



## Decision and Reasons for Decision

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**Application Number:** 210678

**Applicant:** Ms M Richardson

**Respondent:** Brisbane City Council

**Decision Date:** 10 August 2009

**Catchwords:** ADMINISTRATIVE LAW - FREEDOM OF INFORMATION – REFUSAL OF ACCESS – DOCUMENT NON-EXISTANT – applicant sought access to records relating to flooding incident in residence – 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 the agency can refuse access to the documents sought under section 28A(1) 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 Brisbane City Council (**BCC**) has not located and provided her with all documents responding to her freedom of information application.
2. Having considered the parties' submissions and evidence, relevant legislation and decisions, I find that access to the additional documents sought can be refused under section 28A(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) on the basis that there are reasonable grounds for BCC to be satisfied that no additional documents within the scope of the application exist.

### Background

3. On 1 October 2008 the applicant lodged a freedom of information application (**FOI Application**) with BCC in which the applicant stated:

*On 6 February 2008 our home at [stated address] was flooded with sewage. With respect to this incident, I wish to obtain a copy of all documents (e.g. paper file, print-outs, computer records, photographs etc. on file for Brisbane City Council and Brisbane Water, with the exception of any documents that Julie Middleton has sent or received.*

4. By letter dated 25 November 2008 BCC informed the applicant that it had located 82 folios responding to the FOI Application and that all of these folios would be released to her in full (**Original Decision**).
5. The applicant subsequently sought internal review of the Original Decision suggesting that BCC had not located and provided her with all documents responding to the FOI Application.
6. By letter dated 4 December 2008, BCC affirmed the Original Decision (**Internal Review Decision**) stating that '*all reasonable efforts had been made to locate all the documents that met the criteria of your search*'.
7. By letter dated 8 December 2008 the applicant applied to the Office of the Information Commissioner (**Office**) for external review of the Internal Review Decision (**External Review Application**) asserting that BCC had not provided all documents responding to the FOI Application.

### Decision under review

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

### Steps taken in the external review process

4. By letter dated 12 December 2008 I asked BCC to provide copies of the FOI Application, the Internal Review Application and the 82 folios provided to the applicant (**82 Folios**).
5. By letter dated 19 December 2008 the applicant provided the Office with detailed information on the documents she sought from BCC and copies of correspondence

between her and BCC concerning a compensation claim for the damage incurred on 6 February 2008.

6. By letter dated 29 December 2008 the applicant provided the Office with further information concerning the additional documents she sought from BCC.
7. By letter dated 5 January 2009 the Office informed BCC of the information provided by the applicant in her letters dated 19 and 29 December 2008 and asked BCC to conduct further searches for the documents identified in those letters.
8. On 6 January 2009 BCC responded by telephone to some of the inquiries raised in our letter of 5 January 2009.
9. On 7 January 2009 BCC provided the documents requested in our letter of 12 December 2008. The documents included the 82 Folios.
10. In a telephone discussion on 20 January 2009, BCC provided further information on the insurance documents sought by the applicant (see paragraph 14 below).
11. By letter dated 11 February 2009, I conveyed to the applicant a preliminary view that on the information currently available:
  - there were reasonable grounds for BCC to be satisfied that no additional documents responding to her FOI Application exist
  - BCC was entitled to refuse access to the requested documents under section 28A(1) of the FOI Act.
12. By letter dated 18 February 2009 the applicant provided the Office with further information concerning the additional documents she is seeking from BCC. The applicant also provided a letter written by her mother, Ms J Middleton, indicating that contrary to BCC's advice to the Office on 6 January 2009, she had not received historical documents in relation to their residence.
13. While the applicant did not specifically state that she did not accept my preliminary view of 11 February 2009, she clearly communicated her belief that additional documents exist and accordingly, her letter was taken to indicate non-acceptance of the preliminary view.
14. By e-mail dated 25 February 2009, the applicant provided information about an insurance claim before NRMA.
15. By letter dated 26 February 2009 the applicant provided the Office with further information concerning the NRMA insurance claim.
16. On 11 March 2009 Mr Paul Wesener of BCC and staff of the Office met to discuss the information sought by the Office.
17. By letter dated 25 March 2009 I wrote to BCC in relation to the applicant's letter dated 18 February 2009.
18. On 14 April 2009 BCC applied for, and I agreed to, an extension of time in which to respond to my letter at paragraph 17 above.

