

Higgins and Education Queensland

(S 200/98, 31 March 1999, Information Commissioner)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.-4. These paragraphs deleted.

REASONS FOR DECISION

Background

5. This is a 'reverse FOI' application by Dr Higgins, who objects to a decision by the respondent, Education Queensland (the Department), to give the FOI access applicant (----) access to certain documents and parts of documents relating to aspects of Dr Higgins' employment with the Department.
6. By letter dated 31 August 1998, [the access applicant] applied to the Department for access to a number of categories of documents concerning Dr Higgins' employment with the Department, and matters ancillary to that employment.
7. On 2 October 1998, the Department consulted with Dr Higgins in order to ascertain whether he objected to disclosure of the requested documents, which were contained in numerous files held by the Department. In a letter to the Department dated 14 October 1998, Dr Higgins expressed his objection to disclosure of the bulk of the relevant documents.
8. By letter dated 5 November 1998, Ms Lone Keast of the Department advised Dr Higgins that, contrary to his objection, she had decided that only parts of a small number of the documents in issue qualified for exemption from disclosure under s.44(1) of the FOI Act - matter affecting personal affairs. Ms Keast decided that the remaining documents and parts of documents did not qualify for exemption, and that [the access applicant] therefore had a right to obtain access to them.
9. By letter dated 14 November 1998, Dr Higgins applied to the Department for internal review of Ms Keast's decision to grant [the access applicant] access to the bulk of the documents in issue. Ms Storey of the Department conducted the internal review and affirmed Ms Keast's decision. By letter dated 9 December 1998, Dr Higgins applied to me for review, under Part 5 of the FOI Act, of Ms Storey's decision.

External review process

10. Copies of the documents in issue were obtained from the Department and examined. The documents were sourced from files concerning earlier FOI access applications made to the Department by [the access applicant], from Dr Higgins' personnel file held by the Department (including copies of Dr Higgins' curriculum vitae, responses to selection criteria and documents and correspondence regarding Dr Higgins' resignation from the Department), and from the file of the relevant selection panel with respect to Dr Higgins' successful application for the position of Senior Policy Officer, Policy and Project Support Unit, with the Department. Following a telephone consultation between one of my officers and Dr Higgins on 1 February 1999, Dr Higgins advised that he sought review only in respect of Ms Storey's decision to disclose the following folios, or parts of folios (hereinafter referred to as "the matter in issue"):

File C: folios 3-25, 32-54 and 72;

File D: folios 3-25, 28-32, 41, 43, 52-54 and 63;

File J: folios 4-6;

File L: folios 5-6, 9, 13, 14, 16, 17, 18, 20-24, 30-35, 46, 48, 56-58, 80-85, and 110- 112;

File Z: folios 5-19, 26 and 28-29; and

File AB: folios 32-86.

11. By letter dated 19 January 1999, the Deputy Information Commissioner invited [the access applicant], in accordance with s.78 of the FOI Act, to apply to become a participant in this review. [the access applicant] applied for, and was granted, status as a participant in this review.
12. By letter dated 16 February 1999, I wrote to Dr Higgins to advise him that I had reviewed the matter in issue and formed the preliminary view that it did not qualify for exemption under the FOI Act. In the event that he did not accept my preliminary view, Dr Higgins was invited to lodge written submissions and/or evidence in support of his case for exemption. By facsimile letter dated 22 February 1999, Dr Higgins raised issues which indicated that he did not accept my preliminary view. By letter dated 23 February 1999, I asked Dr Higgins to confirm whether his letter dated 22 February 1999 was intended to be the only material on which he relied to support his case in this review. By facsimile letter dated 8 March 1999, Dr Higgins confirmed that his letter dated 22 February 1999 was the only material which he wished to lodge in support of his case.
13. In light of the preliminary view I had formed that the matter in issue did not qualify for exemption under the FOI Act, and given that I did not consider that the matters raised by Dr Higgins in his letter dated 22 February 1999 required any response by the Department or [the access applicant], I saw no need to invite either of those parties to lodge any written submissions and/or evidence in support of their cases for disclosure of the matter in issue. Accordingly, the only material before me, for the purposes of making a determination in relation to this external review, is that provided by Dr Higgins in his application for internal review dated 14 November

1998, his application for external review dated 9 December 1998, and his facsimile letter dated 22 February 1999, together with the relevant decisions of the Department, and the documents containing or comprising the matter in issue.

