



Decision and Reasons for Decision

Application Number: 210634

Applicant: PDE

Respondent: The University of Queensland

Decision Date: 19 February 2009

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

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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. On 20 August 2008 the applicant lodged a freedom of information application with UQ seeking access to the academic record of a student identified only as having received a credit or exemption in a specified course (**Course**) because of her previous studies (**FOI Application**).
4. On 29 August 2008 the applicant provided UQ with additional information to assist UQ to identify the student.
5. In a decision dated 16 September 2008 (**Original Decision**), Mr Zgrajewski, Acting Freedom of Information Officer, UQ, refused the applicant access to the documents sought on the basis that there were no documents responding to the FOI Application.
6. By e-mail dated 18 September 2008 (**Internal Review Application**) the applicant sought internal review of the Original Decision contending that the relevant Head of the School was mistaken in her view that no relevant documents existed.
7. In a decision dated 1 October 2008, Mr Porter, Secretary and Registrar, UQ, affirmed the Original Decision (**Internal Review Decision**) indicating that UQ had:
 - identified the student referred to in the FOI Application
 - checked the student's academic record
 - determined that the student's academic record showed that '*no credit or exemptions had been given for previous studies*'.
8. By letter dated 6 October 2008 (received in this Office on 8 October 2008) (**External Review Application**) the applicant applied for an external review of the Internal Review Decision.

Decision under review

9. The decision under review is the Internal Review Decision referred to in paragraph 7 above.

Steps taken in the external review process

10. By facsimile dated 8 October 2008 the Office of the Information Commissioner (the **Office**) asked UQ to provide copies of the FOI Application, Original Decision, Internal Review Application and Internal Review Decision.
11. In a telephone discussion on 8 October 2008, a staff member of this Office indicated to UQ that this matter would be reviewed.
12. UQ provided the documents requested at paragraph 10 above on 10 October 2008.
13. By letter dated 10 October 2008 I indicated to the applicant that his external review application had been accepted and asked him to provide further information about his claim that another student had been granted a credit or exemption.
14. On 13 October 2008 the applicant contacted the Office indicating that he:
 - had concerns with the external review process
 - did not consider it the role of this Office to make inquiries of him concerning the FOI Application.
15. By e-mail dated 14 October 2008, I noted the issues raised by the applicant at paragraph 14 above, responded to those issues and explained my role and the reasons for seeking further information in the external review process.
16. By email dated 14 October 2008 the applicant provided submissions in support of his application.
17. On 15 October 2008 the applicant telephoned the Office to confirm receipt of his e-mails and to provide further information that might assist in identifying the student
18. On 20 October 2008, in response to inquiries from this Office, UQ agreed to conduct further searches for the student's academic record taking into account the additional information provided by the applicant.
19. On 29 October 2008 UQ provided this Office with documents identified as a result of its further searches.
20. In making my decision in this review, I have taken into account the following:
 - FOI Application, Internal Review Application and External Review Application
 - Original Decision and Internal Review Decision
 - letter from the applicant to Mr Zgrajewski dated 29 August 2008
 - file notes of telephone conversations between the Office and the applicant on 13 October 2008 and 15 October 2008
 - memorandum of an Associate Dean (Teaching and Learning) for the Secretary of the Senate Student Appeals Committee dated 30 September 2008
 - my e-mail to the applicant dated 14 October 2008
 - e-mails from the applicant to this Office dated 14 October 2008 and 16 October 2008
 - file note of telephone conversations between the Office and UQ on 20 October 2008, 7 January 2009, 13 January 2009
 - UQ Information Guide on credit or exemption for previous studies

- UQ Application Form for credit or exemption for previous studies
- UQ course and program information for the Course
- extract¹ from UQ Handbook of University Policies and Procedures
- relevant provisions of the FOI Act as referred to in this decision
- case law as cited in this decision
- decisions of this Office as referred to in this decision.

Issue in the review

21. The applicant, who was enrolled in the Course in 2007/2008, seeks access to a copy of the academic record of a UQ student showing that he had received a credit or exemption for a specified unit. He indicated the UQ student had the following characteristics:

- female
- undertook the Course in 2007
- was undertaking a Doctor of Philosophy (PhD) program in 2008
- attended a specific campus
- was enrolled in a specified UQ School (**School**)
- received a credit or exemption for a specified unit (**Unit**) in the Course.

22. The applicant also identified the student's PhD supervisors.

23. In this decision I refer to this student as Student A.

24. UQ maintains that there is no document responding to the FOI Application.

25. 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.

Findings

Relevant law

Section 28A(1) of the FOI Act

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

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

27. In *PDE and the University of Queensland*² (**PDE**) the Acting Information Commissioner indicates that:³

¹ 30.20.13 Credit for Previous Studies and Recognised Prior Learning

² (Unreported, Office of the Information Commissioner, 9 February 2009).

*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.*

'Satisfied'

28. In *PDE* the Acting Information Commissioner also considered how an agency was to satisfy itself as to the non-existence of documents sought by an applicant and indicated that to be satisfied that a document does not exist, it is necessary for the agency to rely upon its particular knowledge and experience with respect to various key factors including:

- the administrative arrangements of government
- the agency structure
- the 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)
- the agency's practices and procedures (including but not exclusive to its information management approach)
- other factors reasonably inferred from information supplied by the applicant including:
 - the nature and age of the requested document/s
 - the nature of the government activity the request relates to.

29. To be satisfied under section 28A(2) of the FOI Act that a document can not be found an agency must take all reasonable steps to locate a document. Section 28A(1) is silent on the issue of how an agency is to satisfy itself that a document does not exist. When proper consideration is given to the key factors discussed at paragraph 28 and a conclusion reached that the document sought does not exist, it may be unnecessary for the agency to conduct searches. However, where searches are used to substantiate a conclusion that the document does not exist, the agency must take all reasonable steps to locate the documents sought.⁴

30. Therefore, in the context of applying section 28A(1) of the FOI Act it is relevant to ask:

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

³ At paragraph 34.

⁴ See *PDE*.

Applicant submissions

31. The applicant submits that he had a conversation with Student A in which he obtained details of Student A's past and current studies and came away with an understanding she had received a credit or exemption for the Unit. The applicant does not know Student A's name and has not been able to follow up the conversation with her.
32. On the basis of his conversation with Student A the applicant believes that UQ must have a document comprising Student A's academic record showing that she received a credit or exemption for the Unit.

UQ's submissions

33. UQ made the following submissions in the course of this review.
34. To identify the student referred to in the FOI Application UQ identified all students undertaking the Course in 2007 and who specialised in the area identified by the applicant. UQ indicates that this is a relatively rare specialisation. Only two students were identified, one of which was the applicant, with the other being Student A.
35. UQ also checked all PhD enrolments and established that Student A was enrolled in a PhD in 2008 at the campus specified by the applicant and was supervised by the academics identified by the applicant.
36. UQ submits that the only possible student who could meet the description provided by the applicant is Student A.
37. UQ has checked Student A's academic record which does not show a credit or an exemption.

Application of the law

38. For UQ to determine whether there is a document responding to the FOI Application and otherwise to satisfy itself that the document sought does not exist, it is appropriate for UQ to have regard to the key factors that relate to the FOI Application. In this instance those key factors include:
 - the information provided by the applicant that might assist in identifying Student A
 - UQ's knowledge of its record systems as this relates to identifying Student A
 - Student A's academic record
 - UQ's administrative processes in relation to credits and exemptions for the Unit.
39. UQ has used the information provided by the applicant to identify the student referred to by the applicant in the FOI Application. I am satisfied that UQ is correct in having identified Student A as the student referred to in the FOI Application.
40. Policy number 3.20.13 of the UQ Handbook of University Policies and Procedures indicates that applications for credit or exemption should be completed using UQ's application form. Paragraph 2.6.5 of the above policy relevantly provides:

...

Faculty notify students of the outcome of their application as soon as practicable, but no later than four weeks after lodgement of a complete application. For this purpose, a notation is placed on a student's Academic Record ...

41. In view of UQ's policy in relation to applications for credits and exemptions, I am satisfied that if Student A had successfully applied for a credit or exemption for the Unit, the outcome of the application would be recorded on her academic record.
42. I have read Student A's academic record and accept UQ's submission that the record does not show any credits or exemptions.
43. In a telephone discussion with the Office on 13 January 2009, UQ indicated that it had further investigated the obtaining of a credit or an exemption for the Unit. UQ explained that:
 - the Unit is not a compulsory requirement for the Course
 - the Course requires a year-long research project to be completed
 - the purpose of the Unit is to provide students with the research methodology tools to successfully complete the Course
 - a Course student and their supervisor informally consider and assess whether the student would benefit from completing the Unit
 - it may be agreed between a student and their supervisor that it would benefit the student to undertake the Unit or alternatively, that it is unnecessary for the student to complete the Unit
 - if it is considered that a student would not benefit from undertaking the Unit, the student is not required to formally apply for a credit or exemption in relation to the Unit.
44. I accept that the applicant had a discussion with Student A from which the applicant may have inferred that Student A had received a credit or exemption for the Unit, possibly on the basis that it had not been considered of benefit to Student A that she undertake the Unit.
45. Nonetheless, I am satisfied that there are reasonable grounds for UQ to be satisfied that the document sought by the applicant does not exist on the basis of my conclusions at paragraphs 39 and 42 above and that the absence of the information sought by the applicant is satisfactorily explained at paragraph 43 above. Accordingly, access to the document sought by the applicant in the FOI Application can be refused under section 28A(1) of the FOI Act.

DECISION

46. I affirm 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.

J Kinross
Acting Information Commissioner

Date: 19 February 2009