

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 220 of 1993
(Decision No. 94019)

Participants:

DR STEVEN JOHN ROBBINS
Applicant

- and -

BRISBANE NORTH REGIONAL HEALTH AUTHORITY
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - deemed refusal of access to requested documents pursuant to s.79(1) of the *Freedom of Information Act 1992 Qld* - respondent subsequently agreeing to give access to requested documents - applicant dissatisfied with extent of access given - two further documents discovered and access given - applicant's attempt to unilaterally expand the scope of the initial FOI access application not permitted.

Freedom of Information Act 1992 Qld s.25(2), s.27(4), s.27(4)(b), s.27(7), s.27(7)(b), s.51, s.52, s.71(1)(b), s.73(3), s.79, s.79(1), s.89(1)

Cannon and Australian Quality Egg Farms Limited, Re (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported)

Pope and Queensland Health, Re (Information Commissioner Qld, Decision No. 94016, 18 July 1994, unreported)

DECISION

1. The decision under review (being the respondent's deemed refusal of access, pursuant to s.79(1) of the *Freedom of Information Act 1992 Qld*, to documents requested in the applicant's FOI access application dated 8 October 1993) is set aside.
2. In substitution for it, I decide that the applicant may be given access under the *Freedom of Information Act 1992 Qld* to all documents which fall within the terms of his FOI access application dated 8 October 1993 and I am satisfied that those documents consist of the 16 pages attached to the letter of 8 December 1993 from the respondent to the applicant, plus the two letters from Dr Pope to the National Health and Medical Research Council dated 28 April 1993 and 1 June 1993 which are referred to in the fourth paragraph of the Deputy Information Commissioner's letter to the applicant dated 12 January 1994.

Date of Decision: 19 August 1994

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F N ALBIETZ
INFORMATION COMMISSIONER

Participants:

DR STEVEN JOHN ROBBINS
Applicant

- and -

BRISBANE NORTH REGIONAL HEALTH AUTHORITY
Respondent

REASONS FOR DECISION

1. Dr Robbins applied to me by letter dated 29 November 1993 for external review of a "deemed refusal" of access by the Brisbane North Regional Health Authority (the Authority) to documents which Dr Robbins had requested in an FOI access application dated 8 October 1993, but to which he had received no response.
2. Section 79(1) of the *Freedom of Information Act 1992 Qld* (the FOI Act) relevantly provides as follows:

79.(1) Subject to this section, if -

- (a) an application has been made to an agency or Minister under this Act; and*
- (b) the time period provided in section 20(2), 27(4) or 57 has ended; and*
- (c) notice of a decision on the application has not been received by the applicant;*

the principal officer of the agency or the Minister is, for the purpose of enabling an application to be made to the Commissioner under section 73, taken to have made a decision on the last day of the relevant time period refusing -

- (d) ...*
- (e) to grant access to the document; or*
- (f) ...*

3. Essentially, s.79(1) provides that if the time limit specified by s.27(4) of the FOI Act for responding to an FOI access application has expired without the applicant receiving notice of a decision, then the principal officer of the agency concerned is taken to have made a decision refusing access. A decision of a principal officer refusing access to a document is a decision which I have jurisdiction to investigate and review pursuant to s.71(1)(b) of the FOI Act. The significance of providing that the deemed refusal of access is taken to have been made by the principal officer of the agency concerned is that it permits an application for review to be made direct to the Information Commissioner, i.e., without first making an application for internal review under s.52 of the FOI Act (*cf.* s.73(3) of the FOI Act).

4. Section 27(4) and s.27(7) provide as follows:

27.(4) If the agency or Minister fails to decide an application and notify the applicant under section 34 within -

- (a) the appropriate period; or*
- (b) if action is required under section 51 in relation to the application - a period equal to the appropriate period plus 15 days;*

the agency or Minister is taken to have refused access to the document to which the application relates at the end of the period.

