



## **Decision and Reasons for Decision**

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**Application Number:** 210507

**Applicant:** Mr B Sanderson

**Respondent:** Department of Justice and Attorney-General

**Decision Date:** 28 January 2009

**Catchwords:** **FREEDOM OF INFORMATION – section 28A – section 44(1)**  
**– personal affairs – witness statements**

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## REASONS FOR DECISION

### Summary

1. For the reasons set out below, I find that:
  - the Department is entitled to refuse access to some of the matter in issue under section 28A(2) of the *Freedom of Information Act* 1992 (**FOI Act**)
  - the remaining matter in issue does not qualify for exemption under section 44(1) of the FOI Act.

### Background

2. By application received by the Department of Corrective Services on 6 March 2008, and transferred to the Department of Justice and Attorney-General (**Department**) on 11 March 2008 (**FOI Application**), the applicant sought access to:
  1. *The Prosecutions Original Statement of [the principal witness] to Dect Patterson of Kingaroy Police and Dect White of Nambour Police. That said Detectives arrested me for the Murder of [the deceased] 2001.*
  2. *[the principal witness] new statement to Det White of Nambour Police and Det Patterson of Kingaroy Police that resulted in [the principal witness] being charged with Accessory to Murder of [the deceased].*
  3. *[the principal witness] Psych Report tendered to the Court but refused by Justice Byrne. As it contains new Evidence. These articles are for my appeal to the Supreme Court.*
3. By letter dated 30 April 2008, the Department advised the applicant that a decision was to have been made on the FOI Application by 25 April 2008, but as no decision had been made, the Department advised the applicant:
  - that a deemed decision refusing access to the documents the subject of the FOI Application had been made
  - of the applicant's rights under the FOI Act to apply for an external review of that deemed decision
  - that it was continuing to process the FOI Application and requested an extension of time to do so until 16 May 2008.
4. By application dated 2 May 2008 (received 8 May 2008), the Applicant applied to the Office of the Information Commissioner (**Office**) for external review of the deemed decision of the Department (**ER Application**) and requested:
  1. *[the principal witness] Original Statement to Dect Patterson of Kingaroy Police & Dect White of Nambour Police March 2001. Which resulted in my Arrest for the Murder of [the deceased].*
  2. *[the principal witness] 2nd Statement to Dect Patterson of Kingaroy Police and Dect White of Nambour Police which resulted in [the principal witness] charged with Accessory to Murder May – June 2001*
  3. *[the principal witness] Psych Report tendered by the Prosecutor but refused by Justice Byrne because it had word for word statements [the principal witness] had already admitted were false in Court ... This page only required as it is new evidence that Supreme Court should know about!*

and went on to say

*I have been asked to get these documents by Mr Tim Harland Head of Queensland Legal Aid Appeals Section ...*

5. Following receipt of the ER Application, this Office made enquiries with the Department regarding the status of the FOI Application. Following these enquiries, it was determined that the Department's deemed decision to refuse access to the matter in issue would be externally reviewed by this Office.

#### **Decision under review**

6. The decision under review is the deemed decision of the Department (under section 27(5) of the FOI Act), to refuse access to the matter in issue, deemed to have been made on 28 April 2008<sup>1</sup> (**Deemed Decision**).

#### **Steps taken in the external review process**

7. This Office requested and reviewed copies of the documents which the Department identified as responsive to the FOI Application.
8. Following consideration of the folios supplied, this Office made enquiries to:
  - the Brisbane Registry of the Supreme Court in order to ascertain whether any witness statements were accessible on the court record
  - the Department
    - to ascertain the Department's views regarding the release of some documents to the applicant
    - to request the Department provide this Office with a copy of one of the documents which had not yet been located by the Department.
9. By letter dated 20 August 2008, the applicant provided further information regarding his reasons for seeking access to the matter in issue.
10. After obtaining the applicant's consent, a staff member of this Office spoke with Ms Kylie Hilliard of Legal Aid Queensland (**Legal Aid**) on several occasions to clarify which documents were sought by the applicant and to ascertain whether there were any other avenues by which Legal Aid could access these documents on the applicant's behalf.
11. By letter dated 23 September 2008, the Department provided written submissions in relation to the issues noted above, indicating that in the Department's view, access to the Witness Statements should be refused under section 44(1) of the FOI Act.
12. Following receipt of a letter from Ms Hilliard which set out Legal Aid's role in relation to the applicant, the specific documents requested, and that the applicant was prepared for the documents to be provided to Legal Aid (on Legal Aid's undertaking not to provide copies of those documents to the applicant), I sought the Department's response regarding:
  - the outcome of the Department's further enquiries regarding the whereabouts of one of the documents in issue

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<sup>1</sup> On the basis of the information available to me, a decision on the FOI Application was to have been notified to the applicant by 25 April 2008. However, taking into account the public holiday which fell on 25 April 2008 and the weekend following, the Deemed Decision is taken to have been made on 28 April 2008.

