



## **Decision and Reasons for Decision**

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**Application Number:** 210632

**Applicant:** PDE

**Respondent:** University of Queensland

**Decision Date:** 9 February 2009

**Catchwords:** **FREEDOM OF INFORMATION – Section 28A(1) of the *Freedom of Information Act 1992 (Qld)* – Refusal of Access – How Agency or Minister is to be satisfied the document does not exist**

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## REASONS FOR DECISION

### Summary

1. In this external review the applicant seeks access to a document the University of Queensland (**UQ**) contends does not exist.
2. Having considered the parties' submissions and evidence, relevant legislation, case law and decisions, I am satisfied that access to the document sought can be refused under section 28A(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) on the basis that the document sought does not exist.

### Background

3. By application form dated 12 August 2008 (**FOI Application**) the applicant lodged a freedom of information application with UQ seeking access to the results form of a specified UQ course (**Course**).
4. By letter dated 29 August 2008 (**Original Decision**), Mr Zgrajewski, Acting Freedom of Information Officer, UQ, advised the applicant:
  - that UQ had located 3 folios responding to the FOI Application
  - of his decision to release 2 folios in full and 1 folio with information comprising the name and results of another student deleted.
5. By letter dated 3 September 2008 the applicant sought internal review of the Original Decision (**Internal Review Application**) and raised procedural issues in relation to the finalisation of marks for the Course.
6. Mr Zgrajewski contacted the applicant upon receipt of the Internal Review Application to explain the difference between an access application and an application for amendment under the FOI Act. The applicant confirmed that he wished to pursue the access application on the grounds of sufficiency of search.
7. By letter dated 19 September 2008 Mr Porter, Secretary and Registrar, UQ:
  - indicated that, in accordance with the FOI request, a copy of the final form of the results for the Course was provided to the applicant with the Original Decision
  - provided two additional documents '*which relate to the marks for the course before they were finalised,*' one of which was a Request to Amend Result After Results Release form which was signed by the Chief Examiner, UQ, on 4 August 2008 (**Request Form 1**)
  - decided that all documents responding to the FOI Application had been provided (**Internal Review Decision**).
8. On 6 October 2008 the Office of the Information Commissioner (**the Office**) received an application for external review of the Internal Review Decision (**External Review Application**) stating:

*Could you please release complete form of Request to Amend Result after Results Release from University of Queensland [Request Form 1] after FOI and internal review failed to release complete form with signature of course coordinator [course specified] and signature of (Executive Dean/Academic Registrar) BACS ...*
9. Attached to the External Review Application is a copy of Request Form 1 with the word 'signature' highlighted in the signing blocks for the Course Coordinator and the

Executive Dean/Academic Registrar, and the query '? missing why' handwritten near the word 'signature' in each instance.

10. In the conduct of a review the Information Commissioner has the power to review any decision that has been made by an agency in relation to the FOI application concerned and to decide any matter in relation to the application that could, under the FOI Act have been decided by an agency.<sup>1</sup>

#### **Decision under review**

11. The decision under review is the Internal Review Decision referred to at paragraph 7 above in which UQ decided that all documents responding to the FOI Application had been released to the applicant.

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

12. By facsimile dated 8 October 2008 the Office asked UQ to provide copies of documents relevant to this external review.
13. In a telephone conversation on 8 October 2008 the Office notified UQ that the External Review Application had been accepted.
14. Under cover of a letter dated 10 October 2008 UQ provided copies of the FOI Application, Original Decision, Internal Review Application and Internal Review Decision.
15. By letter dated 10 October 2008 I informed the applicant that the External Review Application had been accepted and expressed a preliminary view that UQ appeared to have located and released all documents within the scope of the FOI Application on the bases that the applicant had indicated on his FOI application form that the document was located in Dr Pemberton's office; and UQ advised that the applicant had been adamant that UQ confine its searches to Dr Pemberton's Office. I invited the applicant to make a written submission if he did not accept my preliminary view.
16. On 13 October 2008 the applicant telephoned the Office and submitted that as some signatures were missing from Request Form 1, the procedure and the document are illegal. He outlined his expectation that the Office would address that issue for him.
17. By e-mail dated 14 October 2008 I explained to the applicant my role, the external review process, rights of review in the event he was aggrieved by a decision and reiterated that my letter of 10 October 2008 invited his submissions to the review.
18. By email dated 14 October 2008 the applicant provided further submissions in support of his application.

