



Decision and Reasons for Decision

Application Number: 210589, 210669

Applicant: SW Sheehan

Respondent: Department of Police

Decision Date: 28 January 2009

Catchwords: **FREEDOM OF INFORMATION – section 28A(1) – sufficiency of search – whether reasonable grounds to believe further relevant documents are in the possession or under the control of the agency**

Contents

REASONS FOR DECISION.....	2
Summary	2
Background.....	2
Decision under review	3
Steps taken in the external review process	3
Relevant legislation.....	4
Issue on external review	4
Scope of external review	4
Sufficiency of Search	5
Searches conducted and submissions made by the Department	6
Findings	7
Are there reasonable grounds to believe the documents sought exist?	7
Have the search efforts been reasonable in the circumstances?	8
DECISION	9

REASONS FOR DECISION

Summary

1. I have decided that:
 - there are no reasonable grounds to believe that further documents exist that respond to the applicant's FOI Applications dated 11 May 2008 and 2 June 2008
 - the searches conducted by the Department of Police were reasonable in the circumstances
 - section 28A(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) applies in relation to the applicant's FOI applications on the basis that the documents sought do not exist.

Background

2. The applicant made two applications to the Department of Police (**Department**) for documents which relate to a complaint of professional misconduct made by the applicant. As the applications deal largely with the same, or closely related, issues I will deal with both applications for external review in this decision.

External review 210589

3. By letter dated 2 June 2008 (**FOI Application dated 2 June 2008**) the applicant applied for access to documents related to an official complaint of professional misconduct as follows:

..notes/reports/interviews that were conducted by Ins. G. Coleman with Wayne Bryant and Miles Macedo, in relation to the subject investigation, including relevant dates and times.

4. On 25 June 2008 Inspector D M Kilpatrick decided to refuse the applicant's request under section 28A(1) of the FOI Act (**Original Decision dated 25 June 2008**) by deciding that no documents responding to the FOI Application dated 2 June exist.
5. By letter dated 30 June 2008 the applicant sought internal review of the Original Decision dated 25 June 2008 (**Internal Review Application dated 30 June 2008**) and by letter dated 30 July 2008 Acting Assistant Commissioner PG Taylor decided to affirm the Original Decision (**Internal Review Decision dated 30 July 2008**).
6. By letter dated 15 August 2008, received by this Office on 21 August 2008, the applicant sought external review (**External Review Application**) of the Internal Review Decision dated 30 July 2008.

External review 210669

7. By letter dated 11 May 2008 (**FOI Application dated 11 May 2008**) received by the Department on 24 June 2008, the applicant sought access to reports and investigation material prepared by Inspector G Coleman and Inspector B Shafferius in the following terms:

*..(2) reports
(1) Insp. G. Coleman from Roma QPS*

*(2) Insp. B. Shaffourus from St George/Toowoomba QPS
Both reports and associated investigation material are located at either
Toowoomba or Brisbane.*

8. On 10 July 2008, Inspector DM Kilpatrick decided:
 - to refuse the applicant's request under section 28A(1) of the FOI Act (**Original Decision dated 10 July 2008**)
 - that no documents responding to the FOI Application dated 11 May 2008 exist.
9. The applicant sought review of the Original Decision dated 10 July 2008 by letter dated 13 July 2008 (**Internal Review Application dated 13 July 2008**).
10. By letter dated 29 July 2008, Acting Assistant Commissioner PG Taylor decided to affirm the Original Decision dated 10 July 2008 (**Internal Review Decision dated 29 July 2008**).
11. The applicant's letter dated 15 August 2008, the External Review Application, sought external review of both the Internal Review Decision dated 30 July 2008 and the Internal Review Decision dated 29 July 2008.

Decisions under review

12. The decisions under review are the Internal Review Decision dated 30 July 2008 and the Internal Review Decision dated 29 July 2008.

