



Decision and Reasons for Decision

Application Number: 210687

Applicant: Mr Leach

Respondent: Department of Police

Decision Date: 27 February 2009

Catchwords: **FREEDOM OF INFORMATION – section 28A(1) of the *Freedom of information Act 1992* (Qld) – refusal of access – agency to be satisfied document does not exist – dispatch documents**

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REASONS FOR DECISION

Summary

1. In this external review the applicant asserts that additional documents responding to his freedom of information application have not been provided to him by the Department of Police, known as the 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 further documents responding to the applicant's freedom of information application exist.

Background

3. By letter dated 2 September 2008 the applicant lodged a freedom of information application (**FOI Application**) with the QPS for access to the following material:

12 April 2007 Cairns CIB Detective Bradley McLeish contacted Cairns Police Dispatch pertaining to myself. Please advise if you can provide a job number, computer files, tapes, material.

Be advised Detective Bradley McLeish maintained radio contact with uniform police officer's. Therefore, I require copies of tapes which recorded contact with police personnel and dispatch.

In addition, Detective Bradley McLeish attended my house, 30 mins drive south of Cairns, Gordonvale, searching for myself. Contact with dispatch was made, messages place with Dispatch, please advise if messages can be obtained.

Importantly, I am requesting copies of Dispatch's files and tapes which relate to radio contact with Detective Bradley McLeish dated 12 April 2007, time 1 pm – 2.30 pm.

4. By letter dated 9 October 2008 (**Original Decision**), Acting Inspector PJ Robinson, QPS, informed the applicant that:
 - the QPS had located 19 folios and one audio tape responding to the FOI Application
 - he had decided to release the 19 folios subject to deletions under section 44(1) of the FOI Act and to fully exempt the audio tape under section 44(1) of the FOI Act.
5. By letter dated 28 October 2008 the Applicant sought internal review (**Internal Review Application**) of the Original Decision. The Applicant stated that he was 'sure' other documents beyond the 19 folios and the one audio tape existed.
6. By letter dated 24 November 2008 (**Internal Review Decision**), Assistant Commissioner A Lewis, QPS, decided:
 - to release the audio tape with the registration number of a vehicle not registered to the applicant deleted (though I note the applicant did not seek internal review of this aspect of the QPS' decision)
 - investigating officers had undertaken a thorough search and were unable to locate any further documents relevant to the FOI Application.

7. By letter dated 12 December 2008¹ (**External Review Application**) the Applicant applied for external review of the Internal Review Decision. In the External Review Application the Applicant indicated he was '*dissatisfied the Internal Review Officer has made reasonable effort in locating documents requested*'.
8. In the conduct of a review the Information Commissioner has the power to review any decision that has been made by an agency in relation to the FOI application concerned and to decide any matter in relation to the application that could, under the FOI Act have been decided by an agency.²

Decision under review

9. The decision under review is the Internal Review Decision referred to at paragraph 6 above.

Steps taken in the external review process

10. By facsimile dated 17 December 2008 the Office asked the QPS to provide copies of documents relevant to the external review.³
11. The QPS provided the documents requested at paragraph 10 above to this Office on 12 January 2009. The QPS also provided additional correspondence from the applicant to the QPS in which the applicant applied to the QPS for external review.
12. By letters dated 20 January 2009 I advised the applicant and the QPS that the External Review Application had been accepted. I also asked the applicant to provide submissions by 4 February 2009 in relation to any further documents which he believed the QPS has not provided to him.
13. By letter dated 29 January 2009 the applicant provided submissions to this external review.
14. By letter dated 1 February 2009 the applicant provided submissions for another external review but a small part of those submissions related to this external review.
15. On 17 February 2009 the Office contacted the User Data Administration section of the Police Communications Unit (**UDA**) to discuss record storage and searches of the Computer Aided Dispatch (CAD) system.

¹ Received on 15 December 2008.

² Section 88(1) of the FOI Act provides:

Powers of commissioner on review

(1) In the conduct of a review, the commissioner has, in addition to any other power, power to –

(a) review any decision that has been made by an agency or Minister in relation to the application concerned; and

(b) decide any matter in relation to the application that could, under this Act, have been decided by an agency or Minister...

