Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Application Number: **210604**

Applicant: **OKP**

Respondent: **Department of Communities**

Decision Date: **9 July 2009**

Catchwords: **ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER CONCERNING PERSONAL AFFAIRS – applicant sought access to documents relating to his family history and time in the care of the State – documents concern personal affairs of persons other than the applicant – whether public interest considerations favouring disclosure outweigh public interest considerations favouring non disclosure – whether disclosure to the applicant should be assumed to be disclosure to the world at large.**

ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER TO WHICH SECRECY PROVISIONS OF ENACTMENTS APPLY – whether disclosure is prohibited by section 187 of the *Child Protection Act 1999*.

Contents

REASONS FOR DECISION

Summary

1. In this external review the applicant seeks access to documents concerning his time in the care of the State. The applicant was denied access to parts of the documents sought as this information concerns the personal affairs of his family members.

2. For the reasons set out below, I am satisfied that the matter in issue is not exempt from disclosure under sections 44(1) or 48(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**).

Background

3. By letter dated 16 January 2008, the applicant applied to the Department of Communities[1] (**Department**) for access to '*All files relating to my time at St Vincent's Home, Nudgee and files at Children's Services*' (**FOI Application**).

4. By letter dated 8 July 2008, the Department indicated that it had located seven files in response to the FOI Application and decided to release 7 pages in full, 136 pages in part and to refuse access to 54 pages (**Original Decision**).

5. By letter dated 14 July 2008, the applicant sought internal review of the Original Decision (**Internal Review Application**).

6. By letter dated 25 August 2008, the Department varied the Original Decision by partially releasing 25 pages (**Internal Review Decision**).

7. By letter dated 4 September 2008, the applicant sought external review of the Internal Review Decision (**External Review Application**).

Decision under review

8. Under section 52(6) of the FOI Act, if an agency does not decide an application for internal review and notify the applicant of the decision within 28 days after receiving the application, the agency's principal officer is taken to have made a decision at the end of the period affirming the original decision.

9. The applicant was notified of the Internal Review Decision outside of the statutory time limit. The Department's principal officer is therefore taken to have affirmed the Original Decision, and on this basis, the deemed affirmation of the Original Decision is the decision under review.

10. I have taken the Internal Review Decision to be an explanation of the Department's position and have taken this into account in making this decision.

Steps taken in the external review process

11. By facsimile dated 10 September 2008, the Office of the Information Commissioner (**Office**) asked the Department to provide copies of documents relevant to the external review.[2]

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[1] Formerly the Department of Child Safety.
[2] Including the FOI Application, Original Decision, Internal Review Application and the Internal Review Decision.

12. The Department provided the documents requested at paragraph 11 above by facsimile dated 15 September 2008.

13. By letter dated 24 September 2008, the Department was advised that the External Review Application had been accepted and asked to provide copies of the documents containing information to which access had been refused.

14. The Department provided the documents requested at paragraph 13 above by letter dated 7 October 2008.

15. On 29 October 2008, the applicant advised a staff member of the Office that he particularly sought access to the folios attached to his External Review Application.

16. On 30 October 2008, a staff member of the Office made enquiries with the Department as to whether it would agree to release those folios referred to by the applicant in his External Review Application.

17. By email dated 30 October 2008, a staff member of the Office identified for the Department the particular folios sought by the applicant.

18. By email dated 3 November 2008, the Department indicated that it would not agree to release the folios.

19. On 10 November 2008, a staff member of the Office made enquiries with the Department regarding consultation with members of the applicant's family under section 51 of the FOI Act.

20. On 10 March 2009, a staff member of the Office made enquiries with the applicant regarding consultation with his family members under section 51 of the FOI Act.

21. By letter dated 1 May 2009, I provided a preliminary view to the Department that (**preliminary view letter**):

    - disclosure of the Matter in Issue is not prohibited by section 189 of the *Child Protection Act 1999* (Qld) (**CP Act**)
    - the Matter in Issue does not qualify for exemption under section 48(1) of the FOI Act
    - in respect of section 44(1) of the FOI Act:
        - the matter in issue is comprised of personal affairs information for the purpose of section 44(1) of the FOI Act
        - the following five public interest considerations favour disclosure of the matter in issue:
            - enhancing government's transparency
            - enhancing government's accountability
            - the applicant's justifiable need to know the information sought
            - social and economic well-being of the community
            - respect for fundamental human rights.
        - the principal public interest consideration favouring non disclosure of the matter in issue is the inherent public interest in protecting personal privacy
        - release of the matter in issue to the applicant cannot be assumed to be release to the 'world at large', a concept which has been referred to in previous decisions of the Information Commissioner

- the public interest arguments which favour disclosure of the matter in issue outweigh the public interest in protecting the privacy of the individuals named in the matter in issue
- the matter in issue is not exempt from disclosure under section 44(1) of the FOI Act.

I also confirmed that it was not reasonably practicable for the Department or the Office to consult with members of the applicant's family under section 51 of the FOI Act.

22. By letter dated 7 May 2009, the Office provided a copy of the preliminary view letter to the applicant.[3]

23. By email dated 25 May 2009, the Department sought an extension of time in which to provide submissions in response to the preliminary view letter.

24. By letter dated 26 May 2009, Acting Assistant Commissioner Jefferies agreed to the requested extension.

25. By letter dated 5 June 2009,[4] the Department advised that it did not agree with the release of the matter in issue to the applicant and made submissions in relation to:

- the scope of the FOI Application
- section 187 of the CP Act
- section 44(1) of the FOI Act.

The Department did not make submissions in respect of section 189 of the CP Act and consequently this section is not addressed in my reasons for this decision.

26. In making my decision, I have taken into account the following:

- the FOI Application, Internal Review Application and External Review Application
- the Original Decision and Internal Review Decision
- written correspondence received from the Department during the course of the review
- file notes of various telephone and in-person conversations between staff members of this Office and the applicant during the course of the review
- file notes of various telephone conversations between staff members of this Office and the Department during the course of the review
- relevant provisions of the FOI Act and CP Act as referred to in this decision
- legislation, case law and previous decisions of the Information Commissioner as referred to in this decision
- national and international reports, publications, articles, conventions, inquiries and declarations as referred to in this decision
- content of the material claimed to be exempt.

[3] A small amount of text which comprised information claimed to qualify for exemption was removed from the preliminary view letter.
[4] Received by the Office on 11 June 2009.

Matter in issue

27. During the course of the review the applicant advised the Office that he is:

    - not seeking access to all of the information claimed to be exempt by the Department
    - only seeking access to information contained in particular folios (identified below).

28. Accordingly, the matter in issue in this review is comprised of parts of the following 13 folios which have been exempted from release by the Department:[5]

    - File 05: folios 54, 55
    - File 06: folios 27, 61, 101
    - File 07: folios 100, 101, 102
    - File 08: folios 110, 124, 125, 131, 137.

