OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 07/2001
Applications S 33/00 and S 57/00

Participants:	
S 33/00	GRAHAM RICHARDSON **Applicant**
	QUEENSLAND POLICE SERVICE **Respondent**
	PAUL WHITTAKER **Third Party**
S 57/00	NICKOLAS KARLOS **Applicant**
	QUEENSLAND POLICE SERVICE **Respondent**
	PAUL WHITTAKER **Third Party**

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - 'reverse FOI' - matter in issue contained in a police Court Brief concerning charges to which one of the applicants pleaded guilty - whether matter in issue is information concerning the personal affairs of the applicants - whether disclosure would, on balance, be in the public interest - application of s.44(1) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.44(1), s.51, s.78
Criminal Law (Rehabilitation of Offenders) Act 1986 Qld

Ainsworth and Criminal Justice Commission, Re (1999) 5 QAR 284
Australian Capital Television Pty Ltd v Commonwealth (No. 2) (1992) 177 CLR 106
Burke and Department of Families, Youth and Community Care, Re (1997) 4 QAR 205
Director of Public Prosecutions v Smith [1991] 1 VR 63
The Director-General, Department of Families, Youth and Community Care and Department of Education and Ors, Re (1997) 3 QAR 459
Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (1993) 1 QAR 60
Pope and Queensland Health, Re (1994) 1 QAR 616
Stewart and Department of Transport, Re (1993) 1 QAR 227

DECISION

In both applications for review S 33/00 and S 57/00, I affirm the decisions under review (being the decisions of Assistant Commissioner Williams on behalf of the Queensland Police Service dated 20 January and 4 February 2000, respectively).

Date of decision: 13 August 2001

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. These are 'reverse FOI' applications by Mr Richardson and Mr Karlos, who object to decisions made by the Queensland Police Service (the QPS) to give Mr Whittaker (a journalist with *The Courier-Mail*) access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to the police Court Brief prepared in respect of charges against Mr Karlos that were dealt with in the Magistrates Court at Southport on 21 September 1995.

2. Since 1994, *The Courier-Mail* newspaper has published a number of articles reporting allegations that former Senator Graham Richardson was the beneficiary of the services of prostitutes arranged and paid for by others, some of whom were alleged to have criminal connections. *The Courier-Mail* also reported that questions had been raised as to whether the provision of those services (which are alleged to have cost several thousand dollars) was in return for, or connected with, improper actions on the part of Mr Richardson as a Minister in the Commonwealth Government.

3. The allegations have played a part in investigations by the QPS, the Criminal Justice Commission (the CJC), and the Australian Federal Police (the AFP). They were also touched on by Mr R V Hanson QC in his *Report on an Inquiry into the Alleged Unauthorised Dissemination of Information Concerning Operation Wallah*, dated December 1995 (the Hanson report). The Hanson report provides a useful summary of the investigations which have taken place to date. The investigations by the QPS and the CJC resulted in no charges being laid against Mr Richardson for an offence under Queensland laws, although the CJC referred evidence to the AFP for investigation of whether any offences had been committed against Commonwealth laws. It appears that the AFP found no evidence that Mr Richardson had committed a criminal offence.

4. One of the people alleged to have paid for the services referred to in paragraph 2 above was Mr Nickolas Karlos. In 1995, Mr Karlos was charged with knowingly participating in the provision of prostitution by other persons on 10 August 1993 and on 2 December 1993. A Court Brief (which is the document in issue in this review) was prepared to assist the police prosecutor at the hearing of the charges. The Court Brief consists of six pages. The first page sets out the charges. Further details were added to the first page on 21 September 1995, when Mr Karlos pleaded guilty to the two charges, and was fined, with no conviction recorded. The balance of the Court Brief summarises the evidence which the police prosecutor proposed to lead in the event that the charges were contested. As Mr Karlos pleaded guilty, this evidence was not presented in open court, and Mr Karlos presented a version of events different to that set out in the Court Brief, particularly in regard to the identity of the beneficiaries of the services of the prostitutes.

5. On 23 July 1999, Mr Whittaker lodged an FOI access application with the QPS seeking access to the Court Brief. In accordance with s.51 of the FOI Act, the QPS consulted both Mr Richardson (who was referred to in the Court Brief) and Mr Karlos, with respect to the disclosure to Mr Whittaker of the Court Brief. Both objected to disclosure, but in decisions dated respectively 14 December 1999 and 6 January 2000, Superintendent Doyle of the QPS decided to disclose the Court Brief to Mr Whittaker, subject to the deletion of a small amount of personal information relating to Mr Karlos. (The last-mentioned aspect of Superintendent Doyle's decision has not been challenged, and that small amount of information is not in issue in this review.)

6. By applications dated 5 and 21 January 2000 respectively, Mr Richardson and Mr Karlos sought internal review of Superintendent Doyle's decisions. In decisions dated 20 January and 4 February 2000 respectively, Assistant Commissioner Williams of the QPS affirmed Superintendent Doyle's decisions. By letters dated 9 February and 6 March 2000 respectively, Mr Richardson and Mr Karlos lodged applications for external review, under Part 5 of the FOI Act, of Assistant Commissioner Williams' decisions.

External review process

7. As the applicant for access to the document in issue, Mr Whittaker sought, and was granted, status as a participant in these reviews, in accordance with s.78 of the FOI Act. It was apparent from the early stages that it would not be possible to resolve these reviews by negotiation and agreement between the participants. By letter to Mr Whittaker dated 11 April 2000, I outlined the relevant issues, provided details of preliminary submissions made on behalf of Mr Karlos and Mr Richardson, and invited Mr Whittaker to make written submissions for exchange between the parties, with an opportunity for response.

