

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 235 of 1993
(Decision No. 95006)

Participants:

T D and P A MYERS
Applicants

- and -

QUEENSLAND TREASURY
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - applicants challenging sufficiency of search for documents falling within the terms of the applicants' FOI access application - whether there are reasonable grounds for believing that the requested documents exist and are in the possession or under the control of the respondent - whether the search efforts made by the respondent to locate the requested documents have been reasonable in all the circumstances of the case - meaning of "document of an agency" within s.7 of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.7, s.52

Freedom of Information Act 1982 Vic

Stamp Act 1894 Qld s.4, s.23(1), s.23A, s.26(3), s.28, First Schedule cl. 3

Birrell and Victorian Economic Development Corporation, Re (1989) 3 VAR 358

Cannon and Australian Quality Egg Farms Limited, Re (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported)

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

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

DECISION

The decision under review (being the decision made on behalf of the respondent by Mr Michael Sarquis on 14 December 1993 to the effect that there are no documents in the possession or control of the respondent that fall within the terms of the applicants' FOI access application dated 30 September 1993) is affirmed.

Date of Decision: 21 April 1995

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F N ALBIETZ
INFORMATION COMMISSIONER

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- and -

QUEENSLAND TREASURY
Respondent

REASONS FOR DECISION

Background

1. The applicants seek review of the respondent's decision that no documents can be located in the possession or control of Queensland Treasury which fall within the terms of the applicants' FOI access application dated 30 September 1993.
2. Mr and Mrs Myers applied under the *Freedom of Information Act 1992 Qld* (the FOI Act) to the Office of State Revenue (a division of Queensland Treasury) for access to various documents concerning shares held by them in a company, Jurycastle Pty Ltd (Jurycastle). In their FOI access application, Mr and Mrs Myers described themselves as being shareholders of Jurycastle and stated that they believed their shares in that company had been disposed of without their knowledge or authority. Mr and Mrs Myers allege that their shares were transferred to Graham John Swain and Lorraine Barbara Swain (the Swains). The substance of the applicants' FOI access application is expressed in the following terms:

Our request is we want the document showing the change of shareholding with signature signing our shareholding over to Swain. We have not signed any documents regarding sale of our shares.

3. It is understandable that the applicants would consider that a document recording a transfer of a shareholding in a private company ought to have been lodged with the Office of State Revenue, since s.26(3)(b) of the *Stamp Act 1894 Qld* requires every instrument chargeable with stamp duty under that Act to be lodged in the Stamp Duty Office (the predecessor to the Office of State Revenue) within one month after execution of the document, unless an extension of time is given. Section 4 of the *Stamp Act*, read with clause (3) of the First Schedule of that Act, "Conveyance or Transfer", provides that a conveyance or transfer of shares is assessable to stamp duty on a basis proportionate to the value of the shares being transferred (referred to as *ad valorem* assessment). Section 28 of the *Stamp Act* provides that the Office of State Revenue shall retain possession of any instrument chargeable with stamp duty and which is unstamped or insufficiently stamped, until the stamp duty payable, and any penalty and costs, has been paid.
4. Queensland Treasury's initial decision was made by Ms Anthea Derrington on 25 November 1993. Her decision detailed the searches and inquiries made to locate any documents falling within the terms of the applicants' FOI access application. It indicated that the Office of State Revenue conducted a comprehensive search of the computer system which records all stamp duty lodgements. Those searches are described in Ms Derrington's decision letter as follows:

The search revealed that a number of unspecified documents had been lodged by

Jurycastle Pty Ltd. A number of attempts were then made to locate those documents, including documents which were lodged on 17 July 1992, which should have been placed on a file.

The file in question was recorded as awaiting assessment in stamps team 3, however, team 3 advised that the file was no longer there. In addition team 3 is no longer allocated new files of the nature of the file in question. An unsuccessful search was also conducted of matter held in team 7.

