OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 04/2005
Application 153/04

Participants:

ROBERT & PERLITA WILLIAMSON
Applicants

QUEENSLAND POLICE SERVICE
Respondent

"A"
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – matter in issue comprising audio-tape and video-tape recording of an interview of the third party – third party pleaded guilty to two counts of assault occasioning bodily harm under s.339(1) of the *Criminal Code Act 1899* Qld – no conviction recorded – matter in issue did not form part of Court Brief - 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.6, s.32, s.38, s.39(1), s.40, s.44(1), s.44(2), s.45(1)(c), s.46(1)(b), s.47, s.49, s.78
Attorney-General Act 1999 Qld s.9A
Criminal Code Act 1899 Qld s.339(1), s.669A, s.671
Criminal Offence Victims Act 1995 Qld Part 2 (ss.4-18)
Police Powers and Responsibilities Act 2000 Qld Chapter 8B (ss.319-330)

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Director-General, Department of Families, Youth and Community Care and Department of Education and Ors, Re (1997) 3 QAR 459
Godwin and Queensland Police Service, Re (1997) 4 QAR 70
KBN and Department of Families, Youth and Community Care, Re (1998) 4 QAR 422
New York Times Co. and National Aeronautics and Space Administration, 920 F.2d 1002 (D.C. Cir. 1990)
Richardson and Queensland Police Service, Re (2001) 6 QAR 125
Stewart and Department of Transport, Re (1993) 1 QAR 227
Summers and Cairns District Health Services, Re (1997) 3 QAR 479
Willsford and Brisbane City Council, Re (1996) 3 QAR 368

DECISION

I affirm the decision under review (which is identified in paragraph 4 of my accompanying reasons for decision) that the matter in issue (identified in paragraph 6 of my reasons for decision) is exempt from disclosure under s.44(1) of the *Freedom of Information Act 1992* Qld.

Date of decision: 20 April 2005

….....
CATHI TAYLOR
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicants seek review of a decision by the respondent, the Queensland Police Service (the QPS), refusing them access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to a taped record of interview of the third party conducted by an officer of the QPS on 3 January 2004 in relation to an incident on 2 January 2004. As a result of that incident the third party was charged, under s.339(1) of the *Criminal Code Act 1899* Qld (the Criminal Code), with two counts of assault occasioning bodily harm. The applicants were the victims in relation to the assault charges. The matter was dealt with on 20 January 2004 before the Magistrates Court, at which time the third party pleaded guilty. The Magistrate ordered that no conviction be recorded. The tapes comprising the record of interview did not form part of the Court Brief and they are the matter in issue in this review.

2. By letter dated 16 March 2004, the applicants applied to the QPS for access, under the FOI Act, to documents concerning the incident on 2 January 2004, specified as:

   - *An extract of a crime report*
   - *The Court brief*
   - *A copy of the video of interview*
   - *Any other relevant information that is available to us*

3. Searches conducted by the QPS located fourteen folios and the taped record of interview of the third party. By letter dated 30 March 2004, Acting Inspector J L Owen of the QPS decided to give the applicants access to folios 1-14 subject to the deletion of segments of matter, and to refuse the applicants access to the taped record of interview, relying on s.44(1) of the FOI Act. As a result of discussions between the applicants and the QPS, the

QPS agreed to reconsider its decision regarding the taped record of interview. By letter dated 15 April 2004, however, Acting Inspector Owen advised the applicants that he still considered the taped record of interview exempt under s.44(1) of the FOI Act.

4. By letter dated 19 April 2004, the applicants applied to the QPS for internal review of Acting Inspector Owen's decision "*to deny us a copy of the video recording, taped conversation and any other available material we do not have.*" By letter dated 4 May 2004, Assistant Commissioner C M McCallum of the QPS informed the applicants that he had decided to affirm Acting Inspector Owen's decision to refuse access to the taped record of interview, pursuant to s.44(1) of the FOI Act.

