



Decision and Reasons for Decision

Application Number: 210556

Applicant: Mr Ronald J Price

Respondent: Nominal Defendant (Queensland)

Decision Date: 13 February 2009

Catchwords: FREEDOM OF INFORMATION – Request for a review of a decision of the Information Commissioner is beyond the power of the Information Commissioner. Once a decision has been made, the duty of the Information Commissioner has been discharged and nothing remains to be done i.e. the Information Commissioner is *functus officio*.

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REASONS FOR DECISION

Summary

1. The applicant requested a review of an external review that had been finalised and which concerned documents previously the subject of a decision in another external review. Once issued to a participant in a review, a decision is irrevocable because the decision-making power is spent.

Background

2. The Information Commissioner's decision on this same matter dated 30 June 1999 records:

On 24 January 1993, the applicant was involved in an altercation with two youths who were riding trail bikes near his property. The applicant alleges that he was injured when one of the trail bikes was driven over his foot. At the relevant time, s4F(4) of the MVIA provided that any claim against the Nominal Defendant must be made within three months of the date on which the injury occurred, unless the Nominal Defendant (or prescribed court) exercised its discretion pursuant to s4F(4)(b) to extend time for making such a claim. The applicant's solicitors wrote to the Nominal Defendant on 12 July 1993, nearly six months after the incident, asking the Nominal Defendant to extend the time for giving notice of the applicant's claim. After some investigation, the Nominal Defendant advised the applicant's solicitors that it was not prepared to exercise its discretion to extend time, in favour of the applicant.

On 11 October 1993, an application was filed in the Magistrates Court seeking an order to extend the time for lodgement by the applicant of a claim against the Nominal Defendant under the MVIA. The Nominal Defendant was a party to those proceedings. On 20 May 1994, the Magistrates Court dismissed the application.

3. By letter dated 17 October 1994 the applicant wrote the Nominal Defendant in the following terms:

I demand under the Freedom of Information the right to view and copy ALL documents relating to the file BLB:RMF (No. 27066(f)- Ronald John Price).....Also to include tapes of conversations + videotapes.

4. By letter dated 5 December 1994 the applicant was advised of the initial agency decision to refuse him access to a number of documents including a video and negatives under section 43(1) of the *Freedom of Information Act 1992 (FOI Act)*. By letter dated 12 December 1994 the applicant applied for an internal review. By letter dated 22 December 1994 the agency advised the applicant the original decision had been affirmed.
5. By letter dated 3 January 1995 the applicant applied to the Information Commissioner for an external review (**External Review 1**). The Information Commissioner made a formal decision¹ dated 30 June 1999 varying the agency's internal review decision but affirming that the video held in the Nominal Defendant's file and negatives in its loss assessor's files remained exempt under section 43(1) of the FOI Act.
6. By letter dated 26 February 2002 the applicant made an FOI access application to the Nominal Defendant in the following terms:

¹ *Ronald John Price and the Nominal Defendant* (Unreported, Queensland Information Commissioner, 30 June 1999).

I am re-applying under FOI for all the following documents related to myself and my matters including all documents related to my correspondence and FOI applications etc... These documents are the ones related to and came into creation as a direct result of the incident in January 1993 involving myself.

7. The Nominal Defendant failed to process the applicant's application within the statutory time period.
8. By letter dated 24 June 2002 the applicant applied to the Information Commissioner for review of the deemed refusal of access (**External Review 2**). The Nominal Defendant identified 249 out of 287 documents it was prepared to administratively release in full. The Information Commissioner determined that the remaining documents in contention were exempt on the basis of legal professional privilege.
9. By letter dated 13 October 2005 the applicant applied to the Nominal Defendant for:

...all documents of the agency related to myself and or my family and or my property and or matters related to myself and or my complaints etc.. I also include in an application for all photographs etc including negatives and apply for the Video supplied by a Bill Wit to the Nominal Defendant...I also request an investigation into the allegations that this video has now on 2 occasions been falsely shown as missing from the record.
10. The video negatives sought were documents that were previously found to be exempt by the Information Commissioner in External Review 1. The Information Commissioner is prohibited by the FOI Act from ordering an agency to release exempted documents. An agency however retains a discretion to release its own documents even though the documents fall under an exempt category of documents.
11. The applicant agreed to an extension of time and was given a partial decision by the agency on 10 January 2006 and a decision on 10 March 2006. A range of documents was released by the agency to the applicant including the video previously found to be exempt by the agency and the Information Commissioner. Other documents were found to be exempt.
12. By letter dated 27 January 2006 to the Nominal Defendant the applicant alleged that the video supplied had been corrupted and asked for all the film to be supplied.
13. By facsimile dated 13 March 2006 the applicant applied for an internal review however he was advised by the agency in a letter dated 7 April 2006 that it would not be undertaking the review.
14. By letter dated 10 April 2006 the applicant applied to the Information Commissioner for an external review in relation to a 'deemed refusal' of an FOI application dated 13 October 2005 to the Nominal Defendant (**External Review 3**). On 17 July 2007 a preliminary view was expressed to the parties that certain documents were exempt from disclosure on the basis of legal professional privilege and personal affairs and sought submissions from the applicant about the grounds for any belief that further documents existed and any evidence supporting such a belief to be provided by 3 August 2007.
15. The Nominal Defendant then decided to administratively release to the applicant all documents remaining in contention in the review. As the applicant had not provided the requested details to the external review, the review was finalised.
16. By letter dated 7 July 2008 the applicant requested a "new review of my FOI to Treasury Nominal Defendant". The basis of the request was that the review had been

“shut down improperly”. The applicant acknowledged receiving from the Nominal Defendant all the documents in its possession “except for the video and negatives and tape recordings etc and other documents hidden from my schedules supplied by the Information Commissioner years ago”.

Decision under review

17. Does the Information Commissioner have the power to review, vary, set aside or affirm the outcome of a finalised review or a decision of the Information Commissioner?

Steps taken in the external review process

18. By letter dated 7 July 2008 the applicant was provided with a preliminary view that to the extent that the scope of the request was the same as that of his applications for external review dated 3 January 1995 and 10 April 2006, the Information Commissioner’s duty has been discharged, meaning, the Commissioner had no power to deal with his request and that it would not be dealt with further. The applicant was also advised that there was no basis for his view that the review had been shut down improperly. The applicant was asked to identify in submissions any document he was seeking that had not been dealt with in the 1999 external review decision.
19. By letter dated 9 July 2008 the applicant made the following submissions:
 - “This act [of claiming to be *functus officio*] has never been pulled by anybody in the history of the 1992 Freedom of Information Act.”
 - The FOI Act and the Acts Interpretation Act when read together do not preclude a subsequent FOI application when circumstances change or errors have been made.
 - The Information Commissioner does not have the same powers as the Queensland Supreme Court.
 - The Information Commissioner decisions are not binding on anyone with regard to stopping a new FOI application to be made. When a new application is made there are obvious provisions to being vexatious but when a new application is made all the frills go with it including a right to seek and obtain External Review and are in the Acts in question.
 - “Now to the matter, the decision to release me the documents on computer disc came after I was released years ago, the same documents **by a previous manager of the Nominal Defendant as he record show, Files notes in your Office will show criminal activity.**” The negatives as an example, were never released and are missing from the records. The negatives are negatives of still photographs taken by the Loss Assessors for the Nominal Defendant.
20. By telephone of 5 August 2008 the applicant also submitted that the South Australian Ombudsman had decided that the “state of functus officio did not exist.”

Findings

- The applicant’s FOI application to the Nominal Defendant dated 13 October 2005 requested:

all documents of the agency related to myself and or my family and or my property and or matters related to myself or my complaints....I also include an application for all photographs etc including negatives and apply for the video supplied by a Bill Wit to the Nominal Defendant. Please charge all persons that were involved in hiding or destroying documents related to myself.

