



Decision and Reasons for Decision

Application Number: 210817

Applicant: Mr T O'Connor

Respondent: University of Queensland

Decision Date: 30 June 2009

Catchwords: **ADMINISTRATIVE LAW – FREEDOM OF INFORMATION QUEENSLAND – REFUSAL OF ACCESS - DOCUMENT NONEXISTENT OR UNLOCATABLE – applicant seeks access to a file note relating to an investigation into the applicant’s complaint – whether agency can be satisfied the document does not exist – whether all reasonable steps have been taken to find the document – whether agency can refuse access to the document under section 28A(1) of the *Freedom of Information Act 1992 (Qld)***

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REASONS FOR DECISION

Summary

1. The applicant contends that the University of Queensland (**UQ**) has not located and provided him with a document responding to his freedom of information application.
2. I am satisfied that UQ is entitled to refuse access to the document requested by the applicant under section 28A(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) on the basis that there are reasonable grounds for UQ to be satisfied that the document sought does not exist.
3. The decision under review is affirmed.

Background

4. By application form dated 10 November 2008 (**FOI Application**), the applicant applied to UQ for access to:

Re paragraph 3 of the attached Byrom Report, provide the "notes of my discussions with each are on file" in respect of those persons mentioned in para 3 of page one.
5. The FOI Application refers to a report (**Investigation Report**) authored by Mr Byrom, who was previously UQ's Legal Officer, about the results of an investigation into a complaint the applicant made about the behaviour of a UQ staff member (**Staff Member**) at a meeting in 2004 (**Meeting**).
6. By letter dated 6 January 2009, Ms F Parke, FOI Officer, advised the applicant that she had:
 - located 5 folios responding to the FOI Application
 - decided to release the documents in full (**Original Decision**).
7. By email dated 3 February 2009 the applicant sought internal review of UQ's Original Decision (**Internal Review Application**) and made submissions in support of his case that further documents responding to his FOI Application should have been located.
8. By letter dated 3 March 2009 (**Internal Review Decision**), Professor A Rix, Acting Executive Director (Operations), UQ, advised the applicant that he had:
 - located one further document, which he decided to release in full
 - decided to affirm the Original Decision.
9. By email dated 29 March 2009, the applicant applied to the Office of the Information Commissioner (**Office**) for external review of the Internal Review Decision.

Decision under review

10. The decision under review is the Internal Review Decision referred to at paragraph 8 above.

Steps taken in the external review process

11. By facsimile dated 2 April 2009 the Office asked UQ to provide documents relevant to

this review.¹ UQ provided the requested documents by facsimile on 7 April 2009.

12. A staff member of the Office contacted the applicant by telephone on 8 April 2009 to discuss the applicant's contention that further documents responding to his FOI Application should exist. The applicant requested that he be given some time to present his grounds for review.
13. A staff member of the Office telephoned the applicant on 20, 24 and 29 April 2009 to request the applicant's submissions.
14. By email dated 4 May 2009 the applicant provided submissions in relation to his contention that a further document responding to his FOI Application should exist.
15. By letter dated 29 May 2009, I advised the applicant that:
 - his External Review Application had been accepted
 - I had carefully considered his email dated 4 May 2009 along with relevant case law and legislation
 - the next step in the review would be to issue a decision
 - if he wished to make any final submissions, to forward those submissions to the Office by 12 June 2009.
16. The applicant has not made any further submissions.
17. In telephone conversations on 15, 26 and 29 June 2009, UQ provided information and submissions to a staff member of the Office about the searches it performed for the document sought by the applicant.
18. In making my decision in this matter, I have taken the following into account:
 - the FOI Application, Internal Review Application and External Review Application
 - the Original Decision and Internal Review Decision
 - file notes of telephone conversations between staff of the Office and UQ on 15, 26 and 29 June 2009
 - the applicant's email dated 4 May 2009
 - email dated 20 February 2009 from Mr P Taylor, UQ's Senior Manager for Academic Administration
 - email dated 17 February 2009 from Ms C Feuerriegel, Clerical Officer of UQ's Legal Office
 - the Investigation Report
 - relevant legislation as referred to in this decision
 - *PDE and the University of Queensland* (Unreported, Office of the Information Commissioner, 9 February 2009).