27.(7) In this section -

"appropriate period" means -

- (a) in relation to an application to an agency or Minister for a document that -*
 - (i) came into existence more than 5 years before the commencement of this Part; and*
 - (ii) does not concern the personal affairs of the applicant;*
- 60 days after the application is received by the agency or Minister;*
- or*
- (b) in relation to any other application - 45 days after the application is received by the agency or Minister.*

5. Accompanying his application for external review, Dr Robbins enclosed a copy of his FOI access application, dated 8 October 1993, the relevant portion of which is as follows:

Citing the Freedom of Information Act, I am writing to request all copies of correspondence concerning me and/or my research activities and/or the administration of research projects funded by the National Health and Medical Research Council (NH&MRC) which name me as Chief Investigator and which have been sent to the NH&MRC, its officers or representatives by (1) Dr C B Campbell, Regional Director of the [respondent], or (2) Dr J H Pope, Director of the Sir Albert Sakzewski Virus Research Centre of the Royal Children's Hospital during the period of 18 September 1989 to present.

6. Dr Robbins' application for external review was lodged some 47 days after his FOI access application was received by the Authority on 13 October 1993. This is outside the basic time limit of 45 days specified in the FOI Act for responding to an FOI access application (see s.27(7)(b) of the FOI Act), but in order to determine whether I had jurisdiction to conduct an external review, I considered it prudent to inquire of the Authority whether it had undertaken consultations under s.51 of the FOI Act, which would have extended the time limit to 60 days (see s.27(4)(b) of the FOI Act).

7. A member of my staff contacted the Authority's FOI Co-ordinator, Mr B Evans, on 2 December 1993. Mr Evans apologised for the delay in processing Dr Robbins' FOI access application which he said had been caused by difficulties in obtaining relevant files. He said he had obtained those files and would examine them to extract the requested documents and decide whether any claims of exemption should be made. At that time, it appeared that if consultation was required in accordance with s.51 of the FOI Act, and it could be undertaken and a decision made before the expiry of 60 days, i.e. by 13 December 1993, the Authority would still be within the statutory time limit for responding to Dr Robbins' FOI access application. That would mean that Dr Robbins was not entitled to make an application to the Information Commissioner based on a deemed refusal of access under s.79 of the FOI Act, and the Information Commissioner would lack jurisdiction accordingly. On the other hand, if consultation under s.51 was not required, Dr Robbins' application for review was valid, enlivening the Information Commissioner's jurisdiction under s.79 (and Part 5 generally) of the FOI Act, and rendering the Authority *functus officio*. Since, even on the latter scenario, the Authority would be required to indicate its position on the documents in issue, Mr Evans was requested to complete his examination of the relevant files and inform my office of the Authority's position.
8. The Authority had determined by 7 December 1993 that it was prepared to give Dr Robbins access to all requested documents, and that consultation under s.51 of the FOI Act was not necessary. The Authority accepted that Dr Robbins' application for review was valid, therefore vesting jurisdiction in the Information Commissioner, and sought instruction from my office as to how it should proceed. The Authority was authorised to give Dr Robbins access to the requested documents. This it did by a letter to Dr Robbins dated 8 December 1993. That letter indicated that Mr Evans had identified a total of 16 pages which fell within the terms of Dr Robbins' FOI access application, and access under the FOI Act was given by forwarding copies of those pages as attachments to the letter of 8 December 1993.
9. Subsequently, on 20 December 1993, the Deputy Information Commissioner wrote to Dr Robbins noting the contents of the letter of 8 December 1993 by which the Authority had given to Dr Robbins access to requested documents. Given the response of the Authority, Dr Robbins was asked to indicate whether he was satisfied with that response, and if so, whether he wished to withdraw his application for external review.
10. Dr Robbins replied by letter dated 28 December 1993. In that letter, Dr Robbins indicated that following telephone conversations with officers of the Administrative Law and Litigation Branch of the National Health and Medical Research Council (the NH&MRC), it was clear to him that he had not been provided with items of correspondence requested in his FOI access application. He identified these as:
 - (1) *Correspondence sent to the NH&MRC from a third officer of the BNRHA [the Brisbane North Regional Health Authority] and SASVRC [Sir Albert Sakzewski Virus Research Centre], Dr Karen Trenfield (an officer employed on my NH&MRC research grant and covered in my request as "all correspondence ... from any representative from these two agencies [BNRHA or SASVRC]").*
 - (2) *Copies of correspondence sent by Dr J H Pope to the NH&MRC Secretariat (referred to in page 10 of the documentation provided by Mr Evans).*
- 11... Dr Robbins indicated that he was not satisfied with the response that he had received from the Authority and wished to have his application for external review processed accordingly.

