



Decision and Reasons for Decision

Application Number: 210698

Applicant: Mr D Miranda

Respondent: Public Service Commission

Decision Date: 8 October 2009

Catchwords: **ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – REFUSAL OF ACCESS – applicant sought access to documents relating to his former employment – some documents provided – whether there are reasonable grounds for the agency to be satisfied additional documents do not exist – whether agency has taken all reasonable steps to locate additional documents – whether agency can refuse access to the documents sought under section 28A(1) of the *Freedom of Information Act 1992* (Qld)**

Contents

REASONS FOR DECISION	2
Summary	2
Background.....	2
Steps taken in the external review process	2
Decision under review	4
Section 28A of the FOI Act.....	5
The applicant’s submissions.....	6
The PSC’s submissions.....	6
Direction to Act.....	6
Correspondence and Meeting Documents	7
Searches	7
OWH&S Documents.....	8
Findings and application of the law.....	9
Direction to Act.....	9
Correspondence and Meeting Documents	9
Did the PSC take all reasonable steps to locate documents responding to the FOI Application?.....	9
OWH&S Documents.....	10
DECISION	10

REASONS FOR DECISION

Summary

1. In this external review the applicant seeks access to documents which the Public Service Commission (**PSC**) contends do not exist.
2. Having considered the parties' submissions and evidence, relevant legislation, and previous decisions of the Information Commissioner, I am satisfied that the PSC is entitled to refuse access to the documents sought by the applicant under section 28A(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**).

Background

3. By letter dated 29 July 2008 (**FOI Application**) Carne Reidy Herd Lawyers made an FOI Application to the PSC on behalf of the applicant, seeking access to all documents within the possession of the PSC relating to the applicant and his employment with the Queensland Public Service, including specified types of documents.
4. By letter dated 30 September 2008 (**Original Decision**) Mr Brian Carroll, Executive Director, PSC, advised the applicant:
 - that the PSC had identified 12 folios responding to the FOI Application
 - of the PSC's decision to release all 12 folios.
5. By letter dated 30 October 2008 (**Internal Review Application**) Carne Reidy Herd Lawyers sought internal review of the Original Decision on behalf of the applicant.
6. By letter dated 8 December 2008 Mr Gary Barnes, Executive Director, PSC sought to affirm the Original Decision, stating:

My search indicates that these documents are not held by the Public Service Commission.
7. By email dated 4 January 2009 (**External Review Application**) the applicant sought external review by the Information Commissioner.

Steps taken in the external review process

8. By letter dated 13 January 2009 I informed the applicant that the External Review Application had been accepted and asked the applicant to provide submissions in relation to each of the categories of documents he contended had not been provided to him by the PSC.
9. By letter dated 13 January 2009 I notified the PSC that the External Review Application had been accepted and asked the PSC to provide additional information about its decision and the searches undertaken to locate the requested documents.
10. On 16 January 2009 a staff member of the Office of the Information Commissioner (**OIC**) received a call from the applicant who indicated that he wanted to know the basis for the PSC's refusal to grant him access to the documents and why the PSC did not hold the relevant documents.
11. By letter dated 19 January 2009 the PSC provided written submissions regarding its search processes and enquiries.

12. On 21 January 2009 a staff member of the OIC telephoned the applicant to discuss this and the applicant's other external reviews. The applicant confirmed that his External Review Application concerned sufficiency of search matters and made submissions on why he believed further documents existed but had not been located by the PSC.
13. On 20 April 2009 a staff member of the OIC telephoned the applicant to communicate a preliminary view in relation to three of the applicant's external review matters. However, the applicant indicated to the OIC staff member that he would need to make an appointment for the staff member to speak with him. The OIC staff member requested a meeting time. The applicant declined to make a time and indicated he would get back to the staff member at a later date. However, the applicant did not subsequently contact the staff member to make a time to discuss the reviews.
14. On 12 May 2009 the applicant telephoned to obtain an update on the progress on his external review applications. A staff member of the OIC discussed the reviews and their progress with the applicant.
15. Later on 12 May 2009 the applicant emailed the OIC to:

express (his) concern at the inordinate amount of time that has been taken to progress (his) review applications.
16. On 15 May 2009 I provided the applicant with a written update on the progress of three external reviews concerning him and provided an opportunity for him to forward submissions in relation to two other external review applications received from the applicant.
17. In an email to the Information Commissioner dated 16 May 2009 the applicant indicated that he had not received an update on his applications for external review and expressed concern that he was "*not being afforded access to a fair, objective, ad transparent review process*".
18. On 18 May 2009 I forwarded electronic copies of my letter of 15 May 2009 to the applicant.
19. Shortly after receiving my letter of 15 May 2009, the applicant emailed the Information Commissioner to make a complaint of maladministration in relation to my letter of 15 May 2009 and the handling of his external review applications by staff of the OIC. In particular, the applicant expressed concern that I had:

not observed (the) ethical obligation not to supply protracted and onerous explanations in order to demonstrate a veneer of objectivity and fairness.
20. By email dated 19 May 2009 the Information Commissioner responded to the applicant's complaint.
21. By email dated 21 May 2009 the applicant made further allegations of maladministration by staff of the OIC and disputed statements made by the Information Commissioner in the email above. The applicant asked the Information Commissioner to expedite his applications for external review and asked that he be provided with written preliminary views in relation to each of his applications.
22. On 24 August 2009 a staff member of the OIC called the PSC to clarify issues concerning its role and functions, and made further inquiries regarding meeting notes sought by the applicant.

23. In a telephone discussion on 25 August 2009 the PSC made further submissions regarding one of the documents sought by the applicant (Direction to Act).
24. By letter dated 25 August 2009 I conveyed my preliminary view on the issues in this review to the applicant.
25. By email dated 7 September 2009 the applicant indicated that he did not accept the preliminary view.
26. 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 letter dated 8 December 2008 from Mr Gary Barnes, Executive Director, PSC to the applicant
 - submissions made by the applicant during telephone discussions with staff of the OIC on 21 January 2009
 - written submissions made by the PSC dated 19 January 2009
 - submissions made by the PSC during telephone discussions with staff of the OIC dated 24 and 25 August 2009
 - relevant provisions of the FOI Act as referred to in this decision
 - decisions of the Information Commissioner as referred to in this decision.

Decision under review

27. 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.
28. A decision on internal review was to be notified to the applicant on or around 28 November 2008.¹ Mr Barnes' letter is dated 8 December 2008 and appears to have been sent to the applicant by post either on or after this date.
29. As the applicant was not notified of the internal review decision within the statutory time frame, the PSC's principal officer is taken to have affirmed the Original Decision, and on this basis, the deemed affirmation of the Original Decision is the decision under review. However, I have treated Mr Barnes' letter of 8 December 2008 as if it were submissions received from the PSC, for the purpose of this review.

Issue in the review

30. The applicant contends that the PSC has not provided him with three categories of documents sought in his FOI Application.
31. The PSC contends that the documents in Category 1 and 2 do not exist because they were never created and documents in Category 3 were never received by the PSC.
32. The issue to be determined in this review is whether there are reasonable grounds for the PSC to be satisfied that the three categories of documents do not exist (as documents of the PSC) and accordingly, whether access can be refused under section 28A(1) of the FOI Act.

¹ Depending on the date on which the internal review application was received.

Relevant law

33. 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) to the matter in issue.⁴

Section 28A of the FOI Act

34. 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

35. In *PDE and the University of Queensland*⁵ (*PDE*) the Information Commissioner indicates that:⁶

*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.*

36. Section 28A(1) is silent on the issue of how an agency is to satisfy itself that a document does not exist. In *PDE* the Information Commissioner also considered how an agency was to satisfy itself as to the non-existence of documents under section 28A(1) of the FOI Act and indicated that it is necessary for the agency to rely on 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

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.

⁵ (Unreported, Queensland Information Commissioner, 9 February 2009).

⁶ At paragraph 34.

- the nature of the government activity the request relates to.
37. When proper consideration is given to the key factors discussed 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.⁷
38. In applying section 28A(1) of the FOI Act it is relevant to ask first whether there are reasonable grounds for the agency to be satisfied that the requested documents do not exist. Then, if the agency has used searches to satisfy itself that the additional documents sought do not exist, it is necessary to consider whether the agency has taken all reasonable steps to find the documents sought.

