



Decision and Reasons for Decision

Application Number: 210826

Applicant: RLN

Respondent: Health Quality and Complaints Commission

Decision Date: 9 November 2009

Catchwords: **ADMINISTRATIVE LAW - FREEDOM OF INFORMATION – ACT NOT TO APPLY TO CERTAIN BODIES - applicant seeks access to documents concerning a complaint she made against a health care provider – whether the *Freedom of Information Act 1992* (Qld) applies to the Health Quality and Complaints Commission in relation to conciliation – whether section 11(1)(pa)(i) of the *Freedom of Information Act 1992* (Qld) applies**

ADMINISTRATIVE LAW - FREEDOM OF INFORMATION – REFUSAL OF ACCESS – DOCUMENT NON-EXISTENT OR UNLOCATABLE – whether there are reasonable grounds for the agency to be satisfied documents sought do not exist – whether agency has taken all reasonable steps to locate additional documents – whether the agency can refuse access to the documents sought under section 28A(1) or section 28A(2) of the *Freedom of Information Act 1992* (Qld)

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REASONS FOR DECISION

Summary

1. In this external review, the applicant contends that the Health Quality and Complaints Commission (**Commission**) has not provided her with all documents responding to her freedom of information application.
2. Having considered the relevant legislation and the submissions of the participants, I find that:
 - the *Freedom of Information Act 1992* (Qld) (**FOI Act**) does not apply to the documents remaining in issue in the 'conciliation file' due to the operation of section 11(1)(pa)(i) of the FOI Act
 - access to a decision of the Medical Assessment Tribunal under the *Workers' Compensation and Rehabilitation Act 2003* may be refused under section 28A(1) of the FOI Act
 - access to the remaining documents sought may be refused under section 28A(2) of the FOI Act.

Background

3. By letter dated 12 June 2007 (**FOI Application**), the applicant applied to the Commission stating:

I [the applicant] want to see all copy of document which you using to review my cause.

Under the law freedom of information you have responsibility to send me all document which you using to made your judgment.

4. By letter dated 7 August 2007 (**Original Decision**), Ms Helen Adcock of the Commission informed the applicant that:
 - a complaint file relating to the FOI Application and comprising 268 pages had been located
 - she had decided to give the applicant access to 264 pages in full
 - she had decided to give the applicant access to 4 pages in part, deleting matter which was exempt from disclosure under section 44(1) of the FOI Act
 - the FOI Act does not apply to the conciliation of health service complaints and she was unable to provide the applicant with any documents obtained during the conciliation of the complaint.
5. By letter dated 14 January 2009, the applicant wrote to the Commission:
 - stating that documents were missing and additional documents should have been provided to her; and
 - providing background to her original complaint to the Commission.
6. The Commission accepted the applicant's letter of 14 January 2009 as an application for internal review of the Original Decision (**Internal Review Application**).
7. By letter dated 6 March 2009 (**Internal Review Decision**), Mr John Cake of the Commission informed the applicant that while the applicant's Internal Review Application had been made out of time, he had reviewed the applicant's file and understood that all documents held on that complaint file had been provided to the

applicant. Mr Cake also informed the applicant that the Commission held other documents on a conciliation file, but that these conciliation documents were not accessible under the FOI Act due to the operation of section 11(1)(pa) of the FOI Act.

8. By letter dated 6 April 2009 (received 14 April 2009)¹ (**External Review Application**), the applicant wrote to the Office of the Information Commissioner (**Office**) indicating the Commission had not provided her with all the documents in its possession concerning her and providing information about her dealings with, and copies of correspondence she had sent to, the Commission. The External Review Application:
 - stated that the applicant had not received a copy of any documents from a decision of the 'Medical Assessment Tribunal under the *Workers' Compensation and Rehabilitation Act 2003*' which had been referred to in a letter written by a staff member of the Commission
 - identified a further six 'classes' of documents which the applicant said had not been provided to her
 - stated that the applicant was disappointed with the way in which her complaint with the Commission was handled and set out a number of questions which appeared to relate to circumstances preceding her complaint to the Commission.
9. The FOI Act was repealed by the *Right to Information Act 2009 (RTI Act)*² which commenced on 1 July 2009.³ However, because the FOI Application was made under the FOI Act and has not yet been finalised, for the purposes of this decision, I am required to consider the application of the FOI Act (and not the RTI Act) in this review.⁴

Decision under review

10. Under section 52(6) of the FOI Act, if on internal review, an agency does not decide an application and notify the applicant of the decision within 28 days after receiving the application, the agency's principal officer is taken to have made a decision at the end of the period affirming the original decision.
11. The decision under review is the decision the Commission's principal officer is taken to have made affirming the Original Decision.

