OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 97002
Applications S 148/96 & S 149/96

Participants:

THE DIRECTOR-GENERAL, DEPARTMENT OF FAMILIES, YOUTH AND COMMUNITY CARE
Applicant

DEPARTMENT OF EDUCATION
Respondent

JILL ANNE PERRIMAN
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - 'reverse FOI' application - matter in issue relates to student behaviour management and disciplinary practices of Department of Education with respect to two students - whether matter in issue is information concerning the personal affairs of the students - whether disclosure would, on balance, be in the public interest - application of s.44(1) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.26, s.44(1), s.51, s.78
Education (General Provisions) Act 1989 Qld
Judicial Review Act 1991 Qld
Freedom of Information Act 1982 Vic

Director of Public Prosecutions v Smith [1991] 1 VR 63
Pemberton and The University of Queensland, Re (1994) 2 QAR 293
Stewart and Department of Transport, Re (1993) 1 QAR 227
Willsford and Brisbane City Council, Re (Information Commissioner Qld, Decision No. 96017, 27 August 1996, unreported)

DECISION

1. In respect of application for review no. S 148/96, I affirm the decision under review (being the decision made on behalf of the respondent by Mr P Parsons on 19 August 1996) that the matter in issue on folios 12-15 is not exempt from disclosure to the third party under the *Freedom of Information Act 1992* Qld.

2. In respect of application for review no. S 149/96, I affirm the decision under review (being the decision made on behalf of the respondent by Mr P Parsons on 29 August 1996) that the matter in issue on folios 50-101 of File B and folios 93-96 of File C is not exempt from disclosure to the third party under the *Freedom of Information Act 1992* Qld.

Date of decision: 18 February 1997

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. In these two 'reverse-FOI' applications, the applicant, in his capacity as guardian of two youths, challenges decisions of the respondent under the *Freedom of Information Act 1992* Qld (the FOI Act) to give the third party access to documents concerning the behaviour management processes used by the respondent in respect of the two youths during their attendance at government schools. The third party, Ms Perriman, was a teacher at Tennyson Special School in June 1994, when she allegedly was assaulted by one of the youths. The applicant contends that the matter in issue concerns the personal affairs of the youths and is exempt matter under s.44(1) of the FOI Act.

Application for review no. S 148/96

2. By letter dated 13 March 1996, solicitors for Ms Perriman applied to the Department of Employment, Vocational Education, Training and Industrial Relations for access under the FOI Act to "*our client's file and the Department file relating to an assault on our client by a student of the Tennyson Special School …*". The FOI access application named the student involved, whom I shall refer to as "Student 1". By letter dated 14 March 1996, the Department of Employment, Vocational Education, Training and Industrial Relations transferred Ms Perriman's FOI access application to the Department of Education ("the Department"): see s.26 of the FOI Act.

3. As Student 1 was under the guardianship of the Director-General of the Department of Families, Youth and Community Care, the Department of Education determined that s.51 of the FOI Act required it to consult with the applicant. The applicant responded by letter dated

21 June 1996, contending that four folios related to the personal affairs of Student 1, and should be exempt from disclosure under s.44(1) of the FOI Act.

4. By letter dated 24 June 1996, the Department's initial FOI decision-maker (Ms Keast) notified the applicant of her decision to grant Ms Perriman partial access to the four folios, contrary to the applicant's views that the documents were wholly exempt. The matter which Ms Keast determined to be exempt was the student's name, address, and date of birth, and the name and address of his former guardian. Ms Perriman has not sought review of Ms Keast's decision, so that aspect of Ms Keast's decision is not in issue in the present review.

5. The applicant sought internal review of Ms Keast's decision, which was affirmed by Mr Parsons, on behalf of the Department, in a decision made on 19 August 1996. By letter dated 17 September 1996, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Parsons' decision.

Application for review no. S 149/96

6. By letter dated 11 April 1996, solicitors for Ms Perriman applied to the Department for access to the Department's file "*relating to the operation of the Tennyson Special School over the period of the last 5 years*". After consultation with the Department's FOI Co-ordinator, the request was clarified, by letter dated 3 June 1996, as being confined to the following types of information - "*information, correspondence or documents relating to behaviour management of students, staff management, information in relation to complaints by staff regarding the behaviour and assaults perpetrated by students of the school*".