The submissions and evidence lodged by Dr Higgins

14. Dr Higgins raised a number of issues in support of his objection to disclosure of the matter in issue. In particular, Dr Higgins said (in his application for internal review dated 14 November 1998):

... I note that the decision maker states that she does not hold the view that my employment status elsewhere is my personal affair. I cannot agree with this view. Clearly, in my present capacity I am not employed by any Queensland agency, or any Australian agency, and cannot see how any information held by the Queensland Government about my employment matters elsewhere can be subject to the Queensland FOI Act. It may be that Education Queensland holds the information for communication purposes. That does not, in my view, give it the right to release the data to others as if Education Queensland owned the information itself. ...

...

In summary, I object to the release of information over which I can claim copyright ownership and to that over which I may have a copyright interest.

I also object to the release of information about me that is held by the government merely as a means of communication with me but over which it has no ownership. ...

15. Attached to Dr Higgins' application for external review was a letter which he had sent to the Department, in which he said:

...

I wish to object to your decision to release certain information concerning my current place of work and any documents consisting of my curriculum vitae for the following reason.

Section 7 of the F.O.I [Act] states "document of an agency" or "document of the agency" means a document in the possession or control of an agency, or the agency concerned, whether created or received in the agency, and includes-

- a) a document to which the agency is entitled to access; and*
- b) a document in the possession or under the control of an officer of the agency in the officer's official capacity.*

I submit that the documents under discussion do not meet these tests because:

1. The documents are in the possession of Education Queensland but they are not "under the control" of the agency.

These documents are under the control of the author according to Copyright Act. This [is] a Commonwealth Act and its provision supersedes any State Acts, including the FOI Act (Qld).

Under this test of statutory interpretation, Education Queensland has no legally valid "control" over the relevant documents and cannot be bound by decisions of the Information Commissioner, who has no power to determine matters under Commonwealth law.

2. In Holt and Reeves (decision 98004), the Information Commissioner claims that physical possession of documents is sufficient to make them documents of the agency.

I submit that this interpretation offered by the Commissioner is a mistake of law. Nowhere in the common law jurisdiction is there a confusion between having possession of an item and claiming legal ownership of it. There is a large amount of precedent in the areas of contract and consumer law that clearly distinguishes between who has possession of an item and who has legal title to it.

In this instance there is no doubt that the author of [a] curriculum vitae and other related documents has legal ownership of both the documents and the facts or ideas contained therein, including such things as work address, In other words, I possess the legal title and ownership of these documents.

In summary, neither the Information Commissioner nor Education Queensland can claim legal control of the documents in question because of the operation of the Copyright Act. Also, the Information Commissioner and Education Queensland have no legal title over the documents in question.

16. Dr Higgins' arguments in support of his case for exemption of the matter in issue can be summarised as follows:

- (a) information concerning Dr Higgins' employment status outside the Queensland government is information which concerns his personal affairs and is exempt from disclosure to [the access applicant] under s.44(1) of the FOI Act;

- (b) documents containing information concerning Dr Higgins' current place of work and documents comprising Dr Higgins' curriculum vitae are not "documents of an agency" within the meaning of s.7 of the FOI Act;
 - (c) documents in respect of which Dr Higgins claims copyright ownership should not be disclosed to the access applicant.
17. In his facsimile letter dated 22 February 1999, written in response to the Information Commissioner's letter dated 16 February 1999, Dr Higgins raised the following argument:

You have dealt with the legal aspect of my objection to the release of material to the initial applicant. This person has commenced searches of my files in other States and with other institutions in Queensland.

I remind you of the decision made in Re Stewart:

In Re Stewart v Department of Transport (1993) 1 QAR 227, the Information Commissioner said "In my opinion, the appropriate guiding principle when difficult and marginal cases are encountered in the grey area should be that [the] phrase "personal affairs of a person" extends to the kinds [of] information concerning the affairs of a person which a notional reasonable bystander, applying the current community standards of persons of ordinary sensibilities, would regard as information the dissemination of which (whose affairs the information concerns) ought to be entitled to control, and hence, which should be capable of being claimed to be exempt from mandatory disclosure under the FOI Act."

It seems to me that the application of the reasonable person test (an equitable one) should be applied to these documents. What reasonable person would expect his or her documents to be given over to an applicant who seeks anonymity and who has no apparent reason for wanting the information other than to carry on some kind of harassment against a person's family?

I would suggest that the above test in Re Stewart is the proper test to apply in this circumstance and should be applied by the decision-maker in respect of documents to be released or released in part.

