



Decision and Reasons for Decision

Application Number: 210196

Applicant: Ms Christina Wong

Respondent: Medical Board of Queensland

Decision Date: 30 June 2008

Catchwords: **FREEDOM OF INFORMATION - section 43(1) of the *Freedom of Information Act 1992 (Qld)* - legal professional privilege - waiver - reference to the existence of legal advice**

FREEDOM OF INFORMATION - sufficiency of search - whether applicant has raised reasonable grounds to believe further documents exist

Contents

REASONS FOR DECISION.....	2
Summary	2
Background.....	2
Scope of the FOI access application	2
Decision under review	3
Steps taken in the external review process	3
Matter in issue	6
Findings	6
Relevant legislation.....	6
Section 43(1) of the FOI Act.....	7
Documents associated with the Bundaberg Inquiry	9
DECISION	14

REASONS FOR DECISION

Summary

1. I find that:

- certain parts of folios 1 and 3 in HAM File Volume 4 are not exempt from disclosure under section 43(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**)
- there are no reasonable grounds to believe that further documents relating to the applicant's appearance at the Bundaberg Hospital Commission of Inquiry (**Bundaberg Inquiry**) on 1 June 2005 are in the possession or under the control of the Medical Board of Queensland (**Board**).

Background

2. The relevant background to this review is set out below:

- on 12 December 2005, the applicant lodged a freedom of information (**FOI**) application to the Board seeking access to documents under the FOI Act¹
- in a meeting on 5 January 2006, the applicant and the Board agreed to amend the scope of her FOI access application
- by letter sent on 9 January 2006², the Board informed the applicant of its understanding of the amended scope of the applicant's FOI access application
- by letter dated 11 January 2006, the applicant confirmed that she agreed with the Board's understanding of the amended scope of her FOI access application
- on 18 January 2007, Ms D Cochran, Acting Manager, Information Services issued a decision (**Initial Decision**)
- by letter dated 6 February 2007 the applicant applied for internal review of the Initial Decision
- on 6 March 2007, Mr J O'Dempsey, Executive Officer, issued the internal review decision (**Internal Review Decision**) affirming the Initial Decision in its entirety
- by letter dated 26 March 2007, the applicant applied for external review of the Internal Review Decision.

Scope of the FOI access application

3. The scope of the applicant's FOI access application which is the subject of this review is as follows³:

- *Copy of any documents re: [the applicant] not previously provided to [the applicant] including:*
 - *All documents concerning [the applicant] or in which [the applicant's] name appears in relation to the Bundaberg Hospital Commission of Inquiry, at which [the applicant] appeared on 1 June 2005; and*
 - *All documents concerning Queensland Health in relation to [the applicant] or in which [the applicant's] name appears*
- *With the exception of:*
 - *Any documents affected by the scopes of application number FOI 1 to 9 (2005-075 to 2005-083) and*

¹ The scope of the FOI application is set out in paragraph 3 of this decision.

² I note that this letter was incorrectly dated 9 January 2005.

³ As set out in the Board's letter sent to the applicant on 9 January 2006 and accepted by the applicant by letter dated 11 January 2006.

- *Any documents or material previously provided to [the applicant] by [the Board] under FOI from 2002 to 2004.*⁴

4. I note that this application is the last in a series of ten FOI applications made by the applicant to the Board. It is my understanding that the scope of this application was expressed in terms so as to encompass all documents in the possession of the Board concerning the applicant that had not already been dealt with as part of the applicant's earlier FOI applications.

Decision under review

5. The decision which is the subject of this external review is the Internal Review Decision of Mr O'Dempsey dated 6 March 2007.

Steps taken in the external review process

6. Copies of the documents to which the applicant was refused access by the Board under the Initial Decision were obtained from the Board and examined by this Office.

7. By letter dated 14 November 2007, this Office sought further information from the Board in respect of matter that the Board:

- claimed was irrelevant matter that could be deleted pursuant to section 27(3) and section 27(4) of the FOI Act
- refused to deal with pursuant to section 29B of the FOI Act.

8. By letter dated 14 December 2007, the Board provided this Office with submissions in response to my letter dated 14 November 2007.

