Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	***O96 and Ergon Energy Queensland Pty Ltd* [2019] QICmr 32 (26 August 2019)**
Application Number:	**314303**
Applicant:	**O96**
Respondent:	**Ergon Energy Queensland Pty Ltd (ABN 11 121 177 802)**
Decision Date:	**26 August 2019**
Catchwords:	**ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL TO PROCESS APPLICATION FOR NON-PAYMENT OF APPLICATION FEE - application for non-personal information - application not accompanied by application fee - whether application valid - section 24 and section 33 of the *Right to Information Act 2009* (Qld)**

REASONS FOR DECISION

Summary

1. The applicant applied to Ergon Energy Queensland Pty Ltd (**Ergon**) for access to billing information relating to a neighbouring property.[1]

2. By letter dated 29 August 2018, Ergon sought to clarify certain aspects of the applicant's request. It advised the applicant that if he was seeking access to his personal information or was seeking access on another person's behalf, his application would be processed under the *Information Privacy Act 2009* (Qld) (**IP Act**) for which no application fee was payable, but evidence of identity was required. If he was seeking to obtain access to information that was not his personal information, his request would be processed under the *Right to Information Act 2009* (Qld) (**RTI Act**) which attracted an application fee of $49.70.[2] Ergon noted that the applicant had indicated in his application form that he was not applying for documents that contained his personal information.[3] It asked the applicant to confirm whether or not he wished to proceed with his application by contacting its accounts team to pay the application fee.

3. The applicant responded by letter dated 7 September 2018[4] in which he referred to the RTI Act's pro-disclosure bias and to the fact that government is under an obligation to proactively push information into the public domain rather than requiring formal access applications to be made. The applicant considered this meant that Ergon should 'dispense with formalities' and promptly release the information he sought. In respect of

[1] Application dated 8 August 2018 and received by Ergon on 20 August 2018.
[2] Ergon also advised the applicant that the RTI Act only applied to Ergon in relation to requests for information about its community service obligations pursuant to section 32(1)(b) and schedule 2, part 2, item 14 of the RTI Act.
[3] The applicant had ticked the box that stated that none of the documents he was applying for contained his personal information, but then added, in a handwritten notation, *'i.e., as far as I know of'*.
[4] Received by Ergon on 13 September 2018.

payment of an application fee, he considered that Ergon had failed to properly consult with him as required under section 33 of the RTI Act and he sought a written statement of reasons under the *Judicial Review Act 1991* (Qld).

4. By letter dated 21 September 2018, Ergon advised the applicant that his application sought access to non-personal information and was therefore made under the RTI Act. Ergon stated it considered his application was invalid because it was not accompanied by payment of an application fee and that Ergon was therefore considering refusing to process it. Ergon noted that, under section 33 of the RTI Act, it must not refuse to deal with an application without consulting with the applicant and giving the applicant an opportunity to make a compliant application. Ergon invited the applicant to contact its accounts team to pay the application fee.

5. The applicant responded by letter dated 25 September 2018[5] complaining that Ergon's letter dated 21 September 2018 did not comply with section 33 of the RTI Act because it was not issued within the requisite 15 day time period. He stated that he regarded Ergon's letter dated 21 September 2018 as 'dismissed', and that he required it to be 'removed from the record'. He requested a prompt, full and comprehensive written statement of reasons in response to his letter dated 7 September 2018.

6. By letter dated 16 November 2018, and pursuant to section 33(6) of the RTI Act, Ergon advised the applicant that it had decided that his application was not valid because it did not comply with all relevant application requirements (specifically, payment of the application fee required under section 24(2)(a)), and that it therefore refused to process it.

7. By letter dated 23 November 2018,[6] the applicant applied to this Office (**OIC**) for external review of Ergon's decision.

8. I am satisfied from the terms of the purported access application that the applicant sought access to information that was not his personal information within the meaning of section 12 of the IP Act, and that his application was therefore required to be made under the RTI Act. For the reasons given below, I affirm Ergon's decision made under section 33(6) of the RTI Act that the applicant's purported application does not comply with the relevant application requirement contained in section 24(2)(a) of the RTI Act in that he did not pay the application fee required under section 24(2)(a) and prescribed by section 4 of the *Right to Information Regulation 2009* (Qld) (**RTI Regulation**). Ergon was therefore not required to process the applicant's access request.