Issue in review

19. As part of an external review conducted by the Office of the Information Commissioner in 2004, the applicant attended the Meeting and subsequently lodged a complaint with UQ about the Staff Member. The applicant's complaint was investigated by Mr Byrom.
20. In the Investigation Report, which is addressed to Mr Douglas Porter, Secretary and Registrar, at UQ, Mr Byrom states:

¹ Including the FOI Application, Original Decision, Internal Review Application, Internal Review Decision and any documents relevant to consultations UQ undertook in accordance with section 51 of the FOI Act.

I provided [the Staff Member] with a copy of Mr O'Connor's letter to you and sought his written comments. I also interviewed him and [the meeting attendees in person or by phone] ... Notes of my discussions with each are on file.

21. UQ has located and released to the applicant file notes of Mr Byrom's conversations with three meeting attendees, but has not located a file note of his conversation with the Staff Member (**File Note in Issue**). The applicant contends that UQ has not undertaken sufficient searches to locate the File Note in Issue.
22. The issue for determination in this review is whether there are reasonable grounds for UQ to be satisfied that the File Note in Issue does not exist and accordingly, whether access can be refused under section 28A(1) of the FOI Act.

Relevant law

Section 28A of the FOI Act

23. Section 28A(1)² of the FOI Act provides:

28A Refusal of access—documents nonexistent or unlocatable

- (1) *An agency or Minister may refuse access to a document if the agency or Minister is satisfied the document does not exist.*

Example—

documents that have not been created

24. In *PDE and the University of Queensland*³ (**PDE**) the Acting Information Commissioner indicates that:⁴

*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.*

25. In *PDE* the Acting Information Commissioner also considered how an agency is to satisfy itself as to the non-existence of documents sought by an applicant and indicated that to be satisfied that a document does not exist, it is necessary for the agency to rely upon its particular knowledge and experience with respect to various key factors including:
 - the administrative arrangements of government
 - the agency structure
 - the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)

² I note that a search of a back up system is required before refusing access under section 28(1) only if the requirements of 28A(4) are met. These requirements include that the agency considers the document has been kept in, and is retrievable from, the backup system. I note that documents can be retrieved from UQ's backup system for a period of twelve months. Accordingly, had the File Note in Issue been created and kept in the backup system, it would no longer be retrievable.

³ (Unreported, Office of the Information Commissioner, 9 February 2009).

⁴ At paragraph 34.

- the agency's practices and procedures (including but not exclusive to its information management approach)
 - other factors reasonably inferred from information supplied by the applicant including:
 - the nature and age of the requested document/s
 - the nature of the government activity the request relates to.
26. To be satisfied under section 28A(2) of the FOI Act that a document can not be found an agency must take all reasonable steps to locate a document. Section 28A(1) is silent on the issue of how an agency is to satisfy itself that a document does not exist. When proper consideration is given to the key factors discussed at paragraph 25 above and a conclusion reached that the document sought does not exist, it may be unnecessary for the agency to conduct searches. However, where searches are used to substantiate a conclusion that the document does not exist, the agency must take all reasonable steps to locate the documents sought.⁵
27. Therefore, in applying section 28A(1) of the FOI Act it is relevant to ask whether there are reasonable grounds to be satisfied that the File Note in Issue does not exist and, in doing so, as UQ used searches to satisfy itself that the File Note in Issue does not exist, it is necessary to consider whether UQ has taken all reasonable steps to find the File Note in Issue.

