

# OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Application 167/06

## Participants:

MS RACHEL MEWBURN  
**Applicant**

KOLAN SHIRE COUNCIL  
**Respondent**

## DECISION AND REASONS FOR DECISION

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**REASONS FOR DECISION****1. Background**

- 1.1 The applicant, Ms Rachel Mewburn, has made several FOI access applications and requests for information to the Kolan Shire Council (the Council) in relation to subdivision applications and approvals and to work carried out by the Council. The applicant is concerned that the Council has not acted in accordance with relevant planning policy/ies in approving subdivision developments around her cane farm, and that it may have performed private work for certain Shire residents at less than the appropriate rate.
- 1.2 The Council decided, in relation to the FOI access applications, that the applicant was required to pay an application fee as the documents responsive to each application did not concern her personal affairs. The applicant was also advised by the Council that, if she did pay the fee, the Council would refuse access to some requested matter on the ground that it is available to her through administrative access, or that it is subject to copyright.
- 1.3 The applicant initially contacted the Office of the Ombudsman (by way of an e-mail dated 29 March 2006) in relation to three FOI access applications lodged in March 2006. The Ombudsman's Office forwarded the applicant's request for assistance to this Office and, by way of an e-mail dated 4 April 2006, I informed the applicant that the Information Commissioner did not have jurisdiction to assist her at that time (in respect of the first application because the applicant had not sought review of the Council's decision to charge an application fee; and in respect of the other two applications because the time within which the Council was required to deal with those applications – including requesting an application fee – had not expired). The applicant was also informed that the Council would be in contact with her.
- 1.4 The applicant sent a further e-mail, dated 29 May 2006, in which she contended that there had been no further contact from the Council, which was then "out of time" in dealing with her FOI access applications. I made inquiries of the Council and subsequently advised the applicant, by letter dated 1 June 2006, that:
- the Information Commissioner did not have jurisdiction to deal with her first FOI access application, dated 11 March 2006, as she had not responded to the decision of the Council's CEO, dated 14 March 2006, that an application fee was payable in respect of that application, and had not sought external review of that decision. In accordance with s.25A(5) of the *Freedom of Information Act 1992 Qld* (the FOI Act), the Council was entitled to treat that application as withdrawn 28 days after the applicant received its decision on payment of the application fee; and
  - the Council had written to her on 23 March 2006 in respect of her FOI access applications dated 15 March and 17 March 2006, again advising of its decision that an application fee was payable in respect of each application and, not having received any response from the applicant, had done no further work on those applications.
- 1.5 As the applicant had advised that she had not received anything from the Council, however, it appeared that the Information Commissioner may have had jurisdiction to conduct a review of the Council's deemed refusal of access to documents, and I invited the applicant to lodge an application for external review if she wished this Office to pursue the matter. I also advised the applicant that the matter to which she sought access could be obtained administratively from the Council at no cost and suggested that she might

prefer to do so.

- 1.6 Nothing further was received from the applicant until 19 August 2006, when she sent a further e-mail advising that she had still not received the Council's letter dated 23 March 2006, and that the documents to which she required access were not available to her. The applicant also provided a copy of a further request to the Council, dated 9 August 2006, and advised that the Council had not responded to that request.
- 1.7 After making further inquiries of the Council I replied to the applicant, by letter dated 29 August 2006, repeating the advice in my letter dated 1 June 2006 and further advising the applicant that the Information Commissioner did not have jurisdiction to in respect of her request to the Council dated 9 August 2006. I enclosed a copy of a document from the Council's website and informed the applicant that, if I did not hear from her by 15 September 2006, I would proceed on the basis that that document, and the information I had conveyed to her concerning administrative access to other documents, had satisfied her requirements for access to information and would close the file.
- 1.8 A further e-mail was received from the applicant, dated 3 September 2006, advising that she was not satisfied with the responses to her correspondence. I have therefore treated the applicant's e-mail dated 19 August 2006 as an application for external review by the Information Commissioner, under Part 5 of the FOI Act, in respect of her FOI access applications dated 11 March, 15 March and 17 March 2006 and her request for information dated 9 August 2006.

