



Decision and Reasons for Decision

Application Number: 210765, 210766, 210767, 210768, 210769, 210770, 210771, 210772, 210773, 210774, 210775, 210776, 210777, 210778, 210779, 210780, 210781, 210782 and 210783

Applicant: GRW

Respondent: Residential Tenancies Authority

Decision Date: 27 February 2009

Catchwords: **FREEDOM OF INFORMATION** – Sub-sections (1) and (2) of section 35B of the *Freedom of Information Act 1992* (Qld) – whether applicant required to pay an application fee – whether documents sought concern the applicants’ personal affairs

Contents

REASONS FOR DECISION	2
Summary	2
Background.....	3
Decision under review	3
Steps taken in the external review process	3
Issue in the Review.....	4
The relevant law	5
Sub-sections (1) and (2) of section 35B of the FOI Act	5
Personal affairs and business affairs	5
Business undertaking.....	6
Leasing residential premises	7
Applicants’ submissions.....	8
RTA’s submissions	8
Application of the law.....	8
Characterisation of the information sought in the FOI Applications.....	9
Bond receipt and lodgement forms	9
Form 2	9
Department of Housing Form.....	10
Dispute resolution files	10
RTA Form 16: Dispute Resolution Request.....	10
Record of conciliation.....	10
Information relating to tenancy at (...) Old Logan Road, Gailles.....	10
Form R16	10
Conclusion	11
DECISION	11

REASONS FOR DECISION

Summary

- The Residential Tenancies Authority (RTA) has located at least one document in response to each of nineteen (19) freedom of information (FOI) applications, lodged by the applicants between 31 December 2008 and 9 January 2009, which does not concern their personal affairs. Under sub-sections (1) and (2) of section 35B of the *Freedom of Information Act 1992 (Qld) (FOI Act)*, the applicants are required to pay the application fee prescribed in section 3 of the *Freedom of Information Regulation 2006 (Qld) (FOI Regulation)* in respect of each of the following FOI applications:

No.	Date of FOI Application	Documents sought under FOI Application	Relevant external review file
1	31 Dec 08	Dispute Resolution File No M177429	210765
2	31 Dec 08	Dispute Resolution File No M178097	210766
3	6 Jan 09	Dispute Resolution File No M178264	210767
4	6 Jan 09	Dispute Resolution File No M177851	210768
5	7 Jan 09	Dispute Resolution File No M176816	210769
6	7 Jan 09	Dispute Resolution File No M175838	210770
7	7 Jan 09	Dispute Resolution File No M175842	210771
8	7 Jan 09	Dispute Resolution File No M176810	210772
9	7 Jan 09	Dispute Resolution File No M175844	210773
10	7 Jan 09	Dispute Resolution File No M175845	210774
11	7 Jan 09	Dispute Resolution File No M175837	210775
12	8 Jan 09	Information relating to tenancy at (...) Old Logan Road, Gales (tenants X and Y ¹)	210776
13	9 Jan 09	Dispute Resolution File No M176172	210777
14	9 Jan 09	Bond receipt, lodgement forms for (...) Marie Street, Goodna	210778
15	9 Jan 09	Bond receipt, lodgement forms for (...) Mein St, Scarborough	210779
16	9 Jan 09	Bond receipt, lodgement forms for (...) Karen St, Woodridge	210780
17	9 Jan 09	Bond receipt, lodgement forms for (...) Stubbs Road, Woodridge	210781
18	9 Jan 09	Bond receipt, lodgement forms for (...) Campbell St, Albion	210782
19	9 Jan 09	Bond receipt, lodgement forms for (...) Whytecliffe St, Albion	210783

¹ Tenants' names have been de-identified for the purposes of this Decision.

