

Participants:

FRANK RYDER
Applicant

- and -

DEPARTMENT OF EMPLOYMENT, VOCATIONAL EDUCATION,
TRAINING & INDUSTRIAL RELATIONS
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - application for review of decisions requiring payment of a \$30 application fee for access to documents - documents comprising general information and questions used in interviewing applicants for two senior positions in TAFE colleges - whether the requested documents concern the applicant's personal affairs within the meaning of s.29(2) of the *Freedom of Information Act Qld 1992* and s.6 of the *Freedom of Information Regulation 1992 Qld*.

Freedom of Information Act Qld 1992 s.29(2)
Freedom of Information Regulation 1992 Qld s.6, s.6(1)

Simonsen and Edith Cowan University, Re (Information Commissioner WA, Decision Ref. D01094, 13 July 1994, unreported)
Stewart and Department of Transport, Re (Information Commissioner Qld, Decision No. 93006, 9 December 1993, unreported)

DECISION

The decisions under review (being the decisions of Mr A S Raineri dated 22 December 1993 that a \$30 application fee is payable by Mr Ryder in respect of each of his FOI access applications to the respondent dated 27 October 1993) are affirmed.

Date of Decision: 9 September 1994

.....
F N ALBIETZ
INFORMATION COMMISSIONER

Participants:

FRANK RYDER
Applicant

- and -

DEPARTMENT OF EMPLOYMENT, VOCATIONAL EDUCATION,
TRAINING & INDUSTRIAL RELATIONS
Respondent

REASONS FOR DECISION

Background

1. The applicant seeks review of two decisions of the respondent to the effect that the applicant was obliged to pay a \$30 application fee in respect of each of two applications for access to documents under the *Freedom of Information Act 1992 Qld* (the FOI Act). In each instance, the respondent decided that the applicant had applied for access to one or more documents which did not concern the applicant's personal affairs.
2. By two letters, each dated 27 October 1993, Mr Ryder applied to the Department of Employment, Vocational Education, Training & Industrial Relations (the Department) for access to documents relating to job applications he had made. The first letter (which will be referred to in these reasons for decision as "the Yeronga application") reads:

Recently I was a candidate for the position of Associate Director, Yeronga College of TAFE. Could you please supply me with all information pertinent to the selection exercise, particularly the list of interview questions, marking grids, panel member notes concerning my written application and interview.

3. The second letter (which will be referred to in these reasons for decision as "the Ipswich application") was in identical terms except that it related to the position of Associate Director (HRM), Ipswich College of TAFE.
4. By letters dated 30 November 1993, Mr G D Cumberland, who was then the Acting FOI Co-ordinator for the Department, gave his decisions in relation to the applications. In each letter, Mr Cumberland indicated that the Department was prepared to give access to a number of documents, subject to the deletion of matter relating to the personal affairs of other applicants for the relevant positions, and went on to state that an application fee of \$30 was payable. The relevant part of Mr Cumberland's decision in relation to the Yeronga application is in the following terms:

Section 29(2) of the Freedom of Information Act 1992 provides for the payment of an application fee in respect of applications which do not concern the applicant's personal affairs. Section 6 of the Freedom of Information Regulation prescribes that fee to be \$30.00.

The term "personal affairs" has been judicially considered in other jurisdictions to mean those matters which are of private concern to the individual and includes such things as a person's state of health, the nature or condition of any marital or other relationship, domestic responsibility, financial obligations, and examination or test scores.

Whilst I consider the scoring grids, applicant assessment forms and parts of the selection report contain your personal affairs, I do not consider the questions for interview to contain your personal affairs.

The Information Commissioner in the Ritchie case has found that:

"given the terms in which s.29(2) of the FOI Act, and s.6 of the FOI Regulation, are framed, an application for access to documents need seek only one document which does not relate to the personal affairs of the applicant to attract the imposition of the \$30.00 application fee."

In terms of that decision an application fee of \$30.00 would therefore be considered payable.