A search was then conducted of all relevant storage areas for finalised files. An electronic mail message was also sent to all Brisbane officers of the Office of State Revenue on 13 October 1993 requesting assistance in locating the file.

All relevant No Further Action correspondence bundles were also searched for a period covering in excess of 12 months, however, a bundle dated 20 October 1992 could not be located. A further electronic mail message was issued to all Brisbane officers requesting assistance in locating the October bundle, however, the bundle was not found.

As the missing file has not been able to be found, it is impossible to determine from the computer record the nature of the documents lodged. For example they could refer to a mortgage, purchase of property or a lease, etc.

5. Ms Derrington went on to observe that:

It would be misleading to state that the document you sought could not be found as there is no record that such information had ever been provided to the Office of State Revenue.

6. Ms Derrington also referred to inquiries made of other agencies, which were unable to provide any assistance:

The Australian Securities Commission stated that the Commission only retains current shareholder information which is obtained from annual returns and no historical information is maintained.

In summary, it has not been possible to establish that the information which you seek is, or has ever been, kept within a division of Queensland Treasury.

Notwithstanding these comments, as the Queensland Treasury decision-maker in this matter, I decided on 24 November to refuse access to your request. In taking this action you will be able to pursue your appeal rights under the Act and a copy of those rights is attached for your information.

7. By letter dated 26 November 1993, the applicants applied for internal review under s.52 of the FOI Act, saying:

... we are not satisfied with the search to date. We are very concerned at our shares being disposed of without our authority and knowledge and wish to find the documents relating to this matter.

8. Queensland Treasury's internal review decision was made by Mr Michael Sarquis on 14 December 1993. Mr Sarquis' decision letter stated that he requested the Executive Director of the Office of

State Revenue to undertake a further, more comprehensive search for the information to which Ms Derrington referred in her letter of 25 November 1993. That search involved the following steps:

the "no further action" bundle of 20 October 1992, which previously could not be found, was located and examined

all relevant stamp duty assessing teams in the Office of State Revenue were contacted and requested to conduct a physical search of their areas for documents relating to the applicants' FOI access application

the area of the Office of State Revenue termed "section 28" (if documents have been lodged for assessment, and further information is required before the documents are assessed for stamp duty, those documents are retained in the area known as "section 28", so named after s.28 of the *Stamp Act*, the terms of which are set out at paragraph 3 above) which includes areas for storage of files described as the "cellar" and abeyance areas, was re-examined

the counter services area relating to "awaiting payments" matters was re-examined

the "no further action" clerk was contacted.

9. Mr Sarquis reported that these searches and inquiries failed to locate any matter relating to the documents requested in the applicants' FOI access application, and failed to establish that any such documents do in fact exist. On this basis, Mr Sarquis decided to affirm Ms Derrington's initial decision.
10. The applicants applied, by letter dated 16 December 1993, for external review under Part 5 of the FOI Act.

Principles applicable to "sufficiency of search" cases

11. As I indicated in paragraphs 12-61 of my decision in *Re Smith and Administrative Services Department* (Information Commissioner Qld, Decision No. 93003, 30 June 1993, now reported at (1993) 1 QAR 22) and in paragraphs 14-15 of my decision in *Re Cannon and Australian Quality Egg Farms Limited* (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported), I have jurisdiction to conduct an external review where an applicant, who has applied to an agency for access to a document, subsequently complains that access to the document has been denied because of the agency's failure to locate and deal with the document in its response to the relevant FOI access application. As I indicated in *Re Smith* and *Re Cannon*, I have jurisdiction to conduct an external review on the question of the "sufficiency of search" conducted by the agency, even if there are no other issues raised (e.g. claims that requested documents are exempt under Part 3, Division 2 of the FOI Act).
12. I explained the principles applicable to "sufficiency of search" cases in my decision in *Re Shepherd and Department of Housing, Local Government & Planning* (Information Commissioner Qld, Decision No. 94007, 18 April 1994, unreported) at paragraphs 18 and 19, 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.*

