

# OFFICE OF THE INFORMATION COMMISSIONER (QLD)

**Decision No. 97009**  
**Application S 40/96**

## **Participants:**

EUNICE TURNER

**Applicant**

NORTHERN DOWNS DISTRICT HEALTH SERVICE

**Respondent**

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - application for review of decision requiring payment of a \$30 application fee for access to documents - applicant requesting access to medical records of deceased person in her capacity as next of kin and executrix of deceased - whether the requested documents concern 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* - words and phrases: "next of kin".

*Freedom of Information Act 1992 Qld* s.21, s.29(2), s.53, s.59

*Freedom of Information Regulation 1992 Qld* s.6, s.6(1), s.6(2)

*Acts Interpretation Act 1954 Qld* s.36

*Ambulance Service Act 1991 Qld* s.49

*Health Services Act 1991 Qld* s.62

*Parliamentary Commissioner Act 1974 Qld* s.16(2)

*Succession Act 1981 Qld* s.5, s.45(1), s.45(2), s.52(1)

*Transplantation and Anatomy Act 1979 Qld* s.22, s.23, s.26, s.27

**DECISION**

I affirm the decision under review (which is identified in paragraph 5 of my accompanying reasons for decision) that a \$30 application fee is payable by the applicant in respect of her FOI access application dated 29 November 1995.

Date of decision: 30 May 1997

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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 requiring payment of a \$30 application fee in respect of an access application made under the *Freedom of Information Act 1992* Qld (the FOI Act).
2. By letter dated 29 November 1995, the applicant applied to the Chinchilla Hospital for access to all documents relating to the "*last stay in hospital*" of Mr Thomas Edward Turner (the applicant's late father). The applicant stated that the access application was being made under the FOI Act, and "*as executrix of the estate of the late THOMAS EDWARD TURNER.*"
3. On 10 January 1996, Mr Mike Mutze, the FOI Co-ordinator for the Darling Downs Regional Health Authority (the DDRHA), the predecessor of the respondent, who at that time had responsibility for processing FOI access applications for records of the Chinchilla Hospital, wrote to the applicant in the following terms:

*Should you wish to proceed with this request, classified as a non-personal application, a photocopying fee of \$14.50 and an application fee of \$30.00 is payable.*

*Prior to processing your application I would require the following to be forwarded to this office:-*

- Cheque for \$44.50
- Proof of your identity (eg Driver's licence)
- Copy of legal document nominating you as Estate Executor.

Mr Mutze also provided the applicant with information concerning her right to seek an internal review of his decision regarding the imposition of a \$30 application fee and photocopying charges.

4. On 22 January 1996, the applicant wrote to Mr Mutze, requesting an internal review of his decision, arguing that, by virtue of her appointment as personal representative (executrix) of her deceased father's estate, her FOI access application was "personal", and therefore not subject to a \$30 application fee.
5. The internal review was undertaken on behalf of the DDRHA by Mr Ken Mcloughlin, who advised the applicant, by letter dated 29 January 1996, that he had decided to affirm the original decision of Mr Mutze that a \$30 application fee was payable in respect of the access application. In his letter to the applicant, Mr Mcloughlin relevantly stated:

*On perusal of your request I note that you have requested access to medical records of a third party (i.e., the records of someone other than yourself). Such requests (regardless of the relationship or status of the applicant) attract fees in accordance with section 29 of the Freedom of Information Act ... .*

*I have considered this request and have decided to uphold Mr Mutze's decision to levy the appropriate fees for a non personal application. The legislation with regard to fees is quite straightforward in that any application for access to records of other persons is regarded as a non personal application and fees apply.*

6. On 26 February 1996, the applicant applied to me for external review, under Part 5 of the FOI Act, of Mr Mcloughlin's decision, stating that she had paid the \$30 application fee "under protest", and requesting that I review the matter.
7. A further letter dated 6 March 1996 was forwarded by the applicant to my office, reaffirming her earlier request for external review and the grounds upon which the applicant asserted that a \$30 application fee should not be payable in respect of her access application.

### **Relevant provisions of the FOI Act**

8. Section 21 of the FOI Act provides:

#### ***Right of access***

*21. Subject to this Act, a person has a legally enforceable right to be given access in accordance with this Act to—*

*(a) documents of an agency; and*

*(b) official documents of a Minister.*

9. Section 29(2) of the FOI Act provides:

*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.*

10. Section 6 of the *Freedom of Information Regulation 1992 Qld* (the FOI Regulation) provides:

***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 \$30.00 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.*

**External review process**

11. In her letter to me dated 6 March 1996, the applicant submitted:

*In [Mr Mcloughlin's 29 January 1996 internal review] decision he held that I was a third party.*

*As executrix of my father's estate and therefore his personal representative and again his next-of-kin - it is as if the man was requesting the information himself.*

...