9. By letter dated 13 March 2008, I informed the applicant and the Board of my preliminary view that:

- the Board was entitled to delete parts of folios 360, 383, 385, 386 and 397 in Registrant File Volume 1 pursuant to section 27(3) and section 27(4) of the FOI Act prior to the release of those folios to the applicant
- the Board was entitled to refuse to deal with parts of the applicant's FOI application in respect of those documents which were the subject of the Board's claim under section 29B of the FOI Act
- parts of folios 1-3 and the whole of folio 304 in HAM File Volume 4 are exempt from disclosure under section 43(1) of the FOI Act.

10. In my letter to the Board dated 13 March 2008, I also:

- expressed my preliminary view that the matter in issue in:
 - folios 21 and 315 in HAM File Volume 1
 - folio 42 in HAM File Volume 2
 - folio 41 in HAM File Volume 3
 - folio 53 in HAM File Volume 4is not exempt from disclosure under section 45(1)(c) of the FOI Act

⁴ It was also agreed that the scope of the applicant's applications would include copies/duplicates of documents and any documents to which she was previously refused access under FOI from 2002 to 2004.

- expressed my preliminary view that certain parts of the matter in issue in folios 1 and 3 in HAM File Volume 4 are not exempt from disclosure under section 43(1) of the FOI Act
 - asked the Board to provide further submissions in support of its claim that the matter in issue in the following folios does not fall within scope of the applicant's FOI application:
 - folio 24 in HAM File Volume 1
 - folios 12 and 45 in HAM File Volume 2
 - folios 12 and 44 in HAM File Volume 3
 - folios 24⁵, 56⁶ in HAM File Volume 4.
11. On 28 March 2003, the applicant's representative informed this Office that the applicant accepted all aspects of my preliminary view set out in paragraph 9 of this decision.
12. By letter dated 4 April 2008, the Board:
- provided further submissions in relation to folios which are claimed to fall outside the scope of the applicant's FOI application
 - accepted my preliminary view that certain matter in issue is not exempt from disclosure under section 45(1)(c) of the FOI Act
 - advised that it did not accept my preliminary view that certain parts of the matter in issue in folios 1 and 3 in HAM File Volume 4 are not exempt from disclosure under section 43(1) of the FOI Act.
13. By letter dated 24 April 2008, I informed the applicant:
- that the Board accepted my preliminary view with respect to section 45(1)(c) of the FOI Act
 - of my further preliminary view regarding the application of section 27(3) of the FOI Act to matter in issue in this review
 - of the matter remaining in issue in this review.
14. By letter dated 19 May 2008, the applicant accepted my preliminary view dated 24 April 2008 in respect of the application of section 43(1) of the FOI Act and provided submissions including:
- a sufficiency of search claim in respect of '*... other documents or communications ... (emails, letters, telephone notes, faxes, etc) that could be associated with [the] submission by ... Counsel for the MBQ at the [Bundaberg Inquiry] and Ms Wong's appearance on ... 1 June 2005*'
 - a query with respect to the application of section 27(3) of the FOI Act to certain matter in issue.
15. In a telephone conversation with a staff member of this Office on 2 June 2008, the applicant's representative raised the possibility of the existence of:
- a Board meeting minute
 - other correspondence between the Board and its legal representatives

⁵ The matter in this folio is a duplicate of the matter in issue in folio 12 in HAM File Volume 2 and folio 12 in HAM File Volume 3

⁶ The matter in this folio is a duplicate of the matter in issue in folio 24 in HAM File Volume 1, folio 45 in HAM File Volume 2 and folio 44 in HAM File Volume 3.

which might relate to the written submission which was provided by counsel for the Board to the Bundaberg Inquiry on 1 June 2005 (**Inquiry Submission**).

