



Decision and Reasons for Decision

Application Number: 210700

Applicant: Mr P Minogue

Respondent: Department of Health

Decision Date: 24 June 2009

Catchwords: ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – QUEENSLAND – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER AFFECTING PERSONAL AFFAIRS – applicant sought access to parts of response to a grievance - whether disclosure of the matter in issue would disclose information concerning personal affairs – whether disclosure of the matter in issue would, on balance, be in the public interest – whether matter exempt under section 44(1) of the *Freedom of Information Act 1992* (Qld)

ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – QUEENSLAND – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER CONCERNING CERTAIN OPERATIONS OF AGENCIES – applicant sought access to a file note of a conversation about performance appraisal – whether disclosure of the matter in issue would have a substantial adverse effect on the management or assessment of the Department of Health of its personnel – whether matter exempt under section 40(c) of the *Freedom of Information Act 1992* (Qld)

ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – QUEENSLAND – REFUSAL OF ACCESS – DOCUMENT NONEXISTENT OR UNLOCATABLE – applicant contends further emails and computer files exist – whether Department of Health has reasonable grounds to be satisfied that documents do not exist or cannot be located – whether documents can be refused under section 28A(2) of the *Freedom of Information Act 1992* (Qld)

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REASONS FOR DECISION

Summary

1. I am satisfied that:

- the matter remaining in issue in this review is exempt from disclosure under section 44(1) or 40(c) of the *Freedom of Information Act (1992)* (Qld) (**FOI Act**)
- QH is entitled to refuse access to relevant documents under section 28A(2) of the FOI Act on the basis that all reasonable steps have been taken to find the documents but the documents cannot be located.

Background

2. By application dated 18 July 2008 the applicant applied to the Department of Health, also known as Queensland Health, (**QH**) for access to:

*Personnel files, Human Resource files, Department held files
Payroll number [.....].*

3. On 5 December 2008, Ms Reinberger, Senior Health Information Manager, decided to:

- release 84 folios
- refuse access to some information contained in file notes under section 27(3) of the FOI Act on the basis that it was not relevant to the applicant's application
- refuse access to one document (5 folios) under sections 44(1) and 40(c) of the FOI Act (**Original Decision**).

4. By letter dated 15 December 2009, the applicant:

- applied for internal review of QH's decision
- made submissions regarding the exemptions relied on by QH
- questioned the matter deleted from file notes as irrelevant
- requested further searches for documents the applicant believed should have been located (**Internal Review Application**).

5. By letter dated 18 December 2008, Ms Bonner, Internal Review Officer, advised that she had decided to affirm the Original Decision (**Internal Review Decision**).¹

6. By application forms dated 29 December 2009, the applicant applied under Part 5 of the FOI Act for external review of the Internal Review Decision and provided submissions in support of his case (**External Review Application**). Although the applicant made two separate applications, all relevant issues are considered in this one external review.

¹ On 18 December 2008, Ms Reinberger also provided the applicant with a response to his request for further searches and a review of matter deleted as irrelevant. As an internal review cannot be conducted by the Original Decision maker (see Section 60(4) of the FOI Act), technically, no internal review decision was made in respect of these issues. Accordingly, QH is deemed to have refused the applicant's application for internal review of these matters and the issues are dealt with in this external review on that basis.

Decision under review

7. The decision under review is the Internal Review Decision referred to in paragraph 5 above.

Steps taken in the external review process

8. QH provided the matter which is claimed to be exempt on 12 January 2009, and by letters dated 14 January 2009 I advised both the applicant and QH that the External Review Application had been accepted.
9. QH provided further information about the matter claimed to be exempt and the searches it performed to locate documents responding to the FOI Application to a staff member of the Office in:
 - telephone conversations on 16 and 19 January 2009 and 1 April 2009
 - two emails dated 29 January 2009.
10. By letter dated 2 February 2009, the applicant made submissions regarding the further documents he contends should exist. On 5 February 2009 a staff member of this Office confirmed by telephone that the issues raised by the applicant would be dealt with on external review.
11. By letter dated 8 April 2009, I advised QH of the preliminary view that:
 - parts of the documents in issue were exempt from disclosure under section 44(1) of the FOI Act but the remainder of the documents were not exempt from disclosure
 - parts of the matter deleted as irrelevant under section 27(3) of the FOI Act are relevant to the applicant's application
 - QH was entitled to refuse access to documents under section 28A(2) of the FOI Act on the basis that all reasonable steps to find further relevant documents had been undertaken and the documents could not be located.
12. By letter dated 5 May 2009, QH advised that it:
 - accepted the preliminary view
 - was prepared to release most of the matter it had previously deleted as irrelevant
 - claimed that one file note deleted as irrelevant was exempt from disclosure under section 40(c) of the FOI Act.
13. By letter dated 13 May 2009, I advised the applicant of the preliminary view that:
 - the matter remaining in issue qualified for exemption from disclosure under sections 44(1) and 40(c) of the FOI Act
 - QH was entitled to refuse access to relevant documents under section 28A(2) of the FOI Act on the basis that all reasonable steps had been taken to find those documents and the documents could not be located.
14. By letter dated 25 May 2009, the applicant responded to the preliminary view and provided submissions and further documentation in support of his case.
15. In a telephone conversation on 16 June 2009, QH made further submissions in respect of further documents which the applicant claimed should exist.

