

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 214 of 1993
(Decision No. 95011)

Participants:

RONALD KEITH STEWART
Applicant

- and -

DEPARTMENT OF TRANSPORT
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - jurisdiction to review - interpretation of the terms of correspondence between the applicant and the respondent following the respondent's initial response to the applicant's FOI access application - whether the applicant sought access to documents in respect of which a \$30 application fee was payable pursuant to s.29(2) of the *Freedom of Information Act 1992 Qld* and s.6 of the *Freedom of Information Regulation 1992 Qld*.

FREEDOM OF INFORMATION - applicant challenging sufficiency of search by respondent for documents falling within the terms of his FOI access application - whether reasonable grounds exist for believing that the respondent has possession or control of other documents not dealt with in its response to the applicant's FOI access application.

Freedom of Information Act 1992 Qld s.29(2), s.52, s.52(6), s.79
Freedom of Information Regulation 1992 Qld s.6

Ryder and Department of Employment, Vocational Education, Training & Industrial Relations, Re (Information Commissioner Qld, Decision No. 94023, 9 September 1994, unreported)

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

Stewart and Department of Transport, Re (1993) 1 QAR 227

DECISION

I am satisfied that the respondent has given the applicant access to all documents in its possession or control which fall within the terms of the applicant's FOI access application dated 5 July 1993 (or within the terms of the passage from the applicant's letter dated 12 September 1993 to the respondent, which is set out at paragraph 8 of my reasons for decision), and on that basis I affirm the respondent's (deemed) decision under review.

Date of Decision: 15 May 1995

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INFORMATION COMMISSIONER

Participants:

RONALD KEITH STEWART
Applicant

- and -

DEPARTMENT OF TRANSPORT
Respondent

REASONS FOR DECISION

Background

1. The applicant complains that the respondent has failed (in its response to his FOI access application) to locate and deal with a job application form completed by the applicant in the mid-1980s for a position as a School Crossing Supervisor at the Harristown State School, and a related medical certificate.
2. The respondent has disputed whether the correspondence between it and the applicant is sufficient to ground jurisdiction for me to conduct a review under Part 5 of the *Freedom of Information Act 1992 Qld* (the FOI Act) so I will set out the course of correspondence before commenting on the significance of individual letters.
3. As a result of a prior FOI access application to the Department of Education, Mr Stewart obtained access to a document created by an officer of the Department of Education in April 1992, which contained the following statement:

It is also interesting to note that Mr Stewart had applied to be a crossing supervisor some years ago and been rejected because of his [here a medical condition was specified]. It appears he appealed strenuously against that decision.

4. It would appear that, after receiving this information, Mr Stewart made further inquiries about documents relating to his job application, prompting a response from the Department of Education dated 1 July 1993, which, so far as relevant, stated:

I have read part (a) of your request to be for documents about your application to be a crossing supervisor. These documents would be held with the Department of Transport and you will need to apply to Mr Barry Butterworth, Department of Transport, GPO Box 1549, BRISBANE, 4000. If I have misunderstood your application, please advise me.

5. Following receipt of this information, the applicant made an FOI access application to the Department of Transport (the Department) dated 5 July 1993, in the following terms:

I wish to apply under the FOI Act for documents which state that I have a [medical condition] by the Transport Dept.

These documents would be dated sometime in 1986 when I applied for a job as a

Crossing Supervisor at the Harristown State School.

I have applied to the Education Dept but was informed to apply to this office as it was a Transport matter.

6. The initial decision on behalf of the Department was made by P J Moar on 21 July 1993. Mr Moar's statement of reasons indicated that a search had been conducted of the Road Safety Division's records, but that a search of the book containing records of applications for positions had failed to locate an application in Mr Stewart's name in 1986. Mr Stewart then wrote a letter to the Department, dated 29 July 1993, stating:

As stated in Document 71 Education FOI (it is also interesting to note that Mr Stewart had applied to be a crossing supervisor some years ago and been rejected because of his [medical condition]. It appears he appealed strenuously against that decision).

It is interesting that your letter dated 22 July 1993 stipulates there is no record of this application. Would it be possible to check further into this matter and let me know?

As you can now see that a number of lies have been told to this Department.

7. Ms B Leven of the Department's Road Safety Division replied to Mr Stewart's letter by her letter dated 1 September 1993, in the following terms:

I refer to your letter of 29 July 1993 requesting the Department check further into the matter of an application made by you to be a School Crossing Supervisor at Harristown State School.