## **2. Steps taken in the external review process**

- 2.1 In her e-mail dated 29 August 2003, the applicant made four requests:
- *Please get the council to understand its obligations to respond to requests and correspondence and to realise it cannot ignore letters submitted to it by citizens and ratepayers of the shire.*
  - *Please get me a copy of the letter that the council has told Mrs Barker it has sent to me yet I have still not received it.*
  - *Please investigate Councils lack of responsiveness to my FOI requests.*
  - *Please request on my behalf copies of all the documents I have asked for and have them mailed to me.*
- 2.2 The applicant contended that she had not received the Council's letter dated 23 March 2006, requesting her to pay application fees in respect of her FOI access applications dated 15 March and 17 March 2006. On 23 August 2006 I held a telephone conference with the Council's CEO and FOI officer, who confirmed that the Council had written to the applicant at her post box address on that date; that there was no record of the letter having been returned to the Council as undeliverable; and that, in the ordinary course of post, the applicant should have received that letter the day after it was sent. The Council subsequently provided a copy of the letter to this Office.
- 2.3 The Council also confirmed its previous advice that the matter requested by the applicant in her FOI access application dated 17 March 2006 – information relating to subdivisions in the Kolan Shire – was available to the public through the Council's register of subdivisions, which could be inspected in the Council's offices.
- 2.4 In a subsequent e-mail, the Council identified a document available on its website (the minutes of its Community Services Committee (CSC) meeting held on 15 March 2005) which contained the details of, and conditions of approval for, a subdivision at Tirroan.

The impact assessment and decision notice for this subdivision were the subject of the applicant's FOI access application dated 15 March 2006. I provided a copy of those minutes to the applicant under cover of my letter dated 29 August 2006.

2.5 In her e-mail dated 3 September 2006, however, the applicant reiterated her complaint of lack of action by the Council and by this Office, stating that *"almost six months after my original request to council I still do not have these documents, and it would appear you cannot get them either"*.

2.6 In making my decision I have taken into account the following material:

- the applicant's e-mails dated 29 March, 29 May, 19 August and 3 September 2006;
- the applicant's three FOI access applications dated 11, 15 and 17 March 2006 and request for information dated 9 August 2006;
- the Council's letters to the applicant dated 14 March and 23 March 2006;
- verbal advice received from the Council on 3 April, 29 May, 30 May and 23 August 2006; and
- the Council's e-mail dated 23 August 2006.

### 3. Matter in issue

3.1 The applicant has made three FOI access applications to the Council (dated 11, 15 and 17 March 2006), and a request for information (dated 9 August 2006) not expressed to be made under the FOI Act. She seeks access to:

11 March 2006	<i>the Land Suitability Report and Soil Tests undertaken for the Stallan Subdivision at Tirroan;</i>
15 March 2006	<i>the Impact Assessment and Decision Notice for the Stallan Subdivision at Tirroan;</i>
17 March 2006	<i>information on all proposed, pending and current subdivisions in the Kolan Shire; and</i>
9 August 2006	<i>what Councils policies and costs are for constructing driveways on private property. And I would like to know weather [sic] [two third parties] were given special rates not afforded to other ratepayers by the council.</i>

### 4. Jurisdiction of the Information Commissioner

#### **Request for information dated 9 August 2006**

4.1 With her e-mail dated 19 August 2006 the applicant forwarded a copy of a letter to the Council dated 9 August 2006, requesting information concerning work recently undertaken by the Council (see paragraph 3.1 above) and requiring a response within seven days. That request was not expressed to have been made under the FOI Act and, in my telephone conference with the Council on 23 August 2006, the Council confirmed that it had not been treated by the Council as an FOI access application.

4.2 In my letter to the applicant dated 29 August 2006 I advised her that, even if the Council had accepted her letter as an FOI access application, she was not entitled to request a response within seven days. The FOI Act allows an agency 45 days (and, in some cases, 60 days) within which to process an FOI access application, although the agency is required to acknowledge receipt of that application within 14 days.

- 4.3 I further advised the applicant of my view that, that if the Council had treated her letter as an FOI access application, it would have been entitled to require the payment of an application fee before it processed the application, as documents of the kind to which the applicant sought access (Council policy documents and documents concerning work done by the Council for persons other than herself) did not concern her personal affairs.
- 4.4 I also noted that the wording of the applicant's letter indicated that she appeared to be seeking information rather than, or as well as, documents. The FOI Act confers a legally enforceable right of access to documents (see s.21 of the Act), not to information which has not been documented, or to answers to questions. If the Council treated the applicant's letter dated 9 August 2006 as an FOI access application, it would only be obliged to consider whether to give the applicant access to documents which contain some or all of the information she had requested. If there are no documents which record that information (or some part/s of it), the Council would not be required by the FOI Act to answer the applicant's questions, or to create documents which answer her questions, and the Information Commissioner would have no power to review its failure or refusal to do so.
- 4.5 I am satisfied that the Information Commissioner has no jurisdiction in respect of the applicant's request to the Council for information dated 9 August 2006, and I will not consider that matter further in this review.

