



## **Decision and Reasons for Decision**

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**Application Number:** 210683

**Applicant:** Mr J Leach

**Respondent:** Department of Police

**Decision Date:** 31 March 2009

**Catchwords:** **FREEDOM OF INFORMATION – section 28A(1) of the *Freedom of Information Act 1992* (Qld) – refusal of access – whether reasonable basis for the agency to be satisfied document sought does not exist – surveillance camera recording**

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## REASONS FOR DECISION

### Summary

1. In this external review, the applicant asserts that a document has not been provided to him by the Department of Police, known as the Queensland Police Service (**QPS**).
2. Having considered the parties' submissions and evidence, relevant legislation and previous decisions of this Office, I am satisfied that access to the requested document can be refused under section 28A(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) on the basis that it does not exist.

### Background

3. By letter dated 4 September 2008 (**FOI Application**), the applicant lodged a request with the QPS for access to the following:
  - Inspector Ian Swan's notes dated 16 March 2007
  - the security camera footage for the interview room at Cairns Police Station which the applicant was escorted into on 16 March 2007 (**Recording**).
4. By letter dated 9 October 2008 (**Original Decision**), Acting Inspector PJ Robinson, the QPS, informed the applicant that:
  - a search conducted of Inspector Ian Swan's diary notes reveals there is no mention of the applicant or any interview with the applicant on 16 March 2007
  - inquiries reveal that there is no security camera attached to the interview room
  - access to the requested documents was refused under section 28A(1) of the FOI Act on the basis that the documents sought do not exist.
5. By undated letter received by the QPS on 20 October 2008 (**Internal Review Application**), the applicant applied for internal review of the Original Decision on the basis that:
  - searches for documents had not been conducted
  - the QPS was using the FOI Act as a tool to refuse access to documents.
6. By letter dated 18 November 2008 (**Internal Review Decision**), Assistant Commissioner RE Barnett, the QPS, affirmed the Original Decision and advised the applicant that:
  - Searches were conducted within the Far North Region to locate documents relevant to the FOI Application.
  - The Far North Region supplied documentation indicating that relevant searches were carried out in that area of command and that no documents relating to the FOI Application were found.
  - In response to the Internal Review Application, further searches were carried out within the Far North Region but no documents were located.
  - He had confirmed that there is no security camera positioned within the ground floor interview room at the Cairns Police Station and therefore no such footage exists.

- He had confirmed with Inspector Swan that there is no mention of the applicant or an interview with the applicant on 16 March 2007 in Inspector Swan's notes.
7. By letter dated 4 December 2008 (**External Review Application**),<sup>1</sup> the applicant applied for external review of the Internal Review Decision. In the External Review Application the applicant states:

*Acting Inspector Robinson Queensland Police Service Freedom of Information has relied on searches conducted within the Far North Region to locate documents relevant to my request. However the Far North Region has no relevance to a interview at Cairns Police Station dated 16<sup>th</sup> March 2007.*

*I am not satisfied your decision is a correct decision by using Inspector Ian Swan as a part of the Freedom of Information Application. For Example, Inspector Ian Swan's notes would not have recorded any interview, because Sergeant Peter Fisher Unlawfully constrained and forced myself into the Cairns Police Station dated 16<sup>th</sup> March 2007. Inspector Ian Swan's visit in the interview room dated 16<sup>th</sup> March 2007 was accompanied by Inspector Katina Carol at the request of Cairns Police Personnel. Therefore no records were recorded by Cairns Police Personnel. However, the interview room I was detained in at Cairns Police Station dated 16 March 2007 was captured by security camera footage.*

8. In the conduct of a review, the Information Commissioner (or delegate) has the power to review any decision that has been made by an agency in relation to the FOI application concerned and to decide any matter in relation to the applicant that could, under the FOI Act, have been decided by an agency.<sup>2</sup>

#### **Decision under review**

9. The decision under review is the Internal Review Decision referred to at paragraph 6 above.

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

10. By facsimile dated 17 December 2008, this Office asked the QPS to provide copies of documents relevant to the review.
11. By letter dated 7 January 2009, the QPS provided the requested documents.
12. By letter dated 13 January 2009, I wrote to the applicant confirming that the Internal Review Decision would be reviewed and explained that:
- it appeared from the External Review Application that the applicant had acknowledged that Inspector Ian Swan's notes would not have recorded any interview with him
  - accordingly, unless he advised otherwise by 20 January 2009, I would assume that the scope of the external review would be limited to determining whether the Recording exists.
13. The applicant did not respond to my letter dated 13 January 2009 and the scope of this external review is therefore limited to determining whether the Recording exists.

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<sup>1</sup> The applicant's letter was received by this Office on 12 December 2008 after it was incorrectly sent to Assistant Commissioner Barnett of QPS.

<sup>2</sup> Section 88(1) of the FOI Act.

14. By letter dated 13 January 2009, I asked the QPS to provide a statutory declaration to this Office regarding its submission that there is no video surveillance system in the interview room in the Cairns District Police Station.
15. On 20 January 2009, an officer of the QPS telephoned a staff member of this Office and provided information relevant to the external review (which is set out below at paragraph 23).
16. By email on 20 January 2009, the QPS provided this Office with a statutory declaration signed by Inspector John Ross Harvey of the QPS, Cairns. Inspector Harvey declared that:

*There are no video surveillance cameras attached to the ground floor interview room of the Cairns Police Station.*

17. By letter dated 29 January 2009, I provided the applicant with a copy of the statutory declaration and advised him that it was my preliminary view that:
  - There is no video surveillance of the ground floor interview room in the Cairns District Police Station and therefore no video footage exists in relation to his meeting with police personnel in the Interview Room on 16 March 2007.
  - There are reasonable grounds for the QPS to be satisfied that the Recording does not exist.
  - The QPS was entitled to deny him access to the Recording under section 28A(1) of the FOI Act on the basis that it does not exist.

I invited the applicant to provide submissions to this Office by 16 February 2009 if he did not accept the preliminary view.

18. By letters dated 25 January 2009, 1 February 2009 and 16 February 2009 (and received by this Office on 10 March 2009), the applicant provided submissions in support of his case.<sup>3</sup>
19. In making my decision in this review, I have taken into account the following:
  - the FOI Application, Internal Review Application and External Review Application
  - the Original Decision and Internal Review Decision
  - letters from the applicant to this Office dated 25 January 2009, 1 February 2009 and 16 February 2009
  - the file note of a telephone conversation between a staff member of this Office and a staff member of the QPS on 20 January 2009
  - the statutory declaration provided by Inspector Harvey of the QPS, Cairns dated 19 January 2009
  - relevant provisions of the FOI Act as referred to in this decision
  - decisions of the Information Commissioner as referred to in this decision.

### **Issue for determination**

20. The issue to be determined in this review is whether there are reasonable grounds for the QPS to be satisfied that the Recording<sup>4</sup> does not exist and accordingly, whether access can be refused under section 28A(1) of the FOI Act.

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<sup>3</sup> The applicant's letters dated 25 January 2009 and 1 February 2009 relate to other external reviews currently with this Office. I refer to those letters in this decision because they contain submissions relating to this review.

## The applicant's submissions

21. In his letter to this Office dated 16 February 2009, the applicant submits that:
- He is not satisfied that the QPS has searched for documents.
  - The QPS is using the FOI Act as a tool by just quoting section 28A(1) of the FOI Act.
  - He is satisfied that section 30(1)(c) of the FOI Act is relevant.<sup>5</sup>
  - The Recording does exist *'because a Queensland Police Service admit to Inspector Ian Swan met with myself dated 16<sup>th</sup> March 2007.'*
22. In his letter to this Office dated 1 February 2009, the applicant states that he was detained and interviewed by the QPS on 16 March 2007 and therefore video tapes of the interview must exist.

## The QPS' submissions

23. The QPS submit that there are no video surveillance cameras attached to the ground floor interview room of the Cairns Police Station.

## Findings

### Access to documents under the FOI Act

24. Section 21(a) of the FOI Act gives a person a legally enforceable right of access to documents of an agency. However, section 21 of the FOI Act states that the right of access is *'subject to this Act'*. Accordingly, the right of access can be displaced by a valid refusal of access under section 28A(1) of the FOI Act if an agency is satisfied that the document to which access is sought does not exist.
25. I acknowledge the applicant's contention that section 30(1)(c) of the FOI Act supports his application. Section 30(1)(c) of the FOI Act is not concerned with the 'right of access' but rather the 'form of access'. The right of access only arises under section 21 of the FOI Act and as discussed in paragraph 24 above, that right of access is subject to the FOI Act.
26. Section 30(1)(c) of the FOI Act does not give a separate right of access, instead, if an agency makes a decision to give access to a document, section 30(1)(c) is relevant to the issue of how that access is given. This is reflected in the wording of the section

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<sup>4</sup> Under section 36 of the *Acts Interpretation Act 1954* (Qld) surveillance camera footage qualifies as a 'document'.

<sup>5</sup> Section 30(1)(c) of the FOI Act provides:

#### **30 Forms of access**

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

...

(c) if the document is an article or material from which sounds or visual images are capable of being reproduced – making arrangements for the person to hear the sounds or view the images;

which begins *[a]ccess to a document may be given to a person in 1 or more of the following forms ...'*

27. Accordingly, the effect of these provisions of the FOI Act is that an agency is only required to consider giving access to a document in the manner described in section 30(1)(c) (making arrangements for the person to hear the sounds or view the images) if the agency decides to or is required to give access to the document sought.

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

28. 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

29. In *PDE and the University of Queensland*<sup>6</sup> (*PDE*) the Acting Information Commissioner indicates that:<sup>7</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.*

30. In *PDE* the Acting Information Commissioner also considered how an agency is to satisfy itself as to the non-existence of documents sought by an applicant and indicated that to be satisfied that a document does not exist, it is necessary for the agency to rely upon its particular knowledge and experience with respect to various key factors including:

- the administrative arrangements of government
- the agency structure
- the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
- the agency's practices and procedures (including but not exclusive to its information management approach)
- other factors reasonably inferred from information supplied by the applicant including:
  - the nature and age of the requested document/s
  - the nature of the government activity the request relates to.

31. 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

<sup>6</sup> (Unreported, Office of the Information Commissioner, 9 February 2009).

<sup>7</sup> At paragraph 34.

discussed at paragraph 30 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>8</sup>

32. Therefore, in applying section 28A(1) of the FOI Act it is first relevant to ask whether there are reasonable grounds to be satisfied that the Recording does not exist.

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

33. For the QPS to determine whether the Recording exists, it is appropriate for the QPS to have regard to the key factors that relate to the FOI Application. In this instance, I consider those key factors include:
- the nature and age of the requested document/s
  - the form of documentation requested.
34. The applicant submits that the Recording exists because the QPS admits that Inspector Swan met with him on 16 March 2007. I am not satisfied that this provides any basis on which to conclude that the Recording exists.
35. I accept QPS' evidence, in the form of Inspector Harvey's statutory declaration, that there are no video surveillance cameras attached to the ground floor interview room of the Cairns Police Station.
36. In view of the above, I find that there are reasonable grounds for QPS to be satisfied that the Recording does not exist because there was no facility to create the document sought and accordingly, it is unnecessary for the QPS to conduct searches of the document sought.

### **DECISION**

37. I affirm the decision under review by finding that access to the Recording can be refused under section 28A(1) of the FOI Act on the basis that it does not exist.
38. 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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**S Jefferies**  
**Acting Assistant Commissioner**

**Date: 31 March 2009**

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<sup>8</sup> See *PDE*.