Background

2. By separate facsimiles dated 31 December 2008, 6 January 2009, 7 January 2009, 8 January 2009 and 9 January 2009 the applicants sought access under the FOI Act to the items listed at 1–19 (at paragraph 1 above).
3. By letter dated 20 January 2009 (**Original Decision**) Ms J Sprott, Legal Officer, RTA, decided that the applicants were required to pay an application fee in respect of each FOI application.
4. By facsimile of 24 January 2009 (**Internal Review Application**) the applicants sought internal review of the Original Decision.
5. By letter dated 9 February 2009 (**Internal Review Decision**) Mr F Smith, General Manager, RTA, affirmed the Original Decision.
6. By facsimile dated 16 February 2009 (**External Review Application**) the applicants applied for external review of the Internal Review Decision, stating *'each of the FOI requests were (sic) sent separately so they should be treated individually, not as one request'*.
7. The applicants seek documents under 19 separate FOI applications in relation to their activities as lessor and/or managing owner of various properties in Brisbane. Whilst the applicants have sought external review in relation to 19 separate FOI applications, I have considered each of the requests for review together as the legal issues arising in each external review are essentially the same.

Decision under review

8. The decision under review is the Internal Review Decision referred to at paragraph 5 above.

Steps taken in the external review process

9. In a telephone conversation on 17 February 2009, a staff member of the Office contacted Mr D Breen of the RTA to confirm that the Internal Review Decision relates to all 19 individual FOI applications.
10. On 18 February 2009, an assistant to Mr Smith, General Manager, RTA, contacted a staff member of the Office by return telephone call to confirm the above.
11. In a telephone conversation on 23 February 2009 with Ms J Sprott, Legal Officer, RTA, a staff member of the Office:
 - indicated that the application for external review of the Internal Review Decision has been accepted
 - asked to visit the RTA premises and view one document responding to each FOI application that, in the RTA's view, did not concern the applicants' personal affairs.
12. On 24 February 2009, staff of the Office attended the RTA premises to view the documents that, in the RTA's view, did not concern the applicant's personal affairs.
13. On 25 February 2009, staff of the Office obtained copies of the documents referred to at paragraph 12 above.

14. By letter dated 25 February 2009 (**Preliminary View**) I indicated to the applicants that:
 - the application for external review had been accepted
 - it was my preliminary view that an application fee is payable in respect of each FOI application
 - if they did not accept my preliminary view, they were to provide written submissions by 10 March 2009.
15. By facsimile dated 25 February 2009 the applicants indicated that they did not accept the preliminary view and provided submissions.
16. In making my decision in this matter, I have taken the following into account:
 - each FOI application, Internal Review Application and External Review Application
 - Original Decision and Internal Review Decision
 - copies of the following documents responding to the FOI applications:
 - 5 x RTA Form 2: Bond Lodgement Forms dated 12 February 2008, 6 May 2008, 6 October 2008, 28 November 2008, 6 January 2009
 - Department of Housing Form 2C dated 26 May 2008
 - 10 x RTA Form 16: Dispute Resolution Requests dated 10 November 2008 (5 documents), 27 November 2008 (2 documents), 10 December 2008, 21 December 2008 and undated
 - Record of conciliation dated 18 December 2008 and 30 December 2008
 - RTA Form R16 dated 9 December 2008
 - file notes of telephone conversations including preliminary enquiries with staff of the RTA
 - submissions communicated by Ms Sprott of the RTA during the meeting at the RTA premises
 - the applicants' submissions dated 25 February 2009
 - case law as cited in this decision
 - decisions of the Office as referred to in this decision.

Issue in the Review

17. In this review the issue to be determined is whether, in accordance with section 35B of the FOI Act:
 - there is one document responding to the terms of each of the 19 individual FOI applications that does not concern the applicants' "personal affairs"
 - an application fee is payable in respect of any or all of the 19 FOI applications.

Matter in Issue

18. The terms of the 19 FOI applications indicate that the applicants seek access to three categories of documents:
 - dispute resolution files
 - bond receipt and lodgement forms
 - information relating to a tenancy at (...) Old Logan Road, Gables.
19. In relation to each of the 19 FOI applications, the RTA has provided this Office with copies of one or more documents falling within each of the three categories of documents which the RTA submit do not contain any information concerning the personal affairs of the applicants. These documents are as follows:

Category	Document
Bond receipt and lodgement forms	RTA Form 2: Bond Lodgement Form Department of Housing Form
Dispute resolution files	RTA Form 16: Dispute Resolution Request Record of conciliation
Information relating to tenancy at (...) Old Logan Road, Gailes	RTA Form R16: Dispute Resolution Request

The relevant law

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

20. Sub-sections (1) and (2) of section 35B of the FOI Act set out the requirement to pay an application fee in certain circumstances, providing specifically 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.*

21. The Information Commissioner stated² in *Stewart and Department of Transport*³ (**Stewart**) that:
- ... 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].*

22. To determine whether an application fee is payable in respect of any of the 19 FOI applications, it is necessary to decide whether there is one document that responds to the terms of each FOI application which does not contain information concerning the applicants' personal affairs.