Searches and inquiries made during the external review process

- 13. In the present case, it was necessary (in accordance with the principles set out above) to conduct an independent inquiry as to whether Queensland Treasury had possession or control of any documents falling within the terms of Mr and Mrs Myers' FOI access application.
- 14. The Deputy Information Commissioner wrote to the applicants on 20 December 1993 requesting that they provide an explanation of the basis on which they believed that Queensland Treasury had possession or control of documents which relate to the alleged unauthorised disposal of the applicants' shares in Jurycastle, together with copies of any documents in their possession which demonstrated that Queensland Treasury has possession or control of documents of that kind.
- 15. The applicants responded by letter dated 22 December 1993, saying:

... we advise that letter dated 25 November 1993 signed by Anthea Derrington ... confirms that the Queensland Treasury Department does hold documents that relate to Jurycastle lodged on or about the time when our shares could have been disposed of and that the file appears to have gone astray within the Treasury Department system.
- 16. This is a reference to that part of Ms Derrington's decision letter set out in paragraph 4 above which indicates that documents concerning Jurycastle were lodged on 17 July 1992 but that these documents could not be located by Queensland Treasury. I accepted that these circumstances afforded a sufficient *prima facie* indication that there may be reasonable grounds to believe that the documents requested by the applicants were in the possession of the respondent, so as to justify detailed searches and inquiries.
- 17. In January 1994, the Assistant Information Commissioner telephoned one of the applicants, Mr

Terry Myers, in order to obtain some of the factual background to the transaction to which the documents, which the applicants believe should be held by Queensland Treasury, relate. Mr Myers indicated that he and his wife held shares in Jurycastle, and realised that shares had been divested from them when they inspected records of the Australian Securities Commission which recorded shares being transferred from them to the Swains. The relevant documents from the Australian Securities Commission were subsequently forwarded to my office.

18. The annual return lodged with the Australian Securities Commission in respect of Jurycastle for the financial year ended 30 June 1990 records Mr and Mrs Myers as each owning nine ordinary shares in Jurycastle. Identical details are recorded in a company extract for Jurycastle obtained from the Australian Securities Commission on 27 November 1991. The annual return lodged with the Australian Securities Commission in respect of Jurycastle for the financial year ended 30 June 1992 (which contains a declaration as to the completeness and correctness of the information contained in it, signed by Graham John Swain, as Director, on 25 January 1993), records a deletion of the names of Mr and Mrs Myers from the list of shareholders and from the list of Directors. This, *prima facie*, suggests that a transfer of Mr and Mrs Myers' shareholding in Jurycastle was effected (or at least was regarded by officeholders of Jurycastle as having been effected, and was recorded as such) at some time between 30 June 1991 and 30 June 1992. As noted at paragraph 3 above, an instrument effecting a conveyance or transfer of shares would ordinarily have been required to be lodged for assessment and payment of stamp duty.
19. The Assistant Information Commissioner arranged for an inspection to be undertaken at the Office of State Revenue, so that a search of the records system of the Office of State Revenue could be carried out for documents concerning Jurycastle, or for that matter, any of the other potential parties to the transaction alleged by the applicants to have occurred, including the applicants themselves, the Swains, and the secretary to the company (who was a solicitor who also performed legal services for the company).
20. It was established that the computerised record system of the Office of State Revenue became operational at the end of 1991. Under the guidance of the Assistant Information Commissioner, a search was conducted under the name Jurycastle. This revealed a record of a document having been lodged on or about 17 July 1992, and having been assigned to team 3. The details recorded were not sufficient to disclose whether the documents lodged in respect of Jurycastle on 17 July 1992 related to a transfer of shares, or some other kind of transaction.
21. The computerised record system of the Office of State Revenue also identified a finalised transaction concerning Jurycastle, which related to the transfer of a mortgage. This clearly did not concern the transaction the subject of the applicants' FOI access application.
22. During the Assistant Information Commissioner's attendance at the Office of State Revenue, the searches detailed in Ms Derrington's initial decision were retraced, with the same negative result. As it was possible that documents concerning a share transfer might have been passed to the Compliance section of the Office of State Revenue for recovery of stamp duty assessed, but not paid, an inquiry was made with that section, but it also produced a negative result. A follow-up inquiry on 12 August 1994 confirmed that the Compliance section did not have physical possession of any document falling within the terms of the applicants' FOI access application.
23. After the inspection of the records system of the Office of State Revenue proved fruitless, the solicitor who had also been the company secretary of Jurycastle was interviewed by telephone in order to determine whether he had information which would identify the existence of documents the subject of the FOI access application. The background facts as far as they could be independently established were explained to the solicitor, and he was asked whether he could shed any light on the nature of the documents lodged on behalf of Jurycastle on 17 July 1992. He explained that Jurycastle was the owner of an island off the Queensland coast, and that Jurycastle had gone into

