



Decision and Reasons for Decision

Application Number: 210515

Applicant: Mr David Kalman

Respondent: Department of Justice and Attorney-General

Decision Date: 8 September 2008

Catchwords: **FREEDOM OF INFORMATION – section 35B – section 35C - application fee – whether document concerns an applicant’s personal affairs – the ‘office’ of a justice of the peace – waiver of fees and charges – procedural fairness**

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REASONS FOR DECISION

Summary

1. For the reasons set out below, I find that:
 - four documents responsive to the applicant's freedom of information application (Four Documents) do not concern the applicant's personal affairs
 - as such, the applicant is required to pay an application fee pursuant to section 35B(2) of the *Freedom of Information Act* 1992 (Qld) (FOI Act) in respect of the freedom of information application
 - pursuant to section 35C(1) of the FOI Act, the application fee can not be waived.
2. The decision under review is affirmed.

Background

3. On 7 April 2008, the applicant made a freedom of information application (FOI Application) to the Department of Justice and Attorney-General (Department) for:

the supply of any/all documents, in what ever form it takes, that are in the possession of the Department of Justice, whether it is in the possession of Mr Damien Mealey or John McKenna, or who-ever, that is in any way related to or refers to myself, David W. Kalman.
4. In this FOI Application, the applicant requested relief from any costs associated with his FOI Application on the basis that any costs would cause financial hardship and that the documents sought related to the applicant's personal information. The applicant also indicated that he was in receipt of a pension from Centrelink.
5. By letter dated 15 May 2008 (Original Decision), Ms Robyn Walsh of the Department informed the applicant that she had determined that a non-refundable application fee of \$36.50 was payable pursuant to section 35B(2) of the FOI Act on the basis that at least one of the documents which the Department had located in relation to the applicant's FOI Application did not concern his personal affairs.
6. By email to the Department dated 19 May 2008 (IR Application), the applicant sought an internal review of the decision that an application fee applied to his FOI Application.
7. By letter dated 21 May 2008 (IR Decision), Mr Cameron Thomas of the Department informed the applicant of his decision that the documents the Department had located in relation to his FOI Application included documents which were considered 'non-personal' and as such an application fee would be payable. Mr Thomas also stated that there was no provision in the FOI Act enabling an application fee to be waived.
8. In an email to the Department dated 21 May 2008, the applicant requested the Department supply him with those documents not covered by the requirement to pay an application fee (ie. the documents which did concern his personal affairs) and indicated he intended to apply for a review of the decision that an application fee applied to his FOI Application.
9. By email dated 23 May 2008 (received 26 May 2008), the applicant applied to the Office of the Information Commissioner (Office) for an external review of the IR Decision (ER Application). In the course of this Office making preliminary enquiries

under section 75 of the FOI Act, on 26 May 2008 a copy of the ER Application was provided to the Department.

10. By letter dated 26 May 2008, Mr Cameron Thomas advised the applicant that, pending an outcome in the external review on the issue of the application fee, Mr Thomas was now considering only those documents which were considered to contain matter relating to the applicant's personal affairs and were therefore not subject to the requirement to pay an application fee. In particular, he stated:

As a result of your email of 21 May 2008, I am now considering just those documents that are considered to contain matter relating to your personal affairs and therefore not subject to the requirement to pay an application fee.

Four documents (folios 18 – 21) of the 37 documents in issue have been removed from the scope of the application on this basis.

A decision regarding the four documents (folios 18 – 21) will be made following the outcome of your application for review with the Office of the Information Commissioner, on whether an application fee in relation to these documents is applicable.

Decision under review

11. The decision under review is the IR Decision of Mr Cameron Thomas dated 21 May 2008 that an application fee of \$36.50 was payable by the applicant with respect to the FOI Application on the basis that:
 - the documents located by the Department included documents which were considered 'non-personal' and as such an application fee would be payable
 - there is no provision for a waiver of an application fee in the FOI Act.

Steps taken in the external review process

12. Following preliminary enquiries with the Department, by letter dated 5 June 2008 I requested the Department provide me with those documents relevant to the applicant's FOI Application that the Department had decided did not concern the applicant's personal affairs.
13. I also wrote to the applicant on 5 June 2008, identifying the issues for consideration in the external review as:
 - the Department's decision that some of the documents responsive to the applicant's FOI Application did not concern the applicant's personal affairs and an application fee was therefore payable by him; and
 - the applicant's request that any applicable application fee be waived on the grounds of financial hardship.
14. On 11 June 2008, the Department provided this Office with copies of the Four Documents, being those folios identified in the IR Decision as folios 18 - 21¹ which the Department identified as folios that did not concern the applicant's personal affairs.