Steps taken in the external review process

12. In response to preliminary inquiries made by this Office, by facsimile dated 28 April 2009, the Commission provided copies of a number of documents relevant to the review.
13. By letter dated 22 April 2009, the applicant provided this Office with:
 - a copy of an email she sent to the Commission on 19 April 2009
 - general information about her medical condition

¹ It is unclear on which day the applicant received written notice of the Internal Review Decision. However, it is likely that the External Review Application was received by this Office more than 28 days after the applicant received written notice of the Internal Review Decision. In view of the overall timeframes, the Commission's willingness to deal with the Internal Review Application and the matters raised by the applicant, I have extended time for the applicant to make the External Review Application.

² Section 194 of the RTI Act.

³ With the exception of sections 118 and 122 of the RTI Act.

⁴ Section 199 of the RTI Act.

- a copy of a decision of the General Medical Assessment Tribunal – Gynaecology dated 26 October 2001, under the *WorkCover Queensland Act 1996*, relating to her.
14. A staff member of this Office made preliminary telephone enquiries with the Commission on 1 May 2009.
15. By letter dated 1 May 2009, I wrote to the Commission indicating that:
- the External Review Application had been accepted for review
 - further inquiries would be made of the applicant concerning documents the applicant contended had not been provided to her.
16. By letter dated 1 May 2009, I wrote to the applicant:
- providing her with information about the external review process
 - seeking details in relation to the six 'classes' of documents which she contended the Commission had not provided to her.
17. By letter dated 10 May 2009, the applicant provided the Office with:
- further details of the documents she contended the Commission had failed to provide to her
 - copies of correspondence passing between her and the Commission
 - copies of some of the documents released to her in the Original Decision.
18. By letter dated 27 May 2009, I wrote to the applicant, indicating that the Office would ask the Commission about the documents she claimed were missing.
19. On 18 June 2009, a staff member of this Office:
- spoke with the Commission regarding the applicant's submissions
 - faxed a schedule of documents to the Commission, requesting the Commission cross-reference those documents with the documents contained in the applicant's file and/or provided to the applicant in response to the FOI Application.
20. During telephone conversations between a staff member of this Office and the Commission on 23 June 2009 and 25 June 2009, it was established that:
- the bulk of further documents identified and sought by the applicant had been located
 - those documents were located on the conciliation file which was not considered in the course of processing the FOI Application due to the operation of section 11(1)(pa) of the FOI Act
 - the Commission would give the applicant access to those documents on the conciliation file that were either authored or provided by the applicant
 - the only records or knowledge of the Commission in relation to a 'tribunal decision' was a decision under the *WorkCover Queensland Act 1996* and the reference to the *Workers' Compensation and Rehabilitation Act 2003* in correspondence from the Commission was likely to have been an inadvertent error
 - one document in the schedule comprised correspondence sent by the Commission to a third party in the context of conciliation

- three of the documents in the schedule had not been located, including a document which was created using a software program no longer in use by the Commission and which could not be retrieved.

21. During a further telephone conversation with a staff member of this Office on 6 July 2009, the Commission confirmed that:

- three documents in the schedule could not be found/retrieved
- the remaining documents in the schedule could be provided to the applicant.

22. By letter dated 7 July 2009, the Commission provided the following further documents to the applicant:

- 34 pages from the conciliation file; and
- 14 pages from the assessment file.

In addition, that letter:

- refused access under section 11(1)(pa) of the FOI Act to:
 - a document, described as a letter from the Commission to a doctor dated 5 November 2003; and
 - a document, described in the schedule as a 1 page letter from HRC⁵ to United Medical Protection dated 5 November 2003
- provided details about the documents that could not be located including:
 - an appointment letter dated 25 February 2001 (which the applicant later indicated she had wrongly described); and
 - a referral from a doctor to physiotherapist
- provided details about a letter from the Commission to the applicant dated 8 February 2002 which was retained on a Lotus Notes database, but could no longer be accessed by the Commission.

