

## 'CHI' and Department of Education

(S 15/96, 10 February 1997, Information Commissioner)

*(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)*

1.-5. These paragraphs deleted.

### **REASONS FOR DECISION**

#### **Background**

6. This is a 'reverse FOI' application by [the applicant] who objects to the decision of the Department of Education (the Department) to give access under the FOI Act to information concerning her [child], and complaints made to school authorities about treatment of her [child].
7. By letter dated 26 July 1995, the solicitors then acting for the applicant for access [MM] applied on behalf of their client for access under the FOI Act to certain documents held by the Department. In particular, the solicitors requested access to:
  1. their client's personal file; and
  2. any file holding documentation in relation to their client's probationary period of employment and her dismissal.
8. [MM] was dismissed from employment by the Department as a result of an investigation conducted by Ms O'Hagan of the Department.
9. Some of the documents which the Department identified as falling within the terms of [MM's] FOI access application concerned the applicant in this external review, and the applicant's child. Those documents were documents held on File B and are the working papers of Ms O'Hagan who investigated complaints made by the applicant about [MM]. Those papers were used by Ms O'Hagan to compile her report, a copy of which was provided to [MM] in the course of her employment, and under the FOI Act.
10. Under cover of a letter dated 4 September 1995, the Department provided [the applicant] with copies of the documents which it was considering for release to [MM], in response to [MM's] FOI access application. Those documents, held on File B, comprised folios 007-010, 035-037, 040-044, 050-052, 094-09, 119, 120, 129 and 131.
11. [The applicant] subsequently informed the Department that she objected to [MM] being given access to those documents. She stated the following grounds for her objection:

- ... 1. *They are matters affecting the personal affairs of my child and its disclosure would be detrimental to the family and my child.*
2. *Matters may also affect any forthcoming legal proceedings and may be regarded as privileged.*
3. *Matters were communicated in confidence.*
4. *Matters would disclose an opinion and further a consultation/deliberation had taken place s.41.1 with an officer of the Dept. of Education.*

12. By letter dated 23 November 1995, Ms Lone Keast, Acting Freedom of Information Co-ordinator for the Department, informed [the applicant] that she had decided, on behalf of the Department, to give [MM] access to folios 007-010, 040-044, 050-052, 094-099, 106-109, 119, 120, 129 and 131, with the exception of certain matter contained on those folios which Ms Keast decided was exempt matter under s.44(1) of the FOI Act. Ms Keast refused to give [MM] access to folios 035-037 (inclusive) and 100-105 (inclusive) on the basis that those documents were exempt matter under s.44(1) of the FOI Act. In her decision, Ms Keast considered the application of ss.44(1), 43(1), s.46(1) and s.41(1) of the FOI Act.

13. By letter dated 20 December 1995, [the applicant] applied for an internal review of Ms Keast's decision. In her application for internal review, [she] stated:

...1. *Refer to your decision dated 23/11/95 received 21/1/95*

1. *I re-iterate my decision and refer to previous correspondence setting out the grounds of my objections*

1. *Since you have decided to disclose some documents, I wish to have the decision reviewed on the following basis:*

1. *My child has been traumatised and as a result attended the school counsellor over this matter*

2. *They are documents of a personal nature therefore going within the ambit of s.44(1)*

3. *My child has received better academic grades, after having an unsettled period*

4. *Further the matters are privileged in that they are documents which go to professional privilege in the event of legal proceedings which I understand the applicant has or is issuing*

5. *Also documents entail matters of opinion and recommendations.*

*As a result of the above, I cannot stress my strongest objections to the documents being disclosed pursuant to the Freedom of Information Act. ...*

14. The documents which were considered the subject of the internal review were folios 007-010, 035-037, 040-044, 050-052, 094-109, 119,120, 129, and 131 of File B.
15. On 3 January 1996, Mr Patrick M Parsons, Manager of the Administrative Law and Legislative Operations Branch of the Department, decided to affirm the decision made by Ms Keast.
16. By letter dated 19 January 1996, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Parson's decision.

