



Decision and Reasons for Decision

Application Number: 210686

Applicant: Mr J Leach

Respondent: Department of Police

Decision Date: 31 March 2009

Catchwords: FREEDOM OF INFORMATION – FREEDOM OF INFORMATION – section 28A(1) of the *Freedom of information Act 1992* (Qld) – Refusal of access – whether reasonable basis for agency to be satisfied documents sought do not exist – whether warrant issued

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REASONS FOR DECISION

Summary

1. In this external review the applicant asserts that documents responding to his freedom of information application have not been provided to him by the Department of Police, known as Queensland Police Service (**QPS**).
2. Having considered the parties' submissions and evidence, relevant legislation and decisions I am satisfied that access to the documents sought can be refused under section 28A(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) on the basis that no documents responding to the applicant's freedom of information application exist.

Background

3. By letter dated 4 September 2008, the applicant lodged an FOI Application (**FOI Application**) with QPS. The FOI Application sought access to:

Records from Cairns District Police Station which would suggest a warrant was issued for my arrest dated 16th March 1997.

Clearly I am requesting job numbers, radio room records of assigned officers.

Change over duty shift sergeant's exchange notes and job sheets. I am requesting copies of worksheets for 16 March 2007.

4. By letter dated 6 October 2008 (**Original Decision**) Acting Inspector PJ Robinson informed the applicant that the QPS' searches had not located any documents responding to the FOI Application.
5. By letter dated 15 October 2008, the applicant lodged an application for internal review (**Internal Review Application**) of the Original Decision. In the Internal Review Application the applicant expressed dissatisfaction with the QPS' search efforts.
6. On 13 November 2008, Assistant Commissioner PA Wilson, QPS, affirmed the Original Decision that no documents could be located responding to the FOI Application (**Internal Review Decision**).
7. By letter received in this Office on 15 December 2008 the applicant applied for an external review (**External Review Application**) of the Internal Review Decision.

Decision under review

8. The decision under review is the Internal Review Decision referred to in paragraph 6 above.

Steps taken in the external review process

9. By facsimile dated 17 December 2008 the Office of the Information Commissioner (**Office**) asked the QPS to provide copies of documents relevant to the external review.¹
10. The QPS provided the documents requested at paragraph 9 above to the Office on 7 January 2009.

¹ Including the FOI Application, Initial Decision, Internal Review Application and Internal Review Decision.

11. By letters dated 27 January 2009 I indicated to the:
 - a) applicant that:
 - o the External Review Application had been accepted
 - o it was my preliminary view that there were reasonable grounds for the QPS to be satisfied that documents suggesting a warrant was issued on 16 March 2007 for his arrest do not exist
 - o if he did not accept the preliminary view he should provide any further submissions by 13 February 2009
 - b) QPS that:
 - o the External Review Application had been accepted
 - o I had communicated a preliminary view to the applicant and had requested a response by 13 February 2009.
12. By letter dated 1 February 2009 and received in the Office on 9 February 2009 the applicant indicated that he did not accept my preliminary view and asserted that documents responding to his FOI Application do exist.
13. The applicant currently has a number of external reviews with the Office which relate to two specific incidents and there is a degree of overlap in the applicant's submissions to the Office in relation to the various external review applications. I have therefore taken submissions the applicant has made in relation to other reviews into account to the extent that they relate to the documents sought in this review. In particular, in a letter dated 25 January 2009 the applicant makes submissions regarding the events of 16 March 2007.
14. In making my decision in this matter, I have taken the following into account:
 - FOI Application, Internal Review Application and External Review Application
 - Original Decision and Internal Review Decision
 - letters from the applicant to the Office dated 25 January 2009 and 1 February 2009
 - email dated 28 October 2008 from Inspector Swan to Acting Inspector Doyle
 - folios 13 and 31 (from the Court Brief) of the documents released to the applicant in external review 210688
 - relevant provisions of the FOI Act as referred to in this decision
 - decisions of this Office as referred to in this decision.