5. By letter dated 5 May 2004, the applicants applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Assistant Commissioner McCallum's decision to "*deny us a copy of the video*".

External review process

6. A copy of the taped record of interview was obtained. It comprises two tapes; one audio and one video. The audio-tape captures sound only and the video-tape captures images only. The tapes are to be played in synchronisation.

7. By letter dated 4 June 2004, Assistant Information Commissioner (AC) Barker informed the third party of the review and invited him to apply to become a participant in the review, in accordance with s.78 of the FOI Act. By letter dated 22 June 2004, the third party's solicitor responded by advising that the third party "*objects in the strongest possible terms to the disclosure of the* [taped record of interview] *to the applicants*…", and wished to participate in the review.

8. The participants were consulted to determine whether this review could be resolved through negotiation. A resolution of the review could not be achieved. By letter dated 6 August 2004, the applicants were provided with a preliminary view from this office that the taped record of interview was exempt under s.44(1) of the FOI Act. This preliminary view identified some of the matter in issue as concerning the 'shared personal affairs' of the applicants and the third party, and suggested that if the applicants were to seek access to a transcript of the 'shared personal affairs' information, the public interest considerations would weigh in favour of disclosure of that information. Accordingly, the applicants were requested to advise whether they instead wished to pursue access to a transcript of the taped record of interview.

9. The applicants responded by letter dated 8 August 2004, stating:

> *We maintain our assertion that in the public interest, we are entitled to our application for video and audio-tape.*
> …
> *If you wish to harbour the so-called 'personal affairs' of this thug, then you may offer us a written transcript.*

10. Subsequent communications confirmed that the applicants were not electing to pursue access to a transcript of the taped record of interview in lieu of the tapes.

11. Following a telephone conversation between Mr Williamson and a member of my staff, a further submission was received from the applicants on 16 August 2004. The applicants stated "*we are not prepared under any circumstances to be persuaded out of our application for the video and audiotape…*", and requested written confirmation from my office in that regard, and this was provided to the applicants on 17 August 2004.

12. A copy of the applicants' submissions dated 8 August 2004 and 16 August 2004, together with the letter from my office to the applicants dated 6 August 2004, were provided to the QPS and the third party's solicitor. Both participants were given the opportunity to respond, or to provide additional material in support of their respective positions. By letter dated 23 August 2004, the third party's solicitor acknowledged receipt of this correspondence, and stated that any submissions would be made to my office by the requested date. No submissions have been received from the third party, nor have any other submissions been received from any of the participants in this review.

13. In making my decision in this matter, I have taken into account:

- the taped record of interview (one audio-tape and one video-tape to be played in synchronisation);
- the applicants' FOI access application dated 16 March 2004, application for internal review dated 19 April 2004 and application for external review dated 5 May 2004;
- the QPS's initial, amended initial, and internal review decisions, dated 30 March 2004, 15 April 2004 and 4 May 2004, respectively;
- the applicants' letter to the QPS dated 26 April 2004 (attached to the applicants' application for external review);
- the applicants' submissions dated 8 August 2004 and 16 August 2004;
- a record of a telephone conversation between a member of staff of the Department of Justice and Attorney-General and a member of my staff on 1 April 2005;
- the transcript of proceedings and decision of the Magistrates Court at Goondiwindi on 20 January 2004;
- the Court Brief (in relation to each assault charge);
- excerpts from QPS notebook no. H 003346; and
- Crime report no. 04/3889.

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

14. 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.*

(a) Requirements for exemption

15. In applying s.44(1) of the FOI Act, the first question to ask is whether disclosure of the matter in issue would disclose information concerning the personal affairs of a person other than the applicant for access. If that is the case a public interest consideration favouring non-disclosure is established, and the matter in issue will be exempt, unless there are public interest considerations favouring disclosure which outweigh all public interest considerations favouring non-disclosure.