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<sup>1</sup> Section 88(1) of the FOI Act provides:

#### ***Powers of commissioner on review***

*(1) In the conduct of a review, the commissioner has, in addition to any other power, power to –*

- (a) review any decision that has been made by an agency or Minister in relation to the application concerned; and*
- (b) decide any matter in relation to the application that could, under this Act, have been decided by an agency or Minister...*

19. On 15 October 2008 the applicant telephoned the Office to confirm receipt of his e-mails and spoke with me. During the conversation he reiterated:
- his view that the unsigned document provided by UQ was illegal
  - that it was my role to investigate UQ.

His rights under the FOI Act were explained to him again.

20. By email dated 16 October 2008 the applicant expressed his intention to seek review of this matter by the Supreme Court.
21. On 20 October 2008 the Office conveyed to UQ my view that UQ could not narrow the scope of searches required in response to an FOI application to those locations indicated on an FOI application form by the applicant, i.e. in answer to the requests in the form "Please indicate any area in which you do not wish a search to be made" and "Please specify any other location that you think may hold relevant documents:...." UQ accepted this view and agreed to conduct further searches for the document sought by the applicant.
22. On 28 October 2008 UQ advised the Office that another version of Request Form 1 was on file within the Faculty of Natural Resources, Agriculture and Veterinary Science (**Faculty of NRAVS**) (**Request Form 2**).
23. By letter dated 28 October 2008 UQ provided a copy of Request Form 2, noting that it did not contain the signatures sought by the applicant.
24. On 10 December 2008 the Office contacted Ms Parke, Freedom of Information Officer, UQ, to request further information regarding the absence of Associate Professor Pemberton's signature on Request Form 1.
25. By letter dated 7 January 2009, Ms Parke provided submissions concerning Faculty processes, enclosing a memorandum from Ms Morgan of the Faculty of NRAVS.
26. On 28 January 2009 the Office contacted Ms Power of the School of Chemistry and Molecular Biosciences (**School**) for further specific information on the change of grade process.
27. On 29 January 2009 the Office contacted Ms Logan of the Faculty of NRAVS for additional information about the process of amending results.
28. In making my decision in this review, I have taken into account the following:
- FOI Application
  - Original Decision
  - Internal Review Application
  - Internal Review Decision
  - External Review Application
  - extract of advice from the School enclosed as "Attachment 1" to the Internal Review Decision
  - UQ's submissions dated 10 October 2008
  - telephone conversation with applicant on 13 October 2008
  - email submission from applicant dated 14 October 2008
  - email submission from applicant dated 16 October 2008
  - file note of telephone conversation with Ms Parke on 20 October 2008
  - file note of telephone conversation with Ms Parke on 29 October 2008

- file note of telephone conversation with Mr Zgrajewski on 10 November 2008
- email correspondence from Ms Parke dated 10 November 2008
- UQ's letter of 28 October 2008, received 1 December 2008
- file note of telephone conversation with Ms Parke on 10 December 2008
- UQ's submissions dated 7 January 2009 and enclosed memorandum from Ms Morgan of the Faculty of NRAVS, UQ dated 23 December 2008 and Associate Professor Pemberton's email dated 29 July 2008
- file note of telephone conversation with Ms Power of the School on 28 January 2009
- file note of telephone conversation with Ms Logan of the Faculty of NRAVS on 29 January 2009
- Ms Power's email dated 30 July 2008 to Associate Professor Pemberton
- the Grade Change Report for the period 4 August 2008 to 8 August 2008
- relevant provisions of the FOI Act and *Acts Interpretation Act 1954* (Qld) (**AI Act**) as referred to in this decision
- Explanatory Notes to the Freedom of Information and Other Legislation Amendment Bill 2005 (Qld)
- case law as cited in this decision
- decisions of this Office as referred to in this decision.