### **External review process**

17. Copies of the documents in issue in this external review were obtained from the Department and examined.
18. By letter dated 1 July 1996, I informed the applicant that it was my preliminary view that the decision under review was correct. I invited the applicant to provide me with any written submission and/or evidence on which the applicant wished to rely in support of her case that the documents in issue were exempt in their entirety under the FOI Act. I requested that the applicant lodge any written submission and/or evidence by no later than 22 July 1996.
19. In a telephone conversation with a member of my staff on 26 July 1996, the solicitors acting for the applicant requested and were granted an extension of time in which to lodge any submissions.
20. By letter dated 6 August 1996, the applicant's solicitors informed me that their client no longer objected to [MM] being given access to the documents in issue in accordance with the decision made by the Department (i.e., subject to the deletion of matter which the Department had determined to be exempt matter under s.44(1) of the FOI Act), with the exception of folios 094-099, 106 and 119.
21. In that same letter, the applicant's solicitors set out the applicant's submissions in support of her case in this external review, as follows:

*In relation to her grounds for objections she relies on section 44. The circumstances surrounding this matter are that the information on those documents obtained under duress. There seems to be little doubt that the contents of those pages contain material in which relates to the personal affairs of our client. We would agree that unless the public interest dictates otherwise it should not be disclosed. In these circumstances, we would argue that the*

*public interest would not be well served by documents being made available under those circumstances.*

22. On 16 August 1996, a member of my staff had a telephone conversation with the applicant's solicitor in which the solicitor advised that his client also objected to the disclosure of folios 108 and 120.
23. By letters both dated 19 August 1996, the Deputy Information Commissioner informed the Department and [MM] that the applicant in this external review no longer objected to [MM] being given access to the documents in issue, in the form in which the Department had decided [MM] was entitled to access, with the exception of folios 094-099 (inclusive), 106, 108, 119 and 120 which would remain in issue in this external review.
24. In an effort to informally resolve this external review, the Deputy Information Commissioner asked [MM] to inform him whether, given the documents to which she had now been given access, she still wished to pursue access to the balance of the documents in issue.
25. In a telephone conversation with a member of my staff on 7 October 1996, [MM's] husband informed this office that [MM] wished to pursue access to the matter remaining in issue.
26. By letter dated 17 October 1996, the applicant's solicitors were invited to expand upon their submission dated 6 August 1996, and in particular to address in more detail the public interest considerations on which the applicant wished to rely.
27. By letter dated 4 November 1996, the applicant's solicitors informed me that their client "relies and refers to previous correspondence to [this office] noting her objection to releasing information". No further submissions were provided.
28. By letter dated 22 November 1996, the Department was invited to respond to the submissions lodged by the applicant and provide any written submission and/or evidence on which the Department wished to rely in this external review.
29. By letter dated 10 December 1996, the Department provided the following submission:

*The Department does not wish to present any further information or evidence in this matter, but will continue to rely on the letter dated 23 November 1995 advising [the applicant] of the initial decision on [MM's] application and on the letter dated 3 January 1996 advising [the applicant] of the decision in relation to her internal review application. The Department's decision on the documents in issue, i.e. documents 94-99, 106, 108, 119 and 120 of File B was to release the documents in part by exempting, pursuant to s.44(1) any matter which identifies [the applicant], [the applicant's child], ..., another student (document 120), and a family friend who attended meetings (documents 108, 106, 95 and 94).*

30. In their submission dated 6 August 1996, the applicant's solicitors clearly stated that their client relied on s.44(1) of the FOI Act, and this was the only exemption provision addressed in their submission. I therefore do not intend to deal with the application of any other exemption provisions of the FOI Act. I am satisfied, in any event, that no basis has been disclosed for the application to the matter remaining in issue of any other exemption provisions in the FOI Act.

**Matter remaining in issue**

31. The following table sets out the documents remaining in issue and describes the matter contained in them which the Department claims is exempt matter under s.44(1) of the FOI Act.