Scope

29. The Department submits that:

> *…the original application under Freedom of Information was 'All files relating to my time at the St Vincent's Home Nudgee and files at Children's Services.' That application was duly processed and was subject to internal review. It is submitted that all relevant information related to the applicant was released to the applicant via the original decision and the internal review.*
>
> *It appears that this current application for external review before the Information Commissioner outlines a change in the documents sought. It appears that the review is concerned with determining an application that includes documents to explain "why I was placed into care, including details of my parents and siblings" It is noted that the application subject to external review should be the original application.*

30. In his FOI Application, the applicant sought access to *'All files relating to my time at St Vincent's Home, Nudgee and files at Children's Services*.'

31. In response to the FOI application, the Department identified seven files and decided to release 7 pages in full, partially release 136 pages and refuse access to 54 pages.[6]

32. In the Internal Review Decision the Department identified eight files and decided to release 7 pages in full, partially release 137 pages and refuse access to 53 pages.[7]

33. During the course of the external review, the applicant refined the scope of his application to include only those documents which were attached to his External Review Application.[8] It is the applicant's submission that information contained in these folios will explain why he was placed into care, including details of his parents and siblings.

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[5] A copy of the matter in issue is attached to this Decision, with the information sought to be released by the applicant highlighted in pink. Only the information highlighted in pink forms part of matter in issue in this review.
[6] In accordance with the Original Decision.
[7] One page which was considered to be exempt from release in the Original Decision was partially released to the applicant and information deleted on 24 pages was varied.
[8] These documents are identified in paragraph 28 above.

34. The documents under consideration in this review comprise a subset of those documents which the Department determined were within scope of the FOI Application and to which it denied access. The reason the Department gave for exempting some of the information contained in these documents did not include arguments about the information being out of the scope of the FOI application or irrelevant to the application. Accordingly, the documents represent a narrowing rather than an enlargement of the scope of documents under consideration in this review.

35. I am satisfied that the matter in issue identified at paragraph 28 above is within the scope of the FOI Application.

Findings

Relevant Law - Section 44(1) of the FOI Act

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

> ***44 Matter affecting personal affairs***
>
> *(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.*

37. Section 44(1) of the FOI Act therefore requires me to consider the following questions in relation to the matter in issue:

- Firstly, does the matter in issue concern the personal affairs of person/s (other than the applicant)? (**Personal Affairs Question**) If so, a public interest consideration favouring non-disclosure of the matter in issue is established
- Secondly, are there public interest considerations favouring disclosure of the matter in issue which outweigh all public interest considerations favouring non-disclosure of the matter in issue? (**Public Interest Question**).

Personal Affairs Question

What are the personal affairs of a person?

38. In *Stewart and Department of Transport*[9], a previous decision of this Office, the Information Commissioner discussed in detail the meaning of the phrase 'personal affairs of a person' as it appears in the FOI Act. In particular, the Information Commissioner found 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
- domestic responsibilities or financial obligations.

[9] (1993) 1 QAR 227 (***Stewart***).

39. The Information Commissioner has also indicated that the adjective 'personal' is used in the phrase 'personal affairs' in the same sense as a person might use it in refusing to answer an intrusive question with a retort such as: 'I am not prepared to give you that information; it's personal'.[10]

40. 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.

Public Interest Question

41. The words 'public interest' are never specifically defined and generally refer to considerations affecting the good order and functioning of community and the well-being of citizens. In general, a public interest consideration is one which is common to all members of the community, or a substantial segment of them, and for their benefit. The public interest is usually treated as distinct from matters of purely private or personal interest. However, some recognised public interest considerations may apply for the benefit of individuals in a particular case.

42. As to what constitutes the public interest, Beazley J of the Federal Court of Australia stated:[11]

> ***The question of what constitutes the public interest is not a static or circumscribed notion****. As was said in* D v National Society for the Prevention of Cruelty to Children *[1997] UKHL 1; (1978) AC 171 at 230, per Hailsham LJ "**the categories of public interest are not closed**…". See also* Sankey v Whitlam *per Stephen J at 60.*
>
> [my emphasis]

43. In *Fox and the Department of Police*[12] the Information Commissioner indicated that:

> *Because of the way that section 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.*

[10] See *Stewart* at paragraph 55.
[11] *Australian Doctors' Fund Limited v Commonwealth of Australia* [1994] FCA 1053 at paragraph 34.
[12] (2001) 6 QAR 1 at paragraph 19.

Submissions of Participants

Department's submissions

44. In the Original and Internal Review Decisions, the Department's decision-makers state that:

- the matter in issue is personal affairs information for the purpose of section 44(1) of the FOI Act because it relates to information about the applicant's parents, siblings and carers of his siblings, including details of:
    - the relationship between the applicant's parents
    - the relationships between the applicant's parents, siblings and foster carers
    - medical information
    - assessments of the applicant's parents, siblings and other people
    - personal opinions, beliefs and comments of other people
- the following factors favoured disclosure of the matter in issue:
    - the FOI Act gives applicants the right to seek access to documents held by government agencies
    - open, accountable and transparent decision making processes are enhanced by the provision of access to documents held by government agencies
    - given the applicant's contact with the Department, it is understandable that he is seeking access to information regarding the time he spent in care and that will assist him to understand his family history.
- the following factors favoured non-disclosure of the matter in issue:
    - individuals, including children and deceased persons, have a right to privacy regarding their personal affairs
    - there are details in the matter in issue which are clearly the personal affairs of other people and although families share day to day experiences, the intimate details of each family member is not necessarily shared with other members of the family, particularly when that family has been separated.

45. In its submissions to this Office dated 5 June 2009, the Department stated that:

- the Department's requirements under the CP Act should not be considered in the context of the current application for review as the relevant sections of the CP Act cannot apply to matters that occurred 40 years ago
- the sections of the CP Act referred to do not entitle current care leavers to information that is private and belongs to another person
- the matter in issue is highly personal and protected under section 44(1) of the FOI Act and section 187 of the CP Act does apply
- the matter in issue is comprised of intrinsically personal information that is not information of the applicant but of other persons and notwithstanding the fact that those persons are related to the applicant, the information concerns the personal and private matters directly relevant only to the person that it is about
- the information contained in the matter in issue is of such a nature that it cannot be said that it would be part of a shared family history
- the legislation is clear in its intent that a person is entitled to his or her own information, but not to information that is not his or hers

