



Decision and Reasons for Decision

Application Number: 210419

Applicant: Mr Colin Candy

Respondent: Environmental Protection Agency

Decision Date: 25 November 2008

Catchwords: **FREEDOM OF INFORMATION - section 22(b) of the *Freedom of Information Act 1992* (Qld) - refusal of access - whether documents reasonably available for public inspection**

FREEDOM OF INFORMATION - section 28A(1) of the *Freedom of Information Act 1992* (Qld) - refusal of access to non-existent documents - whether reasonable grounds to believe documents exist - whether adequate searches conducted by agency

FREEDOM OF INFORMATION - section 29B of the *Freedom of Information Act 1992* (Qld) - refusal to deal with application - previous application for same documents

FREEDOM OF INFORMATION - section 77(1)(a) of the *Freedom of Information Act 1992* (Qld) - whether application for review is misconceived - whether Commissioner should decide not to further deal with application for review

FREEDOM OF INFORMATION - section 44(1) of the *Freedom of Information Act 1992* (Qld) - matter concerning personal affairs - public interest balancing test

FREEDOM OF INFORMATION - scope - attempt to expand scope of external review application - whether within jurisdiction of review

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REASONS FOR DECISION

Summary

1. In this decision, I have made the following findings:
 - the scope of this external review is limited to a review of the decision of the Environmental Protection Agency (**EPA**) on the documents sought in the Applicant's freedom of information application (**FOI Application**) dated 30 August 2007
 - section 22(b) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) applies to the documents sought in Item 11 of the FOI Application
 - section 28A(1) of the FOI Act applies to the documents sought in Items 4, 5, 9, 10, 14 and 15 of the FOI Application
 - section 29B of the FOI Act applies to the documents sought in Items 1, 6, 12 and 13 of the FOI Application
 - the External Review Application, to the extent that it concerns Item 7 of the FOI Application, is misconceived and should not be further dealt with pursuant to section 77(1)(a) of the FOI Act
 - the matter in issue in the four folios located by the EPA in response to Item 3 of the FOI Application is exempt from disclosure under section 44(1) of the FOI Act.

Background

2. On 8 March 2001 officers of the Queensland Parks and Wildlife Service (**QPWS**) removed a red kangaroo that the Applicant and his family had been caring for since April 2000. The EPA removed the kangaroo on the basis that it was a '*protected animal*' under the *Nature Conservation Act 1992* (Qld)¹ and that the Applicant was prohibited from keeping it pursuant to section 88 of the *Nature Conservation Act*.² The kangaroo died shortly after it was removed from the Applicant's care and while in the possession of an approved wildlife carer. The removal of the kangaroo, named Mitchell, has been the subject of a number of legal actions instituted by the Applicant.
3. By email dated 30 August 2007 (**FOI Application**) the Applicant applied to the EPA for access to documents as listed in Table 1 below:³

Item No.	Documents sought
1	Details of the information that the Minister for Environment The Honourable Dean Wells MP based his reasoning for producing the Media Statement of 7 th May 2001, in telling the world that Mitchell had died?
2	Details of the Queensland Legislation which prohibits the keeping of kangaroos in suburban backyards as in place at 7 th May 2001?
3	Details of any reports of people ever being harmed or killed by red kangaroos?

¹ Referred to as the *Nature Conservation Act* in this decision.

² The Applicant did not hold a permit under the *Nature Conservation Regulation 1994* (Qld) at the time the kangaroo was removed by the QPWS. Although a rescue permit had previously been issued to the Applicant with respect to the kangaroo, it was only valid for the period 30 September 2000 to 30 October 2000.

³ I have set out the requests for documents in the terms used by the Applicant in the FOI Application.

4	Details of any Reports of any Death Threats to the Carer involved in Mitchell's alleged demise as Reported in Ministerial Briefing Note 8th May 2001?
5	Details of any Reports of the alleged death threats (as required at item 4), sent to Queensland Police Service?
6	Details of the photos taken on the 30th April 2001 of the carcass as Reported in Ministerial Briefing Note 8th May 2001?
7	Details of a list of all protected animals in Queensland as at 2001 and their respective Classifications?
8	Details of a list of native wildlife other protected wildlife as per section 97, Nature Conservation Act 1992?
9	Details of the Declaration Order of the Bridled Nail-tailed Wallaby and the Bilby as Declared by the Order of Governor in Council to be Fauna for the Purpose of the Fauna Conservation Act 1974?
10	Details of any and all Declarations as Ordered by the Governor in Council which include the Red Kangaroo and the Swamp Wallaby as named species of wildlife in Queensland to this day?
11	Details of all Gazette Notices (including protection, pest and open season classifications) which included the Red Kangaroo and the Swamp Wallaby as named species of wildlife to this day?
12	Details of Queensland Parks and Wildlife Service adherence to Q.NPWS Procedure Guide Notice no. 009, Seizure of Wildlife (21st October 1998) at 34 Cypress St, Torquay Q, on the 8th March 2001 and 30th November 2001?
13	Details of the Queensland Parks and Wildlife Service adherence to Q.NPWS Procedure Guide Notice no. 025, Permit to Keep Protected Wildlife (26th August 1998) at 34 Cypress St., Torquay, Q, on the 8th March 2001 and 30th November 2001?
14	Details of Q.NPWS Procedure Guide, Entry and Search, Evidence of Offences, as in place at 2001?
15	Details of Q.NPWS Procedure Guide, for Disposal of Wildlife etc, Not Owned by the State as in place at 2001?

