



## **Decision and Reasons for Decision**

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**Application Number:** 210218

**Applicant:** Mr C Candy

**Respondent:** Environmental Protection Agency

**Decision Date:** 30 January 2008

**Catchwords:** **FREEDOM OF INFORMATION – Sufficiency of search – no reasonable grounds to believe further documents exist**

**FREEDOM OF INFORMATION – section 29B of the *Freedom of Information Act 1992* – agency entitled to refuse to deal with application – previous application for same documents**

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## REASONS FOR DECISION

### Summary

1. There are two issues for determination in this review. The applicant contends that the Environmental Protection Agency (EPA) has not located and dealt with all documents that were requested in his application. The applicant also contends that the EPA was not entitled to refuse to deal with some parts of his application under section 29B of the *Freedom of Information Act 1992* (Qld) (FOI Act) on the basis that the applicant had previously applied for the same documents.
2. Having taken into account all the applicant's submissions, and the submissions made by the EPA, I am satisfied that there are no reasonable grounds to believe that there are further documents, which satisfy the terms of the applicant's application, in the EPA's possession. I am also satisfied that the EPA was entitled to refuse to deal with parts of the applicant's application under section 29B of the FOI Act.

### Background

3. 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. The EPA contends that the kangaroo died shortly after its removal from the applicant, while in the care of a wildlife carer. The removal of this kangaroo, named Mitchell, has been the subject of a number of legal actions brought by the applicant.
4. The applicant applied to the EPA by email dated 15 January 2007 for 24 separate categories of documents. The documents requested by the applicant relate to Mitchell's removal and to the EPA's practices and procedures in general.
5. On 1 March 2007, Mr Lucas Clarke, Senior FOI Officer, advised the applicant that he had located 1044 folios that related to his request. Mr Clarke decided to release most of those documents in full, release some documents subject to exemptions and to refuse access to a number of documents. Mr Clarke also decided to refuse to deal with several items of the applicant's application under sections 22(a) and 29B of the FOI Act.
6. The applicant applied for internal review of Mr Clarke's decision by email dated 3 April 2007. Of the 24 points of his initial application, the applicant indicated that he considered he had not been provided sufficient material in respect of items 1-3, 5-10, 15, 18 and 24 of his application. The applicant also advised that he disagreed with the EPA's decision to refuse to deal with items 17, 19 and 23 of the applicant's application under section 29B of the FOI Act. The applicant has not contested the EPA's application of exemption provisions to exempt certain matter from release.
7. The EPA's internal review decision was made by Mr Doug Watson, Executive Director, Corporate Development, on 20 April 2007. Mr Watson decided that in addition to points 17, 19 and 23, the EPA would refuse to deal with item 21 of the applicant's application under section 29B of the FOI Act. He affirmed the initial decision in all other respects.
8. By letter dated 11 May 2007, the applicant applied for an external review, under Part 5 of the FOI Act, of Mr Watson's decision.

## Decision under review

9. The decision under review is Mr Watson's internal review decision dated 20 April 2007 that there were no further documents responsive to items 1-3, 5-10, 15, 18 and 24 of the applicant's application and that the EPA refused to deal with items 17, 19, 21 and 23 of the applicant's application on the basis that those parts of his application were for documents he had already sought in a previous application.

## Steps taken in the external review process

10. After obtaining and considering the EPA's submissions, I advised the applicant, by letter dated 30 October 2007 that I had formed the preliminary view that there were no reasonable grounds to believe that further documents responsive to the applicant's application existed in the EPA's possession or control, and that the EPA was entitled to refuse to deal with certain parts of his application under section 29B of the FOI Act.
11. The applicant responded by email dated 23 November 2007 and advised that he did not accept my preliminary view. The applicant has personally made a number of submissions during the course of the review and also made a submission through a representative, Mr Michael Charman.
12. By email dated 18 December 2007 I requested the EPA's response to a number of issues raised by the applicant. The EPA responded by two emails dated 29 and 30 January 2008.
13. In making my decision in this matter, I have taken the following into account:
  - The applicant's initial application, application for internal review and application for external review dated 15 January 2007, 3 April 2007 and 11 May 2007 respectively
  - Mr Clarke's initial decision dated 1 March 2007 and Mr Watson's internal review decision dated 20 April 2007
  - The applicant's submissions and attached material, received by emails dated
    - 4 June 2007
    - 11 June 2007
    - 18 June 2007
    - 4 July 2007
    - 7 July 2007
    - 31 August 2007
    - 25 October 2007
    - 31 October 2007
    - 1 November 2007
    - 23 November 2007
    - 27 November 2007
    - 9 December 2007
  - Submission made by Mr Charman dated 22 November 2007 on behalf of the applicant
  - The EPA's submissions received by emails dated 29 and 30 January 2008
  - File notes of conversations between staff of this Office and the applicant
  - File notes of conversations between staff of this Office and officers of the EPA
  - Relevant provisions of the FOI Act and decisions of this Office.

