

**OFFICE OF THE INFORMATION COMMISSIONER (QLD)**

**Decision No. 99004**  
**Application S 24/98**

**Participants:**

"BKR"  
**Applicant**

QUEENSLAND UNIVERSITY OF TECHNOLOGY  
**Respondent**

QUEENSLAND NURSING COUNCIL  
**Third Party**

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - 'reverse-FOI' application - clinical practice notes relating to an enrolled nurse studying for a qualification required to become a registered nurse - documents relating to an incident between the student and a staff member - whether the documents concern the personal affairs of the student - whether disclosure of the documents to the Queensland Nursing Council 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.44(1), s.51, s.78

*Nursing Act 1992 Qld* s.54(1), s.54(2), s.54(2A), s.54(3), s.66(2), s.70(1)(d), s.75, s.79, s.80

*Director-General, Department of Families, Youth and Community Care and Department of Education; Perriman (third party), Re (1997) 3 QAR 459*

*"L" and Nurses Registration Board, Re (1989) 18 ALD 600*

*MacLennan and Nurses Registration Board of the ACT, Re (1994) 36 ALD 793*

*Stewart and Department of Transport, Re (1993) 1 QAR 227*

**DECISION**

I vary the decision under review (being the decision made by Mr K E Baumber on behalf of the respondent on 4 February 1998) by finding that documents SN2-SN14 are not exempt from disclosure to the third party under the *Freedom of Information Act 1992 Qld*, but that the balance of the documents remaining in issue, identified at paragraph 6 of my accompanying reasons for decision, comprise exempt matter under s.44(1) of the *Freedom of Information Act 1992 Qld*.

Date of decision: 30 June 1999

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F N ALBIETZ  
**INFORMATION COMMISSIONER**

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## **REASONS FOR DECISION**

### **Background**

1. In this 'reverse-FOI' application, the applicant objects to the respondent's decision to grant the third party access, under the *Freedom of Information Act 1992 Qld* (the FOI Act), to documents held by the respondent concerning the applicant. The applicant contends that the documents are exempt matter under s.44(1) of the FOI Act.
2. By letter dated 27 October 1997, the Queensland Nursing Council (the Council) made an FOI access application to the Queensland University of Technology (the University) in the following terms:

*An application is hereby made ... for access to all documents held by the University concerning [the applicant], save and except that the Council does not require any information concerning subjects studied by [the applicant], or the marks which he obtained for those subjects.*

*The documents to which the Council is seeking access include all reports of clinical assessments completed by [the applicant], and any reports of incidents concerning [the applicant] during his time as a student, whether or not those incidents took place on campus.*

*This request is made to enable the Council to have regard to all relevant evidence available in order that it may properly carry out its duties as the registering authority of nurses in Queensland pursuant to the Nursing Act 1992.*

3. At the time of the access application, the applicant was an enrolled nurse who was studying at the University's School of Nursing to obtain a qualification which would allow him to apply to become a registered nurse. The applicant was consulted under s.51 of the FOI Act and responded, through his solicitors, objecting to the disclosure to the Council of any of the requested documents.
4. By letter dated 8 January 1998, Ms J Brasch informed the applicant of her decision, on behalf of the University, that the documents did not qualify for exemption, save for references in the documents to the applicant's private address, telephone number and student number. The applicant sought internal review, pursuant to which Ms Brasch's decision was affirmed by Mr K E Baumber, the Registrar of the University, on 4 February 1998. By letter dated 11 February 1998, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Baumber's decision.

#### **External review process**

5. The documents in issue were obtained and examined. The Council was notified of the review, and it applied for, and was granted, status as a participant in the review, in accordance with s.78 of the FOI Act. The Council (the successor to the Nurses' Registration Board of Queensland) is constituted under the *Nursing Act 1992* Qld, and is the body responsible for regulation of the nursing profession in Queensland. There are two levels of accreditation - enrolled nurse and registered nurse. Persons wishing to practise as either an enrolled or a registered nurse must apply to the Council, and satisfy the requirements for enrolment or registration set out in Part 3 of the *Nursing Act*. Initially, the Council was consulted to establish whether it wished to consider alternative methods for obtaining access which might be available under the *Nursing Act*, or through some co-operative arrangement with the University (and other Universities throughout Queensland). The Council indicated, however, that it wished to proceed with this external review.
6. Following consultation with my office, the Council indicated that it no longer sought access to one document of an administrative nature. The documents remaining in issue in this review can be conveniently categorised as follows:
  - A. Documents held by the University in relation to the applicant's clinical performance (Documents SN2-SN14)
  - B. Documents which relate to a complaint about statements made by the applicant to a member of the University's teaching staff (Documents R2-R11 and SN15-SN17)
  - C. A document which records a complaint by the applicant about his treatment as a student of the University (Document R1).