- whether the Department would agree to provide copies of documents to Legal Aid on Legal Aid's undertaking not to provide copies of those documents to the applicant.
13. The Department provided me with further written submissions in relation to these issues by letter dated 21 November 2008, along with copies of documents which the Department identified as responsive to the applicant's FOI Application.
  14. By letter dated 22 December 2008, I communicated a preliminary view to the applicant that the Department had conducted reasonable searches to locate one of the documents requested in the FOI Application, but having been unable to locate the document, the Department was entitled to rely on section 28A(2) of the FOI Act to refuse access to that document.
  15. This Office received submissions from the applicant in response to this preliminary view on 5 January 2009 and 7 January 2009. These submissions:
    - confirmed the witness statements to which the applicant sought access
    - suggested a number of other agencies which may have a copy of the document and/or the particular information sought from the document.
  16. Having considered the applicant's submissions, a staff member of this Office spoke with the Department on 13 January 2009 to confirm the searches undertaken for that document.
  17. By letter dated 14 January 2009, I provided the Department with the preliminary view that the remaining documents requested by the applicant did not qualify for exemption under section 44(1) of the FOI Act.
  18. By email dated 19 January 2009, the Department provided its response to the preliminary view.
  19. In making this decision, I have taken the following into account:
    - the FOI Application
    - the ER Application
    - the Department's submissions
    - the Applicant's submissions and correspondence received from the applicant during the course of the review
    - information obtained from the Brisbane Registry of the Supreme Court, Legal Aid, and the website of the Supreme Court library
    - the matter in issue
    - relevant provisions of the FOI Act
    - relevant case law and previous decisions of this Office.

#### **Matter in issue**

20. The matter in issue in this review consists of:
  - a psychiatric/psychological report of the principal witness (**Report**)and

- the statement of the principal witness to Detective Whyte of Nambour CIB (and Detective Patterson of Kingaroy CIB) dated 26 March 2001 (consisting of 11 folios) (**Statement A**)
- the statement of the principal witness to Detective Whyte of Nambour CIB (and Detective Patterson of Kingaroy CIB) dated 4 May 2001 (consisting of four folios) (**Statement B**)

(collectively the **Witness Statements**).

## Findings

21. Pursuant to section 21 of the FOI Act, a person has a legally enforceable right to be given access under the FOI Act to documents of an agency and official documents of a Minister. This right of access is subject to other provisions of the FOI Act, in particular, section 28 of the FOI Act, which provides that an agency may refuse access to exempt matter or an exempt document. Under section 28A of the FOI Act, an agency may also refuse access to a document which does not exist or is not locatable.
22. I have set out my findings in relation to:
- the application of section 28A(2) of the FOI Act to the Report
  - the application of section 44(1) of the FOI Act to the Witness Statements.
23. I have also considered whether the principal witness should be notified of the external review under section 78 of the FOI Act, to enable the principal witness to provide submissions regarding the disclosure of the matter in issue, or apply to become a participant in the review.

### **Section 28A of the FOI Act**

24. Section 28A of the FOI Act provides:

#### **28A Refusal of access – document nonexistent or unlocatable**

- (1) *An agency or Minister may refuse access to a document if the agency or Minister is satisfied the document does not exist.*

*Example –*

*documents that have not been created*

- (2) *An agency or Minister may refuse access to a document if –*

*(a) the agency or Minister is satisfied the document has been or should be in the agency's or Minister's possession; and*

*(b) all reasonable steps have been taken to find the document but the document can not be found.*

*Example –*

- *documents that have been lost*
- *documents that have been disposed of under an authority given by the State Archivist*

...

25. The decision in *Shepherd and Department of Housing, Local Government and Planning (Shepherd)*<sup>2</sup> was made prior to the enactment of section 28A of the FOI Act. However, the principles in that decision, which addressed the issue of sufficiency of search, provide useful guidance in considering the basis for being 'satisfied' that a document sought does not exist or is not locatable.
26. Having regard to the principles in *Shepherd*,<sup>3</sup> in order to establish whether the Department has taken all reasonable steps to locate the Report, I am required to consider whether the searches undertaken by the Department have been sufficient in the circumstances of this case, having regard to the following questions:
- whether there are reasonable grounds to believe that the Report exists and is a document of the Department (**Question One**)
  - if so, whether the search efforts made by the Department to locate the Report have been reasonable in the circumstances of this particular case (**Question Two**).

