



Decision and Reasons for Decision

Application Number: 2006/F0139

Applicant: Mr R Price

Respondent: Gatton Shire Council

Decision Date: 2 March 2007

Catchwords: Refusal of access – s.22(a) *Freedom of Information Act 1992 (Qld)* – Sufficiency of Search – destruction of tape recording of a Council meeting

Contents

Background	2
Steps taken in the external review process	2
Findings.....	4
Audio recording of the general Council meeting held on 1 March 2006.....	4
Audio recording of Environment Advisory Committee meeting held on 2 March 2006.....	5
Decision	6

Reasons for Decision

Background

1. By letter dated 7 March 2006, the applicant applied to the Gatton Shire Council (the Council) for access, under the *Freedom of Information Act 1992 Qld* (the FOI Act), to tape recordings (both internal security cameras and audio voice recorders) of the Council meeting held on 1 March 2006. He also applied for access to audio voice recordings of a meeting of the Council's Environment Advisory Committee held on 2 March 2006.
2. By letter dated 9 March 2006, Mr Derek Sellers of the Council advised that all general Council meetings are recorded on compact disc (CD), and that a CD containing the audio recording of the meeting held on 1 March 2006 could be purchased from the Council. He therefore refused access to an audio recording of that meeting under section 22(a) of the FOI Act. As for the Environment Advisory Committee meeting held on 2 March 2006, Mr Sellers advised that the audio recording of that meeting had been destroyed on 3 March 2006, following completion of the written minutes of the meeting. Mr Sellers advised that such meetings were not usually recorded, and had only been recorded in this instance to assist the Council's Environmental Officer to prepare the minutes.
3. The applicant applied for internal review of Mr Sellers' decision by letter dated 10 March 2006. The internal review was conducted by the Council's Chief Executive Officer, Mr Colin O'Connor. By letter dated 13 March 2006, Mr O'Connor affirmed Mr Sellers' decision. Advising the applicant that the audio recording of the Environment Advisory Committee meeting that had been destroyed, Mr O'Connor stated that it was classed as a "temporary electronic document" used by Council to allow verification of minutes and was immediately erased upon such verification occurring.
4. By letter dated 16 March 2006, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Mr O'Connor's decision. Amongst other things, the applicant alleged that the Council had illegally destroyed documents. He also protested about having to pay to obtain a CD of the audio recording of the general Council meeting of 1 March 2006.

Steps taken in the external review process

5. By letter to the applicant dated 22 March 2006, Assistant Commissioner (AC) Barker acknowledged receipt of the applicant's external review application. AC Barker stated that in respect of the issue concerning the audio recording of the Environment Advisory Committee meeting held on 2 March 2006, she had written to the Council to request further information. Regarding the audio recording of the general Council meeting to which the Council had refused access under section 22(a) of the FOI Act, AC Barker stated that she was "*proceeding on the basis that the audio recording ... to which you seek access is available on the same conditions as those recordings which were the subject of decisions in six recent reviews, and do not propose at this stage to review the Council's decision to refuse access to that document under s.22(a) of the FOI Act*".
6. By letter to the Council dated 22 March 2006, AC Barker requested that the Council provide "*information concerning the audio recording of the Environmental Council meeting on 2 March 2006, including the purpose for which it was made, the date and*

manner of its disposal, and any policies or document retention/disposal schedules which govern the making and disposal of such tapes”.

7. Mr Sellers responded by letter dated 19 April 2006. As well as reiterating the information contained in his decision letter to the applicant dated 9 March 2006 regarding the destruction of the audio tapes, he stated as follows:

At the post election meeting in April 2004, Council resolved to hold two meetings per month and did not establish Standing Committees, preferring to allocate portfolios to various Councillors. Accordingly, whereas it was Council policy to electronically record the meetings of committees and Council, only the bimonthly meetings have been recorded since the post election meeting.