- there is no reference in the FOI Act that makes an exception to section 44(1) where the decision maker has any discretion to release, if the information would have, but for the person's personal circumstances, been known to the applicant as part of a normal family history
- it agrees that personal affairs of a third party can be released if there is compelling public interest favouring disclosure to outweigh the protected private interest.
- the public interest considerations identified in the preliminary view should not be constructed in a way that creates a private right for the applicant to gain access to personal information that is not information about himself but private and personal to third parties
- the reference to 'justifiable need to know' in the preliminary view is not a consideration referred to in the FOI Act and cannot be a reasonable consideration when making decisions about the release of information of third parties to an individual
- the case of *Victoria Police v Marke* [2008] VSCA 218 is not applicable in the context of this external review as it concerns section 33(1) of the *Freedom of Information Act 1982* (Vic) which is not comparable to section 44(1) of the FOI Act
- determinations of previous information commissioners' continue to apply and release of information to one person has to be viewed as release to the world
- the shortcomings of the child protection system at the time that the applicant was in care are well known and already public via the publication of the CMC report into Abuse of Foster Children in State Care in 2001[13] and no further public interest can be served by releasing intrinsically personal and private information about third parties to the applicant
- the only interest that is being served by release of the matter in issue is the private interest of the applicant
- in this particular case, there are no public interest considerations that are capable of outweighing the protection of personal information conferred by section 44(1) of the FOI Act
- in summary:
    - all of the information in question is highly personal, belonging to persons alive and dead, but not the applicant
    - the information is protected from release under section 44(1) of the FOI Act
    - there is no identifiable compelling public interest that would favour release of information of third parties to the applicant
    - the only interest that is being served is that of the applicant himself.

Applicant's submissions

46. In the External Review Application, a meeting with staff of the Office and telephone discussions with staff of the Office, the applicant made the following submissions regarding disclosure of the matter in issue:

- it may explain why the applicant was placed in care
- it will give the applicant insight into his childhood
- the information will fulfill the applicant's desire to know more about his family's history and why decisions were made
- disclosure of deceased family member's information would not be detrimental to anyone
- information written by staff and social workers has previously been incorrect.

[13] I note this report is dated 2004.

Findings of fact and application of section 44(1) of the FOI Act

Personal Affairs Question

47. The matter in issue concerns the:

- relationships between the applicant, his siblings and parents
- living and care arrangements of the applicant's siblings
- health of the applicant's family members
- government officers' observations and conclusions about the applicant's family members
- personal details of family members, including dates of birth and death
- allegations of wrongdoing
- religion of family members
- name and residential address of family members.

48. I am satisfied that:

- information suggesting that a person has been involved in some alleged (but unproven) wrongdoing concerns the personal affairs of that person for the purpose of section 44(1) of the FOI Act[14]
- the personal details of a person, including dates of birth and death, comprise personal affairs information for the purpose of section 44(1) of the FOI Act[15]
- although a person's name and address in isolation does not ordinarily constitute personal affairs information, the name and residential address of the applicant's family members in this context reveals a private aspect of their life (such as where they choose to live and make their home) and as such, comprises personal affairs information for the purpose of section 44(1) of the FOI Act.[16]
- information concerning the health of the applicant's family members, living and care arrangements, family relationships and religion fall within the accepted meaning of the phrase 'personal affairs' for the purpose of section 44(1) of the FOI Act.[17]

49. Accordingly, I am satisfied that the matter in issue comprises personal affairs information of persons other than the applicant for the purpose of section 44(1) of the FOI Act.

Public Interest Question

50. Because I consider the matter in issue concerns the personal affairs of persons other than the applicant, consideration must be given to whether there are sufficient public interest considerations favouring disclosure of the matter in issue to outweigh the public interest considerations favouring non-disclosure of the matter in issue.

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[14] *Fox and Queensland Police Service* (2001) 6 QAR 1.
[15] *Williamson and Queensland Police Service; 'A' (Third Party)* (2005) 7 QAR 51 at paragraphs 18-20.
[16] *Pearce and Queensland Rural Adjustment Authority and Others* (1999) 5 QAR 242 at paragraph 136; *Gilling v General Manager, Hawkesbury City Council* [1999] NSWADT 43 at paragraph 42; *Schlegel and Department of Transport and Regional Services* [2002] AATA 1184 at paragraphs 60, 63, 100, 101 and 103.
[17] See *Stewart.*

51. I note the following submission made by the Department on 5 June 2009 in respect of the public interest question:

> *The department agrees that personal affairs of a third party can be released if there is* ***compelling*** *public interest favouring disclosure to outweigh the protected private interest.*
>
> *…*
>
> *…There is no identifiable* ***compelling*** *public interest that would favour release of information of third parties to the applicant and the only interest that is being served is that of the applicant himself.*
>
> [my emphasis]

52. A number of provisions of the FOI Act contain public interest tests. The most common public interest test, as reflected in section 44(1), provides that specific information is exempt from disclosure '*unless its disclosure would, on balance, be in the public interest*.'

53. The public interest test referred to in section 44(1) of the FOI Act requires a decision maker to:

- identify all public interest considerations favouring disclosure
- if public interest considerations favouring disclosure are identified, to balance these against public interest considerations favouring non disclosure
- determine whether or not the considerations favouring disclosure outweigh those favouring non disclosure.

54. The public interest balancing test in section 44(1) of the FOI Act does not require a decision maker to identify *compelling* public interest considerations favouring disclosure. This is the public interest test referred to in section 48(1) of the FOI Act which states that specific information is exempt from disclosure *'unless disclosure is required by a compelling reason in the public interest.'* This public interest test is set at a higher level than the test described in section 44(1) of the FOI Act.

55. Accordingly, I do not accept the Department's submission that under section 44(1) of the FOI Act, personal affairs information can only be released if there is *compelling* public interest favouring disclosure that outweighs the protected private interest.

Public interest considerations that favour disclosing the Matter in Issue

56. I have identified five public interest considerations that favour disclosing the matter in issue in this review. These are the public interest in:

- enhancing government's transparency
- enhancing government's accountability
- the applicant's justifiable need to know the information sought
- social and economic well-being of the community
- respect for fundamental human rights

57. I consider each of these public interest considerations in turn below.

Transparency of government

58. Through no fault of his own the applicant had a disrupted upbringing. He carries with him unresolved issues from his separation from his parents and siblings, his becoming a ward of the state and from being raised in an institution. He seeks to understand the reasons this occurred. Under the *State Children Act 1911* (Qld) and the *Children's Services Act 1965* (Qld), the Department at that time had a responsibility to protect a child if the child did not have a parent able and willing to protect him or her.

59. Transparency in government means clear government decisions for which reasons are made plain and other contextual information behind government decision making is made available. Transparent in this context means making plain the departmental reasoning behind its decisions concerning the applicant's entry into care, the choice of placement in an institution, his placement away from his other siblings and the case management decisions made about maintaining contact with his family, work done to restore care of him to his family and any decisions made in his best interests. There is therefore a strong public interest in the applicant obtaining access to documents that assist him in his endeavour to understand how he came to be separated from his family and placed in institutional care.

Accountability of government

60. The Department is charged with extensive statutory obligations under the CP Act for carrying out its duty of care in relation to those children whose parents are unwilling and/or unable to care for them.