### **Question One**

27. On the information available to me, I am satisfied that there are reasonable grounds to believe that the Report exists and should be a document of the Department.<sup>4</sup> In particular, the Department submits that comments in other documents of the agency indicate that such a report should exist.

### **Question Two**

28. The Department submits that access to the Report should be refused under section 28A of the FOI Act on the basis that the Report is unable to be located. In summary, the Department submits (in its correspondence of 23 September 2008 and 21 November 2008) that:
- it has searched for, located and reviewed the relevant files relating to the FOI Application
  - there is evidence that the Report should exist (ie. comments in a document refer to a report)
  - the Report has not been found in the place in the Department's records where it would usually be expected to be found
  - the Department has made further internal enquiries to the Office of the Director of Public Prosecutions to ascertain from persons involved in the relevant matter, the possible location of the Report. However, no further information is available to assist the FOI Unit to establish the location of the Report
  - the test is met for the Department to refuse access to the Report under section 28A of the FOI Act.

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<sup>2</sup> (1994) 1 QAR 464.

<sup>3</sup> See paragraphs 18 – 19.

<sup>4</sup> Section 7 of the FOI Act provides that:

**document of an agency or document of the agency** means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes –

- (a) a document to which the agency is entitled to access; and
- (b) a document in the possession or under the control of an officer of the agency in the officer's official capacity.

29. Following receipt of the applicant's submissions in relation to the letter providing the preliminary view that the Department was entitled to refuse access to the Report under section 28A(2) of the FOI Act, a staff member of this Office made further enquiries with the Department and confirmed:
- searches were conducted for the Report in all of the applicant's DPP files relating to the relevant offence
  - searches were conducted for the Report in the DPP file of the principal witness, relating to the relevant offence
  - enquiries were made to persons involved in the relevant matter to ascertain whether they had any independent recollection of the possible location of the Report
  - the Department reviewed the relevant transcripts of proceedings and were unable to identify a reference to the Report
  - neither a psychiatric or psychological report of the principal witness was located as a result of those searches
  - the Department could not identify any further searches that could be undertaken to locate the Report.
30. On the information available to me, I find that:
- there are reasonable grounds to believe that the Report exists and should be a document of the agency
  - the search efforts made by the Department to locate the Report have been reasonable in the circumstances
  - as the Department has been unable to locate a copy of the Report as a result of its reasonable search efforts, the Department is entitled to rely on section 28A(2) of the FOI Act to refuse access to the Report.
31. I note that the applicant's submissions in response to my preliminary view letter suggest a number of other potential agencies where the Report and/or relevant information in the Report may be found. In this respect, I note that this Office has jurisdiction to conduct an external review of the Department's deemed decision to refuse access to the documents. While this jurisdiction extends to a review of the Department's efforts to locate relevant documents, it does not extend to undertaking enquiries and/or searches with other agencies.

## **Application of section 44(1) of the FOI Act**

### **Section 44(1) of the FOI Act**

32. Subsections 44(1) of the FOI Act provide:

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

...

33. Section 44(1) of the FOI Act therefore requires me to consider whether:

- the matter in issue is information concerning the personal affairs of a person (other than the applicant) (**Personal Affairs Question**)? If so, a public interest consideration favouring non-disclosure of the matter in issue is established
- the public interest considerations favouring disclosure of the matter in issue outweigh all public interest considerations favouring non-disclosure of the matter in issue (**Public Interest Question**)?

### **Personal Affairs Question**

#### ***What are personal affairs of a person?***

34. In *Stewart and Department of Transport*<sup>5</sup>, 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.

35. 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.

#### ***Characterisation of the information in question***

36. The Witness Statements were made by a person other than the applicant about events concerning that person, the applicant and others.

37. In *Godwin and Queensland Police Service*<sup>6</sup> (**Godwin**), where the matter in issue concerned a witness statement, the Information Commissioner said:

*I consider that, at least so far as concerns a member of the public acting in a personal capacity, the fact that a person has (or, indeed, has not) been prepared to co-operate with an investigation by a law enforcement agency is properly to be characterised as information concerning that person's personal affairs ... Matter which would disclose the information that an identifiable individual, acting in a personal capacity, has or has not co-operated with an investigation by a law enforcement agency would therefore, in my opinion, be prima facie exempt from disclosure under section 44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated in section 44(1)*

and went on to say

*I should add that, where information that an identifiable individual has or has not co-operated with an investigation by a law enforcement agency becomes a matter of public knowledge or public record (as would frequently occur when such information is disclosed through evidence given in court proceedings), the weight to be attributed to the privacy interest in protecting disclosure of that information would be significantly diminished, for*

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<sup>5</sup> (1993) 1 QAR 227.