liquidation. There had been a conditional contract for sale of the island which had not proceeded to finalisation, and the solicitor had been involved in attempting to transfer legal ownership of the island from the prospective purchaser back to Jurycastle. There had been litigation over this very issue, and the solicitor referred to a relevant decision given by White J of the Supreme Court of Queensland, in which an order was made that the prospective purchaser of the island do all things necessary to enable a conveyance of the island back to Jurycastle. In the context of such a transfer, the solicitor had written to the Office of State Revenue asking if it was possible for the island to be transferred back to Jurycastle without having to pay stamp duty twice. The solicitor believed that this was the reference that the Office of State Revenue had to the assessment pending, being the documents lodged on 17 July 1992.

24. A copy of the reasons for decision of White J given on 22 June 1992 in the action commenced by Supreme Court Writ No. 673 of 1992 was obtained. This decision sets out some of the history of the conditional contract for the sale of the island, most of which is irrelevant for present purposes, apart from the fact that the conditional contract for the sale of the island was dated 25 August 1991. What is of significance is that the Supreme Court issued a mandatory injunction requiring the prospective purchaser (who it appears was entitled to treat the conditional contract as rescinded, when the relevant condition had not been fulfilled) to sign all necessary documents to enable a conveyance of the island (back to Jurycastle) to be made.
25. I forwarded to Mr and Mrs Myers a copy of White J's reasons for decision, and conveyed my preliminary view that the content of that decision supported the history of events as described by the solicitor, which in turn supported the view that the documents lodged with the Office of State Revenue on 17 July 1992 did not concern the transaction the subject of the Myers' FOI access application. Mr and Mrs Myers did not respond to that preliminary view.
26. I consider that the existence of the Supreme Court's Order supports the solicitor's belief that the documentation lodged on 17 July 1992 was the request to transfer the island back to Jurycastle, without the need to pay stamp duty twice, for these reasons:
 - (a) the timing of the Order of White J, being 22 June 1992, makes it more probable than not that the documentation of 17 July 1992 was consequent upon the Order;
 - (b) the content of the Order is similar in nature to the solicitor's explanation of the purpose of the documentation of 17 July 1992; and
 - (c) the timing of the documentation of 17 July 1992 is more consistent with the solicitor's explanation than the possibility that the documentation relates to the transfer of shares, which one would expect would pre-date the contract for the sale of the island (25 August 1991), especially given my findings about an agreement dated 19 August 1991 referred to later in these reasons for decision.
27. I am therefore satisfied, on the balance of probabilities, that the documentation lodged at the Office of State Revenue on 17 July 1992 did not relate to a change of shareholding in Jurycastle, and did not, therefore, fall within the terms of the applicants' FOI access application.
28. During the course of the telephone conversation with the solicitor referred to in paragraph 23 above, the solicitor indicated that there should be a record in the Office of State Revenue of a transaction in which a mortgage in favour of Jurycastle was transferred. This confirmed the transaction identified in the name of Jurycastle during the inspection conducted at the Office of State Revenue (see paragraph 21 above).
29. As to the share transaction itself, the solicitor indicated that he was aware of an agreement between the applicants and the Swains, whereby shares were transferred from the applicants to the Swains,

but knew nothing about assessment of stamp duty for that transaction. The solicitor also stated that he had at no time received instructions to lodge the transfer for assessment of stamp duty. In fact, the solicitor indicated that he was not even aware of the transfer agreement until quite some time after the transaction occurred, when he had received some information from the Queensland Law Society (which had been provided to the Law Society by the applicants).