The applicant's submissions

39. In his Internal Review Application the applicant states that the following documents were missing from those provided to him:
- *“documents which indicate that Commissioner Purtill directed Brian Carroll to act on his behalf in responding to the applicant's letter dated 24 October 2007” (Direction to Act) and “correspondence between Mr Purtill and Mr Carroll regarding the applicant” (Correspondence)*
 - *“records, including meeting notes of meetings held on 7 November 2007 between Ms J Hunter of the former Department of Employment and Industrial Relations (DEIR), Mr S Woods (DEIR), Ms J Saleh (PSC) and Ms C Fraser (PSC)” (Meeting Documents)*
 - *“any documents that detail the nature of organisational change within the Office of Workplace Health and Safety which resulted in the applicant's substantive position being declared surplus to departmental requirements” (OWH&S Documents).*
40. The applicant indicates generally in his External Review Application that the internal review decision fails to specify a basis for refusal under the FOI Act.
41. In a telephone discussion with an OIC staff member on 21 January 2009 the applicant submitted that the:
- seemingly rushed nature of the internal review decision
 - fact that documents had been located by other agencies
 - inconsistencies between the decision making processes of different agencies
- founded his belief that further documents existed.

The PSC's submissions

Direction to Act

42. By letter dated 19 January 2009, Mr Barnes stated that, in relation to the Direction to Act:
- Additional documents do not exist because they were never created.*
43. In response to further enquiries from this Office Ms Michelle Hartog, RTI Officer, sought further information from Mr Carroll who indicated that:

⁷ See PDE.

- the PSC administers the *Public Service Act 2008 (Qld)*,⁸ *Public Sector Ethics Act 1994 (Qld)* and the *Whistleblowers Protection Act 1994 (Qld)*
- the applicant's letter of 24 October 2007 addressed to Commissioner Purtill sought further information about his registration for deployment
- as an Executive Director, Mr Carroll acted on a formal delegation to undertake duties of the Commissioner at his request
- it was "common practice" to respond to correspondence of this nature on the Commissioner's behalf, when the Commissioner asked him to do so
- Mr Carroll recalls a discussion with the Commissioner in which he was asked to respond to the applicant's letter of 24 October 2007, however there was no written instruction provided.

Correspondence and Meeting Documents

44. In relation to this issue, the PSC submits⁹ that additional documents do not exist because they were not created.

Searches

45. By letter dated 19 January 2009 the PSC responded to enquiries from the OIC requesting submissions regarding the searches undertaken by the PSC to locate documents responding to the FOI Application. The PSC set out the searches undertaken to locate the relevant documents, including the Correspondence and Meeting Documents. The PSC submits that the initial search commenced 9 September 2008 and encompassed:

Record systems

Concord Record System (CRS)

CRS is the records management system used by the PSC to store hard copy files.

"N" Drive

This is the network drive on which agency documents are saved.

Appeals Registry database

The Appeals Registry database holds information regarding appeals cases lodged.

Correspondence Tracking System (CTS)

The CTS is a metadata system which records correspondence sent and received by the PSC.

Searches

The PSC undertook an electronic catalogue search to identify relevant files. Each of the files identified was subject to a manual search for documents responding to the FOI Application.

The PSC performed an electronic search of the network drive for documents responding to the FOI Application.

The PSC performed an electronic search of the database for documents responding to the FOI Application.

The PSC performed an electronic search of the CTS for documents responding to the FOI Application.

⁸ Effective 1 July 2008, previously the *Public Service Act 1996 (Qld)* (**PSA**).

⁹ In the letter of 19 January 2009.

46. The PSC also submits that consultations were undertaken with the following staff to assist in locating relevant documents:
- Jeff Loof, Director, Executive Management
 - Alan Simpson, Director, Information
 - Carolyn Fraser, Director, Merit Protection and Integrity
 - David Brennan, Director, Leadership Capability
 - David Douglas, Executive Director, Executive Management..
47. On receiving the Internal Review Application, the PSC submits that it conducted fresh searches of all of the record systems identified at paragraph 45 above. No further documents were located.
48. The PSC submits that it also undertook a second round of consultation with officers of the PSC to assist in locating documents, including:
- Bruce Wilson, Commission Chief Executive
 - Annette Bastaja, Executive Director, Corporate and Communication
 - Tony Hayes, Deputy Chief Executive
 - Jeff Loof, Director, Executive Management
 - Ben Dalton, Team Leader, Workforce Policy
 - Alan Simpson, Director, Information
 - Carolyn Fraser, Director, Merit Protection and Integrity
 - Kathy Corbiere, Team Leader, Leadership Capability
 - Melanie Widmer, Team Leader, Communication
 - Payul Sheehy, Team Leader, Strategic Directions
 - Kelly Weekley, Team Leader, Graduate Program
 - David Douglas, Executive Director, Executive Management
 - Brian Carroll, Executive Director.

No further documents were located.