12. Dr Robbins' letter of 28 December 1993 was forwarded to the Authority for response. Mr Evans responded on behalf of the Authority by letter dated 11 January 1994. Mr Evans responded to the two issues raised in Dr Robbins' letter of 28 December 1993 as follows:

- (a) as to the question of correspondence sent to the NH&MRC by Dr Karen Trenfield, Mr Evans referred to the precise terms of Dr Robbins' FOI access application (set out above at paragraph 5) which requested correspondence sent to the NH&MRC by either Dr Campbell or Dr Pope, and which made no mention of Dr Trenfield, nor of "any representative from these two agencies [BNRHA or SASVRC]"; and
- (b) concerning the correspondence which Dr Robbins contended had not been provided to him (as referred to on page 10 of the documents which were provided to him) Mr Evans indicated that he had contacted Dr Pope, who advised that he had forwarded three letters (dated 18 March, 28 April and 1 June 1993) and a facsimile transmission (dated 6 October 1993) to the NH&MRC concerning Dr Robbins. Mr Evans indicated that he had been unable to locate two of those four documents in his earlier examination of the Authority's files. However, he had been provided with copies of those documents by Dr Pope. Having examined them, he noted that Dr Pope's letter to the NH&MRC dated 18 March 1993 and the facsimile transmission of 1 October 1993 had previously been forwarded to Dr Robbins under cover of the Authority's letter dated 8 December 1993. He advised that the Authority was also prepared to give Dr Robbins access to the other two documents, i.e. Dr Pope's letters to the NH&MRC dated 28 April 1993 and 1 June 1993.

13. On 12 January 1994, the Deputy Information Commissioner forwarded a letter to Dr Robbins (which also enclosed the Authority's response dated 11 January 1994) in the following terms:

In response to one of the matters raised in your letter of 28 December 1993, namely, that correspondence from Dr Karen Trenfield to the National Health and Medical Research Council (NHMRC) is within the terms of your original FOI access request, the Authority contends that correspondence sent to the NHMRC from Dr Trenfield is outside the terms of your original FOI request, since the terms of your original FOI request specifically request correspondence to the NHMRC from two sources, namely Dr Campbell and Dr Pope. Based on the terms of your original FOI request, a copy of which you provided to me under cover of your letter of 29 November 1993, it is my preliminary view that the contention of the Authority is correct. The phrase you have referred to in inverted commas in the paragraph numbered (1) of your letter of 28 December 1993 does not appear in your original FOI request.

The Authority, however, has turned up two additional pieces of correspondence from Dr Pope to the NHMRC, being letters dated 28 April 1993 and 1 June 1993. The Authority is prepared to release those documents to you, and I have now authorised release by the Authority of those documents to you. I have suggested that the FOI Co-Ordinator of the Authority, Mr Bill Evans, liaise with you as to the form of access to those documents that you prefer.

Once you have had access to the two additional documents from the Authority, I request your response as to whether there is now any issue outstanding in the course of this external review. If there are now no issues outstanding, I request that you provide to me your written confirmation that you wish to withdraw your application for external review on the basis that your original FOI access request has now been satisfied.

