



Decision and Reasons for Decision

Application Number: 210162

Applicant: John Howard

Respondent: Department of Education, Training and the Arts

Decision Date: 15 January 2008

Catchwords: **FREEDOM OF INFORMATION – sufficiency of search – internal audit review - whether reasonable basis to believe that documents exist in the possession or control of the Department of Education, Training and the Arts – whether the search efforts made by the Department of Education, Training and the Arts have been reasonable in the circumstances**

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REASONS FOR DECISION

Summary

1. I am satisfied that documents comprising the 'internal audit review' to which the applicant seeks access do not exist as the review was conducted by the Department of Education, Training and the Arts (Department) on an informal basis by way of verbal communication between departmental officers which did not result in the creation of any documents responsive to the terms of the applicant's freedom of information application (FOI Application).
2. Accordingly, I am satisfied that:
 - there are no reasonable grounds to believe that the requested documents exist and are documents of the Department
 - the search efforts made by the Department to locate such documents have been reasonable in the circumstances.

Background

3. It is relevant to note that the documents to which the applicant seeks access relate to a series of events that occurred in relation to an Out of School Hours Care program administered by the Parents and Citizens Association (P&C) of a state school. The program allegedly experienced problems relating to the appropriate use of facilities by employees and financial management. As a consequence, an audit of the program was conducted by Education Queensland (Internal Audit) and an audit report dated 16 June 2005 was produced (Audit Report). Evidently, a member of the P&C Executive (P&C Member) made a speech to parents involved with the program (and later composed and sent a letter to those parents based on that speech) commenting on the findings of the Audit Report. The applicant wrote to Mr Rod Welford MP, by way of letter dated 19 September 2005 (applicant's letter to the Minister), suggesting that the letter sent to parents was defamatory and falsified the Audit Report and that the appropriate response by the Department would have been to conduct an investigation into the actions of the P&C Member. The Minister responded to the applicant, by way of letter dated 16 November 2005 (Minister's letter), and, in his response, commented that '*I believe my department's internal audit review has found that the audit report itself was not falsified.*'
4. The applicant submits that the reference in the Minister's letter to an 'internal audit review' infers that a further internal audit was conducted (Internal Audit Review) and that it is the documents comprising this Internal Audit Review to which he seeks access.
5. By application dated 8 August 2006, the applicant requested access under the *Freedom of Information Act 1992 (Qld)* (FOI Act) to the following:

'Internal Audit Review' as detailed in Ministers Rod Welford's letter to me dated 16 November 2005 reference 05/98303 (copy attached)
6. In a decision dated 14 November 2006, Ms S Kalas of the Department advised the applicant that searches had been conducted but that the Department had failed to locate any documents responsive to the FOI Application.

7. By letter dated 4 December 2006, the applicant applied for internal review of Ms Kalas' decision on the basis that the searches conducted by the Department were not sufficient.
8. In a decision dated 31 January 2007, Mr T Morris of the Department affirmed Ms Kalas' decision. Mr Morris advised that further searches had been conducted of the relevant areas but that no documents responsive to the FOI Application were located.
9. By letter dated 12 February 2007, the applicant applied for external review of Mr Morris' decision on the basis that the searches conducted by the Department were not sufficient.

Decision under review

10. The decision under review is the internal review decision of Mr T Morris of the Department dated 31 January 2007.

Steps taken in the external review process

11. On 22 February 2007, a staff member of this Office spoke with Mr Morris and requested copies of the documents relevant to the review and an explanation as to why no documents exist.
12. By letter dated 22 February 2007, Mr Morris advised that he had made enquiries with various departmental officers regarding the existence and location of documents comprising the 'internal audit review' referred to in the Minister's letter and that all officers had indicated that only one internal audit report (i.e. the Audit Report) had been produced as a result of the Internal Audit. The applicant had been provided full access to a copy of the Audit Report in a previous decision of the Department and Mr Morris provided me with a copy of the Audit Report.
13. By letter dated 3 May 2007, the applicant provided this Office with submissions and supporting documentation.
14. Between 17 July 2007 and 25 July 2007, a staff member of this Office made various enquiries by telephone with members of the Department in relation to the matters raised by the applicant in his external review application.
15. By letter dated 14 August 2007, I wrote to the Department seeking submissions on why no documents responsive to the FOI Application exist and outlining specific issues to be addressed in those submissions.
16. By letter dated 17 October 2007, the Department provided this Office with submissions and supporting documentation.
17. On 16 November 2007, a staff member of this Office telephoned the applicant and advised him that it was my preliminary view that there were no reasonable grounds to believe that documents responsive to his FOI Application existed and that the searches conducted by the Department were reasonable in the circumstances. The staff member explained the reasons for my preliminary view. The applicant requested that I communicate my preliminary view to him in writing.
18. By way of letter dated 20 November 2007, I confirmed my preliminary view to the applicant in writing and invited the applicant, if he did not accept my preliminary view, to make written submissions in support of his case by 6 December 2007.