4. By letter dated 15 October 2007, Mr L Clarke⁴ informed the Applicant of the decision he had made on the FOI Application (**Original Decision**). The findings made in the Original Decision are set out in Table 2 below:

Table 2		
Item No.	Decision	Section of FOI Act relied on by decision-maker
1	Refused to deal with this request as this matter was previously addressed in an earlier FOI application (no. 06/0042) which has been the subject of a completed external review	Section 29B of the FOI Act
2	Provided copy of section 88 of the <i>Nature Conservation Act 1992</i> (Qld)	None - access provided

⁴ Senior FOI Officer at the EPA.

3	Located six folios comprising two copies of a briefing note dated 18 July 2006 - full access to two folios - partial access to four folios	Section 44(1) of the FOI Act
4	No documents held	Section 21 of the FOI Act
5	No documents held	Section 21 of the FOI Act
6	Refused to deal with this request as this matter was previously addressed in an earlier FOI application (no. 06/0042) which has been the subject of a completed external review	Section 29B of the FOI Act
7	Refused to deal with this request as this matter was previously addressed in an earlier FOI application (no. 06/0042) which has been the subject of a completed external review	Section 29B of the FOI Act
8	Provided copies of relevant sections of the <i>Nature Conservation Act 1992</i> (Qld)	None - access provided
9	No documents held	Section 21 of the FOI Act
10	No documents held	Section 21 of the FOI Act
11	Refused access as documents sought (Government Gazette Notices) are publicly available	Section 22(b) of the FOI Act
12	Refused to deal with this request as this matter was previously addressed in an earlier FOI application (no. 06/0042) which has been the subject of a completed external review	Section 29B of the FOI Act
13	Refused to deal with this request as this matter was previously addressed in an earlier FOI application (no. 06/0042) which has been the subject of a completed external review	Section 29B of the FOI Act
14	No documents held	Section 21 of the FOI Act
15	No documents held	Section 21 of the FOI Act

5. By email dated 13 November 2007 the Applicant applied to the EPA for internal review of the Original Decision (**Internal Review Application**).
6. By letter dated 20 December 2007, Mr P Arthur⁵ informed the Applicant that he had decided to affirm the Original Decision (**Internal Review Decision**).
7. By email dated 24 December 2007 the Applicant applied to this Office for external review of the Internal Review Decision (**External Review Application**).

Decision under review

8. The decision which is the subject of this external review is the Internal Review Decision of Mr P Arthur dated 20 December 2007.

⁵ Corporate Counsel at the EPA.

Steps taken in the external review process

9. Following receipt of the External Review Application, this Office obtained, from the EPA, copies of the FOI Application, Original Decision, Internal Review Application and Internal Review Decision.
10. By letter dated 29 January 2008, I:
 - informed the Applicant that the Internal Review Decision would be reviewed by this Office
 - confirmed the scope of the External Review Application
 - requested the Applicant to provide submissions in support of his contention that further documents relevant to the FOI Application should be in the possession or under the control of the EPA.
11. By email dated 6 February 2008 the Applicant provided this Office with further submissions concerning the existence of additional documents. In that correspondence, the Applicant also indicated that he wanted to expand the scope of his FOI Application as follows:

...in this instance I would like to amend my request to encompass all documents surrounding the disappearance of Mitchell, ie any EPA request's [sic] as to why Mitchell's alleged remains were not frozen as required by the then NQPWS seizure procedure guide?
12. On 12 February 2008, the Applicant provided this Office with additional submissions and documents in support of his contentions.⁶
13. On 24 June 2008 a staff member of this Office informed the EPA that it was not entitled to rely on section 21 of the FOI Act in refusing the Applicant access to the documents sought in Items 4, 5, 9, 10, 14 and 15 of the FOI Application. In response, the EPA explained that it had intended to rely on section 28A of the FOI Act in refusing access to the documents sought in those items of the FOI Application.
14. On 1 October 2008, the EPA confirmed that it specifically relied on section 28A(1) of the FOI Act in refusing the access to the documents sought in Items 4, 5, 9, 10, 14 and 15 of the FOI Application.
15. By letter dated 13 October 2008, I conveyed to the Applicant the preliminary view which I had formed with respect to the issues raised in this review (**Preliminary View**), as follows:
 - the EPA was entitled to refuse access to the documents sought in Item 11 of his FOI Application on the basis of section 22(b) of the FOI Act
 - the EPA was entitled to refuse access to the documents requested in Items 4, 5, 9, 10, 14 and 15 of his FOI Application on the basis of section 28A(1) of the FOI Act
 - the EPA was entitled to refuse to deal with Items 1, 6, 12 and 13 of the FOI Application on the basis of section 29B of the FOI Act
 - Item 7 of the FOI Application should not be further dealt with pursuant to section 77(1)(a) of the FOI Act because it is misconceived

⁶ The Applicants submissions were sent to this Office in two separate emails, both dated 12 February 2008.