## Matter in issue

14. The issues for my determination are:

- whether the searches undertaken by EPA for documents requested in the applicant's application have been sufficient and
- whether the EPA was entitled to refuse access to documents requested in items 17, 19, 21 and 23 of the applicant's application under section 29B of the FOI Act.

15. It is clear from the applicant's submissions that he is extremely dissatisfied with the actions of the EPA in the matter of Mitchell's seizure and his subsequent dealings with the agency. It appears that the applicant wishes to determine the 'protection status' of the red kangaroo at the time Mitchell was seized. In the civil proceedings instituted by the applicant, he has tried 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 his home. In a number of his submissions, the applicant seeks to have the EPA reprimanded for various actions he considers to be unjust. The applicant also wishes the EPA to create documents he accepts do not exist but contends should have been created.

16. For example, in the applicant's submission dated 9 December 2007 he states:

*I hope..... that your office is able to either provide me with a list of protected animals in Queensland as at 2001, or inform me that there is no evidence whatsoever that the red kangaroo and the swamp wallaby were at any time protected by law in Queensland outside of protected areas....*

17. In this review, the jurisdiction of the Office of the Information Commissioner is limited by application of the FOI Act, to determining the two issues listed in paragraph 14 above. I note that the applicant has been advised in telephone conversations and in correspondence, of the issues which I am able to consider.

18. In addition, many of the items of the applicant's initial application are framed in terms of requesting information and answers to questions rather than requesting access to documents. As set out in its initial decision dated 1 March 2007, the EPA treated the applicant's requests for information as requests for documents and provided documents in response. In some cases, the EPA provided the applicant with documents which in my view are technically outside the scope of his application, (as they were created by the EPA, after the date of the applicant's initial application)<sup>1</sup> in order to provide the applicant with the information he requested. This is not required under the FOI Act, but the EPA has endeavored to provide the applicant with the requested information in any case.

19. As a consequence, many of the applicant's submissions are in relation to inconsistencies within those documents which technically fall outside the scope of the applicant's application, rather than providing evidence of the existence of further documents. However, I have carefully read each of the applicant's submissions and have taken them into account in making my decision.

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<sup>1</sup> Section 25(3) of the FOI Act

## Findings

### Sufficiency of search

20. In relation to an external review based on sufficiency of search, the questions I must answer are:<sup>2</sup>
- whether there are reasonable grounds to believe that the requested document exists and is a document of the agency as that term is defined in section 7 of the FOI Act and if so
  - whether the search efforts made by the agency to locate such a document have been reasonable in all the circumstances of the particular case.
21. In sufficiency of search cases, it is also necessary for the applicant to provide sufficient information to enable an agency to reasonably identify the documents sought. The Information Commissioner discussed an applicant's obligations in that regard in *Ainsworth; Ainsworth Nominees Pty Ltd and Criminal Justice Commission; A (Third Party); B (Fourth Party)* (1999) 9 QAR 284<sup>3</sup> (*Ainsworth*).
22. In *Ainsworth* the Information Commissioner acknowledged that the respondent agency carries the onus of establishing that the Information Commissioner should give a decision adverse to the applicant.<sup>4</sup> The Information Commissioner decided, however, that where an applicant asserts that the relevant agency has failed to identify a requested document, and the applicant has information that will enable the agency to identify the document and conduct searches, it is necessary for the applicant to provide that information to the agency. The Information Commissioner said at paragraph 46 of *Ainsworth*:
- Moreover, it is a practical consequence of the issues to be determined in 'sufficiency of search' cases (see paragraph 19 of Re Shepherd - quoted at paragraph 19 above) that applicants will ordinarily need to explain fully their grounds for believing that the respondent agency holds additional responsive documents, and to disclose any relevant documentary or other evidence which tends to support the existence of reasonable grounds for such a belief. If the information provided to me by the respondent agency supports a finding that the questions posed in paragraph 19 of Re Shepherd should be answered in favour of the agency, and I am unable, independently, to identify any further relevant avenues of search or inquiry that an agency could reasonably be required to undertake, then, in the absence of evidence to the contrary from the applicant, there will be only one course open to me - to answer the aforementioned questions in favour of the agency.*
23. Accordingly, in order to answer the questions outlined in *Shepherd* in favour of the applicant, it is necessary for the applicant to provide enough information to afford a reasonable basis to believe that further documents exist in the EPA's possession or control.
24. I will address the questions outlined in *Shepherd* in relation to each of the remaining items of the applicant's application below.