³ Including the FOI Application, Initial Decision, Internal Review Application, Internal Review Decision and copies of the documents released to the applicant with the Original Decision.

16. On 24 February 2009 the Office made additional inquiries with the QPS regarding the documents released to the applicant and the search processes used when searching the CAD system.
17. On 26 February 2009 the Office made further inquiries with the UDA regarding the search parameters used in searching the CAD system in response to the FOI Application.
18. 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
 - the documents released to the applicant in response to the FOI Application
 - letters from the applicant to this Office dated 29 January 2009 and 1 February 2009
 - file notes of telephone conversations between the Office and the UDA on 17 and 26 February 2009
 - file note of telephone conversation between the Office and the QPS on 24 February 2009
 - relevant provisions of the FOI Act as referred to in this decision
 - decisions of this Office as referred to in this decision.

Issue in review

19. The applicant acknowledges that the QPS has provided 19 documents and one audio tape to him in response to the FOI Application. The applicant states however, the released documents did not include personal diary notes or case notes, or dispatch documents extending beyond the time-frame of 10.30 am to 3.30 pm. Accordingly, the applicant contends that the QPS has not released all of the documents sought in the FOI Application to him.
20. The QPS maintains that it has undertaken a thorough search for additional documents and has been unable to locate any further relevant documents.
21. The issue to be determined in this review is whether there are reasonable grounds for the QPS to be satisfied that the additional documents sought by the applicant do not exist and accordingly, whether access can be refused under section 28A(1) of the FOI Act.

Findings

The scope of the FOI Application

22. To access a document under the FOI Act an applicant must make an application in accordance with the requirements of section 25(2) of the FOI Act. In doing so the applicant is required to *'provide sufficient information concerning the document to enable a responsible officer of the agency or the Minister to identify the document.'*⁴

⁴ Section 25(2)(b) of the FOI Act.

Accordingly, the scope of an FOI application is determined by the terms of the application. Although the scope can be amended by a subsequent agreement between the applicant and the agency whilst processing the application, an applicant cannot unilaterally enlarge the scope of an FOI application.

23. The applicant currently has a number of external reviews with this Office and there is a degree of 'cross-over' in some of the documentation sought in the various freedom of information applications relating to the different external reviews. In the FOI Application to which this external review relates the applicant requests documents in four separate paragraphs, the content of which are set out at paragraph 3 above. The applicant makes it clear in the FOI Application that he seeks specific documents relating to 12 April 2007 and in the last paragraph he specifies the time period 1pm to 2.30 pm. In each of the four paragraphs the applicant refers to 'dispatch'.
24. Under cover of a letter dated 22 December 2008 the QPS forwarded to the Office a number of letters from the applicant addressed to the QPS that refer to the Internal Review Decision and seek external review by the QPS.
25. In a letter dated 15 December 2008, the applicant indicates that he is satisfied that other documents exist relating to:
 - Cairns Police Prosecutions files dated 13 April 2007
 - files, computer notes relating to allegations of alleged stalking in respect to a specified individual
 - complaints made to police against the person specified above
26. In another letter dated 15 December 2008, the applicant indicates that he seeks copies of:
 - Detective McLeish's records that relate to 13 April 2008
 - psychiatric report
 - case notes
 - court documents
 - diary notes
 - cassette tapes
 - charge records
 - computer files
27. In another letter dated 15 December 2008 the applicant indicates that he is not satisfied the QPS has provided him with full details of Detective McLeish's computer notes, dispatch notes, codes and radio room computer records. He also refers to '*any requests for computer records, job details relating to Detective McLeish, personal notes only*'.
28. In another letter dated 15 December 2008 the applicant indicates that he is not satisfied the QPS has located 'Detective Bradley McLeish files' which pertain to him including for example:
 - communications between Detective McLeish and Cairns Police Communication Centre dated 12 April 2007

