



## **Decision and Reasons for Decision**

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**Application Number:** 210688

**Applicant:** Mr Leach

**Respondent:** Department of Police

**Decision Date:** 31 March 2009

**Catchwords:** **FREEDOM OF INFORMATION – section 28A(1) of the *Freedom of information Act 1992* (Qld) – refusal of access – whether reasonable basis for the agency to be satisfied document sought does not exist – audio tapes**

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## REASONS FOR DECISION

### Summary

1. In this external review the applicant asserts that in relation to his freedom of information application, the Department of Police, known as the Queensland Police Service (**QPS**) has not located an audio tape belonging to Detective Bradley McLeish from 12 April 2007.
2. The QPS indicates that it agreed to expand the scope of the applicant's freedom of information application on internal review to include an audio tape of an interview process relating to the applicant's arrest on 12 April 2007 (**Interview Tape**), however, as the applicant refused to participate in an interview, the Interview Tape does not exist. During the course of the external review the QPS also located an audio tape belonging to Detective Bradley McLeish from 12 April 2007 (**Audio Tape**), however, the QPS submits that the Audio Tape is outside of the scope of the applicant's freedom of information application.
3. Having considered the parties' submissions and evidence, relevant legislation and decisions I am satisfied that:
  - the Interview Tape does not exist and therefore access may be refused under section 28A(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**)
  - the Audio Tape does not fall within the scope of the FOI Application.

### Background

4. By letter dated 8 September 2008 the applicant lodged a freedom of information application (**FOI Application**) with the QPS for access to the following material:

*...copies of Detective Bradley McLeish files that pertain to myself dated 12<sup>th</sup> April 2007.*

*Clearly I am requesting computer notes, hand written notes, arresting job number dating 12<sup>th</sup> April 2007.*
5. By letter dated 8 October 2008 (**Original Decision**), Acting Inspector PJ Robinson, QPS, informed the applicant that:
  - the QPS had located 43 folios responding to the FOI Application
  - he had decided to release the 43 folios subject to deletions under sections 44(1) , 42(1)(ca) and 27(3) of the FOI Act.
6. By letter dated 29 October 2008 the Applicant sought internal review (**Internal Review Application**) of the Original Decision. The Applicant stated that he was not satisfied that the QPS had made a reasonable effort to locate the audio tape belonging to Detective Bradley McLeish from 12 April 2007.
7. By letter dated 6 November 2008 (**Internal Review Decision**), Assistant Commissioner P Wilson, QPS, decided:
  - that the Original Decision not to release certain documents was appropriate (though I note the applicant did not seek internal review of this aspect of the QPS' decision)

- to enlarge the scope of the FOI Application to also include the Interview Tape, whilst indicating that as the applicant had refused to participate in a recorded interview, the Interview Tape did not exist
  - all reasonable search efforts had been fulfilled regarding any documents relevant to the FOI Application.
8. By letters dated 4 December 2008<sup>1</sup> and 12 December 2008<sup>2</sup> (**External Review Application**) the applicant applied for external review of the Internal Review Decision. In the External Review Application the Applicant indicates he was '*dissatisfied the Internal Review Officer has made reasonable effort in locating documents requested*' and seems to indicate that he is seeking access to the Audio Tape, though he also quotes a statement from the Internal Review Decision which refers to the Interview Tape, from which it may be inferred that he disputes the QPS' decision in relation to the Interview Tape. Accordingly, in this decision I have considered the application of the FOI Act to both the Audio Tape and the Interview Tape.

### Decision under review

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

### Steps taken in the external review process

10. On 17 December 2008 the QPS forwarded to the Office of the Information Commissioner (**the Office**) a letter from the applicant addressed to the QPS that refers to the Internal Review Decision and seeks external review by the QPS.
11. By facsimile dated 17 December 2008 the Office asked the QPS to provide copies of documents relevant to the external review.<sup>3</sup>
12. Under cover of its letter dated 6 January 2009, the QPS provided the documents requested at paragraph 11 above.
13. By letters dated 13 January 2009, I advised the applicant and the QPS that the External Review Application had been accepted.<sup>4</sup> In my letter to the applicant I:
- indicated that in respect to the existence of the Interview Tape, it was my preliminary view that if he had refused to participate in a recorded interview then no recorded interview took place and no audio record of the interview would exist
  - asked the applicant to respond to a number of questions and/or provide submissions in relation to this external review by 28 January 2009.