14. No response to that letter was received from Dr Robbins, and on 22 March 1994, I forwarded a further letter to Dr Robbins (at the address for service of notices which had been nominated in his application for review dated 29 November 1993) asking him to identify and explain the nature of any issues arising from his application for external review which he considered were still to be determined. I subsequently received a letter from Dr Robbins relating to another case before me in which Dr Pope was the applicant and Dr Robbins was a third party (see *Re Pope and Queensland Health* (Information Commissioner Qld, Decision No. 94016, 18 July 1994, unreported)). That letter was forwarded from an address in the State of Kansas in the United States of America, but did not say whether Dr Robbins had moved permanently to that address. On 7 April 1994, I wrote to Dr Robbins at the Kansas, USA address, in the follows terms:

Please note that in respect of your appeal in my file reference no. S 220/93, I forwarded a letter dated 22 March 1994 to your Ashgrove post office box address. Since it appears that you were in the USA at the time that letter was forwarded, I have enclosed a further copy of it for your reference, and I would appreciate your response as soon as practicable.

Please advise me of your contact address for future correspondence.

15. Dr Robbins did not respond to that letter, and indeed no further correspondence has been received from Dr Robbins in relation to this external review (or others in which he was a participant).
16. I am satisfied (for the reasons explained in the first paragraph of the letter quoted at paragraph 13 above) that Dr Robbins in effect attempted to extend the scope of his initial FOI access application by seeking correspondence from Dr Trenfield to the NH&MRC. In *Re Cannon and Australian Quality Egg Farms Limited* (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported), at paragraph 10, I indicated that the interpretation of an FOI access application is not necessarily to be approached in the same manner as the interpretation of a statute or legal document, and in cases where the terms of an FOI access application are ambiguous it will rarely be appropriate to apply legal construction techniques in preference to consulting with the author of the words to clarify the author's intended meaning and agree upon more precise wording for the terms of the FOI access application. In this case, however, on any reasonable construction of Dr Robbins' FOI access application, it cannot be interpreted as applying to correspondence from Dr Trenfield to the NH&MRC. Dr Robbins specifically requested copies of correspondence from Dr Pope and Dr Campbell to the NH&MRC. There was no ambiguity in Dr Robbins' FOI access application that required clarification in this respect.
17. It is not possible for an applicant to unilaterally extend the terms of an FOI access application at the external review stage. The terms in which the FOI access application was framed will already have set the parameters for an agency's response under Part 3 of the FOI Act, and in particular set the direction of the agency's search efforts to locate all documents of the agency which fall within the terms of the FOI access application (see *Re Cannon* at paragraph 8). Section 25(2) provides that an FOI access application must provide such information concerning the document sought as is reasonably necessary to enable a responsible officer of the agency or the Minister to identify the document. (There would appear to be no impediment to the terms of an FOI access application being extended by agreement, and there is, of course, nothing to prevent an applicant from making a fresh application for access to matter which falls outside the scope of an earlier FOI access application.)

18. On the facts of this case, I am satisfied that:

- (a) correspondence sent by Dr Trenfield (if any) to the NH&MRC is outside the scope of Dr Robbins' FOI access application dated 8 October 1993; and
- (b) Dr Robbins has now been allowed access to all documents falling within the scope of his FOI access application dated 8 October 1993.

19. Technically, the decision which I am reviewing is the deemed refusal of the Authority to give the applicant access to the documents requested in the applicant's FOI access application dated 8 October 1993. Section 89(1) of the FOI Act provides as follows:

89.(1) The Commissioner, after conducting a review of a decision (other than a review under section 84), must make a written decision -

- (a) affirming the decision; or*
- (b) varying the decision; or*
- (c) setting aside the decision and making a decision in substitution for the decision.*

20. Accordingly, it is appropriate that I set aside the decision under review. In substitution for it, I decide that Dr Robbins may be given access under the FOI Act to all documents which fall within the terms of his FOI access application dated 8 October 1993, and I am satisfied that those documents consist of the 16 pages attached to the letter of 8 December 1993 from the Authority to Dr Robbins, plus the two letters from Dr Pope to the NH&MRC dated 28 April 1993 and 1 June 1993 which are identified in the fourth paragraph of the Deputy Information Commissioner's letter to Dr Robbins dated 12 January 1994.

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 F N ALBIETZ
INFORMATION COMMISSIONER