

## Aylward and Griffith University

(S 33/96, 5 February 1997, Information Commissioner Albietz)

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

1. - 4. [These paragraphs removed.]

### **REASONS FOR DECISION**

#### **Background**

5. The applicant seeks review of the respondent's decision to refuse him access, under the *Freedom of Information Act 1992 Qld* (the FOI Act), to documents held by the respondent which disclose details of subjects studied and results obtained, by a person other than the applicant, in the course of studies for a graduate diploma awarded by the respondent and a degree awarded by another tertiary institution. The respondent contends that the documents in issue are exempt matter under s.44(1) and s.46(1)(a) of the FOI Act.
6. The applicant is a lecturer at a Queensland TAFE (Technical and Further Education) college. He is aggrieved at an assessment of his teaching performance conducted by [another person]. He disagrees with much of what [the other person] said in his written assessment report, and has sought legal advice as to the appropriate avenue of recourse. He states that, for the purposes of possible litigation, he wishes to know whether [the other person] has studied the subject which the applicant was teaching at the time [the other person] performed the teaching assessment.
7. By letter dated 20 October 1995, the applicant applied to the Freedom of Information Officer at Griffith University (the University) for access to [the other person's] application for entry to a graduate diploma course at the University, and to [the other person's] personal academic record.
8. By letter dated 12 December 1995, Mr Colin McAndrew, the University's Pro-Vice-Chancellor (Administration), notified the applicant of his decision to refuse access to the documents sought by the applicant on the basis that they were exempt matter under s.44(1) and s.46(1)(a) of the FOI Act. The applicant sought internal review of Mr McAndrew's initial decision, which was affirmed by Professor G Kearney, Deputy Vice-Chancellor of the University, in a letter to the applicant dated 22 January 1996. By letter dated 19 February 1996, the applicant applied to me for review, under Part 5 of the FOI Act, of Professor Kearney's decision.
9. I obtained and examined the documents in issue. By letter dated 28 August 1996, I informed the applicant of my preliminary view that the documents in issue concerned the

personal affairs of [the other person] and were, *prima facie*, exempt matter under s.44(1). I indicated that I was unable to identify any public interest factors favouring disclosure which would outweigh the public interest in protecting [the other person's] privacy. I invited the applicant, should he not accept my preliminary views, to lodge a written submission and/or evidence in support of his contention that the matter in issue was not exempt.

10. By letter dated 18 November 1996, the applicant indicated that he did not accept my preliminary views, and provided a written submission in response to my invitation. In it, the applicant narrowed the scope of his FOI access application, stating:

*The only information sought is the subjects taken and the dates of his qualifications which have subsequently been deduced to be not only from Griffith University, but also from Queensland University of Technology.*

11. I have reviewed the documents which the University identified as falling within the terms of the applicant's initial FOI access application. I note that addendum 1 (which is an extract the applicant has somehow obtained from [the other person's] *curriculum vitae*) to the applicant's written submission sets out the respective years in which [the other person] was awarded a degree from the Queensland Institute of Technology, and a postgraduate diploma from Griffith University (the requirements for each having been completed in the first semester of each year). As information in relation to the year of completion of the degree and the postgraduate diploma is already known to Dr Aylward, I take it his reference to dates of "qualifications" in the above-quoted passage is to the times at which particular subjects were taken. On this basis, I have determined that folios 2-16 contain the information sought by the applicant. The balance of [the other person's] application for entry to the graduate diploma course at Griffith University is therefore no longer in issue in this external review. The matter which remains in issue is:

1. folio 2: computer printout of the subjects undertaken by [the other person], and the grades awarded, in the graduate diploma course
2. folios 3-16: grants of exemption from subjects, and certificates of results for each semester, listing the subjects undertaken by [the other person] and grades awarded, in the degree course.

12. While the University contends that the matter in issue is exempt matter under s.44(1) and s.46(1)(a) of the FOI Act, I have only found it necessary to consider the application of s.44(1).

**Section 44(1) - Matter affecting personal affairs**

13. 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.*

14. This exemption provision has two elements. First, one must consider whether disclosure of the matter in issue would disclose 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.

### **Personal affairs matter**

15. 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. I held 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:

3. family and marital relationships
4. health or ill health
5. relationships with and emotional ties with other people
6. 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.

16. The applicant's submission raises a number of points for my consideration, many of which are not pertinent to the characterisation of the matter in issue. For example, he suggests that [the other person's] academic qualifications cannot concern his personal affairs as they are not his property: they belong to the University, he cannot bequeath them, and he cannot change them. Even to the extent that this is a correct assessment of the nature of an academic award, it does not bar characterisation of the subject results of a person as information concerning the personal affairs of the person. In this case, the results were obtained in the course of private study by [the other person]. Whether study is undertaken at a public or private educational institution does not alter the private character of the decision to undertake a course of private study, the time and effort expended in its pursuit, and the subject results thereby obtained. In my opinion, the matter in issue is properly to be characterised as information which concerns the personal affairs of [the other person].
17. The applicant also submits that [the other person] has brought his qualifications into the public domain by including them in his *curriculum vitae* and by producing them at a TAFE

grievance inquiry. He submits that they must be on a database of personal particulars held by TAFE, that they could be surmised by his classmates at University, and that they would have been made public in a public awards ceremony.