16. In *Re Stewart and Department of Transport* (1993) 1 QAR 227, Information Commissioner Albietz discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations) as it appears in the FOI Act (see pp.256-257, paragraphs 79-114, of *Re Stewart*). In particular, Commissioner Albietz 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.

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

(b) Application to the taped record of interview

18. The bulk of the information contained in the taped record of interview concerns the third party's version of the events of 2 January 2004. There is also information identifying the third party's personal characteristics (for example, date of birth, citizenship status, marital status, living arrangements, schooling *et cetera*), as well as reference to the third party's health or wellbeing. I am satisfied that the information contained in the taped record of interview falls within the core meaning of "personal affairs" as discussed in *Re Stewart*.

19. I am further satisfied that the information contained in the taped record of interview is properly to be characterised as:

(a) information which solely concerns the personal affairs of the third party; and
(b) information which concerns the 'shared personal affairs' of the third party and the applicants (i.e., information about the incident on 2 January 2004).

20. I am satisfied that the information that falls within category (a) above is *prima facie* exempt from disclosure under s.44(1) of the FOI Act, subject to the application of the public interest balancing test which is incorporated within s.44(1).

21. Commissioner Albietz discussed the concept of information concerning 'shared personal affairs', and the application to it of s.44(1) of the FOI Act, in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.343-345 (paragraphs 172-178). At paragraph 176, Commissioner Albietz 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 is not practicable;*
> *(b) the s.44(2) exception does not apply; 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).*

22. I am satisfied that the information contained in the taped record of interview that concerns the applicants' personal affairs is inextricably intertwined with information concerning the personal affairs of another person (the third party), such that it is exempt from disclosure to the applicants under s.44(1) of the FOI Act, again, subject to the application of the public interest balancing test which is incorporated within s.44(1).

(c) Public interest balancing test – general observations

23. The public interest balancing test incorporated in s.44(1) is the same kind that appears in s.38, s.39(1), s.40, s.45(1)(c), s.46(1)(b), s.47 and s.49. In all of those provisions, satisfaction of the initial test for exemption means that there is a public interest consideration accepted by Parliament as weighing against disclosure of the relevant information. In the case of s.44(1), it is the public interest in protecting the privacy of information concerning the personal affairs of an identifiable individual.

24. Because of the way that 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 are public interest considerations favouring disclosure and, if so, whether they outweigh all public interest considerations favouring non-disclosure.

25. Where the application for access to information concerns the personal affairs of the access applicant, the access applicant is entitled to whatever assistance can be obtained from section 6 of the FOI Act. Section 6 effects a relaxation of the general principle of viewing release under the FOI Act as 'release to the world at large', 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 (see *Re KBN and Department of Families, Youth and Community Care* (1998) 4 QAR 422, at p.437, paragraph 58).

26. A decision-maker must allocate appropriate weight to the public interest in safeguarding the privacy of information concerning an individual's personal affairs, having regard to the character and significance of the particular information in issue. Some types of information about a person's personal affairs are deserving of greater weight than others, in terms of the relative importance of the privacy interest to be protected. For example, Commissioner Albietz observed that protection of the privacy of an individual's medical records is usually deserving of strong weight: see *Re Summers and Cairns District Health Services* (1997) 3 QAR 479 at p.484, paragraph 18. On the other hand, the privacy interest attaching to the identification of a person as a dog owner was held not to be a particularly strong one: see *Re Willsford and Brisbane City Council* (1996) 3 QAR 368 at p.374, paragraph 22.

27. Other facts may diminish the weight to be accorded to the public interest in protecting the privacy of information concerning an individual's personal affairs. For example, if the particular information in issue can be obtained with little difficulty from sources in the public domain, or has received publicity in the popular media (see *Re Richardson and Queensland Police Service* (2001) 6 QAR 125 at p.142, paragraph 40), and especially if the individual concerned has volunteered (or consented to) the public disclosure of the information (see *Re Director-General, Department of Families, Youth and Community Care and Department of Education and Ors* (1997) 3 QAR 459 at p.467, paragraph 22), it may be difficult to accord much weight to the relevant privacy interests of the affected individual.

