

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 93 of 1993
(Decision No. 93007)

Participants:

Mr K R TIMMS
Applicant

- and -

DEPARTMENT OF EMPLOYMENT,
VOCATIONAL EDUCATION, TRAINING
AND INDUSTRIAL RELATIONS
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - Application for review of a decision requiring payment of a \$30 application fee for access to documents - Whether the requested documents concerned the applicant's personal affairs within the meaning of s.29(2) of the *Freedom of Information Act 1992 Qld* and s.6 of the *Freedom of Information Regulation 1992 Qld* or whether the documents concerned the applicant's business affairs - Words and Phrases: "personal affairs"; "business affairs".

Freedom of Information Act 1992 Qld s.29(2)
Freedom of Information Regulation 1992 Qld s.6
Income Tax Assessment Act 1936 Cth

Re Ritchie and Department of Minerals and Energy (Information Commissioner Qld, 5 February 1993, unreported)
Re Stewart and Department of Transport (Information Commissioner Qld, Decision No. 93006, 9 December 1993, unreported)
Evans v Federal Commissioner of Taxation 89 ATC 4540
Thomas v Federal Commissioner of Taxation 72 ATC 4094
Ferguson v Federal Commissioner of Taxation 79 ATC 4261; (1978) 9 ATR 873
Federal Commissioner of Taxation v JR Walker 84 ATC 455

DECISION

The decision under review (being the decision of Mr A S Raineri dated 10 May 1993 that a \$30 application fee is payable by Mr K R Timms in respect of his FOI access request to the Department of Employment, Vocational Education, Training and Industrial Relations dated 11 March 1993) is affirmed.

Date of Decision: 17 December 1993

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1 By letter dated 11 March 1993, Mr K R Timms requested from the Department of Employment, Vocational Education, Training and Industrial Relations (the Department) access to "all material in your department's possession in relation to complaints made by [X] against myself". The letter enclosed an application form dated 11 March 1993, requesting "copies of all letters, reports, documents and any other material in relation to all complaints made by [X] and investigations carried out by your department".

2 By letter dated 25 March 1993, Mr G D Cumberland, Acting Projects Officer (Executive Services Branch), of the Department advised Mr Timms as follows:

"It is considered the documents sought in your application would not fall within the category of personal affairs and hence the \$30 application fee would be payable."

3 At Mr Timms' request, an internal review of Mr Cumberland's decision was undertaken by Mr A S Raineri, Acting Cabinet Legislation and Liaison Officer, of the Department. By letter dated 10 May 1993, Mr Raineri advised Mr Timms of his decision as follows:

"To fall within the category of information concerning personal affairs, the information must be such that it identifies an individual and can be readily associated with that person. The term 'personal affairs' has been judicially considered under other jurisdictions and has been given a restrictive and narrow interpretation. A clear distinction has been made by the Courts between 'personal affairs' and 'business affairs'.

The documents requested by you consist of correspondence, notes and memoranda arising from complaints made by [X] to the Division of Labour Market reform, and their subsequent investigation by this Department.

It appears, therefore, that the information sought relates to your business affairs rather than your personal affairs.

My decision is, therefore, that I affirm the original decision made by Mr Cumberland to charge you the \$30 application fee."

- 4 On 17 May 1993, Mr Timms made application for external review by the Information Commissioner of Mr Raineri's decision that the \$30 application fee was payable.

The Applicable Legislative Provisions

- 5 Sub-section 29(2) of the *Freedom of Information Act 1992 (Qld)* (the FOI Act) provides as follows:

"An applicant applying for access to a document that does not concern the applicant's personal affairs may be required, by regulation, to pay an application fee at the time the application is made."

- 6 Section 6 of the *Freedom of Information Regulation 1992* (the FOI Regulation) provides as follows:

"Application fee for access to document

6.(1) *An applicant who applies for access to a document that does not concern the applicant's personal affairs must pay an application fee of \$30 at the time the application is made.*

(2) *An application fee is not payable for access to a document that concerns the applicant's personal affairs."*

The Documents in Issue

- 7 The documents identified by the Department as falling within the terms of Mr Timms' FOI access request dated 11 March 1993 were produced to me for inspection, and examined.

- 8 The documents in issue are held by the following areas of the Department's Division of Labour Market Reform:

- Brisbane Head Office;
- South Brisbane Regional Office;
- District Industrial Inspector, Warwick;
- District Industrial Inspector, Emerald; and
- District Industrial Inspector, Roma.

- 9 On 3 February 1992, the office of the then Minister for Employment and Training, the Honourable K Vaughan, MLA, received a letter from Mr X regarding Mr Timms' employment of several individuals for the purpose of shearing sheep owned by Mr Timms. Upon receiving Mr X's letter, the Department undertook an investigation into Mr Timms' employment of seven individuals on 20 July 1989. The documents which fall within the terms of Mr Timms' FOI access request included correspondence, memoranda and other material relevant to the Department's investigation.

