

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 96013
Application S 90/93

Participants:

DENNIS R FERGUSON
Applicant

DIRECTOR OF PUBLIC PROSECUTIONS
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - transcript of applicant's trial in the Supreme Court of Queensland - whether the respondent is entitled to refuse access under the *Freedom of Information Act 1992 Qld* on the ground that the transcript is reasonably open to public access under another enactment (to which a different charging regime applies) - application of s.22(a) of the *Freedom of Information Act 1992 Qld*.

FREEDOM OF INFORMATION - refusal of access - respondent's Annual Reports - whether the respondent is entitled to refuse access under the *Freedom of Information Act 1992 Qld* on the ground that the Annual Reports are reasonably available for public inspection in a public library - application of s.22(c) of the *Freedom of Information Act 1992 Qld*.

FREEDOM OF INFORMATION - refusal of access - documents recording communications undertaken for the preparation of the prosecution case at the applicant's trial - whether subject to legal professional privilege - application of s.43(1) of the *Freedom of Information Act 1992 Qld*.

FREEDOM OF INFORMATION - refusal of access - photographs held on respondent's prosecution file - whether disclosure of photographs would disclose information concerning the personal affairs of the persons depicted in the photographs - whether disclosure of the photographs would, on balance, be in the public interest - application of s.44(1) of the *Freedom of Information Act 1992 Qld*.

FREEDOM OF INFORMATION - refusal of access - matter in issue concerns the affairs of a prisoner other than the applicant - whether information concerning another person's personal affairs - whether disclosure of the information would, on balance, be in the public interest - application of s.44(1) of the *Freedom of Information Act 1992 Qld*.

(ii)

Freedom of Information Act 1992 Qld s.22, s.22(a), s.22(b), s.22(c), s.28(1), s.30, s.30(2), s.43(1), s.44(1), s.52, s.52(6), s.73(3), s.88(1), s.88(2)

Criminal Code 1889 Qld s.129, s.132, s.140, s.671K

Justices Act 1886 Qld s.154

Criminal Practice Rules 1900 Order 9 rule 6(e)

Children's Services Act 1965 Qld s.138

Recording of Evidence Regulation 1992 s.3(1), s.3(2), s.3(3)(b)

Austin v Deputy Secretary, Attorney-General's Department (1986) 12 FCR 22; 67 ALR 585

Clarkson and Attorney-General's Department, Re (1990) 4 VAR 197

Deren & Anor v New South Wales (Supreme Court of New South Wales, No. 11952/90, CLS 1995 NSWSC CL 71, Levine J, 28 April 1995, unreported)

Director of Public Prosecutions v Smith [1991] 1 VR 63

Dunesky & Anor v Elder & Ors (1992) 107 ALR 573

Grofam Pty Ltd & Ors v Australia and New Zealand Banking Group Limited & Ors (1993) 45 FCR 445; 117 ALR 669

JM and Queensland Police Service, Re (Information Commissioner Qld, Decision No. 95008, 12 May 1995, unreported)

Lapidos and Office of Corrections (No. 2), Re (Victorian Administrative Appeals Tribunal, Jones J, 19 February 1990, unreported)

Smith and Administrative Services Department, Re (1993) 1 QAR 22

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

Trade Practices Commission v Sterling (1979) 36 FLR 244

Woodyatt and Minister for Corrective Services, Re (Information Commissioner Qld, Decision No. 95001, 13 February 1995, unreported)

DECISION

I affirm the decision under review.

Date of decision: 31 July 1996

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access under the *Freedom of Information Act 1992 Qld* (the FOI Act) to certain photographs, a trial transcript, and other documents held on the respondent's files relating to the prosecution of criminal charges against the applicant, and to copies of several of the respondent's Annual Reports.
2. Mr Ferguson is currently imprisoned, having been convicted in the Supreme Court of Queensland on 28 June 1988 of ten charges involving sexual offences against children. The Attorney-General successfully appealed against the sentence initially imposed on Mr Ferguson, with the Court of Criminal Appeal ordering an increased sentence. This background is relevant to a consideration of some of the documents in issue.
3. By letter dated 1 December 1992, Mr Ferguson applied to the respondent for access under the FOI Act to -
 - all documents held by the respondent concerning Mr Ferguson between 12 May 1983 and the date of his FOI access application (to include all photographs and audiotapes); and
 - copies of the respondent's Annual Reports between 1984 and 1992.
4. A decision on behalf of the respondent was made by Mr C W Porritt, Deputy Solicitor for Prosecutions (Advocacy), and communicated to Mr Ferguson by letter dated 5 March 1993. Mr Porritt identified a number of files and documents responsive to Mr Ferguson's FOI access application. He noted that the respondent's files contained a transcript of proceedings in the applicant's trial in the Supreme Court in March and April 1988 (pp.5-8 and pp.702-868). Mr Porritt decided that the transcript was a document that was reasonably open to public access