In your previous request under FOI application, you referred to documents dated 1986. On checking all relevant Road Safety Division records we were unable to locate any application, or reference to an application, made by you in 1986 or there about.

However, it came to my attention that the Toowoomba District Office of the Queensland Department of Transport had some documentation relating to an application made by you in 1984 when the Crossing Supervisor Scheme commenced. I arranged for copies of these documents to be forwarded to me and have enclosed them for your attention. I hope that the provision of this information will satisfy your requirements and bring this matter to a conclusion.

8. Mr Stewart responded by a letter dated 12 September 1993 which, so far as relevant, stated:

As per A L McTaggart's letter on document 15 page 2, [which was one of the documents forwarded to the applicant under cover of Ms Leven's letter dated 1 September 1993] he states "application form and doctors's certificate held in the school file has not been produced". Two letters 5/7/93 and 29 July 1993 both mention "[medical condition]" but no evidence has been supplied. This is a formal request for these documents.

9. Ms Leven replied to Mr Stewart by a letter dated 16 September 1993, in the following terms:

With reference to your letter of 12 September 1993 concerning the information previously forwarded to you and your belief that some documents were omitted, I have to advise that you were forwarded all relevant data as per your request.

The documents you refer to are part of an integral filing system and the pages you believe were omitted do not relate to you and therefore I am not at liberty to provide you with this data.

10. By letter dated 8 November 1993, Mr Stewart pressed his claim to the job application form which allegedly stated that he had a medical condition; and Ms Leven responded by letter dated 12 November 1993 stating that she had seen no reference to Mr Stewart having the particular medical condition other than in his letters to the Department.
11. By letter dated 18 November 1993 Mr Stewart made an application for review by the Information Commissioner under Part 5 of the FOI Act. Mr Stewart stated:

I have been trying to obtain through the Transport Department an application form for a Crossing Supervisor's Job but have had no success in doing so. In this form which I applied for this Job it is supposedly stated by a Mr McTaggart that I have a [medical condition] and this form should be sometime in 1984. I have been referred to a Beth Leven (Act Principal Advisor L&PD) who states that she has never seen any reference to my having a [medical condition] other than my letters to the Department of Transport. I have a letter which states that the Applications are forwarded to the Transport Dept but it would seem that my application has conveniently been lost.

I also have proof from the Education Department which also states that I have a [medical condition] made by one of the people at the Harristown State School.

In a letter dated ? from A L McTaggart he states that all Application forms and Doctor's Certificates of the unsuccessful applicants were held in the School file for later reference.

I now wish to have an external review of B Leven's decision on this.

Jurisdiction to review

12. The Department took the position that it did not regard correspondence after Mr Moar's decision of 21 July 1993 as grounding jurisdiction for a review under Part 5 of the FOI Act. In a letter to me dated 9 February 1994, Mr Butterworth explained the Department's position as follows:

As advised in my letter of 14 December 1993 this situation arose from an application under the Freedom of Information Act for access to documents relating to Mr Stewart's alleged [medical condition]. This request was finalised but in the process Mr Stewart was advised, as an aside, that no record could be found of an application by him in 1986 for a position of a Crossing Supervisor.

Mr Stewart, without invoking the Freedom of Information legislation, asked if we could check further on this and advise him. At the time, it was felt that such a matter, if processed under the FOI legislation would attract the application fee of

\$30.00. As Mr Stewart already had an appeal current with you about the payment of the fee the matter would not have progressed any further and no result would have been obtained if the legislation was invoked.

The opportunity was therefore taken to have the matter dealt with outside the Act and the letter passed to the Road Safety Division of this Department. Mr Stewart was advised of this.