19. By letter dated 26 November 2007, the applicant objected to my preliminary view and provided submissions as to why he contends that documents responsive to his FOI Application exist.
20. In making my decision in this review, I have taken the following into account:
 - the applicant's initial FOI Application dated 8 August 2006, letter to the Department dated 11 September 2006, application for internal review dated 4 December 2006 and application for external review dated 12 February 2007
 - the Department's letter to the applicant dated 4 September 2006, the initial decision of Ms Kalas dated 14 November 2006 and the internal review decision of Mr Morris dated 31 January 2007
 - the Department's submissions dated 22 February 2007 and 17 October 2007
 - the applicant's submissions dated 3 May 2007 and 26 November 2007 and the information provided by telephone on 16 November 2007
 - files notes of telephone conversations between a staff member of this Office and departmental officers.

Issue on external review

21. The issue on external review is the sufficiency of the Department's searches for documents comprising an 'internal audit review' referred to in the Minister's letter that the applicant maintains exist in the possession or control of the Department.

Sufficiency of search

22. In relation to an external review based on sufficiency of search, the questions I must consider are¹:
 - whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency² and if so
 - whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of the particular case.
23. I note that where an external review involves sufficiency of search issues, there is a practical onus on an applicant to provide reasonable grounds to believe that documents responsive to the request exist and are documents of the agency.

The applicant's submissions

Documents evidencing the existence of documents responsive to the FOI Application

24. The applicant submits that the Department conducted an investigation into the actions of the P&C Member in order to determine if the Audit Report had been falsified and it is documents comprising this Internal Audit Review to which he seeks access.
25. The applicant submits that the material listed below evidences that the Department did conduct an Internal Audit Review:

¹ *Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464 at paragraphs 18 and 19 (*Shepherd*).

² As that term is defined in section 7 of the FOI Act.

- a handwritten note by the Principal of the school which indicates that the Department was preparing for the Internal Audit Review
- a correspondence background note to the Minister dated 13 October 2005 (correspondence background note) says the Audit Report was not falsified and that there must be information relied on to advise the Minister in this way
- the statement in the Minister's letter that: *'I believe my department's internal audit review has found that the audit report itself was not falsified'* suggests that there has been an Internal Audit Review.

26. The applicant further submits that the document the Department provided to him in relation to a previous FOI application (i.e. the Audit Report) is the document that should have been *subject* to the Internal Audit Review.

Nature of the Internal Audit Review

27. In relation to the meaning of the term 'audit', the applicant submits:

An "audit" infers formality, independence, the collection of records and evidence, and the reporting of a conclusion. Even the concept of an "Internal Audit Review" would infer to an ordinary person these basic concepts that I've elicited above.

If a Minister of the Crown writes to a citizen saying an 'internal audit review' has been conducted, then a basic level of formality ought to be reasonably inferred into the concept of an 'internal audit review'. The Minister did not state that an "informal internal audit review" had been conducted as this would plainly be stupid.

Contemporaneous records

28. The applicant submits that certain '*contemporaneous records*' would have been created as a result of an Internal Audit Review and, as those records form an important part of the review, fall within the scope of the FOI Application. Specifically, the applicant submits:

*In this particular application there is, in my mind, a significant failure to find and provide **contemporaneous records** relevant to an internal audit review, and records that would naturally exist and form part of the 'body' of information that makes up the internal audit review file.*

29. He further submits that:

The nature of the concept of an internal audit review ought reasonably achieve a far better standard than DETA's efforts to date. It ought reasonably include all the documents that form the internal audit review, supplied or initiated by each and every participant that has provided a record, or entry. All these records contribute to form the entire internal audit review file or organisational knowledge base on that matter. These records need not reside all together in one physical location either, as participants have various methods of communicating with each other. DETA has not provided any documentation of any reasonable standard.

