

**BURKALA AND BELMONT**

**OFFICE OF THE INFORMATION  
COMMISSIONER (W.A.)**

**File Ref: 94089  
Decision Ref: D01594**

Participants:

**Michael Stephen Burkala**  
Applicant  
  
- and -  
  
**City of Belmont**  
Respondent

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - request for "personal information" - meaning of "personal information" - refusal of access - ambit of access application - application fee required for non-personal information - Regulation 8 - requirement for applicant to provide "copy" of agency's notice of decision - whether hand written copy of notice of decision sufficient - section 11 - duty of agency to assist applicant - reasonableness of agency efforts to assist applicant- relevance of applicant's conduct to substance of complaint - payment of application fee required prior to agency dealing with application - refusal to deal with application without payment of application fee - when application fee payable - decision to require payment of application fee not reviewable.

*Freedom of Information Act 1992 (WA)* ss.4; 11; 12; 24; 26; 30; 65(1)(c); 68(1).

*Freedom of Information Regulations 1993 (WA)* Regulations 5, 8 Schedule to Regulations Item 1.

*Re Simonsen and Edith Cowan University* (Information Commissioner WA, 13 July 1994, unreported).

*Re Kobelke and Minister for Planning and Others* (Information Commissioner WA, 27 April 1994, unreported).

*Re Veale and Town of Bassendean* (Information Commissioner WA, 25 March 1994, unreported).

*Re Hayes and State Housing Commission of Western Australia (Homeswest)* (Information Commissioner WA, 17 June 1994, unreported).

*Re Gray and The University of Western Australia* (Information Commissioner WA, 23 June 1994, unreported)).

## DECISION

The decision of the agency of 22 July 1994 to refuse to deal with the applicant's access application until an application fee of \$30 is paid is set aside.

In substitution therefore it is decided that, Documents A and B having been provided to the applicant, the agency has fully complied with the applicant's access application and access to any further documents is refused because no further documents exist, or can be found, that fall within the scope of the access application.

Further, I find that no application has been made for access to Documents C-P.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

25th August 1994.

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for review by the Information Commissioner arising out of a decision of the City of Belmont ('the agency') that the documents to which Mr Michael Burkala ('the applicant') requires access under the *Freedom of Information Act 1992* ('the FOI Act'), contain non-personal information for which an application fee of \$30 is payable.
2. On 30 May 1994 the applicant wrote to the agency referring to earlier correspondence between the agency and himself in 1978 and requesting access under the FOI Act in the following terms: "...copies of all documents letters or memoranda containing personal information about me, you may have or may have had in your power or possession relating to the matters raised in the abovementioned letter."
3. On 1 August 1994 the applicant lodged a request for external review with the Information Commissioner. Attached to that application were two handwritten pieces of paper which appeared to be copies of the applicant's initial request to the agency dated 30 May 1994 and a request for internal review dated 15 July 1994 of the agency's purported decision to refuse access to the requested documents. However, the applicant did not provide me with a copy of the agency's notice of decision as required by regulation 8 of the *Freedom of Information Regulations 1993* ('the regulations').
4. From the documents provided by the applicant, the basis for my jurisdiction was not clear and initial inquiries were made with the agency on 2 August 1994 to establish the status of his access application. Those inquiries revealed that the agency had responded to the applicant's access application by certified letter posted to his home address on 13 July 1994. It had also responded to his request for internal review and a certified letter had also been posted to his address on 22 July 1994. Further inquiries with Australia Post established that the applicant had failed to take delivery of either of those letters.
5. In view of these facts, it appeared to me that the agency had complied with its statutory obligations and, therefore, there appeared to be no basis for the applicant's complaint to my office. On 3 August 1994 the applicant was advised that it was my view that, until such time as he took delivery of the agency's letters and was able particularise the decision about which he wished to complain, I would take no further action in relation to his complaint.
6. On 8 August 1994 I received another application for review from the applicant. Attached to this application were four hand-written pieces of paper dated 30 May 1994, 13 July 1994, 15 July 1994 and 22 July 1994 respectively, purporting to be a copy of his initial request, and a copy of the agency's reply to that request and a copy of his request for internal review and the agency's reply to that request. The

application for review particularised two "decisions" of the agency for review, namely, a decision to defer the giving of access and a decision to impose a charge or deposit that was unreasonable.