5. Mr Cumberland's decision in relation to the Ipswich application was in similar terms, but referred to the existence of an additional document described as *"the interpretation of the criteria"*, which Mr Cumberland considered did not concern Mr Ryder's personal affairs.
6. On 10 December 1993, Mr Ryder applied for internal review of Mr Cumberland's decisions, on the basis that he had been refused access to documents and that he had been charged application fees which he felt were not due.
7. Mr Cumberland then contacted Mr Ryder and explained to him that the Department did not object to release of the documents (subject to deletion of the personal affairs matter relating to other applicants) if the fees were paid. Mr Ryder then paid the application fees and lodged an application for internal review, dated 16 December 1993, which was confined to the issue of whether the \$30 application fees had been properly required. Mr Ryder obtained access to the documents he had been seeking (subject to some deletions) and the internal reviews proceeded on the basis that the sole question remaining for determination was whether the \$30 application fees had been properly required.
8. By decisions dated 22 December 1993 Mr Aldo Raineri, who undertook the internal reviews on behalf of the Department, affirmed the initial decisions by Mr Cumberland that application fees were payable.
9. On 9 February 1994, the applicant applied for external review of Mr Raineri's decisions, in accordance with Part 5 of the FOI Act. The material parts of Mr Ryder's review application are:

I maintain that any assessment instrument and a candidate's results, based on the use of that instrument, are integral, not separate. To separate them, as this decision does, is illogical. The results are devoid of meaning if they are divorced from the assessment instrument, i.e. the questions.

...

1. *Both the initial and subsequent review officers indicate that the precedent on which they based their decision is restrictive and narrow. This would appear to be contradictory to the intent of the Act and its basic principles.*
2. *Both officers work in the same section of the same Department. I believe a more obvious degree of independence would have been appropriate.*
3. *The material sought was (and is) freely available through the more bureaucratically cumbersome and costly PSMC appeals process.*

The External Review Process

10. On 15 February 1994, the Deputy Information Commissioner wrote to the applicant in the following terms:

I enclose for your reference a copy of the Information Commissioner's reasons for decision in Re R K & C D Stewart and Department of Transport (Information Commissioner Qld, Decision No. 93006, 9 December 1993, unreported). You will see that the question of whether a \$30 application fee is payable in respect of an FOI access request depends on whether access is sought to even one document, the contents of which cannot properly be characterised as information concerning the personal affairs of the applicant for access. In this case, it is my preliminary assessment that you will have great difficulty in persuading the Information Commissioner that a document comprising a list of questions asked of applicants at interview for the position of Associate Director (HRM), Ipswich College of TAFE, can properly be characterised as information concerning your personal affairs.

If, having read the reasons for decision in Re Stewart, you agree with that preliminary assessment, would you please forward a brief letter stating that you wish to withdraw your application for review. If, on the other hand, you wish to press your application for review, I now extend to you the opportunity to forward a written submission setting out the material facts and circumstances, and any legal arguments, on which you rely to contest that a \$30 application fee is payable in respect of your FOI access application.

11. Mr Ryder responded by letter dated 25 February 1994 in the following terms:

I wish to proceed with an external review of the matter raised in my original submission. I have read the material "Re Stewart and the Department of Transport" and I believe that it is largely irrelevant.

The question I wish to have answered is not whether the material in contention is or is not related to my personal affairs. This has been the approach taken by previous reviewers.

The question is whether an assessment instrument (in this case a list of interview questions) and the results of the use of that instrument (in this case the interviewer notes, completed marking grids, etc) are integral.

If they are integral, then both components should be available under the same regime (either both charged for, or both free of charge).

I come from an educational, not legal, background and I believe that most educators

would argue, as I do, that assessment results of any individual or group are rather meaningless if considered in isolation from the assessment instrument and assessment methodology. The fact that the instrument is common and the results of its use are personal is irrelevant to the argument that complete separation of one from the other is illogical.

The decisions given to me so far have been based on the premise that instrument and results are not integrated. Instead of providing reasons for this particular premise, the reviewers have relied on an irrelevant argument about "personal affairs".