30. The applicant also provides submissions as to what the '*contemporaneous records*' might be. In summary, he submits:

- The internal auditors in the process would have created a trail of documentation including file notes and evidence of correspondence with other participants in the review.

- The Acting Principal of the school at the time, and Ms Helen Starr met in response to the applicant's letter to the Minister and there would be various documents in relation to this meeting and also evidence of correspondence with other participants in the review.
- The people involved in the audit process would have sought legal advice in order to assist in the development of an appropriate opinion. This is supported by the reference in the correspondence background note to 'Officers of the Legal Services Branch' and it is reasonable to conclude that Office of the Legal Services Branch would have made a contribution to the review process.

Evidence provided by the Department

31. The applicant asserts that the Department has not provided substantive proof of admissible court quality and the Department's submissions would be more persuasive if affidavits were obtained from relevant departmental officers.

32. He submits:

At this point in the review process there is still a significant difference between this application, and the results as demonstrated in the decision reflected in "Shepherd and Department of Housing, Local Government and Planning (1994) 1 QAR 464".

In fact the standard of evidence was actually higher in that review compared to what we have seen to date by DETA in this process, to the extent that affidavits formed the documentary evidence by the department involved where appropriate departmental records could not be found or did not exist. I am unaware of any affidavits supplied by DETA with respect to this review that meet this same standard of evidence.

The department in the above case had reasonably discharged its obligations, and had done a thorough and exhaustive search of its records in order to ameliorate the applicants requests for copies of various letters thought to be in the departments' possession and forming part of the relevant file. In this application, DETA, in my view, continues to provide an extraordinarily poor standard of search process, and continues to have glaring omissions regards individuals and documentation to follow up on.

33. The applicant argues further that:

If DETA were to provide the affidavits from each of the internal auditors involved in the Internal Audit Review, the extent of their involvement, and demonstrable proof of their 'approval' of the release of the Minister's letter I may be better persuaded by the standard of evidence that DETA is providing and the veracity of its submission.

The Department's submissions

34. In view of the applicant's submissions regarding the existence of documents comprising an Internal Audit Review, this Office requested, by letter dated 14 August 2007, that the Department provide reasons as to why the documents requested by the applicant cannot be located or do not exist.

35. On 17 October 2007, the Department provided this Office with a response that included extensive submissions on why the documents to which the applicant seeks access do not exist.

36. During the processing of the FOI Application, the Department conducted searches with:

- Mr Alan Baillie, Mt Isa District Office
 - Mr John Mulcahy, Darling Downs South West Queensland Regional Office.
37. In response to the applicant's internal review application, the Department conducted searches with:
- Mr Neville Moo, Director, Internal Audit
 - Mr Andrew Darcy, Principal Internal Auditor, Darling Downs South West Queensland Region.
38. In response to the information required by this Office, the Department made enquiries with Ms Helen Starr, Principal Advisor, Wide Bay South District Office. The Department advises that Ms Starr was working at the Toowoomba District Office at the relevant time and was the officer responsible for the drafting of both the Minister's letter and the correspondence background note.
39. Ms Starr advised that the 'internal audit review' referred to in the Minister's letter, was not a formal audit process and there was no document or formal report produced by the Department stating that the Audit Report was not falsified. It was instead a discussion between various senior officers and departmental auditors.
40. The Department submits that the review was conducted with reference to the Audit Report and the speech made by the P&C Member to parents and concluded that:
- the Audit Report had not been falsified
 - the statements and comments made in the speech regarding the audit were personal comments, perspectives and opinions of the P&C Member.
41. The Minister's letter and the correspondence background note were composed with the advice of the auditors and then sent to Mr Neville Moo, Director, Internal Audit for his approval before being sent to the Minister's office.

Findings

Whether there are reasonable grounds to believe that the requested documents exist and are documents of the Department

Documents evidencing the existence of documents responsive to the FOI Application

42. The applicant refers me to a handwritten note which the applicant submits is written by the Principal of the school and indicates that the Department was preparing for the Internal Audit Review. That note relevantly provides:
- *no compensation*
 - *no retraction*
 - *formal investigation – formal internal audit*
 - ...
43. I am of the view that the comments in that note may indicate that the Department proposed to conduct a 'formal internal audit' however it is not evidence of an audit of such type having occurred. Nor, is it evidence of the creation of documents in the Internal Audit Review process, whether formal or informal.