I eventually received submissions from all parties, including the QPS, and in making my decision, I have taken into account the following material:

- the contents of the Court Brief which is the document in issue in these reviews
- initial decision (Richardson) dated 14 December 2000
- application for internal review (Richardson) dated 5 January 2000
- initial decision (Karlos) dated 6 January 2000
- internal review decision (Richardson) dated 20 January 2000
- submissions (Karlos) dated 21 January 2000
- internal review decision (Karlos) dated 4 February 2000
- external review application (Richardson) dated 9 February 2000
- submissions (Richardson) dated 25 February 2000
- external review application (Karlos) dated 6 March 2000
- submissions (Richardson) dated 22 June 2000
- submissions (Karlos) dated 28 July 2000
- submissions (QPS) dated 13 September 2000
- copies of published articles supplied by the participants.

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

8. 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.*

9. 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 an identifiable individual, other than the applicant for access. 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

10. 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) as it appears in the FOI Act (see pp.256-257, 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:

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

11. 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.

12. There has been no contention that the Court Brief does not comprise information concerning the personal affairs of Mr Karlos and/or Mr Richardson. It is arguable that the mere fact that, in open court, Mr Karlos has been charged with, and pleaded guilty to, the two charges of knowingly participating in the provision of prostitution by other persons, is a public, rather than a private, aspect of Mr Karlos' life. However, the Court Brief records in detail allegations of activities which, in my view, must properly be characterised as information concerning the personal affairs of Mr Karlos, or of Mr Richardson, or a combination of both. It is therefore *prima facie* exempt under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.44(1).

Public interest balancing test

13. Because of the way s.44(1) of the FOI Act is worded and structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always tip the scales against disclosure of that information (to an extent that will vary from case to case according to the relative weight of the privacy interests attaching to the particular information in issue in the particular circumstances of any given case), and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue. It therefore becomes necessary to examine whether there exist public interest considerations favouring disclosure, which outweigh all identifiable public interest considerations favouring non-disclosure, such as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

14. A matter that is of interest to the public does not necessarily equate with the public interest. In *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, I discussed the meaning of the term "public interest" at some length, and (at p.78, paragraph 49) quoted the following passage from the decision of a Full Court of the Supreme Court of Victoria in *Director of Public Prosecutions v Smith* [1991] 1 VR 63 (at pp. 73-75):

> *There are many areas of national and community activities which may be the subject of the public interest. The statute does not contain any definition of the public interest. Nevertheless, used in the context of this statute, it does not mean that which gratifies curiosity or merely provides information or amusement: cf.* R v the Inhabitants of the County of Bedfordshire *(1855) 24 L.J.Q.B. 81, at p.84, per Lord Campbell LJ. Similarly it is necessary to distinguish between "what is in the public interest and what is of interest to know":* Lion Laboratories Limited v Evans *[1985] QB 526, at p.553, per Griffiths LJ ...*
>
> *The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the wellbeing of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals:* Sinclair v Mining Warden at Maryborough *(1975) 132 CLR 473, at p.480 per Barwick CJ. There are ... several and different features and*

> *facets of interest which form the public interest. On the other hand, in the daily affairs of the community events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest* per se *is not a facet of the public interest.*

Public interest considerations favouring disclosure

15. There has been no suggestion that anything in the circumstances of the conviction of Mr Karlos, other than the alleged involvement of Mr Richardson, gives rise to significant public interest considerations favouring disclosure of the Court Brief. The arguments for disclosure are essentially tied to the claimed public interest in disclosure of information about Mr Richardson's conduct, and to provide a context which makes references to him meaningful. There are arguments specific to Mr Karlos when one turns to deal with public interest considerations favouring non-disclosure, and I will deal with those in due course. However, with regard to public interest considerations favouring disclosure, I will focus on the considerations relating to Mr Richardson's alleged involvement.

16. In his internal review decision, Assistant Commissioner Williams stated:

> *At the time of the alleged conduct, Mr Richardson was a serving Federal Senator with significant parliamentary influence. The allegations published in the newspapers suggest that Mr Richardson was provided with the services of prostitutes and that he was not personally responsible for remunerating the prostitutes. Such allegations raise perceptions that there may be some impropriety in a senior politician receiving any gratuitous service.*
>
> *The issues of government accountability in this matter are decisive. I consider that they carry such weight that they prevail over the public interest in according fairness and privacy to your client.*

17. The solicitors for Mr Whittaker submitted:

> *a) at the time he was allegedly supplied with prostitutes, Mr Richardson held a high position as a Minister in the Commonwealth and he had considerable influence on government affairs; his behaviour in that position relates to the workings of government, including the system by which individual members of the government may have such influence;*
> *b) Mr Richardson remains a person of powerful public influence and holds an important public office, namely director of the Sydney Organising Committee for the Olympic Games ("SOCOG"). His behaviour as a former Senator and member of the Government may well reflect on his suitability for his current position and may also indicate the manner in which he may be fulfilling his current obligations;*
> *c) the evidence which was available at the time concerning Mr Karlos and Mr Richardson, if available to the Australian Federal Police, may reflect poorly on the AFP and it is in the public interest to be able to review the operations and systems of the AFP.* [12 May 2000]

