OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 01/2001
Application S 215/00

Participants:

WILLIAM KELVIN FOX
Applicant

QUEENSLAND POLICE SERVICE
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - information about a complaint to police which the applicant contends will assist him to challenge his conviction for murder - information does not concern the applicant's personal affairs - whether disclosure would, on balance, be in the public interest - application of s.44(1) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.34(3), s.35, s.36, s.37, s.42, s.44(1)
Criminal Code Qld s.672A

Ainsworth & Anor and Criminal Justice Commission, Re (Information Commissioner Qld, Decision No. 99010, 17 December 1999, unreported)
Godwin and Queensland Police Service, Re (1997) 4 QAR 70
Griffith and Queensland Police Service, Re (1997) 4 QAR 109
Kahn and Australian Federal Police, Re (1985) 7 ALN N190
R v Fox [1998] QCA 121, 12 June 1998
Stewart and Department of Transport, Re (1993) 1 QAR 227
Wong and Department of Immigration and Ethnic Affairs, Re (1984) 2 AAR 208

DECISION

I affirm the decision under review (being the decision of Assistant Commissioner G J Williams made on 10 August 2000 on behalf of the Queensland Police Service) that the matter in issue is exempt from disclosure to the applicant under s.44(1) of the *Freedom of Information Act 1992* Qld.

Date of decision: 9 February 2001

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F N ALBIETZ
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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to any information it might hold concerning three incidents nominated by the applicant (none of which involved the applicant). The applicant is serving terms of imprisonment after being convicted (in January 1998) of the murder of his ex-wife, and the attempted murder of three other persons, at Glenwood on 27 August 1996, and being convicted (in September 1998) of the attempted murder of another person at Miami caravan park on 22 April 1992. The applicant has unsuccessfully appealed his convictions to the Queensland Court of Appeal and, in each case, was refused special leave to appeal to the High Court of Australia. In his applications for internal review and external review under the FOI Act, he has stated that he seeks the information in issue to assist him to challenge his conviction for the murder of his ex-wife, by way of a petition for pardon (see s.672A of the *Criminal Code* Qld). The Queensland Police Service (the QPS) contends that the documents in issue comprise exempt matter under s.44(1) of the FOI Act.

2. By an FOI access application dated 29 February 2000, the applicant sought access to four categories of documents, concerning:

   (i) an incident at Miami caravan park in early January or February 1992;
   (ii) a second incident at Miami caravan park in 1992-1993;
   (iii) an incident at Glenwood Estate in January 1995; and
   (iv) property sheets created in the course of the QPS investigation into the death of the applicant's ex-wife.

3. By letter dated 30 June 2000, Senior Sergeant G Chapman of the QPS decided to give the applicant access to all four folios located in respect of the fourth category above. In relation to the first three categories of documents sought, Senior Sergeant Chapman decided "to refuse access to the requested documents (if they exist) pursuant to the operation of s.44(1) of the FOI Act".

Senior Sergeant Chapman took the view that s.34(3) of the FOI Act enabled him to convey that decision, without identifying whether any responsive documents did in fact exist.

4. The applicant sought internal review of that decision, and by letter dated 10 August 2000, Assistant Commissioner G J Williams affirmed Senior Sergeant Chapman's decision. By letter dated 12 September 2000, the applicant applied to me for review, under Part 5 of the FOI Act, of Assistant Commissioner Williams' decision.

Use of s.34(3) of the FOI Act

5. Before proceeding further, I will briefly address a general issue about the use of s.34(3) of the FOI Act by the QPS in these circumstances. In his requests for each of the first three categories of documents, the applicant named specific individuals, either as complainants or subjects of complaint. The QPS contends that to make a decision in terms which confirm the existence, in the possession of the QPS, of responsive documents, would, in itself, disclose information about the personal affairs of the complainants or subjects of complaint, namely, that they have made a complaint to the QPS or have been the subject of a complaint to the QPS.

6. The FOI Act contains a provision which allows an agency to "neither confirm nor deny" the existence of documents (s.35 of the FOI Act). However, it is specifically limited in its operation to documents containing matter which is exempt under s.36, s.37, or s.42 of the FOI Act. Section 35 of the FOI Act does not apply in respect of matter which is exempt under s.44(1) of the FOI Act. In lieu of the application of s.35 in the present circumstances, the QPS has sought to rely on s.34(3) of the FOI Act, which provides that an agency "*is not required to include any exempt matter in*" a notice of decision.

7. I consider that the QPS has acted in good faith with a view to protecting legitimate privacy interests in a situation where the mechanics of responding to an FOI access application, in accordance with statutory requirements, could incidentally result in disclosure, by necessary implication, of sensitive personal information. However, as the legislation presently stands, I have significant reservations as to whether it permits the QPS to follow the expedient course of action that it has adopted in this situation. Apart from the fact that specific provision has been made for the use of a 'neither confirm nor deny' response in the limited circumstances specified in s.35, the provision made by s.34(1)(b) of the FOI Act also tells against the use of s.34(3) for what is tantamount to a 'neither confirm nor deny' response.

