

OFFICE OF THE INFORMATION )  
COMMISSIONER (QLD) )

S 136 of 1993  
(Decision No. 94014)

Participants:

WILLIAM ERIC YABSLEY  
Applicant

- and -

DEPARTMENT OF EDUCATION  
Respondent

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

FREEDOM OF INFORMATION - refusal of access - medical certificate in respect of a high school student - information concerning the student's "personal affairs" - whether exempt from disclosure under s.44(1) of the *Freedom of Information Act 1992 Qld* - application of public interest balancing test.

*Freedom of Information Act 1992 Qld* s.6, s.30(1), s.44(1), s.44(2), s.52

*Freedom of Information Act 1982 Vic* s.33(1)

*Education (General Provisions) Act 1989 Qld* s.28(2)

*"B" and Brisbane North Regional Health Authority, Re* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported)

*Department of Social Security v Dyrenfurth* (1988) 80 ALR 533

*Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re* (Information Commissioner Qld, Decision No. 93002, 30 June 1993, unreported)

*Stewart and Department of Transport, Re* (Information Commissioner Qld, Decision No. 93006, 9 December 1993, unreported)

*University of Melbourne v Robinson* [1993] 2 VR 177

## **DECISION**

I affirm that part of the decision under review (being the internal review decision made on 1 February 1993 by Mr P M Parsons on behalf of the respondent) by which it was determined that folio 10 of File 2160 is an exempt document under s.44(1) of the *Freedom of Information Act 1992 Qld.*

Date of Decision: 29 June 1994

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**INFORMATION COMMISSIONER**

Participants:

WILLIAM ERIC YABSLEY  
Applicant

- and -

DEPARTMENT OF EDUCATION  
Respondent

### **REASONS FOR DECISION**

#### **Background**

1. The applicant, a teacher formerly employed by the respondent, seeks review of the respondent's decision to refuse him access to a medical certificate relating to one of the applicant's former students, which the respondent contends is an exempt document under s.44(1) of the *Freedom of Information Act 1992 Qld* (the FOI Act).
2. The applicant lodged with the Department of Education (the Department) an FOI access request dated 20 November 1992. The FOI access request is a lengthy document, running to five pages, most of which is irrelevant for present purposes and will not be repeated here.
3. The Department wrote to Mr Yabsley on 23 December 1992 indicating that it had located 2,203 documents responsive to his FOI access request, the majority of which were part of Mr Yabsley's personnel file. The Department's initial decision was to release all but two of those documents, those two being claimed to be exempt under s.44(1) of the FOI Act.
4. Mr Yabsley subsequently applied, in accordance with s.52 of the FOI Act, for internal review of that initial decision by a more senior officer of the Department. The internal review was undertaken on behalf of the Department by Mr P M Parsons (Manager, Administrative Law and Legislative Operations) who, by letter dated 1 February 1993, informed the applicant of his decision as follows:

*I have examined the document Folio 10 of File 2160. As the matter in question consists of a medical certificate of a person who was at that time a student at a State high school, I have determined that it is of private concern to that person, and, therefore, s.44(1) of the Act applies.*

*Because the matter is of private concern and because of its nature, I have concluded that the disclosure of the matter would be of substantial concern to the person, and, therefore, I took steps to obtain the views of that person (s.51(1)). I considered those views fully.*

*I have examined, too, the document Folio 26 of loose papers, File 2. As this matter consists of school results and comments on performance of a person who was at that time a student at a State high school, I have determined that it is of private concern to that person, and, therefore, s.44(1) of the Act applies.*

*Because the matter is of private concern and because of its nature, I have concluded that the disclosure of the matter would be of substantial concern to the person, and, therefore, I took steps to obtain the views of that person (s.51(1)). I considered those views fully.*

*In respect of public interest as it applies to the matter of the medical certificate and the school results and comments on performance, I am properly and comfortably convinced that on balance there is no public interest in favour of disclosure. I conclude that:*

