



Decision and Reasons for Decision

Application Number: 210558

Applicant: JCO

Respondent: Department of Police

Decision Date: 20 October 2009

Catchwords: **FREEDOM OF INFORMATION – section 28A of the *Freedom of Information Act 1992 (Qld)* – whether reasonable basis to be satisfied the documents sought do not exist – sufficiency of the agency’s searches – whether all reasonable steps taken to find the documents sought.**

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REASONS FOR DECISION

Summary

1. For the reasons set out below, I am satisfied that
 - access to documents responsive to items 1(a)-(g) and (i)-(n), 2(d) and 3(a)-(c) can be refused under section 28A(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) on the basis that the documents sought do not exist;
 - access to the document sought at item 1(h) can be refused under section 28A(2) of the FOI Act on the basis that although this document should be in the possession of the Department of Police, also known as the Queensland Police Service (**QPS**), QPS has taken all reasonable steps to locate the document but the document cannot be found.

Background

2. By letter dated 26 March 2008 (**FOI Application**) to QPS, the applicant sought access under the FOI Act to certain information relating to DNA testing in prisons. The applicant particularised the information to which he sought access by grouping and numbering each request as follows: item 1(a)-(n), item 2(a)-(d), item 3(a)-(c). For ease of reference in this decision, I will refer to these item numbers contained in the FOI Application. The particulars of the items remaining in issue in this review are detailed in the body of this decision.
3. By letter dated 8 May 2008 (**Original Decision**), Inspector Kilpatrick of QPS decided to:
 - refuse the applicant access to item numbers 1(a)-(n) and 3(a)-(c) pursuant to section 22(a) of the FOI Act
 - refuse the applicant access to item number 2(a), (c) and (d) pursuant to section 42(1)(a) and (d) of the FOI Act
 - release information responsive to item number 2(b).
4. By letter dated 28 May 2008 (**Internal Review Application**), the applicant sought internal review of the Original Decision.
5. By letter dated 24 June 2008 (**Internal Review Decision**), Assistant Commissioner Swindells of QPS decided to:
 - affirm the Original Decision in respect of item numbers 1(a)-(n) and 3(a)-(c)
 - overturn the Original Decision in part in respect of item number 2(a), (c) and (d) and:
 - release information responsive to item number 2(a)
 - refuse the applicant access to item number 2(c) and (d) pursuant to section 44(1) of the FOI Act
6. By letter addressed to the Office of the Information Commissioner (**Office**) dated 8 July 2008 (**External Review Application**), the applicant sought external review of the Internal Review Decision.

Decision under review

7. The Internal Review Decision of Assistant Commissioner Swindells, dated 24 June 2008, is the decision under review.

Steps taken in the external review process

8. By email dated 8 July 2008, the Office asked QPS to provide copies of documents relevant to the external review.¹
9. QPS provided the documents requested at paragraph 8 above by facsimile dated 11 July 2008.
10. By letter dated 16 July 2008, the applicant was advised that the External Review Application had been accepted.
11. By letter dated 16 July 2008, QPS was advised that the External Review Application had been accepted and asked to provide:
 - copies of the documents containing information to which access had been refused
 - further submissions in relation to the discovery process available to the applicant² in respect of section 22(a) of the FOI Act
12. QPS provided the documents requested at paragraph 11 above, together with further submissions, by letter dated 14 August 2008.
13. On 2 December 2008, a staff member of the Office made enquiries with QPS to:
 - discuss the matter in issue with respect to section 22(a) of the FOI Act
 - discuss the release of documents responsive to item 2(c) of the FOI Application
 - clarify the remaining matter in issue and exemption claims relied on by QPS under the FOI Act.
14. On 4 December 2008, a staff member of the Office made enquiries with the applicant to:
 - discuss the matter in issue, particularly in relation to section 22(a) of the FOI Act, with a view to informal resolution
 - confirm that QPS would release documents responsive to item 2(c) of the FOI Application.
15. On 10 December 2008, a staff member of the Office made further enquiries with QPS to clarify:
 - the existence or otherwise of documents responsive to the FOI Application, particularly in relation to the claim of section 22(a) of the FOI Act
 - further exemption claims relied on by QPS under the FOI Act
16. By letter dated 16 December 2008, I wrote to QPS:

¹ Including the FOI Application, Original Decision, Internal Review Application and the Internal Review Decision.

² In the current proceedings between the applicant and QPS.

- confirming the matters discussed between staff of the Office and QPS
 - clarifying QPS' position in relation to the provisions of the FOI Act as they applied to the documents in issue
 - seeking further submissions
17. By letter dated 7 January 2009, QPS made the following submissions:
- access to documents responsive to items 1(a)-(g) should be refused pursuant to section 28A(1) of the FOI Act on the basis that the documents sought do not exist
 - items 1(h)-(n) are relevant to the applicant's civil action and access is refused pursuant to section 22(a) of the FOI Act by virtue of the documents being accessible via section 134A of the *Evidence Act 1977 (Qld)* (**Evidence Act**) and/or the *Uniform Civil Procedure Rules 1999 (Qld)* (**UCPR**)
 - information concerning items 2(d) and 3(a)-(c) is held by Queensland Health (**QH**).
18. On 23 February 2009, a staff member of the Office made enquiries with QPS to obtain access to those documents which QPS had refused access under section 22(a) of the FOI Act.
19. By letter dated 24 February 2009, I wrote to QPS to require the production of those documents to which access was refused under section 22(a) of the FOI Act.³
20. On 5 March 2009, an officer of QPS requested an extension of time in which to respond to my letter dated 24 February 2009.
21. By facsimile dated 9 March 2009, I granted QPS an extension of time to respond to 24 March 2009.
22. By letter dated 24 March 2009, QPS produced twelve folios in response to item number 1(i)-(n) of the FOI Application and sought to rely on section 28A(2) of the FOI Act in respect of item number 1(h).
23. On 11 and 12 May 2009 a staff member of the Office made enquiries with QPS and confirmed that QPS sought to rely on section 28A(1) in respect of items 2(d) and 3(a)-(c).
24. On 19 May 2009 I communicated a preliminary view to QPS that:
- access may be refused to items 1(a)-(g), 2(d) and 3(a)-(c) pursuant to section 28A(1) of the FOI Act
 - access may be refused to item 1(h) pursuant to section 28A(2) of the FOI Act
 - access to item 1(i)-(n) could not be refused pursuant to section 22(a) of the FOI Act.
25. On 25 and 27 May 2009 a staff member of the Office made enquiries with QPS regarding the legislative provision by which the applicant's DNA was obtained.
26. By letter dated 28 May 2009, QPS:

³ Pursuant to section 76(1)(e) of the FOI Act.

- advised that it agreed with my preliminary view concerning items 1(a)-(g), 1(h), 2(d) and 3(a)-(c)
 - advised that it no longer objected to the release of the twelve folios it considered were within the scope of item 1(i)-(n) of the FOI Application
 - provided documentary evidence regarding the legislative provision by which the applicant's DNA was obtained.⁴
27. On 3 June 2009, I communicated a preliminary view to the applicant that:
- as the information requested in item 2(a)-(c) had already been released to the applicant, it was no longer in issue in the review
 - QPS agreed to release the twelve folios responsive to item 1(i)-(n) and accordingly, these documents were no longer in issue in the review
 - there are reasonable grounds to be satisfied that documents responsive to items 1(a)-(g), 2(d) and 3(a)-(c) do not exist and accordingly, access can be refused under section 28A(1) of the FOI Act
 - there are reasonable grounds to be satisfied that documents responsive to item 1(h) can not be found and accordingly, access can be refused under section 28A(2) of the FOI Act.
28. By facsimile dated 14 June 2009, the applicant advised that he did not accept the preliminary view and provided submissions.
29. By letter dated 19 June 2009, QPS confirmed that it had released the twelve folios responsive to item 1(i)-(n) to the applicant.
30. On 22 and 23 June 2009, a staff member of the Office made enquiries with QPS regarding DNA samples and the role of QH.
31. By email dated 23 June 2009, I requested further particulars from QPS regarding the processing and storage of DNA samples generally and the role of QH.
32. By letter dated 23 June 2009, I wrote to the applicant to confirm that the twelve folios had been released to him by QPS and to clarify an issue raised in his response to my preliminary view.
33. By facsimile dated 26 June 2009, the applicant made further submissions and stated that disclosure of the twelve folios did not adequately answer item 1(i)-(n).
34. By letter dated 14 July 2009, I wrote to QPS:
- requesting further searches be conducted for documents that may respond to item 1(h)-(n) including those suggested by the applicant in his submissions
 - seeking further submissions
35. On 27 and 28 July 2009, QPS made enquiries with this Office to clarify the issues raised in my letter dated 14 July 2009.
36. By letter dated 28 July 2009, QPS provided submissions in relation to DNA processing and storage.

⁴ This document had previously been released to the applicant by QPS.

37. By letter dated 13 August 2009, QPS provided submissions in relation to the further searches conducted and confirmed no further documents were located.
38. On 29, 30 September and 1 October 2009, a staff member of this Office made enquiries with QPS to clarify information contained in a form titled 'Prison Population DNA Collection.'⁵
39. In making my decision, I have taken into account the following:
 - the FOI Application, Internal Review Application and External Review Application
 - the Original Decision and Internal Review Decision
 - written correspondence received from QPS during the course of the review, including submissions
 - written submissions received from the applicant during the course of the review
 - file notes of various telephone and in-person conversations between staff members of this Office and QPS during the course of the review
 - file note of the telephone conversation between a staff member of this Office and the applicant during the course of the review
 - relevant provisions of the FOI Act as referred to in this decision
 - legislation, case law and previous decisions of the Information Commissioner as referred to in this decision
 - content of the material claimed to be exempt.

Issues in the review

40. The applicant seeks access to certain information concerning DNA testing in prisons.
41. Information responsive to the applicant's request at item 2(a)-(c) was released to the applicant by QPS during the course of the review. Accordingly, this item is no longer in issue in this review.
42. Twelve folios identified in response to items 1(i)-(n) of the FOI Application have also been released to the applicant during the course of the review. However, the applicant claims there are additional documents that QPS has not located or provided to him in response to this item (in addition to the twelve folios already released to him).
43. In respect of the remaining items in the FOI Application, that is items 1(a)-(n), 2(d) and 3(a)-(c), QPS maintains that:
 - documents responsive to item 1(a)-(g) do not exist
 - document/s responsive to item 1(h) have been or should be in the possession of QPS but the document/s can not be found
 - additional documents responsive to item 1(i)-(n) do not exist
 - documents responsive to items 2(d) and 3(a)-(c) do not exist.
44. In this review the issues to be determined are whether there are reasonable grounds to be satisfied that:
 - documents responsive to items 1(a)-(g) and (i)-(n), 2(d) and 3(a)-(c) do not exist and accordingly, whether access can be refused under section 28A(1) of the FOI Act

⁵ A copy of which was provided to the Office by QPS on 28 May 2009.

- document/s responsive to item 1(h) can not be found and accordingly, whether access can be refused under section 28A(2) of the FOI Act.