¹ The copies of the Four Documents provided to this Office were numbered 027: 000018 – 000021, which I understand to mean folios 18 – 21 of collection 27.

15. Having examined the Four Documents, I formed the preliminary view that the Four Documents did not concern the applicant's personal affairs, and as I did not have any discretion to waive an application fee, an application fee would therefore be payable by the applicant in respect of his FOI Application.
16. On 5 August 2008, I contacted the applicant by telephone and provided my preliminary view to him. I also issued a written preliminary view to the applicant on that day.
17. The applicant provided written submissions by email dated 8 August 2008 and 16 August 2008. The relevant issues raised by those submissions are addressed in this decision.
18. On 3 September 2008, an officer of this Office spoke with the Department to clarify the procedural steps taken in relation to the FOI Application.

Preliminary matter

19. In an email dated 8 August 2008, in response to my preliminary view dated 5 August 2008, the applicant submitted the following:

My submission is that you appear to be supporting the Department in this matter.

...

I respectfully request that any review be carried out by a person, other than a person who made, or was involved in the making of your decision.

(I have interpreted the reference to 'decision' in this context as a reference to my written preliminary view dated 5 August 2008.)

20. The preliminary view provided to the applicant on 5 August 2008 was not a decision. Rather, a preliminary view is one of the processes used by this Office to facilitate informal resolution of a matter and to afford procedural fairness by giving parties (and in particular, a party whose interests would be adversely affected by a decision of this Office) an opportunity to respond to relevant issues in the review.
21. The invitation to provide submissions in response to a preliminary view is not an opportunity to 'appeal' a preliminary view as no decision has at that stage been made. In any event, once a decision is made by the Information Commissioner (or her delegate), there is no further avenue of appeal to the Office of the Information Commissioner. An applicant's avenue of appeal in respect of a formal decision of the Information Commissioner ordinarily lies in an application to the Supreme Court for judicial review on a question of law.
22. As a delegate of the Information Commissioner, I am required to conduct reviews and make decisions in accordance with the provisions of the FOI Act (including section 83(3) which requires that in conducting a review, I must adopt fair procedures and ensure participants have an opportunity to present their views), established precedent, and the principles of administrative law, including the requirements of procedural fairness.
23. In light of the fact that I have conducted this review in a manner which has given the applicant an opportunity to provide submissions in support of his view that an application fee should not apply to his FOI Application, and I have complied with the requirements of the FOI Act and the principles of procedural fairness, there is no basis on which I should remove myself from the decision making process in this review.

Issues in this review

24. The first issue in this review is whether the Four Documents, which the Department identified as being those documents which did not concern the applicant's personal affairs, do or do not concern the applicant's personal affairs, and thus, whether an application fee is payable by the applicant pursuant to section 35B of the FOI Act.
25. The second issue in this review is whether the requirement to pay an application fee can be waived.
26. In order to address the first issue, I have examined the Four Documents provided by the Department. Broadly speaking, the Four Documents contain information relating to activities the applicant undertook (ie. conduct) in the capacity of, or in which the applicant represented himself as acting in his capacity as, a justice of the peace.

Findings

27. Section 35B of the FOI Act relevantly provides:

35B Fees and charges for access to documents not concerning personal affairs

- (1) *This section applies to an applicant applying for access to a document that does not concern the applicant's personal affairs.*
- (2) *The applicant must pay, at the time the application is made, an application fee.*
- (3) *The applicant must pay any processing charge and access charge before the applicant is provided access to the document.*

...

28. The effect of section 35B(1) is that an application fee is not payable if all of the documents sought by the applicant concern the applicant's personal affairs. If even one document does not concern the applicant's personal affairs, then the applicant must pay an application fee.²

What are personal affairs?

29. In a previous decision of the Information Commissioner, *Stewart and Department of Transport*³, 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 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.

² See *Stewart and Department of Transport* (1993) 1 QAR 227 [121].

³ (1993) 1 QAR 227.

30. 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.