18. In his submissions on behalf of the QPS dated 13 September 2000, Superintendent Doyle stated:

> *In weighing up the public interest considerations, the real significance of the representations about Karlos and Richardson is that they were prepared on behalf of this agency for use in making submissions in open court in the course of a publicly funded prosecution of a person for offences under the* Criminal Code; *not whether they are, or may be accepted, as proven or accurate. …*
>
> *The principle of openness for court proceedings (for which the brief was prepared) might rationally be taken to extend to the brief itself. The principle of an open court process is, of course, well established in our legal system.*
> …
> *The public interest requires that this agency act responsibly when making representations discreditable about any person in open court, whether the person be the defendant the subject of a specific charge or some third party. A court brief is a key source document disclosing that investigating officers have instructed the police prosecutor as to certain facts which are considered necessarily relevant to the charges and fit for public disclosure, and considerable public interest considerations must tell, it is submitted, in favour of general scrutiny by the community of such material.*

19. In broad terms, the public interest considerations claimed by the QPS or Mr Whittaker to favour disclosure of the matter in issue can be summarised as follows:

(a) accountability of the QPS;
(b) accountability of the AFP;
(c) disclosing information which might assist in making representations to a relevant investigative agency that further action or investigation should be undertaken;
(d) accountability of Senator Richardson for his conduct at a time when he was a Minister of the Crown in right of the Commonwealth of Australia;
(e) informing public debate about acceptance of gifts or benefits by Ministers; and
(f) openness of court proceedings.

20. As to consideration (a), there is of course a general public interest in the accountability of the QPS for the efficient and effective performance of its functions for the benefit of the public, which would be served to some extent by disclosure of the matter in issue. In many instances, this public interest consideration would not outweigh a privacy interest deserving of substantial weight. In this case, there is nothing before me to suggest that the QPS has not carried out its functions in an appropriate manner, so as to more acutely enliven the public interest in accountability of the QPS. Charges have been brought against Mr Karlos which resulted in pleas of guilty. The allegations concerning Mr Richardson contained in the Court Brief were not capable (without more) of forming the basis of a criminal charge against Mr Richardson under Queensland law. Nevertheless, I consider that some weight must properly be accorded to this public interest consideration favouring disclosure.

21. With regard to the related considerations (b) and (c), Mr Whittaker has contended (in the submissions on his behalf dated 12 May 2001) that there has been criticism of the AFP investigation of Mr Richardson's alleged conduct, and that the public interest in accountability of the AFP in respect of that investigation supports disclosure of the matter in issue:

> *6. However, the AFP's investigation was severely criticised by the CJC later in 1995, during the course of a further enquiry by the CJC. The Chairman of the CJC at the time of Operation Wallah, Mr O'Regan, and the Acting Chairman during the course of the subsequent inquiry, Mr Wyvill QC, both accused the AFP of not conducting a diligent enquiry and failing to formally interview several key suspects before it published its report. These allegations were also the subject of considerable publicity in July and August 1995.*
>
> …
>
> *17. … the documents remain relevant to the conduct and the propriety of the actions of the AFP, which are clearly matters which it is the public interest to know and about which it is in the public interest for there to be informed discussion.*
>
> *18. Certainly, at the time when much of the publicity about the allegations occurred, there was a strong conflict of opinion between the CJC and the AFP and there were strongly made allegations that the AFP had not conducted a proper enquiry. This is apparent particularly from the newspaper articles in the Courier Mail on 17 July, 10 August and 22 August 1995 (enclosed). It was then, and it remains, in the public interest for these issues to be aired, even if they may be of any further embarrassment to Mr Richardson and Mr Karlos. This is particularly the case in the context where the Assistant Commissioner of the AFP at the time considered that, as a Minister, Mr Richardson could have been compromised if the allegations made against him were true and that this could have affected Commonwealth interests: see the Courier Mail, 18 August 1995 (enclosed).*
>
> *19. This is a similar situation to that discussed by the Commonwealth Administrative Appeals Tribunal in* Scholes v Australian Federal Police *(1996) 44 ALD 299, especially at pp.344-5 (para.183). If the material in the document is capable of supporting an inference, or indeed provides proof, that Mr Richardson was provided with prostitutes by Mr Karlos and others, then the public is entitled to know that and to ask why the Australian Federal Police took the matter no further. That question was never the proper subject of any enquiry and no findings have been made about it. It is particularly relevant when it was only the AFP investigation which purportedly cleared Mr Richardson of the allegations against him.*

22. The Hanson report makes it clear that the substance of the allegations recorded in the Court Brief was conveyed to the AFP by the CJC, along with some evidence with respect to those allegations. There is nothing before me to indicate that the Court Brief itself was provided to the AFP. The Hanson report commented on the investigation by the AFP at pp.61-64:

> *The suggestion that the AFP's investigation was inadequate was hotly disputed. It is not my task to adjudicate upon the adequacy of the investigation, except insofar as it is necessary to ask whether the investigation may have been perceived to be inadequate and so, perhaps, motivate an officer to give the details to the press. For that limited purpose, it is necessary for me to state my impressions as to whether any such disaffection could have been generated.*
>
> *I do not think that there can be any criticism of the investigation for failing to explore all avenues. …*
>
> *I can see some ground for criticising the approach to the investigation.*
>
> *I was puzzled by the AFP's approach which seemed to me to have been a little narrow. The AFP seemed to take the CJC's report as a complaint and to examine it to see whether that complaint was to be sustained or rejected. An example of this is to be found in the AFP's final report (exhibit 93). At p.14 the following appears -*
>
> > I will examine each of the allegations detailed earlier in this report. This course has been adopted for reasons of fairness because some of the allegations have already achieved publicity and in some instances the conclusions reached have no basis in fact. Much of the material contained in these allegations consists of conjecture, hearsay and rumour. So far as possible, and within the confines of this special reference I have attempted to lay such allegations to rest once and for all.
>
> *I would have thought that the better approach would have been to take the evidence that a Federal Minister was alleged to have been supplied with prostitutes by men with possible criminal connections, to seek an explanation as to why that had occurred, and in the course of doing so, to treat the CJC report as a possible explanation. Having disposed of the CJC's theory, I would expect them to go on and investigate whether there was some other explanation for the assumed facts.*
>
> *…*
>
> *Another area in which I can see that there is scope for criticising the investigation lies in the differences between the preliminary report of 2 March 1995 (exhibit 159) and the final report of 24 May 1995 (exhibit 93).*
>
> *In the former report, at p.10, it is reported -*
>
> > There is no doubt that ["Businessperson A"] pandered to the sexual proclivity of Senator Richardson.

> *There is no such assertion in the final report. The explanation for the disappearance of this assertion from the final report was that both "Businessperson A" and Richardson had denied the suggestion (p.1778). The report does not seem to deal with the fact that there was sworn evidence from the prostitutes which supports that proposition. (CJC first briefing paper at exhibit 9, annexure 2.2 and CJC second briefing paper at exhibit 9, annexure 3.4).*
>
> *In saying this, I am mindful of the fact that Richardson refused to discuss "Businessperson C" and denied that "Businessperson A" had supplied him with prostitutes. Further, the AFP does not have the coercive powers possessed by the NCA and the CJC to require a suspect to answer. Nonetheless, I can see some scope for some officer feeling that the allegations had been too readily brushed aside, when the AFP were faced with denials, or feeling a sense of frustration that the AFP could do nothing about Richardson's denials.*
>
> *Having said all of that, however, I must say that I do not regard the AFP investigation and its final report as a "whitewash" as suggested, e.g., in Mr. Whittaker s article in the Courier-Mail of 7 June 1995, two days after the publication of the AFP findings. I think that that allegation is untrue and unfair. Whittaker, like Pearce, had put a great deal of effort into his investigation of these matters, only to see it all come to nothing.*
>
> *Suggestions that the AFP investigation and report were a whitewash are based upon an inadequate appreciation of the depth of the investigation and the problems it faced, and/or on disappointment at the result.*

23. Mr Whittaker contends that it is only once he has obtained access to the Court Brief that he would be in a position to ascertain how much the AFP was aware of (and so to assess whether it acted appropriately, given the information before it). However, the Court Brief will not show what information from the QPS was communicated to the AFP, or what information was before the AFP. In that regard, the AFP would be the best source of the documents it considered in the course of its investigation. If there was evidence summarised in the Court Brief that was not obtained or further explored by the AFP, this may give rise to an accountability issue as to the steps the AFP took to obtain all relevant evidence from the QPS, and the thoroughness of the AFP investigation.

24. I note that the passage from the Hanson report quoted above expressed criticism about the withdrawal, from the final AFP report, of a conclusion that appeared in the draft report, on the basis merely of a denial by two persons affected, being two of the persons whose conduct was the subject of investigation. If the withdrawal of that conclusion from the final AFP report was due to a perceived lack of evidence, disclosure of the matter in issue would enable Mr Whittaker, or any interested member of the public, to assess the strength of the evidence that the QPS had available to present to a court (if Mr Karlos had contested the charges against him) to substantiate the allegation that Mr Karlos procured, and paid for, the services of prostitutes for Mr Richardson. This might enable questions to be raised about the thoroughness of that aspect of the AFP investigation, and perhaps also whether the AFP pursued all reasonable lines of inquiry seeking possible motives for Mr Karlos or his associates to provide a benefit of that kind to a serving Cabinet Minister.

25. However, for the kind of offences under the *Crimes Act 1914* Cth which the AFP might have been investigating (e.g., bribery or solicitation), it would have been necessary to obtain evidence capable of establishing not only that a gift or benefit was given to, or solicited by, a Commonwealth officer, but that, in return, the Commonwealth officer was to take, or not to take, some specific action. It appears that the AFP investigation found no evidence capable of establishing the latter, and there is nothing in the QPS Court Brief for the Karlos charges that is relevant to that issue.

26. I therefore consider that disclosure of the matter in issue may have some value in furthering accountability of the AFP in respect of its previous investigation, but I do not consider that any great weight should be accorded to this public interest consideration.

27. With regard to consideration (d) listed in paragraph 19 above, I accept that the public interest in accountability extends to individual public officers, including Ministers of the Crown. At the time of the incidents dealt with in the matter in issue, Mr Richardson was a serving Minister in the Commonwealth Government. I do not consider that the "public interest" referred to in the Queensland FOI Act is limited to considerations operating at the level of State or local government. Clearly, the operations of government at a Commonwealth level have a profound effect on Queenslanders, as much as on every other citizen of Australia. The concept of public interest is a broad one, and I see no reason to limit its scope merely because it appears in a Queensland enactment.

28. In my view, the fact that the QPS was satisfied that the allegations against Mr Richardson (if true) involved no offence on his part under Queensland law, and that the AFP found no evidence to establish an offence under Commonwealth law, does not exhaust the public interest in scrutiny of, and accountability for, the propriety of the alleged conduct of a person who, at the relevant time, held an important position of public trust. The sovereign power of the Commonwealth resides with the people and it is exercised only with their consent on their behalf, by their elected representatives: per Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth (No. 2)* (1992) 177 CLR 106 at p.137. Australian electors are entitled to, and do, expect appropriate standards of ethical behaviour from their elected representatives. It is commonly accepted that this extends to activities undertaken away from the actual conduct of the duties of public office, that may affect or compromise a person's ability to faithfully carry out the duties of public office.

