OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 98008
Application S 95/95

Participants:

"KBN"
Applicant

DEPARTMENT OF FAMILIES, YOUTH AND COMMUNITY CARE
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - applicant seeking access to identifying information concerning an individual identified by the applicant's birth mother as being the applicant's natural father - whether such information concerns the personal affairs of the applicant - whether such information concerns the personal affairs of the named individual - whether disclosure of the information would, on balance, be in the public interest - application of s.44(1) and s.44(2) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.5(1)(a), s.5(1)(b), s.5(1)(c), s.6, s.44(1), s.44(2), s.51, s.51(3), s.81
Adoption of Children Act 1964 Qld s.39A, s.39AA(2)

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Fotheringham and Queensland Health, Re (1995) 2 QAR 799
Order No. 200-1997 (Information and Privacy Commissioner, Province of British Columbia, November 28, 1997, unreported)
Pemberton and The University of Queensland, Re (1994) 2 QAR 293
Stewart and Department of Transport, Re (1993) 1 QAR 227

DECISION

I affirm the decision under review (being the decision identified in paragraph 5 of my accompanying reasons for decision).

Date of decision: 30 June 1998

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F N ALBIETZ
INFORMATION COMMISSIONER

TABLE OF CONTENTS

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse her access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to information (recorded on documents created in connection with the applicant's birth and subsequent admission to a nursing home) which would identify the individual named by the applicant's birth mother as being the applicant's natural father.

2. By letter dated 1 January 1994, the applicant sought access, under the FOI Act, to any documents held by the Department of Family Services and Aboriginal and Islander Affairs, the predecessor of the respondent (the Department), which would indicate the name of the applicant's natural father.

3. In response to that application, Ms Ann Cazzulino, Senior FOI Officer with the Department's FOI Branch, advised the applicant by letter dated 23 June 1994 that the Department held one relevant file (i.e., Adoption File 753 Ad). Ms Cazzulino advised the applicant that there were two folios in that file which contained information of the type sought by the applicant, and that she had decided to grant access to those two folios (which had been numbered for identification as folios 44 and 46), subject to the deletion of small portions of matter.
Ms Cazzulino's decision was that the withheld portions of matter were exempt matter under s.44(1) of the FOI Act, on the basis that the information in question concerned the personal affairs of the individual to whom it related ('the putative father'), and that its disclosure to the applicant would not, on balance, be in the public interest:

The deleted material is the name of the person identified by your mother as your father. The information is private to him and without his confirmation it would not be appropriate to disclose his name. There is no record that this person substantiated his paternity. He may never have known of your mother's claim and had an opportunity to confirm it.

[It is unlikely that he is still alive and consultation with surviving relatives regarding disclosure would be a breach of his personal affairs, of which they may well not be aware.]

I have also considered whether a public interest exists in disclosure of the information to you. I am, however, of the opinion that it is not in the public interest to release this type of personal information to any person, without proper authority from the individuals concerned.

4. By letter dated 13 July 1994, the applicant sought an internal review of Ms Cazzulino's decision in respect of the withheld portions of folios 44 and 46. In her application for internal review, the applicant provided details which she considered were relevant in determining the question of whether disclosure to her of the matter in issue would, on balance, be in the public interest.

5. The application for internal review of Ms Cazzulino's original decision was one of a number of such applications received by the Department at the same time. All of those applications for internal review were placed in abeyance while the Department conducted a review of its general policy (i.e., that which is applied by Departmental officers in their dealings with the public, apart from responding to access applications under the FOI Act) concerning the disclosure of material that would identify putative fathers. When that policy review had concluded, the Department's internal review officer, Mr D A C Smith, advised the applicant by letter dated 4 May 1995 that he had conducted the requested internal review in her case, and had decided to affirm Ms Cazzulino's initial decision (to refuse access to the withheld portions of folios 44 and 46). Enclosed with Mr Smith's letter to the applicant were his written decision and reasons for decision (6 pages), and an 'Issues Paper' (7 pages) outlining the issues relevant to the question of the public interest.

6. By letter dated 12 May 1995, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Smith's decision.

Matter in issue

7. I consider it important, for the purposes of the discussion which follows, to describe the matter in issue in its proper context:

- Folio 44 is a *pro forma*, bearing the heading "**State Children Department. "*The Infant Life Protection Acts of 1905 and 1918*." Roll of Nursing Home. The Roll to be Kept by each Occupier**". It records information concerning the applicant's admission to, and removal from, a nursing home in 1923, and details concerning the identities of the applicant's natural parents, as provided to the proprietor of the nursing home by the applicant's birth mother at the time of the admission.

- Folio 46 is a *pro forma*, bearing the heading "**State Children Department.** ***Infant Life Protection Act***". It contains information recorded by an officer of the Department in December 1922, concerning the applicant's birth mother and the putative father, as conveyed to the officer by the birth mother.

The matter in issue (on both of the folios in issue) consists of the Christian name and surname of the putative father (2 words).

8. For the sake of completeness, I note that the remainder of folios 44 and 46, to which the applicant was given access, disclose the following relevant details concerning the putative father: his occupation (carpenter), marital status (single), religion (Methodist), and place of residence (East Brisbane). On folio 46, in response to a *pro forma* question as to whether the putative father would support the applicant, the answer recorded is that he would not, and that there was no evidence of paternity. Also on folio 46, under the heading "Remarks", the departmental officer who completed the form wrote: "*This girl told me she did not know* [putative father's surname]*'s address. I did not believe this as he is the father of her first child*."

External review process

9. The present case is one of a number of applications for external review which have been lodged by individuals in similar circumstances to the applicant, and in which the Department has refused to grant access to identifying information concerning the putative father of the applicant for access. In view of the similarity of the issues raised by these applications, I considered it appropriate to proceed by identifying a suitable 'test case', and proceeding to make a determination in that case. Other cases (including the present application) were held in abeyance, to be determined on the basis of an application of the general principles established in the 'test case' to the particular circumstances of each of the cases held in abeyance.

