



## **Decision and Reasons for Decision**

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**Application Number:** 210598

**Applicant:** Mr K McLean

**Respondent:** Central Queensland University

**Decision Date:** 18 March 2009

**Catchwords:** **FREEDOM OF INFORMATION – Section 43(1) of the *Freedom of Information Act 1992 (Qld)* – legal professional privilege - confidential communications between an agency and its solicitor – confidential communications between a solicitor and third parties - application of the ‘improper purpose exception’**

**Section 28A(1) of the *Freedom of Information Act 1992 (Qld)* – refusal of access – agency to be satisfied does not exist – obligation on an agency to create a document where information does not exist in form requested**

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## REASONS FOR DECISION

### Summary

1. Having considered the parties' submissions and evidence, relevant legislation and decisions, I am satisfied that:
  - the matter in issue qualifies for full or partial exemption under section 43(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**)
  - access to the documents sought can be refused under section 28A(1) of the FOI Act on the basis that no further documents responding to the applicant's FOI Application exist.

### Background

2. By letter dated 30 January 2008, the applicant applied to Central Queensland University (**CQU**) for access under the FOI Act to the following documents (**FOI Application**):<sup>1</sup>
  - *All correspondence (email and physical) sent to the Chancellor and other people concerning this matter.*
  - *Steps and overall student numbers from 1996 to present on Mackay, Bundaberg and Gladstone campuses. Staffing numbers and class break downs for this period.*<sup>2</sup>
  - *All emails between Dr Mc Conachie, Ms Seary and Ms Macintosh and myself from the beginning of 2002 and 10<sup>th</sup> January, 2003.*
  - *All emails and other correspondence sent or received by Dr Mc Conachie, Ms Coveney, Ms Lyn Forbes-smith, Mr Granville, Assoc Prof Clift, Mr Jones, Mr Swann, Ms Culmsee and Ms Seary concerning myself between 1<sup>st</sup> September, 2004 and 30<sup>th</sup> December, 2006.*
  - *All of my emails for 2005 including those sent to myself for my email diary.*
  - *Information on Mr Jones, Ms Seary's Dr Mc Conachie's and Mr Granville's qualifications and the legal or business associations that hold them as a member.*<sup>3</sup>
  - *In 2002, a complaint was made about me to the student association at Mackay Campus – I require a copy of that.*<sup>4</sup>
  - *All of my emails that you can access from my time at CQU.*<sup>5</sup>
3. By letter dated 17 March 2008, CQU decided (**Original Decision**) to:
  - refuse the applicant access to 244 documents under section 43(1) of the FOI Act
  - exclude a number of documents under sections 22(a) and 29B(3) of the FOI Act
  - fully release the remainder of the documents located to the applicant.
4. By email dated 14 April 2008, the applicant applied for an internal review of the Original Decision (**Internal Review Decision**).

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<sup>1</sup> This list is taken from the summary on pages 7 and 8 of the FOI Application.

<sup>2</sup> Documents responding to this part of the application were released to the applicant undercover of the Original Decision and a letter from CQU dated 26 March 2008.

<sup>3</sup> This information was provided to the applicant in the Original Decision.

<sup>4</sup> CQU informed the applicant that it had no record of such a document because the CQU Student Association is a separate entity from CQU.

<sup>5</sup> CQU provided the applicant with a copy of these emails.

5. As CQU did not make an internal review decision within the time limits stipulated in the FOI Act, it is taken to have made a decision on or about 12 May 2008 affirming the Original Decision (**Affirmed Decision**).
6. By email dated 10 June 2008, the applicant sought external review of CQU's decision (**External Review Decision**).
7. By letters dated 15 September 2008, I informed the parties in this review that the Affirmed Decision would be reviewed.

#### **Decision under review**

8. The decision under review is the Affirmed Decision referred to at paragraph 5 above.

#### **Steps taken in the external review process**

9. By letter dated 22 September 2008, CQU provided the Office with its submissions and a copy of the documents in issue in this review.
10. By letter dated 2 October 2008, CQU provided further written material to the Office.
11. By letters dated 11 February 2009 I provided the parties in this review with my preliminary view.
12. By facsimile dated 23 February 2009 CQU provided further submissions in respect of its section 43(1) claim.
13. By written correspondence dated 23 February 2009 and 2 March 2009, the applicant provided submissions contesting the preliminary view.
14. In reaching a decision in this matter, I have taken the following into account:
  - the applicant's FOI Application, Internal Review Application and External Review Application
  - CQU's Original Decision and Affirmed Decision
  - file notes of telephone conversations between staff members of the Office and CQU
  - written correspondence provided to the Office by CQU throughout the course of the external review
  - written correspondence provided to the Office by the applicant throughout the course of the external review
  - a file note of a telephone conversation between a staff member of the Office and the applicant
  - relevant provisions of the FOI Act and other legislation, previous decisions of the Information Commissioner of Queensland and the decisions and case law from other Australian jurisdictions as identified in this decision.

#### **Issues in the Review**

15. During the course of this review, CQU agreed to release further documents (or parts of documents)<sup>6</sup> which it had previously claimed as exempt under section 43(1) of the FOI

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<sup>6</sup> Identified as the category 2 and 3 documents in correspondence to the applicant.

Act to the applicant. As a consequence, those documents (or parts thereof) are no longer in issue in this review.

16. By letter dated 23 February 2009, the applicant indicated that he contested the preliminary view on the following basis:
- CQU cannot claim section 43(1) of the FOI Act in relation to legal advice received from its solicitor because the solicitor may have engaged in an illegal act
  - a great deal of information has been withheld from him including:
    - emails sent to Associate Professor Clift concerning him<sup>7</sup>
    - employee figures and class breakdowns for the period 1996 to 2002.
17. Accordingly, the issues to be determined in this review include whether:
- a) the documents which remain subject to an exemption claim under section 43(1) of the FOI Act (**Matter in Issue**) qualify for exemption under that provision; and
  - b) in respect of the remaining documents sought by the applicant, there are reasonable grounds for CQU:
    - to be satisfied that these documents do not exist
    - to refuse access to these documents under section 28A(1) of the FOI Act.

## Relevant law

### Section 43(1) of the FOI Act

18. This section provides:

#### **43 Matter affecting legal proceedings**

*(1) Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.*

19. The effect of section 43(1) of the FOI Act is that information which attracts legal professional privilege will be exempt from disclosure under the FOI Act.

### **Legal professional privilege**

20. The general principles of legal professional privilege (**LPP**) were summarised by the High Court of Australia in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*<sup>8</sup> as follows:

*It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.*

21. The 'dominant purpose' test for LPP was adopted by the High Court of Australia in *Esso Australia Resources Ltd v Commission of Taxation*<sup>9</sup> in preference to the 'sole purpose' test which was formulated in *Grant and Downs*.<sup>10</sup>

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<sup>7</sup> The applicant states he has only been provided with copies of emails from Associate Professor Clift to him.

<sup>8</sup> [2002] HCA 49; (2002) 213 CLR 543 at paragraph 9.

22. The LPP exemption set out in section 43(1) of the FOI Act reflects the requirements for establishing LPP at common law. In other words, it protects communications passing between a lawyer and a client where:<sup>11</sup>

*the communication is made in the course of a professional relationship of lawyer and client; and*

*the communication is confidential; and*

*the communication is:*

- (i) from the client to the lawyer for the dominant purpose<sup>12</sup> of seeking legal advice; or*
- (ii) from the lawyer to the client for the dominant purpose of providing legal advice; or*
- (iii) from a third party at the client's request for the dominant purpose of use in assisting the lawyer to provide legal advice;<sup>13</sup> or*
- (iv) from the lawyer or the client, or a third party at the request of the lawyer or the client, for the dominant purpose of use in or in relation to existing or anticipated legal proceedings.*

*Paragraphs (c)(i)-(iii) above describe the 'advice limb' of legal professional privilege, while paragraph (c)(iv) describes the 'litigation limb'.*

23. Importantly, all communications must be made in the lawyer's capacity as a lawyer and not in any other capacity.

### **Solicitor-client relationship**

24. Underlying each of the above circumstances is the requirement that a solicitor-client relationship be established. As stated by the High Court:

*Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and [he/she] may relinquish that entitlement.<sup>14</sup>*

25. The High Court of Australia has confirmed that privilege can also apply to communications between government agencies and their salaried legal officers provided there is a 'professional relationship which secures to the advice an independent character notwithstanding the employment.'<sup>15</sup>
26. The Information Commissioner has previously stated that advice from in-house legal advisers<sup>16</sup> may attract LPP if a professional relationship of solicitor (or barrister) and client exists between relevant parties. It is this professional relationship which gives the advice its independent character which is necessary to attract LPP.<sup>17</sup>
27. In considering whether such a relationship exists, it is appropriate to consider whether the relevant legal adviser:

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<sup>9</sup> (1999) 201 CLR 49 (**Esso**).

<sup>10</sup> (1976) 135 CLR 674.

<sup>11</sup> Eimilios Kyrou, 'Under Attack: Legal professional Privilege' (2007) 81(3) LIJ 32 at 34.

<sup>12</sup> The dominant purpose of a communication must be determined objectively, having regard to the evidence, the nature of the document and the parties' submissions: *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674 at page 692; *Waterford v Commonwealth of Australia* (1987) 163 CLR 54 (**Waterford**).

<sup>13</sup> *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357.

<sup>14</sup> *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1 at paragraph 28.

<sup>15</sup> *Waterford* at page 61.

<sup>16</sup> Including legal advisers within a government department or statutory authority.

<sup>17</sup> *Potter and Brisbane City Council* (1994) 2 QAR 37 (**Potter**).

- has been admitted to practice as a barrister or solicitor
  - remains subject to the duty to observe professional standards and the liability to professional discipline.
28. With respect to the possession of a current practising certificate, I note that it is not absolutely necessary to establish the requisite degree of independence. However, it will carry some weight in assisting to establish the requisite degree of independence.<sup>18</sup>
29. On the information available to me, I am satisfied that CQU's solicitor (who is admitted to practice as a solicitor in Queensland) was, at the relevant time, in a position to provide professional legal advice of an independent character, capable of qualifying for LPP.

### **Applicant's submissions**

30. In relation to CQU's claims under section 43(1) of the FOI Act the applicant submits:<sup>19</sup>

*Concerning any concerns, re: legal privilege, VC letter explains exactly why that may not be applicable. I am in the process of a complaint that may result in the deregistration (backdated) of one of the lawyers concerned. Also, legal privilege will have to be examined in relation to other legislation. I believe that there is a great deal of correspondence there would not involve a lawyer on one end of it or be a statutory declaration. Similarly, any lawyers involved would be bound by duty of care and CQU's ethics code and as such any advice that was dangerous to my health would not be subject to legal privilege. Thus I believe that I should have access to virtually all of this as it appears to be concealing topics where that information would have to be tabled by the lawyer or they would face contempt of court charges.*

31. In response to the preliminary view, the applicant raised further concerns about CQU's solicitor, specifically that CQU's solicitor may have condoned an illegal act evidenced by an email between CQU's solicitor and an investigator.<sup>20</sup> The applicant's submissions in respect of this document can be summarised in the following manner:
- the applicant believes the actions of CQU's solicitor in the email may amount to an illegal act in which case, CQU's solicitor cannot claim that he was acting in his capacity as a lawyer at the relevant time and his advice to CQU cannot be held to be legitimate legal advice
  - the applicant believes CQU's solicitor has breached the relevant Anti-Discrimination Act, Duty of Care legislation and the 'legal ethics code.'

### **Analysis**

32. Although, this Office has no jurisdiction to investigate or make a finding as to whether the relevant solicitor has breached any of the stated laws, I have considered the applicant's submissions as a claim that the Matter in Issue cannot be privileged because the relevant communications were made to facilitate the commission of a crime or fraud, known as the 'improper purpose exception.'

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<sup>18</sup> *Potter* at paragraphs 19-27.

<sup>19</sup> In your email received by this Office on 17 July 2008.

<sup>20</sup> Who was engaged by CQU to investigate complaints made by the applicant against CQU.

33. The 'improper purpose exception' has been described by the High Court in the following manner:<sup>21</sup>

*Communications in furtherance of a fraud or crime are not protected by legal professional privilege because the privilege never attaches to them in the first place.*

*Communications made in furtherance of wrongdoing fall outside legal professional privilege, although there is no particularly precise statement as to the nature of the wrongdoing that produces that result.*

34. In determining whether the 'improper purpose exception' is established, the Information Commissioner has previously stated that the following considerations will be relevant:<sup>22</sup>

- *To displace legal professional privilege, there must be prima facie evidence (sufficient to afford reasonable grounds for believing) that the relevant communication was made in preparation for, or furtherance of, some illegal or improper purpose.*

- *Only communications made in preparation for, or furtherance of, the illegal or improper purpose are denied protection, not those that are merely relevant to it (see *Butler v Board of Trade* [1970] 3 All ER 593 at pp.596-597). In other words, it is not sufficient to find prima facie evidence of an illegal or improper purpose. One must find prima facie evidence that the particular communication was made in preparation for, or furtherance of, an illegal or improper purpose.*

- *Knowledge, on the part of the legal adviser, that a particular communication was made in preparation for, or furtherance of, an illegal or improper purpose is not a necessary element (see *R v Cox and Railton* (1884) 14 QBD 153 at p.165; *R v Bell: ex parte Lees* (1980) 146 CLR 141 at p.145); however, such knowledge or intention on the part of the client, or the client's agent, is a necessary element ...*

35. I note that the applicant, as the person alleging that LPP has been displaced by reason of an alleged illegal or improper purpose bears the onus of proving that it is made out in the current circumstances.<sup>23</sup> Further, the standard of proof required is high because it "is a serious thing to override legal professional privilege where it would otherwise be applicable"<sup>24</sup> meaning "vague or generalised contentions of crimes or improper purposes will not suffice."<sup>25</sup>

36. I have examined the email provided by the applicant and note it is a communication between CQU's solicitor, Work Cover Queensland and the investigator where the following is communicated:

- the investigator states that in preparing a report for Work Cover Queensland he intends to consider material already provided to him rather than request that the applicant nominate what information he is specifically relying on to prove his claim, which may slow the process down
- the investigator states that he does not believe the applicant will be disadvantaged taking this course of action because the material already provided "speaks of the issues at hand" however acknowledges that the Claims Assessor at Work Cover Queensland will make the final decision on this issue

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<sup>21</sup> *Commissioner of Australian Federal Police and Another v Propend Finance Limited and Others* (1997) 188 CLR 501 (**Propend**) at pages 545 and 556.

<sup>22</sup> *Murphy and Queensland Treasury* (1998) 4 QAR 446 at paragraph 38.

<sup>23</sup> *Propend* at paragraph 556.

<sup>24</sup> *Propend* at paragraph 592.

<sup>25</sup> *Propend* at paragraph 591.

- CQU's solicitor responds by stating "That sounds fine" and offering his assistance.

37. On the information available to me, I am satisfied that the above email:

- relates to a Work Cover Queensland investigation occurring in 2005
- does no more than inform CQU's solicitor how a report relating to the applicant's claim to Work Cover Queensland is progressing and what information it intends to rely on in its report
- contains no legal advice on the part of CQU's solicitor
- confirms that Work Cover Queensland has ultimate decision-making power on the matters discussed
- does not relate to any legal advice communicated to CQU by its solicitor in the Matter in Issue.

38. Accordingly I am satisfied that in the current circumstances:

- there is no evidence before me which establishes that the relevant communications within the Matter in Issue were made in preparation for, or furtherance of, some illegal or improper purpose
- the 'improper purpose exception' is not made out.

***Application of section 43(1) of the FOI Act***

39. The relevant documents (or parts of documents) which remain the subject of a claim for exemption under section 43(1) of the FOI Act include:

- internal communications between CQU and its solicitor
- communications between CQU's solicitor and third parties

40. In relation to this matter, Justice Lockhart stated in *Trade Practices Commission v Sterling*<sup>26</sup> that LPP extends to:

*Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation on his behalf.*

41. I have carefully reviewed the Matter in Issue and note it comprises confidential communications:

- (or documents which refer to such communications) between CQU and its solicitor where the dominant purpose of each communication is to request or obtain legal advice; or
- between CQU's solicitor and a third party where the dominant purpose of each communication is to request or obtain material to enable CQU's solicitor to provide CQU with legal advice.

42. As there is no evidence before me that the LPP attaching to this matter is waived, I am satisfied that the Matter in Issue:

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<sup>26</sup> (1979) 36 FLR 244 (*Sterling*) at pages 245–246.



- attracts LPP
- qualifies for exemption from disclosure under section 43(1) of the FOI Act.

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

43. Sections 28A(1) and (2) of the FOI Act provide:

#### **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 can not be found.*

Examples—

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

44. In *PDE and the University of Queensland*<sup>27</sup> (**PDE**) the Acting Information Commissioner indicates that:<sup>28</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 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'**

45. 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 found 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)

<sup>27</sup> (Unreported, Office of the Information Commissioner, 9 February 2009).

<sup>28</sup> At paragraph 34.

- 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.
46. 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 45 above and a conclusion reached that the document sought does not exist, it may be unnecessary for the agency to conduct searches. However, where searches are used to substantiate a conclusion that the document does not exist, the agency must take all reasonable steps to locate the documents sought.<sup>29</sup>
47. Therefore, in applying section 28A(1) of the FOI Act, it is relevant to ask whether:
- there are reasonable grounds to be satisfied that the requested documents do not exist
  - as CQU used searches to satisfy itself that the requested documents sought do not exist, it is necessary to consider whether CQU has taken all reasonable steps to find these documents.

### **Applicant's Submissions**

48. In relation to the sufficiency of CQU's searches for documents, the applicant submits that:
- a) he has only been provided with copies of emails sent between himself and Professor Clift, however his FOI Application was framed in terms of emails 'concerning him' – the applicant states he is aware of other documents about him that were sent to Professor Clift and believes copies of those emails should also be provided to him
  - b) in relation to statistical data about staffing numbers and class breakdowns for the period 1996 to 2002, the applicant believes that CQU is required to keep this data in accordance with taxation law.

### **CQU's Submissions**

49. In summary, CQU submits that:
- in relation to a) above:
    - it required the relevant staff member to undertake searches for any emails 'concerning the applicant'
    - all emails provided by Professor Clift and responsive to this aspect of the FOI Application have been released to the applicant
  - the statistical data sought at b) above does not exist in the form requested by the applicant

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<sup>29</sup> See *PDE*.

- it has taken all reasonable steps to locate the documents sought by the applicant, but those documents still being sought by the applicant above cannot be located because they do not exist in CQU's possession.

### Findings on material questions of fact

50. Having considered the parties' submissions, I make the following findings of fact:

- the applicant suspects the existence of further documents and is distrustful of CQU's handling of his FOI Application
- although the applicant does not consider that CQU's searches have been adequate, his submissions on this point do not state with specificity what documents he is seeking. For example the applicant states "*I am aware of other documents about me that were sent to Professor Clift...*" but does not provide any details which would assist in identifying the relevant documents or warrant further searches by CQU
- although CQU would be able to extract the relevant statistical data sought by the applicant at b) above, the information is not currently broken down in the form sought by the applicant and would require CQU to create a document
- CQU has conducted appropriate searches for documents responsive to the FOI Application
- a significant number of documents were located by CQU in its searches and have been provided to the applicant.

### Creation of a document

51. In relation to the applicant's submissions regarding the existence of statistical data, I note that because the applicant's request is framed as a request for information rather than a document, CQU would be required to create a new document in order to provide the relevant information. The Information Commissioner has previously discussed such a request as follows:<sup>30</sup>

*The ordinary and natural meaning of the words used by the legislature in s.21 and s.25 of the FOI Act makes clear that the right of access conferred by the FOI Act is not a right of access to information per se, but a right of access to information contained in the form of documents which exist in the possession or control of a particular agency or Minister, at the time that a valid access application under s.25 of the FOI Act is lodged with that agency or Minister. The natural corollary to this is that **an agency or Minister is not obliged by the terms of the FOI Act to create a new document in order to provide information requested by an access applicant** - an agency or Minister is only obliged to locate existing documents in its possession or control, which fall within the terms of a valid access application under s.25 of the FOI Act (and to make the decisions, in respect of any documents thus located, that are required under the provisions of the FOI Act).*

**[my emphasis]**

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<sup>30</sup> *Pearce and Legal Services Commissioner; Various Landholders (Third Parties)* (1999) 5 QAR 242 (**Pearce**) at paragraphs 6-9.

52. The only exception to the above, is provided for in section 30(1)(e) of the FOI Act.<sup>31</sup>

### **30 Forms of access**

(1) Access to a document may be given to a person in one or more of the following forms—

...

(e) if—

*(i) the application relates to information that is not contained in a written document held by the agency; and*

*(ii) the agency could create a written document containing the information using equipment that is usually available to it for retrieving or collating stored information;*

*providing a written document so created.*

53. I note from the discussion in *Pearce* that section 30(1)(e) of the FOI Act is designed to operate in circumstances where the information being sought is stored and able to be retrieved from a computer database.<sup>32</sup>

54. In the current circumstances CQU has confirmed that the statistical data sought by the applicant may be obtained by searching and extracting the information from timesheets and personnel records.

55. Having regard to the fact that the information currently exists in a range of written documents held by CQU, I am satisfied that:

- the exception under section 30(1)(e) of the FOI Act does not apply in the circumstances
- CQU is not obliged to create the requested document.

### **Application of section 28A of the FOI Act**

56. For CQU to determine whether there are any additional documents responding to the FOI Application and to satisfy itself that the documents sought by the applicant do not exist, it is appropriate for CQU to have regard to the key factors that relate to the FOI Application. In this instance those key factors include:

- the nature of the request as well as the dates specified
- the location at which the records would have been recorded and stored
- any alternative locations or systems in which the documents sought by the applicant may be stored.

57. I accept that CQU has undertaken appropriate searches in all locations where it considered documents responsive to the FOI Application would exist.

58. In the circumstances, I am also satisfied that:

- CQU has taken all reasonable steps to find the documents sought by the applicant
- any documents sought by the applicant in the current FOI Application which have not been provided to the applicant during the course of the review do not exist for the purposes of section 28A(1) of the FOI Act.

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<sup>31</sup> This provision is usually relevant whether information is stored and able to be retrieved from a computer database.

<sup>32</sup> See paragraphs 8-9.

## **DECISION**

59. For the reasons set out above, I set aside the decision under review and in substitution find that:

- the Matter in Issue qualifies for full or partial exemption under section 43(1) of the FOI Act
- CQU is entitled to refuse access to the documents sought in the FOI Application under section 28A(1) of the FOI Act on the basis that any additional documents sought do not exist.

60. 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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**Assistant Commissioner Henry**

**Date: 18 March 2009**