



Decision and Reasons for Decision

Application Number: 210417
Applicant: Mr R Mathews
Respondent: The University of Queensland
Decision Date: 21 August 2008

External review of decision under the *Freedom of Information Act 1992*

I confirm that you seek external review of the University of Queensland's (**UQ's**) decision of 12 December 2007 that an application fee is payable under section 35B of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) in respect of your freedom of information application dated 12 November 2007 (**FOI Application**).

The purpose of this letter is to advise you of my decision in respect of whether an application fee is payable in the circumstances.

In reaching this decision, I have carefully considered the following:

- your FOI Application
- your email to UQ dated 22 November 2007 in which you clarify the scope of your FOI Application
- the initial decision of Mr Zgrajewski dated 29 November 2007
- your email dated 30 November 2007 to UQ seeking internal review of the initial decision
- the internal review decision of Mr Porter dated 12 December 2007
- your email dated 17 December 2007 to this Office seeking external review of the internal review decision
- a copy of the matter in issue provided by UQ
- relevant legislation, case law and previous decisions of this Office.

Summary of decision

On the information available to me, I find that:

- UQ has located the email to Aussie HQ to which you seek access (**Email to AHQ**)
- the scope of your FOI Application contains a global qualification that responsive matter must contain some information concerning your personal affairs
- there is no information concerning your personal affairs in the Email to AHQ
- copies of the Email to AHQ held by UQ contain no additional information (in other words, they are identical to the Email to AHQ)

- on account of your global qualification regarding personal affairs (which I understand you include to avoid paying an application fee), there is no matter responsive to your FOI Application
- in circumstances where an agency is aware that there is no matter responsive to a freedom of information application, it is not entitled to require an applicant to pay an application fee
- in the circumstances, an application fee is not payable.

This decision resolves the issue of the application fee. Accordingly, this matter will now revert to UQ for processing.

Your options

I note that the following options are available to you:

- you may withdraw this FOI Application (given there is no responsive matter) and make a fresh application to UQ which does not contain the global qualification that responsive matter must contain at least some information concerning your personal affairs
- if you choose not to withdraw your FOI Application, you may liaise with UQ as it processes your FOI Application now that the issue of the application fee is resolved
- I also note that the *Judicial Review Act 1991* (Qld) allows parties to apply to the Supreme Court for review of external review decisions of this Office in certain circumstances. You will need to seek your own legal advice in this respect.

Reasons for this decision are set out below.

Reasons

Issue for determination - is an application fee payable?

The issue for determination in this external review is whether you are required to pay an application fee in respect of the FOI Application.

Section 35B of the FOI Act sets out the circumstances in which an application fee is payable.

Section 35B of the FOI Act

Sub-sections (1) and (2) of section 35B of the FOI Act provide that:

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.

The Information Commissioner has relevantly stated¹ that:

... an application for access to documents needs seek only one document which does not concern the personal affairs of the applicant to attract the imposition of the... application fee.²

Accordingly, to determine whether an application fee is payable it is necessary to determine whether there is one document which is responsive to the FOI Application which does not contain information concerning your personal affairs.

In doing so, it is relevant to consider the scope of your FOI Application.

Scope of application

You state in your FOI Application that you seek access to:

All of the information on the [email to Aussie HQ with respect to my website AustLawPublish.com where apparently UQ found some content unacceptable to them, so threatened to sue the Computer host of that site for defamation] in the possession of or under the control of ... UQ, where that info relates to my personal affairs. I require all of that document ... not previously released to me.

You clarify the terms of your FOI Application in your email dated 22 November 2007:

That FOI request was for one document only, or if there are a number of copies of that document ie the email to Aussie hq, then all the copies, that have even a miniscule amount of "personal" information on it.

I guess you are being confused by my qualification of documents that contain information that relates to my personal affairs. That ensures that no application fee is payable. I require that whole email to Aussie HQ, so nothing can be deleted as not relevant. The only info that could be deleted is private info of another person.

You further clarify in your application for internal review dated 30 November 2007 what you mean by the qualification "where that info relates to my personal affairs":

... Rather than decide that an application fee was due, ..., if he felt that the [email] did not contain any information concerning or referencing my "personal affairs", he should have then processed that application minus [the email] because the application was globally qualified as relating to only documents containing any information concerning my personal affairs. In that case this present Internal Review ... would have been lodged by me, THEN. ...

Accordingly, I understand that you seek access to:

- an email from UQ to Aussie HQ:
 - concerning a complaint about the website AustLawPublish.com
 - where that information relates to your personal affairs (that is, taking into consideration the 'global qualification' that any responsive matter will relate to your personal affairs)
- copies of the Email to AHQ which contain 'even a miniscule amount of personal information'.