16. In making this decision, I have taken the following into account:

- the FOI Application, Internal Review Application and External Review Application
- the Original Decision and Internal Review Decision
- the response provided by Ms Reinberger dated 18 December 2009
- file notes of telephone conversations between QH and a staff member of the Office on 16 and 19 January 2009 and 1 April 2009
- two emails from QH dated 29 January 2009
- QH's letter dated 5 May 2009
- the applicant's letters dated 2 February 2009 and 25 May 2009
- file note of telephone conversation between the applicant and a staff member of the Office on 28 May 2009 and 22 June 2009
- relevant provisions of the FOI Act as referred to in this decision
- relevant decisions of this Office as referred to in this decision.

Matter in issue

17. The matter remaining in issue in this review comprises:

- parts of a document (5 folios) authored by Ms E Bain, which comprise a response to a grievance lodged by the applicant (**Response Matter**) which is claimed to be exempt under section 44(1) of the FOI Act
- a file note of a conversation which occurred on 5 July 2008 (**File Note**) which is claimed to be exempt under section 40(c) of the FOI Act.

18. The other issue for determination in this review is whether access to documents can be refused under section 28A(2) of the FOI Act on the basis that QH has performed all reasonable searches for documents the applicant says should exist, but the documents cannot be found.

Findings

Section 44(1) of the FOI Act – Response Matter

19. Section 44(1) of the FOI Act provides that:

44 Matter affecting personal affairs

- (1) *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

20. There are two elements to the test for whether particular information is exempt under section 44(1) of the FOI Act. The two elements are:

- whether the information in issue concerns the “personal affairs of a person;” and if it does
- whether disclosure of that information would, on balance, be in the public interest. This involves weighing the strengths of identified public interest considerations favouring disclosure against the strengths of identified public interest considerations favouring non-disclosure.

21. I will consider each element of the test below.

Does the Response Matter concern personal affairs?

22. Information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life and while there may be a substantial grey area within the ambit of the phrase "personal affairs",² that phrase has a well accepted core meaning which includes:
- family and marital relationships
 - health or ill health
 - relationships and emotional ties with other people
 - domestic responsibilities or financial obligations.
23. However, in *Stewart*, the Information Commissioner also decided that ordinarily, information which concerns an individual's work performance, or other work related matters does not concern a person's personal affairs.³ Whether or not matter contained in a document comprises information concerning an individual's personal affairs is a question of fact to be determined according to the proper characterisation of that information.
24. The Response Matter forms part of a letter authored by Ms Bain, a Human Resources Manager, in response to a grievance lodged by the applicant which concerned Ms Bain. Apart from the Response Matter, the remainder of the response has been provided to the applicant.
25. The Response Matter comprises personal comments made by Ms Bain regarding:
- how the grievance affected her
 - her feelings about the way in which the grievance was lodged.
26. While this information forms part of Ms Bain's response to the relevant grievance, I am satisfied that it:
- concerns neither the applicant's nor Ms Bain's performance of work duties
 - purely records Ms Bain's emotional responses and feelings.
27. The applicant does not contend that the Response Matter does not concern Ms Bain's personal affairs and I am satisfied that the Response Matter is properly characterised as concerning Ms Bain's personal affairs.

Public Interest Test

28. The way in which section 44(1) of the FOI Act is worded means that where matter concerns personal affairs of a person other than the applicant, the matter is, prima facie, exempt from disclosure. This means that it is only where disclosure of the information is, on balance, in the public interest that the information will not be exempt from disclosure under section 44(1) of the FOI Act.

² *Stewart and Department of Transport* (1993) 1 QAR 227 (*Stewart*).

³ *Stewart* at paragraphs 91-102.