23. By letter dated 13 July 2009, I wrote to the applicant:

- indicating that as a result of discussions between the Office and the Commission, the Commission had agreed to provide copies of most of the documents to her
- providing details of documents which had not been provided
- providing a view that there is no Medical Assessment Tribunal decision under the *Workers' Compensation and Rehabilitation Act 2003* concerning the applicant
- explaining that due to the operation of section 11(pa) of the FOI Act, the Act does not apply to conciliation documents held by the Commission and indicating that 'as the FOI Act does not apply to conciliation documents, the Commission is able to refuse access to conciliation documents in an FOI application'
- indicating that unless the applicant indicated otherwise by 27 July 2009, I would assume that the information provided by the Commission and in my letter as well as the additional documents provided by the Commission, resolved the issues in the review
- indicating that if the matter was not resolved, the applicant should provide written submissions by 27 July 2009.

24. A staff member of this Office discussed procedural issues in the review during a telephone conversation with the Commission on 16 July 2009.

⁵ The Commission was formerly known as the Health Rights Commission (HRC).

25. By letter dated 15 July 2009, the applicant provided submissions in response to my 13 July 2009 letter stating in summary that she sought access to:
- the remainder of the conciliation file including a letter described by the applicant as a letter to a doctor dated 5 November 2003
 - other documents which had not been provided by the Commission
 - documents relating to a decision of the Medical Assessment Tribunal under the *Workers' Compensation and Rehabilitation Act 2003* concerning the applicant.
26. During a telephone conversation with the Commission on 28 July 2009, a staff member of this Office discussed the applicant's further submissions about documents. The Commission also indicated that:
- it retained only three files in relation to the applicant, these being the assessment file, conciliation file, and a file related to processing her FOI Application; and
 - no other documents were located on the Lotus Notes database.
27. By letter dated 28 July 2009, I wrote to the Commission:
- indicating that the Conciliation Documents would be subject to a formal decision of the Information Commissioner
 - setting out a further five documents which the applicant submitted were in the possession of the Commission and should be provided to her
 - confirming the Commission's submissions in relation to its searches for documents
 - identifying documents requested by the applicant which were likely to be 'post-application' documents under section 25(3) of the FOI Act.
28. By letter dated 10 August 2009, the Commission wrote to me indicating that:
- a further document requested by the applicant (a letter to the applicant dated 14 February 2002) was retained on the Lotus Notes database but could not be retrieved
 - a document entitled Treatment History would be provided to the applicant
 - a remaining three documents had not been located
 - the 'post-application documents' had been provided to the applicant.
29. By letter dated 11 August 2009, the applicant provided me with a copy of a letter she received from the Commission dated 10 August 2009, and her response to that letter. I note from this letter that the Commission had:
- provided a treatment history and 'return to work plan' dated 1 May 2001 to the applicant
 - advised the applicant that the following three documents could not be located: a referral from a doctor to physiotherapist, a doctor's report dated 24 June 2003, and a letter from the Commission to the applicant dated 14 February 2002 which could not be retrieved from the database.
30. The Commission provided this Office with a copy of a letter dated 24 August 2009, which the Commission had sent to the applicant. It is evident from this letter that the Commission had located, and provided to the applicant, the following documents:
- a copy of a letter written by the applicant to the Commission dated 23 September 2003

- the referral letter from a doctor to a physiotherapist dated 2 May 2001
- a 'return to work plan' dated 1 May 2001 which had not been attached as intended to the Commission's letter dated 10 August 2009.

The Commission had also provided the applicant with a copy of a decision of the Medical Assessment Tribunal (which the applicant had provided to the Commission in April 2009).

31. During telephone conversations between a staff member of this Office and the Commission on 2 September 2009 and 3 September 2009, the Commission:
 - clarified the details of some of the documents over which section 11(1)(pa) of the FOI Act was claimed
 - indicated that it had located a further document referred to by the applicant as a letter from a lawyer to WorkCover dated 12 March 2001 which would be provided to the applicant
 - provided submissions relating to the documents which could not be retrieved from the Lotus Notes database.
32. The applicant sent further correspondence to this Office dated 30 August 2009, 7 September 2009, 16 September 2009, 25 September 2009, and a further letter received 28 September 2009⁶. The applicant provided submissions about a further 13 'missing documents' comprising x-rays and doctors' reports which the applicant indicated she had previously provided to the Commission and reiterating that other documents had not been provided (including the first page of a 'return to work letter', the conciliation report, and the doctor's report dated 24 June 2003). The applicant also posed questions in relation to her medical treatment and the investigation by the Commission in relation to her original health care complaint.
33. In late September 2009, this Office:
 - obtained information from Queensland State Archives regarding agency obligations in relation to records retained in electronic form
 - received confirmation from Q-COMP that only 1 decision had ever been made by the Medical Assessment Tribunal in relation to the applicant's claim, that being the decision dated 26 October 2001.
34. In a letter dated 24 September 2009, I wrote to the applicant to clarify the role of the Information Commissioner in relation to the external review and to update the applicant about the progress of the review.
35. During a telephone conversation on 28 September 2009, the Commission provided further information about documents retained in the Lotus Notes database.
36. On 15 October 2009, a staff member of this Office attended the Commission's premises to:
 - review the files containing documents relevant to the applicant's FOI Application
 - discuss the matters remaining in issue.

