

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 71 of 1994
(Decision No. 95013)

Participants:

CAROLYN DAWN STEWART
Applicant

- and -

MINISTER FOR TRANSPORT
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - applicant challenging sufficiency of search by respondent for documents falling within the terms of her FOI access application - whether search efforts of respondent have been reasonable in all the circumstances - observations on the distinction between "official document of a Minister" and "document of an agency".

Freedom of Information Act 1992 Qld s.7, s.8(1), s.21, s.25, s.26, s.33(3), s.44(1)
Freedom of Information Regulation 1992 Qld s.6

Said and John Dawkins MP, Re (1993) 30 ALD 242

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

Smith and Administrative Services Department, Re (1993) 1 QAR 22

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

Carolyn Dawn Stewart and Department of Transport, Re (Information Commissioner Qld, Decision No. 95010, 15 May 1995, unreported)

Ronald Keith Stewart and Department of Transport, Re (Information Commissioner Qld, Decision No. 95007, 12 May 1995, unreported)

Ward and Secretary to the Department of Industry and Commerce, Re (Commonwealth Administrative Appeals Tribunal, No. V83/261, 21 October 1983, unreported)

DECISION

The decision under review (being the internal review decision of Mr W J Rodiger, on behalf of the respondent, dated 14 December 1993) is varied, in that I find that -

- (a) following the disclosure to the applicant of additional documents during the course of my review, I am satisfied that there are no reasonable grounds for believing that the respondent has possession or control of any documents or parts of documents, falling within the terms of the applicant's FOI access application dated 8 November 1993, to which the applicant has not been given access, except for the letter dated 12 June 1992 from Mr Ronald Stewart to the respondent referred to in (b) below; and
- (b) while there are reasonable grounds for believing that the respondent has possession or control of a letter dated 12 June 1992 from Mr Ronald Stewart to the respondent, I am satisfied that the search efforts made on behalf of the respondent, and by members of my staff, to locate that document have been reasonable in all the circumstances of the case, and that the document cannot now be located.

Date of Decision: 16 May 1995

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F N ALBIETZ
INFORMATION COMMISSIONER

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Applicant

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MINISTER FOR TRANSPORT
Respondent

REASONS FOR DECISION

Background

1. The applicant complains that the respondent has failed to locate and deal with all documents falling within the terms of her initial application for access to documents under the *Freedom of Information Act 1992 Qld* (the FOI Act).
2. By letter dated 8 November 1993, Carolyn Stewart applied to the Minister for Transport (the Minister) for access to documents, in the following terms:

I wish to lodge an FOI against Mr D Hamill, Minister for Transport.

The information sought by me is from the 21/11/91 up until the present time 1993.

This information concerns my Personal Affairs which involve [here a person, who will be referred to as Mrs Z was identified and that person's part-time occupation was stated] and a number of people which she has drawn into these events which have developed and made it necessary for this FOI application.

3. The initial decision in response to this application was made on behalf of the respondent by Mr B J Butterworth of the Department of Transport (the Department) and communicated to Carolyn Stewart by a letter dated 30 November 1993, which stated:

Your letter of 8 November 1993 addressed to the Minister for Transport has been passed to me for response as The Hon The Minister is aware of your previous submissions.

I regret that I cannot see any difference between this application and that which you lodged previously, which you have taken to the Information Commissioner.

Whilst an appeal is pending with the Information Commissioner, I am not permitted to proceed further with the matter and I cannot process your request.

4. By a letter dated 6 December 1993, Carolyn Stewart applied for internal review of that decision stating:

Re your letter dated 30th November, 1993, I do not class this FOI application as the same as the one that is lodged with the Information Commissioner and it is a

separate application.

I must now ask for an internal review against your decision (which I know will be refused).

5. The internal review was conducted by Mr W J Rodiger of the Department, who, in a letter dated 14 December 1993, informed Carolyn Stewart as follows:

I have investigated the situation and am satisfied that the documents which would be responsive to your request have not changed since your original application. You have lodged an appeal with the Information Commissioner in regard to the original application and as Mr Butterworth pointed out, the Department is unable to proceed with a further application whilst the appeal is being decided.

6. By letter dated 20 December 1993, the applicant applied for review under Part 5 of the FOI Act in respect of Mr Rodiger's decision.

