

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 2/2006
Application No. 719/05

Participants:

MR KENT WILKIE
Applicant

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – jurisdictional issue – whether documents sought by the applicant are excluded from the application of the *Freedom of Information Act 1992 Qld* by s.11(1)(f) of the Act – whether the documents were received or brought into existence in performing the judicial functions of the Commission – sufficiency of search for documents

Freedom of Information Act 1992 Qld – ss.7, 11(1)(f), 11(2), 25(3)
Industrial Relations Act 1999 Qld – ss.255, 265, 277, 294, 295, 334

Re Shepherd and Department of Housing, Local Government and Planning (1994)
1 QAR 464

DECISION

I find that the matter in issue in this review is excluded from the application of the *Freedom of Information Act 1992 Qld* by s.11(1)(f) of the Act , so that –

- (a) the Commission was entitled to refuse to deal with the applicant's application dated 31 August 2005 for access to documents under the *Freedom of Information Act*, and
- (b) I do not have jurisdiction to deal further with the applicant's application for review dated 7 November 2005.

.....
Cathi Taylor
Information Commissioner

Date: 24 August 2006

TABLE OF CONTENTS

	Page
Background	1
Steps taken in the external review process	2
Application of s.11(1)(f) of the FOI Act	3
Meaning of “court”	3
Meaning of “registry”	5
Documents sought by the applicant	5
“Sufficiency of search”	6
Decision	8

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 2/2006
Application No. 719/05

Participants:

MR KENT WILKIE
Applicant

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION
Respondent

REASONS FOR DECISION

Background

1. The applicant seeks review of a decision by the Registry of the Queensland Industrial Relations Commission (Commission) to refuse access, under the *Freedom of Information Act 1992 Qld* (FOI Act), to certain documents which the applicant contends are in the Commission's possession. Although the Commission's decision is expressed as a refusal of access to the requested documents, the Commission based that refusal on its belief that the FOI Act does not apply to the Commission's registry in respect of its judicial functions.
2. The applicant is a prisoner at the Woodford Correctional Centre. He believes that documents used in reinstatement proceedings in the Commission, in relation to a prison officer employed at the Centre, contain references to him. By letter dated 31 August 2005, the applicant wrote to the Commission, seeking access under the FOI Act to:

"... copies of any document, tape recording, video recording, statement or any other medium where my name was mentioned or inferred in relation to complaints of bullying and other matters against an employee of the Corrective Services at Woodford Corrections[the Officer]."
3. The applicant's request was dealt with by the Commission registry. In his notice of decision dated 15 September 2005, the Deputy Industrial Registrar and FOI Coordinator, Mr C Chadwick, refused access to the requested documents on the ground that, pursuant to s.11(1)(f) of the FOI Act, the Act "*had no application to the information requested*".
4. By letter dated 27 September 2005 the applicant sought an internal review of Mr Chadwick's decision. The Industrial Registrar and FOI Internal Review Officer, Mr G Savill, informed the applicant by letter dated 31 October 2005 that he had decided to uphold Mr Chadwick's decision.
5. By letter dated 7 November 2005 the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Mr Savill's decision dated 31 October 2005.

Steps taken in the external review process

6. By letter dated 17 November 2005, the applicant was informed that the Information Commissioner would review the decision but it was her delegate's preliminary view that the FOI Act did not apply to the registry of the Commission in respect of the documents to which the applicant sought access, and that the Registrar had correctly applied s.11(1)(f) of the FOI Act.
7. By letter dated 29 November 2005, the applicant advised this Office that he did not accept this preliminary view.
8. On 9 February 2006 a member of the staff of this Office attended at the Commission registry, for the purpose of inspecting the documents responsive to the applicant's freedom of information (FOI) access application and, by letter dated 13 February 2006, Assistant Information Commissioner (AC) Barker informed the applicant that:
 - the staff member had inspected documents relating to the proceedings involving the Officer;
 - the documents lodged in the proceedings largely dealt with the terms of employment of the Officer, and some incidents involving Corrections Officers, and contained almost no references to prisoners;
 - while the names of two prisoners were mentioned, the applicant's was not one of those, nor was his name to be inferred from any of the documents; and
 - the Commission's determination in the Officer's reinstatement application – a copy of which had been provided to the applicant – largely concerned a technical legal argument about the Officer's entitlement to lodge an appeal against her demotion, and did not refer to any evidence or matter concerning the applicant.
9. AC Barker also informed the applicant that, even if she were persuaded to alter her preliminary view concerning the application of s.11(1)(f) of the FOI Act to the requested documents, it appeared that no such documents existed. AC Barker informed the applicant of her preliminary view that there were no reasonable grounds for believing that any responsive documents existed in the possession or control of the Commission, and that the searches by the Commission registry to locate any such documents had been reasonable in all of the circumstances of this case. AC Barker invited the applicant, in the event that he did not accept her preliminary views, to lodge written submissions and/or evidence in support of his case.
10. By way of an undated letter, which was received in this Office on 1 March 2006, the applicant advised that he did not accept AC Barker's preliminary view, and stated that:

“... even though one can independently peruse a document or documents, it is not necessarily obvious to that reader of an inferred intent or reference unless that reader has been inculcated in the same system for a decent period of time.