The application of s.44(1) of the FOI Act

18. Section 44(1) of the FOI Act provides:

44.(1) Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.

19. In my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, I identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act (see paragraphs 79-114 of *Re Stewart*). In particular, I said that information concerns "the personal affairs of a person" if it relates to the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well-accepted core meaning which includes:

1. family and marital relationships;
2. health or ill-health;
3. relationships and emotional ties with other people; and
4. 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, to be determined according to the proper characterisation of the information in question.

20. In *Re Stewart* at pp.261-264 (paragraphs 91-102), I said that employment-related matters fell within the grey area rather than within the core meaning of the phrase "personal affairs of a person". In my decision in *Re Pope and Queensland Health* (1994) 1 QAR 616, after reviewing relevant authorities (at pp.658-660), I expressed the following conclusion at p.660 (paragraph 116):

Based on the authorities to which I have referred, I consider that it should now be accepted in Queensland that information which merely concerns the performance by a government employee of his or her employment duties (i.e., which does not stray into the realm of personal affairs in the manner contemplated in the Dyrenfurth case) is ordinarily incapable of being properly characterised as information concerning the employee's "personal affairs" for the purposes of the FOI Act.

21. The general approach evidenced in this passage was endorsed by de Jersey J (as he then was) of the Supreme Court of Queensland in *State of Queensland v Albietz* [1996] 1 Qd R 215, at pp.221-222. In reviewing relevant authorities in *Re Pope*, I had specifically endorsed the following observations, concerning s.33(1) (the personal affairs exemption) of the *Freedom of Information Act 1982* Vic, made by Eames J of the Supreme Court of Victoria in *University of Melbourne v Robinson* [1993] 2 VR 177 at p.187:

The reference to the "personal affairs of any person" suggests to me that a distinction has been drawn by the legislature between those aspects of an individual's life which might be said to be of a private character and those

relating to or arising from any position, office or public activity with which the person occupies his or her time. [emphasis added]

22. The folios in issue which contain information about Dr Higgins' employment outside Queensland and/or outside the Queensland government, and which he contends is information concerning his personal affairs under s.44(1) of the FOI Act, are as follows:

File J: folios 4, 5 and 6;

File L: folios 6, 9, 13, 17, 22, 23, 30, 31, 34, 48, 57, 110, 111 and 112; and

File Z: folio 26.

23. I note that in her internal review decision dated 24 November 1998, Ms Storey identified folios 14, 46 and 82 on File L as also containing information about Dr Higgins' employment outside Queensland and/or the Queensland government. I have reviewed those folios and they do not appear to contain information of that kind. For example, folio 14 appears to relate to Dr Higgins' employment at James Cook University. In any event, I have formed the preliminary view that none of those folios qualifies for exemption under the FOI Act, for reasons which I will discuss below. However, I note that Dr Higgins may be entitled to make a claim for copyright ownership in respect of folios 46 and 82. I will discuss the issue of copyright further below.
24. In addition, I consider that folio 29 on File Z, which was not identified by Ms Storey as falling within this category of documents, contains information about Dr Higgins' employment outside the Queensland government. I therefore will include that folio in my consideration of this issue.
25. I do not accept the applicant's argument that information concerning the employment affairs of an individual can be characterised as either personal affairs information or non-personal affairs information according to the location at which that individual is employed (i.e., whether it is within Queensland, interstate, or overseas) or the nature of the particular job that that individual is performing (i.e., whether it is public or private sector employment). If matter is correctly identified as falling within the scope of the relevant FOI access application, and is properly to be characterised as information concerning an individual's employment affairs (and which does not stray into the realm of personal affairs in the manner contemplated in the *Department of Social Security v Dyrenfurth* (1988) 80 ALR 533), then it will not qualify for exemption under s.44(1) of the FOI Act.
26. Accordingly, I find that the information contained in the folios listed above which concerns Dr Higgins' employment affairs outside Queensland, or outside the Queensland government (in particular, information which identifies the name of Dr Higgins' current employer, the postal address of his employer and the telephone, facsimile and Email details of his employer), is not exempt matter under s.44(1) of the FOI Act.