7. The handwritten notes clearly were not complete copies of the agency's notices of decision and were not sufficient for my purposes. I require that a photocopy of the relevant notice of decision be provided. As the applicant had not provided me with a copy of the agency's notice of decision as required by regulation 8, he was advised again that I was unable to determine the basis for my jurisdiction to deal with his complaint without that document. The notice of decision which an agency is obliged to provide an applicant under s.30 of the FOI Act is the means by which the agency explains its decision on an access application and identifies the material and findings of fact on which that decision is based. These detailed reasons not only inform an applicant of what has been decided, by whom and why, they also assist to establish my jurisdiction and indicate to me the likely procedures which I may determine are necessary to resolve a complaint.
8. I offered to copy the notice of decision for the applicant using the facilities at my office if, in the circumstances, he was unable to provide me with a photocopy himself. On 11 August 1994 the applicant provided to me the original of the agency's notice of decision dated 22 July 1994 relating to his application for internal review.
9. The notice of 22 July 1994 revealed that the decision on internal review had been made by Mr Bruce Genoni, Town Clerk and he purported to confirm the original decision that the documents identified by the agency as relating to the matters raised in the letter specified by the applicant contained non-personal information for which an application fee of \$30 was payable under section 12(1)(e) of the FOI Act and regulation 5 and item 1 of the Schedule to the regulations. The agency stressed that it was not refusing access to the documents and again sought payment of this fee.

## **REVIEW BY THE INFORMATION COMMISSIONER**

10. A member of my staff contacted the agency on 2 August 1994 and advised it of the nature of the complaint before me. The agency supplied me with a copy of its letter of 13 July 1994 to the applicant. In that letter the agency had informed the applicant that in its opinion the information contained within his request was not personal information and, therefore, an application fee of \$30 was required. In that letter the agency also invited the applicant to telephone the author of the letter to discuss the matter in order to ensure both parties were clear as to the request. My officer sought information about the results of any discussions between the applicant and the agency. At this stage, I had not formally accepted this complaint for review.

11. Even so, the agency explained the background leading to the creation of the documents to which the applicant was seeking access and made copies of those documents available to me. It appears that in 1976 the applicant complained to the agency about a particular matter involving his neighbours' property. The documents resulting from this complaint in 1976 and which contain personal information about the applicant are the documents to which access is sought.
12. I was advised by the agency that the applicant had not responded to its invitation to discuss the nature of his access application and, in view of his reticence, the agency was of the view that it had complied with its obligations under ss.11(2) and (3). However, it appears to me that the agency had also determined that the documents it had identified contained non-personal information and had declined to deal with the application until the prescribed fee was paid.
13. On this basis I accepted the complaint pursuant to s.65(1)(c) as a complaint against an agency's decision to refuse to deal with an access application. On 12 August 1994, in accordance with my obligations under s.68(1) of the FOI Act, I formally advised the agency that I had received and accepted the complaint. In his complaint to me the applicant alleged that there had been a decision to defer access but this was not supported by the contents of the agency's notice dated 22 July 1994.
14. Although the applicant had also complained of the imposition of "*a charge or deposit that was unreasonable*", the agency had not made any demands of the applicant for a charge or a deposit. It had asked him to pay the prescribed fee of \$30 which is payable when an application relates to non-personal information. As I stated in my decision in *Re Simonsen and Edith Cowan University* (13 July 1994, unreported) at paragraphs 43-52, I am not satisfied that the requirement of the payment of the prescribed application fee is a decision which is reviewable by me. However, a decision to refuse to deal with an access application is a matter which may be complained of under s.65(1)(c). The matter for my determination, therefore, was whether the agency's refusal to deal with the access application was justified and this required an answer to the threshold question of whether the agency had properly characterised as non-personal information the relevant documents it had identified.

## **THE DISPUTED DOCUMENTS**

15. The agency supplied me with 16 documents which it considered to be relevant to the access application. These are described as follows:
  - A Letter to applicant dated 30/8/78 from agency acknowledging receipt of complaint and advising that Council could take no further action.
  - B Applicant's complaint to Council dated 25/8/78.