### Issue in the Review

29. The applicant seeks a copy of Request Form 1 bearing the signatures of the Chief Examiner, the Course Coordinator and the Executive Dean/Academic Registrar.
30. UQ maintains that the document sought by the applicant was never created and therefore does not exist.
31. The applicant contends that the document must exist and that UQ's search efforts have been insufficient.
32. In this review the issue to be determined is whether there are reasonable grounds for UQ to be satisfied that the document sought by the applicant does not exist and accordingly, whether access can be refused under section 28A(1) of the FOI Act.

### The law

33. Sections 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.*
34. 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.
35. Section 28A of the FOI Act is silent on how an agency or Minister satisfies itself about the existence of a document. The further requirement in section 28A(2) of the FOI Act of taking all reasonable steps to find the document (typically searches) makes it clear that such steps are not required if the agency is satisfied that a document does not exist. The construction of section 28A of the FOI Act does not preclude an agency or Minister from using searches as a means to satisfy itself that a document does not exist. Indiscriminate searches alone however cannot form a reasonable basis on which to decide a document does not exist.
36. In discussing the equivalent (though differently constructed) provision, section 24A,<sup>2</sup> in the *Freedom of Information Act 1982* (Cth) Justice Finn stated the following:

*Turning to the scheme of the FOI Act more generally, it is fair to say that at many places it requires evaluative judgements to be made and interests to be balanced (particularly in the exemption provisions)...; and on occasion it employs "reasonableness" as a judgemental yardstick of action taken or to be taken or of anticipated consequences of action... Nonetheless, it is equally fair to say that the Act is somewhat indiscriminate in its use of formulae such as "is satisfied" to indicate explicitly that the particular evaluation or judgement required to be made is that of the Minister or agency and that it is not one ultimately for a court...*

*However, what the scheme of the Act does suggest in general terms is that in a matter: (i) in which the Minister or agency is expected to balance the general right of access to documents against another designated public interest; and (ii) in respect of which that Minister or agency is to be taken by virtue of function or responsibility to possess the necessary particular knowledge or experience to make the required judgement, then (whether or not the judgement to be made is circumscribed by other requirements, e.g. designated relevant considerations) the judgement will be that of the Minister or agency and not of the Court. Given the inquiry posed by s24A's "all reasonable steps" requirement this provides some-albeit slight- support for the view that the requirement being one tied to intradepartmental or agency structures, practices and record keeping*

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<sup>2</sup> Section 24A of the Commonwealth FOI Act reads:

**24A Requests may be refused if documents cannot be found or do not exist**

*An agency or Minister may refuse a request for access to a document if:*

- (a) *all reasonable steps have been taken to find the document; and*
- (c) *the agency or Minister is satisfied that the document:*
  - (i) *is in the agency's or Minister's possession but cannot be found; or*
  - (ii) *does not exist.*

*policies and practices, its fulfilment is one of which the Minister or agency is to be the judge.*<sup>3</sup>