**FOI access applications dated 15 March and 17 March 2006**

- 4.6 The applicant contends that she did not receive the Council's letter dated 23 March 2006, informing her that an application fee was payable in respect of each of the above applications. If that is the case, the Council failed to inform the applicant of its decision on access within the prescribed time and the Council's CEO is deemed to have refused access to those documents in accordance with s.27(5) of the FOI Act. The Information Commissioner would therefore have jurisdiction to review that deemed refusal.
- 4.7 The Council has provided a copy of its letter of 23 March 2006 and, while it could not provide evidence of its receipt or delivery by Australia Post, states that to the best of its belief it was mailed to the applicant on that date. It has not been returned to the Council as undeliverable and I note that the address on the letter is the post box to which the applicant has directed, in her correspondence to the Council and to this Office, that mail should be sent. Other mail forwarded to that address has clearly been received by the applicant within a reasonable time.
- 4.8 If the Council's letter dated 23 March 2006 was delivered to the applicant's post box the Council was entitled, 28 days after the date on which it was delivered, to presume that the applicant had withdrawn her application for access in accordance with s.25A(5) of the FOI Act. Section 25A relevantly provides:

***25A Initial duties of agency or Minister in relation to application***

...

- (3) *If, after consulting under subsection (2), an agency or Minister decides—*

...

- (b) *an application fee is payable, because a document sought by the applicant does not concern the applicant's personal affairs, but is unpaid;*

*the agency or Minister must give the applicant written notice of the decision.*

...

- (5) *However, the applicant is taken to have withdrawn the application if—*
- (a) *the applicant fails to give the information within 30 days after the day the notice of a decision under subsection (3)(a) is sent to the applicant; or*
  - (b) *after the applicant is sent the notice of a decision under subsection (3)(b), the applicant fails to pay the application fee—*
    - (i) *if an application for review is made within the period within which an application for review under this Act may be made—within 30 days after the review has been finally disposed of (unless on the review it is decided the application fee is not payable); or*
    - (ii) *otherwise—by the end of the period within which an application for review under this Act may be made.*

4.9 Deeming an access application withdrawn under s.25A(5) is not a decision which the Information Commissioner is empowered to review (see s.101C of the FOI Act), and this office would have no jurisdiction to assist the applicant. As it is not however possible to demonstrate that the applicant received the Council's letter dated 23 March 2006, I will proceed on the basis that she did not, and that the Information Commissioner has jurisdiction to review the Council's deemed refusal of access to the documents requested in the applicant's FOI access applications dated 15 March and 17 March 2006. I will consider those documents further at paragraphs 5.1 to 5.9 below.

#### **FOI access application dated 11 March 2006**

4.10 The applicant forwarded a copy of a letter from the Council, dated 14 March 2006, with her request to the Ombudsman for assistance. That letter advised the applicant of the decision of Mr Mark Watt, the CEO of the Council, that an application fee of \$35.25 was payable in respect of her FOI access application dated 11 March 2006. In an e-mail to the applicant dated 4 April 2006 I informed her that as the documents to which she sought access did not concern her personal affairs, that decision appeared to be correct. I also advised the applicant, however, that if she wished to contest the fee she was entitled to apply to the Information Commissioner for review of that decision (as it was made by the principal officer of the Council).

4.11 The decision on payment of the application fee was dated 14 March 2006 and, in the ordinary course of post, the applicant could reasonably have been expected to have received it no later than 16 March 2006. It was certainly in her possession prior to 29 March 2006. As the access applicant had 28 days from the date on which she was given notice of the Council's decision in which to apply for review by the Information Commissioner (see s.73(1)(d) of the FOI Act), or to pay the application fee, the applicant would have had until a date between 13 April and 26 April to lodge an application for external review of Mr Watt's decision to charge an application fee. Section 73(1) of the FOI Act provides:

### **73 Applications for review**

- (1) *An application for review must—*
- (a) *be in writing; and*
  - (b) *specify an address of the applicant to which notices may be sent under this Act; and*
  - (c) *give particulars of the decision for review; and*
  - (d) *be made within 28 days from the day on which written notice of the decision is given to the applicant, or within the longer period the commissioner allows.*

4.12 No application was received from the applicant within the relevant period. As the applicant did not pay the application fee, the Council was entitled to presume that the applicant had withdrawn her application for access in accordance with s.25A(5) of the FOI Act. As that is not a decision which the Information Commissioner has jurisdiction to review (see s.101C of the FOI Act), I am satisfied that the Information Commissioner does not have jurisdiction in relation to the applicant's FOI access application dated 11 March 2006, and I will therefore not further consider it in this review.