...

... I have been an inmate of Queensland Corrections for nearly thirteen years and can pick up on the more subtle points as would no doubt be appreciated.”
11. In making my decision, I have taken into account the following material:
 - the applicant's FOI access application dated 31 August 2005, application for internal review dated 27 September 2005, and application for external review dated 7 November 2005;
 - the initial and internal review decisions of Mr Chadwick and Mr Savill, dated 15 September 2005 and 31 October 2005 respectively; and
 - the applicant's letter dated 29 November 2005 and undated letter received on 1 March 2006.

Application of s.11(1)(f) of the FOI Act

12. Section 11(1)(f) and s.11(2) of the FOI Act provide:

“11 Act not to apply to certain bodies etc.

(1) *This Act does not apply to—*

....

(f) *a registry or other office of a court, or the staff of a registry or other office of a court in their official capacity, so far as its or their functions relate to the court’s judicial functions; or*

....

(2) *In subsection (1), a reference to an entity in relation to a particular function or activity means that this Act does not apply to the entity in relation to documents received, or brought into existence, by it in performing the function or carrying on the activity.”*

13. Section 11(1) of the FOI Act lists bodies to which the FOI Act does not apply, either generally or when the body is performing specified functions. The inclusion of a body in s.11(1) means, in effect, that the body is not subject to the obligations imposed on agencies by the FOI Act (i.e., under Part 2, to publish certain documents and information; under Part 3, to deal with applications for access to documents made in accordance with s.25; and under Part 4, to deal with applications for amendment of personal affairs information), either generally or when performing specified functions.

14. By virtue of s.11(1)(f) of the FOI Act, the FOI Act does not apply to a registry or other office of a court in so far as its functions relate to the court’s judicial functions. The effect of s.11(1)(f) when read together with s.11(2) is to exclude from the application of the FOI Act documents of a court registry created or received by the registry in performing a function related to the court’s judicial function. Section 7 of the FOI Act provides that “function includes a power”. Accordingly, for the purposes of this review, I must determine firstly whether the Commission is a court for the purposes of s.11(1)(f) and, if so, whether the documents in issue were created or received by the Commission Registry in performing a function relating to the Commission’s judicial functions and/or powers.

Meaning of “court”

15. Section 7 of the FOI Act provides that “*court includes a justice and a coroner*”, but gives no other guidance as to the meaning of the term. The *Acts Interpretation Act 1954* and explanatory notes to the Freedom of Information Bill 1992 do not provide any further assistance in defining this term for the purposes of the FOI Act.

16. The Commission is created by the *Industrial Relations Act 1999* (IR Act) and its powers and jurisdiction are conferred on it by this statute. Whether the Commission is a court for the purposes of the FOI Act, will depend on whether the Commission is established under the IR Act as a court exercising judicial powers and functions.

17. Section 255 of the IR Act provides:

“The Queensland Industrial Relations Commission (the commission), as formerly established as a court of record, is continued in existence.”

18. The term “court of record” is generally accepted to mean a court that has the power to fine or imprison for contempt or another offence: *Ex parte Power; Re Devereaux* (1956) 57 SR

(NSW) 253 at 260. *Butterworths Concise Australian Legal Dictionary* (1997) at p.96, defines this term as follows:

“A court that is either declared expressly by statute to be so, or a court that has the power to fine or imprison, by statute or otherwise for contempt of itself or for other substantive offences: Cooper & Sons v Dawson (1916) 22 ALR 181 at 184.”