18. I do not accept these submissions. A number of them equate "personal affairs" matter with matter which is secret. I have previously indicated that matter does not need to be secret in order to be characterised as personal affairs matter. At p.251, paragraph 60 of *Re Stewart*, I stated:

*60 The decision of the Full Court of the Federal Court in Colakovski v ATC had not been given at the time the EARC Report on Freedom of Information was delivered, but it was given well before the passage of the Queensland FOI Act. In it, Lockhart J expressed a qualification (or perhaps rather a clarification as to appropriate emphasis) to Beaumont J's approach to the meaning of the phrase "personal affairs", as referred to in paragraph 38 above. I think that in general terms it is a sensible qualification that information does not have to be secret, or not widely known, in order to answer the description of information concerning the personal affairs of a person. However, since s.44(1) of the Queensland FOI Act does not contain an "unreasonable disclosure" test, a legitimate question may arise as to the utility or merit of exempting under s.44(1) information concerning the personal affairs of a person which has become widely known in the community or even become a matter of public record. There may be a legitimate question of fact and degree involved in that a person's personal affairs may become so widely known that they ought logically to cease to be eligible for protection under a provision whose basic concern is the protection of personal privacy. This is an issue on which I would not wish to express any concluded view until an appropriate case to test the proposition arises.*

19. I do not regard provision by a person of details of his or her educational qualifications to a prospective employer, the recording of the details by an employer, or their use in an employment-related grievance hearing, as even approaching the level of publication which would require me to consider the question adverted to in the last two sentences of the passage quoted above. (In any event, there is no evidence before me which indicates that the matter in issue - details of subjects studied and results obtained - was ever provided by [the other person] to his employer, or further disseminated in the manner alleged). Likewise, knowledge of another's personal affairs which may accrue to friends and classmates does not render those personal affairs ineligible for protection, under s.44(1), from disclosure to any person who might apply for access under the FOI Act. Moreover, the mere fact that a government agency holds information of this kind does not rob it of its character as personal affairs matter (as appears to be contended by the applicant in 1.1 and 1.3 of his submission); otherwise, there would be no point in having an exemption in the terms of s.44(1): see *Re Stewart* at p.266, paragraph 111. (I note that the matter in issue does not include the bare description of the degree and the diploma obtained by [the other person] - information which is apparently known to the applicant in any event. There is no evidence before me as to whether the award by a University of a degree or diploma

becomes a matter of public record - it is possible that rules and procedures may vary between different tertiary institutions).

20. The matter in issue comprises information which concerns the personal affairs of [the other person], and which is therefore *prima facie* exempt from disclosure to the applicant, by virtue of s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.44(1) of the FOI Act.

### **Public interest**

21. In his submission, the applicant states that he applies for access "*in the public interest on an exactly similar basis to any third party acting responsibly and publicly*". However, the bulk of his submission relates personal factors claimed to justify his obtaining access to the documents in issue. The only submission which points to a general public interest factor favouring disclosure is his contention that a person in a public position such as that held by [the other person] should be prepared to make public his qualifications.
22. I accept that there is a public interest in a public servant being accountable to the public for the quality of his work performance, and in TAFE being accountable for the selection procedures which resulted in the appointment of its employees. It could be respectably argued that the public interest favours disclosure of information which would verify that a holder of public office has attained the tertiary qualifications that are necessary for the discharge of his or her duties of office. Indeed, where selection criteria for a particular public sector position stipulate that tertiary qualifications of a particular kind are a prerequisite for appointment, the public interest in accountability for adherence to the merit principle in public sector selection processes would tell in favour of disclosure of information as to whether a successful candidate for appointment has the requisite tertiary qualifications. However, depth and quality of relevant experience, and demonstrated proficiency in employment, are generally the decisive factors in any selection process. Information as to individual subjects studied and results obtained, by a candidate for employment, is information of minimal significance in respect of selection processes for positions above entry level in most government agencies. I do not consider that the public interest factors referred to above would be materially advanced by disclosure of the individual subjects studied, and results obtained, by [the other person]. The degree course was completed many years ago, and [the other person] has considerable experience in teaching in the general field in question. No doubt, completion of a relevant degree or diploma, and [the other person's] work experience, were significant factors in his appointment. The significance of individual subject results with respect to his appointment, and ability to carry out his duties, must be considerably less. In fact, there is nothing in the material before me to indicate that his employer had access to those individual results in making its selection for appointment.
23. I do not consider that public interest considerations of the kind discussed above warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