(i) The applicants' submissions

28. The applicants have made a number of submissions in support of their case for disclosure of the taped record of interview. The following is a summary of the central arguments raised by the applicants:

(1) disclosure of the taped record of interview would assist the applicants to pursue a legal remedy in respect of the incident on 2 January 2004;
(2) disclosure of the taped record of interview would assist the applicants in preparing a submission to the Attorney-General for his consideration under s.669A of the Criminal Code;
(3) disclosure of the taped record of interview would assist the applicants to pursue an action against the Attorney-General in respect of alleged negligence and deceit;
(4) there is a public interest in enhancing the accountability of the QPS regarding the manner in which it conducts its investigations, where that investigation resulted in the laying of formal charges;
(5) it is in the public interest to assist victims of crime; and
(6) the applicants are aware of some of the information contained in the taped record of interview.

29. I will discuss each of the above submissions in turn.

- Pursuit of legal remedy/action regarding the incident on 2 January 2004

30. In relation to (1) and (2) above, the applicants have submitted that disclosure of the taped record of interview will assist them to pursue a legal remedy either in respect of the injuries sustained by them in the incident on 2 January 2004, or in seeking the Attorney-General's intervention with respect to the outcome of the court hearing on 20 January 2004. (Section 669A(1) of the Criminal Code gives the Attorney-General a right of appeal against a sentence imposed after a plea of guilty.)

31. In *Re Willsford*, Commissioner Albietz said (at pp.372-373, paragraphs 16-18):

> *16. I consider that, in an appropriate case, there may be a public interest in a person who has suffered, or may have suffered, an actionable wrong, being permitted to obtain access to information which would assist the person to pursue any remedy which the law affords in those circumstances* (cf. Re Cairns Port Authority and Department of Lands *(1994) 1 QAR 663 at pp.713-714, paragraphs 103-104; p.717, paragraph 120; and p.723, paragraph 142). The public interest*

necessarily comprehends an element of justice to the individual: see Re Pemberton and The University of Queensland *(Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported) at paragraphs 178 and 190, and the cases there cited. Although the public interest I have described is one which would apply so as to benefit particular individuals in particular cases, I consider that it is nevertheless an interest common to all members of the community and for their benefit.*

17. *The mere assertion by an applicant that information is required to enable pursuit of a legal remedy will not be sufficient to give rise to a public interest consideration that ought to be taken into account in the application of a public interest balancing test incorporated into an exemption provision in the FOI Act* (cf. Re Alpert and Brisbane City Council *(1995) 2 QAR 618 at paragraph 30). On the other hand, it should not be necessary for an applicant to prove the likelihood of a successful pursuit of a legal remedy in the event of obtaining access to information in issue. It should be sufficient to found the existence of a public interest consideration favouring disclosure of information held by an agency if an applicant can demonstrate that -*

    (a) loss or damage or some kind of wrong has been suffered, in respect of which a remedy is, or may be, available under the law;
    (b) the applicant has a reasonable basis for seeking to pursue the remedy; and
    (c) disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.

18. *The existence of a public interest consideration of this kind would not necessarily be determinative - it would represent one consideration to be taken into account in the weighing process along with any other relevant public interest considerations (whether weighing for or against disclosure) which are identifiable in a particular case. On the other hand, it would ordinarily be true to say (to the extent that a decision-maker under the FOI Act is able to make an objective assessment of these matters from the material put forward by an applicant to establish (a), (b) and (c) above) that the greater the magnitude of the loss, damage or wrong, and/or the stronger the prospects of successfully pursuing an available remedy in respect of the loss, damage or wrong, then the stronger would be the weight of the public interest consideration favouring disclosure which is to be taken into account in the application of a public interest balancing test incorporated in an exemption provision of the FOI Act.*

32. As already stated (at paragraph 1 above), the third party was charged under s.339(1) of the Criminal Code with two counts of assault occasioning bodily harm. Those charges were dealt with on 20 January 2004 before the Magistrates Court, at which time the third party pleaded guilty. It is clear from the transcript of proceedings of that hearing that the applicants suffered some loss or damage in respect of the incident, although the applicants contend "*the whole event was down-sized, both in terms of charges laid and injuries sustained …*" (in an attachment to their letter dated 16 August 2004).