13. The Department has subsequently co-operated fully with me in the course of this external review. However, I consider it is necessary to briefly examine the basis of my jurisdiction to conduct the review.
14. In my view, Mr Stewart's letter of 29 July 1993 (see paragraph 6 above) ought to have been treated as an application for internal review of Mr Moar's decision of 21 July 1993. Mr Stewart's letter was written within days of his receipt of Mr Moar's decision, which had attached to it information as to the rights of review available under the FOI Act. Although it did not mention s.52 of the FOI Act, or state that it was intended to be an application for internal review, Mr Stewart's letter dated 29 July 1993 directly engaged the subject matter of Mr Moar's decision of 21 July 1993, and raised a "sufficiency of search" issue, which is a legitimate issue for internal review. If Mr Stewart's letter dated 29 July 1993 was a valid application for internal review, then there has been a deemed refusal by the Department of that application for internal review: see s.52(6) of the FOI Act. The Department has stated that it did not treat the matter as falling within the terms of the FOI Act, so there does not appear to have been a decision given on internal review. On that basis, Mr Stewart was entitled to apply for external review under Part 5 of the FOI Act, and I have jurisdiction to deal with his application.
15. Even if one were to accept the Department's assertion that the letter of 29 July 1993 does not amount to an application for internal review, then Mr Stewart's letter of 12 September 1993 ought, in my opinion, to have been treated as a formal application for access to documents under the FOI Act. Given the previous course of dealings between Mr Stewart and the Department (as related above), and the concluding words of the passage quoted at paragraph 8 above, "*This is a formal request for these documents*", it is difficult for me to see how one could reasonably draw any other conclusion than that Mr Stewart intended to invoke his formal right under the FOI Act to apply for access to the documents nominated in his letter dated 12 September 1993. There having been no formal decision made in response to that application, Mr Stewart was entitled to apply for a review under Part 5 of the FOI Act on the basis of a deemed refusal of his application for access: see s.79 of the FOI Act.
16. The Department has suggested, in a letter to me dated 14 December 1993, that it was not required to deal, under the FOI Act, with Mr Stewart's requests subsequent to his letter of 5 July 1993, because they were requests for documents which did not contain information concerning his personal affairs. The Department submitted that, this being the case, the Department was not required to deal with Mr Stewart's requests, under the FOI Act, until such time as a \$30.00 application fee had been paid. I will therefore consider whether, in either case, an application fee would have been payable.
17. Section 29(2) of the FOI Act provides as follows:

29. ...

(2) *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.*

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

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 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.

19. In my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, I identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act (see paragraphs 79-114 of *Re Stewart*). In particular, I said that information concerns the "personal affairs of a person" if it relates to 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 with and emotional ties with other people;
domestic responsibilities and financial obligations.

20. I further indicated that whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, based on a proper characterisation of the matter in question.

21. In my opinion, the terms of Mr Stewart's letter dated 29 July 1993 make it clear that Mr Stewart was following up his request for access to documents which state that he has a medical condition. If further documents exist which relate to Mr Stewart's health, then in my view they would contain information concerning his personal affairs and, by virtue of s.6(2) of the FOI Regulation, no application fee would be payable. Turning to the letter of 12 September 1993, Mr Stewart seeks to obtain two documents, a job application form and a doctor's certificate. If a doctor's certificate exists, it would clearly contain information concerning Mr Stewart's personal affairs. It is also highly likely that a job application form completed by Mr Stewart would contain at least some information relating to his personal affairs, e.g. home address and telephone number. That would mean that a \$30 application fee is not payable: see paragraph 19 of *Re Ryder and Department of Employment, Vocational Education, Training & Industrial Relations* (Information Commissioner Qld, Decision No. 94023, 9 September 1994, unreported). Moreover, the fact that a person has made an unsuccessful job application is, in my opinion, information which concerns that person's personal affairs: see paragraph 97 of *Re Stewart and Department of Transport* (1993) 1 QAR 227.

22. I therefore do not consider that, in either case, the Department would have been entitled to refuse to deal with Mr Stewart's application on the basis that an application fee was not paid.

23. I am satisfied, therefore, that Mr Stewart was entitled, as at 18 November 1993, to make an application to me for external review under Part 5 of the FOI Act. In his application for external review, Mr Stewart referred to only two documents, one being a job application form and the other

being a doctor's certificate. I have restricted my review to consideration of those documents.

"Sufficiency of search" issue

24. I explained the principles applicable to "sufficiency of search" cases in my decision in *Re Shepherd and Department of Housing, Local Government & Planning* (Information Commissioner Qld, Decision No. 94007, 18 April 1994, unreported) at paragraphs 18 and 19, where I said that 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. In the course of this review, I have established that Mr Stewart made an unsuccessful application for a position as a school crossing supervisor at the Harristown State School in 1984. In a letter dated 28 May 1984 to the then Minister for Transport, Mr Stewart complained about his failure to be appointed, and a number of documents were created within the Department and the Minister's Office as a result. Copies of documents located as a result of searches by Departmental officers were forwarded to Mr Stewart with Ms Leven's letter of 1 September 1993.