Findings

Applicant's submissions

28. The applicant generally submits⁶ that he lacks confidence that UQ has performed all reasonable searches to locate the File Note in Issue. He submits that:
- UQ's management of his previous FOI applications has been unsatisfactory, and provides examples of where he considers this to be the case
 - UQ claimed in the Original Decision to have conducted comprehensive searches, yet a further document was located during the internal review stage
 - it is possible that the document has been misfiled.
29. The applicant specifically submits⁷ that UQ should carry out further searches for the File Note in Issue and pursue other enquiries as follows:
- Records and Archives Management Service (**RAMS**)
Have all the subject files in ARMS (sic) been searched?
 - Staff Files
What about the staff files, including [the Staff Member's] I believe copies should have been placed on each staff file of the several persons including mine, as well as FOI files with cross references between them.
 - FOI Files
I recall that at the meeting reported by Mr Bryom the group reviewed a large number of my requests. Presumably those requests remain on file somewhere. Have those requests, submitted prior to that meeting and any other associated files, been searched?

⁵ See PDE.

⁶ In the FOI Application, Internal Review Application and the applicant's email dated 4 May 2009.

⁷ In his email dated 4 May 2009.

Copies should also have been placed on each of my FOI request submission files kept in the Legal Office and discussed at the meeting of 12 September 2004. Are they there?

- Archives

Have ...relevant documents been culled from Central Registry to the Archives Department...? Where are the electronic records of documents sent to Central Registry for filing?

...when sent to Registry for filing, Mr Byrom did not classify and file documents, such task is undertaken by Registry staff.

- Author of the File Note in Issue

Did Mr Bryom dictate memos to his secretary or prepare his own documents, in which case the document might be in the Secretary's electronic records and not Mr Bryom's?

It is not unprecedented for the University to contact former Officers for assistance. I request UQ should discuss the matter with Mr Byrom.

UQ's submissions

30. UQ submits⁸ that based on the searches it performed, it is reasonable to conclude that the File Note in Issue does not exist. The Internal Review Decision sets out the decision-maker's reasoning in coming to this conclusion as follows:

16. When Mr Byrom prepared the report, he was the University's chief legal officer and worked in the Legal Office. Based on my knowledge of the University's structure, its practices and procedures in relation to information management and my understanding of the nature of the document requested, I am satisfied that, if the document had been created, it would have been filed on a file kept by the Legal Office or Central Registry. It would be unreasonable to expect the file note to have been kept in any other filing system.

17. The Senior Manager of Academic Administration, who manages Central Registry, has advised that a comprehensive search of the files held in Central Registry has been undertaken and that the [File Note in Issue] has not been located. I have also been advised that a comprehensive search of the Legal Office's files (including Mr Byrom's electronic files) has been conducted and that the [File Note in Issue] was not found among the Legal Office's files.

31. UQ submits⁹ that the file notes of Mr Byrom's conversations with the other three Meeting attendees were located on a Central Registry file¹⁰ held by RAMS and that copies of each of these file notes were located in the Legal Office. On this basis, UQ submits that it is reasonable to infer that if the File Note in Issue exists, it would be held with the three file notes created by Mr Byrom.

32. In a telephone conversation with a staff member of the Office on 15 June 2009, UQ further submitted that:

- the Staff Member prepared a memo to explain his version of the events of the Meeting (**Memo**);
- it is likely that the Staff Member prepared the Memo for Mr Byrom as an alternative to being interviewed for the purposes of the Investigation Report; and accordingly
- the File Note in Issue may never have been created.

⁸ In the Internal Review Decision.

⁹ In the Internal Review Decision.

¹⁰ The applicant's staff file.

33. In addition, UQ has responded¹¹ to the particular queries raised by the applicant in his email dated 4 May 2009 as follows:

- RAMS

RAMS is an organisational name encompassing both Central Registry and Archives. RAMS is physically located on campus at UQ and is a storage site for all Central Registry and Archives files.

The FOI Coordinator at UQ requested a search of RAMS for documents responding to the FOI Application. There is no electronic database for these types of records so Mr Philip Taylor, (former) Acting Records Manager, undertook a physical search of RAMS for documents requested by the applicant, including the File Note in Issue.

