



Decision and Reasons for Decision

Application Number: 210467

Applicant: Mr Martin Lally

Respondent: The Department of Health

Decision Date: 30 September 2008

Catchwords: **FREEDOM OF INFORMATION – section 12 *Freedom of Information Act 1992* – documents to which applicant seeks access excluded from the operation of the *Freedom of Information Act 1992***

Contents

REASONS FOR DECISION.....	2
Summary	2
Background.....	2
Decision under review	3
Steps taken in the external review process	3
Matter in issue	4
Findings	4
DECISION.....	5

REASONS FOR DECISION

Summary

1. By virtue of the operation of section 12 of the *Freedom of Information Act 1992* (the FOI Act) there is no right of access to the letter dated 18 July 2005 from Ms Rachel Moss, Assistant Information Commissioner, to Ms Pauline Bazley, FOI Officer QEII Hospital and its attachments under the FOI Act.

Background

2. Mr Martin Lally (the Applicant) applied to the Department of Health (the Department) for access to a letter dated 18 July 2005 from Ms Rachel Moss, Assistant Information Commissioner, Office of the Information Commissioner, to Ms Pauline Bazley, FOI Officer QEII Hospital (the letter) under the FOI Act.
3. The Applicant's application was undated and was received by the Department on 26 September 2007.
4. By letter dated 26 October 2007 Ms Bonita Findlay, of the Department advised the Applicant of her decision to grant full access to the letter, which comprised 1 folio.
5. On 12 November 2007 the Applicant wrote to the Department and submitted that there were attachments to the letter that were responsive to his application which had not been included in the access decision, namely, copies of folios subject to an external review process at the time (referred to as folios 61-63 and 69-71) (attachment one) and a deidentified copy of a decision of the Information Commissioner dealing with a grievance investigation by Queensland Rail (attachment two), hereafter collectively referred to as the attachments.
6. Having received no response the Applicant wrote again to the Department on 21 November 2007.
7. On 21 November 2007 the Department wrote to the Applicant and provided certain documents to him which had been released previously as a result of an earlier Freedom of Information (FOI) access application. Those documents were not the attachments to which the applicant seeks access.
8. On 16 December 2007 the Applicant wrote to Dr Mark Mattiussi the District Manager of the Southside Health Service District of the Department. This letter was dated 16 November 2007 and headed, "*Application for Internal Review of decision made by FOI Officer, Bonita Findlay, FOI Decision Maker, QEII Jubilee Hospital: Decision made (26 October 2007) in response to FOI application dated 25 September 2007*
Decision made (21 November 2007) in response to application for information pursuant to the Freedom of Information Act, dated 12 November 2007".
9. On 16 December 2007, by letter dated 16 November 2007, the Applicant wrote to this Office enclosing a copy of his letter dated 16 November 2007 to Dr Mattiussi.
10. On 19 December 2007 this Office wrote to the Department to make preliminary inquiries with the agency under section 75 of the FOI Act in relation to the applicant's letter of 16 December 2007.
11. By letters dated 21 December 2007 the applicant wrote to this Office and the Department to advise that the date on his letters of 16 November 2007 should have been 16 December 2007.

12. On 16 January 2007 the Department wrote to the applicant and advised that it would not proceed to consider his application for internal review pending the decision of this Office.
13. On 12 February 2008 I wrote to the applicant and to the Department to advise that the applicant's correspondence of 16 December 2007 was not an application for external review for the purpose of the FOI Act.
14. On 5 March 2008 the applicant wrote to the Department (Dr Mattiussi) with his concerns about the Department not processing his internal review application.
15. On 25 March 2008 the applicant wrote to this Office seeking an external review with regard to his undated application to the Department received on 26 September 2007 (the external review application).

Decision under review

16. The decision under review is the deemed decision of the Department to uphold its initial decision dated 26 October 2007.

Steps taken in the external review process

17. On 27 March 2008 this Office wrote to the Applicant and advised that preliminary enquiries were being made with the Department in relation to his correspondence of 25 March 2008.
18. On 27 March 2008 this Office wrote to the Department seeking a copy of the initial access application, the initial decision, the internal review application and any internal review decision.
19. In various communications with the Department between 27 March 2008 and 20 May 2008 this Office clarified the status of the Applicant's application for internal review with the Department.
20. As a result of the information gathered through the preliminary enquiries I determined that the Applicant's external review application was made outside the time frame stipulated in section 73 of the FOI Act for the making of external review applications and on 27 May 2008 exercised my discretion to extend the time within which the Applicant could bring his application for external review.
21. On 27 May 2008 I wrote to the applicant and the Department and advised that I had exercised my discretion to extend the time within which the Applicant could bring his application for external review and thus the deemed decision of the Department would be reviewed.
22. In my letter to the Department dated 27 May 2008 I advised that the Applicant had raised reasonable grounds to believe that documents existed that fell within the scope of his application that had not been disclosed to him, namely the attachments to the letter. Accordingly, I required the Department to undertake searches for the attachments and report back to me on the success of those searches by 10 June 2008.
23. By letter dated 16 June 2008 the Department stated that it had been unable to locate the originals of the attachments and that it was of the view that the attachments were within the scope of the Applicant's application.
24. By letters dated 24 June 2008 I relayed to the Applicant and the Department my preliminary view that by virtue of the operation of section 12 of the FOI Act there is no right of access to the letter and the attachments and thus the issue of locating and

providing access to the attachments was moot. Additionally, the Applicant was invited to make submissions in response to the preliminary view.