27. Dr Higgins has raised a particular objection to the disclosure of his Email address at the University of Otago, where he is currently employed (see folio 5 on File J and folio 111 on File L). In my letter to Dr Higgins dated 16 February 1999, I invited Dr Higgins to lodge a submission and/or evidence aimed at demonstrating that that Email address is a personal address, unconnected to his employment with the University, and which he funds himself and uses primarily as a personal mailbox. Dr Higgins did not, however, provide any submission or evidence to support his claim for exemption in respect of the Email address. Accordingly, I find that references to the Email address as contained in the matter in issue is information which concerns Dr Higgins' employment affairs rather than his personal affairs, and therefore does not qualify for exemption from disclosure under s.44(1) of the FOI Act.

Section 7 of the FOI Act - "document of an agency"

28. The definition of "document of an agency" or "document of the agency" contained in s.7 of the FOI Act determines whether particular documents are subject to the FOI Act. The definition states:

"document of an agency" or "document of the agency" means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes -

(a) *a document to which the agency is entitled to access; and*

(b) *a document in the possession or under the control of an officer of the agency in the officer's official capacity;*

29. A document which is in the possession, or under the control, of an agency, will be a document of that agency for the purposes of the FOI Act. In *Re Holt & Reeves and Education Queensland* (Decision No. 98004, Information Commissioner Qld, 20 April 1998, unreported), I explained my reasons for finding that, notwithstanding the meaning which the term "possession" may have in other legal contexts, its meaning in the context of the definition of "document of an agency" in s.7 of the FOI Act, must be as follows (at paragraph 21):

I consider that the word "possession" in the above definition is properly to be construed as meaning physical possession, rather than legal possession (i.e., possession based on legal ownership of property in a document).

30. The submissions of the applicant have not persuaded me that my view was incorrect. It is clear that the documents in issue are in the physical possession of the Department. As far as I am aware, they are lawfully in the Department's possession. Dr Higgins supplied the bulk of the matter in issue to the Department during the course of his employment with the Department, or in corresponding with

the Department about matters ancillary to his employment. As I stated at paragraph 28 of *Re Holt & Reeves*, persons who forward documents to government agencies ordinarily do so on the basis that property in the document passes to the recipient agency which is to retain and use the document for its administrative purposes. Accordingly, I find, regardless of any issue as to ownership of the documents, they are presently "documents of an agency" within the meaning of s.7 of the FOI Act, and they will be subject to the application of the FOI Act for so long as they remain in the possession of the Department.

Copyright

31. In her internal review decision dated 24 November 1998, Ms Storey affirmed the decision of the initial FOI decision maker, Ms Keast, to the effect that Dr Higgins has a valid claim of copyright in the following folios:

File C: folios 3-25, 32-54 and 72;

File D: folios 3-25, 28-32, 41, 43, 52-54 and 63;

File J: folio 5;

File L: folios 5-6, 16, 18, 20-24, 30-35, 46, 56-58, 80-85 and 111;

File Z: folios 5-19 and 28-29; and

File AB: folios 32-86.

32. An assertion that a person owns copyright in a particular document held by a government agency cannot defeat the general right of access (conferred by s.21 of the FOI Act) to any information contained in a particular document which is not exempt matter under the FOI Act. Some of the applicant's submissions appear to be based on misconceptions about copyright law. A person who purchases a book obtains legal ownership of it, and can do with it what he/she likes (e.g., show it, or loan it, to a friend), except copy it in a manner that infringes the author's rights under the *Copyright Act*. A claim of copyright does not, of itself, afford a ground of exemption under the FOI Act, or a ground for withholding access (other than by way of provision of a photocopy). Section 30(3)(c) of the FOI Act provides:

30(3) If giving access in the form requested by the applicant—

...

(c) would involve an infringement of the copyright of a person other than the State;

access in that form may be refused and given in another form.

33. Section 30(3)(c) of the FOI Act provides, in effect, that if giving access to particular documents by way of provision of copies would involve an infringement of the copyright of a person other than the State, then access must be given in

another form. Ordinarily, in such circumstances, access would be given by way of inspection only.

34. In a review under Part 5 of the FOI Act, it is my function to determine whether or not the matter in issue is exempt matter under the FOI Act. Any issue relating to copyright and the form of access which an agency can or should permit in respect of non-exempt matter, is an issue which must be taken up directly with the relevant agency. I do not have jurisdiction to determine the merits of a claim that copyright subsists in certain documents. The relevant agency must do its best to make the relevant inquiries and decide that issue. In this case, it appears that the Department has accepted Dr Higgins' assertion that copyright subsists in certain documents.

DECISION

35. For the foregoing reasons, I affirm the decisions under review.