

OFFICE OF THE INFORMATION )  
COMMISSIONER (QLD) )

S 186 of 1993  
(Decision No. 94026)

Participants:

HENLEY JOSEPH JENNINGS  
Applicant

- and -

DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL  
Respondent

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - applicant claiming that the respondent failed to provide the documents sought in the applicant's FOI access request - applicant seeking documents relating to matters which are not within the respondent's areas of responsibility - whether application for review misconceived and lacking in substance - application of s.77(1) of the *Freedom of Information Act 1992 Qld*.

*Freedom of Information Act 1992 Qld* s.22(a), s.22(b), s.28(2), s.77, s.77(1)  
*Crimes Act 1914 Cth* s.35  
*Justices Act 1886 Qld*

*Shepherd and Department of Housing, Local Government & Planning, Re* (Information Commissioner Qld, Decision No. 94007, 18 April 1994, unreported)

## **DECISION**

In accordance with s.77(1) of the *Freedom of Information Act 1992 Qld*, I decide not to review further the decision made on behalf of the respondent by Dr K S Levy, dated 16 September 1993, on the basis that the application for review of that decision is misconceived and lacking in substance.

Date of Decision: 26 September 1994

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F N ALBIETZ  
**INFORMATION COMMISSIONER**

Participants:

HENLEY JOSEPH JENNINGS  
Applicant

- and -

DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL  
Respondent

### **REASONS FOR DECISION**

#### **Background**

1. Mr Jennings applied to me on 27 September 1993 for external review of a decision of the Department of Justice and Attorney-General (the Department), complaining, in essence, that the Department had failed to provide the documents which he sought in his FOI access application.
2. Mr Jennings' FOI access application was made on 8 July 1993 by completing and lodging a standard application form produced by the Department. The form allows an applicant to set out a "description of the document/s applicant wishes to obtain". This part of the form allows an applicant to tick boxes marked "Letter", "Form", "Report" and "Other (please specify)". In the area next to the box marked "Other (please specify)", Mr Jennings inserted the following description of the documents to which he sought access:

*Documents relative to statistics Legal Aid Commission of Qld & related documents.*

3. Mr Jennings qualified his request by inserting in the area which follows the heading on the application form "Subject Matter (specify information that will help identify the document/s)" the following words:

*Statistics re perjury cases in Family Law that have been prosecuted last 7 years.*

4. Mr Jennings further qualified his FOI access application by inserting and underlining the word "only" before the word "document/s" in the application form, so as to indicate that the only documents he was requesting were "Statistics re perjury cases in Family Law that have been prosecuted last 7 years".

5. It is necessary to deal in some detail with the Department's response to Mr Jennings' FOI access application, given in the decision of Ms L Barratt, the Department's FOI Co-ordinator, dated 20 August 1993. Ms Barratt said:

*Inquiries made with the Policy and Legislation Division of the Department reveal that the Department holds no statistical information in relation to family law perjury matters. The Policy and Research Branch of the Courts Division does not hold statistical data of the type you request in any readily accessible form. In your application you advise that you wish to inspect documents. I advise that there are no documents held by the Department of Justice and Attorney-General which are able to be inspected which contain the information as requested.*

6. It is apparent that this part of Ms Barratt's response amounts to a decision that the Department has no documents which fall within the terms of Mr Jennings' FOI access application, since the only documents which Mr Jennings sought were "statistics re perjury cases in family law ..." (my underlining), as opposed to documents that deal with perjury prosecutions which arise out of family law proceedings. However, Ms Barratt's decision did not rest on that point alone:

*To ascertain the number of perjury cases in Family Court matters, it would be necessary to search Court Registry files, or depositions. The tribunal in which the perjury is alleged to have occurred would be set out in a document which sets out in full the charge against the accused. To ascertain the number of perjury cases prosecuted in Family Court matters, it would be necessary to carry out a search of indictments, or charge sheets or depositions. To require officers of the Department to undertake any of these document searches to ascertain the number of perjury cases in Family Law that have been prosecuted in the last seven years would substantially and unreasonably divert the resources of the Department from their use by the Department in the performance of its functions. Accordingly, your request for access to these documents is refused for this reason.*