30. By letter dated 1 February 1994, I conveyed to the applicants the results of the searches and inquiries undertaken up to that date, and my preliminary view that the Office of State Revenue does not hold any documents concerning a transfer of shares from the applicants to the Swains.
31. The applicants responded by letter dated 14 February 1994, indicating that they did not accept my preliminary views, and stating that they refuted the solicitor's contention that the applicants had a copy of documents dealing with the transfer of shares. The applicants stated that they had never executed or signed a transfer of their shares in Jurycastle to any person at all.
32. Following receipt of the applicants' letter, the Assistant Information Commissioner contacted Mr Terry Myers. In relation to the existence of a share transfer agreement, Mr Myers said that the only document in his possession was a document dated 19 August 1991, which was an agreement to sell shares in Jurycastle, on the condition that the island in which Jurycastle had an interest was sold, and that Mr and Mrs Myers receive \$50,000 cash for their shares. Mr Myers said that the island concerned was never sold and he had received no money for his shares since November 1990.
33. Mr Myers was requested to forward to my office copies of the documents held by him described in the telephone conversation referred to in the preceding paragraph. The applicants subsequently forwarded copies of three documents as follows:
 - a document described as an "agreement" dated 28 July 1991, the effect of which is not clear, but which appears to provide that, upon a contract of sale of the island being duly executed, Jurycastle would credit the applicants with the sum of \$50,000, with a further \$50,000 being paid from the balance of purchase monies for the island, due in two years or earlier according to the contract for the sale of the island
 - a document described as an "agreement" dated 19 August 1991, but which appears to provide that, in return for the acceptance of \$100,000 for their shareholding in the island concerned, the applicants would "agree to withdraw from the Directorship and Shareholding of Jurycastle Pty Ltd and have no more claims whatsoever"
 - a document described as an "agreement" dated 14 October 1991, the effect of which appears to be that Jurycastle, described in the agreement as the "vendor" would pay to the applicants \$50,000 on 14 October 1991, with a further sum of \$50,000 to be paid to them upon finalisation of the sale of the island or 14 October 1993, whichever first occurred.
34. The "agreements" dated 28 July 1991 and 19 August 1991 are poorly drafted so far as providing a clear statement of the intentions of the parties, and the intended legal effects of the agreements. The "agreement" of 14 October 1991 is more regular, in form and substance. What is of significance, however, is that the "agreement" of 19 August 1991 purports to require the applicants to withdraw from their directorship and shareholding of Jurycastle upon the occurrence of certain events. The document is deficient in that it does not specify to whom their shares were to be transferred.
35. Based on the information provided to me by the applicants and by the solicitor who acted as the secretary to Jurycastle, it appeared to me that the "agreement" of 19 August 1991 was the document regarded by the remaining officeholders of Jurycastle as authorising the transfer of the applicants' shareholding in Jurycastle. Whether the "agreement" was legally capable of causing that result is

not a question falling within my jurisdiction.