24. In any event, I note that the applicant has not sought access to the matter in issue from [the other person's] employer. The matter in issue, which is held by Griffith University, was not created in order to assist [the other person] obtain public sector employment, nor was it created in the course of his public employment. It was created for the purposes of his application to undertake study as a private individual, or as a result of his private study. I do not consider that the public interest in promoting accountability of the TAFE college, or of [the other person], would require the disclosure to the world at large of individual subject details and results held by the University.
25. In *Re Pemberton and The University of Queensland* (1994) 2 QAR 293, at pp.368-377, I recognised and approved a line of authority to the effect that an applicant's involvement in, and concern with, particular information may be of such a nature that it is capable of being taken into account as a public interest consideration favouring disclosure to the particular applicant. This is not a case of that kind. The matter in issue has no direct connection to the applicant of any kind. Rather, the thrust of the applicant's submission is that he needs evidence of the subjects undertaken by [the other person] in order to show that [the other person] did not possess qualifications in the particular subject being taught by the applicant, which formed the basis of the assessment with which the applicant is aggrieved. The applicant says he requires this material in order to further a libel case he wishes to pursue against the [the other person]. The applicant has provided me with copies of other assessors' reports, which he suggests show that there are inaccuracies in [the other person's] assessment report (addendum 3 to the applicant's written submission) and a legal advice which he claims shows his case has a reasonable prospect of success (addendum 4 to the applicant's written submission).
26. The applicant appears to be seeking to invoke two related aspects of the public interest which I have recognised in previous cases. In *Re Pemberton* at p.377 (paragraph 190), I said:
190. *... The public interest in the fair treatment of persons and corporations in accordance with the law in their dealings with government agencies is, in my opinion, a legitimate category of public interest. It is an interest common to all members of the community, and for their benefit. In an appropriate case, it means that a particular applicant's interest in obtaining access to particular documents is capable of being recognised as a facet of the public interest, which may justify giving a particular applicant access to documents that will enable the applicant to assess whether or not fair treatment has been received and, if not, to pursue any available means of redress, including any available legal remedy.*
27. In *Re Willsford and Brisbane City Council* (Information Commissioner Qld, Decision No. 96017, 27 August 1996, unreported), I said (at paragraphs 16 and 17):
16. *I consider that, in an appropriate case, there may be a public interest in a person who has suffered, or may have suffered, an*

*actionable wrong, being permitted to obtain access to information which would assist the person to pursue any remedy which the law affords in those circumstances (cf. Re Cairns Port Authority and Department of Lands (1994) 1 QAR 663 at pp.713-714, paragraphs 103-104; p.717, paragraph 120; and p.723, paragraph 142). The public interest necessarily comprehends an element of justice to the individual: see Re Pemberton and The University of Queensland (Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported) at paragraphs 178 and 190, and the cases there cited. Although the public interest I have described is one which would apply so as to benefit particular individuals in particular cases, I consider that it is nevertheless an interest common to all members of the community and for their benefit.*

17. *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 (cf. Re Alpert and Brisbane City Council (Information Commissioner Qld, Decision No. 95017, 15 June 1995, unreported) at paragraph 30). 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.*

28. On the basis of the material before me, I am not satisfied that any of the elements referred to in *Re Willsford* are present in this case, nor that the public interest consideration described in paragraph 26 above applies with respect to disclosure to the applicant of the matter in issue. The legal advice provided to the applicant (addendum 4 to the applicant's written submission) does not recommend an action for defamation. It suggests that the best option is an action under the *Judicial Review Act 1991* and points out obstacles to such an action. Support for any action is, at best, lukewarm. Nor do I regard the comments of other assessors in addendum 3 as founding any basis for a claim that the applicant has suffered an actionable wrong.

29. Further, I am not satisfied that disclosure of the documents in issue would assist the applicant in any dispute he may have with [the other person] or TAFE. It is clear that [the other person] was assessing the applicant's general approach and attitude to teaching - the methods and techniques he employed and the effectiveness of those methods and techniques. I do not consider that it is either necessary or relevant to the applicant's possible case against [the other person], to demonstrate that the supervisor did or did not study the subject which the applicant was teaching at the time the assessment took place. [the other person's] *curriculum vitae* evidences his practical teaching experience, as do the findings of the Grievance Inquiry (addendum 2 to the applicant's submission). I consider that it is this type of information, to which the applicant already has had access, which is relevant to [the other person's] ability or otherwise to assess teaching techniques. The specific subject which was being taught at the time of the assessment appears to me to be of little relevance.
30. I am not satisfied that refusing the applicant access to the matter in issue will deprive him of the opportunity to assess whether or not he has received fair treatment, or to pursue any legal remedy he may otherwise have had, nor impact upon the merits of any legal proceedings he may choose to bring. In my opinion, any public interest considerations favouring disclosure of the matter in issue are not sufficiently strong to outweigh the public interest in non-disclosure which is inherent in the satisfaction of the test for *prima facie* exemption under s.44(1) of the FOI Act. I find that folios 2-16 comprise exempt matter under s.44(1) of the FOI Act.

### **DECISION**

31. I therefore affirm the finding in the decision under review that folios 2-16 comprise exempt matter under s.44(1) of the FOI Act.