Official documents of a Minister

7. Section 21 of the FOI Act confers a legally enforceable right to obtain access under the FOI Act to two distinct categories of documents. The first category is "documents of an agency". The word "agency" is defined in s.8(1) of the FOI Act to mean a department, local government or public authority. The second category is "official documents of a Minister" (the definition of which is set out at paragraph 10 below).

8. Section 25 of the FOI Act sets out how applications for access are to be made. Section 25(1) provides:

25.(1) A person who wishes to obtain access to a document of an agency or an official document of a Minister under this Act is entitled to apply to the agency or Minister for access to the document.

9. This provision clearly contemplates that access applications to a particular agency or Minister are to be made only for documents of that particular agency or Minister. Therefore a request made of a particular Department must be for documents in the possession or under the control of that Department, and a request made of a Minister must be for documents in the possession or under the control of the Minister: see *Re Ward and Secretary to the Department of Industry and Commerce* (Commonwealth AAT, No. V83/261, 21 October 1983, unreported) at pp.11-13.

10. The term "official document of a Minister" is defined in s.7 of the FOI Act as follows:

7. *In this Act -*

...

"official document of a Minister" or "official document of the Minister" means a document in the possession or under the control of a Minister, or the Minister concerned, that relates to the affairs of an agency, and includes -

- (a) *a document to which the Minister is entitled to access; and*
- (b) *a document in the possession or under the control of a member of the staff of, or a consultant to, the Minister in the person's capacity as*

such a member or consultant.

11. The word "official" in the phrase "official documents of a Minister" indicates that the ambit of the phrase is confined to documents which relate to the duties, functions and responsibilities of the office of Minister; i.e., to documents held in the capacity of Minister, and not in other capacities such as Member of the Legislative Assembly, or member or office-holder of a political party (see *Re Said and John Dawkins MP* (1993) 30 ALD 242).
12. A Minister may hold documents on a particular subject or issue which are not held by the Minister's Department (or by a relevant public authority for which the Minister has portfolio responsibility): for example, documents generated by Ministerial staff or consultants, or correspondence between Ministers, to which the Minister's Department does not have access.
13. I consider that Carolyn Stewart's FOI access application dated 8 November 1993 must be interpreted as having been intended to explore that possibility. In its terms, it is directed to the Minister for Transport, and must, in my opinion, be interpreted as a request for official documents of the Minister for Transport. Support for that conclusion can readily be drawn from the fact that Carolyn Stewart had made a previous application to the Department itself, for documents of the Department relating to the same subject matters as are identified in the FOI access application reproduced at paragraph 2 above. (Her application for access to documents of the Department was dealt with in my reasons for decision in *Re Carolyn Dawn Stewart and Department of Transport* (Information Commissioner Qld, Decision No. 95010, 15 May 1995, unreported).)
14. As Carolyn Stewart's FOI access application was clearly an application for official documents of the Minister for Transport, the primary responsibility for decision making in relation to it fell upon the Minister. The FOI Act permits the Minister to pass on this responsibility in one of two ways.
15. First, s.33(3) of the FOI Act provides that an application for access to an official document of a Minister may be dealt with by such person as the Minister directs. It appears from the opening words of Mr Butterworth's letter dated 30 November 1993 (see paragraph 3 above) that the Minister has directed officers of the Department to deal with Carolyn Stewart's FOI access application to him dated 8 November 1993.
16. Another possibility is that, in appropriate circumstances, the Minister may seek to transfer an application for access to official documents of the Minister to the relevant Ministerial Department or public authority, under s.26 of the FOI Act. Such action would require the consent of the Department or public authority (s.26(2)(b)) and the Minister would be required to give to the Department or public authority copies of any documents held by him or her which fall within the terms of the FOI access application (s.26(3)(a)). In the case of Carolyn Stewart's FOI access application to the Minister, there is no evidence that the Minister has chosen to transfer the application to the Department by the procedures set out in s.26 of the FOI Act. Even if a formal transfer had been undertaken, this would not have affected the outcome of this external review application since the Department has been willing to treat any relevant documents which it might hold as falling within the terms of Carolyn Stewart's FOI access application.

Scope of the FOI access application

17. At paragraphs 6-10 of my decision in *Re Ronald Keith Stewart and Department of Transport* (Information Commissioner Qld, Decision No. 95007, 12 May 1995, unreported) which I shall refer to in these reasons for decision as *Re Ronald Stewart*, I discussed the relevance of an earlier

application by Carolyn Stewart and Ronald Stewart for documents relating to what I described in that decision as the school crossing dispute. (My reasons for decision in that earlier application are reported as *Re Stewart and Department of Transport* (1993) 1 QAR 227.) In *Re Ronald Stewart*, I determined that Ronald Stewart's FOI access application should be interpreted as an application for documents relating to his "personal affairs", as that term is interpreted for the purposes of the FOI Act.