⁶ The letter received 28 September 2009 is undated, however, it appears from other correspondence that this letter was sent by the applicant on 22 September 2009.

In this process, a number of documents sought by the applicant were located.⁷

37. By letter dated 15 October 2009, the Commission released further documents to the applicant including:
 - the conciliation report dated 15 January 2004
 - the first page of a return to work letter dated 1 May 2001
 - the applicant's letter to the Commission dated 23 September 2003 with attachments (including the 'missing documents' referred to in paragraph 32 above and the doctor's report dated 24 June 2003).
38. During a telephone conversation with a staff member of this Office on 20 October 2009, the Commission provided information about searches undertaken of the Lotus Notes database.
39. This Office received a further letter from the applicant on 21 October 2009, attaching a letter the applicant had received from the Commission dated 12 October 2009.
40. By email dated 29 October 2009, the Commission provided this Office with additional information about searches undertaken of the Lotus Notes database. This information was confirmed during a telephone conversation between the Commission and a staff member of this Office.
41. In response to a request by a staff member of this Office, by email dated 5 November 2009, the Commission provided this Office with information about its document retention and disposal practices, along with a copy of a draft document retention and disposal schedule. This information was confirmed during a telephone conversation between the Commission and a staff member of this Office.
42. In reaching a decision in this external review, I have given consideration to:
 - the FOI Application and Original Decision
 - the Internal Review Application and the Internal Review Decision
 - the External Review Application
 - correspondence received from the applicant dated 22 April 2009, 10 May 2009, 15 July 2009, 11 August 2009, 30 August 2009, 7 September 2009, 16 September 2009, 25 September 2009 and further letters received 28 September 2009 and 21 October 2009 (collectively, the **Applicant's Correspondence**)
 - correspondence from the Commission to this Office dated 28 April 2009, 10 August 2009 and 29 October 2009
 - correspondence from the Commission to the applicant dated 7 July 2009, 10 August 2009, 24 August 2009 and 15 October 2009
 - file notes of telephone conversations with the Commission on 1 May 2009, 18 June 2009, 23 June 2009, 25 June 2009, 6 July 2009, 16 July 2009, 28 July 2009, 2 September 2009, 3 September 2009, 28 September 2009, 20 October 2009, 29 October 2009 and 5 November 2009
 - information obtained during a meeting with the Commission on 15 October 2009
 - information provided by Queensland State Archives
 - facsimile dated 29 September 2009 from Q-COMP enclosing a letter dated 23 April 2009 from Steven Murray, Senior Tribunal Coordinator, Q-COMP to the applicant

⁷ These additional documents were held on the applicant's conciliation file, however, the Commission agreed to release these to the applicant.

- email from the Commission to this Office dated 5 November 2009 attaching a Draft Retention and Disposal Schedule
- the relevant files of the Commission
- the matter in issue
- relevant provisions of the FOI Act and the *Health Rights Commission Act 1991* as referred to in this decision
- relevant decisions of the Information Commissioner as referred to in the decision.

Issues in the review

43. As a result of discussions between this Office and the Commission, having regard to the applicant's submissions, a large number of documents were released to the applicant in the course of the review and are therefore no longer in issue.
44. The applicant seeks access to the following documents:

Description	Referred to as
A letter described as a 1 page letter from the Commission to United Medical Protection dated 5 November 2003 A letter described by the applicant as a letter from the Commission to a doctor dated 5 November 2003 The remaining documents retained on the conciliation file	Conciliation Documents
A second Medical Assessment Tribunal decision made under the <i>Workers' Compensation and Rehabilitation Act 2003</i> , and associated documents	Second MAT Decision
Letter from Commission to applicant dated 8 February 2002 Letter from Commission to applicant dated 14 February 2002	Lotus Notes Documents