- radio contact with Detective McLeish and uniformed officers dated 12 April 2007
 - communication between Police Radio Room and Detective McLeish pertaining to visiting the applicant's house
 - radio communication tapes between Police and Detective McLeish 12 April 2007.
29. In a letter dated 20 January 2009 I asked the applicant to specify any further documents which he believed had not been located by the QPS. The applicant responded that:
- he has not been provided with personal diary notes or case notes
 - the documents he is seeking extend beyond the time-frame of 10.30 am to 3.30 pm.
30. The applicant's letter of 20 January 2009 was received after the earlier letters so I have taken the applicant's later letter to be a statement of the additional documents which the applicant contends have not been provided to him in response to the FOI Application.
31. In any event, although the documents listed at paragraph 28 largely accord with the QPS' list of the documents sought in the Internal Review Decision,⁵ the applicant's letters at paragraphs 25 to 27 above seek to unilaterally expand the scope of the FOI Application, that is, they seek access to documents which are not requested in the FOI Application and could not be dealt with in this external review.
32. A question that arises in this external review is whether the personal diary notes and/or case notes and/or dispatch records that extend beyond the time-frame of 10.30 am to 3.30 pm are within the scope of the FOI Application.
33. I have carefully considered the wording of the FOI Application and I am satisfied that the application confines the documents sought to those involving Detective McLeish and other uniformed police officers' communications with Cairns Police Dispatch on 12 April 2007 in relation to the applicant. As the applicant did not request personal diary notes or case notes in the FOI Application and as there is no evidence that the QPS agreed to enlarge the scope of the FOI Application, these items, if they exist, are not within the scope of the FOI Application and will not be considered further. This, however, does not preclude the applicant from lodging a new freedom of information application for these documents.
34. The QPS has provided the applicant with copies of an audio tape as well as the dispatch records for the period 10.28 am to 3.34 pm on 12 April 2007. I am satisfied that if further dispatch records meeting the description provided by the applicant in the FOI Application exist in relation to 12 April 2007, these documents would be within the scope of the FOI Application.

⁵ Except that the first bullet point does not contain the words 'including job numbers, computer files, tapes and other material and the last bullet point does not include the time specified by the applicant.

Relevant law

Section 28A(1) of the FOI Act

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

28A Refusal of access—documents non-existent 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

36. In *PDE and the University of Queensland*⁶ (*PDE*) the Acting Information Commissioner indicates that:⁷

*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'

37. 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.

38. 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 37 above

⁶ (Unreported, Office of the Information Commissioner, 9 February 2009).

⁷ At paragraph 34.

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.⁸

39. Therefore, in applying section 28A(1) of the FOI Act it is relevant to ask whether there are reasonable grounds to be satisfied that the requested documents do not exist and, in doing so, as the QPS used searches to satisfy itself that the additional documents sought do not exist, it is necessary to consider whether the QPS has taken all reasonable steps to find the additional documents sought.

The applicant's submissions

40. The applicant submits that sections 21(a) and 30(1)(c) of the FOI Act support his External Review Application. In his letter of 1 February 2009 the applicant also describes an incident which occurred on 12 April 2007.

The QPS' submissions

41. Information provided by the QPS FOI Unit and the UDA indicates that:
- all computer, telephone and voice (including radio) communication between police headquarters, police personnel and members of the public is recorded electronically
 - the Cairns District police use a purpose-built database called 'Computer Aided Dispatch' (CAD) for recording these communications
 - communications between the community and police headquarters in Cairns are stored only in CAD
 - searches are able to be conducted of CAD records under a number of search parameters, the most common being:
 - name – both of members of the public and police personnel
 - address
 - date
 - time
 - vehicle registration number
 - job number
 - when searches are conducted of CAD records, multiple search parameters are included to ensure all records concerning a particular subject are captured
 - CAD uses a 'Soundex' system whereby names that sound the same are captured in a search regardless of differences in spelling⁹
 - CAD produces two types of records: a Job History and running records
 - the CAD records relating to this FOI Application were archived in Brisbane

⁸ See *PDE*.

⁹ As an example - with 'Soundex', a search for 'Jeffery Leach' will also capture records for 'Geoffrey Leech.' The benefit of Soundex is that variations of, or incorrect spellings will not overly restrict the outcome of searches.

