



Decision and Reasons for Decision

Application Number: 210482

Applicant: Russell Mathews

Respondent: Department of Primary Industries and Fisheries

Decision Date: 26 November 2008

Catchwords: **FREEDOM OF INFORMATION - section 28A(1) of the *Freedom of Information Act 1992 (Qld)* - refusal of access to non-existent documents - whether reasonable grounds to believe documents exist**

FREEDOM OF INFORMATION - section 7 of the *Freedom of Information Act 1992 (Qld)* - document of an agency - documents in possession or under the control of an agency - whether agency needs to take an additional step to be legally entitled to take possession of a document

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REASONS FOR DECISION

Summary

1. In this decision, I have found that the documents to which the Applicant seeks access are not in the possession or under the control of the Department of Primary Industries and Fisheries (**Department**) and therefore, section 28A(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) applies to the documents sought.

Background

2. By email dated 19 February 2008 the Applicant applied to the Department for access to (**FOI Application**):

...all the information on all documents in the possession of, or under the control of, the DPI, involving the investigation of the complaint I made re [an RSPCA inspector].¹

3. By letter dated 4 March 2008, K Balmer² informed the Applicant that:
 - in view of releases under a number of earlier freedom of information applications the scope of the FOI Application had been interpreted to include documents not previously released to the Applicant and created since the date of the Applicant's last application for the same documents
 - searches conducted within the Legislative Support Unit, Biosecurity Queensland, failed to locate any documents in response to the FOI Application
 - the Royal Society for the Prevention of Cruelty to Animals Queensland Incorporated (**RSPCA**) conducted the investigation, not the Department, and therefore, the Department was not provided with a statement by the RSPCA inspector
 - the Department holds no documents that fall within the scope of the FOI Application and therefore, access to such documents was refused pursuant to section 28A(1) of the FOI Act (**Original Decision**).
4. By email dated 5 March 2008, the Applicant applied for internal review of the Original Decision on a number of grounds (**Internal Review Application**). Particularly, the Applicant questioned the adequacy of searches undertaken by the Department.
5. By letter dated 3 April 2008, J Loth³ informed the Applicant that he:
 - had reviewed the files pertaining to the Internal Review Application and to previous FOI Applications the Applicant had made to the Department
 - considered the Department had made all reasonable efforts to locate any additional documents held by the Department which fell within the scope of the FOI Application
 - had decided to affirm the Original Decision.⁴

¹ In the FOI Application, the Applicant specifically identified that he was seeking access to a statement made by a particular RSPCA Inspector.

² Senior Consultant (FOI & Privacy) at the Department.

³ Manager, Administration at the Department.

⁴ This decision was given at least two days outside the 28 day timeframe allowed under section 52(6) of the FOI Act. Accordingly, pursuant to that section, the Department is deemed to have affirmed the Original Decision on 2 April 2008, that is, the end of the 28 day period for making an internal review decision. The Department's **deemed affirmation** of the Original Decision is therefore, the decision which is the subject of this external review.

6. By email dated 10 April 2008, the Applicant applied to this Office for external review (**External Review Application**).⁵

Decision under review

7. The decision which is the subject of this external review is the Department's deemed affirmation of the Original Decision that was taken to occur on 2 April 2008 by virtue of it not having made a decision on the Internal Review Application within the timeframe required under section 52(6) of the FOI Act.⁶

Steps taken in the external review process

8. Following receipt of the External Review Application, this Office obtained, from the Department, copies of the FOI Application, Original Decision, Internal Review Application and Internal Review Decision.
9. By letter dated 13 June 2008, this Office requested submissions from the Department with respect to the issues raised by the External Review Application. On 15 August 2008, the Department provided this Office with submissions and supporting documents.
10. On 13 October 2008, this Office asked the Department to provide further information regarding the documents sought by the Applicant in the FOI Application. On 17 October 2008, the Department provided a response to that request.
11. By letter dated 7 November 2008, I informed the Applicant that I had formed a preliminary view with respect to the issues raised in this review (**Preliminary View**) as follows:
 - there are no reasonable grounds to believe that the documents sought in the FOI Application are in the possession of the Department
 - if documents are in fact held by the RSPCA in relation to the investigation of the Applicant's complaint, those documents are not under the control of the Department for the purpose of section 7 of the FOI Act
 - the Department was entitled to refuse the Applicant access to documents on the basis of section 28A(1) of the FOI Act.
12. When I provided the Applicant with the Preliminary View, I also provided him with a copy of the Department's submissions dated 15 August 2008.⁷
13. By email dated 11 November 2008, the Applicant made submissions in response to the Preliminary View.⁸

⁵ This application was made in conjunction with the Applicant's application in External Review No. 210483.

⁶ See footnote 4 above.

⁷ Excluding submissions made by the Department to this Office on a confidential basis concerning a written agreement between it and the RSPCA. See paragraphs 56 to 57 of this decision in relation to that agreement.

⁸ The Applicant's email was sent in response to correspondence this Office sent to the Applicant in relation to another external review. However, in that email, the Applicant specifically referred to the issues raised in this external review. Accordingly, I accepted that email as the Applicant's contesting submissions in response to the Preliminary View.

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

- FOI Application
- Original Decision
- Internal Review Application
- Department's decision dated 3 April 2008 given in response to the Internal Review Application
- External Review Application
- Applicant's submissions to this Office dated 11 November 2008
- record of a telephone conversation between a staff member of this Office and the Department on 6 November 2008
- the Department's submissions to this Office dated 15 August 2008 and 17 October 2008
- documents provided by the Department in support of its submissions dated 15 August 2008
- relevant sections of the FOI Act, *Animal Care and Protection Act 2001* (Qld) (**ACP Act**) and *Animal Care and Protection Regulation 2002* (Qld) (**Regulations**)
- previous decisions of the Information Commissioner of Queensland as referred to in this decision.

Matter in issue

15. There are no documents in issue in this review because the Department did not locate any documents in response to the FOI Application.

16. In the External Review Application, the Applicant raises the issue of 'sufficiency of search'. Specifically, the Applicant contends that documents concerning the investigation of the complaint which the Applicant made about the RSPCA Inspector, including the Inspector's statement, are in the possession or under the control of the Department and should have been released to the Applicant.

17. In addition to sufficiency of search, the following issues are also relevant to this review:

- does section 28A(1) of the FOI Act apply to the documents sought by the Applicant in the FOI Application
- are documents held by the RSPCA documents in the possession or under the control of the Department as required by section 7 of the FOI Act.

Findings

Relevant legislation

18. Pursuant to section 21 of the FOI Act, a person has a legally enforceable right to be given access to documents of an agency and official documents of a Minister. This right of access is subject to other provisions of the FOI Act, including section 28A of the FOI Act, under which an agency can refuse access to documents which do not exist or cannot be located.

19. The Department refused access to documents sought by the Applicant on the basis of section 28A of the FOI Act. My findings with respect to the application of that provision to the documents sought by the Applicant are set out below.

Section 28A of the FOI Act

20. The Department relied on section 28A(1) of the FOI Act in refusing the Applicant access to the documents sought in the FOI Application. That section provides as follows:

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.*

...

21. In applying section 28A(1) of the FOI Act, the following two questions relating to the issue of sufficiency of search are relevant:⁹

- (i) are there reasonable grounds to believe that the requested documents exist and are documents of the agency as that term is defined in section 7 of the FOI Act

and if so

- (ii) have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of the review.

22. In this decision, I have examined the issue of sufficiency of search as an element of the application of section 28A(1) of the FOI Act.

Reasonable grounds

23. In determining whether there are reasonable grounds to believe that additional relevant documents exist and are in the possession or under the control of an agency, the Information Commissioner has previously indicated¹⁰ that an applicant will ordinarily need to:

- explain fully their grounds for believing that the respondent agency holds additional responsive documents
- disclose any relevant documentary or other evidence which tends to support the existence of reasonable grounds for such a belief.

24. For the purpose of answering the first question in *Shepherd*,¹¹ I must consider whether any documents that may be held by the RSPCA in relation to the investigation of the Applicant's complaint are 'documents of an agency' under section 7 of the FOI Act.

Documents of an agency

25. Section 7 of the FOI Act defines 'document of an agency' as follows:

document of an agency or document of the agency means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes—

- (a) a document to which the agency is entitled to access; and

⁹ *Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464 at paragraphs 18-19 (**Shepherd**).

¹⁰ In *Ainsworth; Ainsworth Nominees Pty Ltd and Criminal Justice Commission; A (Third Party); B (Fourth Party)* (1999) 9 QAR 284 at paragraph 46 (**Ainsworth**).

¹¹ Set out in paragraph 21 of this decision.

- (b) a document in the possession or under the control of an officer of the agency in the officer's official capacity.

26. In interpreting this definition, the Information Commissioner has previously stated as follows:

A document not in the physical possession of an agency will nevertheless be a "document of the agency" for the purposes of the FOI Act, if it is under the control of the agency (or under the control of an officer of the agency in the officer's official capacity). Included in the concept of documents which are under the control of an agency are documents to which the agency is entitled to access. This concept is apt to cover a document in respect of which an agency has legal ownership, and hence a right to obtain possession, even though the document is not in the physical possession of the agency. The words "under the control" convey the concept of a present legal entitlement to control the use or physical possession of a document, as exists in the case of documents held on behalf of a principal by the principal's agent, or documents held by a bailee on behalf of the owner of the documents. In the context of the obligations placed on an agency, by the FOI Act, in respect of "documents of the agency" (including the manner in which an agency is obliged to deal with a document of the agency in response to an application under the FOI Act), I consider that, for a document to be one which is under the control of an agency (or one in respect of which an agency is entitled to access), the agency must have a present legal entitlement to take physical possession of the document (at least for so long as necessary to discharge all of the agency's obligations under the FOI Act in respect of the document).¹²

...

*I accept that it was the legislature's intention that an agency should take steps to bring into its physical possession, for the purpose of dealing with a valid FOI access application, any requested document in respect of which the agency has a present legal entitlement to possession. However, I do not accept that it was the legislature's intention that an agency should have to take some **additional step** in order to put itself into a position where it has a legal entitlement to take possession of a document, in order to respond to an FOI access application for that document. For example, many agencies possess coercive statutory powers to compel the production of documents for certain administrative or regulatory purposes. I do not accept, however, that an agency would be required to take the formal step of exercising its coercive powers to obtain access to a document, merely because that document had been requested in an FOI access application received by the agency.¹³*

...

The ruling test imposed by the definition of "document of an agency" is comprised in the words "in the possession or under the control of an agency". The remaining words of the definition illustrate, rather than extend, the ruling test.¹⁴

[my emphasis]

27. Accordingly, for the purpose of examining the issue of sufficiency of search in this review, I must determine whether the documents sought in the FOI Application are:

- (i) in the possession of the Department, or
- (ii) under the control of the Department.

¹² In *Price and the Nominal Defendant* (1999) 5 QAR 80 at paragraph 18 (**Price**).

¹³ *Price* at paragraph 27.

¹⁴ *Price* at paragraph 33.

(i) Possession

Applicant's submissions

28. In his submissions made to the Department during the processing of the FOI Application the Applicant contends that the RSPCA Inspector's statement is in the possession or under the control of the Department and should have been provided to the Applicant in response to his FOI Application.
29. The Applicant has not made submissions pointing to the existence of any documents in addition to the RSPCA Inspector's statement.

Department's submissions

30. In the Initial Decision, Ms Balmer stated that she had received advice from the Manager, Legislative Support Unit, Biosecurity that the RSPCA did not provide the Department with any statement made by the RSPCA Inspector because the RSPCA, not the Department, investigated the Applicant's complaint.
31. In this review, the Department submits that:
 - the RSPCA Inspector's statement (if it exists) fell within the scope of each of a number of the Applicant's previous FOI applications to the Department and that *'issues relating to "sufficiency of search" were addressed in the consequent internal and external reviews'*
 - the RSPCA Inspector's statement (if it exists) is not, and has never been, in its possession.
32. Notwithstanding the Department's position, a document that was provided to the Applicant by the Department pursuant to an earlier FOI application he made to the Department¹⁵ sets out a request made by Ms Fiona Ferguson, Manager of the Legislative Support Unit at the Department, to the RSPCA, asking the RSPCA Inspector to provide a statement in response to the Applicant's complaint.
33. Having considered that document, I formed the view that it:
 - pointed to the potential existence of a written statement created by the RSPCA Inspector
 - raised reasonable grounds to believe that such a document exists and may have been provided to the Department.
34. Accordingly, I expressed that view to the Department and asked it to:
 - provide clarification of the circumstances surrounding the RSPCA Inspector's statement
 - indicate whether the RSPCA had responded to Ms Ferguson's request.
35. In response, the Department made the following submissions:

...although Ms Ferguson requested that a statement be obtained from [the RSPCA Inspector], no statement was ultimately provided to DPI&F. It was decided by Ms Ferguson upon further consideration after her email of 12 December 2006 that the

¹⁵ Page of an email dated 12 December 2006 sent by Ms Fiona Ferguson to the RSPCA. This document is labelled **FOI External Review Document No. 9** and **FOI Document No. 3**.

*RSPCA should deal with the matter internally. Ms Ferguson therefore verbally advised the RSPCA by telephone that she no longer required a statement. No note was taken of that phone conversation.*¹⁶

Findings on material facts concerning possession

36. I have carefully considered the submissions of the Applicant and the Department and I am satisfied, on the material facts that:
- the Department has conducted searches within the Legislative Support Unit, Biosecurity Queensland and these searches failed to locate any further documents
 - although Ms Ferguson initially requested that the RSPCA Inspector provide a statement, Ms Ferguson subsequently indicated to the RSPCA that a statement was not required by the Department
 - the investigation of the Applicant's complaint was conducted internally by RSPCA
 - the RSPCA Inspector's statement, if it exists, was never provided by the RSPCA to the Department.

Application of the law

37. In view of my findings on the material facts as set out in paragraph 36 above, I am satisfied that:
- if the RSPCA Inspector's statement exists, it is not in the possession of the Department
 - no further documents responding to the FOI Application are in the possession of the Department.

38. I now turn to consider whether the documents sought in the FOI Application are '*under the control*' of the Department.

(ii) Under the control

Relevant law

39. In determining whether the documents sought in the FOI Application are '*under the control*' of the Department, the relationship between the Department and the RSPCA and provisions of the ACP Act are relevant.
40. The ACP Act provides the Director-General of the Department (**Chief Executive**) with the power to appoint officers from the RSCPA to exercise powers under the ACP Act as inspectors. Such inspectors are accountable to the Chief Executive for the proper exercise of those powers.
41. Section 116 of the ACP Act provides for the Chief Executive's control of inspectors as follows:

116 Appointment conditions and limit on powers

- (1) *An inspector holds office on any conditions stated in—*
- (a) *the inspector's instrument of appointment; or*
 - (b) *a signed notice given to the inspector; or*

¹⁶ In the Department's submissions to this Office dated 17 October 2008.

(c) a regulation.

(2) Without limiting subsection (1), the instrument of appointment, a signed notice given to the inspector or a regulation may—

- (a) limit the inspector's functions or powers under this or another Act; or
- (b) require the inspector to give the chief executive stated information or a report about the performance of the inspector's functions or the exercise of the inspector's powers.

(3) In this section—

signed notice means a notice signed by the chief executive.

42. Section 116(2) of the ACP Act provides that an instrument of appointment, signed notice or a regulation may compel an inspector to give the Chief Executive certain information or a report concerning the inspector's performance or the exercise of the inspector's powers.

Applicant's submissions

43. In his submissions made to the Department during the processing of the FOI Application and to this Office in this review, the Applicant contends that:

- the Department has the power to obtain the documents to which the Applicant seeks access from the RSPCA, specifically, documents concerning the suitability of the RSPCA Inspector to remain in that role
- documents of the RSPCA are under the control of the Department.¹⁷

Department's submissions

44. The Department submitted as follows in relation this issue:

... the existence of a right to request information whether that right is a statutory or contractual right does not mean that any document containing information which might be the subject of such a request automatically becomes a document that is within the control of the agency entitled to make the request. ...

...

...any obligation on an agency to request a third party to identify whether a document exists or not and if it does exist to provide a copy to the agency where the original document does not belong to the agency in question, would be comparable to an obligation that the agency create a new document to provide information requested by an application. It is clear the Act is only intended to provide applicants with a right of access to documents which are already in the possession of or under the control of an agency.

...

Managing applications under the Act would be unworkable if agencies were forced to:

1. *assess whether there are any third parties who might be obliged (whether under statute or agreement) to respond to any request for information the agency might make*
2. *assess whether those third parties might hold documents not owned by the agency that would fall within the scope of an FOI application if they were in physical possession of the agency*
3. *make a request for a copy of such documents to be provided to the agency.*

... this is not the intent or the effect of the FOI regime.

¹⁷ In his submissions dated 11 November 2008.

Findings on material facts concerning control

45. I have carefully considered the submissions of the Applicant and the Department and I am satisfied, on the material facts that the RSPCA is:
- a separate legal entity to the Department
 - not an agency for the purposes of the FOI Act.

Application of the law

46. On the information available to me, it appears that the Applicant's complaint about the RSPCA Inspector concerned the inspector's work performance. Accordingly, if the RSPCA Inspector's instrument of appointment (**Instrument of Appointment**), a signed notice or a regulation required her to give the Chief Executive certain information or a report under section 116(2)(b) of the ACP Act in relation to the complaint, it could be concluded that such documents would therefore, be under the control of the Department.
47. To determine this point, the following documents require consideration:
- (i) Instrument of Appointment
 - (ii) signed notice (if one was issued)
 - (iii) relevant regulations.
48. In support of its submissions dated 15 August 2008, the Department provided this Office with a copy of the Instrument of Appointment.¹⁸

(i) Instrument of Appointment

49. The Department submits that the Instrument of Appointment does not oblige the RSPCA Inspector to provide the Chief Executive with information or a report under section 116(2)(b) of the ACP Act.
50. I have examined the terms of the Instrument of Appointment and am satisfied that it does not require the RSPCA Inspector to provide the Chief Executive with information or a report under section 116(2)(b) of the ACP Act.

(ii) Signed notice

51. The Department has informed this Office that the Chief Executive has not issued a signed notice requesting information or a report from the RSPCA Inspector under section 116(2)(b) of the ACP Act.
52. As set out in paragraph 26 above, the Information Commissioner, in *Price*, reasoned that it was not the legislature's intention for an agency to take some additional step in order to put itself into a position where it has a legal entitlement to take possession of a document in order to respond to a request for documents sought in an FOI application.
53. I am satisfied that if the Chief Executive was to now issue a signed notice to the RSPCA Inspector to obtain the statement or any other investigation documents (if they exist) for the purpose of the FOI Application, that would constitute an additional step on the part of the Department, as contemplated by the Information Commissioner in *Price*.

¹⁸ With the consent of the Department, I provided the Applicant with a copy of the Instrument of Appointment as an enclosure to the Preliminary View dated 7 November 2008.

(iii) Relevant regulations

54. The Department submits that there are no regulations which oblige the RSPCA Inspector to provide the Chief Executive with information or a report under section 116(2)(b) of the ACP Act.
55. I have examined the Regulations to the ACP Act and am satisfied that there is no requirement under the Regulations concerning the provision of information or a report to the Chief Executive under section 116(2)(b) of the ACP Act.

(iv) Agreement

56. When providing its submissions dated 15 August 2008, the Department also provided this Office with a copy of an agreement between the Department and the RSPCA which defines the requirements of the RSPCA and the Department with respect to enforcement of ACP Act provisions (**Agreement**).¹⁹ The Department provided this Office with copies of the Agreement on a confidential basis.
57. Based upon my careful analysis of the terms of the Agreement, I am satisfied that it does not give the Department a present legal entitlement to any documents responding to the FOI Application (if such documents exist).

Summary

58. Following analysis of:
 - the Applicant's submissions
 - the Department's submissions
 - relevant sections of the ACP Act and Regulations
 - terms of the Instrument of Appointment and Agreement
 - the reasoning of the Information Commissioner in *Price*,

I have not been able to identify any basis upon which the Department is entitled to require the RSPCA to provide it with a copy of the RSPCA Inspector's statement or any other investigation documents (if such documents exist) for the purpose of the FOI Application without taking a further step as contemplated by the Information Commissioner in *Price*.

59. Accordingly, I am satisfied that:
 - there are no reasonable grounds to believe that the documents sought in the FOI Application are in the possession of the Department
 - any documents that **may** be held by the RSPCA in relation to the investigation of the Applicant's complaint about the RSPCA Inspector are not under the control of the Department and are therefore, not documents of an agency for the purpose of section 7 of the FOI Act²⁰

¹⁹ Two copies of the Agreement were provided— one relating to the period 1 July 2005 to 30 June 2007 and the second for the period 1 July 2007 to 30 June 2008.

²⁰ As my findings in this review answer the first question posed in *Shepherd* (see paragraph 21 of this decision) in the negative, I consider it is unnecessary for me to examine the second question concerning the extent of searches undertaken by the Department.

Conclusion

60. Based on the information before me in this review, I find that:

- there are no reasonable grounds to believe that the documents sought in the FOI Application are in the possession of the Department
- any documents that may be held by the RSPCA in relation to the investigation of the Applicant's complaint about the RSPCA Inspector are not under the control of the Department and are therefore, not documents of an agency for the purpose of section 7 of the FOI Act
- section 28A(1) of the FOI Act applies to the documents sought by the Applicant in the FOI Application.

DECISION

61. I affirm the Department's deemed affirmation of the Original Decision to refuse access to documents sought by the Applicant in the FOI Application on the basis of section 28A(1) of the FOI Act.

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

Acting Assistant Commissioner Jefferies

Date: 26 November 2008