12. Evidence in relation to the Yeronga application was obtained in the form of a statutory declaration executed on 24 March 1994 by Mr B R G Hutchison, who chaired the selection panel for the Yeronga position. Evidence in relation to the Ipswich application was obtained by way of statutory declarations executed on 31 March 1994 and 12 May 1994 by Mr C V Robertson, who was a member of the selection panel for the Ipswich position, and a statutory declaration executed on 24 March 1994 by Ms L C Black, another member of the selection panel.
13. The applicant was given the opportunity to make submissions in support of his application and to comment on the evidence of the selection panel members referred to in the preceding paragraph. In letters of 28 April and 3 June 1994, the applicant made a number of further comments in relation to the Ipswich application. The gist of Mr Ryder's complaint is that, in respect of the Ipswich position, he was not assessed in relation to a selection criterion on which other interviewees for the position were assessed. He asserts that a decision must have been made prior to interview not to assess him in relation to that criterion and that the questions asked of interviewees must have differed.
14. The question of whether or not Mr Ryder was treated fairly by the selection panel does not come within my jurisdiction as Information Commissioner. My role in this external review application is to decide whether an application fee was payable in each case. A substantial part of Mr Ryder's submissions was not relevant to the issues for my determination. However, Mr Ryder has raised the possibility that the list provided to him was personalised and that another, more complete list of questions may have been used in relation to the other interviewees. If that is the case, it is open to Mr Ryder to argue that a list of questions produced personally for him does concern his personal affairs. I have therefore considered his claims of anomalies in the interview process for the Ipswich position, in this context.

Applicable Legislative Provisions

15. 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.*
16. Section 6 of the *Freedom of Information Regulation 1992* (the FOI Regulation) provides as follows:

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.*
17. In my reasons for decision in *Re Stewart and Department of Transport* (Information Commissioner

Qld, Decision No. 93006, 9 December 1993, unreported), 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 the 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; and
- domestic responsibilities or financial obligations.

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.

18. Further, at paragraphs 120-121 of *Re Stewart*, I confirmed that an applicant need only seek access to one document which does not concern his or her personal affairs to attract the imposition of the application fee.
19. In this case, I have examined only the documents which the Department has identified as the documents which, it submits, do not concern the applicant's personal affairs, and which therefore attract a \$30 application fee. It is possible that other documents requested by the applicant contain matter which does not concern the applicant's personal affairs, because it relates to the assessment of the applicant's performance of his employment duties. I have not examined those documents or considered that issue, which is capable of giving rise to difficult questions of characterisation (see paragraphs 83-85, and 91-97 of *Re Stewart*). It is possible that the other documents contain matter which concerns the applicant's personal affairs and matter which does not concern the applicant's personal affairs. If a document contains matter which concerns the applicant's personal affairs, then in my opinion s.6(1) of the FOI Regulation does not apply so as to require the payment of a \$30 application fee in respect of it. It is only when a document, on its proper characterisation, does not concern the applicant's personal affairs, that a \$30 application fee is payable by virtue of s.6(1) of the FOI Regulation.

The Yeronga Application

20. In relation to the Yeronga application, the Department claims that one document which falls within the terms of Mr Ryder's FOI access application does not concern his personal affairs. It is an eight page document entitled "*Information for Applicants and Interview Questions*". The evidence of Mr Hutchison is that it was not created specifically for Mr Ryder's interview. Each of the interviewees, including Mr Ryder, was asked the questions set out in the document. Mr Ryder has not suggested that the document was created separately for him.
21. I can find no basis in the document, or in the evidence, to justify a conclusion that the document concerns the personal affairs of Mr Ryder. Mr Ryder has argued that an assessment instrument and the results of the use of that instrument are integral. I cannot accept that the relationship between them means that the assessment instrument concerns Mr Ryder's personal affairs. Mr Ryder has not argued that this is the case and indeed has suggested that argument about whether the document concerns his personal affairs is irrelevant. The latter comment is clearly incorrect, since the sole criterion stipulated in the relevant legislative provisions for determining whether or not a \$30 application fee is payable is whether or not a requested document concerns the applicant's personal affairs.

22. The particular application of a general document to the circumstances of an individual may well give rise to the creation of a document which concerns the individual's personal affairs. For example, a person may follow general guidelines developed by a Department in order to complete a form or make an application of some type. A student may be given an examination question paper to which he or she is expected to respond in a separate answer booklet. In each case, the result may be a form, application or answer booklet which concerns the personal affairs of the individual. However, this is not sufficient in my view to transform the general document from being one which, until the individual created the new document, did not concern that individual's personal affairs, to one which, thereafter, does concern that individual's personal affairs.
23. I do not dispute that it may well make more sense for an interviewee to consider his or her results in the context of the particular questions asked. However, in cases where guidelines or questions are developed for general use, the fact that an individual responds to them in another document does not, in my opinion, mean that the guidelines or questions can properly be characterised as information concerning the personal affairs of that individual. A similar approach was recently adopted in relation to student examination question sheets by the Western Australian Information Commissioner in *Re Simonsen and Edith Cowan University* (Information Commissioner WA, Decision Ref. D01094, 13 July 1994, unreported) (see especially at paragraphs 44-47).
24. In the present case, there is no evidence that the document was created with Mr Ryder in mind. To the contrary, the evidence of Mr Hutchison was that it was created for the purposes of interview of all interviewees for the position. Therefore, in relation to the Yeronga application, I find that the Department was entitled to require the payment of a \$30 application fee.