7. Although s.28(2) of the *Freedom of Information Act 1992 Qld* (the FOI Act) is not specifically referred to, the paragraph quoted immediately above discloses reliance on s.28(2) of the FOI Act, which is in the following terms:

**28. (2) If -**

- (a) *an application is expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to a specified subject matter; and*
- (b) *it appears to the agency or Minister dealing with the application that the work involved in dealing with the application would, if carried out -*
  - (i) *substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions; or*
  - (ii) *interfere substantially and unreasonably with the performance by the Minister of the Minister's functions;*

*having regard only to the number and volume of the documents and to any difficulty that would exist in identifying, locating or collating the documents within the filing system of the agency or the office of the Minister;*

*the agency or Minister may refuse to deal with the application.*

8. Ms Barratt's decision continued as follows:

*The Policy and Research Branch is able to provide some information which may be of assistance to you. The Branch currently does not have information in the form you request. The information would have to be created in written form from the computer data base, but even then the Department cannot provide what you request. The computer records of the Department contain data on prosecutions for perjury*

*in the last two years in some Magistrates Courts. This data does not include information from court registries which operate manually and are not on the computerised Case Register System. The records would not indicate the tribunal in which the perjury was alleged to have occurred.*

*Similarly, the computer data base of the Supreme and District Courts would be able to provide data on the number of perjury cases and the file number, since May 1988. The data base does not contain information as to the tribunal in which the perjury was alleged to have occurred. To ascertain this, it would be necessary to conduct a search of the indictments held on the files in the Court Registries.*

*The Act provides for charges to be levied to provide access to documents which do not concern the applicant's personal affairs. The Act further provides that a charge may be made for the reasonable costs incurred by the Department in providing a written document containing the information if the Department can do so using equipment that is available for retrieving and collating the stored information. [Note: These are references to s.29(1)(c)(iv) and s.30(1)(e) of the FOI Act.]*

*I am required to advise you of the amount of any charge payable for giving access.*

*It is not possible to calculate precisely at the outset before the computer search is run what the cost of the computer search will be. The cost is calculated by the computer at the end of the search based on search time cost per second. I am advised that it is estimated a search of both systems would not cost more than \$50 per search, and may well be less depending on how long the search takes. The Department will proceed to run the computer printout on the payment of a deposit. Section 11 of the Freedom of Information Regulation provides that a deposit is 20% of the charge.*

*A search can be conducted on both or either system on the receipt of \$10 for the conduct of each search. If you wish the Department to carry out either or both computer searches, would you please advise. However, I stress that the information which can be retrieved will not give you all the information you request. It will tell only the number of perjury cases overall and the case file numbers of those matters on our information data bases. Neither goes back seven years. The information will not be limited to those cases of perjury alleged in a Family Court tribunal.*

*You are able to apply to the Registrars of the relevant Court Registries to conduct a search [of] the court files. There is a prescribed fee set by the relevant enactments applicable for searches of Court Registry files. The relevant enactments also make provision for obtaining copies of documents for a prescribed fee.*

9. Section 22(a) and (b) of the FOI Act are not specifically referred to in this passage, although it is reasonably clear that they were in the decision-maker's contemplation. They provide as follows:

22. *An agency or Minister may refuse access under this Act to -*

- (a) *a document that is reasonably open to public access (whether or not as part of a public register) under another enactment, whether or not the access is subject to a fee or charge; or*
- (b) *a document that is reasonably available for purchase by members of the community under arrangements made by an agency;*

10. Rather than take advantage of the opportunity to obtain computer searches (which might have provided some assistance in setting the direction for further searches which the applicant would have to undertake), Mr Jennings applied for internal review of Ms Barratt's decision. The internal review decision was made on 16 September 1993 by Dr K S Levy, Deputy Director-General of the Department. Dr Levy's decision affirmed the decision of Ms Barratt:

*I confirm that the Department, including the Office of the Director of Prosecutions, does not hold statistical information in relation to family law perjury matters. Perjury committed in a Family Court is an offence under Commonwealth law and is prosecuted by the Director of Public Prosecutions, the Commonwealth prosecutions agency.*