The External Review Process

- 10 Mr Timms' application for external review by the Information Commissioner was made by letter dated 17 May 1993, which included brief submissions in support of his case:

"An application was made by myself to the Department of Employment, Vocational Education, Training and Industrial Relations under the Freedom of Information Act

for access to documents/letters of complaints received by that Department from [X] concerning myself.

The Department ruled that the matter was not of a personal affair and charged an application fee of \$30.00.

I request that you review that decision and I submit the following information in support:

1. *That the documents sought were of a personal nature.*
2. *The documents related to a hobby and not a business.*
3. *Applications of a similar nature to two other Departments have been treated as [being of] a personal nature and no fees were charged."*

- 11 By a further letter dated 20 May 1993, Mr Timms advised me that the other two Departments referred to in his letter dated 17 May 1993 were the Department of Primary Industries (DPI) and the Workers' Compensation Board of Queensland (WCBQ). He said the applications, in each instance, related to complaints made against him by Mr X. Mr Timms stated that both the DPI and the WCBQ provided him access to the requested documents without requiring the payment of an application fee. The second letter also stated:

"At the time of the complaints being made I was a police officer at Tambo and at the time I had a number of sheep in a leased paddock. The sheep were a hobby."

- 12 To expedite Mr Timms' FOI application, it was agreed between the Department and Mr Timms that he would pay the application fee, together with any further relevant charges, and obtain access to the documents which were the subject of his request. It was also agreed that Mr Timms was free to pursue an external review of the Department's decision to require a \$30 application fee, and that if the Department's decision should ultimately be set aside, Mr Timms would be entitled to obtain a refund. Mr Timms was given access to all documents which fell within the terms of his FOI access request.
- 13 By letter dated 25 June 1993, I wrote to Mr Timms drawing his attention to my decision in *Re Ritchie and Department of Minerals and Energy* (5 February 1993), which decision considered the meaning of "personal affairs". I indicated my preliminary view that, whilst some of the documents held by the Department contained references to matters which may be said to relate to his personal affairs, most of the documents related to his "business affairs" and hence a \$30 application fee was required in accordance with the terms of s.29(2) of the FOI Act and s.6 of the FOI Regulation.
- 14 In the light of the preliminary view I had expressed, I invited Mr Timms to take the opportunity to make a written submission in support of his contention that a \$30 application fee was not payable. Mr Timms contacted my office and advised that he did not propose making any submissions further to those raised in his letters dated 17 May 1993 and 20 May 1993. Whilst electing not to provide a written submission, Mr Timms advised that he was not prepared to withdraw his application for external review, and that he wanted me to make a formal decision on the issue.

Personal Affairs and Business Affairs

- 15 Mr Timms contends that the documents in issue in the present external review were of a "personal nature" (which I take to mean that Mr Timms contends that they concern his "personal affairs"), whereas the Department's contention is that the documents relate to Mr Timms' "business affairs"

and, accordingly, an application fee of \$30 is applicable in the present case.

- 16 I have recently canvassed the meaning of the phrase "personal affairs" for the purposes of s.29(2) of the FOI Act and s.6 of the FOI Regulation in my decision in *Re Stewart and Department of Transport* (Information Commissioner Qld, Decision No. 93006, 9 December 1993, unreported) (*Re Stewart*). For the reasons given at paragraphs 23 to 27 of my decision in *Re Stewart*, I concluded that in the Queensland FOI Act the phrase "personal affairs of a person", and its relevant variations, does not include the business or professional affairs of a person.
- 17 Further, at paragraphs 103-107 of my decision in *Re Stewart*, I briefly discussed my views in relation to the meaning of "business affairs" for the purposes of the FOI Act, in the context of whether information concerning "one-off" commercial transactions may, in appropriate circumstances, be properly characterised as information concerning a person's "personal affairs":

"103 I have earlier referred to the basic distinction between personal affairs and business affairs in the scheme of the Queensland FOI Act. For a matter to relate to 'business affairs' in the requisite sense, it should ordinarily, in my opinion, relate to the affairs of a business undertaking which is carried on in an organised way (whether it be full time or only intermittent) with the purpose of obtaining profits or gains (whether or not they actually be obtained). Thus, one-off commercial transactions entered into by individuals in relation to their domestic circumstances are ordinarily more likely to fall within an individual's 'personal affairs'.

- 104 *In this regard, I respectfully disagree with a categorisation made by the Commonwealth AAT in Re Telfer and Australian Telecommunications Commission (1986) 11 ALN N122. In that case, an application was made under s.48 of the Commonwealth FOI Act for amendment of certain Telecom files which related to complaints made by the applicant Mr Telfer in relation to the malfunctioning of his telephone service and consequent overcharging by Telecom. The Tribunal said:*

'Undoubtedly, the inefficient operation of his telephone, the investigation of fault, the initial overcharging and the lengthy correspondence which ensued, were of great concern to the applicant. But overall the Tribunal is of the view that the subject matter of dispute arose out of and related to the details of a business transaction - albeit one with a public utility. We are of the opinion that very few of the pieces of information of which amendment is sought relate to Mr Telfer's "personal affairs" in the sense that the phrase is used in s.48 of the FOI Act.' (my underlining)

- 105 *It is reasonably clear from the Tribunal's reasons that the supply of telephone services was to the applicant's residence, and there is no suggestion that supply of telephone services to the applicant was otherwise than on a domestic basis. To the extent that the passage quoted suggests that matters relating to a business transaction of this kind cannot fall within the ambit of the 'personal affairs' of an individual in a position comparable to the applicant Mr Telfer, it is in my opinion mistaken. (I do not suggest that Telfer's case was wrongly decided since much of the information in issue did not concern the applicant's personal affairs, rather it related to matters such as equipment examinations, reports thereon, the accuracy of Telecom's metering systems, the allocation of metering systems, and etc.)*

106 *The entry by an individual into a mortgage agreement to obtain finance to purchase a family home can undoubtedly be characterised as a commercial or business transaction. But that does not mean that it cannot be characterised as a matter concerning that person's personal affairs. Similarly, where a person enters a contract for the construction of a swimming pool fence around the swimming pool in the grounds of that person's family home, and subsequently pays a fee to the local authority to inspect and certify the pool fence's compliance with relevant legislative requirements, these are matters that can be described as commercial or business transactions, but they would not in my opinion be categorised as the homeowner's business affairs for the purposes of the FOI Act, and would ordinarily fall within the homeowner's 'personal affairs'.*

107 *Likewise, matters relating to an agreement for the lease of residential premises concern a business transaction, but are nevertheless capable of falling within the 'personal affairs' of the tenant. If on the other hand, the landlord is engaged in a business undertaking involving the lease of that property (and perhaps others), the matter would ordinarily relate to the business affairs of the landlord."*

18 To support his contention that the documents in issue were of a "personal nature", thereby being documents which concerned his "personal affairs", Mr Timms has submitted that:

- (a) the documents related to a hobby and not to a business; and
- (b) two applications of a similar nature made by Mr Timms to the DPI and the WCBQ were treated by those agencies as concerning his "personal affairs", resulting in no application fees being charged by either agency.

19 At the material time, Mr Timms was employed by the Queensland Police Service as a police officer at Tambo. His involvement in the pastoral industry was not his primary means of income. The part-time involvement of an individual in a business undertaking in addition to his or her main employment is not uncommon. Well known forms of part-time commercial undertakings include "hobby farms", share trading, acquiring and leasing business or residential premises, and developing properties for sale or lease. The labelling of a commercial undertaking as a "hobby" by the individual concerned with the undertaking is not in itself sufficient to establish that documents relating to incidents in the conduct of that undertaking concern the individual's "personal affairs". My findings in relation to Mr Timms' involvement in the pastoral industry in 1989 are discussed at paragraph 24 below.

20 Mr Timms forwarded to me copies of the documents to which he was given access free of charge by the DPI and the WCBQ, and which he claims are of the same character as the documents for which the Department has levied fees and charges for access. Those documents have been examined, and none are common to the documents in issue. Even if those documents were of a similar character, it may simply have been that Mr Timms was generously treated by the DPI and the WCBQ. Certainly it was open to the Department to make its own assessment (for the purpose of s.29(2) of the FOI Act and s.6 of the FOI Regulation) of the character of the documents to which the Department was requested to give access. I do not think the decisions made by the DPI and the WCBQ are of any relevance to the issue which I have to determine, which is whether the documents which fall within the terms of Mr Timms' FOI access request to the Department are properly to be characterised as documents concerning Mr Timms' personal affairs.

21 I am satisfied that many of the documents which fall within the terms of Mr Timms' FOI access

request to the Department do not contain information which concerns Mr Timms' personal affairs, in the sense of affairs relating to the private aspects of Mr Timms' life (*cf Re Stewart* at paragraphs 51 to 56).