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<sup>2</sup> *Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464 at paragraphs 18 and 19.

<sup>3</sup> At paragraph 46

<sup>4</sup> Section 81 of the FOI Act

**Item 1**

25. This part of the applicant's request was for '*a list of the current named, specified wildlife and their particular classifications, as classified by the advisory committee under section 132(2)(c) of the Nature Conservation Act 1992*'.
26. In response, the EPA provided a copy of the relevant sections of the *Nature Conservation Act 1992* (NC Act) and the *Nature Conservation (Wildlife) Regulation 2006*, which lists various classes of wildlife.
27. In his submissions in relation to this item, the applicant contends that:
  - his application was for the status of named and specified wildlife at 2001 and that the EPA's response is an obscure and irrelevant copy of the Regulation at 2006
  - section 132(2)(c) of the NC Act requires an advisory committee to classify wildlife, and by not providing a list of the named and specified wildlife, the EPA were setting their own procedures and not adhering to law and
  - there are only 210 species of mammals indigenous to Queensland and a list of the protected animals should be readily available.
28. I note that the applicant's initial application requested a list of the *current* named specified wildlife, and that he did not seek a list of the named and specified wildlife as at the year 2001.
29. Section 132(2)(c) of the NC Act provides that an advisory committee can have functions including advising the Minister on the classification of wildlife. I note that this section does not necessitate that an advisory committee classify and list wildlife. Additionally, I note the submission of the EPA that there is no list of named or specified wildlife created by the advisory committee other than that which is listed in the NC Act and the *Nature Conservation (Wildlife) Regulation 2006*.
30. On the basis of the material before me, I am satisfied that:
  - there is no list of named or specified wildlife other than that which is listed in the NC Act and the *Nature Conservation (Wildlife) Regulation 2006*
  - there is no requirement under the NC 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 the applicant's request for information.
31. Accordingly, I consider that the relevant provisions of the NC Act and the *Nature Conservation (Wildlife) Regulation 2006* provided by the EPA is the only material which satisfies the terms of this part of the applicant's application and that it has been provided to the applicant. I find that there are no reasonable grounds to believe that any further documents responsive to this part of the applicant's application exist in the EPA's possession or under its control.

**Item 2**

32. The applicant applied, in this part of his application, for '*A list of the named and specified wildlife in the Register of protected wildlife as at the particular year of 2001*'.
33. The EPA responded by providing the applicant with the advice, in the form of an email from the Conservation Services Division that there is no register of protected wildlife.

34. The applicant submits that:
- in 2001, section 133 of the NC Act stated that the Chief Executive must keep a register of protected wildlife
  - it was an indictable offence not to keep a register of protected wildlife and consequently
  - a register of protected wildlife should have been kept by the EPA.
35. In several of his submissions, and the documents provided in support of those submissions, the applicant appears to accept that there is no register, but wishes the EPA to be held to account for not producing a register which he considered was required by the NC Act. In his submission dated 23 November 2007, the applicant states:
- There is no Register of Protected Wildlife as required by law, section 133(1)(c) of the Nature Conservation Act 1992 as at 2001, I believe as a matter of convenience because the red kangaroo is not listed in such a Register.*
36. Section 133 of the NC Act, as it appeared in 2001, stated that the Chief Executive must keep a register of protected animals. However, that section did not specify in what form the register was to be kept.
37. The EPA submits that in the case of protected wildlife at 2001, the register was kept, albeit indirectly, by way of the regulations current at the time.
38. For the purposes of the FOI Act whether or not a document should have been produced is only a factor in determining whether or not documents are likely to exist currently. In this case, the fact that the NC Act required that a register be produced is not necessarily determinative of its existence and the EPA has provided a reasonable explanation as to why a separate register was not produced, namely, because the register was indirectly kept in the form of subordinate legislation.
39. Accordingly, I find that:
- there was no register of protected animals (other than that which is indirectly contained in the regulation at 2001) in 2001
  - there is currently no register of protected animals
  - the requirement in section 133 of the NC Act is not determinative of the existence of a separate register of protected animals in 2001.
40. The applicant accepts that there is no separate register of protected animals as at 2001 but contends that the EPA's failure to produce a register as required at the relevant time, should be of interest to this Office and that the Information Commissioner should hold the EPA accountable for its failure to produce a consolidated register. Whether or not the EPA should have produced a central register of protected animals is not a matter for my determination.
41. I find that there are no reasonable grounds to believe that documents requested in this part of the applicant's application exist in the possession or control of the EPA.