21. Having reviewed the relevant Information Commissioner decisions, I am satisfied that the "video, and negatives and tape recordings etc" the applicant is seeking through a 'new' external review application dated 7 July 2008 are the same video, negatives and tape recordings that were dealt with in the Information Commissioner's decision dated 30 June 1999 and are the same video, negatives and tape recordings that were dealt with in his FOI application dated 13 October 2005 and subsequent external review process.
22. The question to be answered in this review is whether the Information Commissioner has the power to review finalised reviews and decisions of the Information Commissioner. Having considered the applicant's submissions, I remain of the view that I have no power to amend or repeal any external review decision or to re-open finalised reviews. Reasons for this view follow.
23. The Information Commissioner's Decision in External Review 1 is a valid, final decision made in accordance with the requirements of the FOI Act. The requirements of section 89 of the FOI Act have been met. Importantly, the decision was conveyed to both the applicant and the respondent, the Nominal Defendant. It was lawfully made. The Delegate held the necessary delegation to conduct External Review 3 and the conduct of the review conformed to the requirements of procedural fairness.
24. By letter dated 7 July 2008 the applicant requested a review of the Information Commissioner's Delegate's Decision. The basis of the request was that the external review had been "shut down improperly". The applicant acknowledged receiving from the Nominal Defendant all the documents in its possession "except for the video and negatives and tape recordings etc and other documents hidden from my schedules supplied by the Information Commissioner years ago".
25. The video and negatives and tape recordings sought were documents that were previously found to be exempt by the Information Commissioner in External Review 1. During its processing of the 2005 FOI application, the Nominal Defendant released documents to the applicant including a video tape depicting fence building activities notwithstanding the earlier Information Commissioner decision that this document was exempt. There is nothing in the Act that precludes agencies from administratively releasing documents that have been declared exempt by the Information Commissioner. On this occasion the Nominal Defendant made a decision to release the video, previously found to be exempt by the Information Commissioner. The release of the video was always within the discretion of the agency. The Nominal Defendant searched for but was unable to locate the negatives and tape recordings previously considered by the Information Commissioner as exempt documents.
26. During External Review 2, the applicant was given administrative access to all matter remaining in issue and all documents the Nominal Defendant could locate. By letter dated 17 July 2007 the applicant was asked for a written submission by 3 August 2007 identifying any additional documents he believed existed and the grounds for such a belief. By facsimile dated 1 August 2007 the applicant "dared" the Delegate to hold a public inquiry to determine where "her friends in high places have hidden the missing documents including the negatives and missing video footage including other videos". The applicant also submitted that:

Many documents have been kept from the FOI decision maker. These include related Crown Solicitor and Attorney General etc files. These files have been hidden from me for years.

27. On receipt of these submissions, the Information Commission's Delegate decided to finalise the review on the basis that the applicant had not provided the requested details in writing. It appears that the applicant remains dissatisfied that the Delegate dealt with his submissions in this way. Dissatisfaction with the approach taken by the Delegate discloses no basis to accept a request for a review of the Delegate's Decision. As previously stated, the Information Commissioner's Decision with respect to the documents the applicant continues to seek is final and once the duty had been discharged under the FOI Act, the power was spent. Once a review has been finalised as it was by the Delegate in External Review 3, there is nothing further to be done.
28. The documents that the applicant still seeks cannot be re-considered by the Information Commission because they were considered in External Review 1 when a formal decision under section 89 of the FOI Act was made. While the Information Commissioner's power is spent with respect to these documents, there is nothing in the FOI Act preventing the agency exercising its administrative discretion to release them if the documents can be located.
29. As the applicant has already exercised his right to an external review with respect to the documents he seeks and each of the reviews were finalised, the Office has discharged its responsibility and has nothing left to do. There are no errors in either review that may make the outcomes invalid.
30. Once a decision on an external review is made, the only provision in the FOI Act authorising or empowering the Commissioner to alter a decision is found in section 89A which allows the Commissioner at any time to correct an error in a decision if there is an obvious error and the error resulted from an accidental slip or omission.
31. The applicant is not seeking a correction of an obvious error in the Information Commissioner's Decision and it follows that the Commissioner has no power under the FOI Act to set aside, vary or correct the Information Commissioner's Decision on the basis that it contained some serious error.
32. The applicant has contended that section 24AA of the *Acts Interpretation Act 1954* (Qld) permits the Commissioner to re-open an external review or review, uphold, vary or set aside the Delegate's Decision.
33. Section 24AA of the *Acts Interpretation Act 1954* provides as follows:

24AA Power to make instrument or decision includes power to amend or repeal

If an Act authorises or requires the making of an instrument or decision--

- (a) the power includes power to amend or repeal the instrument or decision; and*
- (b) the power to amend or repeal the instrument or decision is exercisable in the same way, and subject to the same conditions, as the power to make the instrument or decision.*

34. The application of section 24AA of the *Acts Interpretation Act 1954* however must be considered in light of the act as a whole. Section 24AA of the *Acts Interpretation Act 1954* may be displaced wholly or partly by a contrary intention appearing in any Act. (See section 4 of the *Acts Interpretation Act 1954*.)
35. In *Queensland Newspapers Pty Ltd v Stjernqvist* [2007] 1 Qd R 171 Douglas J, without deciding the point, doubted that any power conferred by section 24AA of the *Acts Interpretation Act 1954* could be used "as a substitute for the appeal process or the power of review given by the *Judicial Review Act 1991*" in respect of orders made by the Magistrates Court under section 12 of the *Bail Act 1980* prohibiting the publication

of evidence or information about a bail application. Because of the *quasi judicial* nature of the Information Commissioner's decisions, a similar doubt must arise in the context of the FOI Act, with the decisions of the Information Commissioner being reviewable under the *Judicial Review Act 1991*.

36. In *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing* (unreported) [2008] QSC 305, Jones J found that where a legislative scheme was directed to the making of a determination such that it called for finality in respect of any decision made under the scheme, the legislation expressed a "contrary intention" for the purposes of sections 4 and 24AA of the *Acts Interpretation Act 1954*, as it would "offend against the spirit of the legislation and the clear intention of the legislature for a decision, once made, to be the subject of arbitrary reconsideration or repeal. Section 89 of the FOI Act requires the Commissioner to make a written decision at the end of a review. As the FOI Act makes clear that a determination by the FOI Commissioner calls for finality in respect of any decision made under the scheme, the FOI Act expresses the necessary "contrary intention" for the purposes of sections 4 and 24AA of the *Acts Interpretation Act 1954*.
37. The limitation of the Commissioner's powers to the express powers conferred by section 89A of the FOI Act and the power of review given by the *Judicial Review Act 1991* provide a sufficient basis for me to form the view that the Commissioner does not have any power to vary, revoke or affirm an external review decision.
38. This approach is otherwise more generally supported by the common law. Gummow J considered the history of similar provisions in the *Acts Interpretation Act 1901* (Cth) in *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 where he noted:

...there was "an inconvenient common law doctrine of somewhat uncertain extent to the effect that a power conferred by statute was exhausted by its first exercise"...however, s33(1) of the Acts Interpretation Act 1901 (Cth)...provides that where an Act confers a power or imposes a duty, then unless the contrary intention appears, the power may be exercised and the duty shall be performed "from time to time as occasion requires". But in any given case, a discretionary power reposed by statute in the decision maker may, upon a proper construction, be of such a character that it is not exercisable from time to time and it will be spent by the taking of such steps or the making of the statements or representations in question, treating them as a substantive exercise of the power. The result is that when the decision maker attempts to resile from his earlier position, he is prevented from doing so not from any doctrine of estoppel, but because his power to do so is spent and the proposed second decision would be ultra vires. The matter is one of interpretation of the statute conferring the particular power in issue.
39. Chesterman J considered a number of authorities illustrating the application of similar provisions in other Australian jurisdictions and the United Kingdom in *Firearm Distributors Pty Ltd v Carson and Ors* [2001] 2 Qd R 26. His Honour found at paragraph 32 an "underlying reasoning":