The law

45. The FOI Act was repealed by the *Right to Information Act 2009 (RTI Act)*⁶ which commenced on 1 July 2009.⁷ However, because the FOI Application was made under the FOI Act and has not yet been finalised, for the purposes of this decision, I am required to consider the application of the FOI Act (and not the RTI Act) to the matter in issue.⁸

46. Section 28A(1) and (2) of the FOI Act provide:

28A Refusal of access—documents nonexistent or unlocatable

- (1) *An agency or Minister may refuse access to a document if the agency or Minister is satisfied the document does not exist.*

Example—

documents that have not been created

- (2) *An agency or Minister may refuse access to a document if—*

- (a) *the agency or Minister is satisfied the document has been or should be in the agency's or Minister's possession; and*
- (b) *all reasonable steps have been taken to find the document but the document can not be found.*

Examples—

- *documents that have been lost*
- *documents that have been disposed of under an authority given by the State Archivist.*

47. In *PDE and the University of Queensland*⁹ (*PDE*) the Information Commissioner indicated that:¹⁰

*Sections 28A(1) and (2) of the FOI Act address two different scenarios faced by agencies and Ministers from time to time in dealing with FOI applications: circumstances where the document sought does not exist and circumstances where a document sought exists (to the extent it has been or should be in the agency's possession) but cannot be located. In the former circumstance, an agency or Minister is required to satisfy itself that the document does not exist. If so satisfied, the agency or Minister is not required by the FOI Act to carry out all reasonable steps to find the document. In the latter circumstance an agency or Minister is required to satisfy itself that the document sought exists (to the extent that it has been or should be in the agency's possession) **and** carry out all reasonable steps to find the document before refusing access.*

...to be satisfied that a document does not exist, it is necessary for the Minister or agency to rely upon a number of key factors, including the Minister/agency's particular knowledge or experience with respect to the administrative arrangements of government, the agency structure, the Minister/agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it), relevant administrative practices and procedures including but not exclusively

⁶ Section 194 of the RTI Act.

⁷ With the exception of sections 118 and 122 of the RTI Act.

⁸ Section 199 of the RTI Act.

⁹ (Unreported, Office of the Information Commissioner, 9 February 2009).

¹⁰ At paragraph 34.

information management approaches. The knowledge and experience required will vary from agency to agency, Minister to Minister and from one FOI application to another.

...

Section 28A of the FOI Act now requires an agency to be 'satisfied' as to the existence of a document. Justice Finn referred to the test of 'being satisfied' as an evaluative judgement based on the knowledge and experience of the agency. Such a judgement requires that the decision be made on reasonable grounds. In the context of applying section 28A(1) of the FOI Act the preferred question then is:

Are there reasonable grounds for the agency/Minister to be satisfied that the requested document does not exist?

In the context of applying section 28A(2) of the FOI Act, the preferred question is then:

Are there reasonable grounds for the agency/Minister to be satisfied that the requested document has been or should be in the agency's or Minister's possession?

In practice these questions may be two sides of the same coin and in answering one question, the other question is answered in the opposite. The provision however requires the agency to satisfy itself of either one or the other. Section 28A of the FOI Act should now be applied when a question of the sufficiency of searches otherwise arises.

The second question in Shepherd is presently used in the application of section 28A(1) of the FOI Act and in sufficiency of search reviews:

Have the search efforts made by the agency to locate the document been reasonable in all the circumstances of the review?

This question now needs to be brought into line with the test used in section 28A(2)(b) of the FOI Act to read:

Have all reasonable steps been taken to find the document but the document can not be found?

In the context of applying s28A(1) of the FOI Act this question only needs to be asked if an agency or Minister relies in part on searches to satisfy itself that the document does not exist.

48. Thus, in determining whether section 28A(1) of the FOI Act applies to refuse access to a document, it is relevant for me to firstly ask whether there are reasonable grounds to be satisfied that the requested documents do not exist. In determining whether section 28A(2) applies to refuse access to a document, or in respect of section 28A(1), if the agency has used searches to satisfy itself that the additional documents sought do not exist, it is necessary to consider whether the agency has taken all reasonable steps to find the additional documents sought.
49. One of the issues for consideration in this review is the effect of the operation of section 311 of the *Police Powers and Responsibilities Act 2000* (Qld)¹¹ (PPRA) on the creation of documents.

¹¹ The *Police Powers and Responsibilities and Other Acts Amendment No.22 2000* (Qld) amended the PPRA on 1 July 2000. Section 311 of the PPRA expired three years after its commencement on 1 July 2000 (see section 311(4) of the PPRA).

50. Section 311 of the PPRA states:

Taking DNA sample from prisoner

311.(1) *This section applies to a prisoner who is serving a term of imprisonment for an indictable offence.*

(2) *A DNA sampler may, in accordance with an arrangement between the commissioner and the general manager of the prison -*

- (a) enter the prison where the person is held; and*
- (b) detain the prisoner and take the prisoner to an appropriate place in the prison for the purpose of taking a DNA sample for DNA analysis from the prisoner; and*
- (c) take the DNA sample from the prisoner.*

...

51. Section 314 of the PPRA states:

Help with DNA sampling

314.(1) *This section applies to a DNA sampler who is taking a DNA sample from a person.*

(2) *If help is needed to take the DNA sample, the DNA sampler may ask other persons to give reasonably necessary help.*

(3) *It is lawful for a DNA sampler and a person helping the DNA sampler to use reasonably necessary force for taking a DNA sample.*

(4) *If the DNA sample is being taken with consent, the DNA sampler and a person helping the DNA sampler must immediately stop taking the sample if the person withdraws the consent.*

(5) *However, withdrawal of consent does not make inadmissible evidence of a DNA analysis done on any DNA sample taken before the consent is withdrawn.*

52. Another issue for consideration in this review is the QPS procedure for DNA sampling and analysis as set out in the PPRA.