45. Throughout the course of the review, the applicant has provided information about the background to her medical condition, expressed her concerns about her dealings with government agencies and doctors, and requested answers to questions relating to her medical treatment. It is evident from the Applicant's Correspondence that her medical treatment and the subsequent inquiries into that treatment have been both difficult and painful for her. I acknowledge the applicant's concerns and can empathise with the difficulties she has experienced. However, as I have explained to the applicant, the role of the Information Commissioner on external review is confined to the powers conferred under the FOI Act. In the circumstances of this review, I have therefore been unable to give consideration to many of the issues raised by the applicant because it is outside the Information Commissioner's jurisdiction to do so.

Findings

46. Section 21 of the FOI Act confers on persons a legally enforceable right to be given access under the FOI Act to documents of an agency and official documents of a Minister. This right of access is subject to other provisions of the FOI Act. In particular, the right of access is subject to Part 1 Division 4 of the FOI Act, which sets out provisions relating to the operation and application of the FOI Act (including section 11(1) of the FOI Act), and section 28A of the FOI Act.

Section 11(1)(pa) of the FOI Act

Relevant Law

47. Subsections 11(1)(pa) and (2) of the FOI Act provide:

11 Act not to apply to certain bodies etc.

(1) *This Act does not apply to -*

(pa) *the Health Quality and Complaints Commission in relation to the conciliation of health service complaints under –*

(i) *the Health Rights Commission Act 1991, part 6; or*

(ii) *the Health Quality and Complaints Commission Act 2006, chapter 6;*

...

(2) *In subsection (1), a reference to an entity in relation to a particular function or activity means that this Act does not apply to the entity in relation to documents received, or brought into existence, by it in performing the function or carrying on the activity.*

48. The *Health Rights Commission Act 1991* was in force at the time the relevant conciliation process was undertaken.

Submissions of participants

Commission

49. In its decision concerning the FOI Application, the Commission indicated to the applicant that due to the operation of section 11(1)(pa) of the FOI Act, the FOI Act does not apply to the conciliation of health service complaints.

50. In the course of this review, the Commission provided the applicant with a number of documents from the conciliation file on the basis that those documents were either authored, or provided to the Commission, by the applicant, or had previously been given to the applicant.

51. The Commission continues to maintain that the remaining Conciliation Documents can not be accessed by the applicant due to the operation of section 11(1)(pa) of the FOI Act.

Applicant

52. The applicant submits, in her letter to this Office of 15 July 2009, that the Commission needs to provide all of the documents in the conciliation file to her, relying on:

- section 6 of the FOI Act which provides that in relation to an access application made under the FOI Act, the fact that a document contains matter relating to the personal affairs of the applicant is an element to be taken into account in deciding whether it is in the public interest to grant access and the effect that the disclosure of the matter might have
- the preamble to the FOI Act which provides that the FOI Act is:

An Act to require information concerning documents held by government to be made available to members of the community, to enable members of the community to obtain access to documents held by government and to enable members of the community to ensure that documents held by the government concerning their personal affairs are accurate, complete, up-to-date and not misleading, and for related purposes.

53. The applicant also explains in her letter to the Commission of 25 August 2009 (a copy of which the applicant provided to this Office) that she does not understand how so many documents are missing or have been destroyed. She goes on to say that the:

Health Rights Commission and Health Quality and Complaints Commission made Decision without all documents which [the applicant] provide to Commissioner ...