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<sup>1</sup> Originally sent to the QPS and received by the Office on 17 December 2008.

<sup>2</sup> Received on 15 December 2008.

<sup>3</sup> Including the FOI Application, Original Decision, Internal Review Application, Internal Review Decision and copies of the documents released to the applicant with the Original Decision.

<sup>4</sup> Although the External Review Application was received outside the time limits prescribed under the FOI Act, given the short time period involved, the lack of likely prejudice to the QPS and the issues raised in the application I decided to exercise the discretion under section 73(1)(d) of the FOI Act to extend the time for the applicant to apply for external review.

14. By letters dated 25 January 2009 and 1 February 2009 the applicant provided submissions relating to other external reviews with the Office. However, these submissions do not relate to the issues raised in this external review.
15. By letter dated 6 February 2009 the QPS provided further submissions to the Office in relation to the Audio Tape.
16. On 9 February 2009, 10 February 2009 and 11 February 2009 the Office made additional inquiries with the QPS regarding the Audio Tape.
17. 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
  - a letter from the QPS dated 6 February 2009
  - folio 31 of a document titled Court Brief Defendant Copy
  - file notes of telephone conversations between this Office and the QPS on 9 February 2009, 10 February 2009 and 11 February 2009
  - relevant provisions of the FOI Act as referred to in this decision
  - decisions of the Information Commissioner as referred to in this decision.

#### **Issue in review**

18. The applicant acknowledges that the QPS has provided 43 documents to him in response to the FOI Application. The applicant states however, the released documents did not include an audio recording belonging to Detective Bradley McLeish dated 12 April 2007. Accordingly, the applicant contends that the QPS has not released all of the documents sought in the FOI Application to him.
19. The QPS maintains that it has undertaken a thorough search for the documents sought by the applicant and that although it agreed to expand the scope of the FOI Application on internal review, the expanded scope extends only to the Interview Tape and not the Audio Tape. QPS also submits that the Interview Tape does not exist as it was not created.
20. The issues to be determined in this review include whether:
  - a) the Audio Tape falls within the scope of the FOI Application
  - b) there are reasonable grounds for the QPS to be satisfied that the Interview Tape does not exist and accordingly, whether access can be refused under section 28A(1) of the FOI Act.

## The scope of the FOI Application

21. 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'*.<sup>5</sup> 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.
22. In the FOI Application to which this external review relates, the applicant only sought copies of files held by Detective Sergeant McLeish pertaining to the applicant for the date 12 April 2007 and specifically *'computer notes, hand written notes, arresting job number dating 12<sup>th</sup> April 2007.'*
23. In his Internal Review Application the applicant attempted to unilaterally expand the scope of the FOI Application to include an audio tape by alleging that the QPS had not conducted adequate searches for an audio tape belonging to Detective Sergeant McLeish dated 12 April 2007.
24. In the Internal Review Decision the QPS decision-maker agreed to expand the scope of the FOI Application to include the Interview Tape, but stated nonetheless that because the applicant had refused to participate in a recorded interview on that date, the Interview Tape does not exist.
25. In response to inquiries by the Office, by letter dated 6 February 2009, the QPS confirmed that:
  - it had located the Audio Tape
  - information from the Audio Tape has previously been provided to the applicant in a brief of evidence regarding the related investigation.
26. In subsequent discussions with the Office, the QPS submitted that the Audio Tape falls outside the scope of the FOI Application.
27. In my letter dated 13 January 2009 I asked the applicant to provide submissions in respect of any documents responding to his FOI Application which he believes QPS has not located. The applicant did not make any further submissions to the Office which related to the current external review.
28. A question that arises in this external review is whether the Audio Tape and/or the Interview Tape fall within the scope of the FOI Application, as expanded on internal review.
29. I have considered the wording of the FOI Application and I am satisfied that the application confines the documents sought to those involving Detective Sergeant McLeish's files on 12 April 2007 in relation to the applicant and that within these parameters, the applicant specifically sought access to computer notes, hand written notes and arresting job number.