7. The Department identified numerous documents as falling within the terms of the second FOI access application, including a number of folios concerning the behaviour of another student at the Tennyson Special School (whom I shall refer to as "Student 2"). Again, as Student 2 was under the guardianship of the applicant, the Department determined that s.51 of the FOI Act required it to consult with the applicant. The applicant objected to disclosure of matter relating to Student 2 on the grounds that it was exempt under s.44(1) of the FOI Act.

8. By letter dated 24 June 1996, Ms Keast notified the applicant of her decision to grant Ms Perriman partial access to the folios relating to Student 2, contrary to the applicant's views that those folios were wholly exempt. The matter which Ms Keast determined to be exempt included information showing Student 2's name, his mother's name, his date of birth, his address, and the names of other schools he attended.

9. The applicant sought internal review of Ms Keast's decision, which was again conducted by Mr Parsons. By letter dated 30 August 1996, Mr Parsons notified the applicant that he had decided to vary Ms Keast's decision, by finding that additional information in the documents in issue was exempt matter, namely, information showing the dates of incidents at the school which involved Student 2, and information relating to Student 2's personal health and domestic affairs, and to the personal affairs of his mother. I note that Ms Perriman has not sought review in respect of the information found by Ms Keast and Mr Parsons to be exempt matter under the FOI Act, and that information is not in issue in the present review. By letter dated 17 September 1996, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Parsons' decision.

External review process

10. I obtained and examined the documents containing the matter in issue in these reviews. The matter in issue in application for review no. S 148/96 appears on folios 12-15 (as identified in

the decision under review), which relate to a sanction imposed on Student 1 in June 1994 under the *Education (General Provisions) Act 1989* Qld. Folio 15 is the notice of the sanction given by the School Principal to Student 1. It sets out the terms of the sanction and the basis for the action. Folios 12-14 are letters from the Acting Deputy Executive Director of the Department to the Principal, Student 1, and his former guardian, confirming the sanction.

11. The matter in issue in application S 149/96 appears on folios 50-101 of File B and folios 93-96 of File C (as identified in the decision under review). There is much duplication amongst these folios. The documents relate to the behaviour of Student 2 and efforts by the Department, both informally and under the *Education (General Provisions) Act*, to remedy the situation.
The documents comprise reports of teachers and Departmental officers on the behaviour of Student 2 and possible actions which the Department might take, together with internal memoranda, and correspondence with the Minister, with Student 2, and with his mother.

12. I notified the solicitors for Ms Perriman of the reviews. In accordance with s.78 of the FOI Act, Ms Perriman applied for, and was granted, status as a participant in these reviews.

13. In the application for external review, the applicant stated an intention to lodge a submission outlining his position in relation to these external reviews. After an invitation from my office to lodge further material in support of his case, the applicant advised that he would rely on the arguments raised in correspondence with the Department during the consultations under s.51 of the FOI Act. Having considered that material in the light of the detailed reasons for decision given by Ms Keast and Mr Parsons, and my own examination of the matter in issue, I did not think it necessary to trouble the Department, or Ms Perriman, for further evidence or submissions.

Application of s.44(1)

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

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

15. 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.

Personal affairs

16. 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. I held that information concerns the "personal affairs of a person" if it relates to 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 with and emotional ties with other people
- domestic responsibilities or financial obligations.

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

17. In each of the decisions under review, Mr Parsons found that the whole of the matter in issue concerned the student's education, and relationship with the education system, and therefore was to be properly characterised as information concerning the student's personal affairs under s.44(1) of the FOI Act. I concur with that finding. Information relating to a student's performance or behaviour at school is information which concerns the student's personal affairs, and is *prima facie* exempt under s.44(1).

18. Accordingly, I must consider whether disclosure of any or all of the matter in issue in each external review would, on balance, be in the public interest. I will discuss the public interest considerations raised by the Department, and by the applicant, as favouring disclosure or non-disclosure of the matter in issue, before stating my conclusion on the application of the public interest balancing test in s.44(1).

