



## Decision and Reasons for Decision

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**Application Number:** 210689

**Applicant:** Mr J Leach

**Respondent:** Department of Police

**Decision Date:** 14 May 2009

**Catchwords:** **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 – database files**

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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, also 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**) as there are reasonable grounds for the QPS to be satisfied that the documents requested in the FOI Application do not exist.

### Background

3. By letter dated 4 September 2008 (**FOI Application**) the applicant sought access to:  
*Database files from Cairns District Police pertaining to my meeting with Inspector Ian Swan dated 16 March 2007.*
4. By letter dated 10 October 2008 the QPS informed the applicant that it had not located any documents responding to the FOI Application and was therefore refusing access under section 28A(1) of the FOI Act (**Original Decision**).
5. By letter dated 15 October 2008 (**Internal Review Application**) the applicant sought internal review of the Original Decision.
6. By letter dated 30 October 2008, Assistant Commissioner McCallum, QPS, affirmed the Original Decision (**Internal Review Decision**).
7. By an undated letter received in this Office on 15 December 2008 (**External Review Application**) the applicant sought external review of the Internal Review Decision.
8. The External Review Application was received outside the time limits prescribed by the FOI Act. However, 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.

### *Decision under review*

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

### Steps taken in the external review process

10. By facsimile dated 17 December 2008 the Office of the Information Commissioner (**Office**) asked QPS to provide copies of documents relevant to the external review.<sup>1</sup>
11. QPS provided the documents requested at paragraph 10 above by letter dated 6 January 2009. QPS also included its internal correspondence in relation to its

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<sup>1</sup> Including the FOI Application, Initial Decision, Internal Review Application and the Internal Review Decision.

administration of the FOI Application which contained the following two significant documents:

- a typed submission from the applicant dated 4 December 2008 that had been sent to the QPS providing an explanation as to why he had decided to seek external review in this matter (**External Review Submission**) and
- an email from Inspector Swan dated 28 October 2008.

12. By letters dated 20 January 2009 I indicated to the:

a) applicant that:

- the External Review Application had been accepted
- it was my preliminary view that there were reasonable grounds for the QPS to be satisfied that documents concerning a meeting between Inspector Swan and the applicant on 16 March 2007 do not exist and
- that the QPS were therefore entitled to rely on section 28A(1) of the FOI Act to refuse access to the documents sought

b) QPS that:

- the External Review application had been accepted
- I had communicated a preliminary view to the applicant and had requested a response by 4 February 2009.

13. In a letter dated 25 January 2009 the applicant indicated that he did not accept my preliminary view and made further submissions.

14. On 2 April 2009, a staff member of the Office made further inquiries with QPS regarding its database system.

15. The applicant has had a number of external reviews with the Office which relate to two specific incidents and there is a degree of overlap between the applicant's submissions to the Office in relation to these 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 1 February 2009 the applicant makes submissions regarding the events of 16 March 2007 which preceded his meeting with Inspector Swan.

16. 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 this office dated 25 January 2009 and 1 February 2009 and the External Review Submission
- email dated 27 October 2008 from Acting Inspector Doyle to the Far Northern Region and email dated 28 October 2008 from Inspector Swan in response
- documents released to the applicant in external review 210688
- 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 the review**

17. The issue to be determined in this review is whether there are reasonable grounds for the QPS 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

18. 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*

19. In *PDE and the University of Queensland*<sup>2</sup> (*PDE*) the Acting Information Commissioner indicates that:<sup>3</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.*

20. 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.

21. 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 20 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>4</sup>

<sup>2</sup> (Unreported, Office of the Information Commissioner, 9 February 2009).

<sup>3</sup> At paragraph 34.

<sup>4</sup> See *PDE*.

22. 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 documents sought do not exist, it is necessary to consider whether the QPS has taken all reasonable steps to find the documents sought.

### ***Applicant's submissions***

23. In the applicant's correspondence with the QPS and the Office<sup>5</sup> he made the following submissions in support of his contention that documents responding to the FOI Application exist:

- the meeting on 16 March 2007 (**Meeting**) related to a court proceeding
- searches performed by the QPS in the Far North Region have nothing to do with an interview held at Cairns Police Station
- Inspector Swan advised him that the QPS' legal services would be examining a flyer he was observed posting near Cairns Police Station<sup>6</sup>
- the QPS accept that the Meeting took place, and accordingly a record of the Meeting should exist
- he disagrees with the QPS' categorisation of the Meeting as 'low-key' and informal
- he is not satisfied that the QPS has searched for documents responding to the FOI Application.

24. In his letter dated 25 January 2009, the applicant states that he requested copies of audio and video tape recordings of the Meeting. I am satisfied however that any requests for audio or video recordings are not within the scope of the applicant's FOI Application and are the subject of a separate external review. Accordingly, it is not necessary to address that issue in this review.

25. The applicant also submits that sections 21(a) and 30(1)(c) 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. In response to a preliminary inquiry from the Office, by letter dated 6 January 2009 the QPS provided documents to this Office concerning the searches it conducted for documents responding to the FOI Application. In an email dated 27 October 2008, Acting Inspector Doyle, QPS, asked the Far Northern Region:

- whether Inspector Swan met with the applicant on 16 March 2007
- whether there are any records of the alleged meeting such as diary notes or custody indices
- to confirm the correspondence index contains no details of the alleged meeting
- to confirm no correspondence was generated in response to the alleged meeting.

27. Inspector Swan responded to these inquiries by email on 28 October 2008:

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<sup>5</sup> The Internal Review Application, External Review Application, External Review Submission, letter dated 25 January 2009 and letter dated 1 February 2009.

<sup>6</sup> See paragraph 29 below.

