



Decision and Reasons for Decision

Application Number: 210902

Applicant: O80PCE

Respondent: Department of Education and Training

Decision Date: 15 February 2010

Catchwords: **ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – SCOPE – interpretation of terms of the original application – whether a particular document held by the agency falls within the scope of the original application**

ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – IRRELEVANT MATTER – where agency deleted matter from documents released to applicant on the basis that the matter was not relevant to the application – section 27(3) of the *Freedom of Information Act 1992 (Qld)* – whether deleted matter is relevant to the application

ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – section 7 of the *Freedom of Information Act 1992 (Qld)* – document of an agency – documents in possession or under the control of an agency – whether particular documents sought in the application are under the control of the agency

Contents

REASONS FOR DECISION.....	2
Summary	2
Background.....	2
Decision under review	3
Applicable legislation	3
Steps taken in the external review process	3
Scope of FOI Application	6
Analysis.....	7
Issues to be determined	8
Section 27(3) of the FOI Act.....	9
Applicant’s submissions.....	9
Application of section 27(3) of the FOI Act	10
Document of an agency	11
(i) Possession.....	13
(ii) Under the control	13
Summary.....	13
DECISION.....	14

REASONS FOR DECISION

Summary

1. For the reasons set out below, I am satisfied that:
 - a) the contract between the Department of Education and Training (**Department**) and Accelerated Pathways (**AP**) is a document that does not fall within the scope of the FOI application
 - b) the Department was entitled to refuse the applicant access to parts of a report by AP dated 6 August 2007 under section 27(3) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) on the basis that the information is not relevant to the FOI Application
 - c) some documents sought in the FOI Application are not documents of the Department and therefore cannot be considered in this external review.
2. The decision under review in relation to the application of section 27(3) of the FOI Act is affirmed.

Background

3. In this external review the applicant seeks access to particular documents concerning the Department of Education and Training's (**Department**) 2007 Career Change Program (**Program**).
4. The assessment, decision-making and review of grant recommendation processes of the Program were outsourced by the Department to AP, an Adelaide-based private sector agency who provide services in a number of areas including career transition strategies.
5. The Department and AP entered into a contract in 2006 regarding the work to be performed by AP in relation to the Program (**Contract**).
6. By letter dated 2 October 2008, the applicant applied to the Department for access to particular documents concerning the Program (**FOI Application**).
7. By letter dated 19 May 2009, the Department indicated that it had located 441 pages in four files. In relation to those files the Department decided (**Original Decision**) to:
 - grant full access to six pages
 - grant partial access to 11 pages subject to the exemption of certain matter under section 44(1) of the FOI Act
 - refuse access to nine pages under section 43(1) of the FOI Act
 - refuse access to 21 documents under section 50(c)(i) of the FOI Act
 - refuse access to 390 pages and parts of seven pages under section 27(3) of the FOI Act on the basis that the Department considered those documents to be not relevant to the FOI Application
 - grant full access to 10 pages but as this access was granted over the objections of a third party,¹ access to these documents was deferred pending the expiration of the third party's review rights.²

¹ Section 51 of the FOI Act requires an agency to obtain the views of a third party when the disclosure of a document may reasonably be expected to be of substantial concern to the third party.

8. By letter dated 16 June 2009, the applicant applied for internal review of the Original Decision (**IR Application**).
9. By email dated 20 July 2009 (**ER Application**), the applicant applied for external review as no notification of the Department's internal review decision had been received.³

Decision under review

10. Under section 52(6) of the FOI Act, if on internal review, an agency does not decide an application and notify the applicant of the decision within 28 days after receiving the application, the agency's principal officer is taken to have made a decision at the end of the period affirming the original decision.
11. As the Department did not make an internal review decision within the statutory timeframe, the Department's principal officer is taken to have affirmed the Original Decision.
12. On this basis, the deemed affirmation of the Original Decision is the decision under review (**Affirmed Decision**).

Applicable legislation

13. The FOI Act was repealed by the *Right to Information Act 2009 (Qld)* (**RTI Act**)⁴ which commenced on 1 July 2009.⁵ However, because the FOI Application was made under the FOI Act and has not yet been finalised, for the purposes of this external review, I am required to consider the application of the FOI Act (and not the RTI Act) to the matter in issue.⁶

Steps taken in the external review process

14. By letters dated 22 July 2009, the Office of the Information Commissioner (**OIC**) indicated to the parties that the ER Application had been accepted and asked the Department to provide the OIC with copies of the documents to which the applicant had been refused access.
15. On 30 July 2009, the Department provided copies of the documents requested at paragraph 14 above to the OIC.
16. On 18 August 2009, an OIC staff member discussed the nature of the documents located by the Department and issues relevant to the ER application with the applicant.
17. During August and September 2009, further discussions were held with the Department regarding matters relevant to this review.
18. During a telephone discussion with an OIC staff member on 13 October 2009, the applicant indicated that she wished to pursue access to the provisions of the Contract

² I understand that the third party subsequently withdrew its objections to the release of the documents and the Department consequently provided the applicant with access to the relevant parts of the pages.

³ Section 52(6) of the FOI Act.

⁴ Section 194 of the RTI Act.

⁵ With the exception of sections 118 and 122 of the RTI Act. Though these provisions have since commenced.

⁶ Section 199 of the RTI Act.

between the Department and AP which deal with entitlement to and ownership of documents relating to the Program.

19. In an effort to resolve this matter informally, on 5 November 2009, an OIC staff member asked the Department if it:
- would be agreeable to providing a copy of the Contract to the applicant
 - was not agreeable to the above, whether it would be agreeable to providing a copy of the Contract provisions concerning document entitlement.

The Department indicated that it was not agreeable to either of these options.

20. By letter dated 5 November 2009, I conveyed a preliminary view to the applicant which relevantly indicated that:

- there are reasonable grounds for the Department to be satisfied that all documents, in its possession or under its control, that are relevant to the FOI Application have been provided to the applicant
- the Contract is a document that does not fall within the scope of the FOI Application
- the Department was entitled to refuse access to 390 pages and parts of 7 pages under section 27(3) of the FOI Act on the basis that the information in those pages is not relevant to the FOI Application
- two pages, while not exempt under section 50(c)(i) of the FOI Act can be accessed on the internet and therefore, the Department would be entitled to refuse the applicant access to these pages under section 22(a) of the FOI Act.

21. I indicated to the applicant that if she did not accept the preliminary view her submissions to this review were to be provided by 27 November 2009. I also informed the applicant that:

- the Department had advised the OIC that in the course of processing the IR Application,⁷ additional documents were located in relation to the number of successful and unsuccessful applications and that these would be released to the applicant (subject to the deletion of other people's names) by 13 November 2009
- I would ask the Department to forward to her copies of two pages consisting of Questions on Notice (**QON**) and Minister's responses that had been published on Parliament's website.

22. On 6 November 2009, the Department indicated that the additional documents located in the processing of the IR Application were not limited to the documents referred to in paragraph 21 above. As such further consideration of the documents was required by the OIC.

23. On 6 November 2009, the Department confirmed by email that:

- the OIC would consider the additional documents located in the IR Application
- although the Department is entitled to refuse access to the QON under section 22(a) of the FOI Act, the Department would forward copies to the applicant.

24. In a telephone discussion on 10 November 2009, an OIC staff member sought further clarification from the applicant as to the types of documents she was seeking. The applicant indicated that:

⁷ On which a decision was not made within the statutory timeframe.

- she did not want the additional documents located in processing the IR Application as they were similar to types of documents already provided which were of no relevance to her
 - she did not want documents regarding the publicly known eligibility criteria, rather she was seeking documents about the assessment criteria
 - her expectation was that there would be a report setting out the number of applicants, considerations taken into account, the assessment process, findings and analysis of applicants
 - the report provided to her only showed a few numbers and paragraphs with other information blanked out
 - the applicant indicated that in relation to the preliminary view, her main concern was the Contract between the Department and AP.
25. By letter dated 18 November 2009, the applicant provided her submissions in response to the preliminary view. The applicant confirmed that she specifically seeks access to the following documents only:
- the Contract
 - the full report produced on 6 August 2007 by Mr Greg Wark, the Director of AP regarding the results of the Program (**Report**) subject to the deletion of personal details of applicants.
26. During the course of the review, the applicant indicated that she expected there to be more documents released by the Department in response to the FOI Application. As a result of inquiries made by the OIC, the Department confirmed that any further documents concerning the Program would be held by AP because the assessment, decision-making and review of grant recommendation processes of the Program were outsourced to AP.
27. On this basis, the applicant confirmed that she is also seeking review in relation to whether documents held by AP are considered to be documents of the Department and whether she is entitled to access these documents.
28. In making my decision in this matter, I have taken the following into consideration:
- the applicant's FOI Application, IR Application and ER Application
 - the Original Decision
 - records of telephone conversations between staff of the OIC and the applicant on 17 August 2009, 10 September 2009, 13 October 2009, 10 November 2009 and 5 February 2010
 - records of telephone conversations between staff of the OIC and the Department on 29 July 2009, 19 August 2009, 21 September 2009, 5 November 2009 and 6 November 2009
 - the Department's correspondence to the OIC of 28 July 2009, 15 September 2009 and 6 November 2009
 - the applicant's written submissions of 18 November 2009
 - relevant provisions of the FOI Act and other legislation as identified in this decision
 - previous decisions of the Information Commissioner of Queensland as identified in this decision
 - the Contract and the Report.

Scope of FOI Application

29. In the FOI Application, the applicant states:

I request access to the following documents relating to the 2007 Accelerated Pathways (Career Change) Program:

- 1. Documents relating to the number of applications for the above funding of up to \$50,000, including numbers of successful and unsuccessful applications;*
- 2. Documents relating to the selection criteria applied to the process of assessing applications for the above funding, including the weight given to each criterion;*
- 3. Documents relating to the assessment process undertaken by Education Queensland to approve the application/s of the successful applicant/s for the above funding;*
- 4. Documents relating to the names and classifications of the officers involved in the panel/s charged with assessing the applications for the above funding;*
- 5. Documents relating to the reasons for refusing funding to the unsuccessful applicants;*
- 6. Documents relating to the right of review from a decision to refuse Accelerated Pathways (Career Change) funding available to unsuccessful applicants;*
- 7. Documents relating to the criteria applied during the review process;*
- 8. Documents relating to the names and classifications of the officers involved in the panel/s charged with reviewing the decisions to refuse Accelerated Pathways (Career Change) funding to the unsuccessful applicants.*

Documents referred to include:

- briefing notes, memoranda and internal department correspondence,*
- external correspondence to/from the department or the minister;*
- tenders, agreements and contract documents, plans and drawings for projects*
- reports, submissions, discussion papers*
- project and program documentation*
- policy and strategy documents*
- agenda and minutes of department committees*
- file notes, diaries, notebooks*
- audio/visual records; and*
- electronic mail and facsimiles.*

....

30. The documents sought by the applicant in the FOI Application can be grouped into the following four categories:

- documents relating to the number of successful and unsuccessful applications (Category 1)⁸
- documents concerning the assessment of applications (Category 2)⁹
- documents concerning the reasons for refusing funding (Category 3)¹⁰
- documents concerning the review of decisions to refuse funding (Category 4).¹¹

31. On external review the applicant has indicated that she seeks access to a copy of the Contract.

⁸ Item 1 in FOI Application.

⁹ Items 2, 3 and 4 in FOI Application.

¹⁰ Item 5 in FOI Application.

¹¹ Items 6, 7 and 8 FOI Application.

32. During the course of the external review the applicant narrowed the issues in relation to which she sought review.¹² In her submissions dated 18 November 2009 the applicant states, in part:

I am interested in the following documents only –

1. the contract between the Department and Accelerated Pathways ...

... ..

I consider that my application seeking documents “relating to” the process should be given a wide meaning in order to promote the Objects of the FOI Act as set out in section 4 of the Act. The words “relating to” are not defined in the FOI Act and the Oxford Dictionary includes in its definition the following “have reference to, stand in some relation to”.

... ..

I submit that the Contract between the Department and Accelerated Pathways is a pivotal document in relation to my application and I would ask you to reconsider your view that it is irrelevant to my application.

I consider that it is the key to the reason that the Department holds no documents relating to the Career Change Program and I am disappointed that the Department has taken such a deliberately narrow view of my application, which does nothing to promote transparency and government accountability.

... ..

Analysis

33. Section 25 of the FOI Act provides a broad indication of how an FOI Application must be framed. In particular, section 25(2)(b) of the FOI Act states that an applicant must, at the time of making the FOI application, provide sufficient information concerning the documents sought to enable a responsible officer of an agency to identify the documents. There are sound practical reasons for the documents sought in an FOI application being clearly and unambiguously identified. On this point, the Information Commissioner has previously said:¹³

The terms in which an FOI access application is framed set the parameters for an agency's response under Part 3 of the FOI Act, and in particular set the direction of the agency's search efforts to locate all documents of the agency which fall within the terms of the FOI access request. The search for relevant documents is frequently difficult, and has to be conducted under tight time constraints. Applicants should assist the process by describing with precision the document or documents to which they seek access. Indeed the FOI Act itself makes provision in this regard with s.25(2) not only requiring that an FOI access application must be in writing, but that it must provide such information concerning the document to which access is sought as is reasonably necessary to enable a responsible officer of the agency to identify the document.

34. As such, it can be beneficial for an applicant to contact the agency prior to lodging an access application to discuss the proposed terms of the application to ensure that the application encompasses the documents actually sought.

¹² See paragraph 25 above.

¹³ *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 at paragraph 8.

35. Nonetheless, because section 25 of the FOI Act only provides a broad indication of how an FOI application must be framed, it follows that an FOI application ought not be interpreted narrowly and with the same degree of precision as a piece of legislation.¹⁴
36. The general rule is that an applicant is not permitted to unilaterally expand the terms of an access application.¹⁵ The scope of an application can only be expanded with the consent of an agency. In this matter, the Department did not agree to expand the scope of the FOI Application. Therefore, only those documents covered by the terms of the FOI Application can be dealt with in this external review.
37. I have considered the terms of the FOI Application and the applicant's submissions that the Contract is a pivotal document in relation to the FOI Application.
38. I acknowledge the applicant's contention that the Contract is pivotal to her application, in the sense that the terms of the Contract are relevant to the issue of whether the applicant can access documents sought in Categories 2 to 4 (as discussed in paragraphs 59 to 80 below) under the FOI Act. However, the preliminary issue for consideration here is whether the Contract itself comes within the terms of the FOI Application. I am satisfied that the answer to this question is no.
39. The applicant submits that the FOI Application seeks documents "*relating to' the process*". However, the actual terms of the FOI Application are "*I request access to the **following** documents relating to the 2007 Accelerated Pathways (Career Change) Program*" and underneath this the applicant lists the particular categories and types of documents sought. Therefore, the terms of the FOI Application are quite specific and confined to the types of documents listed.
40. I have carefully examined the Contract and I am satisfied that it is not a document:
- relating to the number of successful and unsuccessful applications (Category 1)
 - concerning the assessment of applications (Category 2)
 - concerning the reasons for refusing funding (Category 3)
 - concerning the review of decisions to refuse funding (Category 4).
41. Accordingly, the Contract is not a document sought in the FOI application and it is therefore outside the scope of the FOI Application.
42. It is not uncommon for documents released under the FOI process to suggest further documents that may assist an applicant to pursue a particular line of inquiry. However, if the further documents do not fall within the terms of the FOI application, and the agency does not agree to expand the scope of the application, those documents would need to be sought from the agency afresh.

Issues to be determined

43. During the course of the review the applicant informed the OIC that she only seeks access to the Contract and the full Report¹⁶ subject to the deletion of personal details of applicants. The applicant also informed the OIC that she seeks review in relation to whether documents held by AP are considered to be documents of the Department and therefore, whether she is entitled to access any such documents.

¹⁴ See Deputy President Forgie's comments as quoted in *Wenzel and Secretary, Department of Defence* [2005] AATA 1174 at paragraph 9.

¹⁵ *Robbins and Brisbane North Regional Health Authority* (1994) 2 QAR 30 at paragraph 17.

¹⁶ The Department released a copy of part of that Report to the applicant subject to the deletion of personal details of applicants under section 44(1) of the FOI Act.

44. As discussed at paragraphs 29 to 42 above, the Contract is outside the scope of the FOI Application. Therefore, the issues to be determined in this review are whether:
- the Department was entitled to refuse the applicant access to parts of the Report under section 27(3) of the FOI Act on the basis that the information in those parts is not relevant to the FOI Application
 - any documents that are within the terms of the FOI Application and which may be held by AP are documents the applicant is entitled to access under the FOI Act.

Section 27(3) of the FOI Act

45. In the Original Decision, the Department granted the applicant partial access to the Report (**Released Report**). Matter considered not relevant to the FOI Application was deleted from the Report in accordance with section 27(3) of the FOI Act.
46. The applicant is seeking access to a full copy of the Report.
47. Section 27(3) of the FOI Act states that:

27 How applications are dealt with

... ..

(3) *If giving access to a document will disclose to the applicant matter the agency or Minister reasonably considers is not relevant to the application, the agency or Minister may delete the irrelevant matter from a copy of the document before giving access to the document.*

48. Section 27(3) of the FOI Act gives an agency a discretion to delete matter it reasonably considers not relevant to the FOI application.

Applicant's submissions

49. The applicant submits that:

I am interested in the following documents only –

... ..

2. the full Report (subject only to the deletion of personal details of applicants under s.44(1)) produced on 6 August 2007 by Greg Wark, the Director of Accelerated Pathways of the Results of the Career Change Program.

... ..

I consider that my application seeking documents "relating to" the process should be given a wide meaning in order to promote the Objects of the FOI Act as set out in section 4 of the Act.

... ..

the word 'relevant' is not defined in the FOI Act. The Oxford Dictionary includes in its definition the following "bearing or pertinent to".

... ..

... I consider that the entire Report produced by Accelerated Pathways in August 2007 should be regarded as relevant to the terms of my application and that the matter

determined to be irrelevant should be considered to be material bearing on, or pertinent to, my application ...

... ..

Application of section 27(3) of the FOI Act

50. As there is no definition of the word 'relevant' contained in either the FOI Act or the *Acts Interpretation Act 1954*, in accordance with the rules of statutory interpretation, it is appropriate to consider the ordinary meaning of this word.
51. The applicant points to the Oxford Dictionary definition which includes "bearing on, or pertinent to".
52. The relationship between the information and the terms of the application does not have to be direct. This supports the requirement in sections 4(5) and (6) of the FOI Act to give members of the community access to information held by government to the greatest extent possible. However, it must be relevant, in the sense of having a bearing upon or being pertinent to the terms of the application.
53. As noted above, the documents to which the applicant seeks access in the FOI Application can be grouped into the four categories identified in paragraph 30 above.
54. I have carefully considered the contents of the Report. The matter deleted from the Released Report does not contain information concerning the Program's selection criteria nor does it provide details in relation to the assessment, decision making or review processes.
55. I am satisfied that the matter deleted from the Released Report:
 - is not pertinent to any of the categories identified in paragraph 30 above
 - does not have a bearing upon any of the categories identified in paragraph 30 above.
56. Section 27(4) of the FOI Act enables an agency to give access to a document with irrelevant matter deleted only if the agency considers, from the application or after consultation with the applicant that the applicant would accept the copy and it is reasonably practicable to give access to the copy.
57. As discussed at paragraph 39 above, the terms of the FOI Application are very specific. Due to the precise terms in which the FOI Application is framed, I am satisfied that it was reasonable for the Department to consider that the applicant would accept the Released Report.
58. For the reasons set out above, I am satisfied that:
 - the matter deleted from the Released Report is not relevant to the FOI Application
 - the Department was entitled under section 27(3) of the FOI Act to delete the irrelevant matter from the Released Report
 - the Department was entitled under section 27(4) of the FOI Act to give access to the Released Report with the irrelevant matter deleted.

Document of an agency

59. The documents already provided to the applicant by the Department fall within category 1 identified in paragraph 30 above.
60. The applicant was not provided with any documents falling within categories 2 to 4 identified in paragraph 30 above (**Categories 2 to 4**).
61. At the outset of the review, the applicant contended that the Department should have located more documents relevant to the FOI Application.
62. During the course of the review, the Department informed the OIC that:
 - the Department and AP entered into the Contract in 2006
 - the assessment, decision-making and review of grant recommendation processes of the Program were outsourced by the Department to AP as per the provisions of the Contract.
63. On this basis, the Department submitted that no documents were located by the Department in relation to Categories 2 to 4 because any such documents would be in the possession of AP.
64. The following extract taken from an internal Department briefing note¹⁷ explains the arrangement between the Department and AP:

The program is to be conducted by an Adelaide-based external provider, Accelerated Pathways, who handle all queries regarding the program. Education Queensland is at arms length from the decision-making and appeal processes regarding who is recommended for a Career Change grant. Recommendations are made on the basis of information provided by the teacher applying for the program and their Principal. Prior to any offer being made, confirmation of departmental workforce needs and the ability to replace the teacher with a quality graduate is confirmed in writing by the Regional Executive Director and the Regional Human Resources Manager.

65. As a result of this arrangement between the Department and AP, it is necessary to determine whether documents held by AP that may respond to the FOI Application are considered to be documents of the Department and therefore, whether the applicant is entitled to access any such documents.
66. Section 21 of the FOI Act provides that:

21 Right of access

Subject to this Act, a person has a legally enforceable right to be given access under this Act to—

- (a) **documents of an agency**; and*
- (b) official documents of a Minister.*

[my emphasis]

67. Section 7 of the FOI Act defines 'document of an agency' as follows:

***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—*

¹⁷ Internal briefing note dated 9 May 2007 at paragraph 4. The Department agreed to the release of this information.

- (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.

68. In interpreting this definition, the Information Commissioner has previously stated as follows:

A document not in the physical possession of an agency will nevertheless be a "document of the agency" for the purposes of the FOI Act, if it is under the control of the agency (or under the control of an officer of the agency in the officer's official capacity). Included in the concept of documents which are under the control of an agency are documents to which the agency is entitled to access. This concept is apt to cover a document in respect of which an agency has legal ownership, and hence a right to obtain possession, even though the document is not in the physical possession of the agency. The words "under the control" convey the concept of a present legal entitlement to control the use or physical possession of a document, as exists in the case of documents held on behalf of a principal by the principal's agent, or documents held by a bailee on behalf of the owner of the documents. In the context of the obligations placed on an agency, by the FOI Act, in respect of "documents of the agency" (including the manner in which an agency is obliged to deal with a document of the agency in response to an application under the FOI Act), I consider that, for a document to be one which is under the control of an agency (or one in respect of which an agency is entitled to access), the agency must have a present legal entitlement to take physical possession of the document (at least for so long as necessary to discharge all of the agency's obligations under the FOI Act in respect of the document).¹⁸

...

*I accept that it was the legislature's intention that an agency should take steps to bring into its physical possession, for the purpose of dealing with a valid FOI access application, any requested document in respect of which the agency has a present legal entitlement to possession. However, I do not accept that it was the legislature's intention that an agency should have to take some **additional step** in order to put itself into a position where it has a legal entitlement to take possession of a document, in order to respond to an FOI access application for that document. For example, many agencies possess coercive statutory powers to compel the production of documents for certain administrative or regulatory purposes. I do not accept, however, that an agency would be required to take the formal step of exercising its coercive powers to obtain access to a document, merely because that document had been requested in an FOI access application received by the agency.¹⁹*

...

The ruling test imposed by the definition of "document of an agency" is comprised in the words "in the possession or under the control of an agency". The remaining words of the definition illustrate, rather than extend, the ruling test.²⁰

[my emphasis]

69. Accordingly, I must determine whether the documents sought in the FOI Application are:

- (i) in the possession of the Department; or
- (ii) under the control of the Department.

¹⁸ In *Price and the Nominal Defendant* (1999) 5 QAR 80 at paragraph 18 (**Price**).

¹⁹ *Price* at paragraph 27.

²⁰ *Price* at paragraph 33.

(i) Possession

70. The applicant was not aware of the arrangement between the Department and AP when she made the FOI Application nor when she applied for external review.
71. The applicant indicated to the OIC that if the Department had explained its arrangement with AP when she originally made the FOI Application she would:
 - have understood why the Department did not locate more documents relevant to the FOI Application
 - most likely not have progressed the FOI Application to this extent.
72. Once the arrangement between the Department and AP became apparent, the applicant indicated that she understood why the Department did not locate more documents and accepted that the Department did not have the relevant documents in its possession.

(ii) Under the control

73. Whilst the applicant accepted that the Department did not have documents responding to Categories 2 to 4 in its possession, she sought review in relation to whether documents held by AP are considered to be documents of the Department and therefore, whether she is entitled to access these documents.
74. To determine whether documents sought in the FOI Application are '*under the control*' of the Department, it is necessary to consider the nature of the agreement between the Department and AP.
75. As I have established that the Contract is outside of the scope of the FOI Application and the Department has not consented to the release of any part of the Contract, I am unable to state in this decision the specific contractual provisions that concern document entitlement.
76. I have carefully examined the Contract and the relevant provisions concerning the Department's and AP's entitlement to documents relating to the work performed under the Contract. Under the Contract, the Department is only entitled to access specifically defined categories of documents.
77. Any documents in Categories 2 to 4 that may be held by AP would not fall within the particular categories specified in the Contract as documents the Department is entitled to access.
78. Based on my analysis of the terms of the Contract, I am satisfied that:
 - it does not give the Department a present legal entitlement to take possession of any documents that may fall under Categories 2 to 4
 - any documents that may fall under Categories 2 to 4:
 - would be held by AP
 - are not under the control of the Department
 - are not documents of an agency.

Summary

79. I have been unable to identify any basis upon which the Department is entitled to require AP to provide it with a copy of documents that may fall under Categories 2 to 4, for the purpose of the FOI Application.

80. As such, I am satisfied that any documents that would fall under Categories 2 to 4 are not documents of the Department for the purpose of section 7 of the FOI Act.

DECISION

81. I affirm the decision under review in relation to the application of section 27(3) of the FOI Act.
82. 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: 15 February 2010