4.13 I note, however, that the Council had informed the applicant that even if the fee was paid, it would be unable to provide her with a copy of the report and tests as *"it would be an infringement of copyright under the Copyright Act 1968"*, and that her application would be declined for that reason. I informed the applicant, in my e-mail dated 4 April 2006, that if she paid the fee and the Council refused her access to the requested documents – as opposed to merely refusing access to a copy of the documents, and providing access by way of inspection only – that refusal would be a decision in respect of which she would be entitled to apply for review.

4.14 As the application did not proceed that foreshadowed decision has been untested. I took the opportunity, however, to clarify for the Council (by way of a letter dated 1 June 2006) the distinction between a refusal to provide a copy of a document (under s.30(3) of the FOI Act) because it would be an infringement of copyright and a refusal of access to documents under one of the exemption provisions in Part 3 Division 2 of the FOI Act.

### **5. Application of s.22(1) of the FOI Act**

5.1 The Council contends that the information and documents to which the applicant seeks access in her FOI access applications dated 15 March and 17 March 2006 are available to her administratively.

5.2 Section 22(a) of the FOI Act provides:

#### **22 Documents to which access may be refused**

*An agency or Minister may refuse access under this Act to—*

- (a) *a document the applicant can reasonably get access to under another enactment, or under arrangements made by an agency, whether or not the access is subject to a fee or charge;*

### **FOI access application dated 17 March 2006**

- 5.3 The applicant's FOI access application dated 17 March 2006 is framed as a request for information concerning subdivisions and proposed subdivisions in the Kolan Shire, rather than as a request for specified documents. The Council has nevertheless identified a document which meets the terms of the request. That document is a register of subdivisions maintained by the Council, which members of the public are able to inspect at a time convenient to themselves and the Council.
- 5.4 I am satisfied that there is a document in the Council's possession which falls within the terms of the applicant's FOI access application dated 17 March 2006, and that that document is reasonably available to the applicant under an arrangement made by the Council.
- 5.5 I therefore find that the Council would be entitled to refuse access to the register under s.22(a) of the FOI Act.

### **FOI access application dated 15 March 2006**

- 5.6 The applicant's FOI access application dated 15 March 2006 seeks access to the impact assessment and decision notice for a particular subdivision, approved by the CSC at its meeting on 15 March 2005. It appears in the minutes of the meeting with the conditions of approval and the advice to be provided to the applicant by the Council (at pp.6-10).
- 5.7 The Council has advised that the information in the CSC minutes is substantially the same (although in a different format) as the information required to be included in the decision notice which the Council must issue under the *Integrated Planning Act 1997* (s.3.5.15). The CSC minutes are currently available on the Council's website and, although they will be removed from the site as later minutes are added, are also available from the Council.
- 5.8 I am satisfied that there is a document in the Council's possession falling within the terms of the applicant's FOI access application dated 15 March 2006, which is reasonably available to the applicant under an arrangement made by the Council.
- 5.9 I therefore find that the Council would be entitled to refuse access to the impact assessment and decision notice under s.22(a) of the FOI Act.

## **6. Application of s.77 of the FOI Act**

- 6.1 Section 77 of the FOI Act provides:

### ***77 Commissioner may decide not to review***

*(1) The commissioner may decide not to deal with, or not to further deal with, all or part of an application for review if—*

*(a) the commissioner is satisfied the application, or the part of the application, is frivolous, vexatious, misconceived or lacking substance;*

- 6.2 I have found that the Council would be entitled to refuse the applicant access to the documents requested in her FOI access applications dated 15 March and 17 March 2006, in accordance with the provisions of s.22(a) of the FOI Act. As the Information Commissioner has no discretion to direct an agency to release matter which the Commissioner has found qualifies for exemption, even if the Information Commissioner were to review a deemed refusal of access by the Council to those documents the applicant would not succeed in obtaining access to them. Moreover, the applicant has



been repeatedly offered access, at no cost, to the information she requires but has chosen not to avail herself of those alternative means of access.

- 6.3 I am therefore satisfied that the applicant's request for review of the Council's failure to provide documents in response to her FOI access applications dated 15 March and 17 March 2006 is lacking in substance.

<b>DECISION</b>
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- 7.1 In accordance with s.77 of the FOI Act, I decide not to further deal with the applicant's request for review of the failure of the Kolan Shire Council to provide access, under the FOI Act, to the documents requested in her FOI access applications dated 15 March 2006 and 17 March 2006.
- 7.2 I find that the Information Commissioner does not have jurisdiction to review the Council's failure to provide access, under the FOI Act, to the documents requested in the applicant's FOI access applications dated 11 March 2006 and 9 August 2006.
- 7.3 I have made this decision as a delegate of the Information Commissioner's powers under s.90 of the FOI Act.

.....  
Susan Barker  
**Assistant Information Commissioner**

Date: 7 September 2006