Public interest considerations favouring disclosure

19. The material before me refers to four public interest considerations said to favour disclosure of the matter in issue to Ms Perriman -

(a) Accountability of the Department.

I recognise that there is a public interest in enhancing the accountability of the Department both with regard to its functions in managing student behaviour and in ensuring that teachers and students have an appropriate and safe environment in which to work and study. The documents in issue relate to disciplinary processes and other behaviour management processes adopted by the Department. It is clearly important for the Department to take action to address what are potentially disruptive, if not dangerous, situations. Disclosure of the matter in issue would allow members of the community a better understanding of procedures used by the Department, and would allow them to assess the performance of the Department in these particular cases. Mr Parsons' decisions discuss this public interest consideration at length.

The applicant contends that current, published, policy and practice guidelines are sufficient to satisfy the public interest, in the context of these cases. The applicant acknowledges that there may be a public interest in scrutiny of the way in which Principals apply the guidelines, but says that this can be addressed without unnecessary intrusion into the privacy of citizens. While published guidelines can be of assistance to members of the community in assessing the performance of an agency, I do not consider that they wholly satisfy the public interest in promoting public scrutiny of agency operations. One cannot, merely by reading guidelines, discover whether those guidelines are apt for the task they are intended to perform, or whether they are complied with by agency personnel, or properly applied. In saying this, however, I accept that there may be occasions (particularly where the privacy interest attaching to personal affairs information is a strong one) when the balance of the public interest favours release of only limited information about agency performance in a particular case.

The applicant also pointed to the existence of other "accountability mechanisms", such as recourse to the Ombudsman, the Criminal Justice Commission, local elected representatives, the Minister, and the courts under the *Judicial Review Act 1991* Qld or the common law. The applicant submits that "*the determination is whether these mechanisms are insufficient to ensure the accountability of the Department of Education.*" I do not accept that the existence of other accountability mechanisms can be used as a basis for any significant diminution of the public interest in disclosure of information under the FOI Act in order to promote the accountability of government agencies.

The FOI Act was intended to enhance the accountability of government (among other key objects) by allowing any interested member of the community to obtain access to information held by government (subject to the exceptions and exemptions provided for in the FOI Act itself). The FOI Act was not introduced to act as an accountability measure of last resort, when other avenues of accountability are inadequate. The FOI Act gives a right to members of the community which is in addition to, and not an alternative for, other existing rights. Indeed, applications are frequently made under the FOI Act to enable members of the community to arm themselves with the information necessary to afford a meaningful opportunity to pursue some of the other accountability mechanisms referred to by the applicant.

(b) Informing public debate.

The Department also recognises a public interest in members of the public having sufficient knowledge to properly consider and debate issues of public concern. The Department refers to recent public debate about the handling of children with special needs in the school system.

Disclosure of the matter in issue would provide specific case histories (from which all identifying details in respect of the individual students have been deleted) showing the ways in which the Department has dealt with students manifesting behavioural problems. Disclosure of the matter in issue would better inform the public about recent practice in this regard, and assist debate about preferable approaches to managing students with behavioural problems. I agree with the Department's view that this is a significant public interest consideration favouring disclosure of the matter in issue.

(c) Fair treatment of the individual.

In *Re Pemberton and The University of Queensland* (1994) 2 QAR 293, at p.377, I said:

> *190. ... The public interest in the fair treatment of persons and corporations in accordance with the law in their dealings with government agencies is, in my opinion, a legitimate category of public interest. It is an interest common to all members of the community, and for their benefit. In an appropriate case, it means that a particular applicant's interest in obtaining access to particular documents is capable of being recognised as a facet of the public interest, which may justify giving a particular applicant access to documents that will enable the applicant to assess whether or not fair treatment has been received and, if not, to pursue any available means of redress, including any available legal remedy.*