33. I do not consider that information describing the personal characteristics of the third party would assist the applicants in pursuing, or in determining whether to pursue, a legal remedy for damages suffered as a result of the incident on 2 January 2004. I therefore find that this public interest consideration has no significant weighting in respect of the category (a) information described in paragraph 19 above.

34. Applying the principles discussed in paragraph 31 above, however, I find that disclosure of information that consists of the third party's version of the incident on 2 January 2004 (i.e., the category (b) information) would assist the applicants in pursuing, or in determining whether to pursue, a legal remedy for damages suffered as a result of that incident.

35. The identification of a public interest consideration favouring disclosure of the category (b) information does not necessarily lead to a finding that disclosure of that information would, on balance, be in the public interest. In some cases, the character and significance of the particular information may be deserving of greater weight (see paragraph 26), so that the identified public interest consideration is not sufficiently strong to warrant a finding that disclosure would, on balance, be in the public interest. For the reasons explained at paragraphs 62-67 below, I find that the privacy interest of the third party is deserving of greater weight in the circumstances of this case, so that disclosure of the category (b) information would not, on balance, be in the public interest.

36. As regards the applicants' submission that disclosure of the taped record of interview would assist the applicants to prepare a submission to the Attorney-General for his consideration under s.669A of the Criminal Code, I find that submission is deserving of little weight. An appeal against the decision of the Magistrates Court would have to be based on the material that was placed before that Court. An appeal court seldom agrees to access and take into account fresh evidence.

37. I also note that an appeal to the Court by the Attorney-General against sentence is required to be made within one calendar month of the date of such sentence (see s.671 of the Criminal Code). That period has expired, and although the Court may, in certain circumstances, grant an extension of time, the applicants have not presented any information which would suggest that there might be a basis to apply to the Court for such extension.

- Pursuit of legal remedy/action against the Attorney-General

38. In their application for internal review dated 19 April 2004, the applicants submitted that disclosure of the taped record of interview would assist in:

> *… a review of why the Attorney General, Mr Rod Welford, incorrectly advised us he did not have the power to appeal this matter, when he is the only Attorney General in Australia, that has exclusive rights.*

39. And, in their submissions dated 8 August 2004:

> *… it would also be in the public interest for an investigation of gross negligence and deceit against the Attorney General for his total ineptness in handling this matter. He has rejected an application, of a similar nature, of a Relator application under the Attorney General's Act, which we believe he negligently undertook and would have been under a conflict of interest, given his previous sloppy involvement.*

40. (Under s.9A of the *Attorney-General Act 1999* Qld, a relator application can be made to the Attorney-General to bring a proceeding to enforce and protect public rights.)

41. Applying the principles established in *Re Willsford*, I am not satisfied that disclosure of the taped record of interview would assist the applicants to pursue a remedy, or to evaluate whether a remedy is available, against the Attorney-General in respect of alleged negligence and/or deceit in the exercise of his powers under s.669A of the Criminal Code and s.9A of the *Attorney-General Act 1999* Qld. The applicants have not provided any information which would suggest that the taped record of interview was considered by the Attorney-General at the time he considered the applicants' requests to exercise his statutory powers, and I am satisfied, following inquiries conducted by my office with the Department of Justice and Attorney-General, that the taped record of interview was not before the Attorney-General at that time. That being the case, any negligence and/or deceit which the applicants allege against the Attorney-General could not include his failure to consider the information in the taped record of interview. Therefore, I am satisfied that the disclosure of the taped record of interview would not assist the applicants to pursue a remedy, or evaluate whether a remedy is available, in respect of actions/decisions taken by the Attorney-General in that respect.