Findings of fact and application of the law

54. Under section 11(1)(pa)(i) of the FOI Act, the FOI Act does not apply to documents received, or brought into existence, by the Commission in performing its conciliation functions under part 6 of the *Health Rights Commission Act 1991*.
55. While I acknowledge the applicant's submissions about the purpose of the FOI Act, I also note that the Parliament has seen fit to exclude from the operation of the FOI Act, certain documents received, or brought into existence, by particular agencies in performing certain functions or activities. Documents received, or brought into existence, by the Commission in performing its conciliation functions under part 6 of the *Health Rights Commission Act 1991* is one such function or activity.
56. In this respect, the provisions of part 6 of the *Health Rights Commission Act 1991* (prior to its repeal) are significant. In particular, it is relevant that section 91 of that Act provided that anything said or admitted during conciliation is not admissible as evidence in a proceeding before a court, tribunal or disciplinary body, and can not be used by the commissioner as a ground for investigation or inquiry.
57. The operation of section 11(1)(pa)(i) of the FOI Act means that the FOI Act does not provide a right of access to documents received or brought into existence by the Commission in relation to conciliation under part 6 of the *Health Rights Commission Act 1991*. It does not mean that the Commission does not have these types of documents in its possession, that the documents are missing, or that the documents have been destroyed.
58. In the course of this review, the Commission provided a number of documents to the applicant that had been located on the 'conciliation file' and were either provided by the applicant, or sent to the applicant in the course of the conciliation process. The Commission has taken this approach to facilitate the applicant's access to documents and information which is known to her.
59. In the course of this review, a staff member of this Office attended the Commission's office to review the remaining documents on the conciliation file. At that meeting the Commission indicated that once a matter is assessed as requiring conciliation, a conciliation file is opened. At the time of the relevant conciliation, only a hard copy filing system was used. Whilst a conciliation is in progress, the file is accessible only by the conciliator. The review of the documents in the applicant's conciliation file undertaken by a staff member of this Office confirmed that all documents on the conciliation file were either received or brought into existence by the Commission in performing its conciliation functions.

60. On the basis of the information set out at paragraph 59 above, I am satisfied that the Conciliation Documents were either received, or brought into existence, by the Commission performing its conciliation functions under Part 6 of the *Health Rights Commission Act 1991*.
61. Accordingly, I find that due to the operation of section 11(1)(pa)(i) of the FOI Act, the FOI Act does not apply to the Conciliation Documents.

Section 28A of the FOI Act

62. Section 28A of the FOI Act provides:

28A Refusal of access – document 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.*
- (2) *An agency or Minister may refuse access to a document if –*
- (a) *the agency or Minister is satisfied the document has been or should be in the agency's or Minister's possession; and*
- (b) *all reasonable steps have been taken to find the document but the document can not be found.*

63. In *PDE and University of Queensland (PDE)*⁸ the Information Commissioner discussed sections 28A(1) and 28A(2) of the FOI Act.⁹
64. To be satisfied that a document does not exist under section 28A(1) of the FOI Act, it is necessary for the agency to make an evaluative judgment based on the knowledge and experience of the agency with respect to¹⁰:
- the administrative arrangements of government
 - the agency's structure, 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 exclusively its information management approaches
 - key factors within the FOI application or factors reasonably inferred from any other information supplied by the applicant.
65. If so satisfied, the agency or Minister is not required by the FOI Act to take all reasonable steps to find the document.
66. However, if the agency relies on searches to make a decision under section 28A(1), or makes a decision under section 28A(2) of the FOI Act, the agency must take all reasonable steps to find the document before refusing access. To ensure that all reasonable steps have been taken to locate documents, a decision-maker should make enquiries and undertake searches of all relevant locations, having regard to the key factors listed above.

⁸ Queensland Information Commissioner, Unreported, 9 February 2009.

⁹ See generally 33 – 55.

¹⁰ *PDE* at [37-38]; *Stiller and the Department of Transport* (Information Commissioner Queensland, unreported, 11 February 2009) at [51].

Steps taken to locate documents

67. During a telephone conversation with a staff member of this Office on 28 July 2009, the Commission provided information about the searches conducted to identify documents relating to the FOI Application.
68. I confirmed my understanding of the Commission's submissions by letter dated 28 July 2009, as follows:
- the Commission has three files only in relation to the applicant, these being:
 - the assessment file (or complaint file)
 - the conciliation file
 - the file relating to the applicant's freedom of information application
 - the Commission has conducted searches of these files and of its electronic database for documents relevant to the FOI Application
 - these locations are the only places where material concerning the applicant would be stored.
69. During a meeting with a staff member of this Office on 15 October 2009, the Commission confirmed that only the assessment file and conciliation file would retain information relevant to the FOI Application.
70. In addition, by email dated 29 October 2009 and during a telephone conversation later that day, the Commission confirmed that:
- it had searched the Lotus Notes database under the applicant's case number
 - records would not be located under any other reference number as this was the applicant's only complaint at the time
 - with the exception of the Lotus Notes Documents referred to at paragraph 44 above, all of the documents from the Lotus Notes database (consisting of file notes, stage reports, and other miscellaneous documents relevant to the assessment of the complaint) had been provided to the applicant.