¹ In relation to an earlier provision of the FOI Act that was substantially similar to sub-sections (1) and (2) of section 35B of the FOI Act.

² *Stewart and Department of Transport* (1993) 1 QAR 227 (**Stewart**) at paragraph 121.

I confirm that UQ has in its possession:

- the Email to AHQ
- identical copies of the Email to AHQ.

Given that all copies of the Email to AHQ held by UQ are identical to the Email to AHQ (that is, they do not contain any additional information), it is unnecessary to consider each document individually to determine whether they:

- (a) contain matter concerning your personal affairs
- (b) are responsive to the FOI Application.

(a) Does the Email to AHQ concern your personal affairs?

Whether or not information contained within 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.

In determining whether the Email to AHQ contains information concerning your personal affairs, it is necessary to consider whether *the information recorded in it* can be characterised as information concerning your personal affairs.

I note that the Information Commissioner has stated that:

- information concerns a person's personal affairs if it concerns the private aspects of a person's life³
- the adjective "personal" is used in the phrase "personal affairs" in the same sense as a person might use it in refusing to answer an intrusive question with a retort such as: "*I am not prepared to give you that information; it's personal*"⁴.

In other words, the phrase "personal affairs" does not capture all of the affairs of an individual, and is clearly distinct from a person's business or employment affairs, or other activities of a public kind.

Ordinarily, information concerning:

- family and marital relationships;
- health or ill health;
- relationships and emotional ties with other people; and
- domestic responsibilities or financial obligations,

is characterised as information concerning an individual's personal affairs.

I also note the Information Commissioner's statement⁵ that:

32. In the present case, I am not considering the name and telephone number in isolation, for the purpose of determining whether they comprise exempt matter under s.44(1) of the FOI Act. I am considering them in the context in which they appear in the Memorandum. Their disclosure in that context would identify the third

³ See Stewart at paragraphs 79-114.

⁴ See Stewart at paragraph 55.

⁵ In *Byrne and Gold Coast City Council* (Decision No. 94008) Unreported, 12 May 1994 (**Byrne**)

party as a person who made a complaint to the local Alderman about the length of grass on public land.

33. *In my opinion the making of that complaint was a personal affair of the [complainant, as they were] acting in the capacity of a private citizen exercising a citizen's privilege to make a private approach to an elected representative about a matter of concern.*
34. *There was nothing in the circumstances attending the making of the complaint that might take the making of it out of the sphere of the private aspects of the third party's life and arguably place it in the public sphere (cf the discussion in Re Stewart at paragraphs 60-62 about the possible argument that matters widely known in the community or easily verifiable from public records cannot be said to be "personal"). For example, if the third party's identity and complaint had been announced by the third party at a meeting of the [Gold Coast City Council] that was open to the public, or published in a letter to the Gold Coast Bulletin, it would be arguable that the making of the complaint was a public act rather than a personal affair of the [complainant], for the purposes of applying s.44(1) of the FOI Act to a record of the complaint in the possession of the [Council]... I note in this regard what was said by Eames J of the Supreme Court of Victoria concerning ... [that State's] personal affairs exemption [provision] ...in University of Melbourne v Robinson [1993] 2 VR 177 at 187:*

"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 public activity with which the person occupies his or her time."

The hypothetical examples posed above are arguably illustrations of a "public activity" of the kind referred to in this passage.

Your submissions

I have carefully considered all of your submissions⁶ including that:

- a website address and URL of a journal posted on the internet (which you say contains information concerning your personal affairs) renders the website address and URL itself, information concerning your personal affairs
- "... *The whole content of the journal article is my personal affairs. There is published on the last page a letter addressed to me. That is personal. It was addressed to ME. It does not change its character by my publishing it. The whole story in that journal is my personal affair. The fact that it is my "personal affair", does not mean that all other characterizations must be excluded ...*"
- if the content of a computer file includes information including an individual's name, address and other personal information, then reference to that file name "...*would be information regarding the personal affairs of ...*" the individual and hence, in accordance with a global qualification that responsive material must contain some personal affairs information, a document which refers to that file would be responsive to an FOI application⁶ written in terms such as the one under consideration in this external review
- information concerning your personal affairs does not cease to concern your personal affairs just because it enters the public domain - personal affairs are personal affairs regardless of whether they are public or not

⁶ Including those set out in your original access application dated 12 November 2007, your email dated 22 November 2007, your application for internal review dated 30 November 2007 and your application for external review dated 17 December 2007.