- C Shire of Belmont Face Sheet dated 7/2/77.
- D Letter to neighbour from Minister for Local Government dated 10/1/76.
- E Letter from Shire Clerk to Secretary for Local Government dated 1/12/76.
- F Letter from Secretary for Local Government to Shire Clerk dated 22/11/76.
- G Notice from Shire of Belmont to neighbour dated 2/11/76.
- H Notice of appeal from neighbour, Form 1, Regulation 3 *Local Government Act 1960*.
- I Copy of document G
- J Letter from Acting Shire Clerk to neighbour dated 2/11/76.
- K Letter from Shire Clerk to neighbour dated 16/9/76.
- L Building/Development Report, undated.
- M Shire of Belmont Face sheet, undated.
- N Letter from Acting Shire Clerk to neighbour dated 2/8/76.
- O Shire of Belmont Agenda Face Sheet dated 19/7/76.
- P Letter from neighbour to Council dated 13/7/76.

16. Upon examining the documents, it appeared to me that documents A and B contained personal information about the applicant. Document A disclosed the applicant's name and residential address; that he had made a complaint to the agency; and advice given to the applicant as to how the agency had dealt with his complaint and the outcome of the complaint. Document A also contained personal information about a third party but that could have been deleted pursuant to s.24 and an edited copy provided to the applicant. In any event, document A was a letter from the agency to the applicant, previously sent to the applicant, and it was difficult to conceive of any reason for now refusing the applicant access to it.
17. Document B was the applicant's letter of complaint to the agency and disclosed the applicant's name and address, handwriting, signature and the fact that he had made a complaint to the agency and the nature of that complaint. Once again, personal information about the third party could have been deleted and an edited copy supplied but, as it was the applicant's own letter to the agency, there seemed to be no good reason to refuse him access to it.

18. I advised the agency of my view that those two letters contained personal information about the applicant and that, unless exemption was claimed, they should be released to the applicant. The agency agreed to make copies of these documents available to the applicant and this was done by certified mail on 4 August 1994.
19. From my examination of the remaining documents I formed a preliminary view that the agency's decision to characterise them as non-personal information, was correct. An applicant is generally at a procedural disadvantage in that he or she will not be in a position to inspect the documents in dispute. Nevertheless, I had the advantage of examining the documents concerned and on 15 August 1994 I conveyed my preliminary view to this applicant and offered him the opportunity to make submissions on the point. He was also given the opportunity, in light of my preliminary view, to reconsider his position and withdraw his complaint. By 22 August 1994 (and at the date of this decision) the applicant had not responded to this invitation and it was necessary to proceed to finalise this matter by way of a formal decision.

### **The proper characterisation of Documents C- P.**

20. Each of the documents described in paragraph 15 records the various administrative steps in the process of the agency dealing with the complaint about the neighbours. With the exception of documents A and B, none of the documents contains personal information about the applicant but I am satisfied that some of them contain personal information about the neighbours.
21. In the Glossary in the FOI Act, "**personal information**" is defined as meaning "*...information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -*
  - (a) *whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
  - (b) *who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.*"
22. As I have stated in previous decisions (see *Re Kobelke and Minister for Planning and Others* ( 27 April 1994, unreported); *Re Veale and Town of Bassendean* (25 March 1994, unreported); *Re Hayes and State Housing Commission of Western Australia (Homeswest)* (17 June 1994, unreported); *Re Gray and The University of Western Australia* (23 June 1994, unreported)), the purpose of exempting personal information from access by third parties, is to protect the privacy of individuals. In this instance there was no question of the agency refusing access to information about third parties. Rather, it was a matter of whether the documents contained personal information about the applicant or some other person or persons.

23. To fall within the definition of personal information, a document must contain information that would enable the identity of the applicant to be apparent, or to be reasonably ascertained from an actual disclosure of the document. Although, in some instances, the mere mention of a person's name may reveal "personal information" about that individual (such as the identity of an informer), more is normally required for the information to be "personal information" as defined. Parts (a) and (b) of the definition suggest that disclosure of the document, ordinarily, must reveal something more about an individual, other than his or her name to attract the exemption.
24. From my examination of the Documents C-P described in paragraph 15, none of the documents mentions the applicant by name, nor do they contain any other reference to characteristics by which he could be identified, nor any other information about him. Therefore, I am satisfied that those documents do not contain personal information about the applicant and that the agency's decision to characterise them as containing non-personal information was correct.