I have attached an extract of the minutes of the Council meetings held on 21 September 2005 and 3 August 2005 showing resolutions establishing the Environment Advisory Committee. The Committee comprises three elected Councillors, three Council Officers and three Community representatives as well as a representative from the University of Queensland. It is not a standing Committee of Council (it comprises more than elected Councillors) and operates in an advisory capacity. It was not intended that the meeting proceedings be recorded and made public other than by written and confirmed minutes which had firstly been ratified by Council.

There are no legislative requirements of which I am aware requiring Council to make and or retain an electronic record of its meetings. Minutes of meetings are retained in accordance with sections 459 and 461 of the Local Government Act 1993.

The recording of the Environment Advisory Committee meeting on 2 March was done using a digital voice recorder. The files were deleted off the voice recorder in preparation for recording the next Council meeting immediately after they were downloaded onto a Personal Computer and Compact Disk. The files on the personal computer were deleted and the compact disk destroyed on 3 March 2006 following completion of the minutes.

8. By letter dated 23 October 2006, AC Moss provided the applicant with a copy of Mr Sellers' letter. AC Moss explained that, based upon the information provided by the Council, she had formed the preliminary view that there were no reasonable grounds for believing that the audio recording to which the applicant sought access still existed in the possession or under the control of the Council. If the applicant did not accept AC Moss' preliminary view, he was invited to provide submissions and/or evidence in support of his case.
9. In various telephone messages left at this office, the applicant stated that he considered that the Council had acted improperly in destroying the audio recordings of the Environment Advisory Committee and he requested an extension of time in which to lodge submissions.
10. By letter dated 27 November 2006, AC Moss granted the applicant his requested extension of time to 11 December 2006, but also stated as follows:

Please note that the only issue for determination in this review is whether there are reasonable grounds for expecting that the document to which you seek access ... exists in the possession or under the control of the Council. The Information Commissioner has no power under the FOI Act to make findings regarding whether or not an agency has acted improperly in destroying a document. If you contend that the Council has improperly destroyed the tape recording, you should raise that matter with the State Archivist, the relevant Minister, or perhaps the Ombudsman's office”.

11. In a telephone conversation on 7 December 2006, the applicant requested a further extension of time until 12 January 2007 within which to provide submissions in support of his case. No such submissions were provided, but in a telephone conversation with AC Moss on 22 January 2007, the applicant stated that he continued to contend that the audio recording had been unlawfully destroyed, and he refused to withdraw his external review application.
12. I am satisfied that the applicant has been given fair opportunity to lodge submissions in support of his case in this review. As he has refused to withdraw his application, it is now necessary to give a decision in order to finalise the review. In making my decision in this matter, I have taken account of:
 - the applicant's FOI access application dated 7 March 2006; application for internal review dated 10 March 2006; and application for external review dated 16 March 2006;
 - the Council's initial decision dated 9 March 2006; and internal review decision dated 13 March 2006;
 - letter from the Council dated 19 April 2006.

Findings

Audio recording of general Council meeting held on 1 March 2006

13. The Council decided to refuse access to this audio recording under section 22(a) of the FOI Act on the basis that the applicant was able to purchase a copy under arrangements made by the Council. Section 22(a) of the FOI Act provides:

22 Documents to which access may be refused

An agency or Minister may refuse access under this Act to—

- (a) a document the applicant can reasonably get access to under another enactment or under arrangements made by an agency, whether or not the access is subject to a fee or charge; ...*

14. As AC Barker noted in her letter to the applicant dated 22 March 2006, this same issue regarding the application of section 22(a) of the FOI Act to audio recordings of meetings has been the subject of a decision relating to six previous reviews involving the applicant and the Council, namely, *Price and Gatton Shire Council*, 14 March 2006 (Application Nos 456/05, 595/05, 600/05, 612/05, 769/05, 770/05). In that decision AC Barker noted (at paragraph 4.3):

The documents to which the applicant seeks access are audio recordings of Council meetings. On request, those recordings are copied by the Council to CD and are made available at a cost of \$10 per CD. The applicant has in fact purchased recordings of some Council meetings. It is therefore evident that the documents in issue in these reviews are available to the applicant, and I do not consider that the cost of \$10 per recording is an unreasonable sum for the Council to charge to recover the cost of materials and of officers' time.