16. On 3 June 2008, a staff member of this Office telephoned the Board and asked it to advise whether a Board meeting was held on either 1 or 2 June 2005 being the dates relevant to the applicant's submissions in respect of the Inquiry Submission and the applicant's appearance at the Bundaberg Inquiry.
17. By letter dated 3 June 2008⁷, the applicant's representative provided this Office with a copy of the Inquiry Submission which the applicant was given at the Bundaberg Inquiry in June 2005.
18. On 11 June 2008, the Board advised this Office that no Board meeting was held on either 1 or 2 June 2005.
19. By email dated 12 June 2008, I provided the Board with a copy of the Inquiry Submission and advised it of my preliminary view that:
 - there are no reasonable grounds to believe that further documents associated with the Inquiry Submission are in the possession or under the control of the Board
 - the searches it had conducted for documents relating to the Bundaberg Inquiry were adequate in the circumstances.
20. By email dated 13 June 2008, I asked the Board to clarify issues relating to the application of section 27(3) of the FOI Act to certain matter in issue in this review (as requested by the applicant).
21. By letter dated 16 June 2008, I informed the applicant of my further preliminary view that:
 - there are no reasonable grounds to believe that further documents associated with the Inquiry Submission or the applicant's appearance at the Bundaberg Inquiry are in the possession or under the control of the Board
 - the searches conducted by the Board have been adequate in the circumstances of this review.
22. By letter dated 20 June 2008 the Board responded to my email dated 13 June 2008 and advised that certain matter in issue in the folios listed below could be released to the applicant pursuant to section 44(3) of the FOI Act:
 - folio 24 in HAM File Volume 1
 - folios 12 and 45 in HAM File Volume 2
 - folios 12 and 44 in HAM File Volume 3
 - folios 24 and 56 in HAM File Volume 4.
23. On 23 June 2008, a staff member of this Office had a telephone conversation with the applicant's representative in which the applicant's representative:
 - was informed that the Board was prepared to release additional matter in the folios listed in paragraph 22 of this decision

⁷ Received by this Office on 6 June 2008.

- advised that the applicant did not accept my preliminary view in respect of the sufficiency of search issue and would be providing submissions in support of her case.
24. By email dated 26 June 2008, the applicant provided submissions in response to my preliminary view dated 16 June 2008 concerning sufficiency of search.
25. In making this decision, I have taken the following into account:
- the applicant's initial FOI access application dated 12 December 2005
 - Ms Cochran's Initial Decision dated 18 January 2007
 - Mr O'Dempsey's Internal Review Decision dated 6 March 2007
 - the applicant's external review application dated 26 March 2007
 - documents in issue
 - correspondence exchanged between this Office, the Board and the applicant during the course of this review
 - file notes of telephone conversations held between this Office, the Board and the applicant during the course of this review
 - the Board's submissions dated 14 December 2007, 4 April 2008 and 20 June 2008
 - the applicant's submissions dated 19 May 2008 and 26 June 2008 and documents provided in support of those submissions
 - the Inquiry Submission and relevant extracts from the transcript of the Bundaberg Inquiry
 - relevant sections of the FOI Act, case law from Australian jurisdictions and previous decisions of this Office.

Matter in issue

26. In light of the parties' acceptance of most aspects of my preliminary view, the documents containing matter remaining in issue in this review are:
- folio 1 on HAM File Volume 4 - comments relating to the entries dated 25 August 2005 and 31 October 2005
 - folio 3 on HAM File Volume 4 - comments relating to the entry dated 20 December 2004.
27. The documents in which the matter in issue appears are Health Assessment Activity Summary Sheets (**Health Assessment Sheets**).⁸
28. Sufficiency of search is also an issue for determination in this review on account of the applicant's submissions in relation to the applicant's appearance at the Bundaberg Inquiry on 1 June 2005 and the Inquiry Submission.

Findings

Relevant legislation

29. 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 is

⁸ These documents are essentially the Board's administrative record of all correspondence sent and received, events and relevant notes pertaining to medical practitioners.

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.⁹

30. Section 81(1) of the FOI Act provides that, in an external review, the agency which or the Minister who made the decision under review, has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.
31. The exemption provision relied upon by the Board in this review is section 43(1) of the FOI Act.

Section 43(1) of the FOI Act

32. This section provides:

43 Matter affecting legal proceedings

(1) Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.

Legal professional privilege

33. The general principles of legal professional privilege are well settled and were clearly summarised by the High Court of Australia in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*¹⁰ as follows:

It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.