37. What is inferred by this statement is that 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 information management approaches. The knowledge and experience required will vary from agency to agency, Minister to Minister and from one FOI application to another. The knowledge and experience required in particular cases will not always rest with individual FOI decision makers alone.
38. What follows is that neither an agency/Minister nor an external merits review body can be satisfied that a document does not exist through a process where an agency/Minister indiscriminately sends out search traces to particular locations in the agency/Office and relies on a nil response. There must be some reference to those key factors listed in paragraph 37 together with key factors within the FOI application or factors reasonably inferred from any other information supplied by the applicant. Those key factors will include the nature and age of the document sought and the nature of the government activity the FOI request relates to. Searches undertaken in the context of section 28A(1) of the FOI Act will be directed by these key factors and those searches undertaken on behalf of FOI units by individual business units must include all reasonable steps to locate the document.
39. This approach, implicit in FOI practices adopted by many agencies, prevents section 28A of the FOI Act from providing a level of protection to those agencies with poor information management practices or low thresholds in the searches required to assist FOI applicants. In such agencies, searches alone may not disclose the existence of a document that should be or has been in the agency's possession.
40. In applying section 28A(1) of the FOI Act, the following two questions from *Shepherd and Department of Housing, Local Government and Planning*<sup>4</sup> have been considered relevant:
- (i) *are there reasonable grounds to believe that the requested documents exist and are documents of the agency as that term is defined in section 7 of the FOI Act and if so*
  - (ii) *have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of the review.*<sup>5</sup>
41. *Shepherd* was not a review decided with respect to section 28A of the FOI Act. It was a review in which documents had been located by the agency however the applicant submitted that further documents existed. This type of review is commonly referred to as a 'sufficiency of search' matter. In deciding whether or not the documents existed, the Information Commissioner took evidence from both the applicant and the officer named, weighed the evidence before him and decided that it was unlikely that further documents existed, and in any event, that the agency's search efforts '*had fulfilled the*

<sup>3</sup> *Chu v Telstra Corp Ltd* [2005] FCA 1730 (Unreported, Finn J, 1 December 2005) at paragraphs 10 and 11.

<sup>4</sup> (1994) 1 QAR 464 (*Shepherd*).

<sup>5</sup> *Shepherd* at paragraphs 18 and 19.

*obligation to make all reasonable searches and inquiries to locate requested documents*.<sup>6</sup>

42. Section 28A was inserted into the FOI Act after the decision in *Shepherd* and it specifically addresses the circumstances addressed in *Shepherd*—documents that are nonexistent or unlocatable. It is therefore preferable that general guidance provided in *Shepherd* and a number of the earlier review decisions be aligned with the approach taken in section 28A(1), section 28A(2) and that the approach now reflect the ordinary meaning conveyed by the text of the provision of the FOI Act, taking into account the purpose or object underlying the Act. Section 4 of the FOI Act states:

**4 Object of Act and its achievement**

- (1) *The object of this Act is to extend as far as possible the right of the community to have access to information held by Queensland government.*

43. 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?*

44. 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?*

45. 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.

46. 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?*

47. 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. Section 28A(2) was inserted into the FOI Act at the same time as section 28A(1) through the *Freedom of Information and Other Legislation Amendment Act 2005* (Qld). Section 28A(2) of the FOI Act provides that in circumstances where the agency or Minister have satisfied themselves that a document has been or should be in their possession, the agency or Minister may only refuse access to a document if 'all

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<sup>6</sup> *Shepherd* at paragraph 23.



*reasonable steps have been taken to find the document but the document can not be found.'*

49. While the FOI Act is silent in relation to the requirements of searches undertaken in relation to section 28A(1), it is preferable that the 'all reasonable steps' test in subsection (2) also be applied should searches be required in relation to section 28A(1) of the FOI Act. This is because of the proximity of the sub-sections and of the fact that the existence (or not) of a document are mutually exclusive propositions, with the answer to one question providing an equally certain answer to the opposite question. If the agency is to be satisfied on reasonable grounds as to the existence of a document and searches are required, in the context of the achievement of the object of the Act, then an agency or Minister must take '*all reasonable steps to find the document*' to locate a document in every circumstance such a question arises.
50. Confirmation of the interpretation conveyed by the ordinary meaning of a provision through the consideration of extrinsic material is permitted by section 14B of the *Acts Interpretation Act 1954* (Qld). The explanatory notes to the amending Bill provide that the amendment addresses Finding 96 in the Parliament's Legal and Constitutional Administrative Review Committee's Report No 32. The preceding discussion to Finding 96 cites section 24A of the Commonwealth FOI Act and recommends that an equivalent provision be inserted into the FOI Act. Section 24A is quoted at footnote 3.
51. The relevant note in the Explanatory Notes to the Bill, provides:

*Clause 18 inserts new s28B which addresses the situation where applications are made for documents which do not exist or cannot be found. At present, the FOI Act does not contain a provision to enable an agency or Minister to refuse such an application. The new section provides that an agency or minister may refuse access to a document if all reasonable steps have been taken to find the document and the agency or Minister is satisfied the document:*

- *has been, or should be, in the agency's or Minister's possession but cannot be found; or*
- *does not exist.*

*The clause addresses LCARC finding 96.*

This explanation quite unambiguously asserts the intention to adopt the approach of section 24A of the Commonwealth FOI Act but the intention remains unexpressed by the Queensland statute. The course of action to be taken by the Office in these circumstances is made clear in the joint judgement of Mason CJ and Dawson JJ:

*The speech (second-reading speech of the Minister when introducing a Bill for the Act into the House of Representatives) while deserving serious consideration, cannot be determinative: it is available as an aid to interpretation. The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the court remains clear. The function of the court is to give effect to the will of Parliament as expressed in the law.<sup>7</sup>*

52. Section 28A of the FOI Act is the law which reflects the will of the Parliament. Section 28A of the FOI Act differs materially from section 24A of the Commonwealth FOI Act. This means that the full intentions as expressed in the Explanatory Notes cannot be given effect to. However the extrinsic material does provide support for the approach

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<sup>7</sup> *R v Bolton; Ex parte Beane* (1987) 162 CLR 514, 517-8.

to the interpretation of the plain meaning of the text of section 28A of the FOI Act proposed in paragraphs 42 to 49 above.

53. It is therefore more appropriate in the context of section 28A of the FOI Act for agencies and Ministers, when relying on searches to satisfy themselves that a document does not exist, to demonstrate that they have taken all reasonable steps to find the document, rather than the current approach of 'reasonable search efforts in all the circumstances of the review' following *Shepherd*.

54. Adopting this reasoning, the question to be addressed in this current review is:

*Are there reasonable grounds for UQ to be satisfied that the requested document does not exist?*

If searches are necessary to substantiate a conclusion that the document sought does not exist, it is appropriate in reviewing the searches undertaken to also ask:

*Have all reasonable steps been taken to find the document?*

55. To be satisfied that the requested document does not exist, UQ must have reference to the key factors that arise in this particular matter including relevant knowledge and experience of assessment recording processes as they relate to the particular document sought by the applicant.

### **Applicant's Submissions**

56. The applicant has made the following submissions to this review.

- *You did not consider on 10/10/2008 document is illegal according to your department website "In Queensland, the Freedom of Information Act 1992 (Qld) gives you a legally enforceable right... to amend information about your personal affairs that is inaccurate, incomplete, out of date or misleading" you need to read your department website and understand the nature of external review.*
- *[Ms] Power was surprise when she knows that I received final grade [for the Course] via mySl.net. [Ms] Power said your results should take more time before release it because Dr Pemberton was just an e-mail her today?*
- *Because of a missing signature on a document of the university, the procedure and the document are illegal*
- *You had said please remember that they are not obligated to provide you with an answer on this point you need to look again to your department website "The FOI Act also requires agencies to make available information about*
  - *how they are organised*
  - *what their functions are*
  - *what kinds of decisions they make*
  - *what arrangements they have for public involvement in their work*
  - *what kind of documents they hold and how the public can see them*
  - *what rules and practices they use to make decisions affecting the public.*
- *You think signed document is not important and role of FOI UQ is not make sure the document completed but you send e-mail with your singe?*

### **UQ's Submissions**

57. Upon receipt of the FOI Application UQ conducted searches for the document sought within the School and in the Course Coordinator's office. The relevant documents located were released to the applicant.