10. My first selection as an appropriate test case raised issues common to all of the applications, and had the advantage that the applicant was represented by solicitors, and hence was well placed to address all relevant issues. I forwarded a letter to the solicitors representing the applicant in that case, in which I canvassed at length the relevant issues as I perceived them, and expressed the preliminary view that the Department's decision appeared to be justified. I invited the applicant's solicitors in that case to lodge a written submission and/or evidence in support of their case. As it turned out, the applicant in that case decided not to contest the preliminary view I had expressed, and the application for review was withdrawn.

11. I selected the present case as the alternative 'test case', since it was the earliest application made in the group of cases which raise common issues. By letter dated 12 January 1998, I conveyed to the applicant my preliminary view that the matter in issue was exempt matter under s.44(1) of the FOI Act, and my reasons for having formed that preliminary view, and I invited the applicant to lodge a written submission and/or evidence in reply.

12. In early February, a member of the applicant's family telephoned a member of my investigative staff to advise that the applicant did not accept my preliminary view, and wished to lodge a written submission addressing the matters discussed in my 12 January 1998 letter to the applicant. However, on 19 June 1998, I received a letter from a solicitor who had been assisting the applicant in this matter, advising that no further submissions would be made, either by the solicitor or by the applicant herself.

13. In formulating my decision and reasons for decision in this matter, I have had regard to the matters discussed in the correspondence between the applicant and the respondent (as referred to in paragraphs 2-5 above), and the applicant's 12 May 1995 application for external review.

Issue for determination

14. The sole issue to be determined in the present external review is whether the Department has satisfied the onus which it bears, under s.81 of the FOI Act, of establishing that the portions of folios 44 and 46 which have been withheld from the applicant, are exempt matter under s.44(1) of the FOI Act.

Section 44 of the FOI Act - "Matter concerning personal affairs"

15. Section 44 of the FOI Act provides (so far as relevant for present purposes):

> ***Matter affecting personal affairs***
>
> ***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.*

16. The s.44(1) exemption clearly extends the scope of its protection to information concerning the personal affairs of deceased persons. 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 a person. If that requirement is satisfied, a *prima facie* public interest favouring non-disclosure is established, and the matter in issue will be exempt, unless there exist public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure, so as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

17. In my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, I identified the various provisions of the FOI Act which employ the term "personal affairs" and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) 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 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 with and emotional ties to other people; and
- domestic responsibilities or financial obligations.

Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, based on a proper characterisation of the matter in question.

Whether the matter in issue is information concerning the personal affairs of a person

18. At paragraph 9 of his 4 May 1995 reasons for decision, Mr Smith stated that the name of an individual alone is not generally regarded as information concerning the personal affairs of the individual, but may be so when the name is linked with some other information of a personal nature. Mr Smith then continued:

> *10. Because disclosure of the name would disclose more than merely a name, namely a link to his being named as the father of a child, I am prepared to accept that the matter is potentially exempt pursuant to section 44(1) in that it is* ***information concerning the personal affairs of a person****. ...* [Mr Smith's emphasis]
>
> *11. If the name of a person named as being the father of another person is the personal affairs of the first person, as has been concluded in this case, it could be argued that equally it is also the personal affairs of the child [in this matter, the applicant] and I make that finding.*

19. In *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at p.343, I acknowledged that information can concern the personal affairs of more than one person. I consider that Mr Smith was correct in his finding that the matter in issue is properly to be characterised as information which concerns the personal affairs of the putative father, and which also concerns the personal affairs of the applicant, for the purposes of s.44(1) of the FOI Act.

Applicability of the s.44(2) exception

20. At pp.343-345 (paragraphs 173-178) of *Re "B"*, I explained how s.44(1) and s.44(2) of the FOI Act apply to information which concerns the personal affairs of the applicant for access, and which also concerns the personal affairs of another person. At paragraph 176 of *Re "B"*, I said:

> *Where ... the segment of matter in issue is comprised of information concerning the personal affairs of the applicant which is inextricably interwoven with information concerning the personal affairs of another person, then:*
>
> *(a) severance in accordance with s.32* [i.e., to provide access to a document subject to the deletion of exempt matter] *is not practicable;*
>
> *(b) the s.44(2) exception does not apply* [for reasons explained at paragraphs 175-176 of *Re "B"*]; and
>
> *(c) the matter in issue is* prima facie *exempt from disclosure to the applicant according to the terms of s.44(1), subject to the application of the countervailing public interest test contained within s.44(1).*

21. I consider that analysis to be directly relevant to the present case. The matter in issue comprises information concerning the personal affairs of the putative father, inextricably interwoven with information concerning the applicant's personal affairs. Accordingly, the matter in issue is *prima facie* exempt from disclosure to the applicant, subject to the application of the public interest balancing test contained within s.44(1).

Application of s.44(1) public interest balancing test

22. The task of determining, after weighing competing interests, where the balance of public interest lies, will depend on the nature and relative weight of the conflicting public interest considerations which are identifiable as relevant in any given case.

23. I have previously explained that the range of public interest considerations which may become relevant in the application of exemption provisions which incorporate a public interest balancing test is not confined to those considerations given explicit legislative recognition in s.5 of the FOI Act (see *Re Fotheringham and Queensland Health* (1995) 2 QAR 799 at p.809, paragraph 23). I note, however, that disclosure to the applicant of the matter in issue in folios 44 and 46 would not advance the legislative objects specified in s.5(1)(a) or (b) of the FOI Act (i.e., promoting open discussion of public affairs, enhancing government accountability, informing the community about government's operations). The only possibly applicable legislative object is that specified in s.5(1)(c): providing members of the community with access to information held by government <u>in relation to them</u>.