- 22 This case actually represents a useful further illustration of the principles discussed in the passage from *Re Stewart* quoted at paragraph 17 above. Mr Timms sought to characterise his part-time activities in grazing sheep on a sub-leased rural property as a hobby rather than a business, which in my opinion indicates that he was cognisant of the issues that arise in income tax law as to the taxation treatment of gains and losses from small scale primary production under the *Income Tax Assessment Act 1936 Cth* (see generally Woellner, Vellar and Byrnes, *Australian Taxation Law CCH*, 4th Ed. 1993 at p.501-518). The issue of whether activities carried on by a taxpayer which produce gains or losses are carried on as a business for the purposes of the *Income Tax Assessment Act 1936 Cth* has arisen in many reported cases. In *Evans v Federal Commissioner of Taxation* 89 ATC 4540 at pp.4554-4555, Hill J said:

"The question of whether a particular activity constitutes a business is often a difficult one involving as it does questions of fact and degree. Although both parties referred me to comments made in decided cases, each of the cases depends upon its own facts and in the ultimate is unhelpful in the resolution of some other and different fact situation.

*There is no one factor that is decisive of whether a particular activity constitutes a business. As Jessel MR said in the famous dictum in *Ericksen v Last* (1881) 8 QB 414 at p416:*

'There is not, I think, any principle of law which lays down what carrying on trade is. There are a multitude of things which together make up the carrying on of trade.'

*Profit motive (but see *cf IR Commrs v Incorporated Council of Law Reporting* (1888) 22 QB 279), scale of activity, whether ordinary commercial principles are applied characteristic of the line of business in which the venture is carried on (*IR Commrs v Livingston* (1927) 11 TC 538), repetition and a permanent character, continuity (*Hope v Bathurst City Council* 80 ATC 4386 at p4390; (1980) 144 CLR 1 at p9; *Ferguson v FC of T* 79 ATC 4261 at p4264), and system (*Newton v Pyke* (1908) 25 TLR 127) are all indicia to be considered as a whole, although the absence of any one will not necessarily result in the conclusion that no business is carried on."*

- 23 I consider that the principles applied in income tax law to the determination of whether a particular activity constitutes a business can provide some guidance in difficult and marginal cases in determining whether, for the purposes of the FOI Act, information in documents should properly be characterised as relating to a person's business affairs. I note that Walsh J observed in *Thomas v Federal Commissioner of Taxation* 72 ATC 4094 (at p.4099), that "a man may carry on a business although he does so in a small way". Similarly, the fact that a taxpayer has a "main" business or employment on which the taxpayer spends more time does not necessarily preclude a finding in appropriate circumstances that the taxpayer conducts another business: *Ferguson v Federal Commissioner of Taxation* 79 ATC 4261; (1978) 9 ATR 873; *Federal Commissioner of Taxation v JR Walker* 84 ATC 455.
- 24 I consider that Mr Timms' undertaking in the pastoral industry, which involved him in making the arrangements to hire seven people to shear 383 sheep and three rams on 20 July 1989 (it was the subsequent investigation of those arrangements by the Department which generated the documents

in issue in this case), constituted his "business affairs" rather than his "personal affairs" for the purposes of characterising the documents in issue, in terms of s.29(2) of the FOI Act and s.6 of the FOI Regulation. I have based this conclusion on the following facts which are evident on the face of the documents which were the subject of Mr Timms' FOI access request, and of other documents forwarded to me by Mr Timms:

- At the material time, Mr Timms was sub-leasing some 500 acres of land in the area of Tambo, Queensland, for the purpose of grazing sheep.
- Mr Timms had a flock of 383 sheep and 3 rams on the sub-leased property.
- On 20 July 1989, Mr Timms employed seven persons to undertake the shearing of the sheep. Mr Timms paid each of those seven persons' wages for the work they performed on the day.
- Mr Timms obtained profits from his pastoral undertaking in 1989.
- Mr Timms previously employed a number of individuals to shear sheep on separate occasions in 1987 and 1988.
- Further, there is other matter contained in the relevant documents which support my conclusion, but which it would be inappropriate to reveal in these reasons for decision, other than that it relates to Mr Timms' treatment of income and outgoings in respect of his part-time undertaking, for income tax purposes.

25 Most of the documents in issue concern Mr Timms' "business affairs". However, some of the documents contain matter which may be said to relate to Mr Timms' personality, reputation, personal finances or other matters which have been held in tribunals and courts in other jurisdictions to fall within the term "personal affairs". However, as discussed at paragraphs 120-121 in my decision in *Re Stewart*, an applicant need only seek access to one document which does not concern his or her personal affairs to attract the imposition of the \$30 application fee.

26 Accordingly, I find that the Department was correct in requiring the payment of an application fee of \$30 by Mr Timms pursuant to the provisions of s.29(2) of the FOI Act and s.6 of the FOI Regulation, in respect of Mr Timms' FOI access application dated 11 March 1993, and I affirm the decision under review.

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 F N ALBIETZ
INFORMATION COMMISSIONER