*The Department is able to provide some information which may be of assistance to you. The computer records of the Department contain data on prosecutions for perjury in the last two years in those Magistrates Courts which have computer data collection facilities. The computer data base of the Supreme and District Courts can provide data back to May 1988. To ascertain in which court the perjury occurred, or was alleged to have occurred, it would be necessary for you to then conduct a search of the indictments or charge sheets held on the files in the respective court registries. You are able to apply to the Registrars of the relevant court registries to conduct a search of the court files. There is a prescribed fee set by the relevant enactments. ...*

11. Rather than follow Dr Levy's suggestion, Mr Jennings applied for external review under Part 5 of the FOI Act, delivering to my office, on 27 September 1993, two letters dated 24 and 27 September 1993. Those letters contain much material which is irrelevant to the issues which I have jurisdiction to determine on a review under Part 5 of the FOI Act, and to which I will not refer further. However, the following passages from Mr Jennings' letter of 24 September 1993 highlight his contentions:

*... my complaint concerns:*

*The failure of Ms Lynn Barratt to locate any documentation concerning statistics relating to perjury perceived during family law court proceedings in Brisbane and the assistance given Ms Lynn Barratt to conceal documents known to me to be or have been within the files of the Attorney General's Department.*

*The co-conspirators I hold are:*

*The Director General Dept of Justice and Attorney General Mr B.B. Smith, who is maintaining "dumb silence" on matters he has an excellent knowledge of - and I refer to the "statistics" mentioned above.*

...

*I hold that Mr B.A. Stewart, a former Director General, Dept of Justice and Attorney General and now, I understand, the Director General, Consumer Affairs, is a party to these mischiefs - he had in his possession documents concerning those "statistics" and he did forward same to the Senate Standing Committee on Legal and Constitutional Affairs. The documentation consisted of 12 Dossiers marked "A" to "L". I hold copy.*

12. Under cover of his application for external review, Mr Jennings also forwarded a copy of a letter to Dr Levy, dated 23 September 1993, in which Mr Jennings referred to the number of perjury cases the subject of his FOI access application and said:

*Yes, I know the number is small, very small, - in the words of the Premier Wayne Goss - "Probably None" an honest man is Wayne Goss.*

...

*Ms Barratt claims, for the Attorney General Qld:*

*"That there are no documents held by the Dept. of Justice and Attorney General which are able to be inspected which contain the information as requested."*

*Her claim is cunningly devised to conceal information that the statistics required are NIL. My Application for the Review of the decision failed to produce the Nil result which is readily available to her from the Director General (of the Department).*

### **The External Review Process**

13. Mr Jennings' application for external review appeared to be based on a number of misunderstandings and misconceptions. I therefore wrote to Mr Jennings on 29 September 1993, indicating that it appeared to me that his application for external review may be misconceived or lacking in substance, in terms of s.77(1) of the FOI Act, which provides as follows:

*77.(1) The Commissioner may decide not to review, or not to review further, a decision in relation to which an application has been made under section 73 if the Commissioner is satisfied that the application is frivolous, vexatious, misconceived or lacking in substance.*

14. My letter to Mr Jennings was in the following terms:

*On the basis of my preliminary assessment of the material supplied to me with your application for review dated 27 September 1993, I consider that your application for review may be misconceived or lacking in substance. I will briefly state my reasons for holding that view and I will then give you the opportunity to provide me with documentary evidence and/or a written submission which might persuade me not to exercise my power under s.77(1) of the FOI Act to decide not to review.*

*Your application seems to be based on a number of misunderstandings and misconceptions.*

*You do not appear to have appreciated the distinction under our federal system of government between Commonwealth jurisdiction and State jurisdiction, when it comes to responsibility for law enforcement. If perjury was committed in a proceeding in the Family Court of Australia, the offence would have been committed under s.35 of the Commonwealth Crimes Act. As such, it would be the responsibility of the Commonwealth Director of Public Prosecutions to take action to prosecute the charge of perjury under s.35 of the Commonwealth Crimes Act. It would not be the responsibility of the Queensland Department of Justice and Attorney-General or of the Queensland Director of Prosecutions (neither of whom would have any direct involvement in the prosecution of such matters) and in the ordinary course of events, there would be no good reason for expecting these two Queensland government agencies to keep statistics on matters which do not fall within their responsibilities.*