42. I therefore find that the applicants' submissions in relation to item (3) in paragraph 28 above are not deserving of any significant weight.

- Accountability of the QPS

43. The applicants state that they have concerns regarding the practices and/or procedures adopted by the QPS during its investigation, and the extent of the charges that were laid. Specifically, it is the applicants' contention that the QPS laid insufficient charges against the third party, and failed to follow procedures regarding the testing of the third party for infectious diseases, as provided for in Chapter 8B of the *Police Powers and Responsibilities Act 2000* Qld (the PPR Act).

44. In their application for internal review dated 19 April 2004, the applicants submitted that disclosure of the taped record of interview would assist:

> *To further investigation into police practices, which are before the Police Minister, CMC, Ombudsman, Civil Liberties, Attorney General*

45. And, in their submissions dated 8 August 2004, the applicants stated:

> … [the third party] *was not detained for the purpose of a blood and urine test as provided by law, given that I had been spat in the face, by* [the third party].
> …
> *It is definitely in the public interest, that police interviews be subject to scrutiny, as there were many charges in this matter, that should have been made, that were not laid.*

46. In their submission dated 16 August 2004, the applicants attached a copy of an article explaining the protocol for requesting blood and urine samples under the PPR Act, and a submission which the applicants provided to the QPS in support of their position that the "*whole court process… was a mockery*".

47. Commissioner Albietz considered the position of complainants to the QPS at some length in *Re Godwin and Queensland Police Service* (1997) 4 QAR 70. At paragraph 52, he stated:

> *52. Whether or not the applicant is a victim of crime is a moot point. The applicant asserts that he is. Based on the statements obtained on investigation of the applicant's complaints, the QPS either does not accept that the applicant is a victim of crime, or at least does not consider that the available evidence supports the laying of charges against Mr A (the alleged perpetrator according to the applicant's complaint). Nevertheless, it is clear that the applicant was a complainant to the QPS, who had suffered injury in an altercation. Once the QPS had decided, after investigation, to take no formal action in respect of the applicant's complaint, I consider that the applicant was entitled to some form of explanation from the QPS, as a matter of sound administrative practice from a provider of publicly-funded services to the community, as to why it had been decided that no formal action would be taken. <u>The extent of the detail that could be offered by way of explanation in such circumstances would necessarily vary from case to case, depending on the need to respect any applicable obligations or understandings of confidence, or applicable privacy considerations.</u> Subject to any such constraints, I consider that there is a legitimate public interest in a complainant, especially a victim of crime, being given sufficient information to be satisfied that the QPS has conducted a thorough investigation (for instance, that the QPS has endeavoured to interview all relevant witnesses nominated by the complainant), and reached a fair and realistic decision about whether the available evidence was sufficient or insufficient to justify any formal action being taken in respect of the complaint.*
>
> (my underlining)

48. I have highlighted the underlined words in the above-quoted passage to indicate that, although there is a public interest in the QPS providing a satisfactory account to a complainant of the outcome of its investigation, there will be cases in which the QPS will have to balance the desirability of disclosure (particularly, the extent of disclosure that would be appropriate) against the need to protect the interests of others. Although *Re Godwin* dealt with circumstances where no formal action was taken, I nonetheless consider that statement applies to questions of accountability of law enforcement agencies generally.

49. In the present case, the applicants have been given access to notes made by the police officer who was called to the scene of the incident following receipt of the complaint by the QPS, and who questioned the third party after he was located (following which the third party voluntarily took part in the taped record of interview). The applicants have also been given access to the Court Brief and the crime report, and have obtained a copy of the transcript of proceedings of the Magistrates Court on 20 January 2004.