Reviewable decision

9. The decision under review is Ergon's decision dated 16 November 2018 made under section 33(6) of the RTI Act that the applicant's access request dated 8 August 2018 did not comply with all relevant application requirements.

Evidence considered

10. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and the appendix).

[5] Received by Ergon on 11 October 2018.
[6] Received on 27 November 2018.

11. The applicant has made multiple, lengthy, handwritten submissions during the review.[7] Those submissions are sometimes difficult to understand, and often discuss matters that are not relevant to the issue for determination. The applicant has complained throughout the review process that neither Ergon nor OIC has properly taken his submissions into account. I will summarise and respond to the applicant's submissions further below.

Issue for determination

12. The applicant does not dispute that his application seeks access to information that is not his personal information and is therefore made under the RTI Act. The only issue for determination, therefore, is whether the applicant's purported application is invalid because it does not comply with a relevant application requirement under section 24(2)(a) of the RTI Act, namely, payment of the prescribed application fee.

Relevant law

13. Section 24 of the RTI Act relevantly provides:

> ***24 Making access application***
>
> *(1) A person who wishes to be given access to a document of an agency or a document of a Minister under this Act may apply to the agency or Minister for access to the document.*
>
> *(2) The application **must** –*
>
> *(a) **be in the approved form and be accompanied by the application fee**; and*
> *(b) give sufficient information concerning the document to enable a responsible officer of the agency or the Minister to identify the document; and*
> *(c) state an address to which notices under this Act may be sent to the applicant; and*
> *(d) state whether access to the document is sought for the benefit of, or use of the document by –*
> *(i) the applicant; or*
> *(ii) another entity; and*
> *(e) if access to the document is sought for the benefit of, or use of the document by, an entity other than the applicant – the name of the other entity.*
>
> *(3) …*
>
> *(4) **The application fee mentioned in subsection (2)(a) may not be waived.***
>
> *(5) … .*
>
> [emphasis added]

14. Section 33 of the RTI Act provides:

> ***33 Noncompliance with application requirement***
>
> *(1) This section applies if –*
> *(a) a person purports to make an access application for a document to an agency or Minister; and*
> *(b) the application does not comply with all relevant application requirements.*

[7] Dated 27 November 2018, 4 January 2019, 28 February 2019, and 2 May 2019.

> *(2) The agency must make reasonable efforts to contact the person within 15 business days after the purported application is received and inform the person how the application does not comply with a relevant application requirement.*
>
> *(3) An agency or Minister must not refuse to deal with an application because it does not comply with all relevant application requirements without first giving the applicant a reasonable opportunity to consult with a view to making an application in a form complying with all relevant application requirements.*
>
> *(4) The applicant is taken to have made an application under this Act if and when the application is made in a form complying with all relevant requirements.*
>
> *(5) …*
>
> *(6) If, after giving the opportunity mentioned in subsection (3) and any consultation, an agency or Minister decides the application does not comply with all relevant application requirements, the agency or Minister must, within 10 business days after making the decision, give the applicant prescribed written notice of the decision.*
>
> *(7) In this section –*
>
> ***relevant application requirement**, for an access application, means a matter set out in section 24(2) or (3) that is required for the application.*

The applicant's submissions

15. In the interest of brevity, and as best as I am able to distil them from his voluminous submissions, the applicant's arguments can be summarised as follows:

    (a) Ergon failed to comply with the requirements of section 33 of the RTI Act and is therefore estopped from making a decision under section 33
    (b) the applicant holds a reasonable apprehension of bias because the Assistant Information Commissioner expressed a preliminary view during the course of the review that Ergon's decision was correct; and because he regarded the Assistant Information Commissioner's preliminary advice – that a formal decision that named him would be required if the matter was unable to resolved informally – as a threat
    (c) the previous *Freedom of Information Act 1992* (Qld) (repealed) (**repealed FOI Act**) had the objective of providing access to information at little or no cost, and this, together with the fact that the IP Act does not require payment of an application fee, as well as the proper application of the purposive test in statutory interpretation, means that Parliament's attempt to impose a mandatory requirement to pay a fee under the RTI Act is an *'impermissible abuse of legislative power'* and contrary to the *'true spirit of the purposes of the overall legislative scheme*'[8]
    (d) the failure to pay an application fee does not invalidate an application: *a would-be applicant, who has made some attempt to lodge a request in writing under the Act, is taken to be an applicant, in fact, with an application … so lodged*[9]
    (e) the processing period under section 18 of the RTI Act was enlivened when Ergon received his access application and Ergon should be taken to have made a deemed decision under section 46 refusing access: therefore, the decision to be reviewed by OIC is a deemed refusal of access
    (f) the matter can be resolved outside the formal processes of the RTI Act; and

[8] Applicant's letter to Ergon dated 8 August 2018.
[9] Applicant's letter dated 28 February 2019.

(g) OIC has failed to pay regard to the 'pro-disclosure bias' principle in the RTI Act.

Discussion

16. I will respond in turn to each of the submissions above.

(a) Section 33 of the RTI Act

17. Section 33 is set out above.

18. I consider that Ergon's letter to the applicant dated 29 August 2018 complied with section 33(2) of the RTI Act in that it advised the applicant within 15 days of the receipt of his purported application that a request to access to non-personal information required payment of a $49.70 application fee. Ergon invited the applicant to contact its accounts division to pay the fee if he wished to proceed. I do not accept the applicant's contention that the letter was invalid because it did not state that it was being provided under section 33. There is no such requirement in section 33(2). The provision simply states that an agency must make reasonable efforts to contact the relevant person within 15 days after receipt of the access request to inform them how the application does not comply with a relevant application requirement.

19. Ergon's letter dated 21 September 2018 complied with section 33(3) of the RTI Act in that it informed the applicant that it had formed the view that his request was a request for access to non-personal information made under the RTI Act and was not valid because it was not accompanied by payment of the application fee as required by section 24(2) of the RTI Act. The letter cited section 33(3) and stated that Ergon could not refuse to deal with the applicant's application until it had given him a reasonable opportunity to consult with it with a view to making a compliant application. Ergon invited the applicant to contact its accounts team to pay the application fee in order to make his application compliant, and to otherwise contact its Corporate Governance Manager if he had any questions or required further information.

20. The applicant responded by letter dated 25 September 2018, but did not pay the application fee. Ergon proceeded to give a decision under section 33(6) of the RTI Act that the purported application did not comply with all relevant application requirements. There is nothing before me to establish that Ergon did not give written notice of that decision within 10 business days after making it.

21. I am therefore satisfied that Ergon complied with the requirements of section 33. The applicant was clearly consulted about the ground upon which Ergon considered his application was non-compliant and was given an opportunity to make the application in a compliant form.

22. The applicant complains that Ergon failed to respond to him on the points he raised in his letter dated 25 September 2018 before giving its decision. He regards this as a failure to properly 'consult' with him within the meaning of section 33(3). I do not accept this.

23. As I have noted, the applicant's submissions are convoluted and often difficult to follow. He raised a wide range of issues in his correspondence with Ergon, including a lengthy discussion about the requirements of section 33, the principles of statutory interpretation, as well as the 'push model' of releasing information without the need for a formal application, and the RTI Act's pro-disclosure bias. He has made many of the same submissions in his correspondence with OIC.

24. I do not accept that Ergon's failure to discuss the issues raised in the applicant's letter dated 25 September 2018 constitutes a failure to consult within the meaning of section 33. Section 33(3) provides that an agency is to provide a reasonable opportunity to consult. Given that the applicant's letter did not raise new relevant matters that were not discussed in his 7 September 2018 letter, I do not consider that there was any requirement on Ergon to continue consulting with him about the issues raised. In my view, it was not unreasonable for Ergon to regard the matters raised by the applicant as irrelevant to the only issue it had to determine, namely, whether the application complied with all relevant application requirements in section 24 such as to make it a valid application.

25. In any event, to the extent that an agency makes a procedural error when dealing with an application, or fails to take into account relevant considerations (I do not find that either occurred in this case), any such issues can be rectified on external review, where the Information Commissioner 'stands in the shoes' of the agency decision-maker and conducts a merits review of the agency's decision. Where an applicant considers that an agency's handling of their request has caused them unfairness or some other detriment, the external review process provides an opportunity to put forward arguments in support of their position.