34. The 'dominant purpose' test for legal professional privilege was adopted by the High Court of Australia in *Esso Australia Resources Ltd v Commission of Taxation*¹¹ in preference over the 'sole purpose' test which was formulated in *Grant and Downs*.¹²
35. The legal professional privilege exemption set out in section 43(1) of the FOI Act reflects the requirements for establishing legal professional privilege at common law. In other words, it protects communications passing between a lawyer and a client where:
 - a) the communication is made in the course of a professional relationship of lawyer and client; and
 - b) the communication is confidential; and
 - c) the communication is:
 - (i) from the client to the lawyer for the dominant purpose of seeking legal advice; or
 - (ii) from the lawyer to the client for the dominant purpose of providing legal advice; or
 - (iii) from a third party at the client's request for the dominant purpose of use in assisting the lawyer to provide legal advice;¹³ or

⁹ The exemptions are contained in Part 3, Division 2, sections 36-50 of the FOI Act.

¹⁰ [2002] HCA 49; (2002) 213 CLR 543 at paragraph 9.

¹¹ (1999) 201 CLR 49.

¹² (1976) 135 CLR 674.

(iv) from the lawyer or the client, or a third party at the request of the lawyer or the client, for the dominant purpose of use in or in relation to existing or anticipated legal proceedings.

36. Paragraphs (c)(i)-(iii) above refer to the 'advice limb' of legal professional privilege, while paragraph (c)(iv) describes the 'litigation limb' of privilege. Importantly, all communications must be made in the lawyer's capacity as a lawyer and not in any other capacity.
37. The High Court of Australia in *Waterford v Commonwealth of Australia*¹⁴ confirmed that privilege can also apply to communications between government agencies and their salaried legal officers provided there is 'a professional relationship which secures to the advice an independent character notwithstanding the employment'.¹⁵

Application to the matter in issue

38. The Board contends that the matter in issue is exempt from disclosure under section 43(1) of the FOI Act.
39. As stated in paragraph 27 of this decision, the matter in issue appears in two pages of Health Assessment Sheets. In both folios, the matter in issue refers to correspondence exchanged between the Board and its legal advisers but does not disclose the content or nature of those communications.
40. By letter dated 4 April 2008, the Board made submissions including that:
- the matter in issue records confidential communications between the relevant parties for the dominant purpose of providing legal advice or for the purpose of litigation
 - the matter in issue refers to pieces of correspondence which themselves are protected by legal professional privilege
 - disclosing the description of the documents would be sufficient to imply to the applicant the nature of the advice and/or documents referred to in the Health Assessment Sheets.
41. The Board's submission raises the issue of waiver of legal professional privilege. Accordingly, I must determine whether disclosure of the general references to pieces of correspondence exchanged between the Board and its legal advisers would waive privilege in those documents.

Waiver of legal professional privilege

42. In *Alexandria Holdings Pty Ltd and the Department of Local Government, Planning, Sport and Recreation*¹⁶, the Information Commissioner found that a reference to the existence of legal advice in a Minister's decision concerning a development application did not constitute waiver of legal professional privilege in respect of the advice.
43. In *Bennett v Chief Executive Officer, Australian Customs Service*¹⁷, Gyles J made the following statement in respect of waiver of legal professional privilege:

¹³ *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357.

¹⁴ (1987) 163 CLR 54 at 61. Hereafter referred to as *Waterford*.

¹⁵ *Waterford* per Mason and Wilson JJ at paragraph 4.

¹⁶ Unreported, 2006/F0164, 22 August 2006.

¹⁷ (2004) 140 FCR 101.

*... the voluntary disclosure of the gist or conclusion of the legal advice amounts to waiver in respect of the whole of the advice to which reference is made including the reasons for the decision.*¹⁸

44. Similarly, in *AWB v Cole (No 5)*¹⁹, Young J concluded:

*It is no doubt correct that a **mere reference** to the **existence** of legal advice in a disclosed document **will not** be regarded as waiver of its contents, albeit a different conclusion would follow if the gist, substance or conclusion of the legal advice is voluntarily disclosed.*²⁰

[my emphasis]

45. I have carefully considered the Board's submissions on this point and accept that the matter in issue refers to documents which themselves, would be protected by legal professional privilege. However, I do not consider that the matter in issue, which merely refers to the existence of those privileged documents, can itself be afforded the protection of legal professional privilege.
46. Consistent with Young J's conclusion in *AWB v Cole (No. 5)* as set out in paragraph 44 of this decision, I do not consider that disclosure of the matter in issue in this review would constitute waiver of legal professional privilege in the documents referred to in the comments section of the Health Assessment Sheets.
47. Accordingly, I find that the matter in issue in folios 1 and 3 in HAM File Volume 4 is not exempt from disclosure under section 43(1) of the FOI Act.