61. The principles for administering the CP Act now provide in part that the welfare and best interests of a child are paramount.[18]

62. Although the CP Act was not in existence when the applicant was a child, the government's responsibilities were essentially the same. However, the manner in which the government now discharges its responsibilities is measurably different to the period of the applicant's experience and these changes can be in part attributed to the accountability of the government to the community for the performance of its role. The acceptance of the principles of transparency, openness and accountability in government has also grown since then.

63. In view of the Department's role in ensuring the safety, health and fundamental rights of one of the most vulnerable groups of children in the State are protected and that decisions made by the Department are in the best interests of the child, there is a legitimate and strong public interest in the Department being accountable for the care of children in its custody or under its guardianship whether currently or previously.

64. This accountability occurs in different ways. The government is accountable through the legal system for the performance of its statutory duties and is accountable to individuals and the community through the provision of information, public debate and the electoral cycle. Governments at both state and national levels have initiated a number of inquiries through which they have accounted to the community. These included the Queensland Government's initiating the 1998 Commission of Inquiry into

[18] Section 5(1) of the *Child Protection Act 1999*.

the Abuse of Children in Queensland Institutions. The historical context of children in care is further recorded through a number of inquiries and reports in recent years.[19]

65. In discharging its statutory duties, the Department's predecessors often placed children in non-government residential care facilities. The Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions[20] states that:

> *Historical evidence demonstrates that the Department failed to provide protection from abuse for children in residential care facilities. Its performance fell far short of the requirements outlined in the Regulations. Notwithstanding the Director's guardianship of State children, the Department appears to have ceded responsibility for the protection of children from abuse to the institutions.*[21]

66. The *Commission Report* highlighted significant and extensive incidents of unsafe, improper and/or unlawful treatment of children in Queensland government and non-government institutions, concluding that *'[t]he history of institutional care in Queensland up until the 1980s … has been one of sacrificing children's interests to expedience*'.[22]

67. A report by the Senate Community Affairs References Committee on Australians who experienced institutional or out-of-home care as children[23] similarly concluded:

> *The Committee considers that duty of care was lacking in several fundamental areas in relation to children in institutional care – in respect of the adequate provision for the basic needs of children … the level of inspections undertaken and the consideration of the welfare of the children in the institutions appear to have been at best basic and in numerous cases deficient…*[24]

68. In the context of discussing the effect of departmental decision-making on individual children in care, the *Commission Report* also noted that children in care may be rendered invisible in a form of systems abuse whereby children's needs may simply not be considered as '*a consequence of conflicting political priorities or interests, or because of adult ignorance*.'[25]

69. It is this historical context which leads me to form a view that significant weight is to be accorded to the public interest in ensuring the Department is accountable for its decision-making, care and management of individuals in its care.

70. The agency submits that they have already accounted for the shortcomings of the child protection system at the time the applicant was in care. In a broad sense this is true, but this does not minimise the need for the Department to be accountable to individuals who have been in its care.

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[19] The Senate Community Affairs Reference Committee, Parliament of Australia, *Protecting vulnerable children: A national challenge* (2005). The report notes '*recent inquiries in the States and Territories have identified deficiencies and shortcomings in their child protection regimes*' at paragraph 7.24.
[20] Queensland Commission of Inquiry, *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions* (1999) (***Commission Report***).
[21] *Commission Report*, page 8.
[22] *Commission Report*, page 107. See also Crime and Misconduct Commission, *Protecting Children: An Inquiry into Abuse of Children in Foster Care* (2004).
[23] The Senate Community Affairs Reference Committee, Parliament of Australia, *Forgotten Australians* (2004) (***Senate Report***).
[24] At paragraph 7.38.
[25] *Commission Report,* page 12.

71. This is borne out in the applicant's submission that information written by staff and social workers has previously been incorrect. On this point the *Senate Report* indicated that:[26]

> *Care leavers are often distressed that many files contain not only simple errors such as misspelled or incorrect names and incorrect dates of birth, but also fundamental misinformation. The perpetuation of incorrect or unreliable information, which appeared to have been accepted at face value with minimal or no checking of its veracity, provided the basis in some cases for significant decisions that affected the child's life.*

72. Care leavers are often among the few people in a position to comment on the accuracy of government record-keeping on their files. It is my view that the public interest in ensuring the accuracy of relevant records is a further and important aspect of the public interest in the Department's accountability in this matter.

Justifiable need to know

73. The Department submits that[27]:

> *A discourse on the applicant's justifiable need to know has been included in the preliminary decision and formed part of the considerations that would favour release. It is noted in relation to those considerations that there is no reference to this consideration in the Freedom of Information Act 1992 and as such cannot be a reasonable consideration when making decisions about the release of information of third parties to an individual.*

74. The Information Commissioner has previously indicated that in certain cases there may be a public interest in a particular applicant having access to information which affects or concerns them to such a degree as to give rise to a justifiable 'need to know' the information which is greater than for other FOI applicants.[28] This public interest consideration can be of determinative weight, depending on the relative weight of competing public interest considerations.[29] Accordingly, I do not accept the Department's submission that the public interest in a particular applicant having a justifiable 'need to know' is not a reasonable public interest consideration because it is not referred to in the FOI Act.

75. The applicant is seeking access to information which may explain to him the circumstances that led to his placement in care as a child.

76. The importance for individuals, formerly in the care of the State, (**Care Leavers**) of accessing information about their family and the circumstances leading to their having been placed in State care is recognised in the *Commission Report*:

> *In recent years there has been a greater awareness of the importance of providing former State wards with information about their time in care (*Bringing Them Home 1997). *Such information can help people to understand why they were placed in care, to deal with current personal issues that may have been the result of their time as wards, to re-establish contact with family members, to strengthen their sense of identity and to recover aspects of their family history. Much information can be made available for young people currently in the system or recently released from care, but for those who were wards prior to the 1980s the situation is less promising.*[30]

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[26] At paragraph 9.60.
[27] In its letter dated 5 June 2009.
[28] *Pemberton and the University of Queensland* (1994) 2 QAR 293 (***Pemberton***) at paragraphs 164 to 193.
[29] *Pemberton* at paragraph 172.
[30] *Commission Report*, page 105.

77. The benefit that results from the provision of 'family history records' was succinctly argued by the Commissioner into Aboriginal Deaths in Custody, Patrick Dodson:[31]

> *Access to knowledge can assist: to reinstate pride in family experiences; enhance a stronger sense of identity; re-establish contacts with family members; reaffirm interaction with broad family networks; …; understand the historical background of contemporary personal issues …; re-claim ownership of material pertaining to family life; develop resources …*

78. The increased awareness in more recent years of the need to provide children in the care of the State with information about their family history and the circumstances that brought them into care is now reflected in the CP Act. The Charter of Rights for a child in care[32] provides in part that:

> ***Because—***
> *The Parliament recognises the State has responsibilities for a child in need of protection who is in the custody or under the guardianship of the chief executive under this Act,*
>
> ***this Act establishes the following rights for the child—***
>
> *…*
>
> *(c) to maintain relationships with the child's family and community;*
>
> *…*
>
> *(e) to be given information about … the child's … personal history, having regard to the child's age or ability to understand.*
>
> *…*

79. The CP Act also now requires the chief executive to ensure that a child who is or has been a child under the guardianship of the CEO, is provided with assistance in the transition from care.[33] The Explanatory Notes in relation to this amendment state that this assistance may include, for example, providing information about identity and personal history. This would, in my view, include the type of information the applicant is seeking.