24. In her 13 July 1994 application for internal review, the applicant raised a number of specific arguments as to why the matter in issue should be disclosed to her. At paragraph 7 of his reasons for decision, Mr Smith quoted the specific points made in the internal review application which Mr Smith considered relevant to the application of the public interest balancing test:

> *I met my natural mother* [*] *five years ago, she was then 93 years of age, and I was 66 years. We had discussed my birth and why I was given up for adoption, and her consequent return to live with her family at their property* [*]. *We discussed my father, but she could not recall his name, saying she had tried to put it all behind her. She had subsequently married* [*] *and had given birth to two more children* [*], *the same names she had given to my brother and me* [*], *before our adoption. Her children born after her marriage are* [*]. *I believe this indicated she had blotted out our existence, along with the memory of our father, with the birth of the two subsequent children.*
>
> *She could not remember the exact date of my birth, only that it was in December. Consider her age then 93 to 96 years. She told me my father had promised to marry her, but then after I was born, he told her he was already married.*
>
> *After finding* [*] *there developed a close bond between us and regular contact and visits were maintained up until her death in August 1993. When I made contact with my brother's adoptive family they said there was speculation in the area where they lived as to who the father was. I would rather know than speculate, my brother is now deceased and was a bachelor with no descendants.*

From my point of view I only wish to know what I believe is rightfully mine, the name of my parents. I do not wish to cause any distress nor make any gain other than personal fulfilment by finding the name of my father. I feel there is an anomaly in your finding which protects an adult father, most probably now deceased, but demonstrates no regard for his child [myself] now aged 71 years, or those of my three children, seven grandchildren and five great-grandchildren.

[*] - segments of identifying information concerning the access applicant or her family members have been deleted.

25. In his reasons for decision, and the Issues Paper attached thereto, Mr Smith identified and discussed at length a number of factors, including those raised by the applicant, which he considered were relevant to the determination of the public interest balancing test in the group of FOI access applications dealing with identifying information concerning putative fathers. Mr Smith stated that he recognised that some of the issues which he identified overlap, some balance each other out, and others arguably should be regarded as irrelevant to the question of the public interest. The factors identified and discussed by Mr Smith were:

- social circumstances
- credibility or accuracy of information
- departmental practice
- privacy
- age of the person
- age of documents
- need to know
- right to know
- medical history and the like
- incidents of history
- sources of information
- nature of the name itself
- likelihood of search
- effect of disclosure

26. Mr Smith concluded that, on the particular facts of the applicant's case, there were a number of public interest factors which supported her access application:

- *the information is of considerable age [72 years];*
- *the applicant is of advanced age [72 years];*
- *the social circumstances of the time;*
- *the Department is the only practical source of the information;*
- *the applicant has demonstrated a strong desire to know the information through her comments which go to her sense of personal fulfilment and relate to what she sees as her rights and the rights of her family, as against the rights of other parties. This factor is reinforced on consideration of section 6 of the FOI Act;*
- *the applicant has indicated that she only wishes to know the name, she does not wish to cause any distress or make any other gain through receiving the information.*

27. On the other hand, Mr Smith recognised two factors which, in his view, supported a conclusion that disclosure to the applicant of identifying information concerning the putative father would not be in the public interest:

- *the privacy of the named person; and*
- *the credibility or accuracy of the information.*

28. Mr Smith also referred (at paragraph 14 of his reasons for decision) to the Department's general policy (see paragraph 5 above) on the disclosure of identifying information concerning putative fathers, which had been reaffirmed in the following terms:

> *... identifying information regarding putative fathers only be disclosed where paternity is confirmed and provided there is no objection to disclosure and contact lodged under adoption legislation.*

29. Mr Smith expressed the view (at paragraphs 20-21 of his reasons for decision) that there were significant arguments as to why, in the public interest, the matter in issue should be disclosed to the applicant. However, he stated that the Departmental review of its general policy in such cases, which he had requested be undertaken in light of the factors favouring disclosure of identifying information in such cases, had resulted in the reaffirmation of the Department's policy without any material change. Accordingly, Mr Smith said that, while the policy must be considered in light of the merits of each individual case, it would be inappropriate to use the provisions of the FOI Act to effect a change in the Department's general policy, and that he was therefore constrained to apply the Department's general policy (as quoted above), to refuse access to the matter in issue.

30. In conclusion, Mr Smith noted (at paragraph 22 of his reasons for decision):

> *This is not an entirely satisfactory conclusion of this matter and I consider there are grounds for me to refer this application and the class of applications in general to the relevant program manager in the Department for further consideration. To elaborate this view, I consider that this matter is so sensitive that it should be dealt with not through the FOI Act, but through an administrative arrangement that considers each application on its unique facts and, whether information is to be provided or denied, this is done in the context of professional services, including counselling and support.*

31. I shall now discuss each of the factors identified by Mr Smith in his 4 May 1995 internal review decision, and the Issues Paper attached thereto, as being relevant to the determination of where the balance of public interest lies, specifically in terms of the relative weight which I consider should be afforded to each of those factors, and where, ultimately, I consider the balance of public interest lies in the specific circumstances of the present case.

Age of the matter in issue

32. In flagging this issue, Mr Smith stated (Issues Paper, item 6):

> *In many situations the sensitivity of documents reduces with age and in many situations documents are regarded as able to be destroyed or able to be publicly released after a certain period of time. ...*

> *While these records are not destroyed or available to the public because they represent someone's personal records, one view is that their sensitivity has decreased. An alternate view is that age does not decrease the sensitivity of the particular information in question.*

33. In *Re Fotheringham*, I considered the relevance of the age of documents as a factor in determining the weight to be accorded, in a particular case, to the public interest in safeguarding the privacy of personal affairs information. With respect to the age of the documents in issue in *Re Fotheringham*, which were medical records concerning a deceased person, recorded between the period 1919 to 1951, I stated (at p.812, paragraph 31):

> *I accept that the age of the documents in issue is a relevant factor. Privacy concerns in respect of deceased persons may lose their potency with the passage of time, such that even sensitive personal information eventually reaches a stage where its primary interest or significance is merely historical. This is largely a question of degree. If, for example,* [the deceased person whose records were sought] *had died in 1852 rather than 1952, or a hundred years ago, I think that considerably less weight would be accorded to the protection of her privacy, even in respect of confidential medical records.*

34. As indicated previously, the documents containing the matter in issue in the present case were created in December 1922 (folio 46) and February 1923 (folio 44). Assuming that the putative father was at least the same age as the applicant's birth mother at the time (i.e., 26 years of age), he would (if still alive) now be more than 100 years old. However, in all the circumstances of the present case, and given the particular nature of the matter in issue, which has not been confirmed or acknowledged to be accurate, I consider that the sensitivity of that information is not diminished to any significant degree, despite the passage of some 76 years since the information was recorded. I shall consider in greater detail below (see paragraphs 70-75) the relevant considerations concerning the potential invasion of privacy of the putative father, or of members of his family (in the event that the matter in issue were to be released), which have led me to this view.