53. Section 478 of the PPRA states:

478 ***How DNA samples may be taken***

A DNA sampler may take a DNA sample from a person only by –

...

- (b) collecting hair, including roots of the hair, from the person.*

54. Section 489 of the PPRA states:

489 ***Power to analyse etc. DNA samples***

- (1) *It is lawful for a police officer or a person acting under an arrangement between the commissioner and the chief executive (health)*¹² –
 - (a) *to perform a DNA analysis of a DNA sample taken under this chapter or received from a declared agency; and*
 - (b) *to perform any further analysis of a DNA sample that may be reasonably necessary for ensuring the accuracy of an earlier analysis; and*
 - (c) *to keep a DNA sample and the results of a DNA analysis of the sample until they are required under this part to be destroyed; and*
 - (d) *to take the steps reasonably necessary to ensure the results of the analysis are included in QDNA; and*
 - (e) *to compare the results of a DNA analysis of a DNA sample with other results of DNA analyses of samples, whether or not DNA samples, to which the police officer or person has access.*
- (2) *A DNA sample mentioned in subsection 1(c) must be kept in a secure place.*
- (3) *It is lawful for a police officer to use the results of any DNA analysis for performing any function of the police service.*

55. Section 490 of the PPRA states:

490 When DNA sample taken from suspected person and results may be destroyed

- (1) *A DNA sample taken from a person suspected of having committed an indictable offence and the results of a DNA analysis of the sample must be destroyed within a reasonably practicable time after the end of 1 year from –*
 - (a) *if the person’s arrest for the indictable offence is discontinued under section 376(1) or 379(6) – the day the arrest is discontinued; or*
 - (b) *if the proceeding for the indictable offence is discontinued before a court – the day the proceeding is discontinued; or*
 - (c) *if the person is found not guilty of the indictable offence, including on appeal – the day the person is found not guilty of the offence; or*
 - (d) *if a proceeding for the indictable offence is not started within 1 year after the sample is taken – the day the sample is taken.*
- (2) *Subsection (1) does not apply if –*
 - (a) *the person has been proceeded against for another indictable offence the charge of which has not been decided; or*
 - (b) *the person has been found guilty of another indictable offence, including an indictable offence dealt with summarily, whether before or after the commencement of this section; or*
 - (c) *the DNA sample and the results of the DNA analysis of the sample are required for the investigation of another indictable offence the person is reasonably suspected of having committed; or*
 - (d) *the person is not proceeded against for an indictable offence because he or she has been found unfit for trial because of mental illness.*

...

¹² The *chief executive (health)* means the chief executive of the health department: Schedule 6, PPRA.

Item 1(a)-(g)

56. The applicant seeks access to:

1. *All information concerning sample (05299) 5299 Case ID 32085 (Document 43 & 45) taken on 5 March 2001 including:*
 - a) *the crime/s the sample relates to;*
 - b) *the investigating officer/s authorising the sample to be taken;*
 - c) *the DNA profile/s obtained from the crime scene/s for the particular crime/s;*
 - d) *the target group/s that the sample relates to;*
 - e) *the intelligence that led to identification of the target group/s;*
 - f) *the intelligence that led sample 5299 to be part of the target group/s and*
 - g) *the authorisation signed by Superintendent, Forensic Services Branch to conduct mass screening of the target groups;*

Applicant's submissions

57. The applicant submits that:

1(a)-(c) I am able to accept that the sample could have been taken without the requisite crime related DNA and naturally I should not have been under investigation. This does not explain how I became part of the target group.

1(d)-(f) The QPS apparently submits that because biological samples could purportedly be taken from prisoners pursuant to section 311 PPRA, then there was no target group. If this were the case there would be no sample taken either. There were target groups. The QPS submission merely defines the documents they need to produce and admits that unorthodox methods may have been used.

1(g) In particular 1(g) needs an answer as it is a QPS Operational Procedures Manual requirement for mass DNA sampling to be authorised. It is simply not plausible that such a large multi million-dollar operation could proceed without the authorisation of the Superintendent.

QPS submissions

58. In respect of item 1(a)-(g), QPS submits that:

This part of the application seeks information in relation to police obtaining a sample of [the applicant's] DNA on 5 March 2001 at the Lotus Glen Correctional Centre. The Police Powers and Responsibilities and Other Acts Amendment No.22 2000 amended the Police Powers & Responsibilities Act 2000 (PPRA) on 1 July 2000. Section 311 of the PPRA 'Taking DNA sample from prisoner' provided for appropriately trained police DNA samplers to obtain biological specimens, i.e. DNA samples, from persons currently serving terms of imprisonment for indictable offences. Section 311 of the PPRA was enacted to operate for three (3) years after the commencement of the amendment (01.07.2003)...

As at 5 March 2001 [the applicant] was serving a period of imprisonment for an offence of Grievous Bodily Harm (GBH). [The applicant] was sentenced by the Cairns District Court on 6 December 2000 to four (4) years imprisonment suspended for four years after having served a period of 12 months imprisonment.

Accordingly, the applicants DNA was obtained through the fact of his incarceration for an indictable offence and the operation of section 311 of the PPRA as opposed to the applicant being targeted for a specific unsolved offence...

...this agency has previously advised the applicant through prior release of documents on 12 December 2007 and through numerous oral communications that these items do not exist. The applicant fails to accept that his DNA was obtained by virtue of his imprisonment for an indictable offence and the operation of the then section 311 of the PPRA.