29. I do not consider that a person's sexual activities would, in themselves, normally be the type of activity with respect to which a public officer should be called to account as a public officer. However, the circumstances in which a public officer accepts a gift or benefit has been recognised as relevant to the performance of public duties and capable of compromising, or appearing to compromise, the integrity of a holder of public office: see, for example, "Guidelines on Official Conduct of Commonwealth Public Servants" (Public Service Commission, Canberra, 1995); "A Guide on Key Elements of Ministerial Responsibility" issued by the Prime Minister (Canberra, December 1998) at pp.10-12. The acceptance of a significant gift or benefit may give rise to at least a perception that there was an expectation of, or agreement as to, a *quid pro quo* in terms of the way the public officer carries out his or her public duties, or, in the case of an office-holder as senior as a Minister of the Crown, deploys the influence that attaches to such a position.

30. I consider that there is a public interest consideration favouring disclosure of information about a situation in which a Minister is alleged to have been offered a benefit of significant value, in order to allow the public to assess whether the Minister has exercised sound judgment and common sense in deciding whether to accept such a benefit. That the beneficiary of the gift did not intend to, or did not in fact, do anything in return, would not, in my view, significantly detract from the public interest in accountability in respect of the holder of an important position of public trust putting himself or herself in a situation of the kind that Mr Richardson is alleged to have done, as a Minister of the Crown in 1993. The weight of that public interest consideration is made even clearer in circumstances where the nature of the alleged benefit is liable to afford an enhanced opportunity for bribery or blackmail, namely, where it puts the giver (or others who know about the benefit) in a position where they may be able to exercise undue influence over the recipient because of the likely desire of the recipient to ensure that the nature of the benefit is not discovered by anyone.

31. In my view, it cannot be a sufficient counter to the force of this public interest consideration, that Mr Richardson has denied the allegations and they remain untested. A lapse in the standards of propriety or ethical conduct (which does not cross the line into criminal conduct) that electors have a right to expect of their elected representatives holding senior positions of public trust, is not going to be tested in a court of law, but is certainly, in my view, a matter on which the public should be informed, since informed public debate may be one of the few avenues available to moderate or deter unacceptable behaviour by holders of public office that does not cross the line into criminal conduct. Disclosure of the matter in issue would assist interested members of the public to assess the strength of the evidence to substantiate the allegations involving Mr Richardson and Mr Karlos, that the QPS had available to present to a court.

32. I do not accept the contentions put on behalf of Mr Richardson and Mr Karlos to the effect that this public interest consideration does not warrant further public ventilation of the allegations against them, because Mr Richardson no longer holds public office and the allegations have long since ceased to be a matter of public controversy. It is inherent in the concept and purpose of accountability that it involves being called to account for, and take responsibility for, past actions (or inaction), and the existence of meaningful accountability measures is intended to promote and encourage (in part, through a desire to avoid being called to account for unsatisfactory performance or conduct) the more efficient, economical and ethical conduct of government by present and future occupants of public office.

33. In my view, disclosure of the matter in issue would also assist to promote more informed public debate about the standards of conduct that the electors have a right to expect from their elected representatives, especially Ministers of the Crown, and whether, for example, a code of conduct should be developed to more explicitly prescribe the standards to be observed, or more specifically proscribe certain behaviours. Fruitful public debate is often fuelled by consideration of specific problem cases, rather than just general principles. With respect to the particular conduct alleged against Mr Richardson and Mr Karlos, I note, for example, the only relevant statements in the currently operative document relating to the conduct of Commonwealth Ministers ("A Guide on Key Elements of Ministerial Responsibility" issued by the Prime Minister, Canberra, December 1998), which is a guide rather than a code of conduct, are the following (from pp.10-11):

> *It is vital that ministers … do not by their conduct undermine public confidence in them or the government.*

…

Along with the privilege of serving as a minister … there is some personal sacrifice in terms of the time and energy that must be devoted to official duties and some loss of privacy. Although their public lives encroach upon their private lives, it is important that ministers … avoid giving any appearance of using public office for private purposes.

…

Ministers should perform their public duties not influenced by fear or favour - that is, by any expectation that they will benefit or suffer as a consequence.

- *Ministers should not accept any benefit where acceptance might give an appearance that they may be subject to improper influence … .*

- *Ministers may accept benefits in the form of gifts, sponsored travel or hospitality only in accordance with the relevant guidelines (provided by the Prime Minister …).*

34. By way of contrast, a recommended Code of Official Conduct for Parliamentarians in Canada (Parliament of Canada, Second Report of the Special Joint Committee on a Code of Conduct of the Senate and the House of Commons, 1997) included:

All Parliamentarians are expected to uphold the following principles:

1. Ethical Standards

Parliamentarians shall/should act with honesty and uphold the highest ethical standards, so as to maintain and enhance public confidence and trust in the integrity of each Parliamentarian and in the institution of Parliament.

2. Public Scrutiny

Parliamentarians shall/should perform their official duties and arrange their private affairs in a manner that will bear the closest public scrutiny, an obligation that is not fully discharged by simply acting within the law.

3. Independence

Parliamentarians shall/should take care to avoid placing themselves under any financial or other obligation to outside individuals or organizations that might influence them in the performance of their official duties. Particular vigilance should be exercised in dealings with paid lobbyists.