19. The QIRC is a court of record created by the IR Act. Unlike superior courts of record, such as the Supreme Court, the Commission has no inherent jurisdiction but derives its express and implied jurisdiction from the IR Act.
20. There is extensive High Court authority which examines the meaning of “judicial power” in the context of statutory courts and tribunals. In *Brandy v Human Rights and Equal Opportunity Commission* (1994-1995) 183 CLR 245, the High Court canvassed the authorities on this issue in determining whether sections of the *Racial Discrimination Act 1975* (Cth), which purported to vest judicial power in the Human Rights and Equal Opportunity Commission (HREOC) in registering and enforcing its determinations, were invalid.
21. In finding that the vesting of judicial power in HREOC was invalid, Deane, Dawson, Gaudron and McHugh JJ considered that, in assigning a definition to “judicial power”, a useful starting point was that advanced by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 in which he described judicial power as:

“...the binding and authoritative decision of controversies between subjects or between subjects and the Crown made by a tribunal which is called upon to take action.”
22. Their Honours then referred to Kitto J’s judgment in *R v Gallagher; Ex parte Aberdare Collieries Pty Ltd* (1963) 37 ALJR 40 at 43 where his Honour stated that judicial power consists of:

“...the giving of decisions in the nature of adjudications upon disputes as to rights or obligations arising from the operation of the law upon past events or conduct.”
23. The other members of the court in *Brandy v HREOC*, Mason CJ and Brennan and Toohey JJ, referred to the views of Latham CJ in *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 199 where his Honour stated:

“If a body which has the power to give a binding and authoritative decision is able to take action so as to enforce that decision, then, but only then, according to the definition quoted, all the attributes of judicial power are plainly present.”
24. Their Honours went on to state that the HREOC’s inability to enforce its own determinations was a “strong factor weighing against the characterisation of its powers as judicial”. In determining whether the HREOC was exercising judicial power, their Honours also considered the remedies which the HREOC had the ability to award including damages, declaratory and injunctive relief. Their Honours found that these remedies were analogous to those of a court in deciding criminal or civil cases.
25. In my view, the authorities discussed above establish that the term “judicial power” encompasses the ability to adjudicate and decide upon controversies between parties according to law. Although the ability of a tribunal to enforce its own orders has been seen as an essential element in the exercise of judicial power, it is not critical to the exercise of judicial power that a tribunal is called upon to execute its own decision: see *Brandy v HREOC* at 269 per Deane, Dawson, Gaudron and McHugh JJ. However, the ability to enforce determinations remains a strong factor in support of characterising powers as judicial.

26. The Commission's jurisdiction and powers are set out in Chapter 8, Part 2 and Part 6 of the IR Act. Relevantly, the Commission has the jurisdiction to hear and decide all questions arising out of and involving the rights and duties of a person in relation to an industrial matter (s.265(1)), the power to grant injunctions (s.277) and the power to enforce its own decisions (s.334(1)(b)). Significantly, s.334 provides as follows:

“(2) A decision of the court or commission —
(a) must be drawn up and verified; and
(b) without limiting any other way of execution and recovery prescribed by or under this Act, may be executed, recovered on, and otherwise enforced;
as a judgment or order of a Supreme Court judge is drawn up, verified, executed, recovered and otherwise enforced against the person, lands, and goods of the party affected.

(3) For the effective operation of subsection (2), the Uniform Civil Procedure Rules, as far as they may reasonably be applied, are to be applied and complied with, with the amendments the court or commission approves.”

27. The powers of the Commission in relation to enforcement of its decisions are particularly persuasive in determining whether the Commission exercises judicial power. Accordingly, I am satisfied that the powers of the Commission as set out above together with the declaration in s.255 that the Commission is a court of record are sufficient to establish that the Commission is a court which exercises judicial power in performing its functions under the IR Act.

Meaning of “registry”

28. The Commission registry is established under s.294 of the IR Act. Sections 294 and 295 of the IR Act provide:

294 Industrial registry

(1) There is an Industrial Registry (the registry).

(2) The registry consists of—

- (a) an industrial registrar (the registrar); and*
- (b) 1 or more deputy industrial registrars (a deputy registrar); and*
- (c) the other staff mentioned in section 303.*

295 Functions of the registry

The registry has the following functions—

- (a) to act as the registry for the court and commission;*
- (b) to provide administrative support to the court and commission;*
- (c) any other functions conferred on the registry by this Act.*

29. The non-exhaustive list of functions conferred on the registry by s.295 of the IR Act includes both administrative support for the Industrial Court (the Court) and the Commission, and acting as the registry for the Court and for the Commission.

Documents sought by the applicant

30. The applicant seeks access to documents concerning complaints against the Officer, in which he believes his name is mentioned or is to be inferred from the content of the relevant document.