80. These statutory obligations on the Department did not exist when the applicant left care. However, because of the special role of a child's guardian and the nature of the information held by the Department about families, there remains a duty on the Department, to the extent it can, to assist those who were in its care and who continue to carry the burdens identified by the applicant in this FOI application.

81. Though the applicant is no longer in the care of the State and is no longer a child, I consider that his interest in the information sought is of such a nature as to give rise to a justifiable need to know the information. With the passage of time, Parliament has come to recognise the importance of children in the care of the State having access to information that affects/affected their lives and the responsibility on the Department to assist people transitioning from care. The passage of time since the applicant leaving

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[31] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report Volume 2* (1991) page 78.
[32] Schedule 1, CP Act; section 74(2) of the CP Act provides that *'[a]s far as reasonably practicable, the chief executive must ensure the charter of rights for a child in care in schedule 1 is complied with in relation to the child*.'
[33] Section 75 of the CP Act.

care has not diminished his need to know, nor the Department's capacity to assist him through the provision of historical documents. I consider that this strongly supports significant weight being attributed to this public interest consideration.

Social and economic well-being of the community

82. The primary objectives of social development are achieving the most productive community members and social inclusion. The achievement of these objectives directly affects the well-being of the community. The pre-requisites to giving children the best start in life are known. They inform the quality of both in- and out-of-home care. Attachment to a key figure, continuity in a child's upbringing and the maintenance of family relationships are significant factors. These factors are specifically recognised in section 122(1)(j) of the CP Act.

83. It is well known that a person's sense of identity affects patterns of exclusion and inclusion and provides a basis for both social cohesion and conflict and the extent to which they can maximise their contribution to the community. The provision of information to the applicant about his family will assist him to fill in some of the gaps in the formation of his identity and perhaps enable him to go on and reap some of the benefits identified by the Commissioner into Aboriginal Deaths in Custody, and canvassed above.

84. To the extent that the information may assist the applicant in re-establishing relationships with his family, or improve his health and outlook, the disclosure of information is in the interests of the social and economic well-being of the community.

Respect for fundamental human rights

85. The principles for administering the CP Act provide in part that the welfare and best interests of a child are paramount. These principles reflect the government's responsibilities in relation to the domestic implementation of the Convention on the Rights of the Child.[34] Article 18 of *CROC* provides that:

> *Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern;*

86. Article 20 of *CROC* provides that:

> *A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.*

87. In relation to institutional care, Article 3 of *CROC* provides that:

> *States shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the area of safety, health, in the number and suitability of their staff, as well as competent supervision.*

88. The state parties to *CROC*, of which Australia is one, stated in the preamble to the Convention that they are

[34] Opened for signature 20 November 1989, ATS 1991 No. 4, (entered into force 2 September 1990) (***CROC***).

> "*Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community."*

89. State parties to the International Covenant on Economic, Social and Cultural Rights[35] also recognised:

- the family is the natural and fundamental group unit of society
- special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.[36]

90. Whilst it has been acknowledged that *'children in the care of the State have a right to expect, having been removed from neglect and abuse occurring at home, that the State will improve their lives and provide the chance for them to become positive and productive adults*',[37] the various reports referred to in this decision indicate that some children in the care of the State, particularly during the period when the applicant was in the care of the State, were deprived of the support and care that would encourage their development and wellbeing.

91. The absence or loss of a family relationship has a significant impact on a young person's life, and that sense of loss was often further exacerbated by institutional care:[38]

> *The loss of identity and connection with family is one of the most traumatic and distressing outcomes from a life lived in institutional care. While in care, few children were told the story behind their placement or encouraged to maintain connections with their families.*

92. One of the consistent themes expressed in the course of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families[39] was the importance of knowing about one's family and the need to know more of the events that occurred during childhood. In a statement that echoes the sentiments expressed by the applicant in this matter, a contributor to the Inquiry stated:[40]

> *That's why I wanted the files brought down, so I could actually read it and find out why I was taken away and why these three here [siblings] were taken by [our] auntie ... Why didn't she take the lot of us instead of leaving two there? ... I'd like to get the files there and see why did these ones here go to the auntie and the other ones were fostered.*

93. The Department has expressed a view that although families share day to day experiences, the intimate details of each family member are not necessarily shared with other members of the family, particularly when that family has been separated. Whilst I acknowledge that this may be the case, it is my view that separation from one's family in childhood increases rather than decreases the public interest in a child so affected accessing remaining family information.

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[35] Opened for signature 16 December 1966, ATS 1976 No. 5 (entered into force 3 January 1976) (***CESCR***).
[36] Article 10, *CESCR.*
[37] Western Australia, *Review of the Department for Community Development* (2007) at page 89.
[38] *Senate Report* at paragraph 9.4.
[39] Commonwealth, Human Rights and Equal Opportunity Commission, *Bringing Them Home* (1997) (***HREOC Report***).
[40] *HREOC Report,* confidential evidence 161.

94. Commenting on the Department's predecessor's failure to encourage family relationships, the *Commission Report* indicates that:[41]

> *Until the 1960s the Department did not keep children in its care informed about their families. It took no responsibility for ensuring that sibling relationships were promoted within the institutions, nor for maintaining ties with family outside … Children were not kept informed of their family circumstances ….*
>
> *The situation improved considerably from the mid-1960s when the first qualified social workers began to be employed by the Department, heralding a gradual improvement in its level of involvement with the children in its care.*

95. The applicant was taken into the care of the Department's predecessor in 1963 at the age of 8, at a time in which there was little awareness of the importance of maintaining sibling and parental relationships or little attention was paid to it. Only later were there gradual improvements in this area.

96. The *Senate Report* found that the long term impacts of institutional care on children '*are complex and varied'* but noted that in the main they have often *'been significantly negative and destructive*' with legacies of lack of trust, low self esteem, anxiety, depression and other significant personal problems being attributed to the lack of normal family upbringing, with such problems possibly persisting across generations.[42] It was also noted that traumas associated with childhood did not have their fullest impact until mid-life, as recollections of childhood events tended to resurface, and for many, '*feelings of abandonment, and of being absolutely and totally alone in their life … intensified with the passing years'*.[43]

97. Due to the effects of departmental practices, physical separation, fractured relationships and lack of resources and support, accessing information about their family history and background, which is often taken for granted by children raised with their families, has often been difficult for people who have left the care of the State. This is exacerbated by their trying to access this information later in their lives, long after their legal ties with the departmental guardian have been abruptly and statutorily severed.