Applicant's submissions

29. The applicant submits⁴ that:
- procedural fairness requires that the whole of Ms Bain's response be provided to him as part of the grievance process
 - Ms Bain would have been aware that her full response should be disclosed to the applicant
 - the full response was offered to him at a meeting on 10 July 2008, but that offer was subsequently retracted
 - as the Response Matter consists purely of Ms Bain's feelings, QH will suffer no detriment to its integrity if the Response Matter is released.

Analysis

30. After careful consideration of these submissions, I find that the following public interest considerations favouring disclosure are relevant in the circumstances:⁵
- improved transparency and understanding of how QH dealt with the grievance
 - allowing a government employee to access adverse comments made about them at work (procedural fairness).
31. However, after extensive consideration of these issues, it is my view that disclosure of the Response Matter will not further these public interest considerations as:
- release will not lead to greater understanding of any government decision making or disciplinary process in respect of the grievance, as the content of the Response Matter is limited to Ms Bain's emotional responses and feelings related to the lodging of the grievance
 - Ms Bain's comments which comprise the Response Matter do not relate to the applicant's work performance
 - denying access to Ms Bain's comments about her emotional responses and feelings does not amount to a denial of procedural fairness to the applicant given that the remainder of Ms Bain's response to the grievance has been released to the applicant.
32. On the basis of the matters set out above, I consider that the two public interest considerations identified above should be afforded little or no weight in the circumstances.
33. Against the public interest considerations favouring disclosure, I must balance the weight of privacy interests attaching to the relevant information (that is, any public interest considerations which favour non-disclosure of the Response Matter).
34. The applicant submits that releasing the Response Matter will not cause any detriment to QH as it only records Ms Bain's feelings about the grievance.

⁴ In his letter dated 25 May 2009.

⁵ These considerations are generally regarded as favouring disclosure.

35. In this respect, I note that the FOI Act specifically recognises⁶ the public interest in protecting an individual's private affairs.
36. As the Response Matter records personal emotional responses and on the basis of the matters set out above, I consider that the strength of the privacy interest in this information is significant in the circumstances.
37. Given my view that release of the Response Matter will not lead to greater understanding of QH process and the strength of the relevant privacy interest, on balance, I am satisfied that:
- the public interest considerations favouring disclosure do not outweigh the public interest considerations favouring non-disclosure of the Response Matter
 - the Response Matter is exempt from disclosure under section 44(1) of the FOI Act.

Section 40(c) of the FOI Act – File Note

38. Section 40(c) of the FOI Act provides that:

40 Matter concerning certain operations of agencies

Matter is exempt matter if its disclosure could reasonably be expected to –

...

(c) *have a substantial adverse effect on the management or assessment by an agency of the agency's personnel;*

...

unless its disclosure would, on balance, be in the public interest.

39. For the File Note to qualify for exemption under section 40(c) of the FOI Act, QH must establish that disclosure of the File Note could reasonably be expected to have a substantial adverse effect on QH's personnel management. If this is established, the File Note is prima-facie exempt from disclosure unless disclosure is, on balance, in the public interest.
40. I will consider each of the elements to the test for exemption below.

Is the File Note part of QH's management or assessment of its personnel?

41. The File Note is titled '*PA&D Conversation with [a third party]*'. QH advises that 'PA&D' stands for Performance Appraisal and Development.

Applicant's submissions

42. The applicant contends⁷ that that the File Note:
- is not part of the third party's performance appraisal as claimed by QH
 - was created (by Ms Whelan, the Nurse Unit Manager) after the third party's performance appraisal and is relation to him
 - forms part of his professional file.

⁶ In section 4 of the FOI Act.

⁷ In his letter dated 25 May 2005.

Analysis

43. I have carefully considered the content of the File Note which details a conversation which occurred between Ms Whelan and a third party in relation to an assessment of the third party's work performance.
44. I am satisfied that the File Note clearly concerns an assessment and appraisal of the third party's work performance and forms part of a performance appraisal process. Accordingly, I am satisfied that the File Note is a record of a performance appraisal interview between Ms Whelan and a third party employee and accordingly, forms part of QH's management or assessment of its personnel.

Can disclosure of the File Note reasonably be expected to have an adverse effect on QH's management of its personnel?

45. The phrase 'could reasonably be expected to' requires the decision maker applying section 40(c) of the FOI Act to discriminate between:
 - unreasonable expectations and reasonable expectations
 - what is merely possible and expectations which are reasonably based⁸.