Scope of the FOI application

15. Under section 25(2)(b) of the FOI Act an applicant must provide sufficient information concerning the document sought to enable a responsible officer of an agency to identify the document.
16. The FOI Application seeks documents which would 'suggest' that a warrant was issued on 16 March 2007 for the applicant's arrest. The request for documents described as 'work sheets' follows on from the request for 'warrant documents' and commences with the word 'clearly'. I have taken the use of the word 'clearly' in this aspect of the FOI Application to mean that the request for 'work sheets' for the Cairns District police officers is related to – rather the being independent of – the request for 'warrant documents'. That is, the applicant seeks information concerning the 'suggested' warrant in the work records of the police officers working at the Cairns District Police Station on 16 March 2007. The applicant has not contested this interpretation of the scope of the FOI Application.
17. Accordingly, if no documents exist that suggest a warrant was issued for the applicant's arrest in relation to the incident on 16 March 2007, it would follow that no 'work sheets'

or other documents for police personnel would exist in relation to the requested warrant documents.

Issue to be determined in the review

18. The issue to be determined in this review is whether there are reasonable grounds to be satisfied that the documents sought by the applicant do not exist, and accordingly, whether access can be refused under section 28A(1) of the FOI Act.

Relevant law

Section 28A(1) of the FOI Act

19. 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

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

*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'

21. In *PDE* the Acting Information Commissioner also considered how an agency is 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.

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

³ At paragraph 34.

22. 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 21 above 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
23. Therefore, in applying section 28A(1) of the FOI Act it is first relevant to ask whether there are reasonable grounds for the QPS to be satisfied that the requested documents do not exist.

Applicant's submissions

24. In his letter dated 1 February 2009 the applicant provided the following information and submissions. The applicant:
- acknowledges that he cannot provide information that suggests a warrant was issued by the QPS
 - argues that he was arrested and detained by the QPS on 16 March 2007 and that this occurred because the QPS had issued a warrant for his arrest and '*were on the lookout*' for him in order to execute the warrant
 - submits that the discussion between the QPS and him at the Cairns District Police Station on 16 March 2007 was a formal interview in respect of the 'arrest'.
25. The applicant also submits that sections 21(a)⁵ and 30(1)(c)⁶ of the FOI Act support his External Review Application. I addressed the applicant's submissions regarding these sections of the FOI Act at paragraphs 42 to 45 of my decision in *Leach and Department of Police* (Unreported, Queensland Information Commissioner, 27 February 2009). It is therefore unnecessary for me to address those submissions again as they do not affect the decision in this matter.

QPS' submissions

26. The QPS decision-maker indicates in the Original Decision that:
- no warrant was issued for the applicant's arrest on 16 March 2007
 - the applicant was arrested on [12]⁷ April 2007 and
 - the arrest on 12 April 2007 occurred without a warrant.
27. In response to an inquiry from Acting Inspector Doyle in relation to the FOI application that is the subject of external review 210689, Inspector Swan indicated in an email dated 28 October 2008 that:
- he had no notes in his diary regarding a meeting with the applicant on 16 March 2007
 - there may have been a meeting between the applicant, Inspector Swan and Chief Superintendent Carroll on 16 March 2007 over the applicant 'posting photographs of a police officer around the town saying he was corrupt'

⁴ See *PDE*.

⁵ Right of access

⁶ Forms of access

⁷ QPS state in the Original Decision that the applicant was charged on 13 April 2007. Although I understand from documents released to the applicant that the applicant's actual arrest took place on the preceding day – 12 April 2007.

- he and Chief Superintendent Carroll told the applicant to stop posting the flyers and the applicant then left the station
- no records of the meeting were generated.

28. The QPS further submits that:

- the Cairns District Police fall within the Far Northern Region of QPS
- in response to the applicant's FOI Application, a search was conducted of the Far Northern register by a senior police officer and this search failed to locate documents concerning the issue of a warrant for the applicant's arrest
- the QPS also inquired with the Officer in Charge of the Cairns District Police Station and the District Officer for the Cairns District but no documents fitting the description provided in the applicant's FOI Application could be located.