59. QPS also provided this Office with a copy of a form titled "Prison Population DNA Collection" with entries dated 1 March 2001 and 5 March 2001.¹³ In the comments section of entry 05286, dated 1 March 2001, it states with reference to the applicant:

Argumentative, refused to believe we were police. Demanded independent witness and names. Video taped by AIREN. Sect 311/314 explained by AIREN/PERSHOUSE. Full details REFUSED TO COMPLY. Spoke with Legal (... YBARLUCEA) aid on 1/3/01. Awaiting reply. Refer to 05299.

and at entry 05299, dated 5 March 2001, it states:

[applicant] refusing to comply with requirement and antagonistic towards police – see entry 05286 where [applicant] previous infringed on police personal space. [applicant] refused to allow hair sample to be taken and fought against corrective services officer. [applicant] placed on the ground, handcuffed with legs locked. Hair sample taken by SGT SMITH (assisted Sgt PERSHOUSE & S/C MIENTJES) when [applicant] released it was noticed that he had suffered a contusion approximately 2cm long above his left eyebrow and there was an extent of blood loss. [applicant] then started breathing strangely.

Findings of fact

60. Having considered the parties' submissions and the evidence before me, I make the following findings of fact:
- on 1 March 2001, the applicant was a prisoner at the Lotus Glen Correctional Centre, having been convicted of an indictable offence of Grievous Bodily Harm
 - on 1 March 2001, QPS officers attended the Lotus Glen Correctional Centre to obtain a DNA sample from the applicant
 - an electronic form was created by QPS titled 'Prison Population DNA Collection' to record the taking of DNA from the applicant
 - the applicant refused to provide a DNA sample to QPS officers on 1 March 2001
 - on 5 March 2001, QPS officers attended the Lotus Glen Correction Centre and a hair sample was obtained from the applicant
 - the applicant's DNA was taken under section 311 of the PPRA
 - section 311 of the PPRA allows for the collection of DNA from prisoners who are serving a term of imprisonment for an indictable offence
 - on 1 March 2001, sections 311 and 314 of the PPRA were explained to the applicant by QPS officers

Analysis

61. The issue to be determined is whether there are reasonable grounds to be satisfied that documents responsive to item 1(a)-(g) do not exist and accordingly, whether access can be refused under section 28A(1) of the FOI Act.
62. The applicant appears to submit that his DNA was taken by QPS because he was part of a target group (identified by some form of intelligence or in relation to particular

¹³ This document had previously been released to the applicant by QPS.

unsolved crime/s) and does not accept that his DNA was taken by virtue of section 311 of the PPRA. Accordingly, he seeks access to documents containing information regarding particular crimes, intelligence, target groups and investigations.

63. QPS submits that:

- section 311 of the PPRA was the basis upon which the applicant's DNA was taken (as evidenced in the Prison Population DNA Collection form); and
- the applicant was informed of section 311 of the PPRA on 1 March 2001 when he refused to comply.

64. Section 311 of the PPRA:

- provides for a DNA sampler to take a DNA sample from prisoners who are serving a term of imprisonment for an indictable offence
- does not provide for intelligence, investigations or target groups to be established or identified
- does not provide for an authorisation by the superintendent, but rather, requires an arrangement between the commissioner and the general manager of the prison

65. As to whether there were target groups or intelligence that led to the identification of target groups in relation to the taking of the applicant's DNA, apart from the applicant's assertions, there is no evidence before me to suggest that was the case.

66. On the contrary, there is evidence before me that the applicant's DNA was taken pursuant to the operation of section 311 of the PPRA, in particular, the fact that the applicant was serving a term of imprisonment for an indictable offence at the time and the details recorded in the Prison Population DNA Collection form.

Are there reasonable grounds to be satisfied that the requested documents do not exist?

67. The answer to this question is yes.

68. The applicant's DNA was taken by virtue of the operation of section 311 of the PPRA. The operation of section 311 of the PPRA does not result in documents of the type requested by the applicant being brought into existence.

69. Accordingly, I find that:

- there are reasonable grounds to be satisfied that documents of the type sought by the applicant do not exist because they were not created
- access to the requested documents can be refused under section 28A(1) of the FOI Act.

Item 1(h)-(n)

70. The applicant seeks access to:

All information relating to the videotape recording of sample 5299 including:

- h) the location of the master copy of the videotape of the taking of the DNA sample;*

- i) the movement, copying, and/or use of the videotape of the taking of sample 5299;
- j) the master tape file number of the videotape of the taking of sample 5299;
- k) the involvement of case officer Weera Warbena 5054054 and the Electronic Recording Section Queensland Police Service Subject Coffee Lab Reference 36801;
- l) the involvement of case officer Constable Henderson 10882 and the Electronic Recording Section Queensland Police Service Subject Coffee Lab Reference 32618;
- m) the Sony VHS tape E 30 Lot Number 33CA3604A recorded in 2001; (Manufactured after January 2000)
- n) the Panasonic VHS tape Electronic Recording Section Queensland Police Service Case Officer Mientjes; Subject Coffee; Lab Reference 22572 Lot Number 41N09DJ3 E60 made in Japan

Applicant's submissions

71. In respect of item 1(h) the applicant submits that:

I have not received the information that you now have concerning the purported loss of the master mini DV tape including any statement made by Mientjes who apparently possessed it last.