7. In addition to the matter in issue itself, I have taken into account the following material in making my decision:

- correspondence between the participants relevant to the making of the initial and internal review decisions of the University;
- a submission on behalf of the applicant dated 23 September 1998;
- a submission from the University dated 17 November 1998; and
- submissions from the Council dated 7 July 1998 and 1 December 1998.

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

8. 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.*

9. 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.

**Does the matter in issue concern the applicant's personal affairs?**

10. 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) as it appears in the FOI Act (see pp.256-257, paragraphs 79-114, of *Re Stewart*). In particular, I said that information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:

- family and marital relationships;
- health or ill health;
- relationships and emotional ties with other people; and
- 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.

11. The matter in issue concerns the applicant's dealings with the University, as a student undertaking a course of private study, in relation to both his academic/clinical performance and to other, non-academic matters. In its submission dated 17 November 1998, the University contended that the category A and C documents did not concern the applicant's personal affairs as they:
- *are not his records; the University retains ownership and control;*
  - *do not deal with the private aspects of his life. In this sense, Perriman (97002) is to be distinguished, because unlike primary and secondary schooling, tertiary education operationalises a vocational choice;*
  - *should be characterised as "quasi-professional". For example, [the applicant] has advised the University FOI Officer on several occasions that he seeks registration and work as a registered nurse on completion of his course.*
  - *are analogous to workplace performance reports. In Stewart's case, the Information Commissioner stated that he found it difficult to endorse the approach in Re Toomer and Department of Primary Industries and Energy (1990) 20 ALD 575, where it was held that an assessment of work performance containing criticism of a person's personality or an attack on professional or personal reputation is personal. ...*
  - *are assessments of [the applicant's] competence as a nurse. Claims regarding clashes of personality (applicant submission p.4) are irrelevant.*
12. The fact that the University retains ownership and control of the applicant's student records (as do government agencies in respect of many records which undoubtedly concern the personal affairs of individual citizens) is essentially irrelevant to the question of whether the information in the records is properly to be characterised as information concerning the personal affairs of the applicant.
13. In *Re Director-General, Department of Families, Youth and Community Care and Department of Education; Perriman (third party)* (1997) 3 QAR 459, I concurred with the finding of the Department of Education that matter which concerned a student's education, and the student's relationship with the education system, was properly to be characterised as information concerning the student's personal affairs. I do not accept the University's contention that matter of the kind described in paragraph 11 ceases to concern the personal affairs of a student because he or she has progressed to tertiary level, and is undertaking a course of study with a view to obtaining the necessary qualifications to seek employment in a certain field. In my view, the decision to undertake a course of study at a public or private educational institution, the time and effort expended in its pursuit, and the subject results/evaluations thereby obtained, fall within the realm of an individual's personal affairs, notwithstanding that the study may have been undertaken as a step towards acquiring trade, professional or employment qualifications. Generally speaking, I consider that an individual's efforts to attain a particular trade or professional qualification through a course of study, or through undertaking some form of examination/assessment, fall within the realm of personal affairs, whereas that individual's conduct of his/her trade or profession (having obtained the necessary qualification) does not.
14. I find that the matter in issue in the category A documents is information which concerns the applicant's personal affairs.

15. The category B documents, which the University initially determined did not relate to the applicant's personal affairs (although it appeared to concede, in its submission dated 17 November 1998, that they may be of a personal nature), concern statements made by the applicant to a clinical facilitator at the University's School of Nursing. The documents include a letter of complaint, a response by the applicant to the complainant, and University documents concerning its handling of the matter.
16. I consider that the subject matter of the category B documents concerns the applicant's personal affairs, since it relates to his personal conduct as a student and his relationships with other individuals. I find that the matter in issue in the category B documents is information which concerns the personal affairs of the applicant.
17. The category C document records a complaint made by the applicant about his treatment in one segment of the course of study he was undertaking. I consider the fact he made the complaint, and the subject matter of the complaint, to be information concerning his personal affairs. I find that the category C document comprises information which concerns the applicant's personal affairs.