*On the other hand, any prosecution under s.35 of the Commonwealth Crimes Act for perjury alleged to have been committed in Queensland would most likely be brought by the Commonwealth Director of Public Prosecutions in the Queensland District Court, or possibly the Queensland Supreme Court or Magistrates Court, though this is less likely. It is possible that amongst the tens of thousands of files held in the registries of those courts, there could be individual court files involving a prosecution under s.35 of the Commonwealth Crimes Act for perjury allegedly committed in the Family Court of Australia.*

*The Queensland Department of Justice and Attorney-General has taken the view that it would substantially and unreasonably divert the resources of that agency from their use in the performance of the Department's normal functions, to engage in a process of searching for and identifying in the filing systems of all Queensland court registries, any individual court files that may involve a prosecution for perjury committed in the Family Court of Australia and brought under s.35 of the Commonwealth Crimes Act. In my preliminary assessment, this is not an unreasonable position for the Department to take.*

*It has graciously offered, however, upon the payment by you of a fee of \$50 (again a charge which I do not consider to be unreasonable) to undertake a computer search of a database which covers the court files held in many (but not all) Queensland court registries, which should reveal the file number and location (by court registry) of any file covered by the database which involves a prosecution for perjury under s.35 of the Commonwealth Crimes Act. Armed with this information, it would then be open to you to visit the court registry concerned, and upon payment of a prescribed fee, inspect the contents of the file to ascertain whether the charge of perjury was brought in respect of an offence alleged to have been committed in the Family Court of Australia, as opposed to some other federal court or tribunal. Such a search would not be as comprehensive as you are seeking - it would not cover every Queensland court registry for each of the last seven years, because the database is not that comprehensive. Nevertheless, I think the Department of Justice and Attorney-General has been quite reasonable to offer you the opportunity to search the data which is contained on its computer databases. I do not think it is reasonable to require manual searches to be undertaken of the tens of thousands of files held in Queensland court registries. That would be like looking for a needle in a haystack.*



*Of course, it would be far more sensible for you to apply to the Commonwealth Director of Public Prosecutions under the Commonwealth Freedom of Information Act 1982 to find out if that office can readily access statistics on the number of prosecutions for perjury brought under s.35 of the Commonwealth Crimes Act in family law matters. I understand from my preliminary inquiries of the Commonwealth Director of Public Prosecutions, that there is at least one such prosecution currently on foot, where a person is charged with having given false evidence on oath in an affidavit filed in Family Court proceedings. Your assertion in your correspondence to me that you know that there must be a "nil return" to your request for statistics on perjury cases in Family Court matters that have been prosecuted in the past seven years, would therefore appear to be quite mistaken.*

*You also appear to be under the misconception that the Queensland Legal Aid Office is part of the Department of Justice and Attorney-General. The Queensland Legal Aid Office is a separate statutory authority, and any request addressed to the Department of Justice and Attorney-General would not be treated as covering documents held by the Queensland Legal Aid Office. If you wish to seek access to documents in the possession or control of the Queensland Legal Aid Office, you must apply directly to the Queensland Legal Aid Office.*

*Again, you appear to be under the misconception that the FOI Act permits you to have access to information as such, rather than to information in documentary form. If, as you allege, Mr B Smith, the Director-General of the Department of Justice and Attorney-General, has an excellent knowledge of the alleged statistics to which you are seeking access, that is irrelevant if the knowledge is merely contained in his head. No public servant can be compelled under the FOI Act to create a document containing information for an FOI applicant. The FOI Act only confers a legal right of access to documents already in existence.*