Justice of the Peace

31. As noted above, the Four Documents contain information relating to activities the applicant undertook (ie. conduct) in the capacity of, or in which the applicant represented himself as acting in his capacity as, a justice of the peace. Accordingly, in deciding this external review, I have given consideration to the status of a justice of the peace and in particular, to the provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991 (Act)*.
32. A justice of the peace is a person with '*a commission of the Crown who is able to exercise particular judicial functions within a jurisdiction, such as the taking of oaths, declarations, and affidavits*'.⁴
33. In Queensland, the Act provides for the appointment, registration and functions of justices of the peace. The Act requires that a register of all appointed justices of the peace (stating the name, address and particulars of appointment of each justice of the peace) is to be kept in such a form and manner that it may be inspected at any office of the registrar in the State and be available for inspection by any person.⁵
34. Importantly, the Act provides that a justice of the peace, has and may exercise all the powers conferred on the justice by the *Justices Act 1886* or any other Act, and may take any affidavit or attest any instrument or document that may be taken or attested under any Act or law.⁶ The Act requires that a person must take an oath of, or make an affirmation of, allegiance and office before performing any of the functions of office.⁷ Further, once registered, a justice of the peace receives a seal of office and a registered number of office.⁸
35. An 'office' is '*a position of authority to which duties and functions are attached*' and is a '*subsisting, permanent position existing independently of the person who fills it*'.⁹ An oath of office is an '*affirmation, declaration, or promise required ... under statute to be made by persons entering upon the duties of public office, concerning the performance of their functions and integrity within that office*'.¹⁰
36. Under section 15(1) of the Act, the Governor in Council may appoint as many persons as the Governor thinks necessary to keep the peace in Queensland. The 'office' of justice of the peace exists independently, regardless of which (or how many) people are appointed to that office. It is a public office, with public purposes, broadly stated as to 'keep the peace in Queensland'. More specifically, this public office equates to various administrative duties¹¹ and minor judicial functions¹² which form part of the legal system of the State.

⁴ Encyclopaedic Australian Legal Dictionary, LexisNexis, 'justice of the peace'

⁵ *Justices of the Peace and Commissioners for Declarations Act 1991*, s13

⁶ *Justices of the Peace and Commissioners for Declarations Act 1991*, s29(1). These powers are subject to express qualifications. For instance, under section 29(3) of the Act, a justice of the peace (qualified), in the exercise of any power to constitute a court for the purpose of a proceeding is limited to taking or making a procedural action or order.

⁷ *Justices of the Peace and Commissioners for Declarations Act 1991*, s20

⁸ *Justices of the Peace and Commissioners for Declarations Act 1991*, s21

⁹ Encyclopaedic Australian Legal Dictionary, LexisNexis, 'office'

¹⁰ Encyclopaedic Australian Legal Dictionary, LexisNexis, 'oath of office'

¹¹ Such as taking statutory declarations under the *Oaths Act 1867 (Qld)*, Part 4

37. The statement of Eames J of the Supreme Court of Victoria in *University of Melbourne v Robinson* [1993] 2 VR 177 at page 187 is also useful in this context:

*The reference to the 'personal affairs of any person' suggests to me that a distinction has been drawn by the legislature between those aspects of an individual's life which might be said to be of a private character and those relating to or arising from any position, office or other public activity with which the person occupies his or her time.*¹³

Do the documents concern the applicant's personal affairs?

38. A 'justice of the peace' constitutes an office which attracts public functions and duties. Such functions and duties are not private in character and arise from a 'position, office or public activity'. Neither the performance (nor purported performance) of those duties, nor the fact of a person being a justice of peace, can be personal affairs.
39. The information contained in the Four Documents relates to activities the applicant undertook (ie. conduct) in the capacity of, or in which the applicant represented himself as acting in his capacity as, a justice of the peace. As the role of a justice of the peace is a public office, that information does not concern the applicant's personal affairs. As such, section 35B of the FOI Act applies to the FOI Application and an application fee is therefore payable.