- (a) the matters are of private concern to the persons involved and the legitimate private rights of those persons must be preserved in this case; and*
- (b) the matters are not of sufficiently serious concern to, or of sufficient benefit to, the public or a substantial section of the public; and*
- (c) the matters are of no demonstrable relevance to the affairs of Government and are likely to do no more than satisfy curiosity of the applicant about both persons who were then students; and*
- (d) overall, there is no identifiable greater public good which is served by disclosure and to which the private rights of either person would have to give way.*

*The balance lay, therefore, in personal privacy.*

*I affirm the decision under review that the document Folio 26 of loose papers, File 2, is exempt, and that the document Folio 10 of File 2160, is exempt. I made this decision on Monday, 1 February 1993.*

5. Mr Yabsley subsequently applied to me seeking review of Mr Parsons' decision in accordance with Part 5 of the FOI Act.

### **The External Review Process**

6. The two documents claimed by the Department to be exempt were obtained and examined. The Department also provided me with its records of the consultation between the Department and the two persons who are the subjects, respectively, of those two documents. When the records of consultation were obtained, it appeared that the person who was the subject of the second document referred to in Mr Parsons' decision (i.e. the school results and comments on the performance of a student) had raised no objection to Mr Yabsley being provided with that document. Because the person concerned evidently had no objection to disclosure of that document to Mr Yabsley, the Department was requested to reconsider its decision to claim an exemption in respect of that document. The Department subsequently decided to exercise its discretion to release that document to Mr Yabsley, notwithstanding that it may have considered the document to be technically exempt. Mr Yabsley has obtained access to that document, which is no longer in issue.
7. On the other hand, the records of consultation regarding the remaining document indicate that the person who is the subject of that document strongly objected to the document being provided to Mr Yabsley.
8. By letter dated 13 September 1993, the Deputy Information Commissioner wrote to Mr Yabsley in the following terms:

*... I have reached the preliminary view that [the document remaining in issue] concerns the personal affairs of the person referred to in the document, on the basis that the document concerns the person's state of health (see the Dyrenfurth case [Department of Social Security v Dyrenfurth (1988) 80 ALR 533] referred to above).*

*It seems to me then, subject to any arguments that you may raise ... to the contrary, that [the] final decision as to whether the document can be considered to be exempt will hinge on whether you can point to public interest considerations which on balance favour the disclosure of the document in the public interest.*

*...*

*In your letter of 22 July 1993 ... you set out some arguments concerning the public interest. Essentially, I consider that the public interest arguments you raised in that letter can be fairly summarised as follows:*

- (a) you contend that the medical certificate may be a forgery. On page 2 of your letter you say that "these documents are fabrications". If you have any documentary evidence which objectively demonstrates that the document is a forgery, please forward that material to me. If, on the other hand, you have not examined the document, please explain the basis on which you contend that the document is a fabrication. On page 1 of your letter, you say that "the AMA has established that I have the right to access the certificate and to confirm that the dates of incapacitation were placed on the certificate". If you have received any documentation from the AMA which confirms this, please forward that documentation to me. Finally, you say that "there is clear documentary evidence to suggest that the certificate may not have been the original provided by the student". Again, I would be pleased if you would provide me with a copy of this documentary evidence;*
- (b) you also appear to be arguing that it is in the public interest for you to obtain a copy of the document in order to demonstrate how the education system may be manipulated to allow cheating by students. You appear to be arguing that the Education Department should require the dates of incapacitation to be set out on a medical certificate. The difficulty I have is with the tenuous connection between your desire to change Education Department policy on the one hand, and on the other hand wishing to obtain a specific medical report concerning a student, whether dates of incapacitation are set out on the face of that document or not;*
- (c) on page 2 of your letter, you concede that "the student is probably unaware of the certificate and its effects on her results. She cannot be blamed for any of this". In making these comments, you seem to be acknowledging the distinction between obtaining a document which concerns the personal affairs of another person, and your real cause of complaint, which is Education Department policy concerning dates of incapacity being set out on medical certificates and use of medical certificates in manipulating marking systems within the Education Department.*