in accordance with another enactment, and relied upon s.22(a) of the FOI Act in deciding to refuse access to the copy of the transcript held on the respondent's file.

5. In respect of the applicant's request for access to the respondent's Annual Reports, Mr Porritt invoked s.22(c) of the FOI Act, refusing access on the basis that the Annual Reports were reasonably available for public inspection in a public library, or by way of inter-library loan.
6. Mr Porritt otherwise decided to grant access to the files he identified as relevant, subject to the following claims for exemption:
 - Prosecution File 1667/87 includes three pages of notes made in the course of preparation of the prosecution case for Mr Ferguson's trial. Mr Porritt decided that these pages were exempt under s.43(1) of the FOI Act because they would be privileged from production in a legal proceeding on the ground of legal professional privilege.
 - Prosecution File 1667/87 includes seven photographs of children and one photograph of a photograph of children. Mr Porritt decided that the photographs were exempt under s.44(1) of the FOI Act, on the basis that disclosure would reveal information concerning the personal affairs of the persons depicted in the photographs, and disclosure would not be in the public interest.
 - Correspondence File 240 includes several letters which refer to the personal affairs of a person other than the applicant. Mr Porritt decided that information which concerned the personal affairs of persons other than Mr Ferguson was exempt matter under s.44(1) of the FOI Act.
7. By letter dated 30 March 1993, the applicant sought internal review of Mr Porritt's decision, in accordance with s.52 of the FOI Act. Having received no response by 27 May 1993, Mr Ferguson applied to me for review under Part 5 of the FOI Act. By virtue of s.52(6) and s.73(3) of the FOI Act, the decision under review is the respondent's deemed decision affirming Mr Porritt's decision made on 5 March 1993.

External review process

8. The documents containing matter claimed by the respondent to be exempt matter, were obtained and examined.
9. After receiving an indication from Mr Ferguson that he wished to press for access to the documents which the respondent had dealt with under s.22 of the FOI Act, I wrote to the respondent requesting particulars of the basis upon which it was asserted that s.22 applied to the trial transcript and the respondent's Annual Reports.
10. In respect of the trial transcript, to which the respondent had refused access relying upon s.22(a) of the FOI Act, I asked the respondent to specify the enactment (and relevant provisions) relied upon to demonstrate that the trial transcript was reasonably open to public access. I asked whether inquiries had been made to confirm that the applicant was able to obtain a copy of the trial transcript by writing directly to the Supreme Court or the State Reporting Bureau, which is responsible for the preparation of transcripts of proceedings in the Supreme Court and District Court.

11. Regarding the application of s.22(c) of the FOI Act to the respondent's Annual Reports, I pointed out that Mr Ferguson had no direct access to a public library, because he was imprisoned. I suggested a compromise whereby the respondent would forward some spare copies of the relevant Annual Reports to the prison library at the correctional centre where Mr Ferguson was detained. If that proposal was not acceptable, I requested that the respondent advise me which public libraries held copies of the respondent's Annual Reports. I asked whether inquiries had been made to establish whether any such public libraries permitted inter-library loans to be made to prisoners or to prison libraries.
12. I received a letter in response dated 24 August 1993. In relation to the transcript of Mr Ferguson's trial, the respondent said that copies of transcripts are available for purchase from the State Reporting Bureau, and an officer of the Bureau had confirmed that a copy of the transcript of the applicant's trial could be purchased from the Bureau. The respondent also pointed out that copies of the transcript would have been made available to Mr Ferguson's counsel at the time of the original trial, and in the form of an appeal book at the time of the appeal, referring to s.671K of the *Criminal Code 1889 Qld*.
13. With respect to the Annual Reports, the respondent reported that the library of the Department of Justice and Attorney-General participated in the inter-library loan program, and held copies of the respondent's Annual Reports for the years 1988, 1989, 1990 and 1991 (the 1992 report had not then been tabled in Parliament). It was noted, however, that the Departmental library did not have copies of the respondent's Annual Reports for the years 1985, 1986 and 1987. The library of the Department of Justice is not a public library - it is not open for use by any member of the public (although it does participate in the inter-library loan program). I do not think it can be said of material held in the library of the Department of Justice that it is available for public inspection in a public library (see the terms of s.22(c) of the FOI Act, set out at paragraph 19 below). Since the respondent was unable to point to a public library which held copies of any of its Annual Reports, nor to any library which held copies of its Annual Reports for the years 1985, 1986 and 1987, it appears that the respondent was not entitled, at the time of the decision under review, to refuse Mr Ferguson access to copies of those Annual Reports in reliance upon s.22(c) of the FOI Act. The respondent has since taken steps, however, to provide copies of Annual Reports (including those for 1985, 1986 and 1987) to a number of libraries, including the State Library of Queensland, the library of the Queensland Corrective Services Commission (the QCSC), and the library of the Department of Justice.
14. The respondent has informed me of the results of inquiries made, which indicate that while some correctional centres do not have well-developed library facilities, any inmate is able to make a request for the provision of material by way of inter-library loan through the Education Officer. If such a request is made, the Education Officer passes the request to the QCSC's library which either meets the request from its own resources, or makes a request, on the inmate's behalf, to a library participating in the inter-library loan scheme.
15. By letter dated 6 September 1993, I provided the applicant with a copy of the respondent's letter dated 24 August 1993 and asked him whether he was satisfied that he was now able to obtain access to the trial transcript and the respondent's Annual Reports, through the avenues explained in the respondent's letter. I also extended to the applicant the opportunity to lodge a written submission addressing the claims for exemption made by the respondent under s.43(1) and s.44(1) of the FOI Act.

16. Mr Ferguson responded with an undated letter received in my office on 15 September 1993. Mr Ferguson contended that various provisions of the *Criminal Code* negated the respondent's refusal to grant access to documentation under s.22, s.43(1) and s.44(1) of the FOI Act; namely, s.129 (destroying evidence), s.132 (conspiring to defeat justice) and s.140 (attempting to pervert justice). In response to this, I wrote to Mr Ferguson indicating that I did not consider that there was any substance to his contention.
17. On the other hand, Mr Ferguson's letter did raise one point of substance. He contended that the respondent had failed to produce two files from 1985, even though the respondent confirmed the location of those files. Inquiries of the respondent prompted a response dated 10 November 1993, acknowledging that two further files from 1985 relating to Mr Ferguson had been located. It appeared that these files had been inadvertently overlooked in the initial response to Mr Ferguson's FOI access application. The respondent was prepared to give Mr Ferguson full access to those two files, and I authorised the respondent to do so.
18. In other correspondence to me, Mr Ferguson raised a number of issues (such as a complaint that his entitlements to remission had been tampered with by the QCSC and the respondent) which are clearly beyond my jurisdiction as Information Commissioner. I informed the applicant of this on several occasions, and I will not refer further to those complaints by the applicant, in these reasons for decision.

Application of s.22 of the FOI Act

19. So far as relevant for the purposes of this external review, s.22 of the FOI Act provides:

22. An agency or Minister may refuse access under this Act to—

- (a) a document that is reasonably open to public access (whether or not as part of a public register) in accordance with another enactment, whether or not the access is subject to a fee or charge; or*
- (b) a document that is reasonably available for purchase by members of the community in accordance with arrangements made by an agency; or*
- (c) a document that is reasonably available for public inspection in the Queensland State Archives or a public library; ...*

Application of s.22(a) to the transcript of the applicant's trial

20. I considered, in some detail, the correct approach to the interpretation and application of s.22(a) and s.22(b) of the FOI Act in *Re JM and Queensland Police Service* (Information Commissioner Qld, Decision No. 95008, 12 May 1995, unreported) at paragraphs 23-43. At paragraphs 33-36 of *Re JM*, I referred to the difficulties involved in reconciling the statutory scheme for obtaining transcripts of criminal proceedings in a Magistrates Court, which imposes restrictions on the persons who may obtain copies of such transcripts (see s.154 of the *Justices Act 1886* Qld), with the ordinary meaning of the phrase "public access" in s.22(a) of the FOI Act.
21. The statutory provisions which pertain to the supply of transcripts of criminal trials in the Queensland Supreme Court and District Court, however, contain no similar restrictions on

access. I am satisfied that the transcript of Mr Ferguson's criminal trial in the Supreme Court of Queensland is reasonably open to public access, within the terms of s.22(a) of the FOI Act.