Summary

48. Following careful consideration of the Board's submissions, the matter in issue, decisions of this Office and relevant case law, I am satisfied that the matter in issue in the Health Assessment Sheets:
- does not constitute a confidential communication between a lawyer and client
 - was not prepared for the dominant purpose of seeking or giving legal advice
 - was not prepared for the dominant purpose of use in current or anticipated legal proceedings
 - refers to the existence of privileged communications but does not disclose the gist, substance or conclusion of legal advice
 - is not exempt from disclosure under section 43(1) of the FOI Act.

Documents associated with the Bundaberg Inquiry

49. The applicant contends that there are reasonable grounds to believe the Board has in its possession or under its control, additional documents such as a Board meeting minute or other correspondence between the Board and its legal representatives, associated with:
- the applicant's appearance at the Bundaberg Inquiry on 1 June 2005
 - the Inquiry Submission provided to the Bundaberg Inquiry by the Board on 1 June 2005.

¹⁸ At paragraph 65.

¹⁹ (2006) 155 FCR 30

²⁰ At paragraph 167.

50. In considering these issues, I have carefully considered all relevant submissions, the Inquiry Submission itself and relevant extracts from the transcripts of the Bundaberg Inquiry.²¹

Background

51. I note that at the end of the Bundaberg Inquiry's morning session on 1 June 2005, the applicant attempted to ask a question of an Inquiry witness.²²
52. In the Bundaberg Inquiry's afternoon session on 1 June 2005, Mr Devlin, Counsel for the Board, provided the Bundaberg Inquiry Commissioner with the Inquiry Submission.²³ In his oral submissions, Mr Devlin stated that:

The submissions address nothing but what's on the public record. There is a chronology that is simply drawn from a judgment of the Health Practitioner's Tribunal. I don't seek to address the matter in public at this stage out of deference to the lady concerned, but I do make a solemn submission that the practice of the Commission in seeking or allowing members of the public to ask questions from the Bar table, in my respectful submission ought to be revisited before – particularly before the Commission goes to Bundaberg.²⁴

53. In response, the Bundaberg Inquiry Commissioner made the following statement in respect of the Inquiry Submission which he had been handed:

... I won't mark this as an exhibit at the moment because I am not even sure that any of it falls within our Terms of Reference. So I will simply accept this as a submission to the inquiry and if it is to be taken any further, then of course, Mr Devlin, you will be heard on that, and the lady ... will likewise be given an opportunity to be heard, either personally or through a representative of her choice.

54. At the commencement of the Bundaberg Inquiry's morning session on 2 June 2005, the Bundaberg Inquiry Commissioner:

- dealt generally with the issue of members of the public approaching the Bar table and questioning witnesses
- advised that the matters in the Inquiry Submission were matters on the public record
- stated that the applicant's concerns fell outside the Bundaberg Inquiry's terms of reference and would therefore not be further dealt with during the Bundaberg Inquiry.²⁵

55. I confirm that the applicant was provided with a copy of the Inquiry Submission at the Bundaberg Inquiry in June 2005.

Sufficiency of search

56. As set out above, the applicant contends that there are reasonable grounds to believe that the Board has in its possession or under its control, additional documents associated with:

²¹ Available at <http://www.qphci.qld.gov.au/transcripts.htm>

²² Page 664 of the transcript of the Bundaberg Inquiry.

²³ Page 707 of the transcript of the Bundaberg Inquiry.

²⁴ Page 708 of the transcript of the Bundaberg Inquiry.

²⁵ Pages 713 to 714 of the transcript of the Bundaberg Inquiry.

