

FMG & Queensland Police Service

(S 69/97, 24 April 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 deleted.

REASONS FOR DECISION

Background

5. The applicant, FMG, seeks review of the decision by the Queensland Police Service (the QPS) to refuse him access to certain documents concerning an investigation into the welfare of his children. As a result of concessions made during the course of my review, the matter remaining in issue has been reduced to the following documents (as numbered for identification purposes by the QPS):

- 081-082: copy of audiotapes of record of interview between police and N
- 083: copy of audiotape of record of interview between police and A
- 157-172: transcript of interview between police and N (i.e., a transcript of documents 081-082)
- 173-188: transcript of interview between police and A (i.e., a transcript of document 083).

N and A are children of the applicant.

6. On 26 April 1996, the applicant and the applicant's wife wrote to the Officer in Charge, Juvenile Aid Bureau, Police Headquarters, stating:

In ..., I was involved in a matter handled by a ... JAB officer and passed on to DFS. Despite the short time span of this contact I held great concerns about the work done and at the time had contact with the CJC but was advised the matters raised did not come under their jurisdiction.

I have since obtained the DFS file under FOI and have had some time to closely examine it This has only reinforced my earlier concerns.

I wish to proceed with an examination of the events and would like to know the grievance procedure available.

I do not know if any police files were created in this matter but would like to know if any had been created in my name or my wife's name, ... If such files do exist what FOI procedures exist

7. That letter was treated by the QPS as an application for access under the FOI Act to documents 'concerning a matter in which you were involved with the Juvenile Aid Bureau' (see Inspector Trappett's notice of decision, on behalf of the QPS, dated 15 November 1996).

8. By letter dated 15 November 1996, Inspector S A Trappett of the QPS FOI Unit informed the applicant that he had decided -

- (a) to grant the applicant access in full to a number of documents;
 - (b) to grant access to a number of documents subject to the deletion of exempt matter; and
 - (c) to refuse access to a number of documents in their entirety, including documents 081-083 and 157-188, relying upon s.44(1), s.42(1)(e) and s.48(1) of the FOI Act.
9. By a letter received by the QPS on 6 December 1996, the applicant sought internal review of Inspector Trappett's decision. During the course of conducting the internal review, Chief Superintendent Jefferies arranged for further searches to be conducted for additional documents falling within the terms of the applicant's FOI access application. Additional documents were located as a result of those searches. By letter dated 28 February 1997, Chief Superintendent Jefferies informed the applicant that he had decided, on behalf of the QPS, to vary the decision of Inspector Trappett. Chief Superintendent Jefferies decided to grant the applicant access to certain documents, and to refuse access to other documents under the FOI Act. He found that the documents which remain in issue in this review were exempt matter under s.42(1)(e) and s.48(1) of the FOI Act.
10. By letter dated 1 May 1997, the applicant applied to me for review, under Part 5 of the FOI Act, of Chief Superintendent Jefferies' decision.

External review process

11. By letter dated 4 July 1997, the Assistant Information Commissioner provided the applicant with a schedule of the documents considered and dealt with by the QPS in processing the applicant's FOI access application. That schedule also recorded the claims for exemption made by the QPS at that stage of the review. The Assistant Information Commissioner requested that the applicant specify the matter to which the applicant wished to press for access in this review.
12. By letter dated 8 July 1997, the applicant made it clear that he required access to documents 081-082 and 083 (the audiotapes described above). In that letter, he stated:

I would respectfully argue that these tapes be released for the following reasons.

The subjects of the tapes, N and A are the natural children of myself and my wife, ..., are minors and our dependants residing at the above address with us.

... PC Constable ... attended ... DFS office ... for a meeting with myself and ... Manager DFS ... (refer Page 67 of DFS FOI release encl. At this meeting tapes were produced, and I have listened to tape 083. The tape 081-2 was inaudible and I believe that I was presented with a false tape to prevent me detecting that the voice on the tape was, in full or in part, that of a person other than that of N whereas ... has stated that N was the sole contributor. This matter is raised in a letter from myself dated ... and this letter is 072-077 in the police FOI file.

I received a copy of notes written by ... and said to be a transcript of 081-082 (060-063 in Police FOI file).

Correspondent (sic) from myself to PC Constable ..., Mrs ... and Mr ... refer to information I received from the tapes and transcript (Letters are 065-068 in Police FOI release).

The matter of my hearing tape 083 is included on page 11 of the statement given by me to Senior Sergeant ... at ... Police Station and a sworn copy of this statement will be number 044-056, released but not supplied.