50. While the applicants may be dissatisfied with the extent and number of charges that were laid, and consider that the circumstances surrounding the incident warranted the third party's arrest and submission to testing for infectious diseases, I nonetheless consider that the applicants have been given sufficient information to assess the investigation by the QPS and to form their own

view as to its thoroughness. Material facts were gathered from the applicants (as complainants) and the offender (the third party) regarding the assault, possible witnesses were sought out by the QPS, and formal charges were subsequently laid.

51. As regards the decision (or lack thereof) by the QPS to arrest the third party, lay other charges, or require the third party to submit to testing for infectious diseases, my powers of review under Part 5 of the FOI Act are limited to determining whether or not matter in issue is exempt matter under the FOI Act; they do not extend to review of decisions by, or conduct of, the QPS.

52. I find that disclosure of the taped record of interview would not enhance the accountability of the QPS, so that no significant weight should be accorded to this public interest consideration.

- It is in the public interest to assist victims of crime

53. In their application for internal review dated 19 April 2004, the applicants stated:

> - *We believe, it is in the Public interests that we being the victims of crime are given every opportunity to seek compensation and ensure the legal procedure is seen to deliver justice.*
> - *We are not interested in any revelation under the dictionary definitions of 'personal' but we are interested in freedom of information and victim's rights.*

54. And, in their letter to the QPS dated 26 April 2004, the applicants stated:

> *Further, you will no doubt be aware of the Fundamental Principles, law officers and government employees are required to extend to Victims of Crime under an Act of Parliament known as the Criminal Offence Victims Act 1995.*

55. In relation to the applicants' submissions that disclosure of the taped record of interview will assist them "*to seek compensation*", I refer to my comments at paragraphs 33-34.

56. As regards "victim's rights", Part 2 of the *Criminal Offence Victims Act 1995* Qld (the COV Act) enshrines "Fundamental Principles of Justice for Victims of Crime" by recognising, amongst other things, that public officials are to treat victims of crime with courtesy, compassion and respect, and that victims of crime should be given access to the state justice system. Section 14 of the COV Act requires a prosecutor, at the sentencing of an offender to inform the Court "*of appropriate details of the harm caused to a victim by the crime*", and section 15 sets out what information is available to a victim of crime, on request, in relation to an investigation. In a submission prepared for the QPS regarding the extent of the charges laid and their experience with the "*whole court process*" (as an attachment to their letter dated 16 August 2004), the applicants expressed concern that their "*injuries were progressively downgraded*", and that they were "*denied* [their] *rights under the* [COV Act]."

57. In the circumstances of this case, I am not satisfied that disclosure of the taped record of interview would provide the applicants with any additional information required to be provided to the applicants as part of the QPS's obligations under Part 2 of the COV Act. The QPS is not obliged to provide the applicants with a copy of the taped record of interview; rather, s.15 of the COV Act requires the QPS to provide the applicants with information about the investigation and charges laid. For the reasons explained at

paragraphs 43-52 above, I have already made the finding that disclosure of the taped record of interview will not enhance the accountability of the QPS in that respect. As regards the QPS's obligation to inform the Court of the details of the applicants' harm, I am not satisfied that release of the taped record of interview would provide the applicants with any information which is not already available to them from documents in their possession. Indeed, the applicants have provided my office with a detailed critique of their injuries based on information already in their possession.

58. I find that no significant weight should be accorded to this public interest consideration.

- the applicants are aware of some of the information contained in the taped record of interview.

59. As discussed at paragraph 27 above, the fact that some of the information is publicly available, or has been disclosed, is not a consideration telling towards disclosure of the information in question, but rather goes towards reducing the weight that can reasonably be attributed to protecting the third party's privacy interest. I acknowledge that the applicants are aware of some of the category (a) and (b) information; for example, the third party's occupation and date of birth were discussed openly in court, and other information, such as the name of medication taken by the third party, was released to the applicants by the QPS as part of their FOI access application. Additional information was observed by the applicants at the time of the incident: for example, the registration number of the vehicle the third party was driving. I therefore consider that in so far as the applicants are aware of at least some of the information, the weighting to be attributed to the third party's privacy interest is lessened. (Although it must also be remembered that disclosure under the FOI Act is, with few exceptions, to be evaluated as if disclosure were to 'the world at large', there being no restriction (apart from any imposed by the general law) on the use or further dissemination, by an applicant for access, of information obtained under the FOI Act.)