(b) Bias

26. I reject the applicant's contention that any reasonable apprehension of bias arises from the way in which OIC has handled this review.

27. OIC is an independent statutory body that conducts merits reviews of government decisions on access to, and amendment of, documents. The procedure to be followed on external review is, subject to the RTI Act, within the discretion of the Information Commissioner.

28. OIC's ordinary practice in the majority of external reviews is to review the agency's decision, and the information in issue, together with any relevant information the participants have provided to date, and to identify the issues for determination. OIC often expresses a preliminary view to the relevant participant, based on the information before it at that time. Where the preliminary view is contrary to the agency's decision, it is communicated to the agency. Where it is contrary to the applicant's position, it is communicated to the applicant. Such a preliminary view is genuinely preliminary. It is an assessment of the issues based on the information before OIC at the time. It offers an adversely affected party an opportunity to understand the issues under consideration and to put forward any further information they consider relevant or wish to have considered.

29. I reject the applicant's assertion that the fact that the Assistant Information Commissioner's preliminary view was supportive of Ergon somehow indicates a level of bias against him, or that OIC is unfairly siding with Ergon. The applicant has been given a fair and reasonable opportunity to understand the issue for determination in this review and to make submissions in support of his case.

30. I also reject the suggestion that OIC's advice to the applicant that, in the event of the review being unable to be resolved informally, a formal published decision that named him as applicant would be required in order to finalise the review, should reasonably be construed as a 'threat' against him. In his letter dated 2 May 2019, the applicant stated:

> *Now, sort of further, to that, I note how you've gone on – under the heading of "next steps" – in your letter, noting that, while my applications and following up correspondence (herein)*

> *has all been marked as confidential material, and proposing then, that if I would insist upon, a formal decision, being made (i.e. the actual exercise of a discretion – under the Act – or I suppose you mean – by that turn of phrase), then the office there, would be minded to publish, a bit of a selection of my submissions herein (along with my name) on the OIC's website, and, well, I'm – obviously – not looking for fame (herein) of course, so what concerns me, immediately – like, as to that sort of proposed method of proceeding, is that … well, it must be said, to the effect of that, it might just appear, in light of all the circumstances, almost like, some kind of a veiled threat, I mean, you know, like, "Pull your head in – quietly – now, or we'll publish (as they say)", and, be that as it may, well, I'm wondering if, that kind of thing, might not be seen – so much – to contribute further to the appearance of bias – distinctly (like) – seems to have arisen already (herein) but anyhow, whilst I realise that, your office, is expressly not subject to the privacy law – in performing its operations – itself, and what is more, given your past performance – in this matter (i.e., persistently only selecting some of what I've said – in order to mount an attack – without due consideration for all of the relevant considerations I've put down), well, please, let me just put it this way – i.e. without waiver (or any prejudice to myself whatsoever) (for, e.g. the Commissioner would certainly have a discretion to merely use pseudonyms), and that is to say that, if the office there, decides to publish, publicly a decision, against me (or purportedly so made then), in this matter, then that will be, your office's decision, alone, and I shall not accept any responsibility, for your having done that, and that is, if I – or any other for that matter – find – or finds (as the case may be) - what your office so publishes then, to give rise to, any cause of action (e.g. for defamation – or damages more generally – or what-have-you – or whatever) then your office itself (alone) will wholly and solely bear the entirety of the legal liability for that then).*
>
> *Like I say though, I hold to, all of the submissions I've made, thus far, herein, and in view of same, advise that, I would only continue to insist that, your office, return to a more due process in its purporting to handle this matter, and thereby, facilitate a proper exercise of discretion under the Act, which of course, would appear to only compellingly call for a decision in my favour – or in accordance with the very logic of my said submissions that is, which ought to only follow, and be communicated to myself (in writing), forthwith.*

31. Section 90 of the RTI Act provides that the Information Commissioner must identify opportunities and processes for early resolution of the review application and promote settlement of the application. Where that is not possible or is unsuccessful, section 110(1) provides that the Information Commissioner must make a written decision that affirms, varies or sets aside the decision. Section 110(3) provides that the Information Commissioner must include in the decision the reasons for the decision. Section 110(6) provides that the Information Commissioner must arrange to have the decision and reasons for decision published. OIC fulfils this obligation by publishing decisions on its website.