<sup>6</sup> (1997) 4 QAR 70 at paragraph 64 – 65.



*the purposes of any balancing exercise that must be undertaken in the application of the public interest balancing test ...*

38. Accordingly, I am satisfied that the fact of the principal witness making the Witness Statements, and the content of those Witness Statements, is matter concerning the personal affairs of the principal witness.

#### *Shared personal affairs*

39. With respect to the content of the Witness Statements, I find that it is properly characterised as the personal affairs of the principal witness and the personal affairs of the applicant (and in some cases, others mentioned in the documents).
40. Applying the principles in *B' and Brisbane North Regional Health Authority*<sup>7</sup> to the matter in issue, I am satisfied that the matter in issue concerning the applicant's personal affairs is inextricably intertwined with information concerning the personal affairs of other persons, such that it is *prima facie* exempt from disclosure under section 44(1) of the FOI Act, subject to the application of the public interest balancing test.

#### **Public Interest Question**

41. The way in which section 44(1) of the FOI Act is worded means that where matter concerns personal affairs of a person other than the applicant, the matter is, *prima facie*, exempt from disclosure. Only if disclosure of the information would, on balance, be in the public interest is the information not exempt under section 44(1) of the FOI Act.
42. I have carefully considered the public interest considerations favouring disclosure and non-disclosure of the matter in issue. My reasoning is set out below.

#### ***Public interest considerations favouring non-disclosure***

43. There is one principal public interest consideration favouring non-disclosure of the Witness Statements. This is the inherent public interest in protecting personal privacy if the information in issue concerns the personal affairs of someone other than the applicant.
44. I have also considered the public interest consideration in safeguarding the flow of information to law enforcement agencies.

#### **(1) Privacy Interest**

45. As indicated above, there is an inherent public interest in protecting personal privacy if the information in issue concerns the personal affairs of someone other than the applicant. An appropriate weight must be allocated to that interest, having regard to the character and significance of the particular information in issue.<sup>8</sup>
46. In my view, the weight to be accorded the privacy interest in information relating to the identity of a witness, that witness's willingness (or otherwise) to cooperate with the authorities and the testimony of that witness concerning the witness's own personal affairs (particularly where there is evidence of wrongdoing on the part of the witness),

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<sup>7</sup> (1994) 1 QAR 279 at paragraph 176.

<sup>8</sup> See *Lower Burdekin Newspaper Company Pty Ltd and Burdekin Shire Council; Hansen, Covolo and Cross (Third Parties)* (2004) 6 QAR 328 at paragraph 23.

would ordinarily be relatively high, unless that information has been treated in such a way as to reduce the weight of the privacy interest.

### **Department's submissions**

47. The aspects of the Department's submissions relevant to the question of the weight of the privacy interest are as follows:

*Enquiries were made with the Supreme Court Criminal registry in relation to exhibits tendered at trial. All tendered exhibits remain on the court file for a period of time before they are released back to either ODPP or to police. Any person is able to view the tendered exhibits of a particular trial **except for those matters/trials involving children or by the order of a Judge to not release any tendered material on a court file.** A person seeking to have access to tendered material/exhibits, on a court file, need not be a person who has a particular interest in a court proceeding and are able to sight the documents/exhibits upon the payment of a fee. They are, however, prohibited from making any copies of any documents or exhibits on the court file.*

...

*Copies of these statements (upon perusal of the transcripts of Mr Sanderson's trial) were tendered in court. Although tendered, the contents of the statements were not published in court and therefore not accessible to the public as such. They are no longer on the court file as they were returned to either the police or to the ODPP (this is also confirmed by ... OIC)*

*Some of the events in the statements include information that concerns Mr Sanderson and his personal affairs and therefore comprises "shared personal affairs" information. This is in line with the relevant FOI principles in relation to "shared personal affairs" as explained by the Information Commissioner in Re "B" and Brisbane North regional Health Authority (1994) 1 QAR 279 at pp.343-345 (paras 172-178). Due to the fact that that the information concerning Mr Sanderson's personal affairs is inextricably interwoven with the information concerning the personal affairs of other individuals (in this case [the principal witness] and the deceased and other witnesses), it is submitted that the information is exempt from disclosure to Mr Sanderson according to the terms of s.44(1).*

*Taking into account the public interest balancing test, it is acknowledged that the identities of the persons are already known to Mr Sanderson. It is also acknowledged that large segments of the statements refer to events which are known to Mr Sanderson due to Mr Sanderson's participation in them and that Mr Sanderson previously had access to these statements in full. Therefore, it is acknowledged that the strength of the privacy interest attaching to this information has been significantly diminished.*

48. The Department's submissions go on to balance that diminished privacy interest against the public interest arguments which favour disclosure (discussed in further detail below).