The Department weighed this factor in balancing the public interest in disclosure of the matter in issue to the particular applicant for access, Ms Perriman, pointing to the fact that she had allegedly been assaulted by Student 1. I am not sure that the public interest consideration identified in the passage quoted above is really applicable in the circumstances of this case. I do not think there is any suggestion of unfair treatment of Ms Perriman by the Department, as opposed to a possible breach of the Department's legal duty, as employer, to take reasonable precautions to prevent a foreseeable risk of harm to its employees (i.e., it is suggested that, if reasonable precautions had been taken, they could have prevented the harm which befell Ms

Perriman). The documents in issue do not refer to Ms Perriman at all, or directly affect her (although those in issue in application for review no. S 148/96 concern the action taken against Student 1 in response to the incident involving the alleged assault) and the only redress which it is suggested she may have against the Department is for not taking proper steps to ensure her safety in the workplace. In that regard,
I accept that the following public interest consideration is applicable in the circumstances of this case.

(d) Pursuit of a remedy.

In *Re Willsford and Brisbane City Council* (Information Commissioner Qld, Decision No. 96017, 27 August 1996, unreported), I said (at paragraphs 16-18):

> *16. I consider that, in an appropriate case, there may be a public interest in a person who has suffered, or may have suffered, an actionable wrong, being permitted to obtain access to information which would assist the person to pursue any remedy which the law affords in those circumstances (cf.* Re Cairns Port Authority and Department of Lands *(1994) 1 QAR 663 at pp.713-714, paragraphs 103-104; p.717, paragraph 120; and p.723, paragraph 142). The public interest necessarily comprehends an element of justice to the individual: see* Re Pemberton and The University of Queensland *(Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported) at paragraphs 178 and 190, and the cases there cited. Although the public interest I have described is one which would apply so as to benefit particular individuals in particular cases, I consider that it is nevertheless an interest common to all members of the community and for their benefit.*
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> *17. The mere assertion by an applicant that information is required to enable pursuit of a legal remedy will not be sufficient to give rise to a public interest consideration that ought to be taken into account in the application of a public interest balancing test incorporated into an exemption provision in the FOI Act (cf.* Re Alpert and Brisbane City Council *(Information Commissioner Qld, Decision No. 95017, 15 June 1995, unreported) at paragraph 30). On the other hand, it should not be necessary for an applicant to prove the likelihood of a successful pursuit of a legal remedy in the event of obtaining access to information in issue. It should be sufficient to found the existence of a public interest consideration favouring disclosure of information held by an agency if an applicant can demonstrate that -*
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> *(a) loss or damage or some kind of wrong has been suffered, in respect of which a remedy is, or may be, available under the law;*
> *(b) the applicant has a reasonable basis for seeking to pursue the remedy; and*
> *(c) disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.*
>
> *18. The existence of a public interest consideration of this kind would not necessarily be determinative - it would represent one consideration to*

> *be taken into account in the weighing process along with any other relevant public interest considerations (whether weighing for or against disclosure) which are identifiable in a particular case. On the other hand, it would ordinarily be true to say (to the extent that a decision-maker under the FOI Act is able to make an objective assessment of these matters from the material put forward by an applicant to establish (a), (b) and (c) above) that the greater the magnitude of the loss, damage or wrong, and/or the stronger the prospects of successfully pursuing an available remedy in respect of the loss, damage or wrong, then the stronger would be the weight of the public interest consideration favouring disclosure which is to be taken into account in the application of a public interest balancing test incorporated in an exemption provision of the FOI Act.*

On the material before me, it appears that Ms Perriman claims to have suffered substantial loss as a result of the alleged assault. She was apparently unable to work for a period of approximately five months after the incident involving Student 1. I consider that Ms Perriman has a reasonable basis for seeking to establish whether a legal remedy may be available to her in respect of any loss attributable to the incident. The documents in issue in application no. S 148/96 were created, at least partly, in response to the incident. I consider that disclosure of the Department's response to the incident may be relevant to the pursuit of her enquiries into the availability of a legal remedy.

All of the documents in issue would assist Ms Perriman to establish the actual procedures adopted by the Department, in two cases, for dealing with behaviour management problems posed by difficult students. This would assist Ms Perriman and her legal advisers to consider whether the efforts of the Department have fallen short of the standard of reasonable care owed by the Department to its employees, and to evaluate whether a remedy is available, or worth pursuing.