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<sup>5</sup> Section 25(2)(b) of the FOI Act.

30. On internal review, the QPS decision-maker agreed to enlarge the scope of the FOI Application to also include the Interview Tape. However, there is no evidence that the decision-maker agreed to enlarge the scope of the FOI Application to include the Audio Tape.
31. Accordingly, the Audio Tape does not fall within the scope of the FOI Application, even as expanded on internal review, and will therefore not be considered further. This, however, does not preclude the applicant from lodging a new freedom of information application for the Audio Tape.
32. In respect of the Interview Tape, I am satisfied that if this document exists it would fall within the scope of the expanded FOI Application.

## Findings

### Relevant law

#### **Section 28A(1) of the FOI Act**

33. 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*

34. In *PDE and the University of Queensland*<sup>6</sup> (**PDE**) the Acting Information Commissioner indicates that:<sup>7</sup>

*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'**

35. 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

<sup>6</sup> (Unreported, Office of the Information Commissioner, 9 February 2009).

<sup>7</sup> At paragraph 34.

- 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.

36. 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 35 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.<sup>8</sup>

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

#### ***The applicant's submissions***

38. The applicant submits the following:

- the QPS has failed to conduct relevant searches
- he has not received any evidence nor documentation of searches conducted by the QPS<sup>9</sup>
- sections 21(a) and 30(1)(c) of the FOI Act support his External Review Application.

#### ***The QPS' submissions***

39. The QPS submits that:

- the applicant declined to participate in a recorded interview with Detective Sergeant McLeish on 12 April 2007
- therefore the Interview Tape would not be able to be located.

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<sup>8</sup> See *PDE*.

<sup>9</sup> In respect of this submission the applicant requests a copy of documentation relevant to the QPS' searches for the audio tape. I note that if these documents exist, they would have been created after the FOI Application was received by the QPS and in accordance with section 25(3) of the FOI Act would not be within the scope of the FOI Application.

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

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

40. I acknowledge the applicant's contention that sections 21(a) and 30(1)(c) of the FOI Act support his application.
41. 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.
42. 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 41 above, that right of access is subject to the FOI Act.
43. 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.
44. As previously stated at paragraph 32 above, I am satisfied that the Interview Tape, if in existence, would fall within the expanded scope of the FOI Application. Accordingly, it is necessary for me to consider whether there are reasonable grounds for the QPS to be satisfied that the Interview Tape does not exist.
45. In relation to this issue, the QPS indicates that the applicant declined to participate in a recorded interview with the QPS on 12 April 2007. I note that in folio 31 of a document titled Court Brief Defendant Copy, which was released to the applicant in response to the FOI Application, the QPS describe the incident that led to the applicant's arrest on 12 April 2007 and then state '*[t]he defendant refused to talk with police and remained aggressive and un-cooperative at all times.*' The applicant, although given the opportunity to do so, has made no submissions disputing the QPS' contention that he did not participate in a recorded interview on 12 April 2007.
46. Accordingly, in the absence of any information to the contrary, I accept the QPS' submission that the applicant did not participate in a recorded interview on 12 April 2007, and find that there are reasonable grounds to be satisfied that the Interview Tape does not exist.
47. In view of the above, I am satisfied that as the QPS established that the applicant refused to be interviewed, there are reasonable grounds for the QPS to be satisfied that the Interview Tape does not exist. In these circumstances, it is unnecessary for the QPS to conduct searches/further searches for the Interview Tape.



## **DECISION**

48. I affirm the decision under review by finding that the Interview Tape does not exist and access may be refused under section 28A(1) of the FOI Act.
49. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

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**S Jefferies**  
**Acting Assistant Commissioner**

**Date: 31 March 2009**