- the matter deleted from the four folios located in response to Item 3 of the FOI Application is exempt from disclosure under section 44(1) of the FOI Act
 - the scope of this external review is limited to a review of the EPA's decision only in respect of the documents sought in the FOI Application dated 30 August 2007.
16. In my letter dated 13 October 2008, I asked the Applicant to inform me, by 27 October 2008, if he accepted the Preliminary View. In the event that he did not accept the Preliminary View, I invited him to provide submissions in response.
17. By email dated 15 October 2008, submissions were made to this Office in response to the Preliminary View by Mr Michael Charman, on behalf of the Applicant.⁷
18. By email dated 27 October 2008, the Applicant provided submissions in response to the Preliminary View and supporting documents. The Applicant's submissions primarily focus on his contentions regarding the existence of further documents.
19. By email dated 28 October 2008, I informed the Applicant that I:
- had accepted his email dated 27 October 2008 and Mr Charman's email dated 15 October 2008 as his submissions in response to the Preliminary View
 - would consider those submissions prior to making my final decision in this review.
20. In making this decision, I have taken the following material into account:
- FOI Application
 - Original Decision
 - Internal Review Application
 - Internal Review Decision
 - External Review Application
 - Applicant's submissions to this Office dated 6 February 2008, 12 February 2008, 15 October 2008⁸ and 27 October 2008
 - records of telephone conversations held between this Office and the EPA dated 24 June 2008 and 1 October 2008
 - documents containing matter to which the EPA refused the Applicant access on the basis of section 44(1) of the FOI Act
 - the decision I made in External Review No. 210439 on 17 June 2008
 - parts of the Applicant's FOI Application dated 12 July 2006⁹
 - relevant sections of the FOI Act
 - relevant sections of the following:
 - *Nature Conservation Act*
 - *Nature Conservation (Wildlife) Regulation 2006 (Qld)*¹⁰
 - *Nature Conservation (Wildlife Management) Regulation 2006 (Qld)*¹¹
 - previous decisions of the Information Commissioner of Queensland and decisions from other Australian jurisdictions.

⁷ I accepted that email as the Applicant's submissions in response to the Preliminary View.

⁸ Authored by Mr Michael Charman.

⁹ That FOI Application became External Review No. 210102.

¹⁰ Referred to as the *Wildlife Regulation* in this decision.

¹¹ Referred to as the *Wildlife Management Regulation* in this decision.

Matter in issue

21. The issues raised by the External Review Application are:
 - (i) does section 22(b) of the FOI Act apply to the documents sought in Item 11 of the FOI Application
 - (ii) does section 28A(1) of the FOI Act apply to the documents requested in Items 4, 5, 9, 10, 14 and 15 of the FOI Application on the basis of section 28A(1) of the FOI Act
 - (iii) does section 29B of the FOI Act apply to Items 1, 6, 7, 12 and 13 of the FOI Application
 - (iv) is the matter in issue in the four folios located by the EPA in response to Item 3 of the FOI Application exempt from disclosure under section 44(1) of the FOI Act.
22. Issue (ii) also requires analysis of the sufficiency of the EPA's searches.
23. The scope of documents sought in the FOI Application is also in issue in light of the Applicant's submission to this Office dated 6 February 2008.
24. It is clear from the Applicant's submissions that he is extremely dissatisfied with the actions of the EPA in relation to the seizure of Mitchell and his subsequent dealings with that agency. It appears that the Applicant wishes to establish that the red kangaroo was not a '*protected*' species under the *Nature Conservation Act* at the time Mitchell was seized. In the civil proceedings instituted by the Applicant in the Supreme Court he attempted to establish that the red kangaroo is **not** a protected animal and accordingly, the EPA was not entitled to seize Mitchell and other animals from the Applicant's residence. The Applicant did not succeed in establishing that point in the Supreme Court proceeding.¹²
25. The Applicant also seeks to have the EPA create documents that he appears to accept do not presently exist, but maintains should have been created by the EPA.
26. In this review, the jurisdiction of the Information Commissioner is limited by the terms of the FOI Act, to determining the six issues set out in paragraphs 21-23 of this decision. The Applicant has been advised on several occasions by this Office of the issues which are the subject of this review.

Findings

Scope of this external review

27. The terms of the FOI Application are set out in Table 1 above.
28. In his submissions to this Office dated 6 February 2008, the Applicant indicated that in addition to the documents requested in his FOI Application he also wanted to seek access to '*all documents surrounding the disappearance of Mitchell*'.
29. The Applicant's request for access to '*all documents surrounding the disappearance of Mitchell*' was not set out in the FOI Application, nor was it the subject of the decision under review.

¹² See *Candy v Thompson & Ors* [2005] QSC 111; SC No 10684 of 2004, 9 May 2005 approved on appeal in *Candy v Thompson & Ors* [2005] QCA 382; Appeal No 4579 of 2005, 14 October 2005.

30. In *Robbins and Brisbane North Regional Health Authority*¹³, the Information Commissioner stated as follows with respect to the scope of an external review application:

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 ... 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. (There would appear to be no impediment to the terms of an FOI access application being extended by agreement, and there is, of course, nothing to prevent an applicant from making a fresh application for access to matter which falls outside the scope of an earlier FOI access application.)¹⁴

31. Based on the Information Commissioner's reasoning in *Robbins* as set out above, I am satisfied that the scope of this external review is limited to a review of the EPA's decision only with respect to the specific documents sought in the FOI Application dated 30 August 2007.

Does section 22(b) of the FOI Act apply to the documents sought in Item 11 of the FOI Application?

32. The EPA refused access to the documents sought in Item 11 of the FOI Application pursuant to section 22(b) of the FOI Act on the basis that Government Gazette Notices can be accessed by inspection in a public library.

Section 22 of the FOI Act

33. This section relevantly provides:

22 Documents to which access may be refused

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

...

- (b) a document that is reasonably available for public inspection under the Public Records Act 2002 or in a public library ...*

34. The State Library of Queensland (**State Library**) online catalogue¹⁵ confirms that Government Gazette Notices from 1859¹⁶ to current are held by the State Library and available for inspection.¹⁷
35. On that basis, I am satisfied that the Government Gazette Notices to which the Applicant seeks access in Item 11 of the FOI Application are reasonably available for public inspection at a public library, namely the State Library.
36. Accordingly, I find that the EPA was entitled to refuse access to those documents on the basis of section 22(b) of the FOI Act.