72. In respect of item 1(i)-(n) the applicant submits that:¹⁴

The 12 documents, which I received on 23rd June...raise more question of adequate access to information than they answer. The documents are exclusively from the Electronic Recording Section and

- a) *not one other reference to the numerous tapes made is given; when surely all those tapes moving about must have created numerous documents;*
- b) *recording event 22572 produced 4 E60 VHS tapes. There is no documentation of the tapes movement;*
- c) *there is no documentation of the movements of the mini DV tape after Mientjes collected it;*
- d) *there is no documentation to explain the urgency of recording event 22572;*
- e) *it is apparent from the processing notes that the mini DV tape that Mientjes had was a copy;*
- f) *Rachel Airen turned up the next day (3 April 2001) with another undocumented urgent job to copy an 'original' audio micro documented;*
- g) *neither Mientjes's or Airen's notebook entries have been provided; where undoubtedly the urgency would be noted;*
- h) *Sharie Henderson turned up on the 23 July 2001 with an "Original" mini DV for 3 copies and her notebook entries have not been provided.*

It is clear that the disclosure of the 12 documents does not adequately answer 1(i-n) but only encompasses one aspect of the relevant tapes production.

QPS submissions

73. In respect of item 1(h), QPS submits that:

In relation to part 1(h) of the applicant's request, where the 'master copy of the video tape' is sought, enquiries have determined that the master tape consists of a 'mini DV tape'. The [twelve] folios determine this tape was collected by Senior Constable Mientjes

¹⁴ I note that the applicant has referred to item 1(l)-(n) in the last line of his submissions. I have assumed that this was a typographical error and the applicant meant to refer to item (i)-(n).

(who at the time was a member of the DNA Unit) on 2 April 2001 from the ERS. Searches by the following units and persons of the QPS have been unable to locate this 'mini DV' master copy:

- Assistant Commissioner State Crimes Operations Command (which amongst other sections includes the Forensic Services Branch, DNA Unit, ERS, Corrective Services Investigation Branch);
- Assistant Commissioner Ethical Standards Command;
- Central Tapes Facility;
- Central Exhibit Facility;
- Office of the QPS Solicitor;
- Legal Liaison Unit;
- Senior Constable Mientjes Bundaberg Scenes of Crime.

74. In respect of item 1(h)-(n), QPS submits that:

... further searches were conducted in relation to [these] issues with the following areas of the QPS:

Photographic & Electronic Recording Section

This location was searched as the Photographic & Electronic Recording Section processed media in relation to the prosecution of the applicant. Approximately 2 hours was taken searching Forensic databases and case file notes on 27 February 2009. On 3 August 2009 a further 2 hours were expended by the ERS searching Forensic databases and case file notes. No further documents were located.

DNA Management Section

This location was searched as Senior Constable Mientjes, Senior Constable Airen and Constable Henderson each worked at the DNA Unit at the time requests for copies of the recording of the taking of the applicants DNA were made. Electronic databases and hard copy records were searched on 5 August 2009. A period of 3 hours was expended by the DNA Management Section searching for documents.

The searches located a statement (three folios) of Constable Henderson which was prepared by the officer in relation to the prosecution of the applicant for disobeying the direction to lawfully provide a sample of his DNA. This statement has previously been provided to the applicant as part of court the [sic] proceedings for that offence. The QPS has no objection to the applicant being provided a further copy of the statement.

Corrective Services Investigation Unit

This location was searched as it was this Unit that commenced the prosecution of the applicant for disobeying the direction to lawfully provide a sample of DNA. The documents sought by the applicant were searched for by the Corrective Services Investigation Unit (CSIU) on 11 March 2009 and 10 August 2009. All CSIU computer databases and records relating to this matter were searched. A total period of 4 hours was expended in searching for the documents. No further documents were located.

Result of Searches

No further documents other than the statement of Constable Henderson referred to above and the 12 folios released to the applicant on 19 June 2009 have been located. These 12 folios form the records relating to the copying of media relating to the applicants refusal to provide a sample of his DNA. There was no statutory obligation or other authority which required the officers involved to record the matters referred to by the applicant in his submissions in their police notebooks.

Findings of fact

75. Having considered the parties' submissions and the twelve folios released by QPS, I make the following findings of fact:
- QPS conducted searches for documents responsive to item 1(h)-(n) and located 12 folios which were released to the applicant during the course of the review
 - the 12 folios located by QPS show the movement of media in QPS
 - In respect of item 1(h):
 - Senior Constable Mientjes collected the master videotape on 2 April 2001 from the Electronic Recording Section of QPS
 - QPS made enquiries with various staff of QPS during its search, including Senior Constable Mientjes, but the master copy of the videotape cannot be located
 - it is QPS' usual practice to keep documents of the kind sought by the applicant at item 1(h) in certain units of QPS (including the Photographic and Electronic Recording Section, DNA Management Section and Corrective Services Investigation Unit) and those units have been searched
 - In respect of item 1(h)-(n):
 - QPS conducted additional searches for a total period of eleven hours in the Photographic and Electronic Recording Section, DNA Management Section and Corrective Services Investigation Unit (where documents of the kind sought by the applicant are kept) and has not located any further documents responsive to item 1(h)-(n)
 - QPS searched forensic databases and case file notes in the Photographic and Electronic Recording Section on 27 February 2009 and on 3 August 2009 because this is where the media in relation to the applicant's prosecution was processed
 - QPS searched electronic databases and hard copy records in the DNA Management Section on 5 August 2009 because this is where Senior Constable Mientjes, Senior Constable Airen and Constable Henderson worked at the time the requests for copies of the recording of the taking of the applicant's DNA were made
 - QPS searched all CSIU computer databases and records relating to this matter in the Corrective Services Investigation Unit on 11 March 2009 and on 10 August 2009 because this Unit commenced the prosecution of the applicant
 - there is no obligation on QPS officers to record reasons for the movement of media
 - QPS has relied on its knowledge of internal practices and procedures to inform its search and enquiry process.