As all the information sought in hard copy has been previously released to my (sic) by the investigating officer that Paragraph 42(1)(e) sub-section 44(1) and section 48 would not apply to previously released material

13. During the course of the external review, a 'sufficiency of search' issue was raised, but subsequently resolved (reference: my letter to the applicant dated 22 January 1998 and his response dated 28 January 1998).
14. Copies of the documents in issue were obtained from the QPS and examined. Where appropriate, third parties were consulted in accordance with s.74(1)(b) of the FOI Act.
15. In my letter to the applicant dated 3 December 1997, I conveyed my preliminary view that the documents remaining in issue qualified for exemption under s.44(1) of the FOI Act. In the event that he did not accept my preliminary views, I gave the applicant the opportunity to lodge evidence and submissions in support of a case that the documents in issue were not exempt. The applicant informed me that he did not accept my preliminary views concerning the documents which remain in issue. Under cover of a letter dated 16 January 1998, the applicant provided me with forms of 'consent' signed by his wife, and by N and A, in the following terms:

I [name] acknowledge that the actions of FMG were intended to be a family response and request that any personal information of mine be included in the supplied material

Signed [signature]

Witness [signature] JP.

16. Apart from these consents', the applicant did not provide me with any submissions or evidence which addressed relevant issues in the application of s.44(1) of the FOI Act to the documents remaining in issue. The effect of such 'consents', for the application of s.44(1) of the FOI Act, is dealt with in paragraphs 30-37 below. A good deal of caution is indicated in situations where 'consents' by minors to the disclosure of information concerning them are provided by an adult who is in a position to exert influence over the minors, and the interests of the adult in gaining access to the information may be at odds with legitimate privacy interests of the minors.
17. I note that in his letter to me dated 28 January 1998, the applicant confirmed that only the documents described in paragraph 5 above remain in issue in this external review. The QPS claims that those documents are exempt under s.42(1)(e), s.44(1) and s.48 of the FOI Act. On the view I have reached, it is only necessary for me to address the application of s.44(1) to the documents in issue.

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

18. Section 44(1) and s.44(2) of the FOI Act provide:

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

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

19. In 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.
20. 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, in the FOI Act (see pp.256-267, 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:
 - affairs relating to family and marital relationships;
 - health or ill-health;
 - relationships with and emotional ties with other people; and
 - domestic responsibilities or financial obligations.
21. 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. The relevant meaning of the word “concerning” in the context of s.44(1) of the FOI Act is “about, regarding”: see *Re Bolton and Department of Transport* (1995) 3 QAR 143 at pp.147-148, paragraphs 14-18. Thus, the crucial question is whether the information in issue is information about the personal affairs of a person other than the applicant for access. If so, the information satisfies the test for *prima facie* exemption under s.44(1) of the FOI Act, irrespective of whether the information may have been used in some way that had an effect on the applicant for access.
22. In respect of documents 081-083 and 157-188 (the audiotapes and transcripts of the interviews conducted by a Senior Constable with the applicant’s children, N and A), I consider that most of the information contained in those documents must properly be characterised as information which does not concern the personal affairs of the applicant, but only concerns the personal affairs of other persons (i.e., the applicant's wife, N, A, and other persons). Such information is, therefore, *prima facie* exempt from disclosure to the applicant under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.44(1). The applicant’s familial relationship to some of those persons does not in itself confer any entitlement to be given access, under the FOI Act, to information concerning the personal affairs of those persons.

23. I consider that the balance of the information contained in documents 081-083 and 157-188 must properly be characterised as information which concerns the applicant's personal affairs and which also concerns the personal affairs of other persons. I explained the principles applicable to information concerning "shared personal affairs" in my decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.343-344 (paragraphs 172-177), of which the following passage is relevant for present purposes:

Thus, if matter relates to information concerning the personal affairs of another person as well as the personal affairs of the applicant for access, then the s.44(2) exception to the s.44(1) exemption does not apply. The problem here arises where the information concerning the personal affairs of the applicant is inextricably interwoven with information concerning the personal affairs of another person. The problem does not arise where some document contains discrete segments of matter concerning the personal affairs of the applicant, and discrete segments of matter concerning the personal affairs of another person, for in those circumstances:

- (a) the former will fall within the s.44(2) exception;*
- (b) the latter will be exempt under s.44(1) (unless the countervailing public interest test applies to negate the prima facie ground of exemption); and*
- (c) s.32 of the FOI Act can be applied to allow the applicant to have access to the information concerning the applicant's personal affairs, by the provision of a copy of the document from which the exempt matter has been deleted*