¹³ (1994) 2 QAR 30. Referred to as **Robbins** in this decision.

¹⁴ *Robbins* at paragraph 17.

¹⁵ Available at www.slq.qld.gov.au.

¹⁶ The first published Gazette is dated 10 December 1859.

¹⁷ The Gazettes are held on microfilm on level 3 of the State Library.

Does section 28A(1) of the FOI Act apply to the documents requested in Items 4, 5, 9, 10, 14 and 15 of the FOI Application on the basis of section 28A(1) of the FOI Act?

37. In the Original Decision and Internal Review Decision, the EPA incorrectly relied on section 21 of the FOI Act in refusing access to the documents sought in items 4, 5, 9, 10, 14 and 15 of the FOI Application. During this review, the EPA submitted that it had intended to rely on section 28A(1) of the FOI Act in refusing the Applicant access to those documents.

Section 28A of the FOI Act

38. This section relevantly provides:

28A Refusal of access—document 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.*

...

39. In applying section 28A(1) of the FOI Act, the following two questions relating to the issue of 'sufficiency of search' require consideration:
- (i) are there reasonable grounds to believe that the requested documents exist and are documents of the agency as that term is defined in section 7 of the FOI Act
and if so
 - (ii) have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of the review.¹⁸

Reasonable grounds

40. In determining whether there are reasonable grounds to believe that additional relevant documents are in the possession or under the control of an agency, the Information Commissioner has previously indicated¹⁹ that an applicant will ordinarily need to:
- explain fully their grounds for believing that the respondent agency holds additional responsive documents
 - disclose any relevant documentary or other evidence which tends to support the existence of reasonable grounds for such a belief.
41. I have examined the submissions the Applicant made to the EPA during the processing of his FOI Application and to this Office during this review. In summary, the Applicant made the following submissions:
- death threats were made by the carer involved in *'Mitchell's alleged demise'* to another individual which were allegedly reported to the Tin Can Bay police station and therefore, the EPA must hold reports relating to those threats
 - on the basis that some Orders in Council exist (which the Applicant has in his possession) in relation to the bridled nail-tailed wallaby, the bilby, the red

¹⁸ *Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464 at paragraphs 18-19. Referred to as *Shepherd* in this decision.

¹⁹ In *Ainsworth; Ainsworth Nominees Pty Ltd and Criminal Justice Commission; A (Third Party); B (Fourth Party)* (1999) 9 QAR 284 at paragraph 46. Referred to as *Ainsworth* in this decision.

kangaroo and swamp wallaby, the EPA must hold more Orders in Council relevant to those animals

- he has not been provided with a document titled *'Entry and Search, Evidence of Offences'* which is referred to in the QPWS Procedure Guide Notice No. 009 21/10/98
- he has not been provided with a document titled *'Disposal of Wildlife etc, Not Owned by the State'* which is referred to in the QPWS Procedure Guide Notice No. 009 21/10/98.

42. In his submissions to this Office dated 27 October 2008, the Applicant contends that *'...the law requires that an Order in Council is published and gazetted, informing the community of which species are specified, prescribed and declared'*.

43. The Applicant's submissions do not address the requirements set out by the Information Commissioner in *Ainsworth* in terms of establishing reasonable grounds to support a belief that further documents exist. Notwithstanding, I have taken the Applicant's submissions into account and note as follows in response:

- there is no evidence before me regarding death threats that were made by Mitchell's carer. If the Applicant is seeking access to police reports, such documents (if they exist) would be held by the Queensland Police Service
- the mere existence of certain Orders in Council does not raise reasonable grounds to believe further Orders in Council relating to the bridled nail-tailed wallaby, bilby, red kangaroo and swamp wallaby are in the possession or under the control of the EPA²⁰
- the reference in the QPWS Procedure to *'Entry and Search, Evidence of Offences'* is not a reference to a document but to a section of the *Nature Conservation Act*²¹
- the reference in the QPWS Procedure to *'Disposal of Wildlife etc, Not Owned by the State'* is not a reference to a document but to a section of the *Nature Conservation Act*²²

44. On the basis of the information before me in this review, I am satisfied that the Applicant has not raised any reasonable grounds to believe that the documents sought in Items 4, 5, 9, 10, 14 and 15 of the FOI Application are in the possession or under the control of the EPA.

45. In light of my finding that there are no reasonable grounds to believe further documents exist, the principles in *Shepherd*²³ do not require me to examine the searches conducted by the agency. However, I have set out the searches undertaken by the EPA below for completeness.

²⁰ In any event, Orders in Council must be notified or published in the Queensland Government Gazette (section 10 of the *Statutory Instruments Act 1992* (Qld)) and therefore, any such documents would be available for inspection in the State Library and the EPA would be entitled to refuse access under section 22(b) of the FOI Act.

²¹ The heading of Section 146 of the *Nature Conservation Act* is **Entry and search—evidence of offences**.

²² The heading of Section 172 of the *Nature Conservation Act* is **Disposal of wildlife etc. not owned by the State**.

²³ Set out in paragraph 38 of this decision.

Searches undertaken by the EPA

46. In an effort to locate the documents sought by the Applicant in items 4, 5, 9, 10, 14 and 15 of the FOI Application, the EPA undertook searches in the following locations:
- Southern Regional Queensland Parks and Wildlife Services Office
 - Executive Services Unit
 - Conservation Services Division.
47. In light of the extensive and thorough searches undertaken by the EPA for the purpose of this FOI Application, I am satisfied that the searches undertaken by the EPA for documents relating to the FOI Application have been reasonable in the circumstances of this case.