36. After the "agreements" had been received from the applicants, the Assistant Information Commissioner spoke again to Mr Terry Myers, expressing the view that the agreement of 19 August 1991 appeared to have been treated as authorising the transfer of the applicants' shareholding in Jurycastle, but that no evidence could be found to suggest that either this document, or any document recording the transfer of shares from the applicants to the Swains, had ever come into the possession or control of the Office of State Revenue.
37. The applicants then wrote to me indicating that they insisted that the matter be investigated to the fullest extent. This letter was taken as an indication that the applicants did not intend to accept the views expressed to them, but wished this matter to proceed to a formal decision.
38. I then obtained a copy of the documents sent by the applicants to the Queensland Law Society (see paragraph 29 above). While examination of those documents shed some light on the applicants' version of events concerning sale of the island, there is nothing in them which might tend to show that documents effecting a change of shareholding in Jurycastle ever came into the possession of the Office of State Revenue.
39. This view was conveyed to Mr and Mrs Myers by letter dated 15 September 1994. Mr and Mrs Myers' response, in their letter of 26 September 1994, discloses a misunderstanding of my function as Information Commissioner:

On reading your letter of the 15 September 1994 we would come to the following conclusions:

...

- 2. The Stamp Duties Office should be advised that documents were never lodged in relation to the stamping of share transfers from Myers to other parties.*
- 3. Alternatively or in addition to that, that the Office of Stamp Duties be instructed to issue a Notice to produce documents pursuant to Section 23 of the Stamp Act 1894.*
- 4. That the Commissioner makes a recommendation that Myers be re-instated to their share entitlement as no documented evidence has been presented which proves that the shares were transferred by Terrence and Patricia Myers.*

40. This discloses that Mr and Mrs Myers' principal concern is to have corrected the substance of what they consider to be an improper transaction. However, my jurisdiction is limited to that which Parliament has conferred under Part 5 of the FOI Act: in this case, to determine whether documents falling within the terms of the Myers' FOI access application are in the possession or under the control of the respondent. I have no jurisdiction to deal with issues of the kind raised in paragraphs 3 and 4 of the Myers' letter to me dated 26 September 1994.
41. Since the applicants had rejected the preliminary views conveyed to them, and in the hope of removing any doubt as to whether a document had been forwarded to the Office of State Revenue recording a transfer of shares in Jurycastle, I wrote to Mr Graham Swain, as a Director of Jurycastle, asking him whether such a document was ever lodged for assessment of stamp duty payable and, if so, where and when such a document was lodged.
42. Mr Swain responded by letter dated 10 November 1994. He did not directly answer the question as

to whether an instrument recording a change of shareholding in Jurycastle had been lodged for assessment of stamp duty. Rather, he referred me to the fact that Jurycastle was in liquidation, and that the liquidator holds all books and documentation relating to Jurycastle. Significantly, Mr Swain confirmed my preliminary view that it was the agreement of 19 August 1991 which had resulted in the transfer of shares.

43. Having regard to Mr Swain's confirmation that it was the agreement of 19 August 1991 that had been treated as effecting the transfer of shares from Mr and Mrs Myers, it was possible that the agreement had been lodged for assessment of stamp duty at any time after that date, i.e. at a time prior to the commencement of the computerised record system referred to in paragraph 20 above. Inquiries were made of the Office of State Revenue about the system of recording transactions prior to the introduction of the computerised system. The Office of State Revenue informed me that the previous system had involved the allocation of a numeric lodgement number to every file received in the office on "file lodgement slips" which provided information such as the receipt number, documents delivered and the history of the file. The Office of State Revenue referred to the difficulty in conducting a search of the file lodgement slips because there were approximately 500 to 800 lodgements per day at the relevant time.
44. Section 26(3)(b) of the *Stamp Act* provides that instruments charged with stamp duty "*shall be lodged in the Stamp Duties Office at Brisbane, Rockhampton, Townsville or Cairns*" within one month of the execution of such instruments. Given the location of the island referred to in paragraph 23 above, and the addresses of the parties to the agreement of 19 August 1991, I considered that it was possible that a document recording a transfer of shares in Jurycastle may have been lodged at Rockhampton after 19 August 1991. I did not consider that it was reasonable to expect that such a document would have been lodged in centres other than Brisbane or Rockhampton. The Office of State Revenue informed me that its computerised records system, which commenced operation at the end of 1991, records transactions lodged at all centres in Queensland. However, before that time each centre retained its own records system. I requested that a search be made of the records system at the Rockhampton office of the Office of State Revenue for any document recording a transfer of shares in Jurycastle.
45. On 16 December 1994, the Office of State Revenue informed me that searches had been made as follows:

Brisbane

the "Section 28" records for the period August-November 1991 were searched;

a further search for the documentation lodged at the Office of State Revenue on 17 July 1992, by the lodgement number assigned to that documentation was conducted;

the "no further action" bundles for August-November 1991 were searched;

a search was conducted at the Counter Services - Awaiting Payments section.

Rockhampton

a manual search was conducted through a recovery registry of the Rockhampton office which records files for the period prior to the introduction of the computerised system. This registry records information concerning the following categories of files: "Section 28" files, miscellaneous correspondence, first and final notices issued to recover stamp duty owing;

files and records in the sections known as "Abeyance" and "Awaiting Payments" were also

searched.

The Office of State Revenue described all of those searches as "*both intensive and time consuming but, unfortunately, unsuccessful*".

46. The results of these inquiries were conveyed to the applicants, again with the opportunity for them to reply on those matters. The applicants did so by letter dated 25 January 1995 which went into some detail concerning their grievances with officers of Jurycastle, but provided no new information relevant to the issues which are within my jurisdiction to determine under Part 5 of the FOI Act.

Application of "sufficiency of search" principles

47. Having set out at length the extensive inquiries made in this review, it remains to apply the principles set out in paragraph 19 of my decision in *Re Shepherd* (see paragraph 12 above). The first question is whether there are reasonable grounds for believing that the documents, to which the applicants have sought access, exist and are documents of the respondent agency (according to the definition of the term "document of an agency" in s.7 of the FOI Act).
48. It appears that documents do exist which deal with a change of shareholding in Jurycastle. Those documents, or copies of them, being the "agreement" dated 28 July 1991, and the "agreement" dated 19 August 1991 (referred to in paragraph 33 above) are in the applicants' possession. It appears to me that these are the instruments which were treated by officers of Jurycastle as affording authority for the transfer of Mr and Mrs Myers' shareholding in Jurycastle, as recorded in documents lodged with the Australian Securities Commission for the financial year ended 30 June 1992 (see paragraph 18 above). Whether or not those agreements were legally effective for that purpose is not an issue which falls within my jurisdiction under Part 5 of the FOI Act.
49. I am satisfied, however, based on the exhaustive searches described above, that neither the documents referred to in the preceding paragraph, nor any documents which fall within the terms of the applicants' FOI access application dated 30 September 1993, have come into the possession or under the control of Queensland Treasury.
50. Although the point was not raised by the respondent, it does seem to me to be arguable that, even if the documents which the applicants seek had been lodged with the Office of State Revenue for assessment and payment of stamp duty, the documents would not thereby have become documents in the possession or under the control of the respondent, within the definition of "document of an agency" in s.7 of the FOI Act. In *Re Birrell and Victorian Economic Development Corporation* (1989) 3 VAR 358 at pp.376-7, Jones J (President) of the Victorian Administrative Appeals Tribunal made the following observations on the meaning of the words "a document in the possession of an agency" in the definition of the phrase "document of an agency" in the *Freedom of Information Act 1982* Vic:

The meaning of possession will vary according to the context in which it is used.

Thus, in Yeates v Hoare [1981] VR 1034 at 1037, Kaye J said when considering "possession" in relation to criminal sanctions:

It is notorious that, apart from any statutory definition, there is no definitive meaning of the word "possession" where it is used in a statute which provides criminal sanctions for breach of its provisions. The meaning to be attributed to such an expression depends upon the context in which it appears and the policy of the statute disclosed by its provisions read as a whole: *DPP v Brooks* [1974] AC 862 at

865, per Lord Diplock. In *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 at 304; [1968] 2 All ER 356 at 387, Lord Pearce said: "One must, therefore, attempt from the apparent intention of the Act itself to reach a construction of the word "possession" which is not so narrow as to stultify the practical efficacy of the Act or so broad that it creates absurdity or injustice."