### **Weight of privacy interest consideration**

49. Having carefully considered the relevant evidence, I am satisfied that the privacy interests in the Witness Statements are significantly reduced on the following basis:
- the Witness Statements were exhibited and read in open court during the proceedings against the applicant which commenced in August 2002 and those which commenced in January 2003. It is not material that the Witness Statements were not 'published' or set out in full in the transcripts of those proceedings. As the Witness Statements were read in open court, the applicant and others in the courtroom were made aware of the content of those statements

- the principal witness was cross-examined on the Witness Statements and provided other evidence relating to the matters the subject of those statements in open court
- the Witness Statements were exhibited to the court record and members of the public were able to view those statements for the period of time that physical copies remained on the Supreme Court file before they were returned in accordance with the Supreme Court registry's administrative processes<sup>9</sup>
- some of the substance of the Witness Statements is referred to in the judgment of the Court of Appeal, which remains publicly accessible on the Supreme Court of Queensland Library website
- as acknowledged in the Department's submissions, the applicant previously had access to the Witness Statements in full.<sup>10</sup>

50. Accordingly, I find that very little weight can be attributed to the relevant privacy interests in the circumstances.

## **(2) Flow of information**

51. In an appropriate case, there may be a public interest consideration in safeguarding the flow of information from members of the public to law enforcement agencies, by not deterring co-operation by members of the public.<sup>11</sup>

### ***Weight of 'flow of information' consideration***

52. In light of the circumstances in which the Witness Statements were provided, and given that the issues have been dealt with in a public manner through the criminal process, there is no evidence before me to suggest that disclosure of the Witness Statements would have a detrimental affect on the flow of information from members of the public in similar circumstances. Accordingly, I am satisfied that no weight should be attributed to this public interest consideration.

### ***Public interest considerations favouring disclosure***

53. In relation to the documents in issue, I consider that there are principally three public interest considerations favouring disclosure of the Witness Statements:

- disclosure of information about how government functions are conducted can enhance the accountability of agencies in the performance of their functions
- given the information concerns the applicant to such a degree, this may give rise to a justifiable 'need to know'<sup>12</sup>
- the applicant's right to pursue a legal remedy.

## **(1) Accountability of Government**

54. Disclosure of information about how government functions are conducted can enhance the accountability of agencies in the performance of their functions. Ordinarily, this is a public interest argument which favours disclosure of information.

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<sup>9</sup> There was no evidence provided which suggested that the exhibits were treated differently due to the involvement of any children in the case, or by order of the court.

<sup>10</sup> Presumably as they would have been served on the applicant and/or his legal representatives prior to the commencement of relevant proceedings.

<sup>11</sup> See *Godwin* at paragraph 68.

<sup>12</sup> See *Pemberton and The University of Queensland* (1994) 2 QAR 293, paragraphs 164 – 193.

### **Department's Submissions**

55. The Department submitted that:

...

*Balanced against this diminished privacy interest are public interest considerations favouring disclosure of the statements to Mr Sanderson, including enhancing the transparency of the criminal justice system and providing members of the community with access to information held by government in relation to their personal affairs.*

...

### **Weight of 'accountability' consideration**

56. In the unreported decision of *MN and QPS*,<sup>13</sup> the Information Commissioner noted that while in cases involving law enforcement investigations there will generally be a public interest consideration favouring disclosure in the interests of furthering the accountability of the law enforcement agency, this public interest consideration favouring disclosure does not carry as much weight in cases where a relevant formal trial process has been undertaken (the investigations having already been subjected to a process of accountability), as it does in cases where there has been no relevant formal trial process.
57. In light of this, and the applicant's stated reasons for seeking the information, I am satisfied that little weight should be attributed to this public interest consideration.

### **(2) Justifiable 'need to know'**

58. As previously stated by the Information Commissioner, in an appropriate case, there may be a public interest in an applicant having access to information which affects or concerns that applicant to such a degree, so as to give rise to a justifiable need to know which is more compelling than for other members of the public.<sup>14</sup>

### **Department's submissions**

59. The Department submits in its letter of 23 September 2008 that:

...

