinarily be true to say (to the extent that a decision-maker under the FOI Act is able to make an objective assessment of these matters from the material put forward by an applicant to establish (a), (b) and (c) above) that the greater the magnitude of the loss, damage or wrong, and/or the stronger the prospects of successfully pursuing an available remedy in respect of the loss, damage or wrong, then

the stronger would be the weight of the public interest consideration favouring disclosure which is to be taken into account in the application of a public interest balancing test incorporated in an exemption provision of the FOI Act.

46. On the information available to me, I find that:

- The applicant's client was assaulted on 2 October 2004 at the Hotel;
- The applicant's client suffered loss and/or damage arising out of the assault (as set out in the medical reports provided to this Office), in respect of which a remedy is, or may be, available under the law;
- The applicant's client has a reasonable basis for seeking to pursue the remedy; and
- disclosure of the Video would assist the applicant's client to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.

47. As set out above, I note that the pursuit of a legal remedy is only one consideration to be taken into account in considering a public interest balancing test. This public interest consideration must be weighed against the public interest consideration which seeks to protect the disclosure of information involving the personal affairs of other persons.

48. I have carefully considered the following public interest considerations:

- the applicant's pursuit, or evaluation of the prospects, of civil proceedings arising out of the relevant assault; and
- the protection of information concerning the personal affairs of the offender and the potentially identifiable patron.

49. In relation to the balancing of public interest considerations I find that the public interest consideration favouring non-disclosure of the Personal Affairs Information relating to the offender and the potentially identifiable patron, does not outweigh the public interest consideration favouring disclosure of that information to enable the applicant to evaluate and possibly pursue a legal remedy in relation to the assault.

50. I say this on the basis that the Personal Affairs Information relating to:

- the offender involves criminal activity which has resulted in loss and/or damage being suffered by the applicant's client; and
- the potentially identifiable patron involves conduct best described as that of a bystander merely observing the aftermath of relevant events,

which are public interest considerations which do not outweigh the public interest consideration favouring release of the Video to the applicant to enable it to pursue, or determine whether it wishes to pursue, a civil legal remedy.

Conclusion

51. In conclusion I find that:

- the Video contains some Personal Affairs Information;
- this information is prima facie exempt under section 44(1);
- this information is shared personal affairs information and is inextricably interwoven, therefore the section 44(2) exception does not apply; and

- public interest considerations favouring non-disclosure of the Personal Affairs Information relating to the offender and the potentially identifiable patron, do not outweigh the public interest consideration favouring disclosure of that information to enable the applicant to evaluate and possibly pursue a legal remedy in relation to the assault.

Decision

52. I set aside the decision of Ms McKemmish made on 16 October 2006. In substitution, I find that the Video is not exempt under section 44(1) of the FOI Act and should be released to the applicant by the respondent.
53. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

F. Henry
Assistant Commissioner

Date: 30 March 2007