Age of the applicant

35. In addressing this issue, Mr Smith stated (Issues Paper, item 5) that arguments could be advanced as to the relevance, as well as the non-relevance, of the age of a particular access applicant. On one hand, Mr Smith noted, the older an access applicant is, the more likely it is that their parents are dead, making the matter in issue arguably less sensitive. In addition, recent changes to adoption legislation had enabled access applicants, in some cases, to gain access to identifying information concerning their birth mothers, but by the time the identifying information had been obtained, and the individual traced, they had already died (thus removing them as a possible source of information concerning the identity of the access applicant's natural father).

36. On the other hand, Mr Smith noted that it could also be argued that the sensitivity of the matter in issue could increase over time:

> *particularly among relatives of the person who had known the person and lived a life with that person without the information that the person has been named [rightly or wrongly] as being the father of a child they knew nothing about, and which information may not be able to be confirmed if the named person is dead.*

37. I consider that the age of the applicant does not, to any significant degree, affect the continuing sensitivity of the matter in issue. It is therefore not a factor which, in my view, is to be afforded any substantial weight in determining where the balance of public interest lies in the present case.

Incidents of history

38. This factor, according to Mr Smith's analysis (Issues Paper, item 8), is linked to the previous issue, and is related primarily to the timing of the change to Queensland's adoption legislation (which took place in the early 1990's):

> *It is likely that a number of applicants will continue for a time to be persons of advanced years who by the time they obtain information under the adoption legislation find that their mothers are dead. The mother would have been the most likely source of information in relation to their father and should the mother be alive and apply for the information in question, namely information she gave at the time of birth of her child, she would get the information under the FOI Act without deletion. Presumably therefore the mother in those cases would most likely give this information to her child, though she could also decide to withhold it.*

39. Specifically in relation to the facts of the applicant's case, Mr Smith noted (at paragraphs 17 and 18 of his reasons for decision):

> *17. The information released to the applicant under adoption law enabled her to trace her birth family and she has set out her experiences in meeting her mother and her brother's adoptive family. The applicant has also presented a possible reason why her mother did not or could not provide her with the name of her birth father. Her mother is now deceased, as is her brother. Now the Department remains the only reasonable and clearly available avenue for obtaining the information.*
>
> *18. There is also a note on the papers released that the same man was the father of the applicant and her brother. This raises a question of whether one should suspect that the name recorded may not be correct [the same person was named by the mother as being the father of the applicant and the father of her brother, yet she told the applicant she could not recall his name]. A further observation is that the applicant was advised as fact on 10 March, 1989 that she had a "full brother". Given the stated policy, it is of interest that this statement was based only on information given in the 1920s by the mother, unconfirmed and unacknowledged by the person named as being the father of both children.*

40. In his analysis concerning this issue, Mr Smith stated as a matter of general principle that a birth mother would, if alive, be able to apply for the information in question, namely information she gave at the time of birth of her child, and would get the information under the FOI Act without deletion. However, it would seem to me that a birth mother would generally have no need to apply under the FOI Act to gain access to information which she herself had supplied to the Department. Having said that, I do acknowledge that an application under the FOI Act to gain the information in issue might be appropriate in particular circumstances, in which the birth mother could not recall the information she had

provided to the Department. (The applicant contends that hers is such a case, but the issue is hypothetical as her birth mother is now deceased, and therefore could not make such an application under the FOI Act.)

41. Further, Mr Smith's analysis proceeded on the basis that, having gained access to the information in issue under the FOI Act, the child's mother could decide to withhold that information from her child, but that it was "*most likely*" or "*more probable than not*" that the mother would divulge that information to the child. In the present case, Mr Smith noted that the applicant had provided an explanation as to why her birth mother could not, or would not, provide her with the information she sought (i.e., her birth mother's stated inability to recall the information).

42. I can accept that in many situations a mother may be willing to divulge information of the type in issue to her child, given the passage of time since that information was recorded. However, I can also conceive of a number of possible scenarios in which a mother would not be amenable to disclosing that information to her child, despite the passage of time.

43. In the absence of any supporting evidence, I consider that it is impossible to presume with any degree of confidence what a mother would be "most likely" to do in such a situation. In all of the circumstances, I consider that this factor is too speculative to be deserving of any substantial weight in determining where the balance of public interest lies.

The Department as the only real source of the information

44. Mr Smith identified as another possibly relevant factor (and one related to the previous point) the fact that, in view of the death of the applicant's birth mother, the Department represents "*the only reasonable and clearly available avenue for obtaining the information*" (reasons for decision, paragraph 17). Without providing any detailed analysis on the issue, Mr Smith determined that this factor was among the group of factors which favoured disclosure of the matter in issue.

45. In my view, this factor is irrelevant to the question for determination. In determining whether there are public interest considerations favouring disclosure of the matter in issue to the access applicant, which are sufficiently strong to outweigh those considerations which tell in favour of preserving the privacy of information concerning the personal affairs of the putative father, it should not matter whether or not other potential sources of that information exist (unless another existing source effectively makes the information in issue a matter of public record, in which event the weight to be accorded the relevant privacy interest will be diminished: see *Re Fotheringham* at pp.810-811; paragraphs 26-29).

Social circumstances

46. Mr Smith indicated (Issues Paper, item 1) that at the time the matter in issue was recorded, the father of a child born outside of marriage was not accorded any status in relation to the child (other than for purposes of maintenance, which was not relevant if adoption occurred). The names of putative fathers were rarely recorded on birth registration forms, and the individuals concerned were never contacted or consulted in relation to such children, and may not even have been aware of their existence.