22. Section 671K(3) of the *Criminal Code* provides that a copy of a record of proceedings or any part of that record may be made available in accordance with provisions of the *Criminal Practice Rules* 1900 and sets out that the *Criminal Practice Rules* may make provision for a number of matters, including charges for a copy of a record or part thereof. Order 9 rule 6(e) of the *Criminal Practice Rules* provides:

The State Reporting Bureau, on receipt of—

- (i) *a written application; and*
- (ii) *payment of the relevant fee prescribed in the Recording of Evidence Regulation 1992;*

is to supply the applicant with a copy of the transcript of the whole or any part of the shorthand note of a trial or other proceeding.

23. Under these provisions, the transcript of any criminal trial in the Supreme or District Court is available to any member of the public who makes a written application and pays the prescribed fee.
24. As I observed at paragraphs 39-41 of *Re JM*, the cost of access to a document under a specialised access scheme (i.e., a scheme other than the FOI Act) is a consideration which might be relevant to a determination of whether access is reasonably available. Section 3(1) of the *Recording of Evidence Regulation 1992* read with Order 9 rule 6(e) of the *Criminal Practice Rules* provides that the fees payable for transcripts of criminal matters in the Supreme and District Courts are set out in the Schedule to that Regulation. The fee set out in the Schedule is currently \$2.40 per page. In addition, s.3(2) of the *Recording of Evidence Regulation* provides that a defendant in a criminal proceeding in the Supreme Court or a District Court is entitled to one free copy of a transcript in printed form, and that the free copy may be issued to the defendant or the defendant's legal representative, even if the proceeding has ended (s.3(3)(b)).
25. At paragraph 40 of *Re JM*, I indicated that if a charging regime for access to government-held information is prescribed in an Act of Parliament or in a statutory instrument which was capable of being, but has not been, disallowed by Parliament, it would not ordinarily be appropriate to question the reasonableness of the charging regime. The charging regime applicable to the transcript in issue in this case is of that kind, and I am satisfied in any event that the prescribed charges are reasonable having regard to the cost of arrangements for the preparation of transcripts of criminal trials in the Supreme Court and District Courts.
26. I am satisfied that the transcript of Mr Ferguson's criminal trial is reasonably open to public access under another enactment, even though subject to a fee or charge, and that the respondent was entitled to refuse Mr Ferguson access, under the FOI Act, to the transcript, by virtue of s.22(a) of the FOI Act.

Application of s.22(c) to the respondent's Annual Reports

27. At paragraph 38 of *Re JM*, I made the following observation on a possible consequence of applying the test inherent in the phrase "reasonably open to public access" in s.22(a) of the FOI Act:

If a document is open to public access by inspection only, then the physical location of the document may affect the issue of whether it is "reasonably open to public access" under s.22(a). If a document is available for inspection only in one location, then (subject to practical considerations which may be present in any particular case) it may be difficult to say that the document is reasonably open to access by members of the public in other regions of Queensland. In such circumstances, an agency may not be entitled to rely upon s.22(a); rather, the applicant may be entitled to insist upon access under the FOI Act in the form of access most convenient to the applicant (cf. s.30 of the FOI Act, especially s.30(2)), e.g., by the provision of a photocopy of the relevant document.