Steps taken in the external review process

13. In a telephone conversation on 10 September 2008, the Department advised this Office of the extent of searches it conducted to locate responsive documents at both the Original Application and Internal Review stages of the FOI process.
14. By letter dated 22 October 2008, the Acting Information Commissioner asked the Department to provide specific information about the searches it had conducted and to undertake further searches for certain categories of documents in issue.
15. In a telephone conversation with a member of staff of this Office, the Department conveyed further information about its procedures for documenting relevant activities. By letter dated 29 October 2008, the Department communicated the results of its further searches and provided this Office with a copy of a document which had already been released to the applicant.
16. By letter dated 11 December 2008, Acting Assistant Information Commissioner Jefferies advised the applicant of the preliminary view that:
 - there were no reasonable grounds to believe that further documents requested by the applicant exist
 - searches conducted by the Department were reasonable in the circumstances
 - it was appropriate for the Department to rely on section 28A(1) of the FOI Act.
17. Acting Assistant Commissioner Jefferies asked the applicant to provide submissions by 7 January 2009 if the preliminary view was not accepted.

18. The applicant responded by letter dated 28 December 2008 to advise that he did not accept the preliminary view and to make further submissions in support of his case.
19. In reaching this decision, I have taken the following into consideration:
 - the applicant's FOI Applications dated 11 May 2008 and 2 June 2008, Internal Review Applications dated 30 June 2008 and 13 July 2008, and the External Review Application
 - the Department's Original Decisions dated 25 June 2008 and 10 July 2008 and Internal Review Decisions dated 29 July 2008 and 30 July 2008
 - records of telephone conversations between the Department and a staff member of this Office on 10 September 2008 and 28 October 2008
 - written correspondence from the Department dated 29 October 2008
 - the applicant's written submissions dated 28 December 2008
 - relevant sections of the FOI Act
 - previous decisions of the Information Commissioner Queensland
 - the Department's Human Resource Management Manual and
 - a document already released to the applicant.

Relevant Legislation

20. Under section 21 of the FOI Act, a person has a legally enforceable right to be given access to documents of an agency and official documents of a Minister. This right of access is subject to other provisions of the FOI Act, in particular, section 28 of the FOI Act, under which an agency can refuse access to exempt matter or an exempt document, and section 28A of the FOI Act, under which an agency can refuse access to documents which do not exist or cannot be located.
21. As noted above, the Department refused the applicant's FOI Applications under section 28A(1) of the FOI Act on the basis that the requested documents do not exist. My findings with respect to the application of this provision to the issues relevant to this external review are set out below.

Issue on external review

22. The issue in this review is the sufficiency of the Department's searches for further documents within the scope of the FOI Applications which the applicant submits exist in the possession or control of the Department.

Scope of external review

23. The applicant's Original Applications in this review were for:

..notes/reports/interviews that were conducted by Ins. G. Coleman with Wayne Bryant and Miles Macedo, in relation to the subject investigation, including relevant dates and times.

and

.. (2) two reports:-

(1) Insp. G Coleman from Roma QPS

(2) Insp. B. Shaffourus from St George/Toowoomba QPS

24. In the applicant's External Review Application, a letter to the Crime and Misconduct Commission attached to the External Review Application, and his letter dated 28

December 2008, the applicant raises several issues which fall outside the scope of the Original Applications.

25. In particular, the applicant submits that at the time of the incident which led to his making a complaint of official misconduct, Officer Bryant made notes of calculations on the bonnet of a Police car.
26. As set out above, the applicant's Original Applications sought notes, reports and interviews prepared by Inspector Coleman and reports prepared by Inspector Coleman or Inspector Shafferius in relation to the professional conduct complaint. Any notes which may have been made on the car bonnet at the time of the incident:
 - were not prepared in relation to the investigation of the misconduct complaint
 - fall outside the scope of the FOI Applications
 - cannot be considered in this External Review.
27. I note that Acting Assistant Information Commissioner Jefferies advised the applicant of this limitation on the scope of the external review in the preliminary view letter dated 11 December 2008.

Sufficiency of search

28. Section 28A(1) of the FOI Act relevantly provides:

28A Refusal of access—document 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.*

...

29. In applying section 28A(1) of the FOI Act, the following two questions are relevant:¹:
 - 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.
30. I note that where an external review involves sufficiency of search issues, there is a practical onus on the applicant to provide reasonable grounds to believe that documents responsive to the request exist and are documents of the agency³.
31. In this review, the applicant has not provided any specific submissions further to the terms of his FOI Applications dated 11 May 2008 and 2 June 2008. The only specific submissions he has made with respect to the existence of further documents are in relation to documents which do not fall within the scope of this review.
32. I also note that several documents which relate to the complaint made by the applicant have been released to him as a result of a previous FOI Application. These documents include:

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

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

³ *Ainsworth Nominees Pty Ltd and Criminal Justice Commission; A (Third Party); B (Fourth Party)* (1999) 9 QAR 284 at paragraph 46.

- a COMPASS report
- correspondence from the Department to Senior Constable M Macedo
- correspondence from the Department to the applicant
- copy of diary entry made by Inspector Shafferius and
- a report emailed internally by Inspector Coleman.

Searches conducted and submissions made by the Department

33. Department submits that at the time of making its Original Decisions dated 25 June 2008 and 10 July 2008:
- searches of the Southern Police region were co-ordinated by the Assistant Commissioner for the Southern Region, and performed by Acting Inspector Doyle
 - the Ethical Standards Command (**ESC**) was also required to conduct thorough searches of its records, and delivered up the COMPASS report previously released to the applicant and
 - on 24 June 2008 Inspector Coleman was contacted and required to search notes in his possession.
34. At the Internal Review stage, the Department submits that further searches of the Southern Police Region were commenced by tracer files, telephone calls and emails.
35. The Department also conducted further searches at the request of this Office on External Review, including enquiries made directly to Senior Constable Macedo.
36. The Department confirms that these searches did not yield any additional documents responding to the FOI Applications.
37. In relation to the separate categories of documents requested in the applicant's FOI Applications, the Department submits that:
- in relation to official QPS Diary entries, neither Sergeant Bryant nor Senior Constable Macedo would have carried a QPS Diary to record day-to-day activities unless attending a scheduled event or 'house call'
 - all notes in relation to the inquiries conducted by Inspector Coleman were entered in the COMPASS file
 - Inspector Coleman's 'report' is recorded in the COMPASS Report and has been released to the applicant
 - Inspector Shafferius was not required to and did not prepare a report
 - Inspector Shafferius made entries in the COMPASS Report and this information was released to the applicant.
38. The Department also submits that:⁴
- the Ethical Standards Command (**ESC**) was alerted to the applicant's complaint on 27 July 2007
 - the ESC assessed the complaint and recommended that a Senior Officer conduct preliminary inquiries into the matter and recommend further action at Region/Command level

⁴ In written submissions dated 29 October 2008.

- Roma District Officer, Inspector G Coleman, was identified as the Appointed Officer for this matter
- Inspector Coleman's preliminary inquiries were communicated in a report stating that the complaint against Sergeant Wayne Bryant was unsubstantiated and required no further action and that a Managerial Resolution (**MR**) was appropriate as regards Senior Constable Miles Macedo
- managerial guidance was delivered to Senior Constable Miles Macedo by M Bianchi on 19 March 2008 and the matter was considered finalised
- the matter was closed by ESC on 17 April 2008
- the above process accords with section 18 of the Human Resource Management Manual (**HRMM**)
- the relevant COMPASS Report documented activity in relation to management of the complaint

Findings

Are there reasonable grounds to believe the documents sought exist?