47. Further, Mr Smith stated that, at the time the matter in issue was recorded, there were certain social reasons why a mother might not want to divulge the identity of the father of a child born outside of marriage, and that there were known instances of mothers giving either the wrong name or a fictitious name when asked to state the name of the child's father, and some instances of the father's name being recorded as unknown, or the mother refusing to divulge the name of the father.

48. Mr Smith correctly pointed out that both the social climate and relevant legislation, in respect of children born outside of marriage, are now much different. The person named as the father of a child is "*more likely to know, is more likely to be involved and to have the opportunity of expressing his views*." Referring to my reasons for decision in *Re Stewart*, in which I had stated (at paragraph 76) that current community standards should be applied in determining whether information concerns the personal affairs of a person, Mr Smith considered that the same approach should be applied in determining matters of public interest.

49. I accept that social mores change over time, and that society's general attitude toward children born outside of marriage is, in many respects, very different from what it was at the time the matter in issue was recorded (in 1922-1923). However, I also recognise the existence of particular situations, or elements of society, in which disclosure of information that a person is stated to have fathered a child outside marriage could still be viewed as potentially damaging to the reputation or social status of the individual in question (eg., already married men, prominent public figures, clergy).

50. I note that in his internal review decision, Mr Smith stated (at paragraph 14) that the existing Departmental policy on the release of identifying information concerning putative fathers is that such information "can only be disclosed where paternity is confirmed and provided there is no objection to disclosure and contact lodged under adoption legislation."

51. The procedure for the lodging of an "objection to disclosure and contact" to which Mr Smith referred is that provided for in the *Adoption of Children Act 1964* Qld (and specifically, Part 4A of that Act, dealing with "Access to Identifying Information"). Under s.39AA(2) of that Act, the only persons entitled to lodge an objection to disclosure of identifying information are "a birth parent of an adopted person, or an adopted person". Section 39A of that Act defines "birth parent" in terms of the person(s) whose consent to the adoption of an adopted person was given or dispensed with in accordance with the law of Queensland applicable to adoptions at the time when the adoption took place. Under the relevant law applicable in the circumstances of the present case, in the case of an illegitimate child, the consent of the child's mother (if living in Queensland) was the only consent required. Accordingly, under the relevant legislative scheme, the child's father, whether ascertained or putative, did not come within the definition of "birth parent", and hence is a person to whom the scheme for lodgment of an objection to the disclosure of identifying information would be inapplicable.
Since the only relevant person who could lodge such an objection to disclosure and contact would be the birth mother, the Department's policy obviously proceeds on the assumption that a birth mother who does not object to being identified to, and contacted by, her natural child, would be prepared to disclose to the child details concerning the identity of the birth father. For the reasons stated at paragraphs 42-43 above, I do not believe that the assumption necessarily follows.

Need to know / Right to know

52. In recognising the relevance of an applicant's "need to know" in the class of applications under consideration before him, Mr Smith stated (Issues Paper, item 7):

> *...applicants have put this factor in terms of they themselves are now advanced in years and need the satisfaction of knowing the name stated to be their father before they die. In most of the applications a strong desire, even the need to know is a strong motivation (eg. "So I can feel a complete person." "Everyone else has rights but I have none even at my age; I need an identity; I am not named on either my birth mother's or adopted mother's death certificates." "Don't you think it causes stress to me.").*

53. In the applicant's case, Mr Smith stated (at paragraph 19 of his reasons for decision) that the applicant had demonstrated a strong desire to know the information in issue, and that he considered this to be one of the factors which favoured a finding that disclosure of that information to the applicant would, on balance, be in the public interest.

54. Although not expressing a view on the "right to know" issue, Mr Smith identified it as a relevant consideration, which had some overlap with other factors (Issues Paper, item 12):

> *One view is that there is an inherent right for a person to know who his/her parents are unless otherwise prevented by law. Does this right extend to knowing who another person with knowledge has stated is that person's parent?*

55. As I said in *Re Stewart* (at p.233, in parenthesis under point (b) of paragraph 9), the issue of whether a document falls within the terms of an exemption provision is generally to be approached by evaluating the consequences of disclosure of the document in issue to any person entitled to apply for it (pursuant to the general right of access conferred by s.21 of the FOI Act), or as is sometimes said, "to the world at large", and I noted that this general principle is appropriate because the FOI Act confers no power to control the use to which a person granted access to a document under the FOI Act will put the document or information contained in it. Although there are proper exceptions to that general principle, it has particular force in the application of s.44(1) of the FOI Act (see *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp.369-370, paragraphs 168-169).

56. Nevertheless, the caselaw which I reviewed in *Re Pemberton* at pp.368-377 (paragraphs 164-193) establishes that, in an appropriate case, there may be a public interest in a particular applicant having access to information which affects or concerns that applicant to such a degree as to give rise to a justifiable "need to know" which is more compelling than for other members of the public. Where the exemption provision under consideration incorporates a public interest balancing test, a public interest consideration of the kind described may be taken into account, in an appropriate case.

57. Similar considerations underlie s.6 of the FOI Act, although its operation is confined to documents containing matter which relates to the personal affairs of an applicant for access. Section 6 of the FOI Act 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 might have.

58. The relaxation (effected by s.6 of the FOI Act) of the general principle of viewing release under the FOI Act as "release to the world at large" is ordinarily appropriate, in the case of an application for access to matter concerning the personal affairs of the access applicant, because the access applicant is ordinarily the appropriate person to exercise control over any use or wider dissemination of information (obtained under the FOI Act) which concerns the personal affairs of the access applicant. However, that rationale carries less weight where the information in issue concerns the 'shared personal affairs' of the access applicant and another individual, because in such situations each individual concerned should have a measure of control over the dissemination of information which concerns their personal affairs, and the access applicant should not be put in a position to control dissemination of information concerning the personal affairs of the other affected individual unless such an outcome would, on balance, be in the public interest.