19. On 29 April 2009, BCC requested additional time to respond to my letter at paragraph 17 above.
20. By letter dated 4 May 2009 the applicant sought to expand the scope of the FOI Application to capture documents concerning purported modifications made to her residence's plumbing system.
21. By letter dated 4 May 2009, BCC provided documents detailing its "Networks Environmental Reporting Procedures." BCC also provided a number of historical records concerning the applicant's residence.<sup>1</sup>
22. By letter dated 21 May 2009 the applicant provided the Office with further information and correspondence in relation to the plumbing system at her residence.
23. On 25 May 2009, a staff member of the Office telephoned BCC and discussed the possibility of BCC agreeing to provide the historical records to the applicant, notwithstanding that these documents were not within the scope of the FOI Application. BCC agreed to provide the historical records to the applicant.
24. On 25 May 2009 a staff member of the Office telephoned the applicant and discussed the progress of the review and informed her of BCC's willingness to provide her with the historical records.
25. By letter dated 25 May 2009 BCC confirmed that it had sent the historical records to the applicant.
26. By letter dated 27 May 2009, I responded to issues the applicant raised in her letters of 4 and 21 May 2009 and explained the scope of the external review.
27. By letter dated 29 May 2009 the applicant wrote to the Office providing further information in support of her application for review.
28. On 9 June 2009 a staff member of the Office telephoned the applicant and discussed the progress of the review and the issues raised in the applicant's letter of 29 May 2009.
29. By letter dated 11 June 2009 I provided the applicant with an update on progress in the review.
30. On 11 June 2009 a staff member of the Office telephoned the applicant and discussed the progress of the review with the applicant's mother.
31. By letter dated 6 July 2009 the applicant raised further issues in relation to one of the documents released to her.
32. On 13 July 2009, I and the Office's Principal Review Officer met with Mr Wesener to discuss the searches conducted by BCC.
33. By letter dated 14 July 2009 the applicant provided copies of a number of documents released to her mother in a more recent FOI application.
34. In making my decision in this review, I have taken into account the following:

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<sup>1</sup> These are the historical records discussed at paragraph 12.

- FOI Application, Internal Review Application and External Review Application
- Original Decision and Internal Review Decision
- correspondence between BCC and the applicant and her family dated<sup>2</sup> 18 March 2008,<sup>3</sup> 4 April 2008, 9 April 2008, 16 May 2008, 28 October 2008, 24 November 2008, 15 December 2008, 30 January 2009, 24 March 2009, 20 May 2009 and 29 May 2009
- correspondence from the applicant to GAB Robins Australia Pty Ltd (**GAB Robins**) dated<sup>4</sup> 28 August 2008
- correspondence from BCC to the Office dated 5 January 2009, 8 May 2009 and 6 August 2009
- correspondence from the applicant to the Office dated 19 December 2008, 29 December 2008, 18 February 2009,<sup>5</sup> 25 February 2009, 26 February 2009, 4 May 2009, 21 May 2009, 29 May 2009, 6 July 2009 and 14 July 2009
- information provided in telephone discussions with BCC on 6 January 2009,<sup>6</sup> 20 January 2009, 12 May 2009, 25 May 2009, 9 June 2009, 29 June 2009 and 9 July 2009
- information provided in telephone discussions with the applicant and her mother on 25 May 2009, 9 June 2009 and 11 June 2009
- information provided by Mr Wesener at a meeting with myself and the Office's Principal Review Officer on 13 July 2009
- the 82 Folios
- printouts of database screenshots concerning the applicant's address
- Brisbane Water's "Networks Environment Reporting Procedure in the Event of a Wastewater Spill"
- BCC's 'Procedure for Management & Reporting of House Floodings' dated 14 December 2005
- BCC Memoranda dated 28 November 2005, 23 May 2006, 5 November 2008, 4 December 2008 and 9 December 2008
- Environmental Incident, Emergency or Complaint (IEC) Report Transport created in December 2008
- internal BCC e-mails dated 2 May 2008, 15 May 2008, 29 April 2009, 5 May 2009 and 5 November 2009
- relevant provisions of the FOI Act as referred to in this decision
- decisions of the Information Commissioner as referred to in this decision.