28. That general approach seems to me to be consistent with the objects and framework of the FOI Act. The quoted comments assumed a situation where access was available in a fixed location by inspection only, and it was either not practical or not permissible for a person residing far away from that fixed location to arrange a satisfactory inspection by an agent. If a particular applicant for access to a document would have to incur unreasonably high costs (e.g. substantial travel and accommodation expenses) in order to inspect a document (in addition to any other charge ordinarily applicable under the specialised scheme of access), but it is practicable instead to provide access under the FOI Act by way of the provision of a photocopy of the document, then in my view it is preferable that a beneficial/remedial statute like the FOI Act be interpreted so as to permit access by way of the provision of a photocopy under the FOI Act, notwithstanding that that may involve some erosion of the revenue intended to be recouped by the charges ordinarily applicable under the specialised scheme of access. I have expressed my preference above for an approach to the interpretation of the word "reasonably" in s.22(a) which would procure that result in an appropriate case. The same result could be achieved by an agency declining, in an appropriate case, to exercise its discretion to invoke s.22(a) as a basis for refusing access under the FOI Act in circumstances of the kind described above.
29. There are factors specific to the interpretation of s.22(c) of the FOI Act, however, which make it difficult to construe the word "reasonably" in s.22(c) as having been intended to permit a result similar to that which I have suggested may be appropriate in particular cases under s.22(a) of the FOI Act. The phrase "reasonably available for public inspection in the Queensland State Archives or a public library" contemplates inspection being available in specific fixed locations, i.e., the Queensland State Archives or a public library. The term "public library" is defined in s.7 of the FOI Act to include:
- (a) the State library; and
 - (b) a local government library; and
 - (c) a library in the State that forms part of a public tertiary educational institution.
30. Thus it appears that an agency could place one copy of, say, a Green paper, or its Annual Report, in the State Library, and refuse an FOI access application for a copy of it, by a

resident of Camooweal or Cloncurry, on the basis that the document was reasonably available for public inspection (even though not reasonably available for inspection by the particular applicant) in the State Library in Brisbane. If s.22(c) were to be amended to omit the word "public", where it first appears, it would permit account to be taken of whether a document was reasonably available for inspection having regard to the circumstances of a particular applicant for access, amongst other relevant factors. However, I consider that given the terms in which s.22(c) is presently framed, it can only be construed in one way. If a document is reasonably available for inspection, by the public at large, in the Queensland State Archives or a public library, then an agency or Minister will have a discretion to refuse access to the document under the FOI Act, by virtue of s.22(c). (Of course, an agency or Minister may still choose not to exercise the discretion conferred by s.22(c), having regard to the circumstances of a particular applicant for access, and instead permit access under the FOI Act even though the material facts which would permit reliance on s.22(c) are established.)

31. An inflexible or unsympathetic approach by an agency or Minister to the application of s.22(c) could produce harsh results for individual access applicants, such as those who live far away from locations at which a particular document is available for public inspection, or those who through physical disability are unable to attend the place at which a particular document is available for public inspection, or those who (like Mr Ferguson) being subject to legal restraints on their freedom of action, are unable to attend the place at which a particular document is available for public inspection.
32. As I have indicated in paragraph 13 above, during the course of my review, the respondent arranged for copies of the Annual Reports requested in Mr Ferguson's FOI access application to be placed in a number of libraries, including the State Library and the QCSC library. In a review under Part 5 of the FOI Act, I must ordinarily have regard to the relevant facts and circumstances as they stand at the date of my decision: see *Re Woodyatt and Minister for Corrective Services* (Information Commissioner Qld, Decision No. 95001, 13 February 1995, unreported) at paragraphs 35 and 58.
33. Since the respondent's relevant Annual Reports have now been placed in the State Library, I am satisfied that those Annual Reports are reasonably available for public inspection in a public library, and that the respondent is entitled, in accordance with the terms of s.22(c) of the FOI Act, to refuse the applicant access, under the FOI Act, to those Annual Reports.
34. The fact that the respondent has gone further, and made copies of the relevant Annual Reports available to the library of the QCSC (meaning they are readily accessible by Mr Ferguson if he makes a request for them through the Education Officer of the correctional centre in which he is detained) makes it unnecessary, in my view, to consider whether the correct or preferable exercise of the discretion conferred by s.22(c) is to decline to invoke s.22(c), having regard to all the relevant circumstances (including the restrictions on the particular applicant's ability to inspect the documents in a public library) notwithstanding that the material facts which entitle an agency to invoke s.22(c) are established. I note that, by virtue of s.88(1) of the FOI Act, I have power to review the exercise by an agency or Minister of the discretions conferred by s.22 of the FOI Act, and to substitute my own decision for the decision under review. (By contrast, the discretion to permit access to exempt matter - a discretion conferred on agencies and Ministers by s.28(1) of the FOI Act - is specifically denied to me by s.88(2) of the FOI Act.)
35. Finally, I observe that the history of this case demonstrates that agencies or Ministers who plan to invoke s.22 of the FOI Act should ensure that the material facts which entitle them to

do so, are established. It appears that when the initial decision was made on behalf of the respondent to invoke s.22(c) in respect of the respondent's Annual Reports, there were no grounds for doing so.