Analysis

76. The issues to be determined are whether there are reasonable grounds to be satisfied that:
- document/s responsive to item 1(h) can not be found and accordingly, whether access can be refused under section 28A(2) of the FOI Act; and
 - documents responsive to item 1(i)-(n) do not exist and accordingly, whether access can be refused under section 28A(1) of the FOI Act
77. The applicant submits that:

- in respect of item 1(h), a master copy of the videotape is in the possession or under the control of QPS
- there should be additional documents responsive to item 1(i)-(n), given the copying and movement of the tapes identified in the twelve folios.

78. QPS:

- agrees that a master copy of the videotape should be in its possession or under its control, and argues that it has searched for the tape in locations where it should exist, but cannot locate the tape
- submits that the twelve folios released to the applicant are the only documents that exist in response to item 1(i)-(n), particularly given that QPS officers are not required to record matters in their police notebooks regarding the reasons for copying and movement of tapes.

79. The decision as to whether an agency has taken all reasonable steps to find a document must be made on a case by case basis, and where relevant, with reference to key factors, including those identified at paragraph 47 above.

80. In determining whether QPS has taken all reasonable steps to locate the documents sought by the applicant at item (h)-(n), it is appropriate in this instance to have regard to:

- QPS' procedures and practices in relation to the movement, copying and recording of media
- the type of documents created, if any, when recordings are moved, copied or recorded internally
- the location in which these documents, if they existed, would be filed/kept
- other relevant information regarding the recording event, including the applicant's prosecution.

Are there reasonable grounds to be satisfied that the document requested at item 1(h) has been or should be in QPS' possession; and that QPS has taken all reasonable steps to find the document?

81. The answer to each of these questions is yes.

82. QPS accepts that the document has been or should be in its possession. This is also clear from the twelve folios that were released by QPS which identify the master copy of the videotape.

83. QPS has relied on its knowledge of internal practices and procedures to determine where the master copy of the videotape should be located. I am satisfied that:

- QPS has provided appropriate explanation of who conducted the searches, how searches were conducted and the time spent searching for documents responding to 1(h)
- QPS has searched in the locations where the documents would ordinarily be located
- the searches have been thorough and have not been cursory, as evidenced by the number of hours spent searching each location
- QPS has taken all reasonable steps to locate documents responding to item 1(h), but this item can not be found
- access to item 1(h) may be refused under section 28A(2) of the FOI Act.

Are there reasonable grounds to be satisfied that the documents requested at item 1(i)-(n) do not exist and that QPS has taken all reasonable steps to locate additional documents?

84. The answer to each of these questions is yes.
85. I refer to the matters noted at paragraph 83 above. QPS has conducted searches in a number of locations where documents of the kind sought by the applicant would be located. I am satisfied that the documents sought by the applicant do not exist as reasons for the copying and movement of tapes is not required to be recorded by QPS officers.
86. Accordingly, I am satisfied that:
- there are reasonable grounds for QPS to be satisfied that the requested documents do not exist
 - QPS has taken all reasonable steps to locate additional documents
 - access to item 1(i)-(n) can be refused under section 28A(1) of the FOI Act.

Items 2(d) and 3(a)-(c)

87. The applicant seeks access to:
2. *Information concerning sample 5299 (Document 45) and the sample/s in case known as “the Gympie Serial Rapist” or “the Gympie Rapist” including:*
...
d) *the dates DNA sample/s in (c) were processed and a DNA profile was obtained in the Gympie Rapist case.*
 3. *Information concerning the continued possession of sample 5299 by Queensland Health including:*
 - a) *who currently claims ownership of the sample;*
 - b) *any lawful reason why the sample has not been destroyed or returned to its lawful owner;*
 - c) *any reason why up to 175 hairs were taken when one is sufficient to establish a DNA profile.*

Applicant’s submissions

88. The applicant submits that:
- [In relation to item 2(d)]*
- Queensland Health do not have access to information relating to particular samples ie 2(d). This forensic information must be held on the DNA database not accessible to Queensland Health. It is obvious that DNA evidence cannot be used in legal proceedings without its bona fides particularly the date of testing being available.*
- ...
- [In relation to item 3(a)-(c)]*

Queensland Health is storing the sample [5299]. Their client is the QPS. The questions are correctly asked of the QPS who must have a policy and/or information about this relationship and the ownership of biological samples.

QPS submissions

89. In respect of items 2(d) and 3(a)-(c), QPS submits that:

On 7 January 2008 the applicant was advised to make application for this information direct to Queensland Health. This Unit is advised by the Officer in Charge of the QPS DNA Results and Management Unit that this information is only held by Queensland Health.

QPS also submits:

DNA person samples are taken by a DNA sampler and then transported to Queensland Health where they are analysed. The results of the DNA analysis are then forwarded to the Queensland Police. The analytical process includes uploading the DNA profile to the Queensland DNA database (QDNA) and the National Criminal Investigations DNA Database (NCIDD).

[In relation to item 2(d)]:

The dates in which DNA samples were taken from persons as part of the 'Gympie Rapist' case were released to the applicant on 7 January 2009 (32 folios). In relation to the dates in which the DNA samples (crime scene or person) were searched against the DNA Database, this information is not held by QPS.

When DNA samples (crime scene or person) are searched against the DNA database, only 'links' are reported by Queensland Health. To make the position clear Queensland Health load a DNA profile to the NCIDD the date is recorded, however no record is made of the date 'it was searched' against other profiles. NCIDD works in such a way that when a profile is loaded it is continually researched against existing and new profiles added to the system.

[In relation to item 3(a)]:

The sample remains under the control of the Commissioner of Police

[In relation to item 3(b)]:

Chapter 17, Part 5, Division 4, of the Police Powers and Responsibilities Act 2000 (Qld) ('PPRA') outlines the requirements for destruction of DNA sample/s and results of a DNA analysis. Pursuant to section 490 of the PPRA [the applicant's] DNA sample/results are not required to be destroyed.