### **Item 3**

42. This part of the applicant's application was for 'A list of the names of the Non protected wildlife in Queensland as at the particular year of 2001.'

43. In response, the EPA advised the applicant that there is no list, and no requirement to produce such a list.
44. In his application for internal review, and in emails dated 4 June 2007, 11 June 2007 and 4 July 2007 the applicant appears to accept that there is no list of non-protected wildlife and that there is no requirement to create and/or maintain such a list, but asserts that it should not be difficult to create a list.
45. The FOI Act cannot be used to create documents or provide information that is not already contained in documents which existed at the time of his application. While I note that the applicant may have important reasons for wishing to compel the EPA to produce a list there is no power under the FOI Act for such compulsion.
46. I find that there are no reasonable grounds to believe that documents requested in this part of the applicant's application exist in the EPA's possession or control.

**Item 5**

47. This part of the applicant's application was for *'Copies of the seizure notices for all regions showing the number and types of native wildlife seized by the EPA/QPWS for the period 1 January 2001 to 31 December 2001 including the name of the officers involved.'*
48. The EPA provided a number of seizure notices and records of exhibits in response.
49. The applicant has a letter from Crown Law, dated 28 August 2006 which provides the applicant with information regarding the number of seizure notices issued for a certain time period. The number of seizure notices provided to the applicant by the EPA, in response to his FOI application, is less than the number of seizure notices Crown Law states were issued. The applicant consequently argues that not all the seizure notices have been provided to him.
50. The EPA submits that seizure notices from the relevant time period are held only in hard copy at each regional office, and are not stored electronically or at any other location. It is the EPA's submission that it has undertaken searches at each of the regional offices and provided all of the seizure notices located to the applicant. The EPA also contends that given the period of time which has now elapsed, it is likely that some seizure notices have been misplaced or destroyed.
51. The applicant submits that he had never been issued with a seizure notice for Mitchell's seizure. I take this submission to mean that there should be a seizure notice for Mitchell's seizure in existence.
52. The EPA submitted that Mitchell was surrendered up to QPWS officers by the applicant, rather than seized, and accordingly a seizure notice was not issued.
53. There appears to be some dispute regarding whether or not Mitchell was handed to the officers with the applicant's consent, however the relevant question I must consider is whether a seizure notice exists.



54. I note the EPA's submission that Mitchell was surrendered to QPWS officers. I further note Douglas J's findings in *Candy v Thompson & Ors* [2005] QSC 111 that Mitchell was taken by QPWS officers with Mr Candy's consent<sup>5</sup>.
55. Based on the material before me, I am satisfied that:
- seizure notices from the relevant time period are only held in hard copy at each regional office and are not stored electronically or at any other location
  - each regional office has been searched and that the only seizure notices located have been identified and provided to the applicant
  - it is possible the data provided to the applicant by Crown Law was inaccurate and it is likely that hard copy records may have been destroyed or misplaced given the time period which has now elapsed
  - the inconsistency between the number of seizure notices provided to the applicant and the number set out in the letter from Crown Law had been satisfactorily explained and the inconsistency is not probative of the existence of further documents requested in this part of his application
  - no seizure notice was issued in relation to Mitchell's removal from the applicant.
56. Accordingly, I find that there are no reasonable grounds to believe that further documents requested in this part of the applicant's application exist in the EPA's possession or control. I am also satisfied that the searches undertaken by the EPA have been reasonable in all the circumstances of the case.

**Item 6**

57. This part of the applicant's application was for '*Details of seizures of native wildlife seized by the EPA/QPWS for the period 1 January 2001 to 31 December 2001 that were unreceipted.*'
58. The EPA did not locate any documents in response to this item, and contends that it is unaware of the term 'unreceipted' being used in relation to wildlife seizures but has provided information regarding seizures in general during the relevant period.
59. During the course of the review, the applicant did not make specific submissions in relation to this item, but in his email dated 23 November 2007, refers to his submissions regarding item 5 in the same email. Again it appears that the applicant is relying on the fact that he was not issued with a seizure notice for Mitchell's seizure or removal, as evidence that a seizure notice exists. I do not consider that this part of applicant's submission regarding item 5 points to the existence of documents which respond to this item of the applicant's application.
60. In my letter dated 30 October 2007 I sought further specific submissions from the applicant in relation to this item. The applicant has not made any further submissions except to assert that the EPA is a deceptive organisation.
61. Accordingly, in the absence of specific submissions as to the existence of documents responsive to this item of the applicant's application and in light of the information provided by the EPA vis-à-vis 'unreceipted' wildlife seizures, I find that there are no reasonable grounds to believe that further documents exist in the EPA's possession or control which fall within the terms of this item of the applicant's application.

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<sup>5</sup> at 15 and 16

**Item 7**

62. The applicant applied for *'Details of any wildlife seized by the EPA/QPWS returned alive in the period 1 January 2001 to 31 December 2001.'*
63. The EPA provided the applicant with documentation surrounding the release of various seized animals into the wild.
64. The applicant has not provided specific submissions in relation to this item. In his application for internal review the applicant mentions that no animals were returned alive to their owners. The EPA submits that if this part of the applicant's application intended to request documents relating to details of animals returned to their 'owners' there would be no such documents in existence as seized animals are not returned to those people from whom the animals were seized.
65. The EPA also submits that it has located all documentation regarding the release of seized animals into the wild for the relevant period. The EPA has noted that it is likely that documents have been destroyed or misplaced in the years between 2001 and the present.
66. In the absence of any submissions from the applicant which would suggest that there are further documents in the EPA's possession or control which were requested in this item, and on the basis of the information provided by the EPA, I find that there are no reasonable grounds to believe that further documents requested in this part of the applicant's application exist in the possession or under the control of the EPA.

**Item 8**

67. This part of the applicant's application was for *'A list of the number of Damage Mitigation Permits for all types of animals for the period 1 January 2001 to 31 December 2001.'*
68. In response, the EPA provided the applicant with an email (created after the date of the applicant's application) from the Ecoaccess Customer Service Unit stating that a report of the Ecotrack system had been run and provided the number of Damage Mitigation Permits (DMPs) issued in 2001, along with several other emails and a printout of a list of certain DMPs issued.
69. The applicant has not made specific submissions regarding the EPA's sufficiency of searches for documents requested in this item apart from to refer to his submissions regarding item 5, and to assert that the EPA is a deceptive organisation. The part of the applicant's submission in relation to item 5, to which it appears the applicant wishes to refer is as follows:

*The EPA/QPWS admit to issuing 23 Damage Mitigation Permits for 2001 in the Crown Law letter of the 28<sup>th</sup> August 2006, but I have in my possession an EPA FOI doc where it is admitted by the EPA/QPWS to issuing 2,695 DMPs for Jan-Mar (3 months) 2001 for only 3 regions in Queensland?*

70. I note that the letter from Crown Law dated 28 August 2006 provides answers to a number of questions posed by the applicant. The only part of the letter which refers to DMPs is the applicant's question, as follows:

*Could you please provide me with the number of mitigation permits issued for the destruction of macropods, and if known specifically for swamp wallaby destruction in 2001?*

and the response provided by Crown Law as follows:

*A report from Ecotrack identified 3 DMP permits issued in 2001 for Macropus agilis – agile wallaby 20, Macropus giganteus – eastern grey kangaroo 200*

71. The letter from Crown Law provides a response to the applicant's question regarding mitigation permits issued for macropods, and specifically swamp wallabies in 2001. I do not consider that the applicant's reference to the letter from Crown Law provides evidence of the existence of documents which are responsive to this part of the applicant's application, which seeks '*a list of the number of Damage Mitigation Permits issued for all types of animals...*'
72. Additionally, in his internal review application the applicant advised that it is unknown if the response provided by the EPA includes all of Queensland and for what species of animal. I note that the terms of the applicant's initial application are confined to a '*list of the number of Damage Mitigation Permits*' issued in 2001 and did not include documents showing what species of animals were involved.
73. The emails provided by the Ecoaccess Customer Service Unit and other areas of the EPA in response to this part of the applicant's application do provide contradictory figures. The EPA submits, however, that one particular response, from the Ecoaccess customer service unit, is the accurate response. The EPA has advised that Ecoaccess is able to distil information from centralised sources about licences and permits where they exist.
74. On the basis of the information before me, and in the absence of any evidence suggesting that further documents which fall within the scope of this part of the applicant's request exist, I find that there are no further documents in the possession or control of the EPA that respond to this part of the applicant's application.

**Item 9**

75. The applicant applied for access to '*A list of the number of/or details of all recreational permits of the taking of macropods for 2001 and the details of the animals taken if known*'.
76. The EPA provided in response, an email from the Ecoaccess customer service unit advising that 1350 recreational wildlife harvesting licences were issued in 2001 and attaching a print out of a list of licences issued for Macropods.
77. Apart from advising that he considers the material provided to be insufficient, that it is unknown whether the responses include all of Queensland, and that there were no details of species provided, the applicant has not made submissions regarding the existence of any further documents, or the sufficiency of the EPA's searches.
78. The EPA has elicited information from its databases and its officers in order to provide the information requested in this part of the applicant's application. The EPA submits that the information provided by the Ecoaccess customer service unit is accurate, as it is a centralised unit and able to access data across the EPA. The applicant has not made any submissions as to the existence of further documents.

79. Based on the information provided by the EPA, and in the absence of any evidence which indicates there are further documents in existence which respond to this part of the applicant's request, I find that there are no reasonable grounds to believe that any further documents requested in this part of the applicant's application exist in the EPA's possession or under its control.

**Item 10**

80. This part of the applicant's application was for '*A copy of the Queensland Species Management Plan as at 2001*'.
81. In response, the EPA provided an email which advised that an officer of the Wildlife Conservation Branch was unable to locate a copy of a document entitled Queensland Species Management Plan as at 2001.
82. Prior to his email dated 23 November 2007, the applicant had not made any submissions regarding the existence of further documents, or the sufficiency of EPA's searches in relation to this item, except to say that he considered the EPA's response to be insufficient. The applicant provided with his email dated 23 November 2007 a number of documents which refer to a 'Queensland Species Management Program'.
83. I requested that the EPA advise me whether the Queensland Species Management Program is a document of the EPA, or was a document of the EPA in 2001.
84. The EPA responded by email dated 30 January 2008 and submits that the Queensland Species Management Program is not a document of the EPA and was not a document of the EPA in 2001.
85. I am satisfied that the Queensland Species Management Program is not a document of the EPA, and was not a document of the EPA in 2001. I find therefore that there are no grounds to believe that further documents requested in this part of the applicant's application exist in the EPA's possession or control.

**Item 15**

86. This part of the applicant's application requested access to '*Details of Mitchell's removal out to Meandarra on the 28<sup>th</sup> April 2001 and the names of those involved*'.
87. In response, the EPA provided documents in relation to Mitchell's removal from the applicant's property.
88. In telephone conversations with staff of this Office, and in submissions made by email dated 31 October 2007 and 23 November 2007 the applicant has asserted that Mitchell did not die but was transported to another property at Meandarra. The applicant has provided two reasons for his believing this to be the case. The applicant contends that:
- he was advised by a member of the EPA's legal staff, that Mitchell was not dead; and
  - kangaroos in the care of the wildlife carer with whom Mitchell was placed were said to have been transported to the property at Meandarra, and the applicant believes one of the kangaroos transported was Mitchell.
89. The applicant argues in his application for internal review that ground staff of QPWS would have been involved in the alleged removal to the property at Meandarra and that

there should be documents in existence which detail Mitchell's alleged removal and show the names of ground staff involved.

90. The EPA contends that Mitchell died and was not moved to Meandarra and accordingly, there are no documents in existence that relate to this aspect of the applicant's application.
91. I note that the applicant's contention that an officer of the EPA's legal unit advised him that Mitchell was moved to the property, would appear to be the only instance of the EPA diverging from its position that Mitchell died and was not moved to Meandarra. The EPA has asserted, since shortly after Mitchell was seized in 2001, that he died in the care of the wildlife carer. Indeed the EPA has made this assertion for a significant period of time, has consistently done so in the course of this review, and in the course of various court proceedings in relation to the matter.
92. The applicant contends that he has evidence that the male kangaroo transported to the property was intact (that is, not castrated). He contends that the other male kangaroo in the care of the wildlife carer at the relevant time was castrated, and that the only male kangaroo transported to the property was intact. This, along with other evidence the applicant says was provided to him by friends of the wildlife carer, is the basis of the applicant's assertions that it was Mitchell who was transported to the property, and not the other male kangaroo in the care of the wildlife carer.
93. In view of the fact that the information the applicant asserts was given to him in the telephone conversation was the only time the EPA suggested that Mitchell was removed, it may be the case that the person who informed the applicant of Mitchell's removal was misinformed or gave him incorrect information. I do not consider that the applicant's submission that the kangaroo taken to Meandarra was intact indicates that that kangaroo was Mitchell, and does not point to the existence of any documents requested in this part of the applicant's request.
94. I consider that the EPA's consistent and continued assertion over time lends weight to a conclusion that Mitchell was not removed and that the EPA's assertion is credible. Apart from the single instance when the applicant contends the EPA advised him differently there has not been a deviation from the EPA's contention that Mitchell did die and was not removed and taken to Meandarra.
95. In light of these considerations, I am of the view that Mitchell was not removed to Meandarra and accordingly there is no reasonable basis to believe that documents are likely to exist in the EPA's possession or control that relate to this aspect of the applicant's application.
96. I find, therefore, that there are no reasonable grounds to believe that there are any documents which fall within the scope of this part of the applicant's request.

**Item 18**

97. This part of the applicant's application requested access to *'Details of all seizures involved in or undertaken by QPWS staff Kay Kelly, Bruce Thompson and Mary Starky'*.
98. The EPA has provided further documents relating to the removal of Mitchell, and a response advising that no further documents had been located.
99. The applicant's request and submissions in relation to this item are not clear. In his internal review application the applicant submitted that his *'request was for details of involvement, not who conducted seizures'* but has not made specific submissions as to further documents he contends should be in existence, or the sufficiency of searches undertaken by the EPA. In the applicant's email dated 23 November 2007 he states:

*I have video footage of Mr Thomson and Ms Starky stealing Mitchell after invading my home on the 8<sup>th</sup> March 2001..  
..it is also my firm belief that Ms Kelly was the drive force behind Mitchell's seizure which I intend to prove..*

100. I take these submissions to mean that the EPA has not provided him with all relevant documents which respond to this part of his application.
101. The EPA has submitted that there are no further documents which respond to this part of the applicant's request. The EPA's submissions in relation to this item are that:
- Kay Kelly would not have been involved with conducting any seizures
  - Mary Starky does not conduct seizures, but was present at Mitchell's seizure and has been involved in seizures conducted by the Queensland Police Service where an animal is injured and needs to be placed with a suitable carer
  - all responsive documents in relation to seizures conducted by Bruce Thompson have been provided.

102. The applicant requests 'details of involvement' of the persons listed in his application, but has not made submissions about any further documents he contends should exist. The EPA contends that only one person listed in the applicant's application actually conducts seizures, and that all documents relevant to this person have been provided. The EPA does not deny that Mary Starky was present at Mitchell's seizure, but contends that neither Kay Kelly nor Mary Starky conducts seizures and consequently, there are no documents which would relate to their involvement in conducting seizures.
103. In the absence of any submissions regarding the existence of further documents from the applicant, and on the basis of the information provided by the EPA, I am satisfied that there are no documents relating to seizures conducted by Kay Kelly or Mary Starky. On the same basis, I am also satisfied that all documents relating to seizures conducted by Bruce Thomson have been provided to the applicant.
104. I find that there are no reasonable grounds to believe that further documents requested in this part of the applicant's application exist in the EPA's possession or control.

**Item 24**

105. This part of the applicant's application was for *'The name of the EPA/QPWS officer responsible for overseeing seizures of wildlife for the period 1 January 2001 to 31 December 2001'*.

106. The EPA provided an email advising that the person responsible for overseeing wildlife seizures was Mr Geoff Clare.
107. The applicant's submissions in relation to this item argue that all written evidence provided to him indicates that Ms Kay Kelly was responsible for overseeing seizures in 2001. The applicant also contends that in a letter from Crown Law dated 28 August 2006 it is stated that the person responsible for overseeing seizures of wildlife had left the agency, while Mr Geoff Clare is still employed the EPA.
108. The EPA submits that the response it provided is accurate, and that there are no further documents responsive to this part of the applicant's application.
109. I note that the letter from Crown Law dated 28 August 2006 refers to the '*officer responsible for seized animals*' having left the EPA. I consider this phrase indicates that the response provided in the Crown Law letter was in respect of an officer who was responsible for the care of seized animals, while the applicant's request in item 24 was for the officer responsible for overseeing wildlife seizures. Consequently I do not consider that the information provided in the letter from Crown Law indicates that the response provided by the EPA was incorrect.
110. I also requested, in my email dated 18 December 2007, that the EPA provide me with details of Mr Clare's, and Ms Kelly's positions, duties and areas of responsibility during 2001.
111. By email dated 29 January 2008 the EPA provided the details requested.
112. The EPA advised that on 19 May 2001 Mr Clare commenced as the Executive Director, Forestry and Wildlife, within the EPA and continued in that role beyond 31 December 2001. The EPA further advised that under the NC Act the Chief Executive was responsible for administration of wildlife for the purposes of the NC Act over the 2001 calendar year.
113. The EPA advised that throughout 2001 Ms Kelly was the QPWS Manager, Wildlife.
114. This item of the applicant's application requests information rather than documents and the applicant has made submissions regarding the accuracy of the information provided by the EPA in response to his application, rather than the existence of any documents which respond to this item.
115. In the absence of any submissions by the applicant as to the existence of any documents, and on the basis of the information provided by the EPA, I am satisfied that there are no grounds to believe that further documents requested in this part of the applicant's application exist in the EPA's possession or control.

***Application of section 29B of the FOI Act***

116. The EPA decided to refuse to deal with items 17, 19, 21 and 23 of the applicant's application under section 29B of the FOI Act. The applicant has not made any submissions regarding the application of section 28B to the relevant items of his application, except to advise that he disagrees with the EPA's decision, and does not accept my preliminary view.

117. Section 29B of the FOI Act 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**).*
- (2) *However, this section does not apply if the applicant withdrew the earlier application or the application was taken to be withdrawn under section 25A(5), 29A(5) or schedule 4, section 2.13.*
- (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;*
  - (b) *when the later application was made, the agency or Minister had not decided whether to grant access to the documents under the earlier application;*
  - (c) *the agency or Minister has decided this Act, or a part of this Act, does not apply to an entity—*
    - (i) *because the entity is not an agency for this Act; or*
    - (ii) *because of section 11 or 12 of another Act;*
  - (d) *the agency or Minister has decided—*
    - (i) *this Act, or a part of this Act, does not apply to the documents because of section 11, 11A, 11B, 11C or 12 or another Act; or*
    - (ii) *access to the documents may be refused under section 22; or*
    - (iii) *the documents sought under the earlier application were exempt from disclosure;*
  - (e) *the agency or Minister has decided the applicant is not entitled to access because of section 11E;*
  - (f) *the agency or Minister refused access to the documents under section 28A in relation to the earlier application.*

118. For the EPA to be entitled to refuse to deal with items 17,19, 21 and 23 of the applicant's application under section 29B of the FOI Act in this case, it must be established that:

1. the documents sought under the later application are the documents sought under the earlier application



2. the EPA's decision on the earlier application has been the subject of a completed review under part 5 of the FOI Act, and
3. the later application has not disclosed any reasonable basis for again seeking access to the documents.

I will deal with each of these three requirements in turn.

***Documents sought under the later application are the documents sought under the earlier application***

119. In this external review (210181), which deals with the later application for the purpose of section 29B, the relevant parts of the applicant's application dated 15 January 2007 are for:

*17. Details kept by the EPA/QPWS in relation to Candy kangaroos on [...] of Anderleigh, [...] of Glastonbury, [...] of Meandarra, [...] of Beerwah, [...] of Serina, and [...] now of Pomona although she lived at Tin Can Bay in 2001, [...] of Caboolture, and [...] of Hervey Bay. (All of these private people had a hand in Mitchell's keeping and I assert his removal from Anderleigh to Meandarra on the 28<sup>th</sup> April 2001, although I am informed that QPWS rangers Mr Doug Shulz, Ms Mary Starky and Mr Bruce Thompson frequented [...] residence at Anderleigh via Gunalda).*

*19. Details of all observations of Mitchell at [...] properties.*

*21. Details of all monitoring of Colin Candy and at his private residences by the EPA/QPWS.*

*23. Details correspondence between Anne Lenz and Paul Arthur in regards to Candy kangaroos.*

120. The earlier application dated 12 July 2006 (which became external review 210102) was for:

*All documents held by the EPA in relation to myself or my daughter Emma, regarding the keeping of kangaroos or wallabies.*

121. Although the specific terms of the later application are not set out in the earlier application, I consider that any documents responsive to items 17, 19 and 23 above, are captured by the terms of the earlier application.

122. The earlier application encompassed a very broad range of documents. In response to the earlier application, the EPA located 5656 folios and 3751 folios were released to the applicant. As each of items 17, 19, 21 and 23 relate to the keeping of kangaroos or wallabies and the EPA's involvement therein, I am satisfied that documents relating to each of items 17, 19, 21 and 23 of the applicant's initial application were included within the terms of the earlier access application.

123. Accordingly, any documents that are responsive to items 17, 19, 21 and 23 that were sought in the later application are the same documents that were sought in the earlier application, and the first criteria is satisfied.

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

124. As noted above, the earlier application is the FOI access application that resulted in external review number 210102. That review was completed on 27 January 2007.
125. Accordingly, the second criteria is satisfied.

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

126. I am unable to identify in the later application, any reason for again seeking access to the documents responsive to items 17, 19, 21 and 23 of the applicant's application. I do not consider that any further responsive documents since the earlier application would have been created and the applicant has not made any submissions regarding any reasons why he is again seeking access to the same documents.
127. I find that the later application has failed to disclose any reasonable basis for again seeking access to the documents.
128. I consider that each of criteria 1, 2 and 3 have been satisfied and accordingly, I find that the EPA is entitled to refuse to deal with items 17, 19, 21 and 23 of the later application under section 29B of the FOI Act.

**DECISION**

129. I affirm the decision of Mr Doug Watson dated 20 April 2007 by finding that:
- there are no further documents which respond to items 1-3, 5-10, 15, 18 and 24 of the applicant's application in the EPA's possession or control; and
  - the EPA was entitled to refuse to deal with items 17, 19, 21 and 23 of the applicant's application under section 29B of the FOI Act.

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**V Corby**  
**Assistant Information Commissioner**

**Date: 30 January 2008**