58. In the Internal Review Decision, the decision-maker states '*I have made further inquiries with [the School] ... an extract of the advice received from [the School] is enclosed as Attachment A' (Advice)*. The Advice states in part:

- a) *All assessment items are submitted to the School office via 'iMark' database... Once the final assessment has been uploaded, the Course Coordinator is provided with a final course summary form for review and signing. This summary constitutes a list of all students with all assessment results, final percentages and assigned grade.*
- b) *The Course Coordinator attends the SMMS Examiners' meeting held after the end of the exam period... At the completion (of the meeting), the Course Coordinator and appropriate Chief Examiner both endorse the summary form by signing.*
- c) *The course results are then submitted for approval (via iMark) to the Associate Dean, Teaching & Learning, Faculty of BACS...*

...

*Obviously **time constraints do not allow for a repeat of this process following supplementary and special exam marking**. However, a ratification process occurs via the Request to Amend Results After Release form process. In this case, the final results for the student were submitted to the School office **via email**. The special exam result was entered into iMark and a new final percentage was calculated. A new grade was assigned based on the course cut-offs. iMark was used to produce the Request to Amend Results After Release form. The form was signed by the appropriate Chief Examiner and sent to the student's Faculty of NRAVS for approval. [**my emphasis**]*

59. In response to inquiries from the Office regarding the absence of Dr Pemberton's signature, under cover of a letter dated 7 January 2009, UQ provided a memorandum from Ms Morgan, Acting Faculty Executive Officer, Faculty of NRAVS. Ms Morgan explains the procedure for processing grades using the iMark system (**Memo**) in circumstances where the results are amended. The Memo provides, in part:

*The Course Coordinator, in this case Associate Professor John Pemberton, submits the results (grades) for students in his course **by email** to the staff member in the School responsible for uploading all student results, in this case Ms Cheryl Power... Associate Professor Pemberton's email is **recognised by the School and Faculty as his authority** in respect of the results he submitted for [the Course] and the subsequent Request to Amend Result form. [**my emphasis**]*

60. In a telephone discussion with the Office on 28 January 2009 Ms Power indicated that her recollection of events relating to the administrative processing of the applicant's results is as follows:

- Associate Professor Pemberton emailed her the results of the applicant's special exam for uploading into iMark
- iMark automatically calculated the result in accordance with the cut-offs and a Request to Amend Results After Release form was generated
- she printed the Request to Amend Results After Release form that day and took it to Ms Ward, Chief Examiner, who signed the form
- Ms Power then faxed the signed form, Request Form 1, to the Faculty of NRAVS.

61. On 28 January 2009, Ms Power provided a copy of Dr Pemberton's email to her dated 29 July 2008 indicating that he attached the results for the special exam for the Course as well as a copy of her email to Dr Pemberton dated 30 July 2008 indicating that she had now entered the marks into iMark.

62. Ms Power also indicated that once the steps outlined in paragraph 60 are completed she would expect the form to be uploaded in SI-net (student database) particularly for straight forward changes such as an SP to a number result. Ms Power would not anticipate dealing with the Request to Amend Results After Release form again.

63. In a telephone discussion with the Office on 29 January 2009, Ms Logan of the Faculty of NRAVS indicated that the Executive Dean does not necessarily sign off result amendments of this nature as some change of result is implicit when a special exam is approved. Ms Logan indicated that once she receives results such as Request Form 1:
- she checks that the Course Coordinator and Chief Examiner have approved the new result (Ms Logan noted that a Course Coordinator's approval is implicit if the results have been entered into iMark)
  - if it is a change that is classified as straight forward such as a Special to a number result (as in this instance) she then uploads the information into SI-net.
64. Ms Logan explained that the Executive Dean's approval is not required for a straight forward change of result. However, at the end of each week, SI-net generates a Grade Change Report that includes all the changes she has uploaded for the week. The Executive Dean signs the Grade Change Report and it is sent to Central Records.
65. On 29 January 2009, Ms Logan provided a copy of the Change of Grade Report for the period 4 August 2008 to 8 August 2008. In line with the information provided by Ms Logan, the Change of Grade Report was signed by the Executive Dean, Faculty of NRAVS and dated 12 August 2008.
66. In summary, UQ submits that:
- the process adopted by the Faculty explains the absence of the Course Coordinator and Executive Dean's signatures on Request Form 1
  - search efforts have been fruitless and support the view that the document sought was never created
  - all reasonable steps have been taken to locate the document sought by the applicant but the document cannot be located because it was never created.