31. The documents concerning the Officer held by the Commission Registry comprise three files (D02 346 – Notification of a Dispute, and D03 1898 and D04 45 – Application for Reinstatement) and a number of loose documents. The three files contain documents filed by the parties in the proceedings before the Commission, such as the Notification of Dispute, Applications for Reinstatement and affidavits; and documents generated in the proceedings by the Commission itself, such as Orders and a transcript of proceedings. The loose documents comprise documents filed by the parties in the proceedings before the Commission, such as copies of the Applications, affidavits and submissions; documents generated in the course of the proceedings, such as a Callover Hearing Sheet, Notification of Callover, Orders, Certificate, decision and transcript of proceedings; and correspondence to and from the applicant in connection with his FOI access application.
32. For the purposes of this decision, I will describe the documents mentioned above – with the exception of the correspondence to and from the applicant in connection with his FOI access application – as the ‘Commission documents’. With respect to the correspondence to and from the applicant in connection with his FOI access application, even if I were to conclude that I have jurisdiction to consider the external review application, I note that correspondence, having been created after the date of the access application, falls outside the terms of that application and could not be dealt with in this review (see s.25(3) of the FOI Act).
33. I am satisfied that the Commission documents were created or received by the registry in the course of specific proceedings before the Commission. Given the nature of the documents – affidavits, exhibits, orders made by the Commission, transcripts of hearings, *et cetera* – I am satisfied that they relate to the judicial functions of the Commission.
34. The Commission registry will also at times handle other categories of documents; for example, documents relating to the personnel files of Commission and Court employees, and operational documents relevant to its administrative support of the Commission and the Court. However, in this case the documents held by the registry are documents filed in proceedings before the Commission. I am satisfied that in receiving or creating those documents, the Registry was performing a function relating to the Commission's judicial functions.
35. Accordingly, I find that the Commission documents are documents of a kind which are excluded from the application of the FOI Act by s.11(1)(f) of that Act.

“Sufficiency of search”

36. For completeness I will note that, even if s.11(1)(f) of the FOI Act did not exclude the Commission documents from the application of the FOI Act, I am satisfied that there are no documents in the possession or control of the Commission which fall within the terms of the applicant's FOI access application dated 31 August 2005.
37. The applicant states that he was informed by “*concerned officers*” at the Woodford Correctional Centre that information had been provided to the Ethical Standards Unit at the Correctional Centre concerning “*malfeasance and misfeasance towards me under the umbrella of the Corrective Services by [the Officer]. This information was part of the case against [the Officer] at the Industrial Relations Commission*”. The applicant contends that a person with considerable experience in correctional centres, such as himself, would identify inferences in the Commission documents which refer to the applicant.
38. Information Commissioner Albietz explained the principles applicable to “sufficiency of search” cases in *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464 at pp. 469-470 as follows:

18. *It is my view that in an external review application involving 'sufficiency of search' issues, the basic issue for determination is whether the respondent agency has discharged the obligation, which is implicit in the FOI Act, to locate and deal with (in accordance with Part 3, Division 1 of the FOI Act) all documents of the agency (as that term is defined in s.7 of the FOI Act) to which access has been requested. It is provided in s.7 of the FOI Act that:*

"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;"

19. *In dealing with the basic issue referred to in paragraph 18, there are two questions which I must answer:*

- (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.*

39. The applicant has provided no specific information or evidence in support of his contention that matter in the Commission documents impliedly refers to him. He has not attempted to identify any specific documents or categories of documents which he contends would contain such inferences. As the staff member of this Office who inspected the documents noted, they contain almost no references to prisoners. Close examination of documents referring to specific prisoners, or to prisoners as a body, did not suggest that the documents were capable of containing any inferred references to the applicant (i.e., by referring to other unnamed prisoners, or by referring generally to prisoners as a group with reference to some particular action or behaviour on the part of that group).

40. In view of the outcome of that inspection, and of the information provided by staff of the Commission Registry, I am satisfied that there are no reasonable grounds for believing that documents, containing either explicit or implicit references to the applicant, exist in the possession or under the control, of the Commission, and that the searches conducted by the Commission Registry to locate any relevant documents have been reasonable in all the circumstances of this case.

DECISION

41. I affirm the decision under review (being the decision dated 31 October 2005 by Mr G Savill on behalf of the Commission) by finding that the documents held by the Commission in relation to the Officer's Notification of Dispute and Application for reinstatement are excluded from the application of the FOI Act by s.11(1)(f) of the FOI Act and therefore that –
- (a) the Commission was entitled to refuse to deal with the applicant's application dated 31 August 2005 for access to documents under the FOI Act; and
 - (b) I do not have jurisdiction to deal further with the applicant's application for review dated 7 November 2005.

.....
Cathi Taylor
Information Commissioner

Date: 24 August 2006