*The point is - if I'm not a personal representative - why did I have to prove that I was an executor - "Copy of legal document nominating you as estate executor"? I supplied them with a statutory declaration relating to same.*

*There is little point undertaking instructions to one's executor by way of will - if they can't act in your capacity. I believe this is depriving one of "NATURAL JUSTICE".*

...

12. By letter dated 13 March 1996, the Deputy Information Commissioner wrote to the applicant in the following terms:

*... it is my preliminary view that Mr Mcloughlin's decision has correctly applied the relevant provisions of the FOI Act and the Freedom of Information Regulation 1992 Qld to the circumstances of your case.*

*The main basis given in your letter dated 6 March 1996 for challenging Mr Mcloughlin's decision is your belief that as executrix of your late father's estate, and his personal representative, and next-of-kin, it is as if your FOI access application for your late father's medical records was effectively being made by your late father himself.*

*I do not consider this to be the correct position in law. The executor/executrix, and/or personal representative, of a deceased person has a distinct legal personality from the deceased person whose estate he or she administers.*

*Once this is understood, I consider that the application of the plain words of s.29(2) of the FOI Act and s.6 of the Freedom of Information Regulation 1992 is relatively straightforward, and that an application fee is payable in respect of your FOI access application for the medical records of the late Thomas Edward Turner.*

...

*If you do not accept my preliminary views, I now extend to you the opportunity to lodge a written submission and/or evidence to persuade the Information Commissioner that you are not obliged, under the terms of the relevant provisions of the FOI Act and the Freedom of Information Regulation 1992, to pay a \$30 application fee and copying charges for access to the medical records of the late Thomas Edward Turner.*

13. The Deputy Information Commissioner subsequently received a letter from the applicant, dated 22 March 1996, in which she advised that she was not disputing the photocopying charges imposed by the respondent, but did not accept the preliminary views which he had conveyed to her in respect of the imposition of a \$30 application fee:

*I believe it has to be a point of law that when one acts as an executor or executrix of a deceased that living person then acts and takes the place of the deceased. Therefore my request is a personal request. I am the sole executrix of my father's estate.*

*I wish the \$30.00 Application fee to be waived. ... I paid the application fee under protest and still do.*

...

*There is little point undertaking one's will if one's executor can't act in all matters of life for one when one is deceased.*

### **Issue for determination**

14. The sole question for my determination is whether the applicant's relationship as next of kin of her late father, or her appointment as personal representative (executrix) of his estate, confers upon her a particular legal status, so that she is not obliged, under the terms of the relevant provisions of the FOI Act and FOI Regulation, to pay a \$30 application fee in respect of an application for access, under the FOI Act, to her late father's medical records.

### **Discussion**

15. The words of the relevant charging provisions in s.29(2) of the FOI Act and s.6 of the FOI Regulation stipulate a single criterion for determining whether or not an application fee of \$30 is payable in respect of a particular FOI access application; namely, whether a document to which access is sought does or does not concern the applicant's personal affairs.
16. The basis of the applicant's case is not that the medical records in question concern her personal affairs, but that her FOI access application was made in a representative capacity, by virtue of her status as next of kin, or alternatively, her appointment as the personal representative (executrix) of her deceased father's estate. The applicant therefore asserts

that "*it is as if the man was requesting the information himself*", and that since the medical records in issue clearly concern her late father's personal affairs, a \$30 application fee should not be payable.

17. I consider that the flaw in the applicant's argument is evident once the particular legal status of an individual as either the next of kin or the personal representative of a deceased person is understood, particularly in the context of the nature of the right conferred by s.21 of the FOI Act.