*...I have viewed my diary and I have no notes on Leach and in particular 16 March 2007. There may have been a meeting with him on that date with C/Superintendent Carroll and myself over him posting photographs of a police officer around town saying he was corrupt. Carroll and I told him to stop [and] he left the station. That is the only time I have spoken to him in Cairns station. There are no indices of the meeting as nothing was generated. Likewise no correspondence.*

*Have spoken to [C/Superintendent Carroll] and she too has inspected her diary and no notes recorded.*

28. QPS also submits that:

- the Cairns District Police falls within the Far Northern Region of the QPS
- each region has its own register and therefore, in this instance, the Far Northern Register is the only database in which a record of the Meeting would potentially be entered
- any entry would be made either as an index entry or as an entry in the correspondence register
- 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 any entries concerning the Meeting.

## Findings

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

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**).<sup>7</sup> At this time the applicant was subject to a Bail undertaking which restricted his movements in and around Cairns.
- A police officer approached the applicant and the applicant subsequently entered the Cairns District Police Station.
- Inside the Cairns District Police Station police officers spoke with the applicant concerning the Flyers.
- After the discussion concluded the applicant left the Cairns District Police Station.

30. To be satisfied that no QPS documents responding to the FOI Application exist, it is appropriate to have regard to the key factors that relate to the FOI Application. In this instance, those key factors include:

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<sup>7</sup> According to a Court Brief (at folio 31) which was released to the applicant in external review 210688. The Court Brief also states that the applicant's allegations are false. The applicant does not seem to dispute that he was posting the Flyer. In his letter of 25 January 2009 he states that 'Inspector Swan advised [him] QPS Legal Services would examine my A4 Flyer, never requested I cease my posting of A4 Flyers'.

- the nature of the request, including the subject matter and date specified in the FOI Application
  - the persons involved in the matter referred to in the FOI Application
  - the location at which the requested documents would be recorded and/or stored
  - the information management system used by the QPS to store the type of information sought by the applicant.
31. The applicant has requested access to *'[d]atabase files from Cairns District Police pertaining to [his] meeting with Inspector Ian Swan dated 16 March 2007'*.
32. The applicant contends that documents responding to his FOI Application should exist because the subject of the meeting was in relation to court proceedings. The applicant also contends that Inspector Swan did not tell the applicant to desist from posting the flyers, but instead told him that QPS' legal people would be looking at the flyer. I also note the applicant's submission that he does not consider that his contact with Police on 16 March 2007 was 'low-key' or informal. I have understood these submissions to mean that, in the applicant's view, the nature and seriousness of the subject of the meeting were such that a record of the meeting should have been created.
33. In light of the terms of the FOI Application, to locate documents responding to the application, in my view, it would be appropriate for the QPS to initially identify all databases in which the information sought could potentially be recorded and to search those database files for any entries/documents concerning the Meeting.
34. I am satisfied that the Far Northern Register contains the *'[d]atabase files from Cairns District Police'* and is the only location in which the information sought by the applicant would be stored.
35. The QPS submit and I accept that a senior police officer searched the Far Northern Register for documents concerning the Meeting and this search failed to locate any documents concerning the Meeting.
36. As the applicant specifically referred to Inspector Swan in his FOI Application, it was appropriate for QPS to make inquiries with Inspector Swan. I note also that Inspector Swan inquired with C/Superintendent Carroll, who it appears had also been present at the Meeting.
37. I acknowledge that the applicant believes the seriousness of the discussion at the Meeting warranted the matter being recorded, however Inspector Swan's recollection of events and the lack of entries in either his or C/Superintendent Carroll's diaries are consistent with the search outcomes and suggest that the Meeting was relatively informal.
38. Having carefully considered the submissions made by the parties in this review, I find that:
- the Far Northern register is the only location which contains the *'[d]atabase files from Cairns District Police'*
  - the applicant met with Inspector Swan and C/Superintendent Carroll at Cairns Police Station on 16 March 2007 but the meeting was unscheduled and relatively informal
  - the applicant left the Cairns Police Station when the meeting concluded
  - Inspector Swan did not take notes of the meeting
  - Inspector Swan did not generate a record of the meeting in the Far Northern Register.

39. The decision as to whether an agency has taken all reasonable steps to find a document must be made on a case by case basis, and where relevant, with reference to:
- the key factors in the FOI and internal review applications including the nature of the documents sought
  - the date the documents may have been created and the personnel who may have been responsible for creating them
  - the regulatory obligations and/or aspect of service delivery that might be involved
  - departmental approval processes and delegations in relation to the document or service in respect of which documents are sought
  - the agency's record keeping practices, including where and in what form the documents sought may be stored, multiple locations, requirements under the *Public Records Act 2002* (Qld) including retention and disposal regimes.
40. In response to the FOI Application the QPS has:
- had regard to the key factors in the FOI and internal review applications, including the date and location of the Meeting
  - identified where the documents sought would be stored if they existed, in this instance, the Far Northern Register
  - conducted searches of the Far Northern Register
  - made inquiries with persons who attended the Meeting.
41. I am satisfied that in conducting the searches and making the inquiries listed at paragraph 40 above, QPS has taken all reasonable steps to locate documents that respond to the FOI Application.
42. Given my findings in paragraphs 38 and 41 above I am satisfied that:
- the documents requested in the FOI Application do not exist because they were never created
  - QPS has taken all reasonable steps to determine whether documents responding to the FOI Application exist
  - there are reasonable grounds for the QPS to be satisfied that the documents requested in the FOI Application do not exist
  - access to the requested documents can be refused under section 28A(1) of the FOI Act.

## **DECISION**

43. I affirm the decision under review by finding that access to the documents requested in the FOI Application can be refused under section 28A(1) of the FOI Act.
44. 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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**Suzette Jefferies**  
**Acting Assistant Commissioner**

**Date: 14 May 2009**