

'KNWY' and the Department of Education

(S 139/97, 6 January 1998, Information Commissioner Albietz)

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

1. - 4. [These paragraphs removed.]

REASONS FOR DECISION

Background

5. [The access applicant's] initial FOI access application sought quite a broad range of information about his children, [KNWY]. By the time [KNWY's] objection to disclosure of information about them came to be reviewed by Mr Parsons, [the access applicant] had reduced the extent of the information to which he sought access, to the following (as per the letter dated 14 August 1997 sent by [the access applicant's solicitors], to Mr Parsons):

... only those documents which reveal evidence of the names which the children use, and/or are registered under, and their marks achieved in School work and assignments need be considered. All other information including family background, attendance records, the assignments themselves really need not be disclosed.

6. In the decision under review (being the internal review decision made on behalf of the Department of Education by Mr Parsons on 22 August 1997), Mr Parsons identified the documents which contained information falling within the terms of [the access applicant's] refined FOI access application and provided [KNWY] with copies of those documents (subject to the deletion of information found by Mr Parsons to be exempt matter under the FOI Act) so that they could see exactly what information [the access applicant] would obtain access to, in accordance with the terms of Mr Parson's decision.
7. By letter dated 16 September 1997, [KNWY] applied to me for review, under Part 5 of the FOI Act, of Mr Parson's decision that [the access applicant] was entitled to obtain access under the FOI Act to information of the kind requested in [the access applicant's] refined FOI access application, as contained in the following documents:

File	Document numbers
A	1-7, 11-12
B	6-11
C	10
D	6, 12, 17, 23, 25-26, 30, 32, 36-37, 39, 43-44, 46, 49
E	2
F	7, 16, 19
G	5, 14, 19, 24, 34, 44, 53, 60
H	23, 26, 28, 30, 62, 75, 91, 109, 123, 140
I	7, 17, 39, 51, 67, 73, 86
J	10, 14, 16, 26, 32, 40, 49, 61, 70, 90-91, 94, 97-98, 101, 105, 115, 120

K	3,11, 14, 18, 32, 36, 40, 47, 53, 56, 58, 63, 69, 71, 76, 83, 88, 93, 100, 107, 113, 117, 125
L	5, 13
M	2-6, 11

That information constitutes the matter in issue in this review.

8. In making my decision in this review, I have taken into account the following matters:
- [the access applicant] still has legal responsibilities towards [KNWY] of a kind which were formerly described as "guardianship";
 - the nature of the information in issue;
 - the objections [KNWY] have raised to [the access applicant] obtaining access to the information in issue, in particular the comments made by [KNWY] in their letters to Ms Keast dated 28 May 1997 and in their application for external review dated 16 September 1997;
 - the general impact which [KNWY's] mother feels that [the access applicant's] obtaining of the information in issue would have on [KNWY], as indicated in her letter to Ms Keast dated 28 May 1997.
9. I am not obliged to follow internal procedural guidelines of the Department of Education (the Department), although I may take them into account in assisting me to understand the background to the issues raised in this external review.

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

10. I am bound to apply the law as enacted by Parliament in the words of the FOI Act. Pursuant to s.21 of the FOI Act, [the access applicant] has a legally enforceable right to be given access under the FOI Act to documents in the possession of the Department, except to the extent that they contain exempt matter. In this case, the only exemption provision in the FOI Act which could possibly apply to the documents in issue is s.44(1), which 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.

11. In *Re Director-General, Dept of Families, Youth & Community Care and Dept of Education* (Information Commissioner Qld, Decision No. 97002, 18 February 1997, unreported) at paragraph 17, I held that:

Information relating to a student's performance or behaviour at school is information which concerns the student's personal affairs, and is prima facie exempt under s.44(1).

12. It is therefore my preliminary view that the matter in issue in this external review consists of information which concerns [KNWY's] personal affairs. Under s.44(1) of the FOI Act, the matter in issue is *prima facie* exempt, subject to the application of the public interest balancing test incorporated in s.44(1). This means that I have to decide whether the public interest in protecting the privacy of information concerning [KNWY's] personal affairs is

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outweighed by the public interest in a person, who has legal responsibilities as [KNWY's] father and legal guardian, having access to that information.