44. I also acknowledge the applicant's reference to the comment in the correspondence background note that the Audit Report was not falsified and agree that the author of the correspondence background note would have relied on certain information in order to advise the Minister in this way. However, I consider that the comment is not evidence that any such information relied on by the author of the correspondence background note was provided in the form of a document.
45. In government departments, such as the respondent in this matter, informal communication occurs frequently in order to resolve issues promptly, and such communication is not always reduced to a written document. Indeed, if all issues that ever arose in government departments were dealt with in writing, this would interfere with the ability of government to act with efficiency and timeliness. In this context I consider the Department's submission that information was communicated verbally to the author of the correspondence background note is credible.
46. While the allegations raised by the applicant in his letter to the Minister were certainly meritorious of some investigation, it is not unreasonable to suggest that the allegations did not warrant an internal review or audit of the type envisaged by the applicant. On the contrary, it would be reasonable for the Department to have addressed the allegations raised in the applicant's letter to the Minister on an informal basis by reviewing the Audit Report and the comments made by the P&C Member to determine whether there had been some wrongdoing.
47. It is clear that the statement in the Minister's letter that: *'I believe my department's internal audit review has found that the audit report itself was not falsified'* provides reasonable grounds to believe that the Department did in fact conduct a review of some type and I note the Department's submissions to that effect. However, in my view, the mere reference to an 'internal audit review' in the Minister's letter does not provide reasonable grounds to believe that documents responsive to the FOI Application were created as a result of the Internal Audit Review.

Nature of the Internal Audit Review

48. I acknowledge:
- that the handwritten note the applicant refers me to, which he submits was written by the Principal of the school, refers to a *'formal investigation'* and a *'formal internal audit'*
 - the applicant's submission that *'a basic level of formality ought to be reasonably inferred into the concept of an 'internal audit review''* because it was referred to in the Minister's letter.
49. I agree with the applicant's submission that the reference to an 'internal audit review' in the Minister's letter infers a certain level of formality in the conduct of the process. However, the mere inference of formality is not evidence of such formality. I do not consider the applicant's argument in this respect is persuasive as to the existence of documents responsive to his FOI Application.
50. The Department specifically submits that the Internal Audit Review was conducted on an informal basis and no documents responsive to the FOI Application were created as a result of that process.
51. It appears to me that the Minister's letter was poorly worded in this regard, or that the author intended to give an impression to the applicant that the Internal Audit Review was a more formal process than it actually was.

52. There is no basis for me to believe that the Department has attempted to mislead the Office of the Information Commissioner. I consider the Department's submissions to be credible and I am of the view that it would have been reasonable for the Department to conduct a review on such a basis.
53. I find the Department's submissions that the Internal Audit Review was not a formal process and did not result in the creation of any documents responsive to the FOI Application to be persuasive in the circumstances.

Contemporaneous records

54. Given my view set out above in relation to evidence of the existence of documents responsive to the FOI Application and the nature of the Internal Audit Review, I am satisfied that the documents the applicant refers to as '*contemporaneous records*' do not exist as the Internal Audit Review was a discussion between various senior officers and departmental auditors and did not result in the creation of any documentation responsive to the FOI Application. I am also of the view that, the Internal Audit Review, was conducted with reference only to the Audit Report and the speech made by the P&C Member to parents, both of which have been disclosed to the applicant.
55. I note that the comments in the correspondence background note referring to Officers of the Legal Services Branch, indicate that those officers provided advice to the Acting Principal of the school in relation to the applicant's request for an apology and other possible responses but does not provide reasonable grounds to believe that they were involved in the Internal Audit Review or that documents responsive to the FOI Application exist.
56. Accordingly I am satisfied that:
- the Department did conduct an Internal Audit Review
 - the Internal Audit Review was a review/investigation into whether the findings of the Audit Report had been falsified
 - the Internal Audit Review was referred to in the correspondence background note and the Minister's letter to the applicant
 - the Internal Audit Review was an informal review conducted by way of a discussion between departmental officers
 - no documentation was produced as a result of that process (other than the Minister's letter to the applicant and the correspondence background note, to which the applicant has been given access previously)
 - any documents relied on by the departmental officers in conducting the Internal Audit Review have already been disclosed to the applicant.
57. Given the above, I find that there are no reasonable grounds to believe that documents comprising the Internal Audit Review to which the applicant seeks access exist.