59. Nevertheless, in the present case, the fact that the information in issue concerns the applicant's personal affairs, and that her interest in obtaining access to it is more compelling than for other members of the public, are considerations which tell in favour of a finding that disclosure to the applicant would on balance, be in the public interest, and they must therefore be weighed in the balance with other competing public interest considerations.

Medical information

60. Mr Smith stated (Issues Paper, item 13) that "*an argument has been raised in some situations that the person needs to know details about their parents so that relevant medical information can be obtained*." However, Mr Smith further noted that this argument had not been a strong factor in any of the cases considered to date, and "*particularly with older people, would not seem to be particularly relevant*".

61. I consider that it would be a rare case in which a consideration of that kind would be entitled to any substantial weight in the application of a public interest balancing test. Any argument based upon an individual's need to establish medical history information concerning their parents presupposes the establishment of a biological link between the individual seeking information and the person identified as their parent. However, the disclosure of the matter in issue would establish nothing more than the name of an individual, which, given the absence of acknowledgment or confirmation of paternity, does not amount to proof of that person's biological relationship to the access applicant. The establishment of such a biological link, and identification of any relevant medical history details, could not be achieved with that information in isolation, but would necessitate direct contact with the person named, or other identifiable family members.

Nature of the name

62. Mr Smith stated (Issues Paper, item 10) that the argument raised in connection with this issue related to whether the name in issue was common, or unusual. According to Mr Smith,
one point of view is that if the name which is sought (either the Christian name or the surname, or both) is a common name, then it could be released without breaching the privacy of the person named (as it would not specifically identify a particular individual).

63. However, in relation to this issue, Mr Smith further stated:

> *While it is a principle worthy of consideration, it would be unfair to a person whose named father happened to have an unusual name.*
>
> *My view is that this factor is not relevant, and should not affect the question of whether or not access is given to the information.*

64. I agree with Mr Smith's analysis, and find that the nature of the name in issue is not a relevant consideration in the application of the public interest balancing test incorporated in s.44(1).

Likelihood of search/contact

65. The relevant considerations which Mr Smith identified in relation to this issue (Issues Paper, item 11) were:

> *There are some applicants where it is quite obvious that their desire and perhaps their need is to actually find a person and find that part of their life. In relation to others, their primary goal seems to be simply to know a name. Some who have obtained the name have expressed satisfaction that they have been provided with this information, that they can now rest and they have no intention of searching for the person or causing concern for anyone.*
>
> *Some have offered to give undertakings that they will not search for the person. That would be difficult to enforce and would probably be unfair. However, this view expressed by the applicant might be taken note of.*
>
> *It would be difficult to prevent a person or a relative of that person at another time searching and using the information provided to assist with that search. So, in general, this issue might not be considered as relevant to the question at hand, however, it may become relevant if a person has demonstrated such a strong likelihood of search that harassment of another person is more likely than not.*

66. At paragraph 19 of his reasons for decision, Mr Smith referred to the applicant's stated intentions in this regard:

> *The applicant has indicated that she only wishes to know the name, she does not wish to cause any distress or make any other gain through receiving the information.*

67. However, I agree with Mr Smith's view that any undertaking not to search for the person named (or any surviving relatives) would be unenforceable in practice. I also consider that an access applicant's present stated intention not to initiate search efforts would be open to change at any time. I do not share Mr Smith's view that this issue is irrelevant to the question at hand, unless the likelihood of search is such that "*harassment of another person is more likely than not*". I consider that any search efforts which ultimately result in contact with the person named could have a variety of negative effects, short of harassment, which should be taken into consideration. One such negative effect, which I consider in more detail at paragraphs 74 below, is the effect which such contact may have upon not only the person named, but also on other members of his family (if any), where no biological link between that individual and the access applicant has been established.

Effect of disclosure

68. In addressing this issue (Issues Paper, item 14), Mr Smith stated that while there are possible negative aspects of disclosure, the possible positive aspects of such disclosure should be recognised:

> *If adoption reunion is able to be taken as a guide, it seems more likely than not that reunion with a relative from whom there has been a long separation or even not ever known is more likely to be a positive experience.*

69. There is no evidence before me of the types of fact situations present in the cases referred to by Mr Smith in which adoption reunions have been positive experiences, and whether the facts of such cases are at all similar to those in the present case. Thus there is no evidence before me on which to conclude that an adoption reunion is just as likely to be a positive experience in a case such as this, in which the paternity of the putative father is unconfirmed, as in cases where the identities of both birth parents are known. Accordingly, I consider that this factor cannot be afforded any substantial weight in determining where the balance of public interest lies in the present case.

Privacy of the named person

70. Mr Smith stated (Issues Paper, item 4) that he considered the privacy interest of the person named to be the major consideration weighing against disclosure of the matter in issue:

> *The major opposition to disclosure comes from the view that to do so may be an invasion of the privacy of the person named, or in the terms of the FOI Act [section 5(2)(b)], that disclosure may have a prejudicial effect on his private affairs.*
>
> *This view is reinforced by the issues raised above about the accuracy of the information and the view that the person named may not have been aware of the pregnancy/birth.*
>
> *In this regard I have noted the comments in* Stewart's case *that a consideration is that release of documents affects who retains the capacity to control the documents and should be regarded as release to any applicant or to the "world at large".*
>
> *This issue needs to be given significant weight as it is possible that action taken on being given identifying information could cause embarrassment, confusion or annoyance. It is the major issue that has to be balanced against any competing public interests.*

71. I agree with Mr Smith's analysis that this factor is one of the most significant considerations weighing against disclosure of the matter in issue. I consider it important to reiterate, in this regard, that the Department's own policy on the disclosure of identifying information concerning putative fathers does not permit the disclosure of such information in cases in which paternity has not been acknowledged. Presumably, the rationale for this policy is concern for the privacy rights of the person concerned, in respect of information which has not been acknowledged to be accurate.