Mr Taylor retrieved and searched several RAMS files, including:

- staff file of the applicant
- staff file of the Staff Member
- related FOI files commenced by the applicant.

Mr Taylor confirmed that he located a copy of the Investigation Report, together with the file notes of Mr Byrom's discussions with the other Meeting attendees and the Memo on the applicant's staff file. The File Note in Issue was not located.

- Staff files

As stated above, the RAMS search involved the retrieval of staff files of both the applicant and the Staff Member.

As indicated above, UQ has located three file notes prepared by Mr Byrom in relation to his interviews with Meeting attendees. Two of the individuals interviewed are UQ Staff Members (**UQ Witnesses**). The staff files of the UQ Witnesses were not searched. UQ indicates that personnel files store human resources-related information only. As this matter concerned a work issue that was not personal to any other meeting attendees, the RAMS search did not extend to staff files of the UQ Witnesses.

- FOI Files & Archives

The applicant has made more than 39 FOI Applications to UQ. Finalised files are stored in Central Registry (within RAMS) and current files are held by the Legal Office.

As Mr Taylor indicated, several finalised FOI files at RAMS were searched because of their relevance to the Meeting. The File Note in Issue was not located.

The Legal Office searches extended to all (current) FOI files. The File Note in Issue was not located.

- Author of the File Note in Issue

If Mr Byrom had been given any assistance in the preparation of his report, it would have come from the Legal Office. The Legal Office database has been

¹¹ In telephone conversations between a member of staff of this Office and UQ on 15 June 2009 and 26 June 2009.

searched. Copies of the other file notes were located in the Legal Office. The File Note in Issue was not.

34. UQ also provided the Office with emails from those Officers who performed searches of the Central Registry and the Legal Office.
35. In an email dated 20 February 2009, Mr P Taylor, Senior Manager for Academic Administration and the former manager of the Records and Archives Management Service advised that a comprehensive search of RAMS was undertaken and the File Note in Issue could not be found. Details of Mr Taylor's search are noted at paragraph 33 above.
36. In an email dated 17 February 2009, Ms C Feuerriegel, Clerical Officer of the Legal Office advised that she had:
 - been up to RAMS and double checked the relevant Central Registry file
 - liaised with an officer from RAMS to ensure the documents are not filed in any other file parts and to seek advice as to whether there are any other files that might contain the missing documents
 - searched Mr Byrom's electronic files
 - searched all Legal Office electronic files
 - not located the File Note in Issue.

Findings of fact and application of the law

Are there reasonable grounds for UQ to be satisfied that the File Note in Issue does not exist?

37. The Investigation Report suggests that Mr Byrom interviewed four Meeting attendees including the Staff Member, and that the notes of Mr Byrom's interviews are 'on file'.
38. UQ has used searches to locate the File Note in Issue, but is satisfied that this document does not exist.

Has UQ taken all reasonable steps to find the File Note in Issue?

39. As UQ has used searches to satisfy itself that the File Note in Issue does not exist, I must consider whether UQ has taken all reasonable steps to locate the document.
40. A decision as to whether an agency has taken all reasonable steps to find the document sought must be made on a case by case basis with reference to the key factors discussed at paragraph 25 above.¹²
41. I accept that in the course of determining whether the File Note in Issue exists, UQ's has:
 - identified that the File Note in Issue, if it was created, was created as a result of Mr Byrom's investigation of the Applicant's complaint
 - determined that if the File Note in Issue was created, it would be filed in either the Legal Office or the Central Registry
 - conducted searches of RAMS (which includes both Central Registry and Archives) at least three times¹³ - the scope of these searches included the staff files of both the Applicant and the Staff Member and the Applicant's relevant FOI files

¹² To the extent that they are relevant to the particular circumstances.

¹³ Searches were undertaken in relation to the Original Decision and further searches were requested by Ms Parke and Ms Feuerriegel at internal review.