Whether the search efforts made by the Department to locate such documents have been reasonable in the circumstances

58. In *Shepherd*³, the Information Commissioner commented that:

It is my view that in an external review application involving 'sufficiency of search' issues, the basic issue for determination is whether the respondent agency has discharged the

³ At paragraph 18.

obligation, which is implicit in the FOI Act, to locate and deal with (in accordance with Part 3, Division 1 of the FOI Act) all documents of the agency (as that term is defined in s.7 of the FOI Act) to which access has been requested.

59. The Information Commissioner in *Shepherd*⁴ also expressed agreement with the comments made by the Commonwealth Administrative Appeals Tribunal⁵ that:

the adequacy of the search effort made to locate the document should be judged by having regard to what was reasonable in the circumstances.

60. What is reasonable in the circumstances, must, in my view, be determined on a case-by-case basis having regard to the submissions and evidence provided by the parties to the review.
61. In the circumstances of this review, the Department has provided an explanation as to why no documents responsive to the FOI Application exist and, as I have found above, I am satisfied that the Department's explanation on that issue is persuasive.

Evidence provided by the Department

62. The applicant submits that he is not persuaded by the Department's submissions because the Department has not provided evidence in the form of affidavits. He notes that, in the decision of *Shepherd*, the submissions made by the Department of Housing, Local Government and Planning were in the form of statutory declarations and therefore provided a higher standard of evidence.
63. I note that where an external review involves sufficiency of search issues, there is no onus on the Department to satisfy *the applicant* that there are no reasonable grounds to believe that documents exist and that the search efforts made by the Department have been reasonable.
64. In *Shepherd*, the Information Commissioner was satisfied with the explanation provided by the Department of Housing, Local Government and Planning and its search efforts in the circumstances. There is nothing in that decision that suggests that the Information Commissioner gave any considerable weight to the fact that the submissions made by the Department of Housing, Local Government and Planning were provided by statutory declaration.
65. In relation to the procedure on external review, I note section 72 of the FOI Act which relevantly states:

72 Procedure on review

- (1) *On a review under this part—*
- (a) *the procedure to be followed is, subject to this Act, within the discretion of the commissioner; and*
- (b) *proceedings are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the commissioner permits; and*

⁴ At paragraph 22.

⁵ In the case of *Re Anti-Fluoridation Association of Victoria and Secretary, Department of Health* (1985) 8 ALD 163 at p 167.

- (c) *the commissioner is not bound by the rules of evidence and may inform himself or herself on any matter in any way the commissioner considers appropriate.*
- (2) *The commissioner may, during a review, give directions as to the procedure to be followed on the review.*
66. As I have explained above, there is no information available to me to suggest that the Department has attempted to mislead the Office of the Information Commissioner. The Department has provided me with a reasonable explanation that is not overcome by the applicant's argument about how the audit should have been conducted.
67. There is no information available to me to suggest that the Department's submissions would be any more persuasive or reliable if statutory declarations or affidavits were obtained from the relevant departmental officers. I consider that the form in which the Department made its submissions is appropriate in the circumstances and I do not consider that the circumstances in this review warrant submissions from the Department in any other form.
68. I am satisfied that the search efforts made by the Department to locate such documents have been adequate and reasonable in the circumstances.

Conclusion

69. I am satisfied that documents comprising the 'internal audit review' to which the applicant seeks access do not exist as the review was conducted by the Department on an informal basis by way of verbal communication between departmental officers which did not result in the creation of any documents responsive to the terms of the FOI Application.
70. Accordingly, I am satisfied that:
- there are no reasonable grounds to believe that the documents responsive to the FOI Application exist
 - the search efforts made by the Department to locate such documents have been adequate and reasonable in the circumstances.

DECISION

71. I affirm the internal review decision by Mr T Morris of the Department dated 31 January 2007.
72. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

V Corby
Assistant Commissioner

Date: 15 January 2008