72. As I have stated previously, it is true that the privacy interest of individuals in particular information concerning them may diminish over a period of time, and may be outweighed if there are public interest considerations of sufficient strength to warrant a finding that disclosure would, on balance, be in the public interest. However, I consider that the nature of the information in issue is such that the person(s) concerned would still have a reasonable expectation of privacy in respect of the information in question (despite the passage of time).

73. Once again, I consider it important to emphasise that the putative father is identified in the context of that individual having been stated by the birth mother to have fathered a child outside marriage some 76 years ago. The only information concerning the putative father, as recorded in the documents in issue, is that provided to the Department by the applicant's birth mother. There was no contemporaneous acknowledgment of paternity by the person identified as the putative father, nor any court proceedings resulting in a declaration of paternity in respect of that individual.

74. Assuming the putative father (whose name comprises the matter in issue) to be the applicant's natural father, there is no independent confirmation that he knew about the birth mother's pregnancy, or the applicant's birth. He may already have been married (as the applicant states she was advised by her birth mother), or may have subsequently married. In either case, that individual may well have gone on to have a family, whose members do not know that the putative father had previously had a child. On the other hand, the person named could, in fact, have no biological link with the applicant, and may no longer be alive to challenge his identification as putative father. In either case, to release the individual's name now would, in my view, constitute a significant incursion into that individual's privacy. It may unfairly damage the reputation of the putative father, or assuming (as is likely) that the person named is now dead, may unfairly tarnish his memory in the eyes of surviving family members.

75. For all of the above reasons, I consider that the privacy interest of the person named is a highly significant factor, which must be accorded substantial weight in determining where the balance of public interest lies in the present case.

76. I consider it appropriate here to comment on the question of consultation. In his internal review decision (at paragraphs 24-27), Mr Smith commented on the question of consultation:

> *24. Should I have been minded to release the information, before coming to a final conclusion as to whether the matter should be released I would have needed to consider the provisions of section 51(1) of the FOI Act as to whether disclosure of the matter* ***may reasonably be expected to be of substantial concern*** *to the person whose name the information is, or, if he is dead, to his closest relative.*
>
> *25. This question raises further issues for consideration in that if consultation were to proceed, the very act of consultation may breach the privacy principles involved. On the other hand, some would say that in some circumstances, the person or a relative may not reasonably be expected to have a substantial concern. Another factor in this and other like applications is that the named person is more likely to be dead and any consultation would then need to take place with the closest living relative, to which status the applicant, but for her adoption, may have a legitimate claim.*

> *26. The age of the information also raises the question of what **steps that are reasonably practicable** to obtain the views of the person concerned need to be taken?*
>
> *27. I consider it is possible to adequately comply with section 51(1) and that this should not be an obstacle to release of the information. However, this whole question of consultation lends weight to the conclusion reached above, that this area should be dealt with not through the FOI Act but through a sensitive administrative arrangement.*

77. While I accept that it may be possible to undertake a process of consultation, I consider that it would raise certain practical difficulties. As noted in the preceding excerpt from Mr Smith's internal review decision, s.51 of the FOI Act requires that an agency which proposes to give access to matter, the disclosure of which may reasonably be expected to be of substantial concern to a person, may only give access to such matter if it has first taken such steps as are reasonably practicable to obtain the views of the person concerned about whether or not the matter is exempt matter. Section 51(3) provides that "person concerned", in relation to a person who has died, means the person's closest relative.

78. Undertaking such consultation in the circumstances of the present case would involve:

- first, making the assumption that the putative father's name, as provided to the Department by the applicant's birth mother, was not fictitious; and
- undertaking searches of public records such as electoral rolls, vital statistics records (register of death certificates), and telephone directory listings, in an effort to locate the person named, or the closest relative of that individual.

79. In regard to the practicality of undertaking searches of the public records mentioned above, I note that:

- even if the name provided by the applicant's birth mother is not fictitious, there would be no way of establishing whether that individual had remained in Queensland (thus necessitating searches of interstate records); and
- the closest relative of a deceased person may bear a different surname than that of the deceased person.

80. In addition to those practical difficulties, I agree with Mr Smith that the very act of consultation would involve a significant intrusion into the lives of persons contacted, who may in fact have no biological connection at all with the applicant. I consider that any consultation process undertaken in the present case would raise concerns about invasion of privacy, of the type which I have discussed above.

Credibility or accuracy of information (and inconsistent Departmental practice)

81. In his Issues Paper (item 2), Mr Smith indicated that there may be uncertainty as to whether the matter in issue is accurate, and questioned whether this issue is relevant to the application of the public interest balancing test in s.44(1). Mr Smith also stated that the Department's varying and inconsistent practice over the years, in respect of the release of such information, "*may support a view that this issue should not be accorded a significant weighting*".

82. Mr Smith further stated (Issues Paper, item 3) that different records of the Department contain information about birth fathers or putative fathers, and in a variety of such records the information has come from a single, unconfirmed source - the mother of the child. As the Department's practice in relation to the release of such information had not been consistent, Mr Smith indicated that this raised an issue of fairness, which had been one of the reasons for seeking clarification of the Department's policy in respect of the release of such information.

83. I consider that the decision as to whether information of the type presently in issue should be disclosed to a particular access applicant must be made on the basis of the specific fact situation present in that individual's case. What may appear to be inconsistent practices on the part of the Department in respect of the disclosure of such information may well reflect differing responses properly tailored to the circumstances present in individual cases.

84. As I have previously stated, while it is possible that the person named as the applicant's putative father is her natural father, it is also possible that he is not. In paragraph 15 of his internal review decision, Mr Smith stated that he had perused the relevant files, and that there was no evidence that the person named as putative father had ever acknowledged paternity, or that he had known of the pregnancy or birth. On one analysis of the facts of the present case, as recorded on the document in issue, the putative father knew of the pregnancy and birth, and had failed or refused to indicate whether he was prepared to provide for the applicant's support. On another view, the birth mother provided information concerning the putative father to the Department without his ever being aware of the pregnancy and birth.
It could well be that the applicant's birth father (who may or may not be the person named on the document in issue) did not know of the applicant's birth, and was never asked to acknowledge paternity or whether he was prepared to provide for the applicant's support.