4. Public Interest

Upon election or appointment to office, Parliamentarians shall/should arrange their private affairs so that foreseeable real or apparent conflicts of interest may be prevented from arising, but if a conflict does arise, it shall/should be resolved in a way that protects the public interest.

5. Gifts and Personal Benefits

Parliamentarians shall/should not accept any gift or personal benefit connected with their office that may reasonably be seen to compromise their personal judgment or integrity.

35. In my view, public interest considerations (d) and (e) set out in paragraph 19 above deserve to be accorded significant weight, in favour of disclosure of the matter in issue, in the application of the public interest balancing test incorporated in s.44(1) of the FOI Act.

36. It has also been suggested that disclosure of the matter in issue would be of assistance in allowing members of the public to assess the suitability of Mr Richardson to hold public positions now or in the future. (At the time of the submission, Mr Richardson held a high profile position connected with the Sydney Olympic Games.) Mr Richardson may or may not seek public office in the future. At this time, I would not regard this argument as adding to the weight of the general consideration concerning accountability in respect of Mr Richardson's alleged conduct at a time he was a Commonwealth Minister.

37. In relation to consideration (f) set out in paragraph 19 above, the QPS (in its letter dated 13 September 2000) noted that the contents of the Court Brief were prepared for presentation to the court, and submitted that the principle of open court processes favoured its disclosure. While I acknowledge the principle, the police prosecutor in Mr Karlos' case did not consider it necessary to disclose the detailed contents of the Court Brief in dealing with the guilty pleas. In the circumstances, I do not consider that the principle takes the matter significantly further.

Public interest considerations favouring non-disclosure

38. The public interest considerations claimed, on behalf of Mr Richardson and Mr Karlos, to favour non-disclosure of the matter in issue can be summarised as follows:

(i) the public interest in protecting the privacy of information concerning the personal affairs of Mr Karlos and Mr Richardson, which is inherent in the satisfaction of the first element of the test for exemption under s.44(1) of the FOI Act;

(ii) the public interest in the fair treatment of individuals subject to untested allegations;

(iii) in the case of Mr Karlos, disclosure would be contrary to the policy of rehabilitation of offenders;

(iv) the presumption of innocence;

(v) disclosure would reduce the likelihood of pleas of guilty;

(vi) disclosure would prejudice the future supply of information to the police;

(vii) disclosure would damage Mr Karlos' health.

39. With respect to consideration (i), the key question is the weight that can realistically be accorded to this public interest consideration favouring non-disclosure, given the extent of public disclosure of the substance of the allegations involving Mr Richardson and Mr Karlos, and of the charges against Mr Karlos. (See, for example, the instances listed at page 5 of Superintendent Doyle's initial decision dated 14 December 1999, and the newspaper articles submitted by the participants.) In *Re Burke and Department of Families, Youth and Community Care* (1997) 4 QAR 205 at p.216 (paragraph 40), I said:

> *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.*

40. My comments in that paragraph have been contended by the participants to lend support both for disclosure and non-disclosure of the Court Brief. I have held in several prior cases that the fact that personal affairs information has become a matter of public record, or been widely disseminated, must logically reduce the weight that can sensibly be accorded to the protection of a privacy interest attaching to that information. However, in some circumstances, there may nevertheless be a public interest in the fair treatment of the individual (discussed further at paragraphs 46-50 below) that continues to weigh in favour of non-disclosure.

41. In this case, there has been extensive publication of the substance of the allegations involving Mr Richardson and Mr Karlos. However, many of the specific details of the allegations concerning Mr Karlos and Mr Richardson that are contained in the Court Brief have not been published. I am not satisfied in this case that the public interest in protecting the privacy of information concerning the personal affairs of Mr Karlos and Mr Richardson, so far as the detailed allegations set out in the Court Brief are concerned, has been significantly reduced by the extent of the prior publication of the substance of the allegations against them.

42. I have also previously indicated that the weight of the privacy interests concerning personal information may be significantly reduced where a person volunteers information about their own personal affairs for publication. In *Re Director-General, Department of Families, Youth and Community Care and Department of Education and Ors* (1997) 3 QAR 459 at p.467 (paragraph 22), I said:

> *22. In the case of Student 2, I note that Student 2 and his mother have co-operated with a journalist in the creation of an article published in the* Courier-Mail *newspaper, including a photograph of Student 2 and his mother. I note that the mother provided a number of details of Student 2's*

> *difficulties at school, including details of particular incidents. That information has therefore become a matter of public record. A person who volunteers information about himself or herself to the media cannot, in my opinion, reasonably expect his or her privacy rights in relation to that information, or closely related information, to weigh heavily in favour of non-disclosure, if a balancing exercise is called for in the application of s.44(1) of the FOI Act. (I note that, in* Director of Public Prosecutions v Smith *[1991] 1 VR 63 at p.69, a Full Court of the Supreme Court of Victoria found that, where persons had taken steps to bring matters of private concern into the public domain, the granting of public access, under the* Freedom of Information Act 1982 *Vic, to documents concerning those matters, would not involve an unreasonable disclosure of personal affairs information.) I should make it clear that, in the case of a child, disclosure of information by, or at the urging of, a parent or guardian, may not always amount to an abandonment of a claim to protection under s.44(1). But, in this instance, I consider that the information released into the public domain, in relation to the behaviour of Student 2, does act to diminish the strength of the privacy considerations favouring non-disclosure of the matter in issue in application for review no. S 149/96.*

43. I was provided with copies of an article by Mr Richardson, published in the *Bulletin* magazine on 14 June 1994 (pages 18-20). In that article, Mr Richardson makes a very brief reference to the allegations concerning the supply of prostitutes, but only as a preamble to the substance of the article which is a defence against other allegations. I do not consider that that publication should be taken to have diminished the weight which would otherwise be accorded to the protection of his privacy so far as the detail of the allegations about the supply of prostitutes is concerned.