#### **The applicant's relationship as next of kin**

18. Although the term "next of kin" appears in two places in the FOI Act (ss.53 and 59 - both in Part 4, which deals with applications for amendment of information), there is no definition of the term in the FOI Act. Further, there is no general definition of the term in s.36 of the *Acts Interpretation Act 1954 Qld* (which defines the meaning of commonly used words and expressions in Queensland legislation).
19. According to Jowitt's Dictionary of English Law (2nd ed, 1977), "next of kin" means: "*those who are next in degree of kindred to a deceased person, i.e., are most closely related to him in the same degree*". Similar definitions are contained in Osborne's Concise Law Dictionary (8th ed, 1993) and Black's Law Dictionary (5th ed, 1979). An individual's status as next of kin of a deceased person is merely one of relationship, and does not in itself confer upon the next of kin any legal status in relation to the transfer or assumption of rights formerly held by the deceased person.
20. If the next of kin of a deceased person had inherent rights of the type contended for by the applicant, there would be no need for the existence of a broad range of legislative provisions which do confer specific powers upon the next of kin of a deceased person to act in a representative capacity on behalf of a deceased person (see, for example, the *Transplantation and Anatomy Act 1979 Qld*, ss.22-23 and ss.26-27; the *Ambulance Service Act 1991 Qld*, s.49; the *Health Services Act 1991 Qld*, s.62; and the *Parliamentary Commissioner Act 1974 Qld*, s.16(2)).
21. A further example is contained in Part 4 of the FOI Act, dealing with applications for amendment of information. Section 53 of the FOI Act provides that an application may be made under Part 4 of the FOI Act by a person who has had access to a document containing information relating to the person's personal affairs, or the personal affairs of a deceased person to whom the person is next of kin. As there is no analogous provision in Part 3 of the FOI Act, dealing with applications for access to documents, I conclude that the next of kin of a deceased person has no authority, either statute-based or at common law, to lodge an access application in a representative capacity on behalf of the deceased person. Accordingly, the applicant's status as next of kin of her late father is entirely irrelevant for the purposes of determining whether a \$30 application fee is payable in respect of the applicant's FOI access application dated 29 November 1995.

#### **The applicant's role as personal representative**

22. The applicant asserts that the role of a personal representative is to "*act in all matters of life*" for the deceased person whose estate they represent. I do not agree that the role of personal representative is as all-encompassing as that suggested by the applicant. In my view, the role of a personal representative is restricted to the performance of the specific duties set out in s.52(1) of the *Succession Act 1981 Qld*; i.e., to collect and administer the estate of the deceased, pay any debts of the estate, and distribute the estate among the persons entitled. It is my view that in carrying out those duties, the personal representative remains a distinct legal personality from the deceased person.



23. With respect to the applicant's argument that, in lodging her FOI access application for her late father's medical records, she was actually 'standing in his shoes'; i.e., "*it is as if the man was requesting the information himself*", I note that sections 45(1) and 45(2) of the *Succession Act* contain specific provisions regarding the devolution to, and vesting in, the personal representative of a deceased person of "[the] *property to which a deceased person was entitled for an interest not ceasing on his or her death*". Section 5 of the *Succession Act* contains the following definition of "property":

*"property" includes real and personal property and any estate or interest therein and anything in action and any other right.*

...

24. The relevant question, then, is whether the right of access conferred by s.21 of the FOI Act is a form of property (as defined in s.5 of the *Succession Act*), which devolves to the personal representative of the deceased's estate. I do not think that it is.
25. The right of access conferred by s.21 of the FOI Act is clearly not a form of real or personal property (which comprises tangible and intangible assets such as land, buildings, personal possessions, negotiable instruments etc., having a readily ascertainable monetary value). The proper scope of the remaining portions of the relevant definition of "property"; i.e., the phrases "anything in action" and "any other right", must, in my view, be assessed in the particular statutory context in which they appear. When viewed in the light of the relevant statutory framework, which concerns the collection, administration and disposal of estate assets, I am of the opinion that the relevant phrases must be construed as referring to interests and rights of a proprietary nature; i.e., having an intrinsic monetary value capable of rendering them estate assets to be duly collected, administered and distributed by the personal representative. I conclude that the right of access conferred by s.21 of the FOI Act has no intrinsic value, and therefore does not form part of the "property" of a deceased person which devolves to their personal representative. Rather, it is a non-transmissible personal right which ceases upon an individual's death.

### **Conclusion**

26. I conclude that there is no legal basis for the applicant's contention that her status as next of kin, or as personal representative (executrix) of her late father's estate, entitles her to lodge an access application in a representative capacity on behalf of her late father, and thus avoid the imposition of a \$30 application fee. Even in her capacity as executrix of her late father's estate, the applicant remains a discrete legal personality from her late father, and while the medical records to which access is sought may be of interest to the applicant, they do not concern her personal affairs. Hence, a \$30 application fee was properly payable in respect of her application for access to those medical records, in accordance with s.6(1) of the FOI Regulation.
27. I therefore affirm the decision under review (being the decision made on 29 January 1996 by Mr K McLoughlin, on behalf of the respondent's predecessor) that a \$30 application fee is payable by the applicant in respect of her FOI access application dated 29 November 1995.

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 F N ALBIETZ  
**INFORMATION COMMISSIONER**