

Tait and Burdekin Shire Council

(L 9/02, 22 March 2002, Deputy Information Commissioner)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.-3. These paragraphs deleted.

REASONS FOR DECISION

Background

4. The applicant, Mr Tait, seeks review of a decision by the Acting Chief Executive Officer of the Burdekin Shire Council (the Council) to the effect that a document to which the applicant requested access under the FOI Act, was not a document in the possession or control of the Council.
5. By letter dated 6 February 2002, Mr Tait requested access, under the FOI Act, to a document described as:

*Pacific Reef Fisheries (Australia) Pty Ltd
Alva Beach Prawn Farm Expansion
Proposal Information for Public Display
As required under Section 93 of the Environmental Protection and
Biodiversity Conservation Act 1999 Cth
Folders 1 and 2*

6. In his decision letter to the applicant dated 21 February 2002, the Acting Chief Executive Officer of the Council explained that the document in question was the property of Sinclair Knight Merz Pty Ltd (SKM), who had entered into an arrangement with the Council for the document to be placed on public display in the Council's offices for a period of 14 days (expiring on 6 February 2002), in order to comply with a requirement imposed by the *Environmental Protection and Biodiversity Conservation Act 1999 Cth*. At the end of the period of public display, the document was returned to SKM.
7. By letter dated 26 February 2002, Mr Tait applied to the Information Commissioner for review, under Part 5 of the FOI Act, of the Council's decision dated 21 February 2002.

Review process

8. After examining the documents attached to Mr Tait's application for review, I

made inquiries of the Chief Executive Officer of the Council, and obtained from him copies of relevant documents. On 7 March 2002, I wrote to the applicant in the following terms:

I have made inquiries of the Chief Executive Officer of the Burdekin Shire Council (the Council) who has confirmed that the Council does not have possession or control of a copy of the document specified in your FOI access application dated 6 February 2002. That document was prepared by Sinclair Knight Merz Pty Ltd (SKM), and was required to be put on public display pursuant to s.93 of the Environmental Protection and Biodiversity Conservation Act 1999 Cth, a piece of Commonwealth legislation administered by Environment Australia. The Council merely facilitated the public display of that document, at the request of SKM. The document always remained the property of SKM, and SKM required the return of the document at the end of the display period.

The document is not a document of the Council for the purposes of the FOI Act, because it is not a document in the possession or control of the Council. The relevant legal principles were explained by the Information Commissioner in Re Holt and Reeves and Education Queensland (1998) 4 QAR 310 at paragraphs 21-26. I have enclosed a copy of that case for your reference.

It is clear that you cannot obtain access to the requested document from the Council under the Queensland FOI Act. It may be possible for you to apply to Environment Australia to obtain access to the document under the Freedom of Information Act 1982 Cth.

I should also inform you that technically your FOI access application dated 6 February 2002 was invalid for failure to pay a \$31 application fee. The document to which you sought access clearly did not concern your personal affairs, and hence a \$31 application fee was payable under the Freedom of Information Regulation 1992 Qld. The Council elected not to take this technical point because it did not have possession or control of the requested document, and considered it would be unduly harsh to require you to pay \$31 in those circumstances. Nevertheless, under the relevant legislative provisions, your FOI access application dated 6 February 2002 was invalid (and would remain invalid until such time as you paid the \$31 application fee) and the Council was not legally obliged to process it.

Unless you can provide me, by 22 March 2002, with material that warrants reconsideration of the position stated in this letter, I will treat your application for review as finalised.

9. The applicant wrote to me on 17 March 2002 setting out a number of arguments as

to why the SKM document should be available for access from the Council under the FOI Act. Those arguments have no legal substance. The applicant has ignored the crucial material fact about ownership and possession of the SKM document, and appears to have completely missed the relevant legal point dealt with in the Information Commissioner's decision in *Re Holt & Reeves and Education Queensland* (1998) 4 QAR 310 at p.318, paragraph 25. At paragraph 24 of *Re Holt*, the Information Commissioner referred to problems of a practical nature for FOI administrators where the documents subject to a valid FOI access application include documents, legally owned by a private citizen or corporation, which are in the temporary custody of an agency which is subject to the application of the FOI Act. The relevant passages from *Re Holt*, for present purposes, are these:

25. *I do not consider that the right of access to documents of an agency conferred by s.21 of the FOI Act was intended to interfere, or should be construed as interfering, with bona fide property rights of a private citizen or corporation in a document that has been placed in the temporary custody of a government agency (cf. D C Pearce and R S Geddes, Statutory Interpretation in Australia, 3rd ed. 1988, at pp.102-103). Thus, for example, I do not consider that an agency is required to withhold a document from its lawful owner (assuming the lawful owner has given notice requiring the return of the document) merely for the purpose of permitting an applicant for access under the FOI Act to obtain access to the document.*
26. *Thus, if in the present case, the Department had been satisfied that Mrs Holt was the legal owner of the audiotapes in its possession, I consider that it should have returned them to Mrs Holt on receipt of her demand for their return. That is a legal issue (dependent on the application of principles of property law) which, in theory, is quite distinct from the application of the FOI Act. The fact that the third parties had requested access to the audiotapes under the FOI Act would not, in my opinion, have afforded sufficient justification for denying or interfering with Mrs Holt's legitimate property rights.*
10. In the present case, the property in the SKM document remained at all times with SKM. For a period of two weeks, the SKM document was in the physical possession and custody of the Council (as a bailee), and hence, in theory, was amenable to the application of the FOI Act. However, SKM remained legally entitled to assert its legal right to possession of the document, which it did at the expiry of the two week public display period. After 6 February 2002, the SKM document was no longer in the physical possession of the Council (it was never a document in respect of which the Council had legal ownership or control) and hence there is no possible legal basis on which it is now a document subject to the application of the FOI Act.
11. The applicant's attempts to pursue access to the SKM document under the FOI Act

are misconceived and without legal substance. Section 77(1) of the FOI Act provides:

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.

DECISION

12. I am satisfied that Mr Tait's application is misconceived and lacking in substance, and I decide not to review further the relevant decision of the Council.