*The essence of the decision by Mr K S Levy is that the Department of Justice and Attorney-General holds no documents which fall within the terms of your FOI access request, other than any documents which may exist in the registry of a Queensland court in a file which relates to a prosecution under s.35 of the Commonwealth Crimes Act brought by the Commonwealth Director of Public Prosecutions. If you have any documentary evidence which objectively tends to show that this is not correct, and that the Queensland Department of Justice and Attorney-General holds other documents which fall within the terms of your FOI access request, then I direct you to forward copies of any such documentary evidence to me forthwith. In particular, I direct you to forward to me copies of those documents which you claim to hold, being:*

- (a) 12 dossiers marked "A" to "L" that were in the possession of Mr B A Stewart, a former Director-General of the Department of Attorney-General, and which were forwarded by him to the Senate Standing Committee on Legal and Constitutional Affairs;*
- (b) the memo dated 4 June 1993 by Mr P L Mitchell when acting as Chief Stipendiary Magistrate; and*
- (c) the documents you refer to as showing that the Attorney-General is fully*

*aware of documents in his Department which fall within the terms of your FOI access request.*

*I am also now affording you the opportunity to supplement your case as disclosed in the documentary evidence which I have directed you to forward to me, by also forwarding a written submission setting out all facts, matters and circumstances, and any legal arguments on which you rely, to challenge the correctness of the decision of Mr K S Levy, as set out in his letter to you dated 16 September 1993.*

*I direct that the documents referred to above, and any accompanying written submission, be forwarded to my office within 28 days of the date of this letter.*

15. During the course of this review, I and members of my staff received a number of letters, telephone calls, and personal visits by Mr Jennings conveying information, almost all of which was irrelevant to issues which I have jurisdiction to determine under Part 5 of the FOI Act.
16. As to the 12 dossiers marked "A" to "L", Mr Jennings, in discussions with my staff, stated that he had retained a copy of those documents. However, he persistently refused to provide a copy of those documents to my office, on the basis that it was necessary for my office to obtain the original dossiers from the Senate Standing Committee in order for them to be of any use. In response to inquiries by my staff, Dr Levy has stated that he has no knowledge of the existence of the 12 dossiers described by Mr Jennings, and that Mr Brian Stewart has no recollection of any such documents. Mr Jennings has not given me any satisfactory explanation of how or why the 12 dossiers are relevant to the issues that are within my jurisdiction to determine on a review under Part 5 of the FOI Act. I see no point in paying any further attention to the alleged dossiers.
17. Eventually, Mr Jennings did provide some documents in response to the request contained in my letter of 29 September 1993. Most of those documents were provided in an indirect fashion, in that Mr Jennings attended at the Department and an officer of the Department copied for him documents which were subsequently forwarded to my office.
18. Mr Jennings provided a copy of the document which had been described as the memo dated 4 June 1993 by Mr P L Mitchell when acting as Chief Stipendiary Magistrate. The memo is actually a letter by Mr Mitchell in response to an earlier letter by Mr Jennings, apparently dated 26 May 1993. If Mr Jennings is suggesting that this memo is a document which establishes that proceedings for perjury arising out of Family Court proceedings have occurred in Queensland within the last seven years, then the document does amount to proof of that contention. However, it is obvious that the proceedings referred to in the memo are proceedings commenced by Mr Jennings himself. This is confirmed when one has regard to a copy of a further document forwarded by Mr Jennings, which is a copy of a complaint sworn by him under the *Justices Act 1886 Qld*, alleging that a person named in the complaint did commit perjury in relation to Family Court proceedings. The complaint was made returnable on 13 November 1992 before the Magistrates Court at Noosa Heads.
19. Mr Jennings also forwarded a copy of a letter dated 22 December 1992 from the Registrar of the Magistrates Court at Noosa Heads, which records the reasons why the presiding Magistrate dismissed Mr Jennings' complaint. The reasons given in that letter for dismissal of the complaint are that any proceedings for perjury concerning Family Court proceedings are to be dealt with under the *Crimes Act 1914 Cth*, and that the Magistrates Court of Queensland had no jurisdiction to hear Mr Jennings' complaint under the *Justices Act 1886 Qld*. Thus, even before Mr Jennings made his FOI access application of 8 July 1993, he had been informed that prosecutions for perjury in relation to Family Court proceedings are to be commenced under the *Crimes Act 1914 Cth*.