- the applicant's appearance at the Bundaberg Inquiry on 1 June 2005
- the Inquiry Submission.

57. The applicant's contentions give rise to 'sufficiency of search' issues. In an external review involving sufficiency of search issues, the decision-maker must determine whether the respondent agency has discharged its obligation, which is implicit in the FOI Act, to locate and deal with all documents of the agency to which access has been requested.²⁶
58. In *Shepherd*, the Information Commissioner found that in external reviews involving sufficiency of search issues, the following two questions are 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.

Reasonable grounds

59. The applicant submits that the Inquiry Submission refers to the existence of other documents which establish reasonable grounds to believe that further documents associated with the Inquiry Submission or relating to the applicant's appearance at the Bundaberg Inquiry exist and are documents of the Board (as that term is defined in section 7 of the FOI Act).
60. The "other documents" to which the applicant refers comprise a single reference to a letter from the Ombudsman dated 30 June 2004²⁷ (**Ombudsman Letter**) on page three of the Inquiry Submission which states that:
- ... the Ombudsman made a limited finding against the Medical Board concerning the former operation of the HAM Unit in its supervision of [the applicant], and we are happy to supply that document if it has not already been supplied to the Commission by [the applicant]. That same letter tabulates the changes to the procedures of the HAM Unit since the time of its supervision of [the applicant].*
61. The applicant also submits that the reference in the Inquiry Submission to proceedings in the Anti-Discrimination Commission of Queensland (**ADCQ**) and related conciliation conference establishes reasonable grounds to believe that there were '*extensive enquiries and communication with the MBQ officers and employees into this matter and the legal representatives involved*'.
62. Finally, the applicant relies on the existence of the Inquiry Submission itself to support her contention that further documents exist.

²⁶ *Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464 at paragraphs 18-19 (**Shepherd**).

²⁷ I note that in her submission dated 26 June 2008, the applicant advises that she has in her possession a letter from the Ombudsman dated 30 April 2004 which concludes that the Ombudsman '*... decided to substantiate [the applicant's] complaint against the Board to the extent that it is considered that [the Board's] monitoring of [the applicant's] participation in the HAM Program ... was deficient ...*'

63. I have carefully considered the applicant's submissions on this point and acknowledge that:
- the Inquiry Submission refers to the Ombudsman Letter and ADCQ proceedings
 - the Board may have provided its legal advisers with verbal instructions to draft the Inquiry Submission to assist the Bundaberg Inquiry Commissioner.
64. From my examination of the Inquiry Submission, relevant extracts of the Bundaberg Inquiry transcript and the applicant's submissions, I am satisfied that:
- as stated by the Bundaberg Inquiry Commissioner on the morning of 2 June 2005, the applicant's concerns (raised on 1 June 2005) fell outside the Bundaberg Inquiry's terms of reference and would not be further dealt with during the Bundaberg Inquiry
 - the Inquiry Submission was produced within a matter of hours on 1 June 2005²⁸
 - the Inquiry Submission sets out information including:
 - background information in respect of the applicant's dealings with the Board
 - submissions in respect of the practice of allowing members of the public to ask questions without notice
 - the reference to the Ombudsman Letter and ADCQ proceedings in the Inquiry Submission relates to matters between the applicant and the Board commenced some time prior to the Bundaberg Inquiry which, in my view, were included in the Inquiry Submission to provide historical context to the Bundaberg Inquiry Commissioner
 - these references do not establish reasonable grounds to believe that further documents associated with the Inquiry Submission or the applicant's appearance at the Bundaberg Inquiry exist
 - neither the transcript extracts nor the Inquiry Submission refer to the existence of other documents such as emails, letters, telephone notes and faxes associated with the Inquiry Submission or the applicant's appearance at the Bundaberg Inquiry
 - in the absence of evidence to support the applicant's assertion that further relevant documents exist, I find that there are no reasonable grounds to believe that further documents associated with the Inquiry Submission or the applicant's appearance at the Bundaberg Inquiry exist and are documents of the Board (as that term is defined in section 7 of the FOI Act).