Personal affairs and business affairs

23. Under the FOI Act there is a distinction between 'personal affairs' and 'business affairs'. The Information Commissioner has stated in *Stewart*⁴ that:
- the phrase "personal affairs of a person" and its relevant variations, does not include the business or professional affairs of a person.*

24. The fact that a person enters into a commercial transaction does not necessarily mean that the documents concerning this transaction concern the person's business affairs and not their personal affairs. This is explained in *Stewart*⁵ where the Information Commissioner stated that:

² 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.

³ (1993) 1 QAR 227 at paragraph 121.

⁴ at paragraph 27.

⁵ at paragraph 103.

...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".

25. An example of this type of transaction includes entering into a mortgage agreement to obtain finance to purchase a family home.⁶
26. At the same time, the fact that a person's name or identifying information is provided in a document, does not necessarily mean that the information concerns the personal affairs of the person. In *Re Timothy Edward Anderson and Department of Immigration and Ethnic Affairs*⁷ (**Anderson**) Deputy President Hall states:⁸

*In my view, the fact that a document may refer to a person by name does not necessarily mean that the document relates to that person's "personal affairs" (cf. *Re Witheford and Department of Foreign Affairs* (1983) 5 ALD 534 at 539). There are many circumstances in which a person may be referred to in correspondence or other documents without the documents containing information with respect to that person's personal (or "non-business") affairs. Correspondence signed in the course of one's business, profession or employment is an obvious example. Documents signed as the secretary of a social club or sporting body would normally be of a similar nature. In my view, acts, matters or things done by a person in a representative capacity on behalf of another person, body or organisation, would not normally be said to relate to that person's "personal affairs". In such cases, the document does not relate to the person's personal affairs because there is no relevant connection between the information contained in the document and any matter personal to the applicant (cf. *Department of Airforce v Rose* 425 US 352 (1976) at 371).*

27. As to the meaning of 'business affairs', the Information Commissioner has previously stated:⁹

*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). (**my emphasis**)*

Business undertaking

28. In *Timms and Department of Employment, Vocational Education, Training and Industrial Relations*¹⁰ (**Timms**) the Information Commissioner considered that the principles of income tax law can provide some guidance as to whether a particular activity constitutes a business undertaking for the purpose of characterising a person's business affairs. In that decision the Information Commissioner stated:

*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.*

⁶ *Stewart* at paragraph 106 where other examples of this type of transaction are noted.

⁷ [1986] AATA 80 (21 March 1986).

⁸ at paragraph 20.

⁹ *Stewart* at paragraph 103.

¹⁰ (Unreported, Queensland Information Commissioner, 17 December 1993) at paragraph 22 and 23.

29. The case law addressing whether an individual is carrying on a business for tax purposes suggests that the following are indicators of a ‘business undertaking’:¹¹
- organised commercial activities with a view to profit or gain (as distinct from a hobby or recreation)
 - scale of activity
 - repetition and a permanent character
 - the maintenance of systems¹² (i.e record keeping)
 - use of systems
 - venture governed by ordinary commercial principles¹³
 - continuity.¹⁴
30. Decisions in the context of taxation law indicate that:
- a lack of income does not prevent a finding that the taxpayer is carrying on a business¹⁵
 - lack of business efficiency is not decisive since many people in business are inexperienced in competent conduct¹⁶
 - a person may conduct a business even though he or she does so in a small way.¹⁷

Leasing residential premises

31. In *Stewart* the Information Commissioner discussed personal affairs and business affairs in the context of an agreement for the lease of residential premises. In that decision, the Information Commissioner noted:¹⁸

*...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.***

[my emphasis]

32. In *Timms*¹⁹, which was decided shortly after *Stewart*, the Information Commissioner applied the reasoning in *Stewart* to identify some examples of part-time ‘business undertakings’. These included ‘*hobby farms, share trading, acquiring and **leasing business or residential premises**, and developing properties for sale or lease.*’ (my emphasis)

¹¹ See, for example, *Thomas v Federal Commissioner of Taxation* (1972) 72 ATC 4094 (**Thomas**) and *Ferguson v Federal Commissioner of Taxation* 79 ATC 4261 (**Ferguson**), and *Brajkovich v Federal Commissioner of Taxation* 89 ATC.