98. The need of children in care to know the type of information sought by the applicant has been recognised since the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally[44]. Article 9 of the Declaration states:

> *The need of a foster or an adopted child to know about his or her background should be recognised by persons responsible for the child's care unless this is contrary to the child's best interests.*

99. Similarly, the Charter of Rights for a child in care[45] partially reflects the implementation in domestic law of Australia's obligation under article 8 of *CROC* to:

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[41] At page 101.
[42] *Senate Report* at paragraphs 6.1 to 6.4 and 6.19.
[43] At paragraphs 6.34 and 6.29.
[44] *United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally*, GA Res 41/85, UN GAOR (1986).
[45] Schedule 1 *CP Act.*

> *Respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.*

100. The *Senate Report* concluded that:[46]

> *The search for identity is crucial for care leavers. For many, being in care has meant the loss of family and connection with their place of origin. Care leavers do not have the mementos of childhood that are taken for granted by most Australian: school reports; photographs; and happy memories of birthdays.*
>
> *The task faced by many care leavers to access records and recover their lost past is immense. Records may be scattered across a number of agencies, they may be in a poor state, lack indexes and directories and agencies do not have the resources to adequately assist care leavers. Unfortunately, in many instances it is too late: the records have already been destroyed or lost …*

101. Accordingly, the *Senate Report* also found that '*there is an urgent need to improve access to records*'[47] and that '*[c]are leavers should be extended the most flexible interpretation of both Freedom of Information legislation and privacy principles in order to access all personal information and to facilitate reconnection with family*'.[48] The Senate Committee recommended that all government agencies agree on guidelines for care leavers accessing records which incorporate a '*commitment to the flexible and compassionate interpretation of privacy legislation to allow a care leaver to identify their family and background*'.[49]

102. In view of the above, I consider that there is a public interest in respecting the right of Care Leavers to know about their family and the events that occurred during their childhood. It is imperative that to the greatest extent possible, Care Leavers have the kind of knowledge about their families that they would have gained through living with them and which may afford them an opportunity to develop a better sense of their own identity from whatever information they can glean about their family history, health, language, culture, traditions, interests, preferences, strengths and weaknesses. It is my view that this public interest consideration should be accorded significant weight in the external review.

Public interest considerations that favour not disclosing the Matter in Issue

103. Having considered the arguments put forward by the parties and the matter in issue, I consider that the principal public interest consideration favouring non-disclosure of the matter in issue is the inherent public interest in protecting personal privacy where the matter in issue concerns the personal affairs of persons other than the applicant (**Privacy Interest**).

104. An appropriate weight must be allocated to that interest, having regard to the character and significance of the particular matter in issue.[50]

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[46] At paragraph 9.99.
[47] At paragraph 9.106.
[48] At paragraph 9.111.
[49] At paragraph 9.117.
[50] See *Lower Burdekin Newspaper Company Pty Ltd and Burdekin Shire Council; Hansen, Covolo and Cross (Third Parties)* (2004) 6 QAR 328 at paragraph 23.

Privacy interest

105. I am satisfied that the type of personal affairs information contained in the matter in issue ordinarily attracts a strong privacy interest.

106. I do note however, that the documents containing the matter in issue are dated between 1969 and 1979 and refer to the applicant's family members, including individuals who are now deceased.

107. I consider that the age of the documents and privacy concerns in respect of the deceased family members slightly reduces the weight to be accorded to this public interest factor, but not by any significant degree.[51]

108. The privacy interest however does appear to be diminished by the nature of the privacy right being protected. In Australia there is neither a constitutional right to privacy nor is there a generally recognised legal cause of action of "unjustified invasion of privacy", although the possibility of one has not necessarily been excluded and Justice Skoien in *Grosse v Purvis*[52] formed the view that there was such an actionable right. In some States and at the Commonwealth level, a statutory regime has been implemented for the collection, correction, use and disclosure of personal information. This is to protect the privacy of individuals with respect to information held by those governments and some non-government entities. In Queensland, the *Information Privacy Act 2009* recognises that personal information held by the public sector must be collected and handled fairly.[53] To that end, it places an obligation on Queensland government agencies and public authorities to comply with privacy principles that regulate the collection, storage, accuracy, use and disclosure of personal information.[54] The privacy principles relating to disclosure of personal information, however, give way where there is a legal authority to disclose personal information,[55] such as that contained in the FOI Act.

109. It is generally agreed that the first publication advocating privacy at least in the United States was "The Right to Privacy" by Samuel Warren and Louis Brandeis.[56] Published in 1890, the article was written largely in response to the increase in newspapers and photographs made possible by printing technologies. The authors asserted that privacy is the "right to be let alone".

110. Privacy is however, a recognised human right and information privacy is reflected in section 44 of the FOI Act. Article 12 of the Universal Declaration of Human Rights[57] states:

> *No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.*

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[51] I refer to the Information Commissioner's comments in *Fotheringham and Queensland Health* (1995) 2 QAR 799 at paragraph 31 in respect of this issue.
[52] (2003) Aust Torts Reports 81-706.
[53] Section 5, *Information Privacy Act 2009* (***IP Act***).
[54] Sections 26 and 30, IP Act.
[55] Information Privacy Principle 11(1)(d), IP Act.
[56] Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 Harvard L.R. 193.
[57] UN GAOR (1948).

111. The recent Australian Law Reform Commission report[58] on a review of privacy laws found that privacy is generally accepted to be of four types: information privacy, bodily privacy, communication privacy and territorial privacy. The relevant privacy consideration in question here is information privacy. The application of information privacy principles to the sharing of information within the family unit and between family members in some circumstances, as opposed to its application to the sharing of an individual's personal information held by government, is not straight forward. The privacy right is rooted in the notion of an arbitrary interference. For example, when considering information sharing between family members living under the same roof, what would be conclusively considered an 'arbitrary interference with a person's privacy' by a member of the family?

112. In the family, whether living together or not, it is difficult for personal information to be kept 'secret' for a range of reasons. There is some information that cannot be kept 'secret'. Individuals growing up in families, by virtue of living together have a 'living' and often 'unspoken' history of shared personal information. This knowledge comprises part of that which has been referred to as 'inseverable personal affairs'. For example, a child growing up with a parent with mental health issues would experience the outward emanations of the condition and know their parent is different to other parents, even if they may not know the name of the illness or it remains undiagnosed.

113. This shared personal information goes to the identity of the child and is critical to his/her wellbeing. Parents are responsible for making judgments about what information children will be given and when, ideally with attention to whether or not the provision of information is in their best interests. Some information may be shared as the child grows older or become obvious to it without being verbally told. Had the applicant lived longer with his family or relatives, he would have seen with his own eyes and developed greater living memories of his family. The applicant was separated from his family at the age of eight and it is clear from his application that already by that age he understood that all was not well. The information on the Department's file will not be a total surprise to him.