Searches conducted by the Board

65. In light of my finding that there are no reasonable grounds to believe that the requested documents exist and are documents of the Board (as that term is defined in section 7 of the FOI Act), the principles set out in *Shepherd* do not require me to examine whether the searches conducted by the Board have been adequate in the circumstances of this review.
66. However, for the sake of completeness, I acknowledge that prior to having an opportunity to review the Inquiry Submission, I asked the Board to undertake searches for a Board meeting minute dated 1 June 2005 or 2 June 2005 in light of the applicant's specific submissions on this point.²⁹

²⁸ Given that Ms Wong attempted to question the Bundaberg Inquiry witness during the morning session on 1 June 2005 and the Inquiry Submission was handed up to the Commissioner in the afternoon session that same day.

²⁹ As set out in her letter dated 19 May 2008.

67. I note that in response to this request, the Board advised this Office that:
- searches were undertaken for a Board meeting minute dated 1 June 2005 or 2 June 2005
 - a Board meeting was not held on either of those dates and therefore, a minute did not exist.
68. The applicant maintains her contention that the following additional searches should be undertaken for further relevant documents:
- Board meeting minutes from 1 June 2005 to the date of the applicant's FOI application (12 December 2005)
 - records of counsel and legal representatives
 - records of all Board staff members from 1 June 2005 to the date of the applicant's FOI application (12 December 2005).
69. In the absence of evidence establishing reasonable grounds to believe that the requested documents exist and are documents of the Board (as that term is defined in section 7 of the FOI Act), I have not asked the Board to undertake any additional searches.
70. Further, as the applicant already has a copy of the Inquiry Submission and a letter from the Ombudsman dated 30 April 2004 in her possession, I do not consider it reasonable to ask the Board to expend further resources to undertake searches for another copy of those documents.
71. I confirm that given my finding that there are no reasonable grounds to believe that the requested documents exist and are documents of the Board (as that term is defined in section 7 of the FOI Act), it is unnecessary for me to consider or comment upon the adequacy of the Board's searches. I do so only to acknowledge that I asked the Board to conduct some searches prior to receiving a copy of the Inquiry Submission, that is before I was in a position to form a view as to whether relevant "reasonable grounds" existed.

Public interest

72. The applicant also raises a public interest argument with respect to the right of individual citizens to raise their concerns in public forums such as the Bundaberg Inquiry. The applicant contends that:
- the right to question authorities is a form of free speech which is a basic right enjoyed in a free democracy such as Australia
 - the applicant was invited to exercise this form of free speech and to ask questions of Mr O'Dempsey, the Executive Officer of the Board, by the Bundaberg Inquiry Commissioner, Tony Morris QC on 1 June 2005.
73. I acknowledge the applicant's submission with respect to the public interest as set out above and recognise that the issues raised by the applicant at the Bundaberg Inquiry and her proceedings with the Board are of great significance to her, both personally and professionally. However, the issues relevant to this external review³⁰ neither require nor allow me to take public interest considerations into account.

³⁰ The application of section 43(1) of the FOI Act and sufficiency of search.

74. On this basis, I find that the public interest in citizens having the right to raise concerns in public forums is not a relevant consideration in this external review.

Summary

75. Based on my analysis of the applicant's submissions, the Board's submissions, relevant extracts of the Bundaberg Inquiry transcripts, the Inquiry Submission and the matters set out in *Shepherd*, I am satisfied that there are no reasonable grounds to believe that further documents (associated with the Inquiry Submission or the applicant's appearance at the Bundaberg Inquiry) exist and are documents of the Board (as that term is defined in section 7 of the FOI Act).

DECISION

76. I vary the decision under review, being the Internal Review Decision of Mr O'Dempsey dated 6 March 2007, and find that the matter set out below is not exempt from disclosure under section 43(1) of the FOI Act:
- folio 1 on HAM File Volume 4 - comments relating to the entries dated 25 August 2005 and 31 October 2005
 - folio 3 on HAM File Volume 4 - comments relating to the entry dated 20 December 2004.
77. I find that there are no reasonable grounds to believe that further documents (associated with the Inquiry Submission or the applicant's appearance at the Bundaberg Inquiry) exist and are documents of the Board (as that term is defined in section 7 of the FOI Act).
78. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

Assistant Commissioner Henry

Date: 30 June 2008