Scope of review

40. In his submissions dated 8 August 2008, the applicant asked me to advise him which of the documents the Department had already provided to him, referred to the applicant's personal affairs. The applicant's submissions appeared to suggest that the Four Documents could not be distinguished in character from those documents which the Department had already provided to him (and the Four Documents must therefore have concerned the applicant's personal affairs).
41. As outlined above, in his letter dated 26 May 2008, Mr Cameron Thomas advised the applicant that in respect of the applicant's FOI Application, Mr Thomas was considering only those documents which were considered to contain matter relating to the applicant's personal affairs and were therefore not subject to the requirement to pay an application fee. The Four Documents were removed from the scope of his initial decision, pending a decision in this external review.
42. This approach appears to have been taken in order to facilitate the applicant's access to documents which responded to his FOI Application, rather than delay processing the applicant's FOI Application pending receipt of the application fee or an outcome in this external review.
43. As the documents which the Department has already provided to the applicant are not within the scope of this external review, I have not considered, nor has the Department provided me with, copies of those documents. I do not consider it necessary to consider the documents already provided to the applicant as I have determined that the Four Documents do not concern the applicant's personal affairs. It is not significant whether the information in the documents already released to the applicant contains

¹² Such as constituting a court to deal with an application for bail in accordance with the *Justices of the Peace and Commissioners for Declarations Act 1991* and the *Bail Act 1980*. Further, under section 1 of the *Criminal Code*, a reference to 'judicial officer' includes a justice of the peace constituting a court.

¹³ This statement has been endorsed in decisions of this Office, for example, *Pope and Queensland Health* (1994) 1 QAR 616, [114].

information which does or does not concern the applicant's personal affairs, as the issue before me is to determine whether, on the basis of the information contained in the Four Documents, an application fee is payable. As stated above, if even one document to which the applicant seeks access does not concern the applicant's personal affairs, an application fee will be payable,¹⁴ and that is the case here.

44. I do note that if a document contains at least some information which can be properly characterised as information concerning the personal affairs of the applicant, it will be a document which concerns the applicant's personal affairs, and no charge will be payable for access to that document.¹⁵ In the second last paragraph of page three of the IR Decision, Mr Thomas has set out the reasons why the Department categorised the majority of the documents (ie. those located at the time of the IR Decision) as documents concerning the applicant's personal affairs¹⁶. The Four Documents can be distinguished from those documents.

Request to waive application fee

45. The applicant's FOI Application dated 7 April 2008 stated:

As I am in receipt of ... [a pension] ... I seek total relief of any cost associated with my request on the basis that any cost would cause financial hardship, and that, the documents sought refer to documents related to my personal information ...

46. Section 35C(1) of the FOI Act provides

35C Waiver of fees and charges

- (1) *An application fee may not be waived.*
- (2) *A processing charge or access charge may be waived only as provided under this Act.*
- (3) *A processing charge or access charge must be waived if the agency or Minister considers the applicant is in financial hardship.*
- (4) *A processing charge or access charge may also be waived under section 79(2).*

47. The fees that may arise from FOI applications fall into two categories:

- the application fee; and
- processing fees and access charges.¹⁷

48. Section 35C(1) of the FOI Act provides that an application fee may not be waived. This means that I have no discretion to waive the application fee, where an application fee applies, even where the applicant provides sufficient evidence of financial hardship.

¹⁴ See *Stewart and Department of Transport* (1993) 1 QAR 227 [121].

¹⁵ See *Price and Surveyors' Board of Queensland* (1999) 5 QAR 110 [29].

¹⁶ That paragraph reads as follows: *'In examining the documents identified above as responsive to your application, I am of the view that documents which contain your home address, telephone number, personal mobile number or private email address are documents which I must categorise as personal. This is the case for the emails or email replies which include your own personal email address, which constitute the majority of the documents located.'*

¹⁷ Processing fees and access charges are determined by the agency in accordance with the FOI Act and the *Freedom of Information Regulation* 2006. I have not been required to consider the imposition of any processing fees or access charges as part of this external review.

DECISION

49. As set out in these reasons for decision, the office of a 'justice of the peace' is a public office and information relating to activities a person undertakes (ie. their conduct) in the capacity of, or in which a person represents themselves as acting in their capacity as, a justice of the peace is not information that concerns that person's personal affairs.
50. On this basis, I have decided that:
 - the Four Documents do not concern the applicant's personal affairs
 - as such, the applicant is required to pay an application fee pursuant to section 35B(2) of the *Freedom of Information Act 1992 (Qld)* (FOI Act) in respect of the applicant's FOI Application
 - pursuant to section 35C(1) of the FOI Act, the application fee can not be waived.
51. The decision under review is affirmed.
52. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992 (Qld)*.

Assistant Commissioner Corby

Date: 8 September 2008