Applicant's submissions

46. The applicant contends⁹ that:
 - under the rules of procedural fairness, the applicant should be given access to anything which is adverse to him
 - Ms Whelan should have advised the third party that she was making a file note of the relevant conversation and that the applicant would have a right to respond
 - QH used the information in the file notes against him and he should be able to view their entire contents to assess his options
 - Ms Whelan has breached privacy principles, including by seeking other employees for comment which may be detrimental or adverse to the applicant, without affording him a right to reply.

Analysis

47. In its letter dated 5 May 2009, QH submits that:
 - performance appraisal is an aspect of an individual's employment relationship that is treated as highly confidential and accessible only by a strictly limited group
 - to release performance appraisal information to a third party (such as the applicant) would seriously erode the relationship of trust between employee and employer.
48. I note that the Information Commissioner has previously considered whether release of information regarding performance reviews and appraisals would have the kind of substantial adverse effect contemplated in section 40(c) of the FOI Act.

⁸ *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at paragraph 73.

⁹ In his letter dated 25 May 2009 and a telephone conversation with a staff member of the Office on 22 June 2009.

49. In *Pemberton and The University of Queensland*,¹⁰ the Information Commissioner decided that disclosure of information relating to performance reports or appraisals other than to the subject of the report or appraisal, could reasonably be expected to have a substantial adverse effect on the management or assessment by the University of its personnel.
50. The Information Commissioner also recognised the importance of performance reviews to agencies' management and assessment of their personnel, as well as the importance of keeping confidential matters discussed in performance reviews.
51. In the circumstances, I am satisfied that releasing a record of an interview between a staff member and their supervisor about their performance, in the context of a performance appraisal process, could reasonably be expected to have the following adverse effects:
- management problems caused by a perceived breach of confidence and the potential for prejudice to future supply of like information that is needed for the purposes of management processes¹¹
 - serious disruption to working relationships.¹²
52. I am also satisfied that the lessened effectiveness of performance reviews, as well as disruption to working relationships, which I consider could reasonably be expected to result from disclosure of the File Note, constitute a substantial adverse effect.
53. Accordingly, on the information before me, I am satisfied that:
- the File Note forms part of the management of QH of its personnel
 - release of the File Note could reasonably be expected to have a substantial adverse effect on the management of QH's personnel.
54. Next I must consider whether there are sufficient public interest considerations which favour release of the File Note to outweigh the public interest considerations which favour non-disclosure.

Public interest balancing test

55. The applicant submits that the rules of procedural fairness require that he be given an opportunity to respond to anything which may be adverse to him. I note that the applicant is at a necessary disadvantage of not knowing what the File Note contains, and I am precluded by section 87(3)¹³ of the FOI Act from revealing matter claimed to be exempt. However, as set out above, the File Note records an interview with a third party about that person's work performance and I do not consider that procedural fairness requires the content of the File Note to be disclosed to the applicant.
56. I have also considered the public interest in scrutinising the job performance of QH employees. However, given the importance of QH's responsibilities and objectives, I find that there is a public interest in QH operating as efficiently and effectively as possible which is in part dependent upon on its ability to manage its staff effectively.

¹⁰ (1994) 2 QAR 293 at paragraph 145.

¹¹ See for example *ALE & RBA and Central Queensland University; W (Third Party)* (S9/95; A10/95, 20 January 1997, unreported).

¹² See for example *HIC and Department of Police* (Unreported, Information Commissioner Qld, 7 December 1998).

¹³ Commissioner to ensure non-disclosure of particular matter.

57. I also note the applicant's submission that actions of other QH employees amount to breaches of the applicant's privacy. After carefully considering the content of the File Note, I do not consider that it evidences any breach of privacy relevant to this consideration of public interest factors favouring disclosure of the File Note.¹⁴
58. Accordingly, on the basis of the matters set out above, I am satisfied that:
- the public interest is best served by QH retaining the ability to conduct frank, candid and confidential appraisals of the performance of its staff in a performance review context
 - in the circumstances, the detrimental effect on the ability of QH to manage its staff which disclosure of the File Note (which relates to the performance appraisal of a third party) could reasonably be expected to have, outweighs any public interest in scrutinising the performance of that third party
 - release of the File Note could reasonably be expected to have a substantial adverse effect on the management of QH staff
 - public interest considerations favouring disclosure of the File Note are insufficient to outweigh the public interest considerations which favour non-disclosure of the File Note
 - the File Note is exempt from disclosure under section 40(c) of the FOI Act.

Section 28A of the FOI Act – Further documents

59. Section 28A 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

- (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 cannot be found.