18. I consider that the terms of Carolyn Stewart's FOI access application to the Minister make it clear that she sought access only to documents which related to her "personal affairs", thereby intending to avoid the requirement to pay an application fee under s.6 of the *Freedom of Information Regulation 1992*. I must therefore consider the sufficiency of search undertaken on behalf of the Minister for documents which relate to Carolyn Stewart's personal affairs, as that term is interpreted for the purposes of the FOI Act.
19. As to the time period covered by this application, Carolyn Stewart applied for documents created between 21 November 1991 and "the present time 1993". The Minister (through his delegates) has been willing to provide access to documents created up to 14 December 1993 (the date of Mr Rodiger's internal review decision) and I have treated this as the cut-off date for searches.
20. Carolyn Stewart has indicated that she does not seek access to documents which may be held concerning registration, licensing or accidents relating to motor vehicles or vessels. She has also indicated that she does not wish to pursue access to documents copies of which have been provided to her husband. I will therefore not consider further, in my reasons for decision, documents which fall into either of those categories.

Sufficiency of search

21. I have previously considered my jurisdiction, and powers on review, in respect of sufficiency of search issues in my decisions in *Re Smith and Administrative Services Department* (1993) 1 QAR 22 and *Re Shepherd and Department of Housing, Local Government & Planning* (Information Commissioner Qld, Decision No. 94007, 18 April 1994, unreported). As I said in *Re Shepherd*, at paragraphs 18-19, the two questions which I must answer in such a case are:
 - (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.
22. At paragraph 20 of my decision in *Re Ronald Stewart*, I indicated that there were a number of external review applications made by members of the Stewart family for documents held by the Department and by the Minister. I also noted that searches were carried out in Departmental offices in Brisbane and Toowoomba, and in the Minister's office, for documents which might fall within the terms of any of the various applications. I described those searches at paragraphs 20-30 of my decision in *Re Ronald Stewart*. From those searches, members of my staff have identified all documents which concern, or which may reasonably be argued to concern, the personal affairs of Carolyn Stewart. As a result of those searches a number of further documents were identified as falling within the terms of Carolyn Stewart's FOI access application to the Minister. The Minister's delegate has agreed to the release to Carolyn Stewart of all documents so identified.

23. In *Re Ronald Stewart*, I referred to a letter dated 12 June 1992 from Ronald Stewart to the Minister (a copy of which was provided by Mr Ronald Stewart for my information). That document also falls within the terms of Carolyn Stewart's FOI access application to the Minister. I described the searches undertaken for that document at paragraphs 21-24 of my decision in *Re Ronald Stewart*. For the reasons set out at paragraph 32 of that decision, I find that there are reasonable grounds to believe that the requested document exists and is an official document of the Minister, but I find that the search efforts made on behalf of the Minister to locate the document have been reasonable in all the circumstances, even though ultimately unsuccessful.
24. As to Carolyn Stewart's general claim that there are other documents concerning her personal affairs in the possession or under the control of the Minister, I find that there are no reasonable grounds to believe that such documents exist. Extensive searches carried out by staff of the Minister and the Department, and by staff of my office, plus examination of a wide range of documents by my staff, have not given rise to any indication that there are further documents in existence which fall within the terms of Carolyn Stewart's FOI access application for documents relating to her personal affairs. I cannot identify any further searches which the Minister might reasonably be called upon to undertake in a quest for such documents.

Conclusion

25. As further documents were discovered in the course of my review, it is appropriate that I vary the decision under review. I find that -
- (a) following the disclosure to the applicant of additional documents during the course of my review, I am satisfied that there are no reasonable grounds for believing that the respondent has possession or control of any documents or parts of documents, falling within the terms of the applicant's FOI access application dated 8 November 1993, to which the applicant has not been given access, except for the letter dated 12 June 1992 from Ronald Stewart to the respondent referred to in (b) below; and
 - (b) while there are reasonable grounds for believing that the respondent has possession or control of a letter dated 12 June 1992 from Ronald Stewart to the respondent, I am satisfied that the search efforts made on behalf of the respondent, and by members of my staff, to locate that document have been reasonable in all the circumstances of the case, and that the document cannot now be located.

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