Public interest balancing test

13. The *Family Law Act 1975* Cth is a Commonwealth law which spells out the legal responsibilities of parents. It defines “parental responsibility” as “all the duties, powers, responsibilities and authority which, by law, parents have in relation to children”: see s.61B of the *Family Law Act*. Section 61C of the *Family Law Act* goes on to say:

61C.(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.

14. [The access applicant's] solicitors have informed me that [the access applicant] has what used to be referred to as a “joint guardianship” order with respect to [KNWY], and [KNWY] have not disputed that. Therefore, the responsibilities referred to above were not taken away from [the access applicant] when the Family Court granted [KNWY's] mother a custody order (as it then was) in respect of [KNWY], because (in the words of s.61D of the *Family Law Act*):

61D.(2) A parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for the child except to the extent (if any):

- (a) expressly provided for in the order; or*
- (b) necessary to give effect to the order.*

15. At that time, the legal responsibilities of a "guardian" were described in the *Family Law Act* as follows:

63E. (1) *A person who is the guardian of a child under this Act has responsibility for the long-term welfare of the child and has, in relation to the child, all the powers, rights and duties that are, apart from this Act, vested by law or custom in the guardian of a child, other than:*

- (a) the right to have the daily care and control of the child; and*
- (b) the right and responsibility to make decisions concerning the daily care and control of the child.*

16. On 11 June 1995, the *Family Law Reform Act 1995* Cth came into effect and changed the type of orders which the Family Court is empowered to make about parenting (see Part VII, Divisions 5 and 6). It also provided, in Schedule 2, for how guardianship orders under the “old Act” are to be treated:

Treatment of custody, access, maintenance and guardianship orders

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2.(4) An order for the guardianship of a child in force under the old Act immediately before the Part VII commencement, has effect, after that commencement, as if:

...

(b) so far as it deals (expressly or impliedly) with other aspects of parental responsibility for the child—it were a specific issues order made under Part VII of the amended Act.

17. The *Family Law Act 1975* imposes a positive responsibility on [the access applicant] with respect to [KNWY's] “long-term care, welfare and development”, which has not been altered by either the parents' separation, or the custody order made in the mother’s favour. I am satisfied that matters relating to a child’s education are matters which concern a child’s “long-term care, welfare and development”. What used to be referred to as “custodianship” at common law (but what we now understand as “long-term care, welfare and development”) was said by Nygh J of the Family Court in *McEearney and McEearney* (1980) FLC ¶90-866 at p.75,501 (a case in which the father was granted custody of the child, Y) to include:

[A] any decisions which transcend the daily management of Y, any decisions in other words which will have an important effect upon her future are decisions in which both parents should consult each other. First of all, the joint custodianship [read guardianship] will give the right to the mother to be kept advised at all times of the educational progress of Y, to be supplied with copies of school reports when they become available and the mother is to be consulted should there be any plan to change the schooling of Y.

18. I am satisfied that [the access applicant's] obtaining access to the matter now in issue, i.e., the names [KNWY] use at school, and their marks from 1996, will not adversely affect [KNWY] in the way contemplated in their letters dated 28 May 1997 (when a much wider range of information was in issue). [The access applicant] has a positive responsibility imposed on him by the *Family Law Act 1975* which only the Family Court of Australia can alter. So long as he has not had his responsibilities removed from him by the Family Court, I consider that there is a public interest in [the access applicant] having access to sufficient information to be properly informed of [KNWY's] educational progress. I consider that the public interest in [the access applicant] having access to the matter in issue (being the matter proposed for release to [the access applicant] in Mr Parson's internal review decision dated 22 August 1997 - see paragraph 7 above) is sufficiently strong to outweigh the public interest in protecting the privacy of that information, and warrants a finding that disclosure to [the access applicant] of the matter remaining in issue would, on balance, be in the public interest. I therefore find that the matter remaining in issue is not exempt from disclosure to [the access applicant] under s.44(1) of the FOI Act.

DECISION

19. For the foregoing reasons, I affirm the decision under review, being the decision made on behalf of the Department by Mr Parsons on 22 August 1997.

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