<b>Folio</b>	<b>Description of Folio</b>	<b>Matter found by the Department to be exempt matter under s.44(1)</b>
094	Report re applicant's child dated 30 August 1994	The applicant's name, the name of the applicant's child, another person's name and references which would identify the gender of the applicant's child
095	Report re applicant's child dated 6 September 1994	The applicant's name, the name of the applicant's child, another person's name and references which would identify the gender of the applicant's child
096	Letter to applicant's child dated 23 August 1994	The name of the applicant's child and address
097	Letter to applicant dated 23 August 1994	The name of the applicant, the name of the applicant's child and information which would identify the gender of the applicant's child
098	Letter to the applicant's child dated 24 August 1994	The name, age and address of the applicant's child
099	Letter to applicant dated 24 August 1994	The name of the applicant, the applicant's address, the name and age of the applicant's child and references which would identify the gender of the applicant's child
106	Report on applicant's child dated 30 August 1994	The name of the applicant, the name of the applicant's child, another person and references which would identify the gender of the applicant's child
108	Report on applicant's child dated 6 September 1994	The name of the applicant, the name of the applicant's child, another person's name and any references which would identify the gender of the applicant's child

119	Note to J Rodwell dated 22 July 1994	The name of the applicant's child and the signature of the applicant's child
120	Note, including response by applicant's child	The name of the applicant's child, another student's name, another person's name and references to the gender of the other student

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

32. 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.*

...

33. 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 relates to 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:

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

34. 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.

35. I consider that the documents remaining in issue in this external review contain matter which can be properly characterised as information concerning the personal affairs of the applicant's child (such matter is not restricted to the matter which the Department in the decision under review found to be exempt matter under s.44(1) of the FOI Act). Further, folios 094, 095, 097, 099, 106, and 108 contain matter which concerns the personal affairs of the applicant. Folios 094, 095, 106, 108 and 120 contain a small amount of matter which can be characterised as personal affairs information of other persons.

36. Folios 095 and 108 contain matter which directly concerns the employment affairs of [MM].

37. A finding that the information contained in some of the documents in issue is properly to be characterised as information concerning the personal affairs of a person other than the applicant for access does not of itself determine the issue of whether or not that information is exempt matter under s.44(1) of the FOI Act. It must then be determined whether there exist any public interest considerations, favouring disclosure of the information in issue to the applicant for access, which are of sufficient weight to warrant a finding that disclosure would, on balance, be in the public interest.

**Application of the public interest balancing test**

38. Ms Keast, in her initial decision on behalf of the Department, relevantly stated:

*One argument brought forward by [the applicant] was that these documents concern the personal affairs of [the applicant's] child. A number of the documents at issue concern the student's behaviour, and at first glance they do appear to relate only to that student, rather than to the investigation and dismissal of [MM]. However, from closer examination of the documents in their context, and through consultation with investigation officer Suzie O'Hagan, I formed the view that the student's records were relevant to the investigation into complaints about [MM], and as such they became an integral and non-separable part of the findings of the investigation. While ordinarily I agree that such information is the personal affairs of the student I decided to release the substance of the documents, by exempting the identity of the student and the parent. By making this decision I believe that I have struck a balance between the public interest served by disclosing to [MM] the substance of documents considered in the course of the investigation, and the public interest served in preserving the privacy of the individual, in particular where such preservation is provided for by s.28 of the Education (General Provisions) Act 1989.*

[Section 28(2) of the *Education (General Provisions) Act 1989* Qld provides:

*A person, whether the person is an officer of the department or not, who fails to preserve and aid in preserving secrecy with regard to all confidential matters concerning any student contained in school records and in records of the department or who communicates any such matter to any person except -*

- (a) to a person authorised by the chief executive to receive such information; or*
- (b) to a lawfully constituted court or tribunal; or*
- (c) as required to carry out the person's approved duties;*

*commits an offence against this Act.]*

*While I found that some of the documents in issue were the personal affairs of the student, I found that the public interest balancing test weighed toward disclosure of the substance of the documents when their privacy remained protected by exempting the identity of the student and parent.*