### **Findings on material questions of fact**

67. Having considered the parties' submissions, I make the following findings of fact:
- on 29 July 2008 Associate Professor Pemberton sent an email to Ms Power which constituted his authorisation, as Course Coordinator for the results of the special exam for the Course for Semester 1 2008
  - the results provided by Associate Professor Pemberton for the special exam undertaken by the applicant were uploaded to iMark by Ms Power
  - iMark computed a new final percentage for the applicant and a new grade was calculated based on pre-determined cut-offs for the Course
  - iMark generated a Request to Amend Results After Release form in respect of the applicant
  - Ms Power printed this form on 4 August 2008 and took it to the Chief Examiner for signature
  - the Chief Examiner signed the form on 4 August 2008
  - Ms Power faxed Request Form 1 to the Faculty of NRAVS to be processed
  - on or after 4 August 2008 Ms Logan received Request Form 1 and uploaded the amended grade into SI-net (student portal) without consulting the Executive Dean as Request Form 1 constituted a 'straight forward' amendment following an approved special exam
  - Ms Logan signed Request Form 1 on 8 August 2008, indicating that the results were 'updated in SI-net'
  - the Change of Grade Report was generated in SI-net and signed off by the Executive Dean on 12 August 2008

- UQ conducted searches for a version of the Request Form signed by the Chief Examiner, Course Coordinator and Executive Dean/Academic Registrar upon receipt of the FOI Application, on receipt of the Internal Review Application and again during this external review and was unable to locate a document fitting this description.

## Analysis

68. The applicant appears to submit that Request Form 1 is illegal because the FOI Act gives a person a legally enforceable right to amend certain documents. Part 4 of the FOI Act is concerned with amendment. The FOI Application concerns access to documents, not amendment of documents. Accordingly, this submission is not relevant to the issues in this review.
69. The applicant also submits that agencies are required to make information about, for example, how they are organised and the kinds of decisions they make, available to the public. This appears to be a reference to Part 2 of the FOI Act which is concerned with requirements on agencies to publish particular information. This is not a relevant consideration in this external review which is concerned with access to documents.
70. Although the applicant seems to suggest in his submissions that UQ should be required to provide him with a copy of Request Form 1 with the signatures he is seeking, the FOI Act does not require an agency to create a document in response to an FOI application. The legal right of access is subject to the FOI Act and applies only to *'documents that are or may be, in existence on the day the application is received'*.<sup>8</sup>
71. The applicant submits that Request Form 1 and the procedure connected with Request Form 1 render Request Form 1 illegal. In this external review the applicant contends that UQ's searches for the document requested in the FOI Application are insufficient. Accordingly, the external review raises the issue of whether the applicant has been refused access to the document he is seeking. The legality or otherwise of Request Form 1 is not a relevant consideration in this review.
72. On the Request to Amend Result After Results Release form attached to the External Review Application, the applicant highlights the places on the form where he believes the signatures of the Course Coordinator and the Executive Dean/Academic Registrar are missing and includes a notation '?missing why'. The FOI Act does not confer a right to obtain answers to questions from Government agencies or to require agencies to extract answers from any documents held.<sup>9</sup> This does not mean that an agency is prohibited by the FOI Act from answering questions, but it means that the FOI Act does not require UQ to answer to the applicant's questions in this instance.
73. Nonetheless, the applicant's questions point to his expectation that because the form includes signing blocks for the Course Coordinator and the Executive Dean/Academic Registrar these individuals would have signed Request Form 1 before the results were uploaded into Si-Net. Given the layout of Request Form 1, which provides for the signatures of the Course Coordinator and Executive Dean/Academic Registrar, the applicant's expectation that Request Form 1 would have been signed by these individuals as well as the Chief Examiner is understandable.