15. Enquires made by this office to Gatton Shire Council on 2 March 2007 confirmed that this arrangement is still in place. The cost associated with the purchase of the CD has risen to \$16.50, however I do not consider that this price increase to be unreasonable.
16. For the same reasons as explained in the above decision, I am satisfied that the Council was entitled, under section 22(a) of the FOI Act, to refuse the applicant access

to the audio recording of the Council meeting held on 1 March 2006, on the grounds that such a recording can be purchased from the Council under access arrangements made by the Council.

Audio recording of Environment Advisory Committee meeting held on 2 March 2006

17. Information Commissioner Albietz explained the principles applicable to 'sufficiency of search' cases in *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464 (pp. 469-470, paragraphs 18 and 19) as follows:

18. *It is my view that in an external review application involving 'sufficiency of search' issues, the basic issue for determination is whether the respondent agency has discharged the obligation, which is implicit in the FOI Act, to locate and deal with (in accordance with Part 3, Division 1 of the FOI Act) all documents of the agency (as that term is defined in s.7 of the FOI Act) to which access has been requested. It is provided in s.7 of the FOI Act that:*

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

- (a) a document to which the agency is entitled to access; and
- (b) a document in the possession or under the control of an officer of the agency in the officer's official capacity;"

19. *In dealing with the basic issue referred to in paragraph 18, there are two questions which I must answer:*

(a) *whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency (as that term is defined in s.7 of the FOI Act);*

and if so

(b) *whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.*

18. The Council has stated that the audio recording of the Environment Advisory Committee meeting held on 2 March 2006 was destroyed on 3 March 2006, following completion of the minutes of the meeting. On the basis of the information provided by the Council, and in the absence of any evidence to the contrary, I am satisfied that there are no reasonable grounds to believe that the audio recording still exists within the possession or under the control of the Council.

19. As I noted above, the applicant does not appear to dispute that the audio recordings have been destroyed. Rather, he contends that their destruction was unlawful. However, he has provided no evidence in support of that contention. The Council has submitted that the audio recording was made only for administrative convenience in preparing the minutes of the meeting, and that there was no obligation on the Council either to make the recording, or to retain it.

20. The Local Government Sector Retention and Disposal Schedule: QDAN 480v.3, which applies the Gatton Shire Council (QDAN97/0075), contains retention and disposal authority with respect to Council meetings. The Schedule defines a Council meeting in section 13.6, page 162 as follows:

Council Meetings

The activity of recording the formal decision-making process of local government.

As stated in the extract of Mr Sellers' letter dated 19 April 2006, and reproduced in paragraph 7 above, the Environment Advisory Committee, as the name suggests, operates in an advisory capacity only. I do not consider that meetings of an advisory committee would fall under the definition of "Council meetings" as provided for in the Schedule and as such any recordings of such meetings would not be subject to the Schedule's provisions.

21. There is no evidence before me to indicate that the Council acted improperly in destroying the audio recording of the meeting after the minutes had been completed. In any event, as was pointed out to the applicant during the external review, the Information Commissioner does not have power under Part 5 of the FOI Act to make findings regarding whether or not an agency has acted improperly in destroying a document. The questions to be answered in "sufficiency of search" cases are confined to those set out in paragraph 17 above. As I have noted, I am satisfied that there are no reasonable grounds to believe that the audio recording to which the applicant seeks access still exists within the possession or under the control of the Council.

Decision

22. I affirm the decision under review (being the decision dated 13 March 2006 of Mr O'Connor) by finding that:
- (a) the Council correctly exercised its discretion under section 22(a) of the FOI Act to refuse access to the audio recording of the Council meeting held on 1 March 2005; and
 - (b) there are no reasonable grounds for believing that the audio recording of the Environment Advisory Committee meeting held on 2 March 2006 continues to exist in the possession, or under the control, of the Council.
23. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

M Gittins
Assistant Information Commissioner

Date: 2 March 2007