that where a power is adjudicative in nature, affecting rights or liabilities, it can only be exercised once, such a view would accord with the law relating to arbitral awards and judicial pronouncements. The common law very early insisted that an arbitrator could not vary or recall an award. The rule was very strict.
40. Decisions of the Information Commissioner are adjudicative in nature, and following Chesterman J's reasoning, this provides a further basis on which to decline the applicant's request to review the Delegate's Decision.

41. In *Ping v Medical Board of Queensland* [2004] 1 Qd R 282 Moynihan J at 284 held that where an Act required a statutory body to decide or elect to proceed by one of two alternative courses, then, having chosen one course, section 24AA of the *Acts Interpretation Act 1954* could not operate to authorise the statutory body to repeal the decision and elect to proceed by the alternative course.
42. In the Court of Appeal decision *Re Petroulias* [2005] 1 Qd R 643 McMurdo P at 655 thought it arguable that the power found in section 24AA could be used by the Registrar of the Court to review and re-exercise a decision to register a solicitor, where the decision had been based on mistaken facts. In expressing this view, Her Honour noted:

With very limited exceptions such as fraud or clear statutory statements, administrative decisions, once given effect by communication to the affected party, are irrevocable: Goulding v Chief Executive, Ministry of Fisheries.² This is because the decision-making power is spent.³
43. In light of all of the above judicial authority it appears open to me to form the view that once the decision making power of the Commission has been exercised, the power is spent. The Commissioner may not amend or repeal an external review decision under section 24 AA of the *Acts Interpretation Act 1954*.
44. In his submissions the applicant referred to a decision of the South Australian Ombudsman that 'functus officio' did not exist. The South Australian Ombudsman reports in his 2001-2002 Annual Report on a case where he had decided that he was not *functus officio* in circumstances where he had exercised his powers to direct an agency to remake its determination and the agency presented the Ombudsman with further submissions.
45. As Gummow J noted in *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211, the question as to whether a power is spent is a matter of interpretation of the statute conferring the particular power in issue. The FOI review scheme operated by the South Australian Ombudsman is significantly different to the Queensland scheme. The Ombudsman has conferred on him a power to direct an agency to remake a determination. The agency may not follow a recommendation of the Ombudsman in re-making its decision. The Ombudsman in his Annual Report states that the Ombudsman's role is "not one which directly affects the legal rights of persons such as to suggest that the decision and direction is final in its effect on the rights of any person". This can be distinguished from the role of the Information Commissioner who does determine the rights of an application for access to documentation and the Information Commissioner's decision is final and binding on agencies. As the statute conferring power on the South Australian Ombudsman is significantly different to the statute conferring power on the Information Commissioner, the South Australian Ombudsman external review to which the applicant has referred me can carry no persuasive value in my considerations.
46. My finding therefore is that as a decision of the Information Commissioner has been made previously in relation to the documents sought in External Review 1 and External Review 3 has been finalised, the applicant's request for a review of the Delegate's Decision is beyond the power of the Commissioner and that the Information Commissioner is *functus officio* in these circumstances.

² [2004] 3] NZLR. 173, 182-83 [30], 185-186 [42]-[43]

³ *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR, 193, Gummow J at 211

DECISION

47. The applicant's request for a review of a finalised review is beyond the power of the Commissioner because the documents being sought by the applicant have been subject to a final decision under section 89 of the FOI Act and a second review had been otherwise finalised.

Julie Kinross
Acting Information Commissioner

Date: 13 February 2009