36. I find that the respondent is entitled to refuse Mr Ferguson access under the FOI Act to the requested copies of the respondent's Annual Reports, by virtue of s.22(c) of the FOI Act.

Application of s.43(1) - Legal Professional Privilege

37. Section 43(1) of the FOI Act provides:

43.(1) Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.

38. In *Re Smith and Administrative Services Department* (1993) 1 QAR 22, I discussed (at pp.51-57; paragraphs 82-98) the requirements for exemption under s.43(1) of the FOI Act. At paragraph 82 of my decision, I referred to the useful summary of principles set out in the decision of Mr K Howie, a member of the Victorian Administrative Appeals Tribunal, in *Re Clarkson and Attorney-General's Department* (1990) 4 VAR 197, at p.199, of which the following extracts are relevant in the present case:

(1) *To determine whether a document attracts legal professional privilege consideration must be given to the circumstances of its creation. It is necessary to look at the reason why it was brought into existence. The purpose why it was brought into existence is a question of fact.*

(2) *To attract legal professional privilege the document must be brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings. Submission to legal advisers for advice means professional legal advice. It includes the seeking or giving of advice. Use in legal proceedings includes anticipated or pending litigation.*

...

(4) *Legal professional privilege attaches to confidential professional communications between salaried legal officers and government agencies. It must be a professional relationship which secures to the advice an independent character. The reason for the privilege is the public interest in those in government who bear the responsibility of making decisions having free and ready confidential access to their legal advisers. Whether or not the relationship exists is a question of fact.*

...

39. It has been accepted by some of Australia's senior appellate courts that a person holding office as Director of Public Prosecutions may -

(a) stand in a professional relationship of legal adviser to client, in respect of clients, such as the Attorney-General or a government agency, who seek legal advice, or provide instructions, in respect of a criminal prosecution matter; or

- (b) in the course of discharging the functions and duties of his or her office, stand in the relationship of client to legal adviser, in respect of independent counsel, or legally qualified salaried employees of the Director of Public Prosecutions, who are instructed to provide legal advice or professional legal assistance to, or conduct court proceedings on behalf of, the Director of Public Prosecutions.

(As to point (a), see the judgments given by Full Courts of the Federal Court of Australia in *Austin v Deputy Secretary, Attorney-General's Department* (1986) 12 FCR 22 at p.23, and in *Grofam Pty Ltd & Ors v Australia and New Zealand Banking Group Limited & Ors* (1993) 45 FCR 445 at p.452; also *Dunesky & Anor v Elder & Ors* (1992) 107 ALR 573 and *Deren & Anor v New South Wales* (Supreme Court of New South Wales, No. 11952/90, CLS 1995 NSWSC CL 71, Levine J, 28 April 1995, unreported). As to point (b), see the judgment of a Full Court of the Supreme Court of Victoria in *Director of Public Prosecutions v Smith* [1991] 1 VR 63 at p. 70, and *Austin's* case at p.23.)

40. Thus, confidential communications made pursuant to relationships of professional legal adviser and client, of a kind referred to above, which satisfy the 'sole purpose test' and other criteria of eligibility under the general law to attract the protection of legal professional privilege, will qualify for exemption under s.43(1) of the FOI Act. This does not mean that every communication between the Director of Public Prosecutions and his or her salaried legal staff will attract the protection of legal professional privilege, as is evident from the finding by a Full Court of the Supreme Court of Victoria in *DPP v Smith* (at p.70) that a communication from the Victorian Director of Public Prosecutions to a solicitor employed in his office, which expressed the Director's own opinion on the discharge of a function of his office, did not attract legal professional privilege.
41. I have examined the documents claimed by the respondent to be exempt under s.43(1) of the FOI Act. They comprise records of communications made for the purpose of preparing for the trial of criminal charges against Mr Ferguson. It is clear from the nature of the records that they must have been made either by the barrister who conducted the prosecution of Mr Ferguson on behalf of the respondent, or by an officer of the respondent whose job it was to assist that barrister with preparations for the trial by obtaining information necessary for the conduct of the trial (and it is clear that the records were made for that sole purpose). Thus the respondent was the client in a relationship of the kind referred to in paragraph 39(b) above.
42. I am satisfied that the documents fall within the fourth class of documents subject to legal professional privilege identified by Lockhart J in *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at p.246, namely:
- Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which ... relate to information sought by the client's legal adviser to enable him to ... conduct litigation on his behalf.*
43. I find that the documents are exempt under s.43(1) of the FOI Act.