Nonexistent documents

71. In the course of this review, the applicant provided this Office with a copy of a decision of the Medical Assessment Tribunal - Gynaecology made in relation to the applicant on 26 October 2001, under the *WorkCover Queensland Act 2001*.
72. On the basis of comments made by the then Complaints Resolution Director for the Commission in a letter to Dr Bruce Flegg (then leader of the Liberal Party) dated 2 April 2007, the applicant seeks access to a Second MAT Decision and associated documents. Those comments were as follows:

I note that [the applicant] also raises concerns about the decision of the Medical Assessment Tribunal under the Workers' Compensation and Rehabilitation Act 2003 ...

Submissions of participants

Applicant

73. The applicant indicates that she has no knowledge of the Second MAT Decision and is aware only of a decision dated 26 October 2001 of the General Medical Assessment Tribunal Gynaecology under the *WorkCover Queensland Act 1996*.

74. However, the Applicant's Correspondence regarding this issue tends to suggest that the applicant:
- believes she should be provided with copies of documents about the tribunal decision under the *Workers' Compensation and Rehabilitation Act 2003*, or copies of documents which the Complaints Resolution Director was referring to when she wrote the above letter
 - does not accept that the reference to a decision under the *Workers' Compensation and Rehabilitation Act 2003* was inadvertent
 - considers that if the reference was inadvertent, it constitutes false information which has not been corrected.

Commission

75. The Commission has indicated to this Office that:
- it has conducted a search for a Second MAT Decision on files relating to the applicant and it has neither located a copy of it nor found any reference that a decision was made
 - such a decision would only be in its possession if it were provided by the applicant (as there is no other basis on which the Medical Assessment Tribunal itself would provide a copy to the Commission)
 - the Complaints Resolution Director is no longer with the Commission and so the Commission has not been able to ask her about her reference to the Second MAT Decision.
76. The Commission suggests that the Complaints Resolution Director made a mistake in her description in the letter to Dr Flegg and the decision she was in fact referring to was the one made on 26 October 2001. The Commission has indicated that:
- the *Workers' Compensation and Rehabilitation Act 2003* replaced the *WorkCover Queensland Act 1996* in 2003
 - the Complaints Resolution Director worked for the Commission after 2003 and so was used to referring to the *Workers' Compensation and Rehabilitation Act 2003*, and the Medical Assessment Tribunal
 - it is of the view that the reference to the *Workers' Compensation and Rehabilitation Act 2003* was an inadvertent error and there is no Second MAT Decision.

Other relevant information

77. Under section 83(2) of the FOI Act, the Information Commissioner may, for the purposes of a review, obtain information from such persons and make such inquiries, as the Information Commissioner considers appropriate.
78. Accordingly, in the course of this review, I sought clarification from Q-COMP as to whether the Medical Assessment Tribunal had made any decision, apart from the decision dated 26 October 2001, with respect to the applicant.
79. By facsimile dated 29 September 2009, Q-COMP provided me with a copy of a letter sent to the applicant on 23 April 2009 which indicated:
- the reference to a decision of the Medical Assessment Tribunal under the *Workers' Compensation and Rehabilitation Act 2003* is an error

- only 1 decision has been made by the Medical Assessment Tribunal in respect of the applicant's claim, being the decision dated 26 October 2001.

Findings of fact and application of the law

80. Where an agency is satisfied under section 28A(1) of the FOI Act that a document does not exist (as set out in paragraph 64 - 66 above) it is not necessary for an agency to take all reasonable steps to find the document. However, if the agency does rely on searches to establish that a document does not exist, the agency must take all reasonable steps to find the document.
81. The Commission has indicated that:
- it searched for a Second MAT Decision on files retained by the Commission relating to the applicant
 - these are the only places where documents relating to the applicant would be located
 - such a decision would only be in its possession if it were provided by the applicant
 - the Commission has been unable to locate a Second MAT Decision.
82. The applicant also indicates that she is unaware of a second decision.
83. In any event, Q-COMP has confirmed that the Medical Assessment Tribunal has made only 1 decision with respect to the applicant's claim (the decision dated 26 October 2001) and that there is no Second MAT Decision.
84. In view of the above, I find that access to the Second MAT Decision and related documents may be refused under section 28A(1) of the FOI Act on the basis that there are reasonable grounds to be satisfied that the documents do not exist because they were not created.

Unlocatable documents

85. The applicant also seeks access to the Lotus Notes Documents.

Submissions of participants

Applicant

86. In her letter dated 10 May 2009, the applicant indicated that the following documents were still 'missing' from the documents provided to her:
- letter from Commission to applicant dated 8 February 2002
 - letter from Commission to applicant dated 14 February 2002.