[In relation to item 3(c)]:

The QPS holds no information to support this comment.

Findings of fact

90. Having considered the parties' submissions and the relevant provisions of the PPRA, I make the following findings of fact:

- DNA samples are taken by a DNA sampler and are analysed by QH
- a DNA sampler may take a DNA sample from a person by collecting hair, including roots of the hair, from a person

- it is lawful for a police officer or person (under an arrangement between the Commissioner and the chief executive of QH) to:
 - perform a DNA analysis and compare the results with other DNA analyses of samples
 - keep a DNA sample and the results of a DNA analysis until they are required by Part 5, Chapter 17 of the PPRA to be destroyed
 - take the steps reasonably necessary to ensure results of the DNA analysis are included in QDNA
 - use the results of any DNA analysis for performing any function of the police service.
- results of DNA analysis are forwarded to QPS by QH
- QH upload DNA profiles to the Queensland DNA Database (**QDNA**) and National Criminal Investigations DNA Database (**NCIDD**)
- QH only reports any 'links' found between a DNA sample and the DNA database to QPS
- no record is made by QPS of the date that a DNA sample is searched against other profiles in the database and no document is created by QPS in this process
- such DNA samples remain under the control of QPS
- the applicant's DNA sample remains under the control of QPS
- a DNA sample and the results of a DNA analysis of the sample are not required to be destroyed if the person who gave the DNA sample has been found guilty of another indictable offence
- the applicant has been found guilty of another indictable offence, namely, Grievous Bodily Harm (see paragraph 60 above)
- the applicant's DNA sample and the results of the DNA analysis of his sample are not required to be destroyed by QPS.

Analysis

91. The issue to be determined is whether there are reasonable grounds to be satisfied that documents responsive to items 2(d) and 3(a)-(c) do not exist and accordingly, whether access can be refused under section 28A(1) of the FOI Act.
92. In his request at item 2(d), the applicant is seeking access to information regarding the processing and profiling of his DNA sample and those samples involved in the "Gympie Serial Rapist" case.
93. QPS submits that:
 - QH analyses DNA samples and uploads these samples to the QDNA and NCIDD
 - only 'links' are reported by QH to QPS
 - they make no record of the date that a DNA sample is searched against other DNA profiles
94. At item 3(a)-(c), the applicant appears to be seeking answers to questions relating to DNA sample 5299 including ownership and the return of the sample. In this regard, the FOI Act does not require an agency to:
 - answer questions asked in FOI applications
 - create a document in response to an FOI application
 - extract answers to questions from documents in its possession.

95. The Information Commissioner stated in *Hearl and Mulgrave Shire Council (Hearl)*¹⁵ that:

The FOI Act is not an Act which gives persons a legally enforceable right to obtain answers to questions asked of government agencies, or even to have government agencies extract answers to questions from documents in their possession. The legally enforceable right conferred by s.21 of the FOI Act is a right to be given access under the Act, and subject to the Act, to documents of an agency and official documents of a Minister.

96. Although QPS is not required to answer questions asked by the applicant at item 3(a)-(c) or extract answers to questions from documents in its possession, QPS has provided the following information in response to this part of the application:

- sample 5299 remains under the control of the Commissioner of Police
- the sample/result is not required to be destroyed by QPS
- QPS does not hold information to support the applicant's comment at 3(c).

97. Sections 478, 489 and 490 of the PPRA:

- provide for a DNA sampler to take a DNA sample from a person by collecting hair, including the roots of the hair, from a person
- does not specify how many hairs, including a minimum or maximum number, are to be collected for this purpose
- provides that a DNA sample and the results of DNA analysis are not required to be destroyed if the person who gave the DNA sample has been found guilty of another indictable offence
- provide for a police officer or authorised person to analyse a DNA sample
- does not provide for 'ownership' of the DNA sample to transfer to the authorised person, but rather, provides for the DNA sample and analysis to be kept until they are required to be destroyed by chapter 17, part 5 of the PPRA and for the results of the analysis to be included in the QDNA.

98. Accordingly, it is these sections of the PPRA which detail the processes and procedures for DNA sampling and analysis. No other documents have been created to explain this process as it is clearly provided for in the provisions of the PPRA.

99. It is appropriate to provide documents to an applicant if they are responsive to the core issue of the questions raised. It is evident from the applicant's questions that he is seeking information about the location, ownership and other details regarding DNA sample 5299. If documents responsive to the core issues of the applicant's questions did exist, then it would be in accordance with the object of the FOI Act to provide such documents to the applicant. However, in this instance it is clear that the PPRA is the source of documentation for the processes and procedures for DNA sampling and analysis in cases such as the applicants. Therefore, documents responsive to the core issue of the applicant's questions are not created by QPS.

Are there reasonable grounds to be satisfied that the requested documents do not exist?

100. The answer to this question is yes.

¹⁵ (1994) 1 QAR 557 at paragraph 30.

101. QPS has endeavoured to answer the applicant's questions. However, for the reasons set out above, there are reasonable grounds to be satisfied that the documents sought by the applicant do not exist because they were not created.
102. Accordingly, access to the requested documents can be refused under section 28A(1) of the FOI Act.

DECISION

103. I vary the decision under review by finding that:

- access to documents responsive to items 1(a)-(g) and (i)-(n), 2(d) and 3(a)-(c) can be refused under section 28A(1) of the FOI Act on the basis that the documents sought do not exist;
- access to documents responsive to item 1(h) can be refused under section 28A(2) of the FOI Act on the basis that although this document should be in the possession of QPS, it has taken all reasonable steps to locate the document but the document cannot be found.

104. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

Assistant Commissioner Corby

Date: 20 October 2009