- the journal to which the University takes exception is personal to you, as its whole content is your personal affairs
- as the email referred to the journal, which is part of your personal affairs, then the email is related to your personal affairs
- “... *The FOI statute is to be widely interpreted. The journal to which Porter and UQ took exception, is clearly personal to me, within the expression of the statute. ... Because the subject email referred to that journal which is part of my “personal affairs”, then that email is “related to my personal affairs”...*”

Analysis – personal affairs information

I have carefully considered:

- the content of the Email to AHQ including the reference to the website AustLawPublish.com (**Website Address**) and a universal resource locator associated with that website address (**URL**)
- the Information Commissioner’s reasoning in *Stewart* and *Byrne* as to what constitutes personal affairs information.

Accordingly, I must consider whether reference to the Website Address and URL in the Email to AHQ can be characterised as information concerning your personal affairs.

In accordance with relevant statements made by the Information Commissioner⁷, I note that:

- I must consider the information contained in the Email to AHQ in the context in which it appears in that document, to determine whether it contains information concerning your personal affairs⁸
- the Email to AHQ refers to the Website Address and URL
- the Email to AHQ does not:
 - mention your name or the name of any other individual, other than the named sender and recipient
 - refer to any aspect of your family relations, health, relationships or emotional ties with other people, nor does it refer to your domestic or financial obligations.

After carefully considering the entire content of the Email to AHQ⁹ and all of your submissions, I find that none of the information in the Email to AHQ concerns your personal affairs as disclosure of this information (including the Website Address and URL) in the context which it appears in the Email to AHQ would not identify you as having any connection with the Website Address or the URL.

(b) Is there any responsive matter?

Ordinarily, an application fee is payable where the matter in issue does not concern the applicant’s personal affairs.

However, in this external review, the scope of your FOI Application requires that any responsive matter must comprise not only a particular email from UQ to AHQ, it must also contain some information concerning your personal affairs.

⁷ Set out on pages 3, 4 and 5 of this decision.

⁸ In order to determine whether an application fee is payable in the circumstances.

⁹ Including reference to the Website Address and URL.

On the basis of my finding that the Email to AHQ does not contain any information concerning your personal affairs and in accordance with the scope of your FOI Application, I further find that the Email to AHQ is not responsive to your FOI Application.¹⁰

Accordingly, I must now determine whether an agency can request payment of an application fee when it is aware that there is no matter responsive to an application.

Is an application fee payable?

In my view, where the scope of an application makes it unclear as to whether an application fee is payable, this issue should be clarified prior to requesting payment of the application fee, by obtaining, examining and assessing any responsive documents. In this way, the agency is able to determine whether there is at least one document which does not contain information concerning the applicant's personal affairs.¹¹

Support for this view of the operation of section 35B of the FOI Act is found in the report of the Legal, Constitutional and Administrative Review Committee, Parliament of Queensland (**LCARC**), titled Freedom of Information in Queensland (Report No. 32, December 2001) (**LCARC FOI Report**) which relevantly states at paragraph 6.3.6 that:

In some cases it will not become clear whether an application relates only to documents which contain information about the applicant's personal affairs until the agency or minister has at least partially processed the application. In such cases, the agency or minister should not require the fee to be paid until they have ascertained that a fee is payable.

While I acknowledge that section 35B of the FOI Act does not on its face require an agency to locate and assess any responsive documents before requesting that an application fee be paid, I do not consider that it was the intent of the legislature that an applicant would be charged an application fee in circumstances where an agency is aware that no responsive documents exist.

In accordance with all of the matters set out above, I am satisfied that:

- there are no documents responsive to your FOI Application on account of the global qualification that any responsive matter *must* also contain some information concerning your personal affairs
- where an agency is aware that there are no documents responsive to an FOI application, it cannot require an applicant to pay an application fee under section 35B of the FOI Act
- in the circumstances, there is no application fee payable in respect of your FOI Application.

¹⁰ Nor are any identical copies of the Email to AHQ in the possession or under the control of UQ, responsive to the FOI Application.

¹¹ I note that the requirement under section 35B(2) of the FOI Act that the fee *must* be paid at the time the application is made, has been interpreted by the Information Commissioner as being merely directory because it is dependent on the applicant receiving notice of the relevant agency's decision that payment of an application fee is required: *Allanson and Department of Tourism, Small Business and Industry* (Unreported, Queensland Information Commissioner, 30 December 1997).

Decision

On the basis of the matters set out above, I set aside the decision under review and find that no application fee is payable in respect of the FOI Application under section 35B of the FOI Act.

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

Yours sincerely

Assistant Commissioner Henry