39. Mr Parsons, in his internal review decision, considered that the following arguments favoured non-disclosure:

- 1. The confidence of staff in a discreet process for investigating certain personnel practices complaints is served by limiting disclosure.*
- 2. Those interviewed and those who might in future be needed to come forward to complain or give evidence about a complaint could be discouraged from making full statements if they thought those statements could be released.*
- 3. Departmental policy aims to reconcile such internally handled disputes by minimising publicity of allegations and evidence taken through internal investigation processes, and thereby advances the public interest in striving to avoid unduly protracted disruption of effective working relations. It aims also to avoid unnecessarily bringing officers into disrepute in the community where publication of allegations and counter- allegations would merely confuse and perhaps titillate community curiosity about staff relations.*

40. Mr Parsons considered that the following arguments favoured disclosure:

- 4. There is a general public interest that can be served in full access to matter on the public record where it deals with issues that would benefit by public scrutiny and participation*
- 5. The particulars of the complaints are not matters of general public debate though the general administration of eliminating and resolving complaints could be valid fields for public participation and scrutiny on policy and operational effectiveness of the Department's performance*
- 6. There is a public interest served in ensuring individuals receive fair treatment according to law, particularly if one side wishes to challenge the methodology and outcome of the investigation.*

41. Mr Parsons decided that the factors favouring disclosure were of slightly greater weight than those favouring non-disclosure.

42. In my view, the fact that [MM] has been given access to Ms O'Hagan's investigation report in its entirety, both in her capacity as a teacher, and under the provisions of the FOI Act, is of significance. The documents in issue (as previously stated) comprise the working papers of the investigator who investigated complaints made against [MM]. The documents in issue were used by the investigator to compile her report and thus



became an integral part of the investigation which culminated in the investigator's report. I have also considered the following public interest arguments:

7. the public interest in those who are the subject of complaints being able to obtain details of the complaints made against them
8. the public interest in accountability for the processes of such an investigation; in particular, I consider that there is a public interest in a person who is the subject of such an investigation being able to access documents which provide details of the investigation process under which they were dealt with
9. the public interest in a person being able to control the dissemination of information which concerns his/her personal affairs so as to maintain his/her privacy.

43. In *Re Stewart* at p. 258 (paragraph 81), I said:

*For information to be exempt under s.44(1) of the FOI Act, it must be information which identifies an individual or is such that it can readily be associated with a particular individual. Thus deletion of names and other identifying particulars or references can frequently render a document no longer invasive of personal privacy, and remove the basis for claiming exemption under s.44(1). This is an expedient (permitted by s.32 of the Queensland FOI Act) which has often been endorsed or applied in reported cases: see, for example, Re Borthwick and Health Commission of Victoria (1985) 1 VAR 25 ... .*

44. I have noted above that there are a number of public interest considerations favouring disclosure to [MM] of the documents in issue. In my view, the Department was correct in deciding that the documents in issue can be edited in a way that would provide [MM] with sufficient information to satisfy the public interest considerations favouring disclosure, while also satisfying the public interest in protecting the privacy of other persons named in them. I note that [MM] would probably be able to identify the persons whose names are to be deleted. Those persons are known to her anyway through her involvement in the incidents detailed in the documents in issue, so there cannot be any reasonable suggestion of damage to their privacy interests merely by disclosure to [MM]. However, s.44(1) is an exemption provision which is ordinarily to be applied by reference to the effects of disclosure to the world at large, and deletion of the names of other persons will afford them a measure of privacy protection.
45. Once the matter which the Department found to be exempt under s.44(1) is deleted from the documents remaining in issue, the public interest arguments favouring disclosure to [MM] are sufficiently strong to displace the *prima facie* exempt status of the information which concerns the personal affairs of other persons.

### **DECISION**

46. I therefore find that the documents remaining in issue are not exempt under s.44(1) the FOI Act, with the exception of the small amount of matter described in the right hand column of the schedule set out in paragraph 31 above, which is exempt matter under

s.44(1) of the FOI Act.

I therefore affirm the decision under review.