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<sup>8</sup> Section 25(3) of the FOI Act.

<sup>9</sup> *Hearl and Mulgrave Shire Council* (1994) 1 QAR 557 at paragraph 30.

***Determining whether the document sought was created***

74. The applicant raised sufficiency of search issues when seeking internal review of the Original Decision. In addressing this issue it would have been appropriate for the decision-maker to have reference to the key factors that arise in this particular matter including relevant agency knowledge and experience of assessment recording processes as they relate to the particular document sought by the applicant. However, this task was not straight forward because the framing of the FOI Application made the documents sought unclear. A version of the document actually sought by the Applicant was only released on internal review. It appears from the Internal Review Decision that the decision-maker was not aware that this was the particular document sought by the applicant as he comments that the document sought by the applicant had already been released with the Original Decision and Request Form 1 related to the marks for the Course **before** they were finalised. Accordingly, the applicant's view that another, more complete version of Request Form 1 must be held by UQ seems only to have emerged on external review.
75. In this review, in order to be satisfied that access to the document sought can be refused under section 28A(1) of the FOI Act, it is necessary to:
- identify the process for creating and processing the document sought
  - identify UQ's usual administrative process for authorising amended student results for special exams prior to the results being uploaded into Si-net and therefore finalised
  - ascertain whether there is any evidence to suggest that there has been any deviation from the usual process and if so, investigate the matter further with relevant personnel and possibly undertake relevant searches.

***Are there reasonable grounds to be satisfied that the requested document does not exist?***

76. The answer to this question is 'yes'.
77. UQ's usual process for amending results after a special exam is initiated by an email from the Course Coordinator, which is taken as the Coordinator's authority as to the correctness of the results provided with the email. The results are uploaded into iMark at which time a new final percentage and grade is calculated. A Request to Amend Results After Release form is generated for the particular student. This form is printed and then signed by the Chief Examiner. The form is then faxed to the Faculty of NRAVS, where the results are uploaded into Si-net.
78. In the case of the applicant's special exam results:
- on 29 July 2008 the Course Coordinator emailed the applicant's results for the special exam to Ms Power
  - on 4 August 2008 Ms Power uploaded the results into iMark and a Request to Amend Results After Release form was generated in respect of the applicant
  - Ms Power printed the Request to Amend Results After Release form and took it to the Chief Examiner to have it signed
  - Ms Power faxed the signed form, that is, Request Form 1, to the Faculty of NRAVS to be processed
  - on or after 4 August 2008 Ms Logan received Request Form 1 and uploaded the amended grade into SI-net (student portal) without consulting the Course Coordinator or the Executive Dean/Academic Registrar as Request Form 1 constituted a 'straight forward' amendment following an approved special exam

- Ms Logan then signed Request Form 1, indicating that the results were 'updated in SI-net'
- the Change of Grade Report was generated and signed off by the Executive Dean on 12 August 2008.

79. In this instance it is clear that the applicant's special exam results were processed in accordance with UQ's usual processes for amending results after a special exam. As explained above, this process does not require the Request to Amend Results After Release form to be signed by the Course Coordinator and/or the Executive Dean/Academic Registrar. Accordingly, there are reasonable grounds to be satisfied that the document sought by the applicant does not exist because it was not created. If so satisfied, it is unnecessary for an agency to conduct searches to locate a requested document.

80. However, had there been evidence that UQ may have deviated from its usual processes for amending results after a special exam, targeted searches and further inquiries with relevant personnel would have been necessary to establish that all reasonable steps had been taken to locate the document sought by the applicant.

81. In this external review I am satisfied that:

- there are reasonable grounds to be satisfied that the document sought by the applicant does not exist because it was not created
- access to the document can be refused under section 28A(1) of the FOI Act.

## **DECISION**

82. I vary the decision under review by finding that UQ was entitled to refuse access to the document sought in the FOI Application under section 28A(1) of the FOI Act on the basis that the document sought does not exist.

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**J Kinross**  
**Acting Information Commissioner**

**Date: 9 February 2009**