I consider that there is a public interest consideration of the type identified in *Re Willsford* which favours disclosure of the matter in issue to Ms Perriman.

Public interest factors favouring non-disclosure

20. Given the terms in which s.44(1) of the FOI Act is framed, the mere finding that matter comprises information concerning the personal affairs of a person is enough to raise a public interest consideration telling in favour of non-disclosure of the matter. However, the weight of that public interest consideration will vary according to the nature of the matter in issue (*cf. Re Willsford* at paragraph 22) and the circumstances of each case.

21. In the case of Student 1, the Department contends that the public interest in maintaining the privacy of Student 1 is diminished because he has engaged in physical action against the third party.

    I consider that there is some merit in this point. One should rightly question whether a person can act in such a manner as to threaten the security of another person (which is itself a form of invasion of privacy - I note that the Australian Law Reform Commission in its Report No. 22, *Privacy*, identified, as one of the major privacy interests, the interest in freedom from interference with one'sperson and 'personal space', or 'privacy of the person': see *Re Stewart* at p.254, paragraph 68), and then expect substantial weight to attach to a privacy interest in preventing disclosure of information, relevant to the incident, to the other person.

22. In the case of Student 2, I note that Student 2 and his mother have co-operated with a journalist in the creation of an article published in the *Courier-Mail* newspaper, including a photograph of Student 2 and his mother. I note that the mother provided a number of details of Student 2's

difficulties at school, including details of particular incidents. That information has therefore become a matter of public record. A person who volunteers information about himself or herself to the media cannot, in my opinion, reasonably expect his or her privacy rights in relation to that information, or closely related information, to weigh heavily in favour of non-disclosure, if a balancing exercise is called for in the application of s.44(1) of the FOI Act. (I note that, in *Director of Public Prosecutions v Smith* [1991] 1 VR 63 at p.69, a Full Court of the Supreme Court of Victoria found that, where persons had taken steps to bring matters of private concern into the public domain, the granting of public access, under the *Freedom of Information Act 1982* Vic, to documents concerning those matters, would not involve an unreasonable disclosure of personal affairs information.) I should make it clear that, in the case of a child, disclosure of information by, or at the urging of, a parent or guardian, may not always amount to an abandonment of a claim to protection under s.44(1). But, in this instance, I consider that the information released into the public domain, in relation to the behaviour of Student 2, does act to diminish the strength of the privacy considerations favouring non-disclosure of the matter in issue in application for review no. S 149/96.

23. The Department also raised the possibility that disclosure of information of this nature might lead to a souring of relations between students/parents and schools, which are seen as acting *in loco parentis*, and as secure repositories for private information about students. Given the matters discussed in the preceding two paragraphs and the extreme nature of the problems dealt with in these cases, I consider that they are of a sufficiently unusual nature that disclosure of the matter in issue could not reasonably be seen as representing a general policy of disclosure of student records by the Department.

Conclusions with respect to the application of the public interest balancing test in s.44(1)

24. Before stating my conclusions, I must say that I appreciate the concerns of the applicant with regard to protection of the privacy of the students. I consider that the applicant acted quite appropriately as guardian of the students in seeking to protect their interests. I also consider that both decision makers in the Department of Education have presented well developed reasons for decision in assessing what is a difficult choice between the competing public interest considerations.

25. With respect to the matter in issue in both applications for review, I find that disclosure to Ms Perriman would, on balance, be in the public interest. I consider that the combined weight of the public interest considerations favouring disclosure, which are discussed above in subparagraphs 19(a), (b) and (d), is sufficient to outweigh the relevant privacy interests, which, in my opinion, were somewhat diminished in strength having regard to the factors referred to in paragraphs 21 and 22 above.

26. I therefore find that none of the matter in issue in either application for review is exempt matter under s.44(1) of the FOI Act.

Conclusion

27. In each application for review, I affirm the decision under review.

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F N ALBIETZ
INFORMATION COMMISSIONER