### Scope of the external review

35. The FOI Application is part of a spectrum of inquiries being conducted by the applicant in response to the flooding of her residence on 6 February 2009 (**Flooding Incident**). Over the period since the Flooding Incident occurred, the applicant and her family have

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<sup>2</sup> Provided to the Office by the applicant.

<sup>3</sup> Two letters are dated 18 March 2008.

<sup>4</sup> Provided to the Office by the applicant.

<sup>5</sup> Two letters are dated 18 February 2009.

<sup>6</sup> Two telephone discussions occurred on 6 January 2009.

had numerous communications and correspondence with BCC, NRMA Insurance and GAB Robins with the aim of ascertaining the cause/s of the flooding, remedying the damage resulting from it and preventing a further flooding incident.

***Documents no longer in issue***

36. BCC did not provide the applicant with any documents concerning a claim made to BCC from NRMA Insurance in the documents released. The applicant's letter of 19 December 2008 indicates that at that time she held the view that NRMA Insurance had lodged a claim with BCC for recovery of a payment to a member of the applicant's family in respect of some of the damage associated with the Flooding Incident and that therefore documents concerning this claim should have been provided to her by BCC.
37. In telephone discussions on 6 January 2009, BCC indicated to a staff member of the Office that its insurance broker, Jardine Lloyd Thompson Australia (**Jardine**) had confirmed that not only was there no relevant claim from NRMA Insurance but also that no insurance claims had been lodged concerning the applicant's residence.
38. In a discussion with a staff member of the Office, the applicant indicated that she did not accept that no claim had been made and she subsequently made her own inquiries with NRMA. NRMA confirmed that no funds had been recovered from BCC in respect of the applicant's residence.<sup>7</sup> Both the applicant<sup>8</sup> and BCC<sup>9</sup> subsequently confirmed that the NRMA claim was lodged with Jardine on 18 March 2009.
39. Having confirmed that an insurance claim was not lodged until early 2009, the applicant has accepted that on the date her FOI Application was lodged, no claim from NRMA Insurance had been lodged with BCC and that accordingly, no relevant documents existed at that time. In view of this, the NRMA insurance claim material is not in issue in this review.
40. The applicant had also contended that the report prepared by GAB Robbins did not include all of the photographs taken of her residence on 6 February 2008.
41. The applicant acknowledges that outside of the FOI Application, BCC provided her family with further copies of photographs of their residence taken on 6 February 2008.

***Documents not within the scope of the review***

42. In her correspondence with the Office, and as her inquiries regarding the Flooding Incident progressed, the applicant sought to expand the documents which she believed were within the scope of the FOI Application. The additional documents sought included, for example:
  - documents concerning previous 'flooding incidents' at the residence
  - certification documents in relation to plumbing work conducted at the residence in 1987
  - building approval and certification in relation to the construction of the residence
  - documents concerning the relief gulleys at the applicant's residence

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<sup>7</sup> Letters between the applicant and NRMA Insurance dated 16 and 17 February 2009.

<sup>8</sup> By letter to the Office dated 26 February 2009.

<sup>9</sup> By letter to the Office dated 8 May 2009.

- documents concerning compensation claims in relation to the Flooding Incident.<sup>10</sup>
43. The FOI Act requires an applicant to provide sufficient information concerning the document/s sought to enable a responsible officer of an agency to identify the document/s. There are sound practical reasons for the documents sought in an FOI application being clearly and unambiguously identified. On this point the Information Commissioner has previously said:<sup>11</sup>

*The terms in which an FOI access application is framed set the parameters for an agency's response under Part 3 of the FOI Act, and in particular set the direction of the agency's search efforts to locate all documents of the agency which fall within the terms of the FOI access request. The search for relevant documents is frequently difficult, and has to be conducted under tight time constraints. Applicants should assist the process by describing with precision the document or documents to which they seek access. Indeed the FOI Act itself makes provision in this regard with s.25(2) not only requiring that an FOI access application must be in writing, but that it must provide such information concerning the document to which access is sought as is reasonably necessary to enable a responsible officer of the agency to identify the document.*

44. Notwithstanding the breadth of the issues that have arisen in the applicant's dealings with BCC over the period since she lodged her application, her FOI Application was quite specific. The terms of the application were:

***On 6 February 2008 our home at [ stated address] was flooded with sewage. With respect to this incident, I wish to obtain a copy of all documents (e.g. paper file, print-outs, computer records, photographs etc. on file for Brisbane City Council and Brisbane Water, with the exception of any documents that Julie Middleton has sent or received.***

[my emphasis]

45. While the application is broadly worded in terms of the types of documents to which the applicant seeks access, it is specifically confined to documents concerning the Flooding Incident.
46. During the course of the external review a staff member of the Office spoke with the applicant regarding the scope of the review and explained that if the applicant sought documents outside of those requested in her FOI Application, she would need to lodge a fresh application. I also wrote to the applicant confirming the scope of the external review on 27 May 2009.
47. In this review, I am satisfied that the FOI Application is confined to documents that specifically concern the Flooding Incident but excludes those documents already provided to the applicant's mother in a previous FOI application. Accordingly, the scope does not extend to documents concerning any previous flooding incidents, general plumbing issues at the applicant's residence, certification and approval documents for the applicant's residence or documents concerning compensation claims in relation to the Flooding Incident.<sup>12</sup>

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<sup>10</sup> Including, for example, her subsequent letter to GAB Robins (which she indicates was not responded to), which the applicant believes GAB Robins must have provided to BCC or in respect of which BCC and GAB Robins must have corresponded. Similarly, in relation to the applicant's letter to BCC dated 11 July 2008, which was copied to GAB Robins.

<sup>11</sup> *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 at paragraph 8.

<sup>12</sup> By letter dated 29 May 2009 the applicant informed the Office that another FOI application had been lodged with BCC seeking documents that were not within the scope of this FOI Application or the previous application lodged by the applicant's mother.

## Issue in the review

48. It does not appear be in contention that on 6 February 2008 water in the sewer line for the applicant's residence backed up the line and exited through the floor drain of the applicant's bathroom. The applicant has indicated that through her FOI application, she is seeking documents which would explain why the Flooding Incident occurred.
49. Few of the documents provided to the applicant by BCC in response to the FOI Application concern the Flooding Incident itself. Instead, the bulk of the documents deal with an investigation of the applicant's and several of her neighbours' sewer lines eight months after the Flooding Incident (**Later Flooding Incident**), the discovery of a blockage and its subsequent clearance at that time.
50. The applicant contends that additional documents responding to the FOI Application must exist, including investigation documents in relation to the Flooding Incident which are similar in nature to those concerning the Later Flooding Incident.
51. In this review the issue to be determined is whether there are reasonable grounds for BCC to be satisfied that additional documents relating to the Flooding Incident<sup>13</sup> do not exist and accordingly, whether access can be refused under section 28A(1) of the FOI Act.

## Relevant law

52. The FOI Act was repealed by the *Right to Information Act 2009 (RTI Act)*<sup>14</sup> which commenced on 1 July 2009.<sup>15</sup> 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.<sup>16</sup>

### **Section 28A(1) of the FOI Act**

53. 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*

54. In *PDE and the University of Queensland*<sup>17</sup> (**PDE**) the Information Commissioner indicates that:<sup>18</sup>

*Sections 28A(1) and (2) of the FOI Act address two different scenarios faced by agencies and Ministers from time to time in dealing with FOI applications: circumstances where the document sought does not exist and circumstances where a document sought exists (to the extent it has been or should be in the agency's possession) but cannot be located. In*

<sup>13</sup> And which have not already been provided to the applicant's mother.

<sup>14</sup> Section 194 of the RTI Act.

<sup>15</sup> With the exception of sections 118 and 122 of the RTI Act.

<sup>16</sup> Section 199 of the RTI Act.

<sup>17</sup> (Unreported, Office of the Information Commissioner, 9 February 2009).

<sup>18</sup> At paragraph 34.



*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.*

55. In *PDE* the Information Commissioner also considered how an agency was 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.
56. To be satisfied under section 28A(2) of the FOI Act that a document can not be found an agency must take all reasonable steps to locate a document. Section 28A(1) is silent on the issue of how an agency is to satisfy itself that a document does not exist. When proper consideration is given to the key factors discussed at paragraph 55 and a conclusion reached that the document sought does not exist, it may be unnecessary for the agency to conduct searches. However, where searches are used to substantiate a conclusion that the document does not exist, the agency must take all reasonable steps to locate the documents sought.<sup>19</sup>
57. Therefore, in applying section 28A(1) of the FOI Act it is relevant to firstly ask whether there are reasonable grounds for the agency to be satisfied that the requested documents do not exist. If the agency has used searches to satisfy itself that the additional documents sought do not exist, it is then necessary to consider whether the agency has taken all reasonable steps to find the additional documents sought.