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

44. Sections 44(1) and 44(2) of the FOI Act provide:

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

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

45. 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 the relevant variations of that phrase) as it appears in the FOI Act (see pp.256-267, paragraphs 79-114, of *Re Stewart*). In particular, I said that information concerns the "personal affairs of a person" if it 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; 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 matter in question.

46. Exemption has been claimed under s.44(1) for -

- seven photographs of children, and a photograph of a photograph of children, contained in prosecution file 1667/87;
- one letter in correspondence file 240 which refers solely to the affairs of a person other than the applicant, and three letters in the same file which refer to the affairs of the applicant and to the affairs of another person.

47. I am satisfied that disclosure of the photographs would disclose information concerning the personal affairs of the persons depicted in them, and hence that the test for *prima facie* exemption under s.44(1) of the FOI Act is satisfied. I have not sought to establish whether the photographs were tendered as exhibits at Mr Ferguson's trial, as I do not consider that to be a factor which would influence my findings in the present case. It may be possible in some cases to argue that, if a photograph has been tendered as an exhibit in evidence at a trial, the weight to be accorded the privacy interest weighing against disclosure of the photograph is substantially diminished. Such an argument could not apply to these photographs, however, given the extent of the legislative protection from disclosure of the identities of children involved in court proceedings of this kind (see s.138 of the *Children's Services Act 1965* Qld) and the importance of the public policy considerations which underlie those legislative provisions.

48. Mr Ferguson has not pointed to any public interest considerations which might warrant a finding that disclosure of the photographs would, on balance, be in the public interest, and I do not consider that there are any.
49. I find that the photographs are exempt matter under s.44(1) of the FOI Act.
50. The documents from Correspondence file 240 are letters which have passed between the respondent and the QCSC. One of them, which is date-stamped 19 February 1990, solely concerns the affairs of a prisoner other than the applicant, and is claimed to be exempt in its entirety under s.44(1). Another three letters (dated 14 October 1988, 22 January 1990, and 6 March 1990) which concern the affairs of the applicant and another prisoner, have been disclosed to the applicant subject to the deletion (as exempt matter under s.44(1) of the FOI Act) of the name of the other prisoner. The applicant has therefore obtained access to the information in those three letters which concerns his own affairs. He has also obtained access to the information in those three letters which concerns the affairs of the other prisoner, but not in a form which identifies the other prisoner.
51. I have previously stated my agreement with the view expressed by Jones J (President) of the Victorian Administrative Appeals Tribunal in *Re Lapidos and Office of Corrections (No. 2)* (unreported, 19 February 1990) to the effect that information concerning what happens to a prisoner while in prison is information which concerns the prisoner's personal affairs: see *Re Stewart* at p.257, paragraph 80.
52. Having examined the four letters referred to above, I am satisfied that the matter withheld from Mr Ferguson satisfies the test for *prima facie* exemption under s.44(1) of the FOI Act. Again, Mr Ferguson has not pointed to any public interest considerations favouring disclosure which might warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest. I do not consider that there are any. In particular, the general public interest in accountability of the respondent, or of the QCSC, for the discharge of their functions, would not be served in any substantial way by the disclosure of the matter in issue.
53. I am satisfied that the matter from Correspondence file 240 which has been withheld from the applicant is exempt matter under s.44(1) of the FOI Act.

Conclusion

54. Given my findings above, and subject to my noting that grounds for invoking s.22(c) of the FOI Act (to refuse access under the FOI Act to requested copies of the respondent's Annual Reports) do not appear to have been available at the time of the decision under review, but are available at the time of giving my decision, I consider it appropriate to affirm the decision under review.

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F N ALBIETZ
INFORMATION COMMISSIONER