32. All applicants are informed of these processes at the time OIC writes to them accepting their application for review.[10] Applicants are advised that formal decisions contain the names of the parties unless the Information Commissioner exercises the discretion to de-identify a decision, as well as the facts relied upon, details of the relevant law, details of submissions made by the participants, and reasons for the decision.

33. I do not accept that the statutory requirement to publish a decision could in any way be regarded as a threat or some form of intimidation designed to force an applicant to withdraw his application. The Information Commissioner has a discretion to anonymise a decision in limited circumstances, most usually when the decision contains sensitive personal information about the applicant or where naming the applicant could reasonably be expected to enable others to identify that information that has been published elsewhere is the applicant's personal information. Given the submissions the applicant has made in this review about the state of his financial position, together with the fact

[10] OIC Information Sheet: *Information Sheet for Applicants.*

that other decisions concerning the applicant are required to be anonymised because they contain sensitive personal information, I have elected to exercise the discretion to anonymise this decision.

34. Throughout this review, the applicant has labelled his correspondence as 'Confidential', or 'Personal, Private and Confidential'. It has been explained to him on several occasions that OIC is unable to accept submissions on a confidential basis from any participant in a review, except in exceptional circumstances, because of the obligation upon OIC to afford procedural fairness to participants and to provide reasons for its decisions. I am unable to identify any extraordinary circumstances in this case. The issue for determination relates to a threshold processing issue under the RTI Act. I am also unable to identify how discussing the submissions the applicant has made in support of his case in this review could possibly give rise to an action for defamation or unspecified damages or any other legal action. I acknowledge the applicant's genuinely-held views made in his submissions over the course of the review, but I must reiterate that the issue for determination is purely mechanical in nature, and not, of itself, personal or sensitive.

(c) Intent of legislative scheme

35. I accept that the repealed FOI Act had, as an objective, the provision of information at little or no cost. However, it required the payment of an application fee where the document applied for did not concern the applicant's personal affairs.[11] That application fee could not be waived.[12] The same scheme has continued in the RTI Act and IP Act. The RTI Act includes a detailed and prescriptive scheme of costs for accessing information. An application fee must be paid where the information applied for is not the applicant's personal information, and that requirement cannot be waived by an agency. Applications for personal information under the IP Act attract no application fee and there are no charges for processing the application.

36. I reject the applicant's assertion that Parliament's attempt to impose a mandatory requirement to pay a fee under the RTI Act is an *'impermissible abuse of legislative power'* and contrary to the *'true spirit of the purposes of the overall legislative scheme'*. From the inception of freedom of information legislation in Queensland, Parliament has drawn a clear distinction between accessing personal and non-personal information. It has evinced a clear intention both in the repealed FOI Act, and in the plain and unambiguous words used in section 24(2)(a) of the RTI Act (as set out above) that persons wishing to access non-personal information must pay an application fee. Furthermore, it expressly provided under section 24(4) of the RTI Act that the requirement to pay the fee cannot be waived.

37. I also reject the applicant's submission that the purposive approach to statutory interpretation means that 'must' in section 24(2) should be read down to 'may' in order to accord with the *'overarching legislative scheme'*. As I have noted, the clear intention of the legislative scheme enacted by Parliament is to distinguish between applications for personal and non-personal information, and to impose a mandatory requirement to pay an application fee in relation to the latter.

38. While there may be occasions where it is appropriate in specific legislative provisions to interpret 'must' as 'may', I do not consider that section 24(2)(a) is such an occasion. As noted, the RTI charging regime is clearly prescribed in the RTI Act and the RTI Regulation. Parliament's intention to impose a mandatory requirement to pay an application fee is clearly expressed. There is no ambiguity or uncertainty such as to

[11] Section 35B.
[12] Section 35C(1).

justify the applicant's contention that the fee was intended to be discretionary and to therefore read 'must' as 'may'. The fact that Parliament made specific provision that the fee could not be waived is a clear indication to the contrary. The mandatory nature of the provision is consistent with the Explanatory Notes[13] and historical developments in FOI/RTI legislation in Queensland.