44. In *Re Ainsworth and Criminal Justice Commission* (1999) 5 QAR 284 at p.330 (paragraph 141), I said:

> *Information that indicates or suggests that an identifiable individual has been involved in some alleged (but unproven) criminal activity or other wrongdoing is properly to be characterised as information concerning the personal affairs of that individual: see* Re Stewart *at p.257, paragraph 80;* Re Wong and Department of Immigration and Ethnic Affairs *(1984) 2 AAR 208;* Re Kahn and Australian Federal Police *(1985) 7 ALN N190. Moreover the weight of the privacy interest attaching to information of that kind is ordinarily strong. Intelligence data compiled by law enforcement agencies of the kind now under consideration does not frequently consist of admissible evidence that demonstrates the commission of criminal offences. As explained by Mr Paul Roger, Director of the Intelligence Division of the CJC, in paragraph 6 of his statutory declaration dated 16 December 1994:* Intelligence information, by its nature, often consists of unsubstantiated allegations, innuendo and rumour, which may not have been substantiated. It is open to a number of interpretations. To make information of that nature public, may result in unfairness to persons referred to directly or indirectly in the information. *I consider that significant weight attaches to the public interest in the protection of an individual's reputation against suggestions of criminal activity or wrongdoing, that is unable to be proven in court proceedings.*

45. The solicitors for Mr Richardson have relied on this passage. It does afford some support for the weight to be accorded to protection from disclosure of the information in issue that concerns Mr Richardson's personal affairs. However, two significant points of distinction should be noted. First, the information under consideration in that passage from *Re Ainsworth* concerned the conduct of private citizens, rather than the conduct of a person holding an important position of public trust, which as I have explained above, gives rise to additional public interest considerations that would not ordinarily be present in the case of a private citizen who has conducted his or her personal affairs in such a way that law enforcement authorities have been unable to gather sufficient reliable evidence to justify the laying of charges for a contravention of the law. Second, the information under consideration in the quoted passage from *Re Ainsworth* was qualitatively different from the information in issue in the present case. The former consisted largely of unsubstantiated intelligence data. The latter comprises a summary of the evidence which the QPS considered reliable enough to support the charges against Mr Karlos, and which it proposed to present to the court in the event that the charges were contested.

46. With respect to consideration (ii) set out in paragraph 38 above, I stated in *Re Pope and Queensland Health* (1994) 1 QAR 616 at pp.649-650 (paragraph 96):

> *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.*

47. Each participant in this review has sought to rely on the above passage to support his case, whether for or against disclosure of the Court Brief. It has been claimed on behalf of Mr Richardson that fairness requires that he be protected from any wider dissemination of allegations that have never been tested in court, and in respect of which several investigations have resulted in no charges being laid against him. However, as explained in paragraphs 28-32 above, I do not accept that those factors exhaust or diminish the public interest considerations favouring public scrutiny of Mr Richardson's alleged conduct. I consider that the circumstances of this case are close enough to the kinds of cases I had in mind when I wrote, in the passage quoted above, that there is a clear public interest in ensuring that allegations of improper conduct against government employees, which appear to have some reasonable basis, are properly investigated, and that appropriate corrective action is taken where individuals or systems are found to be at fault, and that there is proper accountability to the public in that regard.

48. I also note that in this case I am not dealing with a preliminary report that might have been used as a basis for further investigation or raised issues which might be subject to further investigation. The Court Brief summarises evidence which would have been led in the Magistrates Court, if Mr Karlos had not chosen to plead guilty. It is true that the evidence could have been tested in the court if Mr Karlos contested the charges, although if that had occurred, the evidence would have become public and Mr Richardson would have had no opportunity to contest it, unless he had appeared as a witness to contradict it, and thereby subjected himself to cross-examination.

49. With regard to Mr Karlos, he pleaded guilty to two charges of knowingly participating in the provision of prostitution by other persons. While he disputed the identity of the persons to whom the prostitutes were supplied, I am not satisfied that disclosure of the Court Brief (even if it were totally inaccurate in regard to the identity of the persons to whom prostitutes were supplied) would render any injustice to Mr Karlos in terms of the improper conduct alleged against him, and conceded by his guilty plea. The fundamental issue from the point of view of Mr Karlos' personal affairs is that he pleaded guilty to the two charges of knowingly participating in the provision of prostitution, rather than the identity of the person to whom the prostitutes were supplied.

50. Given the stage that the police investigation had reached and the nature of the evidence summarised in the Court Brief, I do not consider that the public interest in the fair treatment of individuals (as referred to in paragraph 96 of *Re Pope*) raises a consideration of any substantial weight in this case, above or beyond the weight that properly attaches to consideration (i) identified in paragraph 38 above.

51. With respect to consideration (iii), the solicitors for Mr Karlos referred to the *Criminal Law (Rehabilitation of Offenders) Act 1986* Qld, suggesting that it may prohibit disclosure of the fact that Mr Karlos had been charged with, and pleaded guilty to, the two offences. It would appear that if Mr Karlos had been convicted on the two charges, the *Criminal Law (Rehabilitation of Offenders) Act* would apply to the convictions. However, as Mr Karlos was discharged without conviction there is some doubt as to whether that Act has any application to him. Nevertheless, I accept that the Act reflects a public interest consideration

favouring non-disclosure of what may be regarded as old convictions. That consideration must be weighed with all the other relevant public interest considerations to find where the balance lies.