- more recent records remain with the district in which they are recorded
- when searches are requested from the CAD system, the FOI Unit, QPS provides a copy of the application and often in addition, a covering explanation of the scope of the application to the UDA
- the UDA always use multiple parameters to search for records because they are aware that the records are often transcribed from voice and the data may be changed in the recording
- all the information in an FOI application is used in the search - the person's name and variations of their name, their address, dates, times, persons or officers referred to ensure all relevant records are captured.

Application of section 28A(1) of the FOI Act

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

42. I acknowledge the applicant's contention that sections 21(a) and 30(1)(c) of the FOI Act support his application.
43. Section 21(a) of the FOI Act gives a person a legally enforceable right of access to documents of an agency. However, section 21 of the FOI states that the right of access is '*subject to this Act*'. Accordingly, the right of access can be displaced by a valid refusal of access under section 28A(1) of the FOI Act if an agency is satisfied that the document to which access is sought does not exist.
44. Section 30(1)(c) of the FOI Act is not concerned with the 'right of access' but rather the 'form of access'. The right of access only arises under section 21 of the FOI Act and as discussed in paragraph 43 above, that right of access is subject to the FOI Act.
45. Section 30(1)(c) of the FOI Act does not give a separate right of access, instead, if an agency makes a decision to give access to a document, section 30(1)(c) is relevant to the issue of how that access is given. This is reflected in the wording of the section which begins '**[a]ccess to a document** may be given to a person in 1 or more of the following forms' Accordingly, the effect of these provisions of the FOI Act is that an agency is only required to consider giving access to a document in the manner described in section 30(1)(c) (making arrangements for the person to hear the sounds or view the images) if the agency decides to or is required to give access to the document sought.
46. In view of my conclusion at paragraphs 33 to 34 above regarding the scope of the FOI Application, it is necessary to consider whether there are reasonable grounds for the QPS to be satisfied that it has provided the applicant with all dispatch documents within the scope of the FOI Application and therefore that no additional dispatch documents exist in relation to the FOI Application.
47. For the QPS to determine whether there are any additional documents responding to the FOI Application and otherwise to satisfy itself that the additional documents sought by the applicant do not exist, it is appropriate for the QPS to have regard to the key factors that relate to the FOI Application. In this instance those key factors include:
 - the nature of the request as well as the date specified
 - the location at which the records would have been recorded and stored

- the system used to record and store dispatch records
 - any alternative locations or systems in which the documents sought by the applicant may be stored.
48. I accept the QPS' submissions at paragraph 41 above regarding the CAD system, the information stored in that system and the UDA's search methodology for locating documents in response to FOI Applications.
49. As the Cairns District Police record all computer, telephone and voice (including radio) communication between police headquarters, police personnel and members of the public electronically in the CAD system and this is the only place that this information is stored, it is appropriate for the QPS to search the CAD system to identify the relevant dispatch records, using the parameters provided in the FOI application.
50. The QPS has conducted electronic searches of the CAD system. I am satisfied that in this instance, in accordance with the UDA's usual search practices, the search parameters would have included at least, the applicant's name, his address, the date of 12 April 2007 and Detective McLeish's name. In view of the QPS' explanation of the searches conducted and the retrieval capacity of the CAD system I would expect all relevant documents responding to the FOI Application to be ascertained using this search methodology.
51. The QPS has identified and released dispatch documents to the applicant covering the period 10.28 am to 3.34 pm on 12 April 2007. I have read the dispatch documents released to the applicant. These include the Job History and the running records, that is, both forms of record which would be expected to be generated by the CAD system. These documents appear to be a complete record of an incident involving the applicant on 12 April 2007 in that they record:
- a response to a reported incident
 - progressive information relating to the QPS' attempts to locate the applicant over a number of hours
 - that the job is cancelled because the applicant has been located.
52. In view of the above, I am satisfied that the QPS has taken all reasonable steps to find the documents sought by the applicant and that there are reasonable grounds to be satisfied that no further documents responding to the FOI Application exist.

DECISION

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

S Jefferies
Acting Assistant Commissioner

Date: 27 February 2009