Personal notebooks

49. The applicant identified two PSC officers, Ms Saleh and Ms Fraser, as attendees of the meeting on 7 November 2007. The PSC consulted with Ms Fraser both at the time of the initial search and the internal review search. The PSC indicated that Ms Saleh was not at the PSC at this time and was therefore unavailable for consultation. However, the PSC undertook a manual search of both officers' personal notebooks for the relevant time period.
50. No relevant documents were located.

OWH&S Documents

51. In relation to this issue, the PSC submits¹⁰ that additional documents do not exist because they were never received.
52. The PSC indicates that its role is to assist and support Queensland government agencies to deliver high quality services to Queenslanders. In response to further enquiries from the OIC regarding the circumstances in which the PSC receives documents from other agencies, Ms Hartog, FOI Officer, PSC, contacted Ms Fraser, who, as I have previously indicated, attended the meeting of 7 November 2007. Responding to those enquiries, Ms Fraser indicated that:
- the nature and quantity of information provided by agencies varies on a case by case basis

¹⁰ By letter dated 19 January 2009.

- the PSC only retains copies of information it requires to support agencies and provide advice
- the PSC would not require internal documents "describing the nature of organisational change" in order to provide advice
- in relation to the meeting of 7 November 2007, Ms Fraser recalls that the DEIR did not provide any OWH&S Documents to the PSC.

Findings and application of the law

Direction to Act

53. Having regard to the PSC's submissions at paragraphs 42 and 43 above, I am satisfied that:
- it was ordinary practice for a PSC Executive Director to act on their formal delegation and undertake tasks as assigned by the Public Service Commissioner
 - in this instance, the Public Service Commissioner verbally assigned the task of responding to the applicant's letter of 24 October 2008 to Mr Carroll
 - the Commissioner did not issue a written direction to the Executive Director to support his verbal instructions to respond to the applicant's letter.
54. Accordingly, I am satisfied that there are reasonable grounds for the PSC to be satisfied that a Direction to Act does not exist, and the PSC is entitled to refuse access under section 28A(1) of the FOI Act.

Correspondence and Meeting Documents

55. I acknowledge the applicant's submissions that:
- the Commissioner and his Executive Director might be likely to correspond in writing about matters being considered by the PSC
 - PSC officers might take notes at a meeting in which they provide advice to staff of another agency.
56. I note that 12 documents were identified in the Original Decision and provided to the applicant by the PSC. The documents included file notes of 28 October 2007 and 7 November 2007 (**File Note**). The File Note is a record of dialogue between the PSC and DEIR, including a notation about the "outcome of meeting" which stated:
- ... were advised that Registration for service wide deployment would not be considered practicable given Darin's unresolved behavioural issues. The expectation is that DEIR would be required to manage these issues.*
57. The notation above appears to bring finality to the dialogue between the PSC and DEIR. The PSC has also used searches to support its conclusion that the further Correspondence and Meeting Documents do not exist. In this instance, it is therefore also relevant to ask whether the agency has taken all reasonable steps to find the documents sought.

Did the PSC take all reasonable steps to locate documents responding to the FOI Application?

58. I am satisfied that the answer to this question is yes. I accept the PSC's submissions at paragraphs 45 to 50 regarding the search and inquiry process undertaken in response to the FOI Application and the Internal Review Application and am satisfied that:

- the PSC identified the locations and systems from which relevant documents could be identified and/or retrieved and conducted appropriate searches
- the PSC identified and consulted relevant personnel who would be expected to have knowledge of documents responding to the FOI Application
- the PSC has taken all reasonable steps to find documents responding to the FOI Application, including the Correspondence and Meeting Documents.

59. Accordingly, I find that:

- there are reasonable grounds for the PSC to be satisfied that the Correspondence and Meeting Documents do not exist
- access to the Correspondence and Meeting Documents can be refused under section 28A(1) of the FOI Act.

OWH&S Documents

60. I accept the PSC's submissions at paragraph 52 above, noting in particular that:

- the PSC only retains copies of information it requires to support agencies and provide advice
- the PSC would not require internal documents of the type sought in order to provide advice
- in relation to the meeting on 7 November 2007 Ms Fraser specifically recalls that the DEIR did not provide any OWH&S Documents to the PSC.

61. In view of the above, I am satisfied that there are reasonable grounds for the PSC to be satisfied that OWH&S Documents do not exist, and access to OWH&S Documents can be refused under section 28A(1) of the FOI Act.

DECISION

62. I affirm the decision under review by finding that the PSC was entitled to refuse access to the documents sought in the FOI Application under section 28A(1) of the FOI Act on the basis that the documents sought do not exist.

63. 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: 8 October 2009