52. With respect to consideration (iv), Mr Karlos' solicitors made the following submission:

> *(g) Generally speaking, the Police must conduct their inquiries confidentially, consistently with the presumption of innocence, and solely for the purpose of detecting and prosecuting offenders in the Courts. Police should use the Court as the proper forum for dissemination of information concerning investigation and prosecution of criminal offences. Information not then released or disclosed should remain confidential even (and especially) after conviction, even on a plea of guilty, except for the proper purposes and functions of the Queensland Police Service.*
>
> *Once the presumption of innocence goes (upon a plea of guilty and a conviction), the lawful functions of the Queensland Police Service (to investigate, detect and prosecute crimes) are spent and discharged.*

53. I do not consider that there is any public interest consideration which is as broad in nature as this submission suggests. It is a matter for the QPS and the government generally as to what information is disclosed about individual cases. That is certainly not limited to disclosure in court. Under the FOI Act, the interests of individuals who have been investigated or charged are taken into account in terms of the personal affairs exemption under s.44(1). However, I do not consider that there is any general public interest in non-disclosure of information other than in a court.

54. With respect to consideration (v), the solicitors for Mr Karlos submitted:

> *(g) If those charged with offences should learn to expect that the Queensland Police Service will become an open mine of sensitive and embarrassing information soon, or even many years after conviction, and that such information is to be made available to the news media, it is inevitable that many such persons will be discouraged from pleading guilty.*
>
> *Persons who have committed offences must be dealt with under the law for those offences. Nothing should be done to interfere with this. The law and the Courts prescribe and impose appropriate penalties and sentences for that conduct. The due administration of justice requires that those should be the only sanctions which the Queensland Police Service actively pursues. To do otherwise would inevitably discourage early and timely pleas of guilty, so as to hinder and frustrate the due administration of justice.*

55. My comments above in relation to consideration (iv) apply also to this submission. There may be some circumstances in which particular individuals, charged with less serious offences, may prefer to plead guilty in the hope of thereby minimising the risk of widespread public disclosure of embarrassing information if the charges were contested in open court. I consider that that class of cases would be quite limited in any event, that the

persons charged would be taking a calculated risk that would necessitate careful weighing of factors particular to their respective cases, and that the likelihood that disclosure under the FOI Act of the relevant Court Brief in this case would lead to a marked reduction in guilty pleas with attendant consequences for the court system, is negligible. There are factors peculiar to this case which have attracted a level of journalistic interest (leading to use of the FOI Act) that are not likely to recur in the vast majority of cases coming before the courts. I am not satisfied that any weight should be accorded to this consideration claimed to favour non-disclosure.

56. With respect to consideration (vi), the solicitors for Mr Karlos contended that people who provide information and documents to the QPS should not be discouraged from doing so by the prospect that documents given confidentially will end up in the newspapers. The Court Brief was prepared within the QPS, to summarise the evidence that was available to the QPS to present to the Court if the charges were contested. The suppliers of the evidence must have understood, at that stage, that they may be required to give evidence in open court if Mr Karlos contested the charges. There is nothing before me to suggest that any of the persons who co-operated with the QPS in the course of the investigation in terms of supply of information would be likely to be concerned at the disclosure of the information in the Court Brief. I do not accept that disclosure of the Court Brief could reasonably be expected to discourage members of the public from providing information to the QPS in the future.

57. With respect to consideration (vii), I have before me copies of two medical certificates and a letter from Mr Karlos' son. I have no reason to doubt that Mr Karlos was in poor health at the time the certificates were issued. However, whether disclosure of the Court Brief would put added stress on Mr Karlos' health is another matter. The nature of the allegations has already been made public and Mr Karlos has pleaded guilty to two charges relating to his involvement in the matter. The allegations have been the subject of numerous newspaper articles from 1994 up to 2000. I am not satisfied that disclosure of the detail that is contained in the Court Brief would have any adverse effect on Mr Karlos' health.

Weighing up the competing public interest considerations

58. I accord significant weight to the privacy interests of Mr Karlos and Mr Richardson. Notwithstanding the extent of publication of the substance of the allegations against them, I accept that disclosure of the Court Brief would cause further distress to them and to members of their respective families. I am also cognizant of the fact that the allegations do not relate to the day to day duties of Mr Richardson when he was a Minister, but rather to an aspect of his private life. (It was nevertheless an aspect in which his alleged conduct, and his decision-making in that regard, was relevant to his public role.) However, when this and the other considerations I have accepted as weighing against disclosure, are balanced against considerations (a), (b), (c), (d) and (e) identified in paragraph 19 above, I am satisfied that the latter group (particularly the strength of considerations (d) and (e)) tilt the balance in favour of disclosure. I make this finding even in respect of those segments of the Court Brief that concern the personal affairs of Mr Karlos alone, because those segments are integral to the context of the allegations against Mr Richardson.

59. I therefore find that disclosure of the matter in issue would, on balance, be in the public interest, and that it is not exempt matter under s.44(1) of the FOI Act.

Conclusion

60. For the foregoing reasons, I affirm the decisions under review (being the decisions of Assistant Commissioner Williams on behalf of the QPS dated 20 January and 4 February 2000).

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F N ALBIETZ
INFORMATION COMMISSIONER