In this case the meaning of possession must be considered in the context of the FOI Act and, in particular, in the light of the scheme and object of that Act. ...

...

... It follows, in my view, that a situation could arise where an agency has mere custody of documents that would not amount to possession and therefore the documents would not be subject to the FOI Act

51. If the last-mentioned view of Jones J is correct, it seems to me to be arguable that Queensland Treasury has mere custody of documents lodged with it for assessment and payment of stamp duty. The property in a document lodged would remain with the party (to the transaction evidenced in the document) which had lodged it. That party would retain the right to possession and control of the document lodged, which Queensland Treasury would be obliged to return, once satisfied that the applicable stamp duty had been paid. If a dispute arises over payment of stamp duty, Queensland Treasury may retain custody of a document for an extended period, but its entitlement to custody of the document would ordinarily only be for the limited purpose of satisfying itself that the amount of stamp duty properly payable is, in fact, paid. (If, on the other hand, Queensland Treasury was entitled to take and retain, for its own administrative purposes, copies of documents lodged for assessment and payment of stamp duty, the position in respect of such copies would be different. A copy of a document retained by Queensland Treasury for its own administrative purposes would no doubt be a document in its possession or control for the purposes of the FOI Act.) As I have noted above, the issue was not argued by the participants in this case, and I do not wish to express any concluded view in respect of it.
52. If that argument were correct, it would probably be the case that the applicants' FOI access application was misconceived from the beginning. Even if not misconceived, it was always something of a long shot. If an agreement of the kind sought by the applicants had been lodged for assessment and payment of stamp duty, and there were no irregularities in its processing, the agreement would have remained in the physical possession of Queensland Treasury for only a very short period of time, before it was returned to the party which had lodged it. All that Queensland Treasury would have retained would have been some rather brief details as a record of the lodgement, and the payment of duty. An applicant seeking such a document under the FOI Act would either need extremely fortuitous timing with the lodgement of an FOI access application, or else the benefit of some irregularity or dispute attending the assessment of stamp duty payable, which caused Queensland Treasury to retain the relevant documents for an extended period, or perhaps to make copies of the relevant document for its own administrative purposes.
53. Nothing of that kind occurred in the present case, in which the results of my investigation make it clear that there is no evidence to suggest that the documents which the applicants seek were ever lodged with the respondent. Indeed, were it not for the fact that the respondent's initial searches had disclosed that a number of unspecified documents had been lodged by Jurycastle on 17 July 1992 and their whereabouts could not be accounted for, I doubt that I would have been prepared to commit such a significant amount of resources on the part of my staff and the staff of the respondent, to the searches and investigations undertaken in this case.

54. Strictly speaking, it is unnecessary to consider the second question posed in paragraph 19 of *Re Shepherd* (see paragraph 12 above). However, for the sake of completeness, I record my conclusion that the search efforts made by the agency, and by my staff, to locate documents falling within the terms of Mr and Mrs Myers' FOI access application, have been reasonable in all the circumstances of this case. The searches made by Ms Derrington and Mr Sarquis were retraced by the Assistant Information Commissioner and in themselves were extensive and painstaking. During the course of this external review, further inquiries were made by my staff of persons outside the respondent agency (mostly directed to ascertaining the nature of the documents lodged on 17 July 1992) and further searches have been made by staff of the Office of State Revenue at my request. All the searches and inquiries have produced a negative result.

Conclusion

55. I affirm the decision of the internal reviewer, Mr M Sarquis, dated 14 December 1993, that there are no documents in the possession or control of Queensland Treasury that fall within the terms of the applicants' FOI access application dated 30 September 1993.

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F N ALBIETZ
INFORMATION COMMISSIONER