*Balanced against this diminished privacy interest are public interest consideration favouring disclosure of the statements to Mr Sanderson, including enhancing the transparency of the criminal justice system and providing members of the community with access to information held by government in relation to their personal affairs. Section 6 of the FOI Act requires a decision maker to take into account the fact that much of the matter in issue contains information concerning Mr Sanderson in weighing competing public interest factors. (Mr Sanderson's application suggests that he is pursuing access to these particular statements so as to pursue an appeal of his manslaughter conviction. I understand that his previous application for leave to appeal against his sentence was refused and his appeal against conviction was dismissed by the Court of Appeal in 2003.) In this regard, I acknowledge that his involvement in, and concern with, the particular information is of such a nature or degree as to give rise to a justifiable 'need to know'.*

<sup>13</sup> (Unreported, 23 February 1998).

<sup>14</sup> *KBN and Department of Families, Youth and Community Care* (1998) 4 QAR 422 (**KBN**) at paragraph 56.

*However, it is submitted, that the key public interest considerations favouring disclosure of the statements to Mr Sanderson are themselves diminished in strength and therefore carry less weight in the circumstances of his case. The fact that Mr Sanderson already had access to the statements, while lessening the privacy interests as noted above also, operates to diminish the weight of the transparency and “need to know” considerations, in that these public interest considerations have already largely been satisfied as a consequence of this access.*

*Regard should also be given to the fact that the FOI release is to the world at large and not just to Mr Sanderson, given the unconditional nature of the right of access contained in s.21 of the Act. It is submitted that the statements in issue, contain information about other people that is particularly personal or sensitive, and the privacy interests attaching to that information as against the world at large remains strong. It is acknowledged that the s.6 of the Act operated to relax this “world at large” principle in appropriate cases, the benefit of that provision is reduced in Mr Sanderson’s case as the relevant information concerns the “shared personal information” of Mr Sanderson and other individuals.*

### **Weight of ‘justifiable need to know’ consideration**

60. While a public interest consideration is generally one which is common to all members of, or a substantial segment of the community, as distinct from matters that concern purely private or personal interests, section 4(2)(c) of the FOI Act recognises *‘that, in a free and democratic society ... members of the community should have access to information held by government in relation to their personal affairs’ ... [my emphasis]*.
61. I note that disclosure of matter under the FOI Act has previously been considered to be ‘disclosure to the world at large’ rather than disclosure to the particular applicant. However, section 6 of the FOI Act<sup>15</sup> effectively relaxes that general principle, in that it requires that *‘the fact that the document contains matter relating to the personal affairs of the applicant’* be taken into account as a public interest consideration.
62. I am satisfied that:
- in his correspondence to this Office, the applicant has expressed a strong desire to have the Witness Statements disclosed to him as well as the personal significance of disclosure of this information, in particular, that the Witness Statements provide evidence which is of value to an assessment of merit for a petition for pardon (discussed in greater detail below)
  - the applicant’s interest in obtaining access to the matter in issue is more compelling than for members of the general public
  - the applicant’s need to know the information or right to know constitutes a public interest consideration favouring disclosure of the matter in issue to the applicant.
63. Although section 6 of the FOI Act allows the fact that a document contains matter relating to the personal affairs of the applicant to be taken into account as a public interest consideration, this consideration carries less weight in circumstances where

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<sup>15</sup> **6 Matter relating to personal affairs of applicant**

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

- (a) whether it is in the public interest to grant access to the applicant; and*
- (b) the effect that the disclosure of the matter might have.*

the information concerns 'shared personal affairs' rather than that person's personal affairs alone.<sup>16</sup>

64. In this review, disclosure of the matter in issue to the applicant would disclose information concerning his personal affairs.<sup>17</sup> However, such disclosure would also necessarily disclose information concerning the personal affairs of others including the principal witness. Accordingly, the public interest in the applicant having access to matter constituting information concerning his personal affairs must be balanced against the public interest in the protection of personal privacy and therefore carries only some weight in the circumstances. (Also, as set out above, I note that the weight of the relevant privacy interests is significantly reduced in the circumstances).

### **(3) Right to pursue a legal remedy**

65. In an appropriate case, there may be a public interest in a person who has suffered an actionable wrong being permitted to access information which would assist them to pursue a remedy which the law affords in those circumstances.
66. 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. As set out in *Willsford and Brisbane City Council (Willsford)*,<sup>18</sup> it should be sufficient to establish this public interest consideration, if an applicant can demonstrate that:
- 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
  - the applicant has a reasonable basis for seeking to pursue the remedy
  - 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.
67. The existence of a public interest consideration of this kind represents one consideration to be taken into account in the weighing process along with any other relevant public interest considerations.