#### **WAS THE AGENCY'S DECISION JUSTIFIED?**

25. The agency's letter of 13 July 1994 was signed by N P Hartley, Deputy Town Clerk, City of Belmont. That letter advised the applicant that the agency did not *"...believe that the information contained within your request is of a personal nature (as defined by the Freedom of Information Act 1992) and therefore an application fee of \$30 is required."*
26. The letter further advised the applicant that if he wished to proceed with his application, he was to forward \$30 to the agency and, finally, invited the applicant to contact Mr Hartley to discuss the matter personally in order to ensure that *"...we are both clear as to your request."* The applicant did not respond to this letter.
27. In my view, the agency's letter of 13 July 1994 proceeded on a misunderstanding of the applicant's access application. The applicant had clearly requested documents relating to a particular incident, and which also contained personal information about the applicant. The documents identified by the agency as relating to the particular incident did not, in the opinion of the agency, contain personal information about the applicant. Those documents did not, therefore, fall within the ambit of the access application. In those circumstances, in my view, the agency ought to have issued to the applicant a notice under section 26 of the Act, informing him that it was not possible to give access to the requested documents because no such documents exist. Pursuant to section 26(2) the sending of such a notice is to be regarded as a decision to refuse access to the document and the applicant is entitled to apply for internal review of that decision.



28. It was, of course, open to the agency also to advise the applicant - as, in effect, it did - that although it held no documents falling within the scope of the access application, it did hold other documents relating to that matter to which the applicant may desire access. To assist the applicant to determine whether he wished to apply for access to those documents, the agency could have set them out in a schedule, briefly describing each one without disclosing potentially exempt matter. If the applicant desired access to those documents, which the agency considered contained no personal information about the applicant, the applicant would have to lodge an application for those documents together with the required application fee of \$30.
29. In the event, even if the agency had provided the additional information referred to in paragraph 28, the enquiries carried out by my staff left no doubt that the provision of that additional information by the agency would not have been of any assistance whatsoever in the resolution of this particular matter. That is because my staff discovered that the applicant failed to take delivery of the agency's correspondence of 13 July 1994, despite the fact that it was sent to him by the agency by certified mail, and despite the post office having notified him on more than one occasion that the correspondence was available for collection.
30. On 15 July 1994, 45 days after lodging his application, the applicant applied to the agency for internal review of the agency's decision to refuse *"...to supply copies of all documents as requested in my letter dated 13 May 1994 and refusal to supply a description of documents not supplied and reasons for not supplying it"*.
31. On 22 July 1994 the agency responded to the applicant's request for internal review. An internal review was conducted. In my opinion, the internal reviewer also proceeded on a mistaken basis. That is, he purported to review the agency's decision that the application was for non-personal information and would not be dealt with until the applicant paid an application fee of \$30. In my view, the relevant decision of the agency should have been that access to the requested documents (that is, documents relating to the applicant's complaint to the agency and containing personal information about the applicant) was refused because the agency held no documents that satisfied the applicant's request.
32. From the terms of his access application, the access applicant clearly sought access to personal information only. In my view, the agency should have dealt with his application in the first instance by providing him with copies of Documents A and B as the decision-maker could have rightly decided that those were the only documents that were within the ambit of his application. The agency could also have advised the applicant that it held no other documents that satisfied his application, but held some related documents for which he may care to make an access application. However, I acknowledge that the agency made what I consider to be a reasonable effort to clarify the intention of the applicant, but to no avail.
33. I also note that whilst s.11 of the FOI Act imposes a duty upon agencies to administer the Act in accordance with the principles in s.4 and also imposes a

duty upon agencies to assist an applicant to make a valid and acceptable access application, there is no corresponding duty on an applicant to respond in a like manner. In this instance, in my opinion, based on the documents produced and the evidence obtained from the inquiries of my officers, the agency took reasonable steps to assist the applicant. The applicant chose not to avail himself of that assistance, nor to take receipt of his certified mail from the agency. By way of comment, it may be that an applicant's lack of co-operation when an agency has made real efforts to assist him or her may become relevant to the determination of whether or not the agency has discharged its responsibilities under the FOI Act, or as to whether there is any substance to an applicant's complaint.

34. As the agency has now provided the applicant with full access in the form requested, that is, copies of documents which stem from the incident in the letter of 30 August 1978 and contain personal information about the applicant, I consider that it has complied with the terms of the Act and the access application.
35. I find that the contents of the remaining documents are properly characterised as non-personal information. An application for access to documents containing information that is not personal information about the applicant must be lodged with an application fee of \$30. If the applicant seeks access to documents C-P, he is required by s.12 to lodge an application for those together with an application fee of \$30.

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