Examples-

- *documents that have been lost*
- *documents that have been disposed of under an authority given by the State Archivist.*

60. In *PDE and the University of Queensland*¹⁵ (**PDE**) the Acting Information Commissioner indicates that:¹⁶

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

¹⁴ I note that the applicant has raised his concerns regarding breaches of the Privacy Principles governing QH with QH itself.

¹⁵ (Unreported, Office of the Information Commissioner, 9 February 2009).

¹⁶ At paragraph 34.

*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'

61. 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.
62. 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 in the above paragraph 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.¹⁷
63. Therefore, in the context of applying section 28A(2) of the FOI Act it is relevant to ask whether QH has taken all reasonable steps to locate the requested documents, and the documents cannot be found.
64. The applicant contends that two categories of further documents exist which have not been provided to him:
- emails between three QH employees
 - computer files used by Ms Whelan.

¹⁷ See *PDE*.

Emails

65. The applicant submits¹⁸ that further emails concerning him exist and were sent between three particular QH employees.
66. QH makes the following submissions¹⁹ in relation to the searches it performed for relevant emails sent between the three employees:
- when the applicant's FOI Application was received, searches were performed for all documents relating to the application
 - when the Internal Review Application was received, two of the QH employees named by the applicant were requested to perform further searches of their email accounts and each advised that they held no further emails responding to the applicant's request
 - the third employee named by the applicant²⁰ no longer works at QH and another appropriate staff member was requested to search for emails held by the former employee, however no further emails were located.
67. In respect of the above, QH has provided this Office with copies of the search requests sent to relevant areas of the Townsville District Hospital, as well as copies of emails sent to individuals requesting searches.
68. Accordingly, on the basis of the matters set out above and the general searches performed by QH when the FOI Application was received, I am satisfied that:
- each of the employees named by the applicant²¹ were requested to perform further searches for emails responding to the applicant's request
 - each relevant person responded that they had been unable to locate any emails further to those which had already been released.

Computer files

69. In the applicant's letters to this Office dated 2 February 2009 and 25 May 2009, he submits
- that further information responding to his request could be held on the computer used by Ms Whelan
 - he has been informed that a pass-worded computer file existed on the computer used by Ms Whelan when she was the Nurse Unit Manager of the Endoscopy Unit.
70. QH submits²² the following in relation to any further files which may be held on computers used by Ms Whelan:

¹⁸ In the Internal Review Application, External Review Application, and in letters dated 4 February 2009 and 25 May 2009.

¹⁹ In the Original Decision and a telephone conversation with a staff member of the Office on 1 April 2009.

²⁰ Ms Whelan

²¹ Apart from Ms Whelan who had left the employ of QH and a search for relevant emails was performed by another person.

²² In an email dated 29 January 2009 and a telephone conversation with a staff member of the Office on 16 June 2009.

- the only places where files created or used by Ms Whelan would be is on either the network drive or on a personal hard drive allocated to Ms Whelan
- when the Internal Review Application was received, QH performed a search of the network drive, along with administrative files and folders, and no further documents responding to the applicant's request were located
- the search of the network drive was performed using the applicant's name
- as a result of the District's upgrade process, all computers which would have been used by Ms Whelan have been replaced, and the hard drives from the old computers have been removed and wiped of data
- in any event, it is unusual for staff to use personal hard drives as they cannot be password protected.

71. As evidence of the searches conducted, QH has provided a screen dump of the network drive search which yielded no results.

72. The applicant also noted²³ his dissatisfaction with QH's upgrading of its computers while the search for documents requested in his FOI Application was ongoing. On this point, QH submits that the upgrade process occurred well before the applicant made his FOI Application.

73. On the basis of the matters set out above, I am satisfied that:

- any documents responding to the applicant's request would be stored on either the network drive or Ms Whelan's personal hard drive
- the network drive has been thoroughly searched and no documents have been located
- any computers which would have housed Ms Whelan's personal hard drive have been replaced, and the hard drives have been removed and wiped of data
- QH has taken all reasonable steps to locate the requested documents and the documents cannot be found
- QH is entitled to refuse access to the requested documents under section 28A(2) of the FOI Act.

DECISION

74. I vary the decision under review by deciding that:

- the Response Matter is exempt from disclosure under section 44(1) of the FOI Act
- the File Note is exempt from disclosure under section 40(c) of the FOI Act; and
- QH is entitled to refuse access to documents under section 28A(2) of the FOI Act on the basis that all reasonable steps to locate relevant documents have been undertaken and the documents cannot be found.

75. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

Assistant Commissioner Henry

Date: 24 June 2009

²³ In a telephone conversation with a member of staff of the Office on 22 June 2009.