26. An examination of these documents reveals the following:

Mr Stewart's application was reviewed by the Harristown State School Parents and Citizens Association (the P&C Association) and was ranked seventh on the list of applicants.

On 11 April 1984, the top three applicants were selected by the P&C Association as permanent school crossing supervisors, together with the fourth ranked applicant as a relief crossing supervisor.

The applicants chosen by the P&C Association were referred to the Harristown State School Principal for his confirmation.

After receiving the Principal's confirmation, the successful applicants' application forms were forwarded to the Department.

Application forms and doctors' certificates concerning unsuccessful applicants (which included Mr Stewart) were not forwarded to the Department but were held on the Harristown State School file.

27. It therefore appears clear that, in the normal course of events, no documents relating to Mr Stewart's unsuccessful job application would have come into the possession of the Department. This is further confirmed by inquiries made of the Community Programs section of the Department, which indicated that it only received copies of the applications of successful applicants. The application forms lodged by unsuccessful applicants would have been retained at the Harristown State School, which falls under the control of the Department of Education.

28. One must ask, however, whether the fact that Mr Stewart complained to the Minister for Transport about his failure to be appointed would have led to a copy of his job application being provided to the Department. Having reviewed the documents which the Department has located relating to Mr Stewart's complaint (copies of which have been provided to Mr Stewart), I consider that they do not give rise to any reason to believe that Mr Stewart's job application was ever provided to the Department in order to respond to the complaint.
29. The complaint by Mr Stewart to the Minister was made by a letter dated 28 May 1984. A letter acknowledging the complaint was sent on 15 June 1984, the day on which a letter was sent to the Principal of the school seeking a response from the P&C Association. The Principal subsequently forwarded to the Department by a letter dated 22 June 1994 a two page reply from the President of the P&C Association. On 10 August 1994, on the basis of that reply, a letter was sent by the Minister to Mr Stewart advising that the Minister proposed to take no further action in respect of the matter. There is no suggestion that the matter went beyond this point. It is clear that no-one handling the matter within the Minister's office, or the Department, considered that it was necessary to obtain a copy of Mr Stewart's job application in order to deal with his complaint.
30. Extensive searches by officers of the Department at the Road Safety Office in its Harristown Client Service Centre in Toowoomba, and the Community Programs and Registry sections of the Department at Spring Hill, have failed to locate the job application or any related medical certificate. While it appears clear that a job application existed, I do not consider that there are reasonable grounds to believe that the job application, or any related medical certificate, were ever documents of the respondent agency, within the terms of the definition of "document of the agency" in s.7 of the FOI Act.
31. Mr Stewart has relied on a letter from the Education Department dated 1 July 1993 (see paragraph 4 above) as proof that the Department of Transport must have his job application. If his job application had been successful, the advice he received from the Department of Education would have been correct, at least to the extent that the Department of Transport would normally have held the successful job applications at some stage. However, Mr Stewart's job application was unsuccessful and it appears that the advice offered by the officer of the Department of Education was mistaken. While it was reasonable, at the time he received it, for Mr Stewart to act on that advice, it is clear to me now that the advice which Mr Stewart received from the Department of Education does not prove the existence of a particular document, or that a particular document is held by the respondent.
32. Finally, I note that in an effort to resolve the matter to Mr Stewart's satisfaction, a member of my staff made inquiries of the current Principal of the Harristown State School, who agreed to search for any files that might be held by the school on unsuccessful applicants for positions as school crossing supervisor. Searches caused to be made by the Principal revealed copies of unsuccessful applications dating back only to 1989. The Principal indicated that he had not been at the school before this time, but he was aware that the filing organisation of the school had changed substantially at about that time, and that some out-of-date records had been discarded in the course of this reorganisation. He could only surmise that applications prior to that date had been destroyed. He confirmed that he found no job application from Mr Stewart.

Conclusion

33. I am satisfied that the respondent has given the applicant access to all documents in its possession or control which fall within the terms of the applicant's FOI access application dated 5 July 1993 (or within the terms of the passage from the applicant's letter dated 12 September 1993 to the

respondent, which is set out at paragraph 8 of my reasons for decision), and on that basis I affirm the respondent's (deemed) decision under review.

F N ALBIETZ
INFORMATION COMMISSIONER