Findings

29. The events involving the applicant on 16 March 2007 are the subject of a number of external reviews. From the submissions provided by both the applicant and the QPS in this review and the documents released by the QPS to the applicant in external review 210688, the following incidents appear to have precipitated the applicant lodging the FOI Application:

- On 16 March 2007 the applicant was observed by police officers and a number of members of the public posting A4 flyers (containing a photo of the applicant and his email address and allegations that Police had mistreated and assaulted him) at a construction site opposite the Cairns District Police Station (**Flyers**).⁸ At this time the applicant was subject to a Bail undertaking which restricted his movements in and around Cairns.
- Sergeant Peter Fisher approached the applicant and the applicant went inside the Cairns District Police Station.⁹
- Inside the Cairns District Police Station a number of police officers spoke with the applicant concerning the Flyers.
- After the discussion concluded the applicant left the Cairns District Police Station.

30. The applicant submits that only the issuing of a warrant and the consequent 'arrest' could explain Sergeant Fisher's request/requirement that the applicant accompany him into Cairns District Police Station and the subsequent discussion between the applicant and the police officers. In his submissions the applicant refers to his 'arrest and detainment' in the Cairns District Police Station on 16 March 2007.

31. Folio 13 of the documents released to the applicant in external review 210688, is titled Court Brief Defendant Copy (**Court Brief**). The Court Brief records that the applicant was arrested on 13 April 2007.¹⁰ The check box titled 'Fingerprinted' is ticked and the check box titled 'Warrant Executed' is blank. Accordingly, I accept QPS' submission

⁸ According to the Court Brief at folio 31. The Court Brief also states that the applicant's allegations are false. The applicant states in his letter of 25 January 2009 that 'Inspector Swan advised [him] QPS Legal Services would examine **my** A4 Flyer, never requested I cease my posting of A4 Flyers' [my emphasis].

⁹ I note that the applicant states alternatively in his submission of 1 February 2009 that Sergeant Fisher:

- told him that he would be charged if he didn't follow him into the police station
- dragged him into the police station
- placed him under arrest
- told him he would be charged if he didn't follow his orders
- constrained and escorted him to the Cairns District Police Station.

¹⁰ Although I understand from documents released to the applicant that the applicant's actual arrest took place on the preceding day – 12 April 2007.

that the applicant was arrested without a warrant on 12 April 2007. This is consistent with Section 365 of the *Police Powers and Responsibilities Act 2000* (Qld) which provides that in the circumstances specified in the provision, an individual may be arrested without a warrant being issued for the arrest.

32. I do not accept the applicant's contention that he was arrested on 16 March 2007 and that this occurred as a result of a warrant having been issued for his arrest.
33. There is no evidence in the material available to me to suggest that the applicant was arrested on 16 March 2007. Further, both Inspector Swan and the applicant indicate that the applicant left the Cairns District Police Station following the meeting/discussion. On this point, the applicant states that he was told to 'get out' of the station. Accordingly, there is no evidence suggesting that the applicant was taken into police custody.
34. I do not accept the applicant's contention that the QPS were on the lookout for him to execute a warrant. I am satisfied that in circumstances where the QPS:
- had observed the applicant posting the Flyers in the vicinity of the Cairns District Police Station
 - knew the applicant was subject to a Bail undertaking which restricted his movement in and around Cairns

it is not unreasonable to expect that QPS Officers would question the applicant about his conduct in response to what was directly observed and/or reported.

35. I am satisfied that in undertaking searches of the Northern Register and making inquiries with Inspector Swan, the QPS was able to ascertain that no warrant was issued for the applicant's arrest on 16 March 2007 and in doing so to ascertain that no documents responding to the FOI Application could exist.
36. As no warrant was issued, there can be no documents associated with that 'warrant'. Accordingly, I am satisfied that:
- the documents requested in the FOI Application do not exist because they were never created
 - there are reasonable grounds for the QPS to be satisfied that the documents requested in the FOI Application do not exist
 - it is unnecessary for the QPS to conduct searches/further searches to locate the documents sought
 - access to the requested documents can be refused under section 28A(1) of the FOI Act.

DECISION

37. I affirm the decision under review by finding that access to the requested documents can be refused under section 28A(1) of the FOI Act on the basis that no documents responding to the FOI Application exist.
38. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

Acting Assistant Commissioner Jefferies

Date: 31 March 2009