

Devine and Department of Justice

(S 54/99, 31 March 2000, 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. The applicant, Mr Devine, seeks review of a decision dated 23 March 1999, made on behalf of the Department of Justice (the Department) by Dr K S Levy, Deputy Director-General, who refused access to a number of e-mail communications in the possession of the Coroner, Mr Casey SM, on the basis that they were not subject to the application of the FOI Act. The subject e-mail communications were provided to Mr Casey SM, in his role as Coroner, by Detective Senior Sergeant Paton (of the Queensland Police Service) at a pre-inquest conference convened prior to the third coronial inquest into the death of [a relative of the applicant's]. The e-mail communications were sent and received by DSS Paton in the course of his investigation relevant to the third inquest. They were not ultimately tendered at the third inquest.
6. By application dated 4 November 1998, the applicant applied to the Department for access, under the FOI Act, to:

... all e-mail documents provided by the Queensland Police Service to the Coroner Mr G Casey SM in the matter of the cause and circumstances surrounding the death of my [relative].
7. By letter dated 25 February 1999, Ms L Barratt, Manager, Freedom of Information, informed the applicant of her decision that the e-mails were not subject to the FOI Act by virtue of s.11(1)(e) of the FOI Act. By letter dated 2 March 1999, the applicant sought internal review of Ms Barratt's initial decision. By letter dated 23 March 1999, Dr K S Levy, Deputy Director-General, informed the applicant of his internal review decision which, in effect, affirmed Ms Barratt's initial decision.
8. By letter dated 4 April 1999, the applicant applied to me for review, under Part 5 of the FOI Act, of Dr Levy's decision.

External review process

9. Mr Casey SM was consulted. He declined to give the applicant access to the documents in issue, outside the framework of the FOI Act. He did not seek to become a participant in this review.
10. Following consideration of the questions in issue in this review, I informed the applicant (by letter dated 21 February 2000) of my preliminary view that the operation of s.11(1)(e) of the FOI Act meant that the documents in issue were not subject to the application of the FOI Act. The applicant lodged a submission in response by e-mail sent on 27 March 2000. The applicant stated that he had received advice that the distinction between administrative and judicial functions was "very grey", but did not otherwise address the issues that I must determine. He attacked government agencies which "brickwalled requests for information", and spoke of his and his wife's efforts to find information ----.
11. I sympathise with the applicant. However, if s.11(1)(e) applies to the documents in issue, I have no power to direct that the applicant be given access to them. Any decision I made which ignored the effect of s.11(1)(e) would be readily open to challenge in the Supreme Court. I am bound to apply the law as enacted by the Parliament.
12. I have considered the following material in making my decision in this review:
 1. the applicant's initial access application dated 4 November 1998, and his application for internal review dated 2 March 1999;
 2. the internal review decision dated 23 March 1999, made on behalf of the Department by Dr Levy;
 3. the applicant's application for external review dated 4 April 1999, together with enclosures; and
 4. the applicant's submission dated 27 March 2000.

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

13. Section 11(1)(e) and 11(2) of the FOI Act provide:

11.(1) This Act does not apply to—

...

(e) the judicial functions of—

(i) a court; or

(ii) the holder of a judicial office or other office connected with a court; ...

(2) In subsection (1), a reference to documents in relation to a particular function or activity is a reference to documents received or brought into existence in performing the function or carrying on the activity.

14. In *Re Christie and QIDC* (1993) 1 QAR 1 at p.8 (paragraphs 19-22), I explained that there is a drafting error in s.11(2) of the FOI Act, but that the legislature's clear intention can be given effect by reading s.11(2) as if it were in these terms:

In subsection (1), a reference to a particular function or activity means that this Act does not apply to documents received or brought into existence in performing the function or carrying on the activity.

15. Section 7, s.7A and s.7B of the *Coroners Act 1958* (the Act) detail the jurisdiction of Coroners. Section 30 of the Act provides that a Coroners Court shall be a court of record. Section 49(2) of the Act provides that a Coroner has power to deal with and dispose of property which comes into the Coroner's custody or possession as a result of any inquiry or proceeding by or before the Coroner under the Act, and which has not been tendered as an exhibit at an inquest.
16. Under the Act, the procedures adopted at an inquest such as conducting the hearing in public, the examination of witnesses on oath, and the reception of submissions on points of law, are indicative of the Coroner exercising a judicial function. Authority exists for the proposition that a Coroner, either undertaking inquiries or holding an inquest, is exercising judicial power: see *Civil Aviation Authority v Australian Broadcasting Corporation* (1995) 39 NSWLR 540; *Attorney-General (NSW) v Mirror Newspapers Ltd* (1980) 1 NSWLR 374 and *Abernethy v Deitz* (Unreported, NSW Court of Appeal, No 40244 of 1996, 9 May 1996).
17. Section 7 of the FOI Act defines "court" to include a justice and a Coroner. Bearing in mind the effect of s.11(2), it is my view that a document received, or brought into existence, by a Coroner in performing judicial functions as Coroner, falls within the exclusion provided for in s.11(1)(e) of the FOI Act, and hence is not subject to the application of the FOI Act.
18. Although it is not clear from his submission, I will assume that the applicant seeks to contend that the relevant e-mail communications provided to Mr Casey, and indeed the conference convened prior to the third inquest, formed part of the administrative functions carried out by Mr Casey, rather than being part of his judicial functions.
19. There are no doubt numerous functions undertaken by a magistrate which fall into the realm of "administrative" functions e.g., making travel arrangements to attend hearings in country centres, or dealing with personnel matters concerning court staff. However, in this case, the function being performed concerned a specific inquest with respect to which Mr Casey SM was Coroner. I do not consider that the fact that the conference was held outside a court setting, or prior to a formal

court hearing, means that Mr Casey was not performing a judicial function. It was clearly aimed at preparation for the hearing of the inquest.

20. I find that the documents in issue were received by the Coroner in performing his judicial functions, and hence they are excluded from the application of the FOI Act by the operation of s.11(1)(e) of the FOI Act.

DECISION

21. I decide to affirm the decision under review, that the documents sought in the applicant's FOI access application dated 4 November 1998 are excluded from the application of the FOI Act by s.11(1)(e) of the FOI Act.