39. In his submission dated 2 May 2019, the applicant referred to his impecunious position and what he regarded as a lack of empathy being shown towards him. The RTI Act takes account of an applicant's financial position and whether they are suffering financial hardship only in respect of payment of processing or access charges. Chapter 3, part 6, division 3 makes provision for an agency to waive payment of processing or access charges where an applicant is the holder of a relevant concession card. However, as I have noted, section 24(4) specifically provides that an application fee may not be waived. While I acknowledge the applicant's position, the state of an applicant's finances is irrelevant to the mandatory requirement to pay the application fee.

(d) Application not invalid

40. Failure to comply with one or more of the application requirements contained in section 33 of the RTI Act means that no application has been made. Section 33(4) provides that an applicant is taken to have made an application under the RTI Act **if and when** the application is made in a form complying with all relevant application requirements. This includes payment of an application fee for a non-personal application.

41. As the applicant did not pay the application fee, he did not make a valid application. I reject his submission that failure to pay the fee did not invalidate the application. Such an interpretation would be contrary to the clear terms of section 33(4).

(e) Deemed refusal of access

42. It follows from my findings immediately above that I do not accept that Ergon is deemed to have made a decision refusing access. Section 46 of the RTI Act is enlivened only when a valid access application had been made. As the applicant did not make a valid application, section 46 has no relevance.

(f) Informal resolution

43. Section 90 of the RTI Act provides that the Information Commissioner must identify opportunities and processes for early resolution of the review application and promote settlement of the application.

44. OIC endeavours to identify ways to informally resolve reviews wherever possible. However, we were unable to identify any options for informal resolution of this review. The review concerns only the threshold matter of when an application fee is required to be paid. No documents are in issue as Ergon did not process the applicant's request, having determined it was not valid. In those circumstances, informal resolution of the review application is not possible.

45. An agency has a discretion to give a person administrative access to documents, outside the scope of the RTI Act. Section 4 of the RTI Act provides that the RTI Act is not intended to prevent or discourage the publication of information or the giving of access to documents otherwise than under the RTI Act if the publication or giving of access can properly be done or is permitted or required to be done by law. However, where the

[13] See the *Right to Information Bill 2009* (Qld).

information sought is the personal information of someone other than the applicant, administrative access is often not appropriate due to the likely need to consult with affected persons. In any event, the discretion is solely the agency's to exercise. Ergon has chosen not to exercise it in this case.

(g) Pro-disclosure bias

46. Section 44(1) of the RTI Act provides that it is Parliament's intention that if an access application is made to an agency for a document, the agency should decide to give access to the document unless giving access would, on balance, be contrary to the public interest.

47. Section 44 concerns the decision-maker's considerations for deciding access to documents. This provision is only relevant once the agency is dealing with a compliant application. As no compliant application has been made, section 44(1) has no relevance.

Decision

48. I affirm Ergon's decision made under section 33(6) of the RTI Act that the applicant has not made a valid access application under the RTI Act because he has failed to comply with the relevant application requirement set out in section 24(2)(a) of the RTI Act, namely, payment of the prescribed application fee. Ergon was therefore not required to deal with the applicant's request.

49. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Louisa Lynch
Right to Information Commissioner

Date: 26 August 2019

APPENDIX

Significant procedural steps

Date	Event
27 November 2018	OIC received the applicant's external review application dated 23 November 2018 and accompanying submissions.
28 November 2018	OIC notified the applicant and Ergon that the external review application had been received and requested procedural documents from Ergon.
5 December 2018	OIC received the procedural documents from Ergon.
18 January 2019	OIC wrote to the applicant to provide a progress update.
7 February 2019	OIC received submissions from the applicant dated 4 January 2019.
26 February 2019	OIC notified Ergon that the application for external review had been accepted. OIC wrote to the applicant, advising him of the same, and also communicating the preliminary view that Ergon was entitled to refuse to deal with his access application for non-payment of the application fee.
4 March 2019	OIC received submissions from the applicant dated 28 February 2019.
30 April 2019	OIC responded to the applicant's submissions.
7 May 2019	OIC received final submissions from the applicant dated 2 May 2019.