#### ***Department submissions***

68. The Department submits in its letter of 21 November 2008:

...

*The Department notified the Information Commissioner, on 23 September 2008, of its position that the statements concern [the principal witness] personal affairs and qualify for exemption under s44(1) of the FOI Act. At the time that view was formed, Mr Sanderson had submitted that he required the documents for use in an appeal to the Supreme Court. It is my understanding that when an appeal is lodged, an appellant will be provided with the necessary documents to conduct the appeal. In fact, Mr Sanderson had already appealed his conviction and sentence in 2002 and both appeals were dismissed. In these circumstances, this type of submission carries no weight against the privacy interest of the witness, particularly when the views of the witness have not been ascertained under s.51 of the FOI Act in the initial decision (because it was a deemed*

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<sup>16</sup> See *KBN* at paragraph 58.

<sup>17</sup> Which is a factor to be taken into account in considering the effect that disclosure of the matter might have (section 6(b) of the FOI Act).

<sup>18</sup> (1996) 3 QAR 368 at paragraphs 16 – 18.

refusal). I do not know if [the principal witness] has been invited, or has agreed, to be a participant in the external review under s.78 of the FOI Act.

We understand from Legal Aid's letter that Mr Sanderson has applied for a grant of aid from Legal Aid to petition for a pardon. In the Department's view, this recent action taken by Mr Sanderson carries greater weight in favour of disclosure than a mere assertion that he needed the documents for an appeal. However, the Department would not be inclined to withdraw an objection to disclosure of [the principal witness] statements without [the principal witness'] views being taken into account ...

### **Application of Willsford test to the Witness Statements**

69. On the basis of the information provided to me, the *Willsford* test applies in the following manner:

- the 'loss or damage' suffered by the applicant in this case is imprisonment following a conviction of unlawful killing. The possible remedy available to the applicant under law is a petition for pardon<sup>19</sup>
- the applicant seeks this information to assist in determining whether he has a reasonable basis to pursue this remedy<sup>20</sup>
- disclosure of the Witness Statements would assist the applicant to pursue the remedy, or to evaluate whether a remedy is worth pursuing. In particular, I understand that the applicant seeks this information with the intention of providing it to Legal Aid, to enable Legal Aid to consider this evidence as part of its assessment of merit for a petition for pardon. Legal Aid confirms that it is in the process of assessing merit in respect of a petition for pardon.

### **Weight of 'right to pursue a legal remedy' consideration**

70. Having regard to the application of the test in *Willsford*, I am satisfied that in the circumstances of this case, significant weight should be attributed to this public interest consideration.

### **Summary – weighing the public interest considerations**

71. In its submissions dated 23 September 2008, the Department submitted:

*Accordingly it is submitted, that the public interest in protecting the privacy of the relevant witnesses, and the personal affairs of other individuals apart from Mr Sanderson identified in the statements while diminished, nevertheless outweighs the public interest factors weighing in favour of disclosure (themselves significantly diminished). The disclosure of the information in the statements will constitute release to the world at large and that personal information about these persons would be disclosed if released.*

*Therefore, the disclosure of the statements would not, on balance, be in the public interest and that the statements qualify for exemption under s.44(1) of the FOI Act.*

72. I have weighed the public interest considerations favouring non-disclosure against the public interest considerations favouring disclosure of the Witness Statements, and have done so having regard to the Department's submissions.

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<sup>19</sup> In *Re Fritz* [1995] 2 Qd R 580, McPherson JA said at page 596 'The power to pardon is an aspect of the royal prerogative of mercy forming part of the common law'.