*...*

*If you wish to take the opportunity to provide a written submission, it should address*

*the following issues:*

*whether or not disclosure of a medical certificate concerning a person other than yourself would disclose information concerning that person's "personal affairs" for the purposes of s.44(1); and*

*what public interest considerations (apart from those set out in your letter of 22 July 1993) exist in favour of release of the document so that disclosure would, on balance, be in the public interest.*

9. Mr Yabsley eventually responded to this letter, providing a short submission and a long statutory declaration, both dated 29 November 1993. Mr Yabsley's submission and statutory declaration were forwarded to the Department, and the opportunity was extended to the Department to file evidence and a final submission in response.
10. The Department did not wish to file any evidence in response. The Department did provide a short submission dated 25 February 1994, in which the Department affirmed its reliance on the public interest considerations set out in Mr Parsons' decision letter (see paragraph 4 above), and set out reasons why the applicant's alleged public interest considerations favouring disclosure of the document in issue were spurious and should be given no weight.
11. Mr Yabsley was afforded the opportunity to make short points of reply to the Department's submission, but instead lodged a 2½ page covering letter, an eight page submission and 34 attached documents, comprising a total of 50 pages. Most of the reply and its attachments are irrelevant to the issue for determination in this external review, since they rehearse other matters of dispute between Mr Yabsley and the Department both before his retirement in December 1990 and since that time.
12. Surprisingly, in that reply dated 12 April 1994 Mr Yabsley stated for the first time that he has possession of a copy of the document in issue (and attached a further copy of the document to prove it). Mr Yabsley's former School Principal has confirmed to a member of my staff that a copy of the medical certificate was handed to Mr Yabsley in 1985 for official purposes. Mr Yabsley appears to have retained that copy. Mr Yabsley said (in his reply dated 12 April 1994) that *"although I have the document ... it is imperative for legal reasons that the document be obtained officially and through proper channels"*.
13. Mr Yabsley did not say what those legal reasons are, though he has stated in writing on many occasions that he will bring legal proceedings against the Department concerning its treatment of him. I am not aware of any reason why Mr Yabsley should believe that he is not capable of using the copy of the medical certificate which he has retained, in any legal proceedings which he brings. Certainly, Mr Yabsley, as a former officer of the Department, is subject to the obligations imposed by s.28(2) of the *Education (General Provisions) Act 1989 Qld*, which provides as follows:

28.

...

*(2) A person, whether he 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 the records of the Department or who communicates any such matter to any person except -*

- (a) to a person authorised by the Director-General to receive such information;*

- (b) to a lawfully constituted court or tribunal; or
  - (c) as required to carry out his approved duties,
- commits an offence against this Act.*

14. The obligation which this statutory provision imposes on Mr Yabsley to observe confidentiality with respect to the copy of a student's medical certificate in his possession is specifically relaxed for the purpose of communications to a lawfully constituted court or tribunal. This provision does not therefore prevent Mr Yabsley from making use of his copy of the medical certificate in legal proceedings, if the relevant court or tribunal permits him to do so. If the original document is required for production in court, then only the issue of a subpoena for production by the court would achieve that result. Even if Mr Yabsley were to be granted access under the FOI Act, he would only be allowed to inspect the original, or to obtain a copy of it (see s.30(1) of the FOI Act).
15. I note, however, that whereas s.28(2) of the *Education (General Provisions) Act* imposes strict limits on the use that might lawfully be made of the copy of the student's medical certificate which Mr Yabsley has retained (thereby preventing Mr Yabsley from using it in any way, not sanctioned by the statutory provision itself, that might constitute an invasion of the privacy of the person who is the subject of the medical certificate), release of a copy of the document to Mr Yabsley under the FOI Act would ordinarily mean that there are no restrictions, apart from any imposed by the general law, on the uses to which Mr Yabsley might put the certificate.
16. While Mr Yabsley's reasons for seeking access under the FOI Act to a document of which he already has a copy are somewhat mystifying, the correct legal position is that an applicant's motives for seeking access to a particular document under the FOI Act are irrelevant to the determination of whether or not the document falls within the terms of an exemption provision. That issue is, with limited exceptions, to be approached by evaluating the consequences of disclosure of the document in issue to any person, or as is sometimes said, "to the world at large". (Two notable exceptions are where s.6 of the FOI Act applies; i.e. where the matter in issue relates to the personal affairs of the applicant; and where disclosure of otherwise confidential information to a particular applicant would constitute an authorised use of the confidential information: see *Re "B" and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported) at paragraphs 103-4 and 153. Neither exception applies in this case.)

### **The Document in Issue**

17. The document in issue is a handwritten letter of two sentences in length, signed and dated by a General Practitioner. The substance of the letter is that a named student is suffering from a specified medical condition and should be excused from swimming, which in the doctor's opinion was the most likely cause of the condition. The letter does not state a specific period during which the student should be excused from swimming. The person named in the letter was, at the time, a student of the applicant, when the applicant was a Physical Education teacher at a Queensland High School.

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

18. Subsections 44(1) and (2) of the FOI Act provide as follows:

*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.*

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

19. In my reasons for decision in *Re Stewart and Department of Transport* (Information Commissioner Qld, Decision No. 93006, 9 December 1993, unreported), 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 the relevant variations thereof) as it appears in the FOI Act (see 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:

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

20. I also wish to take the opportunity to specifically endorse some observations that are consistent with my own reasoning in *Re Stewart* but which were made in a case of which I was not aware at the time of publication of my reasons for decision in *Re Stewart*. The case is *University of Melbourne v Robinson* [1993] 2 VR 177 and the observations are those of Eames J of the Supreme Court of Victoria concerning s.33(1) (the personal affairs exemption) of the *Freedom of Information Act 1982 Vic* (at p.187):

*The reference to the 'personal affairs of any person' suggests to me that a distinction has been drawn by the legislature between those aspects of an individual's life which might be said to be of a private character and those relating to or arising from any position, office or public activity with which the person occupies his or her time.*

21. The document in issue in the present case is a document which concerns the health or ill-health of a person other than the applicant, and I am satisfied that the information contained in the document concerns the personal affairs of that person, for the purpose of s.44(1) of the FOI Act.
22. That finding is not itself decisive as to whether the document in issue is exempt under s.44(1) of the FOI Act.
23. As I pointed out at paragraph 179 of my reasons for decision in *Re "B" and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported), the public interest balancing test contained in s.44(1) is such that once an initial judgment is made that the matter concerns the personal affairs of a person, then it will have been established that there is a *prima facie* ground of justification in the public interest for non-disclosure of the matter, unless the further judgment is made that the *prima facie* ground is outweighed by other public interest considerations, such that disclosure of the matter in the document "would, on balance, be in the public interest".



### **Consideration of the Public Interest Balancing Test**

24. The "public interest" arguments which in Mr Yabsley's contention warrant disclosure of the document in issue are summarised and considered below.