- conducted searches of Mr Byrom's electronic files and all Legal Office electronic files
 - located the file notes of three Meeting attendees in both the Legal Office and the Central Registry
 - determined that the Staff Member prepared the Memo.
42. The Applicant has expressed concern at the release of a further document (his original complaint letter) at the internal review stage of the processing of his application. On this basis he refutes UQ's claim that it has conducted comprehensive searches.
43. The document subsequently released was an attachment to one of the file notes released with the Original Decision. In response to inquiries from the Office,¹⁴ it appears that on the physical file in RAMS the complaint letter was not attached to the relevant file note and was not identified as a document responding to the FOI Application when the documents were being copied.¹⁵ However, on internal review, the file notes filed in the Legal Unit were identified and there the complaint letter was attached to the relevant file note. The complaint letter was subsequently released.
44. I acknowledge the applicant's concern that all relevant documents were not released at the time of the Original Decision. When all relevant documents are not identified in the initial searches, this can tend to undermine an applicant's confidence in the veracity of the searches undertaken. However, I do not agree with the applicant's contention that *'the only reliable demonstration by UQ of reasonable steps having been taken to locate the information is best evidenced by producing the document.'*
45. I have carefully considered the parties' submissions. I accept that the extract from the Investigation Report identified in paragraph 20 above suggests that Mr Byrom created the File Note in Issue. However, UQ's searches have located the file notes Mr Byrom created in relation to the three Meeting attendees he interviewed in both RAMS and the Legal Office. Mr Taylor indicates, and I accept that at RAMS, he located the three file notes and the Memo together on the applicant's staff file.
46. In my view, the fact that the three file notes were identified in two separate locations and in each instance the File Note in Issue was not located with the other file notes, supports a conclusion that the File Note in Issue was not created. In addition, the co-location of the Memo with the three file notes located affords weight to UQ's conclusion that it may have been unnecessary for Mr Byrom to create the File Note in Issue as he had access to the Memo.¹⁶
47. The applicant submits that UQ should be required to contact Mr Byrom to discuss the matter. I am satisfied that UQ has thoroughly searched the locations where, if it existed, the File Note in Issue would be found. Accordingly, in this case, I do not consider that taking all reasonable steps to locate the File Note in Issue requires UQ to contact a former employee.
48. I also accept UQ's submission that the File Note in Issue is not a document of the type that would be filed on the staff files of the UQ Witnesses. These individuals were interviewed as witnesses only and it is reasonable to conclude that in light of UQ's practices in relation to its staff files that the File Note in Issue would not be filed on these files. Accordingly, I am satisfied that it is unnecessary for UQ to search the staff files of the UQ Witnesses.

¹⁴ In telephone conversations between a member of staff of this Office and UQ on 15 June 2009, 26 June 2009 and 29 June 2009.

¹⁵ The physical files in RAMS do not leave the premises.

¹⁶ I note that the Memo is not within the scope of the FOI Application but this does not preclude the applicant from applying for access to the Memo.

49. Based on careful consideration of all the information available to me, I am satisfied that:
- if the File Note in Issue was created, it could reasonably be expected to have been kept with the other file notes of interviews Mr Byrom conducted in the course of his investigation
 - the File Note in Issue was not located with the file notes created by Mr Byrom in his investigation
 - in any event, if it existed, the File Note in Issue would be stored/filed in the Central Registry (at RAMS) or the Legal Office
 - UQ has conducted appropriate and thorough searches of RAMS and the Legal Office and the File Note in Issue cannot be located
 - UQ has taken all reasonable steps to locate the File Note in Issue and it cannot be located
 - there are reasonable grounds for UQ to be satisfied that the File Note in Issue does not exist
 - access to the File Note in Issue can be refused under section 28A(1) of the FOI Act.

DECISION

50. I affirm the decision under review by finding that access to the File Note in Issue can be refused under section 28A(1) of the FOI Act on the basis that the document does not exist.
51. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

Suzette Jefferies
Acting Assistant Commissioner

Date: 30 June 2009