(ii) Balancing the public interest considerations

60. While it is arguable that the weight of the public interest in protecting the privacy of information concerning the personal affairs of the third party is lessened by the applicants' awareness of at least some of the information, it must nevertheless be outweighed by public interest considerations favouring disclosure, if I am to find that disclosure of the taped record of interview would, on balance, be in the public interest.

61. As regards the category (a) information, I am unable to identify any public interest considerations which are of sufficient weight to overcome the public interest consideration (inherent in satisfaction of the test for *prima facie* exemption under s.44(1) of the FOI Act) which favours non-disclosure of information concerning the personal affairs of persons other than the applicants for access. I find that the category (a) information (described in paragraph 19 above) comprises exempt matter under s.44(1) of the FOI Act.

62. As regards the category (b) information (described in paragraph 19 above), I have identified (at paragraph 34) that there is a public interest consideration favouring disclosure of that information. However, I consider that the privacy interest of the third party is deserving of greater weight in the circumstances of this case (see paragraph 26), so that disclosure of the category (b) information in audio/video form would not, on balance, be in the public interest. In my view, the inflection of the third party's voice, or the disclosure of his facial

and physical features, and his reactions as he undergoes questioning by an officer of the QPS, are of their nature more intrusive and revelatory of what is inherently personal about the third party, than just the words in which he described the incident that occurred on 2 January 2004.

63. The recognition that a person's voice is distinct from the words alone is not a novel concept. In *New York Times Co. and National Aeronautics and Space Administration*, 920 F.2d 1002 (D.C. Cir. 1990, 1006), the majority of the United States Court of Appeals for the District of Columbia stated:

> *… information is not conveyed by words alone. The information recorded through the capture of a person's voice is distinct and in addition to the information contained in the words themselves.*

64. In that case, the Court was deciding whether the audio-tape recording of the voice communications of the astronauts who perished in the explosion of the space shuttle *Challenger* on 28 January 1986, was a "similar file". (Under United States FOI legislation, (5 USC 552(b)(6)), the comparable exclusion protects "*personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy*".)

65. Although there was dissenting opinion as to whether the audio-tape was a type of "similar file", it was unanimously accepted by the Court that "*voice inflections and other "*non-lexical*" information* can *constitute personal information…* ." *New York Times Co. and National Aeronautics and Space Administration*, 920 F.2d 1002 (D.C. Cir. 1990, 1010).

66. In the circumstances of this case, how the third party said what he did, and how he reacted to questioning by an officer of the QPS must affect the weight to be accorded to his privacy interest. Considering the form of access which is in issue (i.e., audio-tape and video-tape), I have concluded that the privacy interest of the third party in respect of the category (b) information should properly be accorded greater weight than might otherwise be the case if I were to consider a purely text-based document. I do not consider the public interest consideration in favour of disclosure to the applicants of the category (b) information could be considered to outweigh the privacy interest of the third party in respect of that matter.

67. I find that the privacy interest of the third party is deserving of greater weight in the circumstances of this case, so that disclosure of the category (b) information would not, on balance, be in the public interest. I find that the category (b) information comprises exempt matter under s.44(1) of the FOI Act.

Conclusion

68. For the foregoing reasons, I decide to affirm the decision dated 4 May 2004 by Assistant Commissioner McCallum on behalf of the QPS, by which it was decided that the matter in issue was exempt under s.44(1) of the FOI Act.

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CATHI TAYLOR
INFORMATION COMMISSIONER