87. As noted in paragraph 44, I have referred to these documents as the Lotus Notes Documents.

Commission

88. In relation to the Lotus Notes Documents, the Commission submits in summary:
- the documents were created using the Lotus Notes software program

- the Lotus Notes program is no longer used by the Commission and no copies of Lotus Notes exist in the Commission
- the Lotus Notes Documents can not be read by any contemporary program and exist only as a notation
- there is no 'electronic version' of the Lotus Notes Documents, but simply a record that the documents existed
- the Lotus Notes Documents are a different type of document to those documents which have been provided to the applicant from the Lotus Notes database because the Lotus Notes Documents were created as an 'attachment' rather than being typed directly on to the screen page
- the Commission has been unable to locate any hard copies of the Lotus Notes Documents.

Findings of fact and application of the law

89. Under section 28A(2) of the FOI Act, an agency may refuse access to a document if:
- the agency is satisfied the document has been or should be in the agency's possession; and
 - all reasonable steps have been taken to find the document but the document can not be found.
90. I am satisfied that the Lotus Notes Documents have been in the Commission's possession.
91. To be satisfied that all reasonable steps have been taken to locate documents, a decision-maker should make enquiries and undertake searches of all relevant locations, having regard to the key factors noted in paragraph 64.
92. I have considered and accept the Commission's submissions at paragraph 88 above. The Commission indicates it is not possible to access the Lotus Notes Documents from the database as the documents themselves are no longer retained on the system. What remains is simply a record of the documents having been made. The Commission has also searched for but has been unable to locate hard copy versions of the Lotus Notes Documents.
93. In an email dated 24 September 2009, in response to my enquiry, Ruth Nitkiewicz, Senior Appraisal Archivist, Agency Services, Queensland State Archives indicated that:
- Public authorities are required to create and keep full and accurate records "for as long as they are required for business, legislative, accountability and cultural purposes" under principle 7 of Information Standard 40: Recordkeeping (IS40). IS40 is issued by the State Archivist under s.25 of the Public Records Act 2002, and is a mandatory standard for all public authorities.*
- Under principle 7 of IS40, all public records, regardless of format, must be accessible and useable.*
94. Under the *Public Records Act 2002* (Qld),¹¹ a person must not dispose of a public record unless the record is disposed of under an authority given by the archivist or other legal authority, justification or excuse.

¹¹ Section 13.

95. In an email on 5 November 2009, the Commission indicates that neither it nor the predecessor Health Rights Commission has/had an approved retention and disposal schedule, though the Commission is currently in the process of consulting with State Archives on this and provided our Office with a copy of a draft schedule. The Commission also indicates that although it is entitled to conform to the General Retention and Disposal Schedule, published by State Archives (**General Schedule**), the policy of the agency is, in the absence of an agency specific retention and disposal schedule, to not dispose of any documents.
96. The applicant was provided with many documents held on the Lotus Notes database, notwithstanding that this database is no longer used by the Commission. By email dated 29 October 2009, the Commission indicated that the applicant's case number was used to search the database. The Commission provided a list of documents generated by the search, indicating that all documents except the Lotus Notes Documents had been provided to the applicant. In view of the documents provided to the applicant and the Commission's policy of not disposing of any documents, (even if disposal is permitted under the General Schedule), it appears that non-retention of the Lotus Notes Documents in either electronic or hard copy form was no more than an inadvertent oversight.
97. As indicated at paragraph 90 above, I find that the Lotus Notes Documents have been in the Commission's possession, as evidenced by the record in the Lotus Notes database. Taking into account the Commission's electronic searches and searches of the applicant's complaint file, I am satisfied that the Commission has taken all reasonable steps to locate the Lotus Notes Documents, but they cannot be located.
98. Accordingly, I find that access to the Lotus Notes Documents may be refused under section 28A(2) of the FOI Act.

DECISION

99. Accordingly, I vary the decision under review by finding that:
- the FOI Act does not apply to the Conciliation Documents under section 11(1)(pa)(i) of the FOI Act
 - access to a Second MAT Decision and related documents may be refused under section 28A(1) of the FOI Act on the basis that such documents do not exist
 - access to the Lotus Notes Documents may be refused under section 28A(2) of the FOI Act.
100. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

Suzette Jefferies
Acting Assistant Commissioner

Date: 9 November 2009