¹² *Newton v Pyke* (1908) 25 TLR 127.

¹³ *IR Commrs v Livingston* (1927) 11 TC 538.

¹⁴ *Hope v Bathurst City Council* 80 ATC 4386 at page 4390; (1980) 144 CLR 1 at page 9; *Ferguson* at page 4264.

¹⁵ *Ferguson* at page 4264 per Bowen CJ and Franki J.

¹⁶ *Thomas* at page 4100 per Walsh J.

¹⁷ *Thomas* at page 4099 per Walsh J.

¹⁸ in *Stewart* at paragraph 107.

¹⁹ at paragraph 19.

Applicants' submissions

33. The applicants submit²⁰ that they are entitled to all documents responding to each of the FOI applications for free because:

*... this matter relates to our personal property
The rates notices state our name personally and we pay personally from our own pockets
We are not a company or a organisation.*

34. In their submissions of 25 February 2009 the applicants state that:

*We are not a business or organisation and this matter involves our personal and financial affairs
We personally own this property as individuals
This matter does not involve our employment affairs
This matter does not involve our business affairs or professional affairs since property is in a individual private name (...) not a business name (...).*

RTA's submissions

35. In the Original Decision Ms Spratt, states:

Each request for information you have made is a request which relates to your business affairs.

36. In support of the statement at paragraph 35 above, the RTA submits that the applicants:

- own multiple properties in the Brisbane area
- lease these properties to tenants for market value
- conduct their affairs from a business address
- coordinate interactions with tenants through the RTA, relying heavily on RTA dispute resolution services
- have utilised the RTA services in managing their properties and tenants, and in doing so, have quoted an Australian Business Number (**ABN**) for use of the online facilities
- seek copies of numerous documents (including receipts) for their 'records'.

37. The RTA submits that any information sought by a lessor in relation to their business undertakings (as distinct from their personal finances) should ordinarily be characterised as relating to the lessor's business affairs.

Application of the law

38. The applicants' submissions go to the nature of their activities as lessor and/or managing owner(s). In their submissions, the applicants explain why they believe their undertakings are 'personal' in nature. Stating, for example, that '*we are not a business or organisation*'.

39. In *Inglis v. Federal Commissioner of Taxation*²¹ (**Inglis**) Brennan J said that:

²⁰ In the External Review Application.

²¹ 80 ATC 4001 at page 4004 to 4005; (1979) 10 ATR 493 at page 496 to 497.

The carrying on of a business is not a matter merely of intention. It is a matter of activity. ... At the end of the day, the extent of activity determines whether the business is being carried on. That is a question of fact and degree.

40. Having regard to the submissions of the parties and the case law and decisions discussed above, I consider each of the categories of documents in turn below.