Where, however 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).*

24. In the present case, the information in issue which concerns the applicant's personal affairs is inextricably interwoven with information concerning the personal affairs of other persons. Thus, in accordance with the last paragraph of the passage quoted above, such matter is *prima facie* exempt from disclosure to the applicant according to the terms of s.44(1), subject to the application of the public interest balancing test incorporated in s.44(1).
25. I must therefore consider whether or not there are any public interest considerations favouring disclosure to the applicant of the matter in issue, which are of sufficient weight to warrant a finding that its disclosure would, on balance, be in the public interest.
26. In respect of those parts of the matter in issue which relate to the personal affairs of the applicant, the applicant is entitled to whatever assistance can be obtained from s.6 of the FOI Act which provides:

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

(a) *whether it is in the public interest to grant access to the applicant;*
and

(b) *the effect that the disclosure of the matter might have.*

27. I note that the applicant has concerns regarding the integrity of the investigation conducted by the QPS into the welfare of the applicant's children. The applicant's concerns prompted him to make a complaint to the CJC against the investigating officer. I recognise that there is a public interest in the accountability of the QPS for the conduct of investigations, although this must be balanced against the need to respect any applicable obligation or understandings of confidence, or applicable privacy considerations, so as not to unduly inhibit complainants and witnesses from disclosing all relevant information to police investigators.
28. It appears that the applicant was permitted to listen to the audiotapes of the interviews with N and A (despite this being unusual in cases involving child welfare matters), although the applicant contends that he was unable to properly hear the recording of the interview with N. The applicant has been permitted access to the investigating police officer's notes of the interview with N, which summarise what that officer considered to be the most important points arising in a long interview. The applicant and his wife were interviewed by the police in relation to allegations made against them and, from the material before me, it appears that the applicant and his wife were given the opportunity to respond to the allegations made against them. Given the extent of the information to which the applicant has been given access under the FOI Act in respect of the relevant investigation, and given the extent of the disclosure made to the applicant by the QPS in the course of that investigation, I do not consider that disclosure of the matter remaining in issue would advance the public interest in accountability of the QPS for the conduct of its investigations, in any substantial way.
29. The disclosure referred to in the preceding paragraph could arguably be used to support a contrary proposition, i.e., that the extent of the disclosure that has been made to the applicant diminishes the weight of the privacy interests to be protected, at least so far as disclosure to the applicant is concerned. However, the consequences of disclosure of information under the FOI Act are, with few exceptions, to be evaluated as if disclosure were to any person (or, as is sometimes said, 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. I do not consider that the privacy interest attaching to the matter in issue (which, in my opinion, is a strong privacy interest, having regard to the nature and sensitivity of the relevant information) has been compromised or significantly diminished by the extent of the disclosure to the applicant which has already occurred. By contrast, disclosure under the FOI Act (with no restriction on further use or dissemination) of the matter in issue, in documentary form, would, in my opinion, constitute a serious invasion of privacy.
30. As I have noted in paragraph 15 above, the applicant supplied my office with forms of 'consent' to disclosure of the matter in issue, completed by his wife, and N and A. (I should also note that the documents in issue contain some information concerning the personal affairs of other individuals, from whom no 'consents' have been obtained.) What is the legal effect, if any, of those 'consents'? They cannot alter the fact that the matter in issue concerns the personal affairs of persons other than the applicant, and hence is *prima facie* exempt under s.44(1) of the FOI Act.

31. In the case of a valid ‘consent’, given freely by a person with proper legal capacity to do so, the consequences (for the application of the FOI Act) of that person’s consent to the disclosure, to a particular applicant for access, of information concerning the personal affairs of the first- mentioned person, would be two. Firstly, such a consent would be relevant to the exercise of the discretion which an agency possesses, by virtue of s.28(1) of the FOI Act (see *Re Norman and Mulgrave Shire Council* (1994) 1 QAR 574 at p.577, paragraph 13), to disclose information to a particular access applicant notwithstanding that it is technically exempt matter under the FOI Act. (My views as to how agencies should ordinarily exercise that discretion, when dealing with personal affairs information, are indicated in parentheses in paragraph 176 at p.344 of *Re “B”*.) However, in a review under Part 5 of the FOI Act, the discretion which agencies possess by virtue of s.28(1) of the FOI Act is denied to the Information Commissioner by the terms of s.88(2) of the FOI Act which provides:

...