### **Applicant's submissions**

58. The applicant submits that BCC has not provided her with the information she requested. The applicant contends that instead, BCC provided her with a large number of documents which were not relevant to her inquiry and which she did not request.<sup>20</sup>

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<sup>19</sup> See *PDE*.

<sup>20</sup> BCC, in what was, in my view, an effort to be helpful to the applicant and to attempt to informally resolve this review, has provided her with a relatively large number of documents falling outside of the scope of the FOI Application. These documents include:

- documents concerning a later flooding incident in the applicant's neighbourhood
- documents created after the date of lodgement of the FOI application<sup>20</sup>
- historical records in relation to the applicant's residence.

59. Much of the applicant's submissions to the Office discuss issues that are outside the scope of the FOI Application<sup>21</sup> or which seek 'post-application documents'.<sup>22</sup> In her letter to the Office dated 19 December 2008 the applicant provided information about two classes of documents she contends BCC has not provide to her. These are:
- BCC documents concerning the cause of the Flooding Incident
  - documents provided by GAB Robins.
60. The applicant says that, as part of its normal operating procedures, BCC would produce file notes, internal correspondence, internal e-mails and reports in response to incidents such as the Flooding Incident. In particular the applicant is seeking the work report of the BCC staff members who attended her residence on 6 February 2008.
61. The applicant also contends that the 'Clean Up Surcharge Crew' who attended her residence on 6 February 2008 would have, as a matter of procedure, created a report concerning the Flooding Incident.
62. The applicant does not accept the GAB Robins Report is the total of GAB Robins' record of its assessment. The applicant claims that the report failed to include photographs of damage 'inside the built-in wardrobes'<sup>23</sup> and that it lacked an itemised 'list of contents damages with corresponding values.'

### **BCC's submissions**

63. BCC acknowledges that it has a procedure for documenting 'wastewater on premises' in circumstances such as the Flooding Incident.<sup>24</sup> The procedures require a memorandum be compiled for the Manager of Brisbane Water advising:
- the time of notification of the spill
  - the time the spill ceased
  - the cause of the spill
  - the owner of the property
  - any action that occurred.
64. BCC's procedure also stipulates:
- the personnel to whom the memorandum is provided
  - a memorandum is to be sent to Plumbing Inspectors DRS for a plumbing inspection
  - the electronic storage destination for the memoranda.

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<sup>21</sup> For example, in a letter to the Office dated 29 December 2008, the applicant provided rating and drainage information for her residence and in a letter to the Office dated 19 December 2008, the applicant provided rainfall intensity data for her suburb going back 100 years.

<sup>22</sup> For example, in a letter to the Office dated 4 May 2009, the applicant seeks documents concerning a BCC statement made on 24 March 2009 regarding a BCC inspection on 12 February 2009. Under section 25(3) of the FOI Act, the application is taken only to apply to documents that are, or may be, in existence on the day the application is received.

<sup>23</sup> By covering letter dated 28 October 2008 BCC provided the applicant's mother with 'all the (10) pictures taken on the 6<sup>th</sup> of February 2008'. As indicated above, these photographs as no longer in issue in this review.

<sup>24</sup> Brisbane Water Networks Environment Reporting Procedure in the Event of a Wastewater Spill.