#### **Public interest balancing test**

18. As I have found that the matter in issue concerns the personal affairs of the applicant, I must consider whether there are public interest considerations favouring disclosure of that matter, which outweigh the public interest consideration, inherent in the satisfaction of the test for *prima facie* exemption under s.44(1), which favours protection from disclosure of information concerning the applicant's personal affairs.
19. Both the University and the Council have based their arguments in favour of disclosure on the public interest in the Council obtaining access to the documents in order to carry out its statutory functions (of ensuring safe and competent nursing practice in Queensland). The applicant has contended that the powers of the Council to obtain information are set out in the *Nursing Act* (which does not include a power to compel the University to disclose the documents in issue) and that there is no reason why those powers should be extended by the FOI Act. The applicant contends that he is being discriminated against by the Council and that the documents, if disclosed to the Council, would be used to further that discrimination. In respect of the category B documents (relating to an incident with a staff member), the applicant contends that the allegations made in the complaint are unproven, and that the University did not find it necessary to take action against him.
20. The requirements for entitlement to practise as a nurse are set out in s.54 of the *Nursing Act*, which provides:

*54.(1) A person is qualified to be a registered nurse, or an enrolled nurse, if the person complies with the requirements of this section in relation to registration or enrolment.*

*(2) The person must satisfy the council that the person meets either of the following educational requirements—*

*(a) that the person has successfully completed an appropriate accredited nursing course in Queensland (including the passing of any further examinations, and undertaking any additional*

*supervised practice, required by the council) within such period before the making of the application for registration or enrolment as the council determines;*

*(b) that the person—*

*(i) has successfully completed an appropriate nursing course conducted outside Queensland for the purposes of registration or enrolment as a nurse that, in the council's opinion, is based on, and would enable achievement of, competencies similar to those in, and acquired by, accredited nursing courses conducted in Queensland; and*

*(ii) has gained registration or enrolment as a nurse in a place outside Queensland.*

*(2A) The person must also satisfy the council that the person is competent and fit to practise nursing.*

*(3) Without limiting subsection (2A), the person must satisfy the council—*

*(a) that the person's state of health is such that the person is capable of carrying out the person's duties as a registered or enrolled nurse without endangering any patient the person may attend; and*

*(b) that the person has a sufficient command of the English language, both oral and written, to ensure that the safety and wellbeing of patients is maintained.*

21. The Council has drawn attention to s.70(1)(d) of the *Nursing Act*, which provides that the Council may cancel the registration or enrolment of a nurse who does not have, or who ceases to have, the qualifications necessary for registration or enrolment. I also note that s.75 of the *Nursing Act* provides for annual re-registration or re-enrolment of nurses, at which time the Council must be satisfied that the applicant is qualified to be registered or enrolled. The Council has also drawn attention to s.66(2) of the *Nursing Act*, which provides that the Council may refer a registered or enrolled nurse, or an applicant for registration or enrolment, for a health assessment in order to satisfy itself of that person's ability to properly carry out his or her duties.
22. In its submissions, the Council has referred to a number of matters which have given it cause for concern about the health and fitness of the applicant to practise as a nurse. The applicant is presently an enrolled nurse, and the Council has before it an application from the applicant to practise as a registered nurse. At any time at which the Council has before it an application for registration or enrolment as a nurse, or during which a person is registered or enrolled as a nurse, I consider that the Council has a continuing interest in obtaining information relevant to that person's satisfaction of the requirements for registration or enrolment under s.54 of the *Nursing Act*.



23. In support of the Council's application, the University has submitted that:

*Considerable weight must be given to the QNC's duty to ensure high standards of medical care are maintained by those it registers to treat people in need. Concomitantly, when a registering body asks an educational body for specific information under the FOI Act, the public interest in facilitating fully informed decisions requires the release of the information.*

*It is stressed that the release of student records to a registering body is an activity which we would not partake of lightly. However, where a registering body requests information with respect to an individual student, the wider public interest of health care standards and fully informed decision-making favours supplying the information required.*

24. I accept that there is a very strong public interest in ensuring that nurses are, and continue to be, competent and fit to practise as nurses, and that they do not endanger the wellbeing of patients in their care due to lack of professional skills or to otherwise being unfit for the practice of nursing. This public interest consideration must be afforded considerable weight.
25. The category A documents consist of records of the applicant's clinical practice placements while a student at the University's School of Nursing. Section 54(2A) of the *Nursing Act* provides that the Council must be satisfied that a person is competent and fit to practise nursing. Documents about clinical practice placements would clearly be relevant to the Council in assessing whether a person is competent to practise nursing. In some cases, they may also be relevant to the question of a person's fitness to practise nursing. I consider that the public interest in disclosing such information to the accrediting authority for nurses is very strong, and will ordinarily be sufficient to outweigh the public interest in non-disclosure of information concerning an individual's personal affairs. I certainly consider that disclosure of the category A documents to the Council in this instance would, on balance, be in the public interest.
26. The applicant has submitted that the category A documents (which the University is required to keep in accordance with s.79 of the *Nursing Act*), are required only for:

*...a single discrete purpose, that of inspection by the Council pursuant to section 80 of the Nursing Act 1992. The purpose of section 80 of the Nursing Act 1992 is to enable the QNC to inspect academic institution records in order to assess the standard of education which each nursing course provides. The category A documents, are relevant only in respect of QUT maintaining its accreditation and can have no other purpose. There is a public interest in ensuring that all nursing courses are at a standard that is considered appropriate by the QNC, however, it does not follow from that statement that the records of an individual student are required in order to fulfill that purpose. The paramount concern which the QNC expresses in its submissions, that of ensuring safe and competent nursing practice, is ensured by safe and competent nursing schools. This concern is more than adequately addressed by the QNC inspecting the student records pursuant to their limited statutory powers.*

27. There is no doubt that safe and competent nursing schools are essential to the training of nurses, and to the high standards of nursing practice expected of their graduates. However, it is the responsibility of the Council to ensure not only that individual applicants for accreditation possess a particular academic qualification in nursing, but that they are, and remain, competent to practise nursing. That is not a role which the Council can surrender to nursing schools. In the absence of any legislative requirement for nursing schools to disclose to the Council information relevant to the fitness or competence of a student to practise as a nurse, the Council is, in my view, acting with prudence in finding alternative means to inform itself on such matters if it has reason to hold concerns about the fitness or competence of a particular student (whether that student is currently registered or enrolled, or has applied to the Council for registration or enrolment). I find that the category A documents are not exempt from disclosure to the Council under s.44(1) of the FOI Act.
28. The category B documents are different in nature. They concern a complaint about statements allegedly made by the applicant to a member of the teaching staff of the University. When approached in relation to those alleged statements, the applicant indicated that the person to whom he spoke had misunderstood the comments, and wrote to that person explaining his position. Although the University was involved in that process, it initiated no action against the applicant. While the category B documents would not appear to relate directly to an assessment of the competence of the applicant, there are other criteria under s.54 of the *Nursing Act*, including whether a person is fit to practise nursing, and a person's state of health. I recognise a public interest in the Council being able to gain access to information which would allow it to carry out its functions in relation to those criteria.
29. In seeking access to the category B documents, however, the Council is seeking to draw on information relating to conduct of the applicant which is not directly related to his practice or competence as a nurse. (As to the distinction between the weight to be accorded to matters arising in a professional context compared to those arising in a personal context, see *Re "L" and Nurses Registration Board* (1989) 18 ALD 600, and *Re MacLennan and Nurses Registration Board of ACT* (1994) 36 ALD 793.) Particularly in respect of information concerning conduct which does not take place in the context of nursing practice, it will be necessary to carefully assess the seriousness and potential relevance of the information to the functions of the Council, against the privacy interests which s.44(1) aims to protect. I can readily foresee instances where serious misconduct outside of nursing practice should be disclosed to the Council because it has significant relevance to the question of whether a person is fit to practise nursing, or to the person's state of health. However, I do not consider that information concerning every private aspect of a person's life should necessarily be made available to the Council under the FOI Act, in order to allow it to assess whether a person meets the requirements for registration or enrolment.
30. In this case, the University did not regard the incident as serious enough to warrant proceedings under its disciplinary powers. The applicant contends that the complaint arose out of a misunderstanding, that the validity of the complaint had never been tested, and that it remains unproved. I am not aware whether the complainant made a formal complaint to the Council about the incident. If she did, then the Council can no doubt obtain far better details regarding the incident from the complainant than it could from the meagre information contained in the documents in issue. If she did not, that would tend to show that the complainant did not regard the incident as raising issues requiring consideration by the Council.

31. On the material before me, I am not satisfied that the statements complained of should be regarded as so serious, or of such relevance to the Council's functions, as to require disclosure of matter in the category B documents to the Council. I must weigh any public interest in disclosure to the Council against the public interest in protecting from disclosure information concerning the personal affairs of the applicant. On the material before me, I am not satisfied that disclosure of the category B documents to the Council would, on balance, be in the public interest. I find that the category B documents are exempt matter under s.44(1) of the FOI Act.
32. The category C document is a brief note of a telephone conversation concerning a complaint, made by the applicant to a member of staff of the University, about the applicant's treatment in the course of his studies. I do not consider that it sheds sufficient light on whether the applicant meets the requirements for registration or enrolment as a nurse to outweigh the public interest in protecting from disclosure information concerning the personal affairs of the applicant. I find that the category C document is exempt matter under s.44(1) of the FOI Act.

### **Conclusion**

33. For the foregoing reasons, I vary the decision under review (being the decision made by Mr K E Baumber on behalf of the respondent on 4 February 1998) by finding that documents SN2-SN14 are not exempt from disclosure to the third party under the FOI Act, but that the balance of the documents remaining in issue are exempt matter under s.44(1) of the FOI Act.

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