Summary

48. Based on my analysis of:
- the submissions the Applicant made to the EPA during the processing of his FOI Application and to this Office during this review
 - the searches undertaken by the EPA in processing the FOI Application
 - the explanations provided by the EPA as to why the documents sought in the FOI Application do not exist

I am satisfied that, with respect to the documents sought in Items 4, 5, 9, 10, 14 and 15 of the FOI Application:

- there are no reasonable grounds to believe that those documents are in the possession or under the control of the EPA
- the searches undertaken by the EPA have been reasonable in the circumstances of this review
- section 28A(1) of the FOI Act applies to those documents.

Does section 29B of the FOI Act apply to Items 1, 6, 7, 12 and 13 of the FOI Application?

49. In the Original Decision, Mr Clarke refused to deal with Items 1, 6, 7, 12 and 13 of the FOI Application on the basis of section 29B of the FOI Act because the documents sought in those items were *'...previously addressed in [the Applicant's] previous Freedom of Information application Reference Number 06/0042...'*
50. The Internal Review Decision affirmed the reliance on section 29B of the FOI Act and further explained that the ground upon which the refusal to deal was based was section 29B(4)(a)(ii) of the FOI Act because the previous FOI Application had been the subject of a completed review under Part 5 of the FOI Act.

Section 29B of the FOI Act

51. This section relevantly provides:

29B Refusal to deal with application—previous application for same documents

- (1) *This section applies if an applicant applies to an agency or Minister (the **later application**) for access to documents that have been the subject of an earlier*

*application made by the same applicant to the same agency or Minister (the **earlier application**).*

...

(3) *The agency or Minister may, to the extent the later application relates to documents sought under the earlier application, refuse to deal with the later application on a ground mentioned in subsection (4) if—*

- (a) *the agency or Minister is satisfied the documents sought under the later application are the documents sought under the earlier application; and*
- (b) *the later application has not disclosed any reasonable basis for again seeking access to the documents.*

(4) *The grounds are as follows—*

(a) *the agency's or Minister's decision on the earlier application—*

- (i) *is the subject of a review under part 5 and the review is not complete; or*
- (ii) *has been the subject of a completed review under part 5;*

...

Application of section 29B of the FOI Act

52. For the EPA to be entitled to refuse to deal with items 1, 6, 7, 12 and 13 of the FOI Application on the basis of section 29B(4)(a)(ii) of the FOI Act, the following must be established:

- (i) the documents sought under the later application are the documents sought under the earlier application
- (ii) the later application has not disclosed any reasonable basis for again seeking access to the documents
- (iii) the EPA's decision on the earlier application has been the subject of a completed review under Part 5 of the FOI Act

53. I have examined each of these requirements below. However, I have not examined the application of section 29B of the FOI Act to Item 7 of the FOI Application because I have found that the Applicant's request for access to documents in that item is misconceived and should not be further dealt with on the basis of section 77(1)(a) of the FOI Act. My reasons for making that finding are set out in paragraphs 65-76 of this decision.

(i) Documents sought under the later application are the documents sought under the earlier application

54. This external review concerns the *later application* for the purpose of section 29B of the FOI Act. The relevant requests for access in the FOI Application are set out in the table below:

Table 3	
Item No.	Document sought
1	Details of the information that the Minister for Environment the Honourable Dean Wells MP based his reasoning for producing the Media Statement of 7 May 2001, in telling the world that Mitchell had died
6	Details of the photos taken on the 30 April 2001 of the carcass as Reported in Ministerial Briefing Note 8 May 2001

12	Details of Queensland Parks and Wildlife Service adherence to Procedure Guide Notice no. 009, Seizure of Wildlife (21 October 1998) at 34 Cypress St, Torquay Q, on the 8 March 2001 and 30 November 2001
13	Details of the Queensland Parks and Wildlife Service adherence to Procedure Guide Notice no. 025, Permit to Keep Protected Wildlife (26 August 1998) at 34 Cypress St., Torquay, Q, on the 8 March 2001 and 30 November 2001

55. The *earlier application* dated 12 July 2006 (which became external review no. 210102) sought access to:

All documents held by the EPA in relation to [the Applicant] or [the Applicant's] daughter Emma, regarding the keeping of kangaroos or wallabies.

56. The documents sought in Items 1, 6, 12 and 13 of the *later application* are not specifically identified by the terms of the *earlier application*. However, I consider that the documents responsive to Items 1, 6, 12 and 13 as set out in the table above, are captured by the broad terms of the *earlier application*.

57. In response to the *earlier application*, the EPA located 5656 folios and released 3751 folios to the Applicant. On the basis that items 1, 6, 12 and 13 of the *later application* relate to the Applicant's keeping of kangaroos or wallabies and the EPA's involvement therein, I am satisfied that:

- documents relating to those items are encompassed by the terms of the *earlier application*
- the requirement in section 29B(3)(a) of the FOI Act is satisfied.

(ii) *The later application failed to disclose any reasonable basis for again seeking access to the documents*

58. In the *later application*, the Applicant raised the following to support his requests for access to documents in Items 1, 6, 12 and 13 of the FOI Application:

- **Item 1:** the only information which has been provided by the EPA to the Applicant in relation to the Minister's advice that Mitchell had died is a Ministerial Briefing Note dated 8 May 2001
- **Item 6:** the photos provided by the EPA of Mitchell's remains are of an age far greater than three weeks post-mortem whereas the Applicant seeks access to photos ranging between one and six days post-mortem
- **Item 12:** the relevant QPWS Procedure Guide advises that when a seizure notice is issued, the remains of dead protected wildlife are frozen to adequately preserve the evidence. The EPA has incorrectly assumed that the Applicant surrendered Mitchell to the QPWS so a seizure notice was not required, but in fact, a seizure notice should exist
- **Item 13:** the Applicant had '*humanised Mitchell and ... he was reliant upon [the Applicant] for survival*' and therefore, he should have been issued with a permit to keep the animal.²⁴

²⁴ The Applicant concedes that such permits are only issued for protected wildlife despite his contention that Mitchell did not fall within this category.

59. I have carefully examined the Applicant's submissions. I note that his submissions with respect to Items 1, 6 and 12 raise the issue of sufficiency of search, that is, he contends that further documents should exist in relation to those items. I note that in the *earlier application*, the Applicant raised the ground of sufficiency of search on internal review. Sufficiency of search was also dealt with on the external review concerning the *earlier application*. However, no further documents were located by the EPA with respect to the *earlier application* at either stage of review.

60. Accordingly, I am satisfied that:

- the grounds raised by the Applicant do not disclose any reasonable basis for him to again be seeking access to the documents to which he has previously sought access in the *earlier application*
- the Applicant has not raised any reasonable grounds to believe that any further responsive documents would have been created by the EPA between the dates of the *earlier application* and the *later application*.

61. Accordingly, I find that:

- the *later application* fails to disclose any reasonable basis for again seeking access to the documents sought in the *earlier application*
- the requirement of section 29B(3)(b) of the FOI Act is satisfied.

(iii) The EPA's decision on the earlier application has been the subject of a completed review under Part 5 of the FOI Act.

62. The *earlier application* was the Applicant's FOI application to the EPA dated 12 July 2006 that resulted in external review number 210102. That review was completed on 27 January 2007 by virtue of the Applicant's acceptance of a preliminary view in resolution of the review.

63. Accordingly, I am satisfied that the requirement in section 29B(4)(a)(ii) of the FOI Act is satisfied.

Conclusion

64. In light of my findings set out in paragraphs 52-64 of this decision, I conclude that:

- the requirements of section 29B of the FOI Act are satisfied
- the EPA was entitled to refuse to deal with items 1, 6, 12 and 13 of the FOI Application on the basis of section 29B of the FOI Act.

Item 7 of the FOI Application

65. In Item 7 of the FOI Application the Applicant sought access to:

Details of a list of all protected animals in Queensland as at 2001 and their respective Classifications.

66. This request is similar to requests the Applicant has made in several previous FOI applications he has made to the EPA for access to lists of protected animals and

wildlife.²⁵ I dealt with those requests for access in External Reviews No. 210218 and 210439 and issued a decision in both reviews.²⁶

67. In my decision in External Review No. 210439, I conducted a thorough analysis of the relevant legislative scheme as it applied to the Applicant's requests for documents. I have extracted the relevant parts of that decision and set them out below:

I have undertaken a thorough review of the [Nature Conservation Act] and the [Wildlife Regulation] and the [Wildlife Management Regulation] (the NC Scheme). I have sought submissions from the EPA, and, after considering [the Applicant's] submissions, those made by the EPA and the relevant legislation, have concluded that:

- *the object of the [Nature Conservation Act] is the conservation of nature through an integrated and comprehensive conservation strategy, including the protection of native wildlife and its habitat.*
- *the [Wildlife Regulation] and the [Wildlife Management Regulation] both operate to further the object of the [Nature Conservation Act]. The purpose of the [Wildlife Regulation] is to prescribe the classifications of wildlife and state the declared management intent for each classification, while the [Wildlife Management Regulation] provides for the management of wildlife that is not in a protected area.*
- *Native Wildlife is defined in the Schedule of the [Nature Conservation Act] as any taxon or species of wildlife indigenous to Australia. The Schedule states that wildlife indigenous to Australia is wildlife that was not originally introduced to Australia by human intervention or a migratory animal that periodically or occasionally migrates to Australia.*
- *one of the means utilised in the NC Scheme to protect native wildlife and its habitat is to declare certain animals as protected animals.*
- *the [Nature Conservation Act] defines protected animals as:*

protected animal means an animal that is prescribed under this Act as threatened, rare, near threatened or least concern wildlife, but does not include a processed product that—

- (a) is made or derived from a protected animal; and
- (b) is declared under a regulation or conservation plan for the protected animal to be a processed product that is not included in this definition.

- *I note that the [Nature Conservation Act] in force as at 9 February 2001 used the term "common wildlife" and that this term was later changed to "least concern wildlife"*
- *threatened, rare and common wildlife are also defined in the [Nature Conservation Act] Schedule as those animals that have been prescribed as such for the purpose of the [Nature Conservation Act]. The prescription of such wildlife occurred by way of regulation, namely the [Wildlife Regulation] and the [Wildlife Management Regulation]*
- *the [Wildlife Regulation] prescribes the categories of extinct in the wild wildlife, endangered wildlife, vulnerable wildlife, rare wildlife, near threatened wildlife, least concern wildlife, international wildlife and prohibited wildlife.*
- *the [Wildlife Management Regulation] prescribes the categories of domestic animals, exempt animals, controlled animals, commercial animals, recreational animals and restricted animals.*
- *there is no comprehensive list of 'common' or 'least concern' wildlife in either of those regulations*
- *rather the [Wildlife Regulation] lists in the schedules extinct, endangered, vulnerable, rare and near threatened wildlife and defines 'common' or 'least*

²⁵ Those applications became External Review No. 210218 and 210439.

²⁶ Decisions dated 30 January 2008 and 17 June 2008, respectively.

concern' wildlife in schedule 6 as animals indigenous to Australia that are not captured in the classification of extinct, endangered, vulnerable, rare or near threatened (with some listed exceptions that are dealt with differently under the [Nature Conservation Act] and Regulations)

- *Schedule 3 of the [Wildlife Management Regulation] lists exempt, controlled, commercial, recreational and restricted wildlife, and Schedule 4 defines these terms by reference to Schedule 3.*

Thus, in relation to the operation of the scheme, it is clear that lists of the type being sought by [the Applicant] are contained in the NC scheme, to the extent that the [Nature Conservation Act], the [Wildlife Management Regulation] and the [Wildlife Regulation] contain "lists" or "prescriptions" of animals.

68. In my decision in External Review No. 210439, I found that the application was misconceived, and pursuant to section 77(1)(a) of the FOI Act I decided not to deal with the application for review.

Section 77 of the FOI Act

69. Section 77 of the FOI Act relevantly provides:

77 Commissioner may decide not to review

(1) The commissioner may decide not to deal with, or not to further deal with, all or part of an application for review if—

- (a) the commissioner is satisfied the application, or the part of the application, is frivolous, vexatious, misconceived or lacking substance; or*

...

70. In *McGlade v Human Rights and Equal Opportunity Commission and Another*²⁷, Carr J set out the requirements which must be satisfied to support a finding that a matter or application is misconceived. His Honour relevantly stated as follows:

*What needed to be demonstrated was what Ormiston JA described in Rabel as "...facts which would undoubtedly deny the complainant relief, that the complaint is so hopeless that it should be summarily brought to an end".*²⁸

71. In order to determine whether the External Review Application, to the extent it concerns Item 7 of the FOI Application, is misconceived, I must be satisfied that the facts are such that the Applicant would not obtain any relief from the external review process and that therefore, the review with respect to Item 7 should not proceed.

72. Mr Charman submitted, on the Applicant's behalf that the Applicant's request in Item 7 of the FOI Application is '*...not "misconceived" -- it is a legitimate question and one that must be properly answered*'. Mr Charman's submissions focus on the alleged failure of the Minister (and the EPA) to comply with requirement under section 133(1)(c) of the *Nature Conservation Act* to keep a register of protected wildlife.

73. In the decision I gave in External Review No. 210218, I made the following findings:

- there is no list of named or specified wildlife other than that which is listed in the *Nature Conservation Act* and the *Wildlife Regulation*

²⁷ [2000] 180 ALR 507.

²⁸ At page 516.

- there is no requirement under the *Nature Conservation Act* that an advisory committee create a list of 'named, specified wildlife'
- contrary to the Applicant's assertion, the FOI Act does not oblige the EPA to create a list to satisfy his request for information
- the relevant provisions of the *Nature Conservation Act* and the *Wildlife Regulation* provided by the EPA is the only material held by the EPA which satisfies the terms of the Applicant's application and that material was provided to him by the EPA
- there are no reasonable grounds to believe that other lists exist in relation to the classification of wildlife that have not already been disclosed to the Applicant
- the only lists are those that appear in the definitions section of the *Nature Conservation Act* and the *Wildlife Regulation*.

74. In the decision I gave in External Review No. 210439, I made the following findings:

- the Applicant was seeking the same or similar lists as those sought in External Review No. 210218, in addition to other lists
- lists of the type that were sought by the Applicant exist in the *Nature Conservation Act*, the *Wildlife Regulation* and the *Wildlife Management Regulation* to the extent that those pieces of legislation "list" or "prescribe" animals
- the reasons given by the EPA as to the existence/non-existence of the documents being sought by the Applicant were consistent with my conclusions with respect to the relevant legislative scheme and were otherwise cogent
- there was no likelihood that the Applicant's external review application would succeed on its merits and on that basis, the application for review was misconceived.

75. As set out above, in External Review No 210218, I found that the documents to which the Applicant sought access were contained within the relevant legislation, namely, "lists" of animals and wildlife. In External Review No. 210439, I found that the Applicant's request for the same documents was misconceived and should not be dealt with pursuant to section 77 of the FOI Act.

76. My decisions in those reviews demonstrate that "lists" of animals and wildlife are contained in the *Nature Conservation Act* and corresponding regulations and that applications by the Applicant for access to such documents are misconceived because those documents are publicly available within the legislation or do not exist in the form that the Applicant seeks access.

77. The documents to which the Applicant seeks access in Item 7 of the FOI Application are substantially the same as those documents sought in his FOI applications which were the subject of External Reviews No. 210218 and 210439. On that basis, it is clear that the Applicant will not obtain any relief from the external review process with respect to Item 7 of the FOI Application because those documents will be publicly available or will not exist in the form that the Applicant seeks access.

78. Accordingly, I am satisfied that the External Review Application, to the extent that it concerns Item 7 of the FOI Application, is misconceived. I therefore, decide not to further deal with that item pursuant to section 77(1)(a) of the FOI Act.

Is the matter in issue in the four folios located by the EPA in response to Item 3 of the FOI Application exempt from disclosure under section 44(1) of the FOI Act?

79. The EPA refused access to parts of documents located in response to Item 3 of the FOI Application²⁹ on the basis that certain matter in those documents:
- concerns the personal affairs of other individuals
 - is exempt from disclosure under section 44(1) of the FOI Act.

Section 44(1) of the FOI Act

80. This section provides:

44 Matter affecting personal affairs

(1) *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

81. The test for whether matter qualifies for exemption under section 44(1) of the FOI Act comprises two parts, as follows:

- (i) would disclosure of the matter in issue disclose information that is properly characterised as information concerning the personal affairs of a person?

if (i) is answered affirmatively,

- (ii) a public interest consideration favouring non-disclosure is established and the matter in issue will be *prima facie* exempt. However, if the public interest considerations favouring disclosure outweigh all identifiable public interest considerations favouring non-disclosure, a finding that disclosure of the matter in issue would, on balance, be in the public interest, is warranted.

82. In *Stewart and Department of Transport*³⁰ the Information Commissioner discussed the meaning of the phrase '*personal affairs of a person*' as it appears in the FOI Act.³¹ In particular, the Information Commissioner said that:

- information concerns a person's personal affairs if it concerns the private aspects of a person's life
- there is a substantial grey area within the ambit of the phrase '*personal affairs*', but that phrase has a well-accepted core meaning which includes matter relating to:
 - family and marital relationships
 - health or ill health
 - relationships and emotional ties with other people
 - domestic responsibilities or financial obligations.

83. Whether or not information contained in a document comprises information concerning an individual's personal affairs is a question of fact, to be determined according to the proper characterisation of the information in question.

²⁹ Those documents are two versions (a draft and a file copy) of a briefing note dated 18 July 2006.

³⁰ (1993) 1 QAR 227. Referred to in this letter as *Stewart*.

³¹ See paragraphs 79-114 of *Stewart*.

Application of section 44(1) of the FOI Act

84. I have examined the matter which the EPA claims is exempt from disclosure under section 44(1) of the FOI Act. That matter consists of the names and personal details of individuals who were the subject of, or otherwise involved in, attacks by kangaroos in the Ripley area.
85. I am satisfied that the matter in the briefing notes concerns the personal affairs of other individuals and is *prima facie* exempt from disclosure under section 44(1) of the FOI Act.

Public interest balancing test

86. On account of the way that section 44(1) of the FOI Act is worded and structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always weigh against disclosure of that information.
87. The weight afforded to such a finding varies from case to case depending on:
- the weight of relevant privacy interests (which favour non-disclosure) attaching to the information
 - the existence of relevant public interest considerations favouring disclosure
 - the particular circumstances of the case.
88. If there are no public interest considerations in favour of disclosure, a finding in support of non-disclosure will be made.
89. In general terms, a matter of public interest must be a matter that concerns the interests of the community generally. However, it has been recognised that *'the public interest necessarily comprehends an element of justice to the individual'*.³² In this regard, the Information Commissioner has previously stated as follows:

*Thus, there is a public interest in individuals receiving fair treatment in accordance with the law in their dealings with government, as this is an interest common to all members of the community. Similarly, the fact that individuals and corporations have, and are entitled to pursue, legitimate private rights and interests can be given recognition as a public interest consideration worthy of protection, depending on the circumstances of any particular case.*³³

90. Accordingly, it is necessary for me to examine whether there are any public interest considerations favouring disclosure of the matter in folios 3, 6 and 7, which I have found is *prima facie* exempt, and if there are, whether they outweigh the interest in maintaining the privacy of the other individuals.
91. After careful consideration of this issue, I consider that the following public interest considerations in support of disclosure may be relevant in the circumstances:
- accountability of the EPA in dealing with and reporting animal attacks
 - openness and transparency and increased public understanding of government processes

³² *Attorney-General (NSW) v Quin* (1990) 64 ALJR 627) per Mason CJ.

³³ *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at paragraph 55.

- fair treatment of individuals in accordance with the law in their dealings with government agencies
92. However, I am satisfied that disclosure of the personal affairs information concerning the other individuals referred to in the briefing notes will not further the above public interest considerations as it is the information about the attacks themselves, not the individuals' names which demonstrates whether the agency had an obligation to act and discharged that obligation appropriately. Accordingly, those considerations should be afforded little weight in the circumstances, whereas, the weight that should be afforded to protecting the privacy of those individuals is significant.
93. On balance, I am satisfied that the public interest considerations favouring disclosure do not outweigh the public interest considerations favouring non-disclosure of the matter in issue in the briefing notes.
94. Accordingly, I am satisfied that the matter in issue in the briefing notes
- concerns the personal affairs of other individuals
 - disclosing it would not, on balance, be in the public interest
 - is exempt from disclosure under section 44(1) of the FOI Act.

DECISION

95. I vary the decision under review, being the Internal Review Decision, and find as follows:
- the scope of this external review is limited to a review of the EPA's decision on the documents sought in the FOI Application dated 30 August 2007
 - section 22(b) of the FOI Act applies to the documents sought in Item 11 of the FOI Application
 - section 28A(1) of the FOI Act applies to the documents sought in Items 4, 5, 9, 10, 14 and 15 of the FOI Application
 - section 29B of the FOI Act applies to the documents sought in Items 1, 6, 12 and 13 of the FOI Application
 - the External Review Application to the extent that it concerns Item 7 of the FOI Application is misconceived and should not be further dealt with pursuant to section 77(1)(a) of the FOI Act
 - the matter in issue in the four folios located by the EPA in response to Item 3 of the FOI Application is exempt from disclosure under section 44(1) of the FOI Act
96. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

Assistant Commissioner Corby

Date: 25 November 2008