Characterisation of the information sought in the FOI Applications

Bond receipt and lodgement forms

Form 2

41. An RTA Form 2 records the details of the payment of a bond in relation to rental premises. It contains information about both the lessor and the tenant. I have considered the Form 2 in relation to five of the FOI applications.²²
42. The Form 2 includes the address of the rental premises and in some instances, the applicants' name(s), in their capacity as lessor and signature(s) (as agent), a business address, business telephone number and details of the rent and bond. In two instances neither applicant is named on the form because the property is managed through a real estate agency.²³
43. I acknowledge the applicants' submissions about the personal nature of their activities in that they, for example, personally own the properties in their personal names. However, as Brennan J noted in *Inglis*, the carrying on of a business is a matter, not of 'intention' but of 'activity.' Accordingly, in determining whether the applicants are involved in a business undertaking, it is appropriate to have regard to the factors identified at paragraph 29 above.
44. I am satisfied that activities done by an individual can constitute a business undertaking. Although incorporation is a common feature of many businesses, it is not, in my view, a necessary pre-condition for an activity being characterised as a business undertaking.
45. This emphasis on the activity itself is reflected in *Timms*. In *Timms* the applicant was employed as a police officer and he argued that his income from pastoral activities was not his primary source of income, but rather, a personal hobby. In that decision the Information Commissioner found that, notwithstanding the applicant's view that his involvement in the pastoral industry constituted no more than a hobby, the undertaking concerned his 'business' rather than his 'personal' affairs.
46. On the basis of the principles arising from *Stewart* and *Timms*, as discussed above, I find that the applicants' role as lessor in relation to the various properties concerns their business affairs and not their personal affairs. I have drawn this conclusion because I am satisfied that their undertaking in relation to their rental properties is carried on in an organised way for the purpose of obtaining a profit. Specifically:
- the applicants are leasing numerous properties to tenants in the open marketplace under formal rental agreements (evidenced by bond lodgements with the RTA)
 - this undertaking is ongoing and conducted with a view to making profits

²² Applications 14, 15, 17, 18 and 19.

²³ Applications 17 and 18.

- the applicants' dealings with the RTA in respect of the leased premises have been frequent and regular, thus suggesting a continuity and system to the applicants' activities in relation to these properties.

47. The Form 2 also includes in some instances a mobile telephone number. It appears that the applicants use this mobile telephone number as a business number. In any event, this number is listed in the business listings of the White Pages as one of the applicant's telephone contact numbers in relation to his work as a solicitor. Professional affairs are also distinguished from personal affairs under the FOI Act. They concern '*the work activities of persons who are admitted to a recognised profession and who ordinarily offer their professional services to the community at large for a fee*'.²⁴ I am satisfied that this information either concerns the applicants' business affairs or one of the applicants' professional affairs and that it does not concern their personal affairs.

Department of Housing Form

48. A Department of Housing Form responds to FOI application number 16. This form does not identify the applicants and accordingly, it does not concern their personal affairs.

Dispute resolution files

RTA Form 16: Dispute Resolution Request

49. The applicants seek access to various dispute resolution files. A number of these files contain an RTA Form 16.²⁵
50. I have reviewed each of these forms. They identify the rental property and in most instances, contain the applicant(s)' names as lessor (and/or lessor's agent), business address, business telephone number, mobile telephone number²⁶ and signature. Some include information concerning the basis of the dispute.
51. For the reasons discussed at paragraphs 43 to 47 above, I am satisfied that these documents concern the applicants' business affairs and not their personal affairs.

Record of conciliation

52. A record of conciliation responds to FOI applications 3 and 4. In these documents the applicants are identified as a party to conciliation in relation to identified rental premises and on one record, some information is recorded regarding issues raised by the applicants about the tenancy.
53. For the reasons discussed at paragraphs 43 to 46 above, I am satisfied that these documents concern the applicants' business affairs and not their personal affairs.

Information relating to tenancy at (...) Old Logan Road, Gailes

Form R16

²⁴ *Pope and Queensland Health* (1994) 1 QAR 616 at paragraph 29.

²⁵ Applications numbered 1, 2, 5 – 11 and 13.

²⁶ See paragraph 47 above.

54. A Form R16 responds to FOI application number 12. This form contains the address of the rental premises, an applicant's name, business telephone number, mobile telephone number²⁷ and signature.
55. For the reasons discussed at paragraphs 43 to 47 above, I am satisfied that the information on these documents concern the applicants' business affairs and not their personal affairs.

Conclusion

56. I have carefully examined one document responding to each of the 19 FOI applications and I am satisfied that:
- at least one of the documents sought in each of the 19 FOI applications does not contain any information concerning the personal affairs of the applicants
 - in accordance with section 35B of the FOI Act the applicants are required to pay an application fee, as prescribed in the FOI Regulation, in respect of each of the 19 FOI applications identified at paragraph 1 above.

DECISION

57. I affirm the decision under review, being the internal review decision of F Smith dated 9 February 2009.
58. I have made this decision as a delegate of the Information Commissioner under section 90 of the *Freedom of Information Act 1992* (Qld).

S Jefferies
Acting Assistant Commissioner

Date: 27 February 2009

²⁷ See paragraph 47 above.