**(1) The document in issue is a forgery.**

25. This argument was first raised in Mr Yabsley's letter of 22 July 1993 and repeated (embellished with various speculative theories) in his statutory declaration of 29 November 1993 and his reply dated 12 April 1994. This contention is in fact contradicted by Mr Yabsley's own evidence (on page 2 of Mr Yabsley's statutory declaration of 29 November 1993) where Mr Yabsley describes having telephoned the doctor who provided the medical certificate, and the doctor having acknowledged that he provided the medical certificate, and that he examined the student for that purpose. According to Mr Yabsley, the doctor was unaware of the use to which the certificate had been put (which in Mr Yabsley's account was to avoid course assessment in swimming) and the doctor was prepared, if requested by the student's parents, to add to the certificate the relevant dates of incapacitation according to his examination of the student. In my opinion, the material supplied by Mr Yabsley contains nothing of substance to suggest that the document in issue was forged; in fact, it tends to confirm that the document is genuine.
26. In his statutory declaration of 29 November 1993 and his reply dated 12 April 1994, Mr Yabsley advances various speculative theories in relation to the pedigree of the copy of the medical certificate in issue, but without a shred of substantive evidence to support them. For example, in his reply dated 12 April 1994, he states that he has evidence to suggest that the document in issue is a composite of two other documents, manufactured either by the student or by the School Principal himself, but Mr Yabsley has not supplied me with any such evidence, nor any evidence to support any of his speculative theories in this regard.
27. I am not aware of any substantive material which suggests that the document in issue is a forgery, and I am not prepared to give any weight to this alleged public interest consideration said to favour disclosure of the document in issue.

**(2) The document was used to cheat the assessment system, and exemplifies an allegedly widespread practice of using medical certificates for claimed incapacity to manipulate the assessment system.**

28. Mr Yabsley alleges that the medical certificate in issue was used by the student concerned to avoid having to participate in swimming classes, and therefore the student was not exposed to the rigours of examination of the relevant skills. In his application for review, Mr Yabsley submitted:

*A substantial section of the public would benefit if this certificate were used to confirm cheating, and if as a result, the Education Act were amended to include specific criteria that must be included on such certificates presented by students as evidence of illness for a claim for a deferred rating. Using these certificates, I can have a student receive a VHA [Very High Achievement rating] after completing only 25% of any course. Such cheating is known to be rife. Honest students can easily be displaced from higher education places.*

29. In his reply dated 12 April 1994, Mr Yabsley returned to this theme:

*There is no doubt that the document is in the public interest. The Department has continually placed teachers in impossible positions without proper administrative direction. It is universal practice to demand a doctor's certificate from students who absent themselves from exams, yet the Education Act gives no direction on the nature of these documents or what is the minimum acceptable standard. I do not consider it sufficient for any teacher of grade 12, where the student is in a position to dislodge another child from a place in Higher Education, to accept a document that does not support the claim or marks. I consider any Department that would demand this of me as negligent in the extreme.*

*The public of Queensland demand the highest standards from us as educators, and they expect we will monitor methods of cheating and eliminate them, not destroy the careers of teachers who oppose such unprofessional standards as exemplified by the Department's acceptance of this certificate.*

30. Mr Yabsley has also placed in evidence before me a copy of a letter he obtained from the Honorary Secretary of the Queensland Branch of the Australian Medical Association, dated 15 January 1990, which is in the following terms:

*I acknowledge your letter of December 1, 1989 where you raise concerns about medical certification in which no mention is made by the doctor, of when the period of incapacitation for a child begins and ends.*

*If this information is needed, I believe that the institution has the right to request from the doctor concerned an estimation at least of how long the child will be incapacitated because of his or her illness. Standard sickness certificates contain this information.*

31. The document in issue was not written on a standard sickness certificate form, but that in my opinion does not affect its genuineness.
32. I have no way of knowing whether Mr Yabsley's allegations of widespread cheating of school assessment procedures, through manipulation of medical certificates, are correct or merely fanciful. I can readily agree with the applicant and the Queensland Branch of the Australia Medical Association that proper professional and ethical practice on the part of medical practitioners should require that a certificate of medical incapacity be issued only after a medical examination of the subject of the certificate, and that a certificate should contain the examining doctor's best estimate of how long the period of incapacity is likely to last. I can also accept that there is a public interest in the Department having in place proper procedures to attempt to ensure that medical certificates claiming incapacity are not used to manipulate school assessment systems.
33. These, however, are quite general issues, which do not depend for their efficacy or their advancement on the applicant having access under the FOI Act to the document in issue. I do not see how it can be said that disclosure of the document in issue would further these public interests, but if it were capable of doing so, it would be to such an insignificant extent that these public interest considerations could not be afforded sufficient weight to displace the substantial weight which, in my opinion, must be accorded to the public interest, which is inherent in the satisfaction of the *prima facie* test for exemption under s.44(1) of the FOI Act, in preserving the privacy of the personal affairs of the subject of the document in issue.