(2) If it is established that a document is an exempt document the [Information Commissioner] does not have power to direct that access to the document is to be granted.

My decision-making function, therefore, is confined to determining whether the matter to which the applicant has been refused access is, or is not, exempt matter under relevant provisions of the FOI Act.

32. The second consequence of a person freely giving consent to the disclosure, to an applicant for access under the FOI Act, of information concerning the first person’s personal affairs, is to significantly reduce the weight to be accorded to the public interest in protecting the privacy of the first person in respect of the relevant information, at least in so far as disclosure to the particular applicant for access is concerned. In such a case, that would mean that the public interest in protecting an individual’s privacy (which is inherent in the satisfaction of the test for *prima facie* exemption under s.44(1) of the FOI Act) may carry little weight on the side of the scales favouring non-disclosure of the relevant information, against which are to be balanced any public interest considerations favouring disclosure of the relevant information.
33. However, 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 weight of the privacy interest attaching to particular information 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. Thus, consent by a person to disclosure of information concerning that person’s personal affairs is not sufficient in itself to support a finding that the information is not exempt matter under s.44(1). There must, in addition, be identifiable public interest considerations telling in favour of disclosure of the information in issue, which are sufficiently strong to warrant a finding that disclosure of the information in issue would, on balance, be in the public interest.
34. As I remarked at paragraph 16 above, a good deal of caution is indicated in situations where ‘consents’ by minors to the disclosure of information concerning them are provided by an adult who is in a position to exert influence over the minors, and the interests of the adult in gaining access to the information may be at odds with the legitimate privacy interests of the minors.

35. Concerning the two children who signed the ‘consents’, N is aged 14 and A is aged 11. In *Gillick v West Norfolk and Wisebeck Area Health Authority* [1986] 1 AC 112, the English House of Lords decided that a child is capable of giving consent to medical treatment (in that case, the use of a contraceptive device) if the child had achieved sufficient intelligence and understanding to enable her to understand what was proposed. *Gillick’s* case was followed by the High Court of Australia in ‘Marion’s case’ (*Secretary, Department of Health and Community Services (NT) v JWB and SNB* (1992) 66 ALJR 300, at 305), in relation to a case involving sterilisation of a minor. Although the principle in *Gillick’s* case and Marion’s case involved a different context (consent to medical treatment) than the present case, I believe that the principle is applicable to consideration of a ‘consent’ completed by a child in relation to disclosure, under the FOI Act, of documents in respect of which the child has (in my opinion) a patent and strong privacy interest.
36. Applied to the facts of this case, I do not consider that a child of the age of 11 is capable of having a sufficient understanding of the issues and consequences of giving a ‘consent’ to disclosure, under the FOI Act, of information concerning her personal affairs. It is possible that a child of the age of 14 is capable of having such an understanding. However, in the present case, the applicant was in a position to exert influence over N, and the applicant’s interests in disclosure of the matter in issue are at odds with N’s legitimate privacy interests, which, in my view, an independent tribunal should be astute to protect. On the material available to me, I am not satisfied that it would be proper to rely upon the purported ‘consents’ signed by N and A, as significantly reducing the weight of the privacy interest attaching to the matter in issue which concerns their personal affairs.
37. Different considerations apply to the consent signed by the applicant's wife. She is, of course, an adult of full legal capacity. The principle from *Gillick’s* case as discussed above is of no relevance to her. I think that I may take the consent signed by the applicant's wife into account, in the application of the public interest balancing test incorporated in s.44(1). However, the matter in issue which concerns the personal affairs of the applicant's wife is inextricably intertwined with matter concerning the personal affairs of N and A, or of other individuals. The consent signed by the applicant's wife is not capable of diminishing the weight to be accorded to the privacy interests of other individuals.
38. Taking into account all of the public interest considerations referred to above, I am not satisfied of the existence of public interest considerations favouring disclosure which are sufficiently strong to outweigh the public interest in non-disclosure which is inherent in the satisfaction of the test for *prima facie* exemption under s.44(1) of the FOI Act. Disclosure of the matter in issue would be invasive of the privacy of N, A, and other individuals, to an extent which is not outweighed by public interest considerations favouring disclosure. I therefore find that documents 081-083 and 157-188 are exempt from disclosure to the applicant under s.44(1) of the FOI Act.

DECISION

39. I vary the decision under review (being the internal review decision of Chief Superintendent Jefferies dated 28 February 1997) by finding that documents 081-083 and 157-188 are exempt from disclosure to the applicant under s.44(1) of the FOI Act.