8. One difficulty with the approach taken by the QPS is that it could confuse, prejudice or inhibit the pursuit by an applicant (who has legitimate grounds to argue in support of a case that disclosure of information concerning the personal affairs of another individual would, on balance, be in the public interest) of his or her rights to press such a case for disclosure at the stages of internal review or external review. (I should note that the present applicant has clearly not been prejudiced or inhibited in that regard.)

9. I consider that the practical difficulty which the QPS has sought to address by relying on s.34(3) is one which merits consideration by Parliament, as to whether a practicable legislative solution can be devised. I have previously made a submission to that effect to the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament, which currently has a reference to review the operation of the FOI Act.

External review process

10. In this case, there are two pages in issue. They relate to one of the three incidents referred to in the applicant's FOI access application. I have obtained and examined those pages. Notwithstanding my above comments in relation to s.34(3), I do not consider it necessary to identify in my reasons for decision the particular incident to which the two pages in issue relate. In the circumstances, I do not consider that disclosure of the existence of the two pages discloses any information concerning the personal affairs of an identifiable person.

11. In addition to the matter in issue, I obtained transcripts of Queensland Court of Appeal and High Court proceedings involving the applicant. By letter dated 10 October 2000, I informed the applicant of my preliminary view that any documents in issue did qualify for exemption under s.44(1) of the FOI Act. I referred to comments in the Court of Appeal and the High Court about the strength of the Crown case against the applicant. I invited the applicant to lodge submissions and/or evidence in support of his case, should he wish to contest my preliminary view. The applicant responded by letter dated 23 October 2000, making brief submissions in support of his case, and attaching a copy of the Queensland Director of Public Prosecutions' *Summary of Argument* in the High Court proceedings.

12. In making my decision, I have taken into account the contents of the matter in issue, the reasons for decision given in the QPS's initial and internal review decisions, the arguments made in correspondence from the applicant to the QPS and to my office, and the additional material referred to in the preceding paragraph.

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

13. Section 44(1) of the FOI Act provides:

> ***44.(1)*** *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

14. 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 other than the applicant for access. If that requirement is satisfied, a *prima facie* public interest favouring non-disclosure is established, and the matter in issue will be exempt, unless there exist public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure, so as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

Information concerning personal affairs

15. In *Re Stewart and Department of Transport* (1993) 1 QAR 227, I identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act (see pp.256-257, paragraphs 79-114, of *Re Stewart*). In particular, I said that information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:

- family and marital relationships;

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

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

16. No part of the matter in issue comprises information concerning the personal affairs of the applicant. The matter in issue records a complaint made by one person against another. It contains information of a personal nature about both the complainant and the subject of the complaint. I am satisfied that disclosure of any part of it would enable the applicant to determine the identities of the complainant and the subject of the complaint, i.e., this is not a case where disclosure of the documents, subject to the deletion of identifying information, is practicable. In *Re Godwin and Queensland Police Service* (1997) 4 QAR 70 at p.95 (paragraph 64), I held that the fact that an individual, acting in a personal capacity, has provided information to the QPS, is itself information concerning that individual's personal affairs. That principle applies with respect to the complainant who is referred to in the matter in issue. Moreover, the details of the complaint comprise information concerning the personal affairs of the individuals affected.

17. As to the subject of the complaint, I note that, subject to the exceptions (which are not relevant in the present case) discussed in *Re Griffith and Queensland Police Service* (1997) 4 QAR 109 at pp.124-127 (paragraphs 43-53), it is now well-established that information that indicates or suggests that an identifiable individual has been involved in some alleged (but unproven) criminal activity, or other wrongdoing, or has otherwise been the subject of police investigation or intelligence-gathering, is properly to be characterised as information concerning the personal affairs of that individual: see *Re Stewart* at p.257, paragraph 80; *Re Ainsworth & Anor and Criminal Justice Commission* (Information Commissioner Qld, Decision No. 99010, 17 December 1999, unreported) at paragraph 140; *Re Wong and Department of Immigration and Ethnic Affairs* (1984) 2 AAR 208; *Re Kahn and Australian Federal Police* (1985) 7 ALN N190.

18. I find that the whole of the matter in issue is properly to be characterised as information concerning the personal affairs of persons other than the applicant.