114. When the Department assumes the role of a child's guardian, it assumes ultimate responsibility for the child's development and making decisions critical to him/her. Children growing up in care have an impoverished sense of their 'living history' in their birth family, a history made no less important to the development of their identity having been separated from their family. Having a strong sense of a person's identity is critical to the person achieving their fullest possible potential. The imparting of information to a child in care about their family, including the personal information of others, is therefore a critical part of the role of guardian. It is one of the decisions the Department must make in the best interests of the child and to fulfill its statutory duties as it substitutes for the parents.

115. Where there is a conflict between the Department performing its role of guardian and its other statutory duties in the best interests of the child and its observance of other obligations such as protecting personal information, there is a public interest in the Department prioritising the interests of the child. Where the Department needs to find a balance between the rights of others, such as the right of privacy not to be subject to arbitrary interference and the best interests of the child, the Department has a statutory responsibility to perform its duty to children in its care in the best interests of the child.

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[58] Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice,* Report No 108 (2008).

116. The privacy interest to be protected in the circumstance of the applicant is the personal affairs of other family members. Much of it is information he would have been privy to had he resided with his family. Much of it would have been so called 'shared personal information' whether spoken or unspoken. The information is necessary for him to complete to the extent possible his understanding of himself and his family and how he has come to be in the place he currently occupies in the world.

117. The privacy right should not be understood out of the context of the notion of 'arbitrary interference'. Privacy rights were never intended to extend to interfere with the normal discourse within families nor to impede a child's identity development. This puts in context the accepted notion that another person's personal information can be the applicant's personal information by virtue of the fact that it relates to the health of a biological parent. Many conditions including health conditions are inherited or result from learned behaviour. On this basis health information about the applicant's family may be the health information of the applicant.

118. For these reasons my view is that the nature of this privacy interest lessens the significance of the weighting which should be accorded to it.

Possible dissemination of the matter in issue by the Applicant

119. In my preliminary view letter to the Department, I referred to the Victorian Court of Appeal decision of *Victoria Police v Marke*[59] to support my view that:

- release of documents under the FOI Act should not be assumed to be release to the 'world at large'
- the likelihood of the applicant disseminating the information beyond other members of his family is relatively low given the personal nature of his interest in the information.

120. The Department made the following submission in response:

> *Discussion is provided of a recently decided Victorian Case (Victoria Police v Marke [2008] VSCA 218) in relation to whether release to one person constitutes release to the world. The Department submits that this case in context of this external review is not applicable. The Victorian case concerned the application of Victorian Freedom of Information Act section 33(1) and whether the decision maker should or could consider in making the decision to release or not, if the recipient of the information will publish the information further. Section 33(1) is not comparable to section 44(1) of the Queensland Act. There is no indication in that case as to whether the issue in question was one of intrinsically personal information of third parties or if the matter in question concerned some other information. On that basis it is submitted that determinations of previous information commissioners would continue to apply and that* ***release to one person has to be viewed as release to the world****.*
>
> [my emphasis]

121. The decision of *Marke* concerns section 33(1) of the *Freedom of Information Act 1982* (Vic) (**Vic FOI Act**) which provides that:

> ***33 Document affecting personal privacy***
>
> *(1) A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).*
>
> *…*

[59] [2008] VSCA 218 (***Marke***).

122. Although it is clear that section 33(1) of the Vic FOI Act is drafted in different terms to section 44(1) of the FOI Act, the function of each section is relatively similar. Both provisions are concerned with the exemption of information relating to or concerning personal affairs.

123. In considering the personal affairs exemption in Queensland, the Electoral and Administrative Review Commission's (**EARC**) Report on Freedom of Information stated that:

> *…if the information in the document relates in part to the personal affairs of a person other than the applicant, it is necessary to ask whether disclosure of that information would, on balance, be in the public interest. In this respect, the draft Bill differs from the FOI legislation of other Australian jurisdictions, which requires an assessment of whether disclosure would be unreasonable. The draft Bill departs from this model in order to make it clear that the public interest is the ultimate criterion for disclosure, but* ***otherwise it is not intended to depart from the approach taken in other Australian jurisdictions****.*
>
> [my emphasis]

124. The decision of *Marke* is the most recent decision of an intermediate appellate court to consider the 'world at large' principle in the context of intended or likely dissemination of information claimed to be exempt under the personal affairs provision.

125. Although each member of the Court held that a decision-maker is not bound to regard disclosure to an applicant as disclosure to the world, each differed as to the reason for reaching this conclusion.

126. In his reasons for decision, Weinberg JA noted that *'the expression 'to the world at large' is nothing more than a metaphor'* which really means that *'there is nothing to limit or restrain general publication. Once a document is made available under FOI, the information is in the possession of the recipient who can do with it whatever he or she wishes, without any constraints.'*[60]

127. Pagone AJA went on to agree with the trial judge that *'an applicant can disseminate the documents to the world at large once obtained…* [however] *it does not follow as a matter of logic that the applicant will disseminate the documents widely, or at all.'*[61]

128. In my view, the decision of *Marke* supports the proposition that a decision maker[62]:

- should not assume that disclosure of information to an applicant is disclosure to the world at large
- should not exclude from consideration evidence about the intended or likely extent of dissemination of information by the applicant.

129. I consider that this correctly states the position in Queensland. In my view, the FOI Act does not support the long held and widely utilised assumption that release of documents to an applicant is necessarily release to the world at large.

130. Accordingly, I do not accept the Department's submission that release of information to one person has to be viewed as release to the world.

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[60] *Marke* at paragraph 67.
[61] *Marke* at paragraph 103.
[62] This proposition may be found in the reasons of Weinberg JA and Pagone AJA.

131. I have also considered the likelihood of the applicant disseminating the matter in issue beyond other members of his family and I find it is relatively low given the personal nature of his interest in the information.

Summary – weighing the public interest considerations

132. I have considered and weighed the public interest considerations favouring non-disclosure against the public interest considerations favouring disclosure of the matter in issue.

133. On the basis of the matters discussed above, I am satisfied that:

- significant weight should be given to the public interest in:
  - enhancing transparent in government
  - enhancing the accountability of government
  - the applicant's justifiable need to know the information sought
  - social and economic wellbeing of the community
  - the equitable treatment of children in, or people formerly in, State care.
- although the privacy interest in the matter in issue is strong and is only slightly reduced as a result of the:
  - age of the documents
  - diminished privacy concerns of deceased persons over time

  the nature of the privacy interest is such that its weight is significantly lessened.

134. Having weighed the privacy interest favouring non-disclosure against the public interest considerations favouring disclosure, I am satisfied that the public interest arguments which favour disclosure of the matter in issue (as discussed above) outweigh the public interest in protecting the privacy of the named individuals.

