



## **Decision and Reasons for Decision**

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**Application Number:** 210433

**Applicant:** Mr Kenneth Vaughan

**Respondent:** Brisbane City Council

**Decision Date:** 25 August 2008

**Catchwords:** **FREEDOM OF INFORMATION – section 35B of the *Freedom of Information Act 1992* (Qld) – whether payment of application fee appropriate in the circumstances – whether documents concern applicant’s personal affairs.**

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## REASONS FOR DECISION

### Summary

1. On the information available to me, I am satisfied that Brisbane City Council (**Council**) is not entitled to request payment of an application fee under section 35B of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) in respect of the applicant's freedom of information application.

### Background

2. By letter dated 15 November 2007 the applicant sought access to :

*All letters and copies of email between me and the Lord Mayor, the previous Lord Mayor, the councillors and Brisbane Council and the Council CEO*

**(FOI Application)**

3. By letter dated 19 November 2007, Mr Wesener, Council's FOI and Administration Manager, decided that the applicant was required to pay an application fee because the information sought in the FOI Application did not concern the applicant's personal affairs (**Initial Decision**).
4. By application dated 24 December 2007, the applicant requested that the Initial Decision be internally reviewed.
5. By letter dated 10 January 2008, Mr Askern, Chief Legal Counsel of Brisbane City Legal Practice, affirmed the Initial Decision (**Internal Review Decision**).
6. By letter dated 7 February 2008, the applicant applied for external review of the Internal Review Decision.

### Decision under review

7. The decision under review is Council's Internal Review Decision dated 10 January 2008.

### Steps taken in the external review process

8. By letter dated 12 February 2008, I wrote to Council to obtain a sample of documents responsive to the applicant's FOI Application which Council considered did not concern the personal affairs of the applicant.
9. By letter dated 19 February 2008, Council provided this Office with copies of the relevant documents and made submissions including that:
  - the mere reference to the applicant's name on relevant documents does not mean that those documents concern the applicant's personal affairs
  - the various subjects raised by the applicant in relevant documents do not concern a 'private aspect' of the applicant's life, rather, they relate to matters of general concern to the applicant
  - the matters raised by the applicant in relevant documents are policy type issues for Council and do not concern the personal affairs of the applicant
  - the fact that a document records policy or contains information about an activity that may have some impact on the applicant, does not of itself mean that that document concerns the applicant's personal affairs

- the vast majority of documents which are responsive to the applicant's FOI Application do not concern the applicant's personal affairs.
10. On 20 May 2008 a staff member of this Office communicated a preliminary view to Council that:
- the documents in issue concern the personal affairs of the applicant
  - in the circumstances, Council is not entitled to request payment of an application fee under section 35B of the FOI Act in respect of the applicant's FOI Application.
11. By letter dated 3 July 2008, I confirmed this preliminary view to Council.
12. By facsimile dated 18 July 2008, Council advised that it did not accept the preliminary view and advised that it relied on its submissions dated 19 February 2008 in support of its case.
13. In reaching this decision, I have taken the following into consideration:
- the applicant's FOI application to Council dated 15 November 2007
  - Mr Wesener's initial decision dated 19 November 2007
  - the applicant's internal review application dated 24 December 2007
  - Mr Askern's internal review decision dated 10 January 2008
  - the applicant's external review application dated 7 February 2008
  - Council's submissions dated 19 February 2008
  - the documents in issue provided by Council
  - relevant legislation, cases and previous decisions of this Office.

#### **Matter in issue**

14. The matter in issue in this review comprises the following:
- 9 emails from the applicant to the Lord Mayor dating from 2005 to 2007, including:
    - 7 emails from the applicant's personal email account
    - 2 emails from the email account referred to as 'council-watch'
  - 5 letters of reply from the Lord Mayor to the applicant dating from 2005 to 2007
  - 1 email of reply from the Lord Mayor to the applicant dated 2005.
15. I note that the matter in issue contains information including:
- the applicant's name
  - the applicant's email and postal address
  - the applicant's views about issues of concern which he has drawn to the attention of the Lord Mayor and to which the Lord Mayor has responded.

#### **Issue on external review**

16. The issue on external review is whether Council is entitled to require the applicant to pay an application fee in the circumstances.

## Findings

### Section 35B of the FOI Act

17. Section 35B of the FOI Act provides 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.*
- (3) *The applicant must pay any processing charge and access charge before the applicant is provided access to the document.*

...

#### **Application of section 35B of the FOI Act**

18. The Information Commissioner set out the correct approach to the interpretation of section 35B of the FOI Act in the decision of *Stewart and Department of Transport*<sup>1</sup>:

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

19. Accordingly, I must determine whether there is one document which is responsive to the FOI Application which does not concern the applicant's personal affairs.

#### **Personal Affairs**

20. Section 44(1) of the FOI Act provides:

#### **44 Matter affecting personal affairs**

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

21. In applying section 44(1) of the FOI Act, I must assess whether disclosure of the matter in issue would disclose information concerning the personal affairs of a person other than the applicant for access.

#### **What are personal affairs**

22. In *Stewart*, the Information Commissioner discussed in detail<sup>2</sup> the meaning of the phrase 'personal affairs of a person' as it appears in the FOI Act. In particular, the Information Commissioner found that information concerns the 'personal affairs of a person' if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase 'personal affairs', that phrase has a well accepted core meaning which includes:

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

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<sup>1</sup>(1993)1 QAR 227 at paragraph 121 (**Stewart**)

<sup>2</sup> See paragraphs 79-114.

23. 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.

**Is a person's name their personal affairs**

24. I note that the Information Commissioner has previously considered whether a person's name constitutes their personal affairs.
25. In *Pearce and Qld Rural Adjustment Authority*<sup>3</sup>, the Information Commissioner stated that:

21. *A person's name, in isolation, does not ordinarily constitute information concerning that person's personal affairs. In Commissioner of Police v the District Court of New South Wales and Perrin (1993) 31 NSWLR 606, Mahoney JA said (at p.638):*

*A person's name would not, I think, ordinarily be, as such, part of his personal affairs. It is that by which, not merely privately but generally, he is known.*

*Likewise, in State of Queensland v Albietz [1996] 1 Qd R 215, de Jersey J said (at p.221):*

*I do not think that the name by which a person is known ordinarily forms part of that person's "personal affairs".*

22. ***However, a person's name almost invariably appears in a document in the context of surrounding information. It is the characterisation of a person's name, in the context of the information which surrounds it, which may give rise to difficulties. Thus, Lockhart J, sitting as a member of a Full Court of the Federal Court of Australia, in Colakovski v Australian Telecommunications Corporation (1991) 100 ALR 111, said (at page 119):***

*There is a real question as to whether the name and telephone number can answer the description of 'information relating to the personal affairs' of that person under s.41(1)<sup>4</sup>. Viewed as an abstract conception I would be inclined to the view that it could not, **but such questions are not considered by Courts in the abstract.***

23. ***Thus, while disclosure of a person's name, in the abstract, would not ordinarily be a disclosure of information concerning that person's personal affairs, disclosure of that name in the context in which it appears may disclose information concerning the person's personal affairs.***

[my emphasis]

26. Further, in *Stewart*<sup>5</sup> the Information Commissioner noted that:

- a person's name, address and telephone number were matters falling into the 'grey area' rather than within the 'core meaning' of the phrase 'personal affairs of a person'
- such matter must be characterised according to the context in which it appears.

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<sup>3</sup> S186/98, 4 Nov 1999.

<sup>4</sup> This case refers to section 41(1) of the *Freedom of Information Act 1982* (Cth), which is a similar provision to section 44(1) of the FOI Act.

<sup>5</sup> At paragraphs 86-90.

27. In accordance with the decisions set out above, it is clear that in certain circumstances, a person's name may be their personal affairs.
28. In *Stewart*<sup>6</sup> the Information Commissioner accepted that the fact that the applicants had lodged certain complaints with a government agency, was a matter concerning the applicants' personal affairs for the purpose of assessing whether an application fee was payable.
29. I also note that in the decision of *Byrne and Gold Coast City Council*<sup>7</sup> (where the matter in issue concerned a complaint made by a local resident to the local Alderman about the length of grass on public land), the Information Commissioner found that the fact that a person made a complaint to an elected representative about a matter of concern to them, was information concerning that person's personal affairs. In reaching this conclusion, the Information Commissioner stated that:

*In my opinion the making of that complaint was a personal affair of the third party ... [who] was 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.*

30. More specifically in *Byrne*, the Information Commissioner decided that the fact of making a complaint is to be distinguished from the substance of the complaint, which may or may not itself comprise information concerning the personal affairs of the complainant so as to qualify for exemption under section 44(1) of the FOI Act<sup>8</sup>.
31. I also note the case of *Gilling v General Manager, Hawkesbury City Council*<sup>9</sup> (where the documents in issue comprised the names and addresses of persons who provided objections to the Council in respect of a development application), where in finding that the objectors' names and addresses were information concerning the objector's personal affairs, Deputy President Hennessy stated<sup>10</sup>:

*'In order to determine whether the name and addresses constitute personal affairs in this case, the context in which they appear must be examined. The names and addresses were provided by local residence as part of a letter of objection to council in relation to a development application. The authors wrote the letters in their capacity as private individuals concerned about a proposed development in their area. Unlike the situation in Perrin's case, this information was not provided in the course of the performance of any public duty or responsibility.'*

### **Council's submissions**

32. In its submissions dated 19 February 2008, Council states:

*It is Council's position that the mere reference to [the applicant's] name on these documents does not mean that the documents concern the applicant's personal affairs. The various subjects raised by [the applicant] in his correspondence does not concern a 'private aspect' of [the applicant's] life but relate specifically to matters of general concern to [the applicant].*

*In terms of some of the issues [the applicant] has raised in relation to the construction of tunnels, the Hale Street Bridge project, parking on footpaths, cyclists riding on footpaths, these matters are policy type issues for Council and are not about the personal affairs of*

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<sup>6</sup> At paragraph 119.

<sup>7</sup> (1994) 1 QAR 477 (*Byrne*)

<sup>8</sup> *Byrne* at paragraph 36.

<sup>9</sup> [1999] NSWADT 43 (*Gilling*).

<sup>10</sup> *Gilling* at paragraph 42.

[the applicant]. *The fact that a document records policy or contains information about an activity that may have some impact on the applicant does not of itself make it a document concerning the applicant's personal affairs.*

33. I also note Council's submission<sup>11</sup> that:

*I note that the applicant confirmed with a member of your staff that the email address [referred to as council-watch] was a personal email address used solely by the applicant to communicate his personal views. Quite frankly such confirmation is not surprising given the issue at hand. This email address may well be used by the applicant to voice his concerns on any range of issues but that in itself does not mean that the matters raised relate to his 'personal affairs' or private aspects of his life.*

### **Applicant's submissions**

34. In respect of the email account referred to as 'council-watch', the applicant submits that he:

- created this email account for his own personal use and used it to communicate his own personal views on matters of concern to him to the Lord Mayor
- did not use it in any representative capacity.

### **Analysis – personal affairs information**

35. I consider that the facts in this case are analogous to those in *Byrne* where the Information Commissioner found that the fact that a concerned resident made a complaint about the length of grass on public land to an elected representative was a matter concerning that person's personal affairs.

36. On the information available to me including the submissions, legislation, decisions and case law set out above, I am satisfied that:

- the applicant's name and other identifying details appear on the relevant documents in a particular context, that is, the information in the relevant documents identifies not just a person, but the person who holds the concerns set out therein<sup>12</sup>
- in sending the relevant emails<sup>13</sup>, the applicant acted in his capacity as a private citizen exercising his privilege to make a private approach to a local representative about various matters which were of concern to him
- the documents in issue are properly characterised as concerning the personal affairs of the applicant as they set out:
  - in respect of the documents authored by the applicant, the applicant's name and address in the context of his concerns or complaints which he raises with the Lord Mayor in his capacity as a private individual concerned by local civic affairs
  - in respect of the documents authored by Council, Council's responses to the applicant, which set out the applicant's name and contact details in the context of the concerns or complaints which the applicant raised with the Lord Mayor in his capacity as a private individual concerned by local civic affairs

<sup>11</sup> In its correspondence dated 18 July 2008.

<sup>12</sup> Which were sent to the Lord Mayor and to which the Lord Mayor responded.

<sup>13</sup> Including the emails from the 'council-watch' email account which, on the information available to me, was created and used by the applicant to communicate the applicant's personal views to the Lord Mayor. I also note that there is no evidence before me to support the view that the applicant used the email account in any representative capacity.

- as all of the responsive documents (which Council provided to this Office for the purposes of this review) concern the applicant's personal affairs, no application fee is payable in the circumstances under section 35B of the FOI Act.

## **DECISION**

37. I set aside the decision under review and find that the applicant is not required to pay an application fee under section 35B of the FOI Act in respect of the FOI Application.
38. I have made this decision as a delegate of the Information Commissioner under section 90 of the FOI Act.

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**Assistant Commissioner Henry**

**Date: 25 August 2008**