<sup>20</sup> *Willsford*, at paragraph 20

73. While I acknowledge that in many cases, the weight to be accorded the privacy interest in information relating to the identity of a witness, that witness's willingness (or otherwise) to cooperate with the authorities and the testimony of that witness concerning that witness's personal affairs, may be relatively high, I am satisfied that the Witness Statement have been treated in such a way (as set out above) so as to significantly reduce the weight of the privacy interest in that information. Accordingly, little weight can be attributed to this public interest consideration favouring non-disclosure. As noted above, in the circumstances of this case, no weight should be attributed to the public interest in safeguarding the flow of information to law enforcement agencies.
74. Balanced against this are the public interest arguments favouring disclosure of the Witness Statements. In summary, I am satisfied that:
- the public interest in the accountability of government attracts only a little weight
  - the weight of the applicant's justifiable need to know (while ordinarily strong) is reduced somewhat in the circumstances by the fact that the Witness Statements contain personal affairs information about persons other than the applicant (although, as noted above, the privacy interest in this information is also significantly reduced)
  - significant weight should be attributed to the public interest in the applicant's right to pursue a legal remedy.
75. Accordingly, having weighed the significantly reduced privacy interest favouring non-disclosure, against the public interest considerations of accountability of government, the applicant's justifiable need to know, and the applicant's right to pursue a legal remedy, I am satisfied that the public interest arguments which favour disclosure of the Witness Statements outweigh the public interest arguments which favour non-disclosure.

## Consultation

76. The Department's letter dated 21 November 2008 states that:

*... In these circumstances, this type of submission carries no weight against the privacy interest of the witness, particularly when the views of the witness have not been ascertained under s.51 of the FOI Act in the initial decision (because it was a deemed refusal). I do not know if [the principal witness] has been invited, or has agreed, to be a participant in the external review under s.78 of the FOI Act.*

*We understand from Legal Aid's letter that Mr Sanderson has applied for a grant of aid from Legal Aid to petition for a pardon. In the Department's view, this recent action taken by Mr Sanderson carries greater weight in favour of disclosure than a mere assertion that he needed to the documents for an appeal. However, the Department would not be inclined to withdraw an objection to disclosure of [the principal witness] statements without [the principal witness] views being taken into account ...*

77. In my letter to the Department dated 14 January 2009, I communicated the preliminary view that it was unnecessary to consult with the principal witness regarding the possible disclosure of the Witness Statements.
78. In its response dated 19 January 2009, the Department indicated that:
- the issue of consultation with the principal witness remained of concern to the Department



- it remained of the view that the Department would not consider disclosing documents of the type in issue without having given the principal witness an opportunity to present their views and participate in the review process.

79. I have carefully considered whether the principal witness should be notified of the external review under section 78 of the FOI Act,<sup>21</sup> to enable the principal witness to provide submissions regarding the disclosure of the Witness Statements, or apply to become a participant in the review.

80. As set out above, the Witness Statements have been treated in such a manner so as to significantly reduce the privacy interest in the personal affairs information of the principal witness:

- the Witness Statements were exhibited and read in open court during the proceedings against the applicant which commenced in August 2002 and those which commenced in January 2003. It is not material that the Witness Statements were not 'published' or set out in full in the transcripts of those proceedings. As the Witness Statements were read in open court, the applicant and others in the courtroom were made aware of the content of those statements
- the principal witness was cross-examined on the Witness Statements and provided other evidence relating to the matters the subject of those statements in open court
- the Witness Statements were exhibited to the court record and members of the public were able to view those statements for the period of time that physical copies remained on the Supreme Court file before they were returned in accordance with the Supreme Court registry's administrative processes
- some of the substance of the Witness Statements is referred to in the judgment of the Court of Appeal, which remains publicly accessible on the Supreme Court of Queensland Library website
- as acknowledged in the Department's submissions, the applicant previously had access to the Witness Statements in full.<sup>22</sup>

81. Having participated as a witness at the applicant's trials and given oral testimony, the principal witness would be aware that the applicant has knowledge of the substance of the Witness Statements. Accordingly, disclosure of the Witness Statements could not reasonably be expected to be of substantial concern to the principal witness, given the public treatment of those statements and the applicant's existing knowledge of their content.

82. For the reasons set out above, I am satisfied that:

- the Witness Statements do not qualify for exemption from disclosure under section 44(1) of the FOI Act
- disclosure of those statements could not reasonably be expected to be of substantial concern to the principal witness such that the principal witness need be notified of the review to enable the principal witness to provide submissions or apply to become a participant in the review under section 78 of the FOI Act.

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<sup>21</sup> Section 78(2) of the FOI Act provides: 'Any person affected by the decision the subject of the review (including, if the review concerns matter that is claimed to be exempt matter, a person whose views must be sought under section 51 in relation to the matter) may apply to the commissioner to participate in the review.'

<sup>22</sup> Presumably as they would have been served on the applicant and/or his legal representatives prior to the commencement of relevant proceedings.

## **DECISION**

83. I set aside the decision of the Department and find that:

- the Department is entitled to rely on section 28A(2) of the FOI Act to refuse access to the Report
- the Witness Statements do not qualify for exemption from disclosure under section 44(1) of the FOI Act.

84. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

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**Assistant Commissioner Henry**

**Date: 28 January 2009**