Public Interest balancing test

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

20. The applicant claims that information about any of the three incidents which he contends took place would show that there were other potential assailants who may have been responsible for the death of his wife, thereby raising sufficient doubt as to his conviction to justify a pardon. In his application for external review dated 12 September 2000, the applicant asserted:

> *The information of the complaint **1-2-3**, is relevant to my case as it relates to new or fresh evidence. The information was not placed before the court at my trial by the Crown of the charge murder of* [the applicant's ex-wife] *on the 27th day of August 1996 at Glenwood. This information is relevant to my legitimate expectations of a fair trial under the rules of natural justice. The information relates to a hypotenuse* [sic] *of a **Third Person** being involved in the circumstances surrounding the murder.*

21. In his submission dated 23 October 2000, the applicant argued:

> *It is my submission that the rights of the individual to access such information as may be necessary to establish one's innocence within the operation of the criminal justice system must other than in the most extraneous of circumstances outweigh any perceived infringement of another's personal privacy. Presumably, such would especially be the case in circumstances where the failure to establish innocence on the part of the accused will result in the imposition of a term of life imprisonment.*
>
> …
>
> *Such an application* [for a pardon] *is a legitimate pursuit of my rights of redress and as such ought not to be discarded out of hand. Further, although you correctly refer to various aspects of the transcript from my appeals to date, I am sure that you will be well aware of matter such as the ultimate outcome in the case of **R v Condren** or, perhaps even more appropriately, the matter of **R v Chamberlain**.*

22. In his external review application dated 12 September 2000, the applicant referred to a number of cases concerning claims to public interest immunity. While I am here considering a claim for exemption under the FOI Act, rather than a claim of public interest immunity in court proceedings, I accept that those cases point to situations where there may be a public interest consideration favouring disclosure, to a person in the position of the applicant, of relevant, potentially exculpatory material. Given that criminal justice legislation affords avenues for correcting a miscarriage of justice (e.g., appeal rights; s.672A of the *Criminal Code*), there may be a public interest in a person obtaining access to information that would assist the *bona fide* use of those avenues (as distinct from, say, accessing information merely to pester or harass a victim or witness).

23. I acknowledge a public interest in enhancing the operation of the criminal justice system, and in persons in a position such as the applicant having access to matter which may assist in establishing that they should regain their liberty. However, in the present case, that public interest must be weighed against the public interest in protecting the privacy of information concerning the personal affairs of the individuals identified in the matter in issue. I consider that it is appropriate (in assessing the weight to be accorded to the public interest considerations identified in the first sentence of this paragraph) to take into account the strength of the Crown case against the applicant, and the likelihood that disclosure of the matter in issue would assist the applicant to mount a persuasive case in support of the remedy he proposes to seek.

24. In that regard, it is relevant to consider the comments of the learned appellate judges who have been required to analyse the evidence given at the applicant's trial. In the reasons for judgment delivered by the Queensland Court of Appeal on 12 June 1998 in *R v Fox* [1998] QCA 121, McPherson JA (with whom Pincus JA and Thomas J agreed) stated:

> *At the trial, at which the appellant himself gave evidence, the only issue was one of identity. There was, however, ample evidence, both direct and circumstantial, to identify the appellant as the intruder who fired the gunshots. ...* [His Honour summarised the evidence as to motive.] … *There was other evidence to connect him with the crime, including an oral admission to an acquaintance, and forensic evidence linking him with the car; with cartridge cases from which the shot had come; and with the gun from which the shots had been fired, which the police claimed to have found at or near his hiding place at Mt Glorious where he was later arrested.*
>
> *It does not go too far to say that the prosecution evidence against the appellant at his trial was overwhelming, making it in the circumstances not at all surprising that on appeal the complaint that the verdict was unsafe was not pursued.*

25. In addition, at the hearing of the application for special leave to appeal to the High Court on 22 June 2000, Kirby J made the following comments:

> *… The case, on one view, at least on my preliminary view and having read the applicant's submissions, … seems an overwhelming Crown case, overwhelming.*
>
> *…*
>
> *The sons of the applicant recognised him. He was found in hiding after several months. The weapon that was used in the homicide was found nearby after a search. It is an overwhelming Crown case, and assume one got the orders that you are seeking right and tendered the issue to a Full Court, one would like to think that it was being tendered in a case where one had a feeling in the back of one's mind, if only Mr Fox was legally represented by a good legal counsel, then this will or might make a difference. Now, I cannot bring myself to that view in this case.*

26. The above comments indicate the strength of the Crown case against the applicant, which is discussed in the appeal transcripts. The copy of the Director of Public Prosecutions' *Summary of Argument* to the High Court (which was provided by the applicant) also gives a useful summary of the case against the applicant.

27. In the face of this material, the applicant seeks to obtain any information which might support his claim that there existed one or more potential alternative assailants. To the extent to which he is aware of any incidents involving a third party, he can of course refer to them in any petition for pardon, without necessarily having himself had access to documents of the QPS. I note that the incidents described by the applicant in his FOI access application all occurred well over a year before the murder of the applicant's ex-wife. In the circumstances, I am not satisfied that the matter in issue is sufficiently relevant to, or supportive of, a case for the applicant to obtain a pardon, as to outweigh the public interest in protecting the privacy of information concerning the personal affairs of the individuals identified in the matter in issue.

28. I find that disclosure of the matter in issue to the applicant would not, on balance, be in the public interest, and, accordingly, I find that the matter in issue is exempt from disclosure to the applicant under s.44(1) of the FOI Act.

Conclusion

29. For the foregoing reasons, I affirm the decision under review (identified in paragraph 4 above) that the matter in issue is exempt from disclosure to the applicant under s.44(1) of the FOI Act.

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INFORMATION COMMISSIONER