85. In the circumstances of the present case, I acknowledge that the birth mother could have genuinely been unable to recall the identity of the applicant's birth father, due to her advanced age (93 years) at the time of her reunion with the applicant. I note that at the time the information recorded on folio 46 was provided to the Department (in 1922), although expressing suspicion about the birth mother's statement that she did not know the putative father's address, the departmental officer recording the information appeared to accept the truthfulness of the birth mother's identification of the putative father. However, in my view, the officer's implicit acceptance of the birth mother's identification of the putative father cannot be taken as verification of the information provided by the applicant's birth mother, which remains uncorroborated.

86. Mr Smith mentioned, but did not comment further upon, a proposal that the matter in issue, should it be released, could be endorsed with the following qualifying statement: "*the release of the name of the person named as being the child's father does not in any way confirm that the person named is the applicant's father, it is merely the name stated by the applicant's mother as being his/her father.*" (Issues Paper, item 2).

87. The difficulty which I have with such a qualification is that it would not lessen the potential negative consequences of release for the putative father or his surviving relatives (which I have discussed at paragraph 74 above). Further, I consider that it would not advance, in the manner contended for, any of the public interest considerations in favour of disclosure of the matter in issue.

Consideration of caselaw from other jurisdictions

88. My research has disclosed only one case, decided under Freedom of Information legislation, in which the central issue was the access applicant's entitlement to gain access to the name of her putative father, as recorded in records concerning the applicant held by a government agency. That decision (Order No. 200-1997, 28 November 1997, unreported), by the Information and Privacy Commissioner of the Province of British Columbia, Canada, concerned an application for review of a decision by the province's Ministry for Children and Families, to deny access to the name of the person identified in the access applicant's adoption file as being her natural father.

89. In support of its decision to refuse to grant access to the information sought, the Ministry submitted that the information in issue may be inaccurate or unreliable. In support of that submission, the Ministry filed affidavit evidence in which the Supervisor of the Adoption Section of the Ministry deposed that:

- in her experience, it was not uncommon for birth fathers to be falsely named by birth mothers;
- birth mothers sometimes write letters in which they admit to falsely naming the birth father;
- birth fathers sometimes deny that they are the fathers during interviews (the Supervisor acknowledging that some denials are false, but that she believed many to be credible).

90. With respect to this issue, the Information and Privacy Commissioner stated:

> *… there is nothing in the adoption records which would indicate a basis for questioning the accuracy or reliability of the information concerning the birth father in this case. According to the original account of the birth mother, who is now deceased, the birth mother and father were engaged and had had a relationship of more than several years. The father was then killed in the Korean War. While I can understand, given the sensitivity of illegitimacy, that some birth mothers may develop a fictitious relationship, the depth of detail available in this adoption record concerning the father and his parents and the fact that the adoption was handled through a law firm militate against the conclusion that the information is inaccurate or unreliable. The Ministry's concern that the information may be inaccurate or unreliable is speculative.*
>
> *I do not consider the evidence of the Supervisor concerning her experiences with other birth parents to provide a sufficient evidentiary basis to conclude that this record is not accurate or reliable … Without some basis to question the accuracy or reliability of the specific information contained in this adoption record, I am not prepared to conclude that the personal information is likely to be inaccurate or unreliable.*

91. Another factor cited by the Ministry in support of its decision to refuse access was the privacy rights of the person named; i.e., its concern "*that disclosure of the information in dispute may unfairly damage the reputation of the named father among "his surviving family and friends"* ". The Information and Privacy Commissioner rejected the Ministry's concern in this regard, on the basis of the detailed information recorded in the applicant's adoption records:

> *Given that, in this case, the named individual was relatively young when he died, has likely been dead for forty-six years, there are no living siblings, the parents would be in their nineties (and therefore may not be alive) and the identities of former friends are unknown, I find that the prospects for unreasonable invasion of the privacy of the named father are extremely remote.*

In the result, the Information and Privacy Commissioner directed the Ministry to give the applicant access to the name of her "alleged" father.

92. I consider the outcome in that case to have been justifiable on its particular facts. However, that fact situation is readily distinguishable from the circumstances of the present case. Whereas the record before the Information and Privacy Commissioner contained extensive evidence verifying the relationship between the birth mother and the individual named as the birth father, there is no evidence in the present case to corroborate the birth mother's identification of the person named as the applicant's putative father. Further, in the present case, there is no evidence that the applicant's natural father (who may or may not be the individual whose name is in issue) died young, without leaving family or friends. Indeed, as recorded at paragraph 24 above, the applicant's natural father was apparently already married at the time of his relationship with the applicant's birth mother. If so, that individual may well have descendants, or other family members, still living.

93. Given the significant factual differences noted above, I find nothing in the British Columbia Information and Privacy Commissioner's analysis of the issues in the case before him which alters my assessment of the relative weight to be accorded to the various public interest considerations which I have identified as being relevant in the application of the public interest balancing test in s.44(1) of the FOI Act to the matter in issue in the present case.

Conclusion

94. This case calls for the exercise of judgment on some difficult issues concerning sensitive and personal matters: issues on which, I suspect, reasonable minds might well differ. I sympathise with the applicant's concern at not knowing the identity of her birth father. However, after examining all of the factors which I consider to be relevant, including the competing public interest considerations discussed in detail above, I am not satisfied that the public interest considerations which favour disclosure to the applicant of the matter in issue are strong enough to outweigh the public interest (inherent in the satisfaction of the test for *prima facie* exemption under s.44(1) of the FOI Act) in safeguarding the privacy of information concerning the personal affairs of a person other than the applicant for access. I am not satisfied that disclosure of the matter in issue would, on balance, be in the public interest. Accordingly, I find that the matter in issue is exempt matter under s.44(1) of the FOI Act.

Decision

95. For the foregoing reasons, I affirm the decision under review.

……..
F N ALBIETZ
INFORMATION COMMISSIONER