39. As set out above, in relation to the FOI Application dated 2 June 2008 for '*notes/reports/interviews... in relation to the subject investigation*', the Department contends that all documents that were created in relation to the investigation into the applicant's complaint have been located and released to him.
40. The COMPASS system (Complaints, Other Matters, Processing and Statistical System) is a central electronic repository of complaint information and is designed to allow the Department to manage misconduct or disciplinary complaints. The Department submits that when dealing with complaints of misconduct, the COMPASS system is generally used exclusively to document the process and that this was the case in dealing with the applicant's complaint.
41. I note that in this case, ESC recommended that preliminary inquiries be conducted in relation to the applicant's complaint to ascertain whether the matter could be resolved through managerial resolution strategies. Inspector Coleman was appointed as the officer to undertake preliminary enquiries.
42. The instructions to the Appointed Officer noted on page 14 of the COMPASS Report list the type of activities that may be undertaken when conducting preliminary inquiries. Apart from a requirement to enter any tape recordings in the Master Tape Detail, there is no requirement to create particular documents or recordings when conducting preliminary inquiries.
43. If the matter is found suitable for managerial guidance, the Appointed Officer is required to provide an email to the ESC that includes a précis of the complaint and other details about the information ascertained in the preliminary inquiry process together with a recommendation outlining any suitable managerial strategies. Inspector Coleman created such an email and it has been provided to the applicant.
44. Having carefully considered the contentions of the applicant, the submissions of the Department and the COMPASS Report, I am satisfied that:
 - the applicant lodged a complaint with the ESC on 27 July 2007
 - that complaint was dealt with as a preliminary inquiry process
 - Inspector Coleman was the Appointed Officer to undertake the preliminary inquiries

- documents related to the inquiries were generated in the COMPASS System in accordance with Departmental policy
- when conducting preliminary inquiries, the documents which the Appointed Officer is required to create are limited to an email to be sent to ESC and I note that such a document was generated by Inspector Coleman (a copy of which has been released to the applicant)
- Inspector Shafferius was not required to and did not prepare a report
- Inspector Shafferius made entries in the COMPASS Report and this information was released to the applicant
- in all, copies of the COMPASS Report, correspondence from the Department to Senior Constable Macedo, correspondence from the Department to the applicant, a copy of a diary entry made by Inspector Shafferius and a report emailed internally by Inspector Coleman were released to the applicant under an earlier FOI application

45. There is no independent evidence before me to indicate that any documents other than those already released were created in relation to the applicant's complaint. Accordingly, I am satisfied that:

- there are no reasonable grounds to believe that the Department has further documents in its possession or control responding to the applicant's FOI applications
- it is appropriate to apply section 28A(1) of the FOI Act on the basis that the documents sought do not exist.

Have the search efforts made by the Department been reasonable in all the circumstances?

46. Given my finding that there are no reasonable grounds to believe that further documents responding to the applicant's FOI Applications exist, it is not strictly necessary for me to consider the extent of the Department's searches. However, for completeness, I note that:

- the Department conducted searches for documents (other than those already released to the applicant) prior to making the Original Decisions dated 2 June 2008 and 11 May 2008 and the Internal Review decisions dated 30 July 2008 and 29 July 2008
- the Department conducted the additional searches requested by this Office during the external review process and
- no further documents responding to the FOI Applications have been located.

47. Accordingly, I am satisfied that:

- the Department identified all relevant areas in which to conduct searches and has undertaken appropriate searches during the FOI process as well as in response to inquiries made by this Office
- the search efforts made by the Department have been reasonable in the circumstances and support the conclusion that further responsive documents do not exist.

DECISION

48. I affirm the Internal Review decisions of Acting Assistant Commissioner Taylor dated 29 July 2008 and 30 July 2008 by finding that:

- there are no reasonable grounds to believe that further documents exist that respond to the applicant's FOI Applications dated 11 May 2008 and 2 June 2008
- the searches conducted by the Department of Police were reasonable in the circumstances
- it is appropriate to apply section 28A(1) of the FOI Act in relation to the applicant's FOI applications on the basis that the documents sought do not exist.

49. 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 Henry

Date: 28 January 2009