25. By letter dated 7 July 2008 the Department advised that it accepted my preliminary view.
26. By letter dated 23 July 2008 the Applicant made submissions in response to the preliminary view.

Matter in issue

27. The core issue in this review is the applicant's contention that he should have access to the attachments to the letter.

Findings

28. While the applicant contends that the attachments to the letter should have been included in the Department's decision, there is a threshold issue to address. Namely, whether the applicant was entitled to access the letter and its attachments under the FOI Act.
29. I note that the Applicant wrote to me on 7 July 2008 in response to my letter of 24 June 2008 outlining my preliminary view. In that letter the Applicant made a number of submissions about the process adopted by this Office in a previous external review to which he was a party. The Applicant did not specifically address the issue that is before me in this review, namely, the application of section 12 of the FOI Act to the letter and the attachments. However, it was clear from the Applicant's letter that he did not accept my preliminary view and wanted to pursue access to the attachments. As the Applicant's submissions were not relevant to the question of the application of section 12 of the FOI Act I have not dealt with them in this decision.

30. Section 12 of the FOI Act states:

12 Application of Act to Information Commissioner

Section 20 and parts 3 and 4 do not apply to the commissioner or documents of the commissioner.

31. The effect of section 12 of the FOI Act has previously been considered by the Information Commissioner in the matter of *Price and Surveyors' Board of Queensland* (1999) 5 QAR 110.
32. In that matter the Information Commissioner found that:

14. The Information Commissioner is a "public authority" within the meaning of s.9(1)(d) of the FOI Act, and hence an "agency" as defined in s.8 of the FOI Act. Part 3 of the FOI Act confers and regulates a right of access to "documents of an agency", i.e., documents in the possession or under the control of an agency, as per the definition of "document of an agency" in s.7 of the FOI Act. In providing that Part 3 of the FOI Act does not apply to the Information Commissioner, s.12 of the FOI Act clearly intends that citizens shall not have the right to apply to the Information Commissioner for access, under the FOI Act, to documents in the possession or under the control of the Information Commissioner.

...

15. However, the wording of s.12 goes further, and the question arises as to what additional work was intended to be performed by the words "... parts 3 and 4 do not apply to ... documents of the commissioner." They cannot have been intended merely to cover documents in the possession or under the control of the Information Commissioner, because the application of parts 3 and 4 of the FOI Act to documents in the possession or under the control of the Information Commissioner has been effectively excluded by the

words "... parts 3 and 4 do not apply to the commissioner ...". Given that context, I consider that the logical construction of the words "... parts 3 and 4 do not apply to ... documents of the Commissioner" is that they were intended to extend the exclusions effected by s.12 to documents authored by the Information Commissioner (or his/her delegates under s.90 of the FOI Act), even though such documents are in the possession or control of another agency which is subject to the application of the FOI Act.

...

18. ... s.12 obviously encompasses documents held by the Information Commissioner, but I consider that it extends just as strongly, if not more so, to documents that have been created by the Information Commissioner and forwarded to (or otherwise received by) another agency. The significant point about correspondence between my office and respondent agencies is that, since both have access to the contents of the documents in issue, there can be free reference to the matter in issue in a review, for the purpose of making or illustrating arguments about the merits of exemption claims (when seeking to effect a negotiated resolution of disputes pursuant to s.80 of the FOI Act, or to clarify issues on which evidence or submissions are sought), whereas in correspondence from my office to other participants in a review, I am obliged to avoid disclosure of the matter in issue: see s.87 of the FOI Act. Correspondence between my Office and respondent agencies, for the purposes of a review under Part 5 of the FOI Act, frequently contains references to matter claimed to be exempt, and to information provided on a confidential basis. It may comment on information of considerable commercial sensitivity, or serious personal concern to individuals. It may discuss information which is subject to legal professional privilege or statutory secrecy provisions.

...

22. ... in my view, a document authored by the Information Commissioner (or his/her delegate under s.90 of the FOI Act) remains a "document of the Commissioner" within the terms of s.12 of the FOI Act, notwithstanding that it is in the possession of another agency (such as, in this instance, the Board).

33. Thus the effect of section 12 of the FOI Act is to exclude documents of the Information Commissioner and his/her delegate from the operation of Part 3 of the FOI Act.
34. Both the letter and the attachments concerned in this review are documents of the Information Commissioner, having been authored by a delegate of the Information Commissioner. Accordingly, I find that they are excluded from the operation of Part 3 of the FOI Act by the operation of section 12 of the FOI Act. It follows that the Applicant has no right to apply for, or obtain, access to those documents.
35. I note that the Department initially stated that it could not locate the original of the first attachment. However, it was subsequently discovered in the course of this review. Notwithstanding this, in light of my finding that section 12 of the FOI Act applies to the letter and attachments such that there is no right of access under the FOI Act to those documents, I do not consider it necessary to address the issue of whether the Department's searches were sufficient or whether the attachments fell within the scope of the Applicant's application.

DECISION

36. I set aside the decision of the Department.
37. In substitution of the Department's decision I find that:
 - The documents in issue in this review, namely the letter and the attachments, are documents of the commissioner for the purpose of section 12 of the FOI Act.

- By virtue of the operation of section 12 of the FOI Act the letter and the attachments are excluded from the application of the access provisions set out in Part 3 of the FOI Act, so that the Applicant has no right to apply for, or obtain, access to those documents under the FOI Act.

38. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

V Corby
Assistant Commissioner

Date: