



Decision and Reasons for Decision

Application Number: 210813

Applicant: Mrs N Palmer

Respondent: Gold Coast City Council

Decision Date: 21 December 2009

Catchwords: **FREEDOM OF INFORMATION – terms of the Freedom of Information application – sufficiency of search – section 28A of the *Freedom of Information Act 1992***

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REASONS FOR DECISION

Summary

1. In this external review the Applicant contends that the entire contents of a Gold Coast City Council (**Council**) file fall within the terms of her Freedom of Information Application (**FOI Application**) and that Council has construed the terms of the FOI Application too narrowly and consequently the searches to locate documents responsive to her FOI Application have not been sufficient.
2. I find that:
 - the terms of the FOI Application were sufficiently specific to set Council's search parameters. The Applicant clearly sought access to a copy of a specific Council file on the particular subject of a Council Officer's attendance at the Applicant's property as a result of advice received from the Queensland Building Services Authority (**QBSA**).
 - Council does not have a *file* responsive to the terms of the FOI Application. However, Council located *documents* it considered corresponded with the terms of the application.
 - for the purpose of section 28A (1) of the FOI Act, it is reasonable to be satisfied that no documents exist that are responsive to the terms of the FOI Application. Therefore, access may be refused to the Council file on the matter of the Council Officer's attendance at the Applicant's property as a result of the advice received from the QBSA on the basis that it does not exist.
 - Council's searches were sufficient having regard to the terms of the FOI Application.

Background

3. By application dated 8 December 2008, Mrs Noelene Palmer (**Applicant**), through Mr Wayne Palmer, her husband, in his capacity as her agent (**Applicant's Agent**), applied to the Gold Coast City Council (**FOI Application**) for access to information under the *Freedom of Information Act 1992* (**FOI Act**) in the following terms:

...a copy of the Gold Coast City Council file on the matter that Council's Ms Harrison refers to in the underlined section which is clouded on the attached...
4. The attached 'clouded' section with underlining is as follows:

Ms Harrison...was not investigating a complaint about a "noisy air-conditioner", rather she was at the Palmer's residence as a result of the written advice received from the QBSA.
5. By letter dated 19 January 2009 Ms Kath Johnson, Freedom of Information decision maker for Council, decided that Council held five pages that corresponded to the FOI Application and the Applicant was provided full access to the pages (**Original Decision**). The five pages specifically concerned the 'written advice received from the QBSA' and the resulting attendance of Ms Harrison (**Council Officer**) at the Applicant's property.
6. By e-mail dated 13 February 2009, the Applicant's Agent, questioned Council's decision that the FOI Application captured only five pages. The Applicant's Agent asserted that among other documents sought, the Applicant was seeking Council's responses to correspondence authored by the Applicant's Agent.

7. By return e-mail of 13 February 2009, Council advised that it would treat the e-mail of the Applicant's Agent as being a request for internal review of Ms Johnson's decision.
8. By letter dated 5 March 2009 Mr Conrad Martens, Internal Review Officer for Council, decided to affirm Ms Johnson's decision and found that Council held no further information that related to the FOI Application (**Internal Review Decision**).
9. By letter dated 18 March 2009, the Applicant and her Agent applied for external review of Mr Marten's decision (**External Review Application**). Attached to that letter was a bound collection of material entitled '[Applicant] - Freedom of Information Application NEP-GCC-Fo14- Gold Coast City Council PN149679/11/02(P1)' (**Supporting Documents**). In the External Review Application the Applicant's Agent submits that Council's responses to the correspondence from him and the Applicant come within the scope of the Applicant's FOI Application.

Decision under review

10. The decision under review is the Internal Review Decision of Mr Conrad Marten of Council dated 5 March 2009.

Steps taken in the external review process

11. By telephone on 23 March 2009, a member of this Office contacted Ms Webber of Council to obtain Council's submissions on the scope of the FOI application.
12. By telephone on 23 March 2009, 26 March 2009, 27 March 2009 (twice) and 30 March 2009 a member of this Office had extensive discussion with the Applicant's Agent.
13. By letter dated 1 April 2009, Acting Assistant Commissioner Jeffries notified the Applicant and her Agent of procedural matters regarding conduct of reviews, and acknowledged the telephone contact between the Applicant's Agent and this Office during which he provided arguments in favour of a broad interpretation of the scope of the Applicant's FOI Application.
14. By letter dated 1 April 2009, Acting Assistant Commissioner Jeffries notified Council that this Office:
 - considered the issue in the review was the scope of the FOI Application, and therefore whether Council has provided all documents responding to the FOI Application;
 - would consider the views put by Ms Webber of Council and the Applicant and her Agent.
15. By letter dated 18 August 2009, I provided the FOI Applicant with a preliminary view that the FOI application could not be read more broadly as requesting access to a larger file that contains, among other documents, the written advice received from the QBSA, and that the scope of the FOI Application was the Gold Coast City Council's file on the matter of the written advice received from the QBSA, and which relates to the Applicant and her Agent.
16. By letter dated 25 August 2009, the Applicant and her Agent responded to my preliminary view and provided further submissions.

17. In reaching a decision in this external review, I have given consideration to:

- the FOI Application and Original Decision
- the Internal Review Application and Internal Review Decision
- the External Review Application and Supporting Documents
- the Applicant's oral submissions in telephone conversations between the Applicant's Agent and this Office on 23 March 2009, 26 March 2009, 27 March 2009 (1), 27 March 2009 (2) and 30 March 2009.
- written submissions received from the Applicant on 25 August 2009.
- the provisions of the FOI Act as set out in this decision
- case law and previous decisions of the Office as referred to in this decision.

Issues in the review

18. The issues in this review are the interpretation of the terms of the Applicant's FOI Application and whether the searches of the Council to locate documents responsive to the terms of the FOI Application have been sufficient.

Applicable legislation

19. The *Right to Information Act 2009 (RTI Act)* commenced on 1 July 2009.¹ Section 194 of the RTI Act repeals the FOI Act. However, section 199 of the RTI Act provides in relation to applications made under the repealed FOI Act:

199 Applications under Freedom of Information Act 1992

- (1) *The repealed Freedom of Information Act 1992 continues to apply in relation to an application under that Act that has not been finalised before the commencement of this section as if this Act had not been enacted.*
- (2) *For subsection (1), an application has not been finalised until -*
 - (a) *a decision on the application is made; and*
 - (b) *either -*
 - (i) *the time for exercising any review rights or appeal rights in relation to the decision has ended without any rights being exercised; or*
 - (ii) *any review or appeal in relation to the decision has ended.*

20. Accordingly, because the FOI Application was made under the repealed FOI Act and has not yet been finalised, for the purposes of making a decision in this review, I am required to consider the application of the FOI Act (and not the RTI Act) to the matter in issue.

The law

21. Section 25(2) of the FOI Act provides:

25 How applications for access are made

- ...
(2) *The application must—*
 - (a) *be in writing; and*
 - (b) *provide sufficient information concerning the document to enable a responsible officer of the agency or the Minister to identify the document; and*
 - (c) *state the address to which notices under this Act may be sent to the applicant; and*

¹ With the exception of sections 118 and 122 of the RTI Act.

(d) *if the application is being made on behalf of the applicant—state the name of the applicant and the name of the applicant's agent.*

22. Accordingly, an applicant should provide sufficient information in an application for access to enable the identification of the document to which access is sought.
23. There have been a number of decisions of this Office that have considered the issue of the construction and interpretation of FOI applications. In particular the Information Commissioner has previously commented on the terms in which an FOI application is made as follows:

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 document².

24. Additionally, in *Cannon* having considered the terms of the FOI Access request in issue, the Information Commissioner observed that the problem in that case was not the sufficiency of the searches undertaken by the agency but with the terms of the FOI application itself. He concluded that the Agency's response to the FOI application was sufficient in light of the terms in which the FOI application was framed.³
25. In the decision of *Robbins and Brisbane North Regional Health Authority*⁴ (**Robbins**) the Information Commissioner reinforced the notion that the terms of an FOI Application will set the parameters for an agency's search efforts and went on to say that an applicant cannot unilaterally expand the terms of an FOI Application. The Information Commissioner noted:

*It is not possible for an applicant to unilaterally extend the terms of an FOI access application at the external review stage. The terms in which the FOI access application was framed will already have 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 application (see *Re Cannon* at para 8). Section 25(2) provides that an FOI access application must provide such information concerning the document sought as is reasonably necessary to enable a responsible officer of the agency or the Minister to identify the document.*

26. Additionally, in that case the Information Commissioner noted that where there is ambiguity in the terms of an FOI application it is rarely appropriate to apply legal construction techniques in preference to consulting with the author of the words for clarification. However, in the circumstances of that case the Information Commissioner was satisfied that there was no ambiguity in the terms of the FOI application that required clarification.⁵

² *Cannon and Australian Quality Egg Farms Limited* (1994)1 QAR 491 (**Cannon**) paragraph 8.

³ See *Cannon* at paragraph 16.

⁴ *Robbins and Brisbane North Regional Health Authority* (1994) 2 QAR 30 at paragraph 17.

⁵ See *Robbins* at paragraph 16.

27. Section 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.*

28. In *PDE and the University of Queensland*⁶ (**PDE**) the Information Commissioner indicated that:⁷

*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.*

...to be satisfied that a document does not exist, it is necessary for the Minister or agency to rely upon a number of key factors, including the Minister/agency's particular knowledge or experience with respect to the administrative arrangements of government, the agency structure, the Minister/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), relevant administrative practices and procedures including but not exclusively information management approaches. The knowledge and experience required will vary from agency to agency, Minister to Minister and from one FOI application to another.

...

Section 28A of the FOI Act now requires an agency to be 'satisfied' as to the existence of a document. Justice Finn referred to the test of 'being satisfied' as an evaluative judgement based on the knowledge and experience of the agency. Such a judgement requires that the decision be made on reasonable grounds. In the context of applying section 28A(1) of the FOI Act the preferred question then is:

Are there reasonable grounds for the agency/Minister to be satisfied that the requested document does not exist?

In the context of applying section 28A(2) of the FOI Act, the preferred question is then:

⁶ (Unreported, Office of the Information Commissioner, 9 February 2009).

⁷ At paragraph 34.

Are there reasonable grounds for the agency/Minister to be satisfied that the requested document has been or should be in the agency's or Minister's possession?

In practice these questions may be two sides of the same coin and in answering one question, the other question is answered in the opposite. The provision however requires the agency to satisfy itself of either one or the other. Section 28A of the FOI Act should now be applied when a question of the sufficiency of searches otherwise arises.

The second question in Shepherd is presently used in the application of section 28A(1) of the FOI Act and in sufficiency of search reviews:

Have the search efforts made by the agency to locate the document been reasonable in all the circumstances of the review?

This question now needs to be brought into line with the test used in section 28A(2)(b) of the FOI Act to read:

Have all reasonable steps been taken to find the document but the document can not be found?

In the context of applying s28A(1) of the FOI Act this question only needs to be asked if an agency or Minister relies in part on searches to satisfy itself that the document does not exist.

29. Thus, in determining whether section 28A(1) of the FOI Act applies to refuse access to a document, it is relevant to first ask whether there are reasonable grounds to be satisfied that the requested documents do not exist. In determining whether section 28A(2) applies to refuse access to a document, or in respect of section 28A(1), if the agency has used searches to satisfy itself that the documents sought do not exist, it is necessary to consider whether the agency has taken all reasonable steps to find the documents sought.

The terms of the FOI Application

30. I have in the material before me a copy of the Applicant's FOI Application. The FOI Application is comprised of a covering letter dated 8 December 2008 which:
- attaches a completed Council FOI Access Application form (**Council's FOI form**),
 - attaches page 6 of the decision of this Office in the matter of *Palmer and the Gold Coast City Council 210463 (Earlier Decision)*; and
 - sets out an authorisation for the Applicant's husband to act as her agent in the FOI Application.
31. In the section of Council's FOI form headed 'Description of document/s applicant wishes to obtain' the Applicant states as follows:

COULD WE PLEASE ASK FOR A COPY OF THE GOLD COAST CITY COUNCIL FILE ON THE MATTER THAT COUNCIL'S MS HARRISON REFERS TO IN THE UNDERLINED SECTION, WHICH IS CLOUDED IN THE ATTACHED "EXTRACT COPY ONLY" OF THE "OFFICE OF THE INFORMATION COMMISSIONER (QLD) – 210463 – PAGE 6 OF 8".

**SPECIAL NOTE! SHOULD COUNCIL BE UNSURE ABOUT THE FILE THAT WE ARE SEEKING THEN WE WOULD ASK COUNCIL TO CONTACT US ON FOR CLARIFICATION!*

32. On the attached copy of page 6 of the Earlier Decision the Applicant has written the words 'EXTRACT COPY ONLY' on the top left corner of the page and has highlighted the following passage:

Ms Harrison...was not investigating a complaint about a "noisy air-conditioner", rather she was at the Palmer's residence as a result of the written advice received from the QBSA.

Applicant's submissions

33. I note that included in the Supporting Documents provided to this Office by the Applicant and her Agent is a comprehensive set of documents related to the FOI Application, including the various correspondence (by email and post) between the parties and the documents that were provided by Council to the Applicant. In particular the Applicant has provided a copy of the documents provided to the Applicant under cover of the Council's notice of its Original Decision (letter dated 19 January 2009) and documents subsequently provided to the Applicant (copies of correspondence from the Applicant and her Agent to Council) under cover of Council's letter dated 3 February 2009.
34. Also within the supporting documents is a copy of the letter which is the 'written advice' that is referred to in the extract of the earlier decision that was attached to the FOI Application. That letter is from QBSA to Council and is dated 30 January 2007, and it outlines concerns about the use by the Applicant of her property for purposes that were not approved by Council and suggests that Council may wish to investigate the concern (**QBSA letter**).
35. The supporting documents also contain a copy of a file note dated 23 April 2007 made by the Council Officer who attended at the Applicant's property in response to the QBSA letter.
36. On 28 January 2009, having received notification of Council's initial access decision, the Applicant's Agent sent an email to Council in which he stated:

We note with interest that the section of file PN149679/16/- (P1) that contains our correspondence with Council regarding the "noisy air conditioner" issue is not included as part of the papers that you have provided to us.

In that email the Applicant's Agent sought an explanation from Council as to why Council had not included 'the section of the file or files' that contained their 'correspondence with Council regarding the "noisy air conditioner" issue'.

37. Following a telephone conversation between the Applicant and Council on 2 February 2009, the Applicant and her Agent sent an email to Council dated 7 February 2009. The Applicant and her Agent stated at item 2 in the email:

*We wish to confirm that [the Applicant] understood that she had advised that the information that we were seeking was "the total **CONTENTS** of the file or files that contain our correspondence streams with Council which are referenced NEP-PET1 and NEP-PET2".*

And at item 10:

*We trust that this expansion of our explanation of our Fol Access Application – PN149679/11/02(P1) assists in the clarification and confirmation of our requirement for the total **CONTENTS** of Council's file or files that relate to QBSA dobbing [the Applicant] into*

Council, Councils matters that were associated with QBSA dobbing [the Applicant] into Council and our correspondences with Council regarding the noisy air conditioner claim.
(sic)

38. A copy of the email of the Applicant and her Agent dated 7 February 2009 is contained in the Supporting Documents. Two hand written notes appear on the copy of the email; one on the top and one on the bottom. The note on the top of the document is from the Applicant's Agent to the Applicant requesting that she contact Council to clarify whether the email had been received by Council. That note is dated 11 February 2009. The note on the bottom of the page is undated. It is a note from the Applicant to the Applicant's Agent in response to his note. It relays the crux of the telephone conversation between the Applicant and Ms Webber of Council. The note states:

Referred to Review with Conrad Martens has 28 days to respond. she feels she has sent everything – but because you don't, it has gone for review.

39. In the Applicant's External Review Application, the Applicant stated:

- *As part of our preparation for our Crime and Misconduct Commission claim against Council, we have lodged a Fol application for Councils' files which will clarify that Council were aware that [the Council Officer] had advised the [Applicant and her Agent] that she was investigating a noisy air conditioner complaint.*

...

- *We wrote to Council to explain that we required **the total CONTENTS of Council's file or files.***

...

- *We expect that if the ... correspondence that was provided to us by Council was in Council's file referenced PN149679/16-(P1) and **was in the scope of the FOI application**, then Council's responses to our correspondences should also be **in the scope of the FOI application?***

[Applicant's emphasis]

40. In a telephone conversation with a staff member of this Office on 23 March 2009 the Applicant's Agent submitted that it should have been clear to Council that the Applicant was seeking more documents than just the QBSA documents because of the history between the parties and the fact that the Applicant and her Agent were pursuing certain matters through the Crime and Misconduct Commission.

41. The Applicant's Agent also submitted in telephone conversations with a staff member of this Office on 26 March 2009 and 27 March 2009 that the FOI Application should be read to include Council documents concerning the 'air conditioner issue' and in particular, the responses of Council to his correspondence to it concerning that issue.

42. The Applicant's Agent stated in his email to this Office dated 25 August 2009 that the:

*Fol application was made with the intention to obtain the contents of the **larger file** in order to prove that ... [a] section of the [Council] ignored correspondence that was designed to clarify why the [Council] had used the excuse of the noisy air conditioner, which appears to have been an endeavour to cover up the association between the QBSA and the [Council], which condones either party dobbing in people who appear to be breaking the rules as different to addressing the situation directly with the person that is thought to be breaking the rules.*

43. In his email dated 25 August 2009 the Applicant's Agent argued that the application for the file should be read as an application for a larger file.

Council's submissions

44. In a letter to the Applicant's Agent dated 30 January 2009 Council stated:

...assumption was that you did not require a copy of your own documents to be included as part of the documents released to you.

45. In a letter to the Applicant dated 3 February 2009 Council stated:

I refer to my letter dated 30 January 2009 and your telephone discussion on Monday 2 February 2009 with Miss Kathy Johnson, wherein she advised that at the time of processing your application, her assumption was that you did not require a copy of your own documents to be included as part of the documents released to you.

I wish to confirm your instructions to Miss Johnson, wherein you have requested a copy of all correspondence with your reference NEP-PET1-1 to NEP-PET1-9 and NEP-PET2-1 to NEP-PET2-3.

Please find enclosed a copy of the documents as requested.

46. Council stated in the Internal Review Decision:

The scope of the original application was succinctly and no doubt thoughtfully framed.

...

It is noted that the FOI Decision Maker made an assumption that you did not require a copy of your own written communications to Council to be included as part of the documents released to you. That was rectified on 3 February 2009.

...

In my view, you have received the total of the information falling within the scope of your application. Of course you may, if you wish, put in another application with a broader scope to capture other information that you are apparently seeking.

47. In an email to the Applicant's Agent (contained in the Applicant's supporting documentation) dated 10 March 2009, Council stated its view that Council's correspondence to the Applicant and her Agent were not within the scope of the FOI Application and suggested that the Applicant and or her Agent might consider the option of lodging a fresh FOI Application in deciding whether to exercise their right of External Review.
48. In a telephone conversation with a staff member of this Office on 23 March 2009 Council restated its view that the application was very specific. Additionally, Council argued that in light of the previous experience of the Applicant and her Agent with FOI applications, they should have known that if they were seeking a complete file, this application was not worded to achieve that. Council contended that the Applicant and her Agent had been informed on several occasions that a new FOI Application for the matter they were seeking should be lodged, at which point Council would be happy enough to process.
49. On 10 and 11 September 2009 a staff member of this Office telephoned Council to clarify Council's position in relation to a number of issues.
- Firstly, clarification was sought about whether the correspondence from the Applicant and her Agent that Council had provided to the Applicant under cover of their letter dated 3 February 2009 had been released to the Applicant as part of the documents being released under the FOI Act or if it had been released on an administrative basis. Ms Webber of Council stated that Council had taken the view

that the correspondence from the Applicant and her Agent to Council post dated the attendance of the Council Officer at their premises and therefore was not responsive to the terms of the application. The provision of the correspondence of the Applicant and her Agent was not part of the FOI decision because it concerned broader complaints about Council conduct generally; they were not documents about Council's attendance at the property. However, Council were happy to give the Applicant and her Agent their own correspondence on an administrative basis, when they asked for it, because it was their correspondence.

- Secondly, clarification was sought about the nature of Council's records management system. Ms Webber provided detailed information concerning Council's records management. She said that:
 - Council files documents electronically and in hard copy
 - they do not have separate files on complaints because there can be numerous complaints relating to one issue and it would be impossible to have a filing system that was filed according to complaints, rather they file complaints on general property files
 - General Property files have the digits '16' in the file reference number. Council also has FOI files, these have the digits '11' in the file reference number. There are also specific property files which contain the digits '36' in the file reference number and these files have material on them which relates to financial matter such as water and rate notices
 - a General Property file can contain all general matters relating to a particular property descriptor since its inception. It could include complaints about dogs or pool fences and issues about local laws and property management issues
 - the documents provided to the Applicant were sourced from the General Property file for the Applicant's property description.
- Thirdly, and further to the information concerning Council's records management system, Ms Webber submitted that Council do not hold a file responsive to the terms of the FOI Application; rather they hold five documents that concern that subject. Those documents formed part of the larger, General Property file for the Applicant's property, and the larger file covers broader subject matters and does not fall within the scope of the FOI Application.
- Finally, Ms Webber stated that Council is not pedantic about the terms of FOI requests because people will often ask for a copy of the 'complaint file about X' without understanding Council's filing system. They sourced the documents released to the Applicant from the General Property file for the Applicant's property. In Council's view, the whole of the General Property file was not responsive to the application.

Earlier Decision of this Office

50. As previously noted, as part of her FOI Application in this matter the Applicant highlighted an extract from an Earlier Decision of this Office. Accordingly, it is pertinent to revisit the paragraph from which the extract was taken and other relevant parts of the earlier decision.
51. The earlier decision concerned an application by the Applicant (who is also the Applicant in this review) for an extension of time within which to make application for external review of a decision of the Gold Coast City Council dated 12 September 2007.
52. The Applicant had sought access to documents containing '*...the contact details of the person or persons who lodged a complaint with the Gold Coast City Council about a*

noisy air conditioner at my home address...' and Council had decided that there were no documents responsive to the terms of the Applicant's FOI Application.

53. The Information Commissioner examined the merits of the substantive application for review in determining whether to exercise the discretion to extend the time within which the Applicant could bring an application for external review.

54. On page 5 of the earlier decision the Information Commissioner observed:

29. *To assist me in examining the merits of the substantive application with respect to sufficiency of search and specifically, whether there is an explanation as to why the documents sought by the applicant do not exist, I requested the Council to provide me with a submission addressing the following issues:*

- *whether a complaint was in fact made about an air conditioner at the applicant's property*
- *whether the QBSA had identified concerns about an air conditioner in the context of its investigations into the applicant's property*
- *why the Council raised the issue of air conditioner noise when visiting the applicant's property.*

30. *The Council responded to those issues as follows:*

- *no complaint was made to Council about an air conditioner at the applicant's property*
- *the notification sent to the Council by the QBSA made reference to the owner of the property 'operating a commercial venture in the building by way of manufacturing and/or distributing of air conditioning components'*
- *no specific reference was made to a 'noisy air conditioner' in the QBSA notification*

31. *With respect to why the Council raised the issue of air conditioner noise when visiting the applicant's property, Council provided the following explanation:*

Ms Harrison of Council's Development Compliance branch ... is an acting Compliance Officer and had attended Mr & Mrs Palmer's residence on 21 March 2007.

Ms Harrison ... was not investigating a complaint about a "noisy air conditioner", rather she was at the Palmer's residence as the result of the written advice received from the QBSA.

Mr Palmer invited Ms Harrison into the shed at the back of the premises, part of which was set out like a consultancy office. However, Mr Palmer declined to show Ms Harrison the balance of the inside of the shed.

... a conversation ensued between her and Mr Palmer, where she made mention of the fact that an air conditioner was running in the shed.

It would appear that this comment made by Ms Harrison is what had [led] Mrs Palmer to believe a complaint had been made about a "noisy air conditioner".

55. The Information Commissioner, having considered the Applicant's submissions and the submissions of Council, went on to make the following findings of fact⁸:

- *the Council inspected the applicant's property as a result of a notification it received from QBSA indicating that the applicant was 'operating a commercial venture in the building by way of manufacturing and/or distributing of air conditioning components'*⁶
- *a complaint was **not** made to the Council by the QBSA, or any other individual, about air conditioner noise on the applicant's property*

⁸ At paragraph 35.

- *the applicant's husband incorrectly perceived that a comment made by the Council inspector in relation to an air conditioner operating in the applicant's shed was connected with a noise complaint.*

56. The Information Commissioner determined that there was no merit in the substantive application for review and decided not to exercise the discretion to extend the time within which the Applicant could apply for external review.

Findings of fact

What are the terms of the Application?

57. It is clear from the material before me that by letter dated 8 December 2008 the Applicant wrote to Council to apply for access to documents under the FOI Act. Attached to that letter were Council's FOI form and an extract from the Earlier Decision of this Office. The applicant cross referenced a particular part of a sentence contained in the extract of the earlier decision to the request contained in Council's FOI form.

58. I note that on Council's FOI form the Applicant sought access to a copy of a particular Council file. The cross reference to and highlighting of the attached extract defined the file being sought. Namely, a file 'on the matter' that was highlighted in the attached extract from the Earlier Decision.

59. The part of the extract that had been highlighted states:

'rather [the Council Officer] was at the Palmer's residence as the result of the written advice received from the QBSA.'

60. The result of cross referencing the highlighted part of the extract from the Earlier Decision is that the subject of the FOI Application is a specific file about the presence of the Council Officer at the Applicant's property following written advice received by Council from QBSA. Thus, the FOI Application should be read as seeking access to a specific file concerning that particular subject. Therefore, the documents to which the applicant seeks access are those located on a particular file of a particular description.

61. This conclusion is supported by the 'Special Note' the Applicant made on Council's FOI form that if Council were 'unsure about **the file** that' the Applicant was seeking, to contact the applicant for clarification.

What types of files do Council have?

62. Council have submitted that it would be logistically impractical to create separate complaint files. Council says it is its practice to place property related complaints (such as fencing disputes or inappropriate use complaints) and their related correspondence on what it calls General Property files. General Property files have file reference numbers that include the number '16' and the property descriptor.

63. I consider that Council's submissions concerning the manner in which complaints are filed are reasonable and credible. I find that it is Council's usual practice to file property related complaints on General Property files.

Do Council have a file responsive to the terms of the application?

64. It is clear from the terms of the FOI Application that the file sought by the Applicant concerned 'written advice received from the QBSA'. It is clear from the QBSA letter

that the 'written advice' concerned the use by the Applicant of her property for a purpose for which it was not approved. The QBSA letter was therefore a property related complaint about the use by the Applicant of her property for a purpose for which it was not approved.

65. There is no evidence before me to suggest that Council deviated from its usual practice of placing property related complaints on a General Property file when it filed the QBSA letter.
66. I find that Council does not have a specific file about the particular subject of the Council Officer's attendance at the Applicant's property pursuant to the written advice of the QBSA. Accordingly, I find that Council does not have a file responsive to the terms of the FOI Application.

What documents did Council provide to the Applicant?

67. Council provided five documents to the Applicant with the Original Decision letter dated 19 January 2009. Four of the five documents are Council generated documents. They are marked with a Council file reference. In each case the file reference contains the digits "16", denoting that the documents are from a General Property file. The remaining document is a copy of the QBSA letter. It is evident on the face of the documents that they were sourced from a General Property file.
68. Additionally, in response to correspondence from the Applicant's Agent concerning the absence of the Applicant's own correspondence in the documents released under cover of the 19 January 2009 letter, Council provided an additional 42 documents to the Applicant under cover of a letter dated 3 February 2009.
69. I have reviewed the additional 42 documents and they are all copies of correspondence from the Applicant and/or her Agent to Council or documents entitled "Document Action Sheet". The Document Action Sheets are an internal Council document that is attached to each piece of incoming correspondence. The purpose of the Sheet appears to be tracking Council's actions in response to the incoming correspondence, for example, whether a response is to be provided to the incoming correspondence or whether the correspondence has been referred to a different area in Council for action.

Were the documents provided with the letter dated 3 February 2009 provided pursuant to the FOI Act?

70. I note that, in its letter dated 3 February 2009 Council described the 42 documents being provided to the Applicant as being responsive to a request for a copy of correspondence with a particular reference. It did not describe the 42 documents as being responsive to the terms of the FOI Application or that they were being provided pursuant to that application or the FOI Act.
71. I also note that this same approach was taken by Council in its Internal Review Decision. Council did not describe the 42 documents as being responsive to the terms of the FOI Application or that they were being provided pursuant to the FOI Act. Council stated in the Internal Review Decision that it was of the view that it had provided all documents within the scope of the FOI Application and that if the Applicant sought other documents then a fresh application with a broader scope should be made.
72. The Applicant's note to her Agent that appears on the bottom of the copy of the email dated 7 February 2009 also reflects that Council were of the view that it had provided all the documents responsive to the FOI Application.

73. In its submissions to this Office in telephone conversations on 10 September 2009 and 11 September 2009 Council submitted that the correspondence from the Applicant and her Agent post dated the attendance of the Council Officer at their premises and therefore was not responsive to the terms of the application. The provision of the correspondence to the Applicant was not part of the FOI decision because it concerned broader complaints about Council conduct generally and were not documents about Council's attendance at the property. However, Council had been happy to provide copies of the correspondence to the Applicant and her Agent administratively because they had asked for it and it was correspondence they had authored.
74. I find that the 42 documents provided to the Applicant under cover of Council's letter dated 3 February 2009 were not provided pursuant to the FOI Act but were released to the Applicant on an administrative basis.

Analysis

75. The crux of the Applicant's submissions is that documents responsive to the terms of her FOI Application exist that have not been located or provided to her by the Council. Essentially, the Applicant has questioned whether the Council's searches for documents responsive to her FOI Application have been sufficient. However, before that question can be answered, the question of the interpretation of the terms of the Applicant's FOI Application must first be addressed.
76. The *form* of the Applicant's FOI Application was somewhat convoluted. Rather than expressing the request in a sentence in a letter or on an application form to the Council the Applicant chose to attach a form to a letter and cross reference parts of the Earlier Decision of this Office to the form. Despite this though, I consider that the *terms* of the FOI Application are clear.
77. As previously noted, the terms of the FOI Application seek access to a specific file about the presence of the Council Officer at the Applicant's property following written advice received by Council from QBSA. Therefore, the documents to which the applicant seeks access are those located on a particular file of a particular description.
78. In light of my conclusion as to the terms of the FOI Application, the question becomes whether a file which meets that description exists in the Council's possession or control. Because if there is no file responsive to that description, there can be no documents responsive to the application.
79. I am satisfied that Council did not deviate from the usual practice of filing property related complaints on General Property files in relation to the QBSA letter and that therefore there is no specific file about the presence of the Council Officer at the property following written advice received by Council from QBSA. I am satisfied that Council hold a small number of documents that concern that subject to which access has been given to the Applicant. Those documents were filed on the General Property file for the Applicant's particular property, which covers broader subject matters than just the presence of the Council Officer at the property following written advice received by Council from QBSA and which consequently does not fall within the scope of the Applicant's FOI Application.
80. The fact that no file exists that is responsive to the terms of the FOI Application results in there being no documents responsive to the terms of the FOI Application as Council does not hold a *file* on the subject of the attendance of the Council Officer at the Applicant's property as a result of the written advice received from the QBSA.

81. In light of my conclusions that no *file*, and ipso facto *documents*, responsive to the terms of the FOI Application exist, for the purpose of section 28A (1) of the FOI Act, it is reasonable to be satisfied that no documents exist that are responsive to the terms of the FOI Application. Therefore, access to the file may be refused on the basis that it does not exist.
82. However, I note that according to Council it is not its usual practice to take a strict approach to the interpretation of the terms of the FOI applications it receives because it does not expect applicant's to understand its filing system or records management practices. In my view, to take such an approach is in keeping with the object of the FOI Act, which is to extend as far as possible the right of the community to access information that is held by Queensland government⁹. In this case Council have provided the Applicant with access to five *documents* that it considered might correspond with the subject of the Applicant's FOI Application, despite their having been filed on a file that was not responsive to the terms of the Applicant's FOI Application, thus giving effect to the object of the FOI Act. I am of the view that Council has taken the correct approach to processing the Applicant's FOI Application in providing access to those documents.
83. I note that the Applicant contends that the scope of her application is not limited in the way I have outlined above. One of the arguments raised by the Applicant is that the FOI Application should be read as seeking a copy of Council's file which contains, among other documents, documents about the particular subject. That is, seeking access to specific documents on a particular subject, rather than seeking access to a specific file on a particular subject.
84. Certainly, it is evident in the correspondence from the Applicant and her Agent to Council, subsequent to the receipt by the Applicant of Council's Original Decision, that the applicant considered that her FOI Application extended to the '*total contents of Council's file or files*' that either '*contained [the Applicant's] correspondence streams with Council*' or '*relate to QBSA dobbing [the Applicant] into Council, Councils matters that were associated with QBSA dobbing [the Applicant] into Council and [the Applicant's] correspondences with Council concerning the noisy air conditioner claim*'.
85. However, such an interpretation can not be placed on the terms of the FOI Application. The Applicant placed very clear limits on the terms of her FOI Application, namely a copy of a file about a particular subject matter. The broader terms outlined above were not introduced by the Applicant until after the Council had provided its notice of its Original Decision to the Applicant. Had the Applicant, in the first instance, sought access to a copy of *documents* from a file which contains documents about a particular subject matter or a copy of a file which contains, among other things, documents on a particular subject matter, then the Applicant's argument as to the scope of the FOI Application could be entertained. However, as previously noted, by requesting access to a copy of Council's 'file on the matter' of the Council Officer's attendance at the Applicant's property as the result of the written advice received from the QBSA, the application is focused on a file about a particular subject. The application can not be read more broadly as requesting access to a file that contains, among other documents, documents concerning the written advice received from the QBSA and the subsequent presence of the Council Officer at the applicant's property.
86. Another contention of the Applicant and her Agent is that, if their correspondence from the file from which the 5 documents were sourced (the 42 documents) were considered

⁹ Section 4(1) of the FOI Act.

to be in scope by the Council (as evidenced by the provision of those documents to the Applicant) then Council's correspondence to the Applicant and her Agent, and documents concerning the 'noisy air conditioner issue' from the same file must also be within the scope of their application. In effect the Applicant contends that Council's provision of additional documents indicates an acceptance of a broader scope and further documents responsive to the broader scope exist that have not been provided.

87. This argument raises the issues of whether the Applicant's correspondence with Council subsequent to the receipt of the Original Decision was an attempt by the Applicant to unilaterally expand the terms of the FOI Application, and whether Council's action in providing the 42 documents to the Applicant was an implied acceptance of a unilateral expansion of the scope of the application.
88. The general rule is that an applicant is not permitted to unilaterally expand the terms of an access application (see *Robbins* paragraph 17). Expansion of the terms of an application can be done with the consent of the agency, but there is no obligation in the FOI Act on an agency to do so. An agency that is not prepared to so consent may request that the applicant lodge a fresh FOI application for any document that falls outside the terms of an existing application.
89. As noted earlier in this decision, section 25 of the FOI Act requires that an applicant should provide sufficient information in an application for access to enable the identification of the document to which access is sought.
90. In my view the terms of the Applicant's FOI Application were sufficiently specific to satisfy the requirements of section 25(2) of the FOI Act. Accordingly, the search parameters for responsive documents were sufficiently clear and there was no ambiguity in the Applicant's FOI application that required clarification on Council's part prior to taking its course of action in dealing with the FOI Application. Thus the correspondence from the Applicant and her Agent to Council, subsequent to the receipt by the Applicant of Council's Original Decision, in which the applicant expressed her view that the FOI Application was broader than Council had interpreted it, was an attempt on the part of the Applicant to unilaterally expand the terms of her FOI Application.
91. In light of my finding earlier in this decision that Council did not provide the 42 documents pursuant to the FOI Act or the Applicants FOI Application, but did so on an administrative basis, I do not consider that Council's actions were an implied acceptance of the Applicant's attempt to unilaterally expand the terms of the FOI Application. Particularly given Council's reiteration in various telephone conversations and correspondence with the Applicant and, or, her Agent that it considered it had located all documents that it considered fell within the scope of the FOI Application.
92. In relation to the Applicant's contention that correspondence concerning the 'noisy air conditioner issue' fall within the scope of her Application. This contention is based on the Applicant's belief that a complaint about a noisy air conditioner was made to Council and was the basis (or part of the basis) for the Council Officer's attendance at her property. No doubt, in light of the Applicant's belief on this issue, she expected that documents about the 'noisy air conditioner issue' would form part of the file concerning the attendance at her property of the Council Officer following receipt of the advice of the QBSA.
93. However, as noted previously in this decision, the Information Commissioner found in the Earlier Decision of this Office that *'a complaint was not made to the Council by the QBSA, or any other individual, about air conditioner noise on the applicant's property'*, and I hold the same view. Accordingly, such documents do not fall within the scope of the Applicant's FOI Application.

94. As to the Applicant's submission that the application for 'a file' should be read as an application for a larger file, I believe the contention to be based on a misunderstanding of an issue that was raised by me with the Applicant in the course of this external review. I note that in a letter to the Applicant dated 18 August 2009 I wrote that:

...emphasising that part of the sentence results in the subject of the application being the written advice received by Council from QBSA, thus restricting the application to a file concerning that subject. In my opinion the application can not be read more broadly as requesting access to a larger file that contains, among other documents, the written advice received from the QBSA.

95. In her submission dated 25 August 2009 the Applicant indicated it was her understanding that my view was based upon an interpretation of the term "file" as being different to a "larger file". However, the issue I raised with the applicant was the restriction of the terms of the application to a file on a particular *subject*. I stated that the FOI Application could not be read more broadly to encompass a larger file that contained among other things, documents on that *subject*. It appears that the Applicant has misconstrued my point to be about file size rather than subject.

96. As noted earlier in this decision, in *Cannon* the Information Commissioner observed¹⁰ that the problem at the heart of that external review was not the sufficiency of the agency's search efforts to locate documents responsive to the application but with the way the FOI Application had been phrased. In my view the same can be said of the matter before me now. As in *Cannon* the problem in this case lies not with the sufficiency of the searches undertaken by Council for documents responsive to the terms of the applicant's FOI Application, but with the terms of the FOI Application itself. I can not find that the Council's response to the FOI Application was insufficient given the terms in which the applicant's FOI application was framed. As previously noted the terms of the FOI Application focussed expressly on a specific file the particular subject matter of which was the attendance of a Council Officer at the Applicant's property pursuant to QBSA correspondence, and I am satisfied that no file on that subject matter exists.

97. In conclusion, I find that:

- the terms of the Applicant's FOI Application result in the application being for a copy of a specific Council file on the particular subject matter of the Council Officer's attendance at the Applicant's property as a result of the advice received from the QBSA
- Council do not create separate complaint files for property related complaints, rather property related complaints are filed on General Property files. Accordingly, no file exists that is responsive to the terms of the FOI Application
- for the purpose of section 28A (1) of the FOI Act, it is reasonable to be satisfied that no documents exist that are responsive to the terms of the FOI Application. Therefore, access may be refused to the Council file on the matter of the Council Officer's attendance at the Applicant's property as a result of the advice received from the QBSA on the basis that it does not exist; and
- Council has acted in accordance with the objects of the FOI Act in identifying and providing access to documents which correspond to the terms of the FOI Application, despite there technically being no documents responsive to the FOI Application.

¹⁰ See *Cannon* paragraph 16.

DECISION

98. I vary the decision under review and find that pursuant to section 28A (1) of the FOI Act access may be refused to the file on the basis that it does not exist.
99. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

Assistant Commissioner Corby

Date: 21 December 2009