65. In the course of the review BCC made the following submissions:
- the procedure for documenting wastewater surcharges had, as a matter of practice, fallen into disuse because the extended period of drought in Queensland meant that the process had not been required for several years
  - accordingly, neither a memorandum nor a plumbing inspection report was generated in relation to the Flooding Incident
  - because its procedures were not followed, little documentation was created in relation to the Flooding Incident
  - when the procedure was revived in December 2008 a memorandum and an 'Environmental Incident, Emergency or Complaint (IEC) Report – Transport' were created concerning the Flooding Incident and BCC has provided copies of these documents to the applicant's family.
66. In support of the submissions at paragraph 65 above, BCC provided a copy of internal BCC correspondence confirming the above<sup>25</sup> as well as copies of the documents described in the last bullet point.
67. BCC also indicates that its remedial processes when a resident contacts it to notify of sewage in private property is as follows:
- a service request for maintenance response is completed<sup>26</sup>
  - a Clean Up Surcharge Crew attends the residence
  - the crew clear the blockage in the sewer line by a process known as 'rodding'.
  - if damage has resulted from the spillage, GAB Robins is engaged by a telephone call to attend the residence and provide a damage assessment report.
68. BCC indicates that the Clean Up Surcharge Crew members for the Flooding Incident were contacted by e-mail concerning any diary entries they may have created in relation to this incident and they reported that they created no diary entries. Copies of email correspondence dated 24 April 2009 and 29 April 2009 provided by BCC clearly evidence these inquiries. John Gedge, BCC states:
- As discussed, I have spoken to both Steve Green and John Ward and neither have diary entries relating to [applicant's address] for the 6 February 2008.*
69. BCC also indicates that:
- investigation of sewerage systems and in particular, the use of Closed Circuit Television (**CCTV**) systems to survey sewer lines is expensive and consequently usually only conducted where a problem extends beyond a single property
  - both the clearance of single property blockages and investigations of sewerage systems are conducted by the Water and Wastewater Services Unit in Brisbane Water and consequently, documents concerning work performed on sewer lines is created by and located within this Unit

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<sup>25</sup> In an email from John Gedge to Paul Wesener dated 5 May 2009.

<sup>26</sup> The relevant service request form for 6 February 2008 was provided to the applicant as one of the 82 Folios provided in response to the FOI Application.

- as part of its processing of the FOI Application, BCC asked Brisbane Water to provide all of its documentation concerning the applicant's residence for the relevant period and the documents obtained were then provided in full to the applicant
- Brisbane Water orders its records according to subject matter, however, the address of a property is a common identifier for all records and when searches are conducted on a property address, the search captures all documents concerning that address.

### **Documents released to the applicant**

70. Documents released to the applicant show that on 6 February 2008:

- at approximately 7 pm a person at the applicant's residence telephoned BCC to report the Flooding Incident
- in response to the call above, a Clean Up Surcharge Crew attended the applicant's residence
- at 8 pm GAB Robins was telephoned and informed of the incident
- at 8.15 pm the remedial work was concluded
- at 8.30 pm the service was restored
- late in the evening, GAB Robins attended the applicant's residence.

### ***Application of section 28A(1) of the FOI Act***

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

#### ***Findings of fact***

71. Having considered the submissions and evidence of both parties I am satisfied that:

- in response to a notification about the Flooding Incident, a Clean Up Surcharge Crew from the Water and Wastewater Services Unit in Brisbane Water was dispatched to the residence shortly thereafter
- the crew performed remedial work on the sewer line
- the remedial work took a relatively short period of time
- GAB Robins attended the applicant's residence on the night of 6 February 2008 at the request of BCC to conduct a damage assessment
- BCC's procedures for documenting incidents such as the Flooding Incident had not been followed for some time
- neither a memorandum nor a plumbing inspection request was generated for the Flooding Incident
- BCC has confirmed with the Clean Up Surcharge Crew that they did not make any diary entries
- BCC has conducted a search of the Water and Wastewater Services Unit in Brisbane Water and has not located any additional documents in relation to the Flooding Incident
- BCC has conducted a search of its CMX system and no further documents were located

- In response to inquiries from BCC, Jardine provided BCC with documents concerning GAB Robins' assessment.

***Has BCC taken all reasonable steps to locate additional documents?***

72. The decision as to whether an agency has taken all reasonable steps to find a document must be made on a case by case basis, and where relevant, with reference to relevant key factors, including those identified at paragraph 55 above.
73. In determining whether BCC has taken all reasonable steps to locate the documents sought by the applicant it is appropriate in this instance to have regard to:
- BCC's procedures for dealing with 'wastewater' spills and any key personnel involved
  - BCC's practices in relation to conducting sewer line investigations
  - the type of documents created when an investigation of a sewer line is conducted
  - the location in which the investigation documents, if they existed, would be filed
  - any other relevant information concerning the work conducted by BCC on 6 February 2008 at the applicant's residence
  - BCC's procedures for engaging GAB Robins.
74. I have considered and accept BCC's submissions as set out in paragraphs 63 to 69 above.

**Investigatory Material**

75. I am satisfied that BCC has made appropriate inquiries with the members of the Clean Up Surcharge Crew that attended the applicant's residence in response to the Flooding Incident. The Job Card which was created by the clean up surcharge crew was released to the applicant in response to the FOI Application. The Job Card provides for information to be written on the back of the document, if necessary. BCC has confirmed, and I accept that no information has been entered on the reverse side of the Job Card.
76. In light of BCC's documented procedures in relation to waste water spills on premises, it would be reasonable to expect that a memorandum and a plumbing inspection report would have been created at or around the time of the Flooding Incident. However, BCC indicates that the procedure was not followed in this instance and has explained why this occurred. That the documents detailed in paragraph 65 were subsequently created following a review of the procedure clearly supports BCC's explanation. Accordingly, I accept that because the procedure was not followed, neither a memorandum nor a plumbing inspection report was created prior to the FOI Application.
77. The FOI Act does not require an agency to create a document in response to an FOI Application. The Information Commissioner stated in *Hearl and Mulgrave Shire Council (Hearl)*<sup>27</sup>

*The FOI Act is not an Act which gives persons a legally enforceable right to obtain answers to questions asked of government agencies, or even to have government agencies extract answers to questions from documents in their possession. The legally*

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<sup>27</sup> (1994) 1 QAR 557 at paragraph 30.

*enforceable right conferred by s.21 of the FOI Act is a right to be given access under the Act, and subject to the Act, to documents of an agency and official documents of a Minister.*

78. This is not to say that agencies cannot provide answers to inquiries made of it or that it cannot create documents that would satisfy the objectives sought through an FOI Application.<sup>28</sup> The Information Commissioner went on to state in *Hearl*.<sup>29</sup>

*My remarks in the opening sentence of paragraph 30 should not be taken to suggest that it is improper for an agency to provide answers to questions asked of it, or extract answers to questions from documents in its possession, if it is prepared to do so in the interests of assisting a member of the public. Any such suggestion would be contrary to s.14 of the FOI Act. Similarly, there is no impediment in the scheme of the FOI Act to an agency negotiating with an applicant for access under the FOI Act with a view to creating a new document to provide the information which the applicant seeks, where that would be more convenient for either or both of the applicant and the agency.*

79. As noted in paragraph 65 above, in this case BCC did create a memorandum and an IEC in relation to the Flooding Incident after the date of the FOI Application and the applicant's family has been provided with copies of these documents.
80. The documents released in relation to the Later Flooding Incident show that an investigation process in relation to a sewer line is relatively substantial and time-consuming.
81. The documents concerning the Later Flooding Incident (**Later Flooding Incident Documents**) consist of 75 pages detailing the investigation of the sewerage system in the applicant's street undertaken over a period of several days in early October 2008. This work involved at least eight residences in the area. While not within the scope of the FOI Application, the Later Flooding Incident Documents illustrate the volume and type of documents generated by BCC when there is an investigation of a sewer line. The provision of the Later Flooding Incident Documents also confirms that this category of document is created by and stored within the Water and Wastewater Services Unit. I accept that BCC does not ordinarily conduct an investigation in circumstances where a single flooding incident occurs and that no investigation was conducted into the cause of the Flooding Incident. Accordingly, I accept that no investigation documents were created.

### **GAB Robins Material**

82. GAB Robins Australia Pty Ltd (**GAB Robins**) was<sup>30</sup> a private-sector 'loss adjustment firm'. GAB Robins was engaged by BCC to assess property damage caused by water burst or sewage overflow. BCC's 'Procedure for Management & Reporting of House Floodings' dated 14 December 2005, confirms that GAB Robins' involvement is initiated by a telephone call from BCC.<sup>31</sup> As necessary, GAB Robins provides a report of its assessment to Jardine.

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<sup>28</sup> BCC informed the Office on 13 July 2009 that, post application, it has in fact, created explanatory documentation in relation to the Flooding Incident and this material will be provided to the applicant's family.

<sup>29</sup> *Ibid* at paragraph 31.

<sup>30</sup> GAB Robins is now known as Cunningham Lindsey Group.

<sup>31</sup> Information provided by BCC on 8 May 2009. BCC memoranda dated 28 November 2005 and 23 May 2006 provide information about GAB Robins' role in providing a claim assessment service for BCC.

83. At approximately 9 pm<sup>32</sup> on 6 February 2008 GAB Robins attended the applicant's residence in response to the Flooding Incident. GAB Robins consequently wrote a four-page report (**Report**) with its assessment of the damage caused to the applicant's personal property and residence resulting from the Flooding Incident.
84. In response to the applicant's mother's earlier FOI application, BCC made inquiries with Jardine regarding any documents that may have been on file with Jardine in relation to the Flooding Incident, as evidenced in an email from BCC to Jardine dated 2 May 2008.
85. The Report, GAB Robins one-page invoice and a one-page invoice of another private-sector agency, Insight Restorations, were provided to the applicant as part of the 82 Folios. Insight Restorations were responsible for extracting the water in the residence, removing and dumping the carpet and sanitising the affected areas.
86. The document referred to in paragraph 84 above indicate the following:
- GAB Robins' attendance at the applicant's residence was initiated by a telephone call at approximately 8 pm on 6 February 2008
  - the assessment took four and a half hours in total
  - the sole recommendation to BCC was that Insight Restorations' invoice be paid
  - three photographs of the damage to the residence were included in the Report
  - the only itemised damage was 'stuffed toys, reading and writing books and the timber base of a seahorse statue'.
87. The applicant's contention in relation to the GAB Robins documents seems to be that the Report is not as detailed as, in her view, it should have been including that photographs were not included of all items damaged in the Flooding Incident.<sup>33</sup> I accept that the GAB Robins Report is not detailed. This is perhaps not surprising as the assessment process took a relatively short time and involved a relatively low monetary amount. The applicant's view as to the adequacy or otherwise of the report does not point to the existence of additional documents.
88. Neither BCC's procedures in relation to engaging GAB Robins nor GAB Robins' role in relation to events such as the Flooding Incident suggest that any additional documentation should exist.
89. In view of the nature of the GAB Robins Report, BCC's Procedures for engaging GAB Robins, GAB Robins' role in the process, the searches conducted by BCC and inquiries made with Jardine (to whom the GAB Robins Report was provided), I am satisfied that no itemised list of damages was produced and BCC has already provided all GAB Robins material to the applicant.

#### **Searches conducted by BCC**

90. I am satisfied that documents concerning the Flooding Incident, if they existed would be locatable within Water and Wastewater Services Unit in Brisbane Water. In this Unit documents are filed according to subject matter. BCC indicates that all records across

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<sup>32</sup> GAB Robin's report states that it attended the applicant's residence at 9 pm. The applicant contends the time was between 10 and 10.30 pm. Nothing hinges on this time.

<sup>33</sup> BCC provided ten photographs to the applicant's family of which three were used in the Report.

all the files for a property are searchable in BCC's records management and electronic document management system, TRIM,<sup>34</sup> by using the property address as the primary search term. I accept that appropriate searches have been conducted of the Water and Wastewater Services Unit in Brisbane Water and these searches have not located any additional documents in relation to the Flooding Incident.

91. I accept BCC's submission that it conducted searches of its CMX files (which record correspondence) to locate documents responding to the FOI Application. An internal BCC email and handwritten file note, both dated 5 November 2008, (provided by the applicant to the Office on 14 July 2009) evidence the search request, notes in relation to the searches as well as further inquiries made in relation to the documents sought.
92. The file note referred to at paragraph 91 above also provides evidence of inquiries made with the Acting Insurance Claims Management Officer and that Officer's subsequent inquiries with Jardine.

### **Conclusion**

93. Taking into account the documents sought by the applicant, the inquiries made by BCC, BCC's record-keeping processes, the processes which occurred in relation to the Flooding Incident and the searches undertaken by BCC, I am satisfied that BCC has taken all reasonable steps to locate documents that respond to the FOI Application.
94. In view of the above, I find that there are reasonable grounds for BCC to be satisfied that no further documents exist in response to the FOI Application.

### **DECISION**

95. I affirm the decision under review by finding that BCC was entitled to refuse access to additional documents sought in the FOI Application under section 28A(1) of the FOI Act.
96. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

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**Suzette Jefferies**  
**Acting Assistant Commissioner**  
**Date: 10 August 2009**

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<sup>34</sup> Total Records and Information Management.