- (3) **The document was part of a chain of events which eventually led to Mr Yabsley's**

**retirement from employment with the Department and it would provide useful evidence in Mr Yabsley's endeavours (including litigation) to seek redress against the Department.**

34. Mr Yabsley has forwarded to me a great deal of documentary material, some of which he has obtained as a result of his FOI access request to the Department, dealing with his transfer from the school at which the medical certificate incident occurred, the history of his dispute with the Department, his eventual retirement from the Department, and his subsequent attempts to seek redress against the Department.
35. Mr Yabsley may well perceive the medical certificate as the catalyst of a series of events which culminated in his retirement from the Department. However, I accept the submission of the Department that it was not the medical certificate itself which caused Mr Yabsley's difficulties, but Mr Yabsley's response to the School Principal's decision (which the Department accepts was a decision within the scope of the Principal's authority) to accept the medical certificate as valid on its face. Mr Yabsley's response to the Principal's decision resulted in an official recommendation, following investigation by a Departmental investigator, that Mr Yabsley be disciplined for insubordination, and his problems with the Department appear to have escalated from that point.
36. In my reasons for decision in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (Information Commissioner Qld, Decision No. 93002, 30 June 1993, unreported), I said (at paragraph 55):

*While in general terms, a matter of public interest must be a matter that concerns the interests of the community generally, the courts have recognised that: "the public interest necessarily comprehends an element of justice to the individual" (per Mason CJ in Attorney-General (NSW) v Quin (1990) 64 ALJR 627). Thus, there is a public interest in individuals receiving fair treatment in accordance with the law in their dealings with government, as this is an interest common to all members of the community.*

37. I do not think that this undoubted public interest carries any substantial weight in the circumstances of the present case. Disclosure of the document in issue under the FOI Act will not enhance Mr Yabsley's ability to pursue his grievances through the Department or through the courts, for the reasons explained at paragraphs 13-15 above. Any weight to be accorded to this public interest consideration is insufficient to outweigh the privacy considerations inherent in the satisfaction of the *prima facie* test for exemption under s.44(1) of the FOI Act.
38. I note that Mr Yabsley is unable to obtain assistance from s.6 of the FOI Act in the circumstances of this case. Section 6 provides:

**6.** *If an application for access to a document is made under this Act, the fact that the document contains matter relating to the personal affairs of the applicant is an element to be taken into account in deciding -*

- (a) *whether it is in the public interest to grant access to the applicant; and*
- (b) *the effect that the disclosure of the matter might have.*

39. I am satisfied, however, that the information contained in the document in issue relates solely to the personal affairs of the student who is the subject of the document. Even if it could be argued that the information in the document relates to Mr Yabsley (which I do not accept) it could only relate to his employment affairs, not his personal affairs (*cf. Re Stewart* at paragraphs 83 to 85).
40. I have considered carefully all of the arguments addressed to me by Mr Yabsley in his various letters and submissions and his statutory declaration (of which those having any arguable significance are summarised above) and I am not persuaded that there are public interest considerations favouring disclosure of the document in issue which would cause me to make the judgment that, notwithstanding that the document in issue contains information concerning the personal affairs of a person other than the applicant, its disclosure under the FOI Act would, on balance, be in the public interest. It follows that I am satisfied that the document is an exempt document under s.44(1) of the FOI Act.

### **Conclusion**

41. During the course of my review, the Department agreed to release one of the two documents that were initially in issue. The appropriate decision, therefore, is that I affirm that part of the decision under review (being the decision of Mr Parsons made on 1 February 1993) by which it was determined that folio 10 of file 2160 is an exempt document under s.44(1) of the FOI Act.

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 F N ALBIETZ  
**INFORMATION COMMISSIONER**