135. Accordingly, I find that the matter in issue is not exempt from disclosure under section 44(1) of the FOI Act and should be released to the applicant.

Relevant Law – Section 48(1) of the FOI Act

136. As the Department submits that *'…section 187 of the Child Protection Act 1997 does apply',* I have also considered the application of section 48(1) of the FOI Act briefly below.

137. Section 48 of the FOI Act provides:

> ***48 Matter to which secrecy provisions of enactments apply***
>
> *(1) Matter is exempt matter if its disclosure is prohibited by an enactment mentioned in schedule 1 unless disclosure is required by a compelling reason in the public interest.*
>
> *(2) Matter is not exempt under subsection 1 if it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to the document containing the matter is being made.*

138. Sections 186, 187 and 188 of the CP Act are set out in Schedule 1 of the FOI Act. This means that matter will be exempt from disclosure under the FOI Act if its disclosure is prohibited by sections 186, 187 or 188 of the Child Protection Act 1999 unless:

- the information relates to the applicant's personal affairs only[63]
  or
- there is any compelling reason in the public interest to disclose this information.[64]

139. I consider that only section 187 of the CP Act is relevant to this external review. This section provides essentially that information obtained by persons involved in the administration of the CP Act must be kept confidential except in specific circumstances.

140. As I am satisfied that the exception to section 48(1), as contained in subsection (2) does not apply, that is, the matter in issue does not concern the applicant's personal affairs only, I will consider section 187 of the CP Act in more detail.

Section 187 of the Child Protection Act 1999 - Confidentiality of information

141. Section 187(1) of the CP Act provides in part that a person who is or has been a public service employee performing functions in relation to the administration of the CP Act "must not use or disclose information about another person's affairs."

142. More specifically, section 187(2) of the CP Act provides that:

> *The person must not use or disclose the information, or give access to the document, to anyone else.*
>
> *Maximum penalty – 100 penalty units or 2 years imprisonment.*

143. However, subject to section 186 of the CP Act (which is not relevant for present purposes), section 187 provides that information may be disclosed for specific purposes. In particular, section 187(3)(a) allows information or documents to be disclosed to the extent necessary for a person to perform their functions under the CP Act.

144. As already discussed, the Department, to discharge its role as guardian, has a role in imparting personal and family history. Section 75 of the CP Act provides that the chief executive must ensure that a person who has been in their custody or under their guardianship is provided with help in the transition from being a child in care to independence.

145. The Explanatory Notes to the Child Protection Bill 1998 indicate that the help or assistance provided to a person who has been in care may include for example '*providing information about identity and personal history*.'[65]

146. As already discussed above, the Senate Committee found that the *'search for identity is crucial for care leavers'*[66] as is having an understanding of their personal history.

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[63] In accordance with section 48(2) of the FOI Act.
[64] In accordance with section 48(1) of the FOI Act.
[65] At page 30.
[66] At paragraph 9.99.

147. Despite the passage of time since the applicant was in care, and the fact that the CP Act was not in force when the applicant left care, I am satisfied that:

- disclosure of the matter in issue is not prohibited by section 187 of the CP Act
- the matter in issue does not qualify for exemption under section 48(1) of the FOI Act.

Compelling reason in the public interest

148. As I am satisfied that the matter in issue does not qualify for exemption under section 48(1) of the FOI Act, it is unnecessary for me to consider whether disclosure is required by a compelling reason in the public interest. For sake of completeness, had I found that the matter in issue did qualify for an exemption under section 48(1) of the FOI Act, I would consider that there is a compelling reason in the public interest.

149. The public interest test contained in section 48 of the FOI Act carries with it a more demanding test for disclosure than the usual test for public interest disclosure under the FOI Act given the use of the word "compelling". On this point the Information Commissioner has previously stated that:[67]

> *In my view, the imposition of a more demanding test for disclosure in the public interest, i.e. the test of a "compelling reason in the public interest" must have been intended by Parliament to indicate that it regards the public interest consideration favouring non-disclosure, which is inherent in the satisfaction of the test for* prima facie *exemption under s. 48(1),* ***as one deserving of very great weight, such that it is to be overborne only by a compelling reason requiring disclosure in the public interest.***
>
> [my emphasis]

150. When considering the meaning of the phrase '*required by a compelling reason in the public interest*' the Information Commissioner has also found that:[68]

- the use of the word '*required*' conveys a sense of the imperative, of something that is demanded or necessitated; and
- there must be one or more identifiable public interest considerations favouring disclosure which are so compelling (in the sense of forceful or overpowering) as to require (in the sense of demand or necessitate) disclosure in the public interest.

151. The abuse and neglect of children in State care for a significant part of the last century, as uncovered by numerous inquiries throughout Australia in the past decade or so, was so pervasive and abhorrent as to result in apologies to Care Leavers from governments, churches and non-government organisations. In Queensland, in accordance with recommendations in the *Commission Report*, the government established a reparation scheme and provided funding for a dedicated resource service, the Aftercare Resource Centre, (**Aftercare**) to 'support the needs' of Care Leavers. Aftercare's website states that:

> *Many former children in care share feelings of sadness, rejection and shame about the past. Many struggle to understand who they are and where they belong, and have difficulty trusting and relating to others.*

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[67] *KT and Brisbane North Regional Health Authority* (1998) 4 QAR 287 at paragraph 66.
[68] *Whittaker and Queensland Audit Office* (2001) 6 QAR 78 at paragraphs 29-30.

152. It is clear from the various inquiries that the government approaches to 'child protection policies' have had a significant personal and financial cost for the many thousands of individuals placed/taken into the care of the State. The *Senate Report* describes this cost as profound and notes that the harm that resulted to individuals also has '*a massive long-term social and economic cost for society which may be compounded when badly harmed adults in turn create another generation of harmed children'*.[69]

153. In relation to information concerning identity and personal history:

- it has been acknowledged by Parliament that Care Leavers have suffered significant harm whilst in the care of the State and are entitled to special assistance to aid them in rebuilding their lives
- inquiries concerning children in State care have identified that having access to information about their identity and personal history is of fundamental importance for Care Leavers in seeking to resolve the myriad effects of their early lives
- in accordance with increased community understanding and awareness children currently in State care have a statutory right to be given access to information about their personal history as this is recognised by Parliament to be a fundamental aspect of ensuring that such children do not suffer the damage reported by Care Leavers including feelings of isolation, abandonment and loss of identity.

154. In view of the above and the public interest factors discussed in relation to section 44(1) of the FOI Act, I am satisfied that the public interest in ensuring that Care Leavers are afforded every opportunity to repair the damage done to their lives and reach their potential provides a compelling, that is, forceful reason that necessitates disclosure of the matter in issue.

DECISION

155. I set aside the decision under review and find that the matter in issue is not exempt from disclosure under section 44(1) of the FOI Act.

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Julie Kinross
Acting Information Commissioner

Date: 9 July 2009

[69] At paragraph 6.53.