20. Mr Mitchell's letter is of no assistance to Mr Jennings, since, although it does demonstrate that at least one complaint of perjury in relation to Family Court proceedings has been made in Queensland courts in recent years (namely his own), the document does not demonstrate the existence of documents of the category sought by Mr Jennings in his FOI access application, namely, statistics in relation to proceedings for perjury concerning family law proceedings in Queensland.
21. Mr Jennings was asked to forward copies of the documents that he relied upon to contend that the Attorney-General is fully aware of documents in his Department which fall within the terms of Mr Jennings' FOI access application. As referred to in paragraph 17 above, Mr Jennings did provide a number of documents concerning correspondence with the Department (which were photocopied by the Department and provided to me). Those documents do not assist Mr Jennings to establish that the Department possesses documents on statistics regarding "perjury cases in family law that have been prosecuted in the last seven years" (to use the terms of Mr Jennings' FOI access application). Indeed, some of the documents contain indications contrary to Mr Jennings' assertion that the Department holds documents concerning such statistics. An example is the following extract of a letter, dated 21 January 1991, from the Director-General of the Department of the Attorney-General to Mr Jennings:

*I am directed to reiterate that the data you were then seeking is not maintained by the Legal Aid Office, but perhaps by the Family Law Court. As indicated to you previously, the Family Law Court comes within Commonwealth jurisdiction. Should you have any further difficulties in that regard, I am directed to advise you should take up matters with the Commonwealth Attorney-General, Senator M Tate.*

22. A further example appears in the letter from the Queensland Attorney-General to Mr Jennings dated 24 September 1990:

*I would emphasise, however, that the data maintained by the Legal Aid Office does not extend to showing the type of information you requested. Perhaps the Family Law Court may be in a position to provide you with the further details you are seeking and it is suggested you approach that court direct.*

*I am sure you will appreciate the Family Law Court comes within the Commonwealth jurisdiction.*

### **Application of s.77 of the FOI Act**

23. Mr Jennings has not provided me with any material which casts doubt on my preliminary assessment, as conveyed to him in my letter dated 29 September 1993, that his application for external review is misconceived and lacking in substance.
24. At paragraphs 18 and 19 of my reasons for decision in *Re Shepherd and Department of Housing, Local Government & Planning* (Information Commissioner Qld, Decision No. 94007, 18 April 1994, unreported) I said:

18. *It is my view that in an external review application involving 'sufficiency of search' issues, the basic issue for determination is whether the respondent agency has discharged the obligation, which is implicit in the FOI Act, to locate and deal with (in accordance with Part 3, Division 1 of the FOI Act) all documents of the agency (as that term is defined in s.7 of the FOI Act) to which access has been requested. It is provided in s.7 of the FOI Act that:*

**"'document of an agency' or 'document of the agency' means a document in the possession or under the control of an agency, or the agency concerned,**

whether created or received in the agency, and includes -

- (a) a document to which the agency is entitled to access; and
- (b) a document in the possession or under the control of an officer of the agency in the officer's official capacity;"

19. *In dealing with the basic issue referred to in paragraph 18, there are two questions which I must answer:*

- (a) *whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency (as that term is defined in s.7 of the FOI Act);*

*and if so,*

- (b) *whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.*

25. It is inherently unlikely that the respondent would hold any documents containing the particular statistics which Mr Jennings seeks, since they relate to matters which are the responsibility of Commonwealth government agencies.

26. Mr Jennings has not put forward any evidence to suggest that the information which he seeks in his FOI access application is in the possession or control of the Department, or otherwise to cast doubt on the correctness of the decision under review.

### **Conclusion**

27. I am satisfied that Mr Jennings' application for review is misconceived and lacking in substance. In accordance with s.77(1) of the FOI Act, I decide not to review further the decision of Dr K S Levy, dated 16 September 1993, on the basis that the application for review of that decision is misconceived and lacking in substance.

.....  
F N ALBIETZ  
**INFORMATION COMMISSIONER**