The Ipswich Application

25. The agency has claimed that two documents which fall within the terms of Mr Ryder's FOI access application do not concern his personal affairs.
26. The first document is entitled "*Interpretation of Criteria for Position of Associate Director - Studies (Human Resources)*". The evidence of Mr Robertson is that it was created by the members of the selection panel prior to the shortlisting of candidates. The document is a two page list of typed notes setting out points which panel members considered relevant to selection. The points are numbered from 2.1 to 2.5 (representing the key selection criteria) and from 3.1 to 3.3 (representing the other selection criteria). The document contains some handwritten notes which, according to evidence given by Ms Black, were created before the selection process started.
27. The second document is entitled "*Questions for Interview*". Mr Robertson has given evidence that this document was developed in consultation with panel members. The document appears to have been developed from the basis of the first document and follows its numbering scheme with respect to numbers 2.1 to 2.5, 3.1 and 3.3. There is, however, no question or set of questions for criterion 3.2. The document also contains a number of handwritten notes which Mr Robertson states were made by him. The omission of questions for criterion 3.2 and the failure of the committee to assess Mr Ryder in relation to criterion 3.2 has caused Mr Ryder considerable concern.
28. Mr Robertson has given evidence that both the typed document and the handwritten notes were created before the interview process began. He has further stated that both the first and second document were used in relation to all interviewees and that no part of those documents was created specifically for Mr Ryder.
29. Mr Ryder has pressed his claim that he was not asked a question in respect of criterion 3.2, but that other interviewees were assessed in relation to that question. He considers that this shows he has been treated unfairly in the selection process. As noted above, he has suggested that, as a question

in respect of criterion 3.2 does not appear in the second document, there may have been two "Questions for Interview" sheets created; one especially for him, which did not contain a question in respect of criterion 3.2, and one for the other interviewees, which did. He submits that the sheet created for him would contain information concerning his personal affairs.

30. In response to the claim that there was a special document created for Mr Ryder, Mr Robertson's further statutory declaration of 12 May 1994 states:

1. *The document headed "Questions for Interview" was the only such document created for the interviews for the selection process and that all three interviewed applicants were asked the same questions from that document. There was no other document which contained a question relating to Other Selection Criterion 3.2.*
2. *The scores given to the other interviewed applicants for the abovementioned criterion were taken from the information provided in their respective applications.*

It is accepted practice to use the Key Selection Criteria as the primary source of data for deciding merit for a position and to use the Other Selection Criteria to discriminate between two or more applicants whose scores are very close. In the case in question Mr Ryder was significantly behind the other two after the scores for the Key Criteria were assessed, so the inclusion of scores from the Other Selection Criteria was restricted to the other two applicants for the final comparison.

31. In his letter of 3 June 1994, Mr Ryder claims that Mr Robertson's statement that there was only one list of questions used for all candidates cannot be reconciled with the selection panel's marking of interviewees as evidenced by comparative score tables completed by the panel. I cannot agree with Mr Ryder on this point. Mr Robertson explains that there was no question in relation to criterion 3.2 because that criterion was assessed not on the basis of the interview, but rather on the written job applications received from applicants. The evidence before me does not suggest that there was another document created for the other interviewees or that the second document was created especially for Mr Ryder.

32. It is clear to me that the "Interpretation of Criteria" document does not concern Mr Ryder's personal affairs for the reasons explained at paragraphs 21-23 above. The existence of one document which does not concern Mr Ryder's personal affairs is enough to dispose of the matter, but I also find that the "Questions for Interview" document does not concern Mr Ryder's personal affairs.

Conclusion

33. Accordingly, I find that the Department was entitled to require the payment of a \$30 application fee, pursuant to the provisions of s.29(2) of the FOI Act and s.6 of the FOI Regulation, in respect of each of Mr Ryder's FOI access applications dated 27 October 1993, and I affirm the decisions under review.

.....
F N ALBIETZ
INFORMATION COMMISSIONER