



## Decision and Reasons for Decision

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**Application Number:** 210548, 210553, 210554

**Applicant:** Mr Ronald Price

**Respondent:** Department of Police

**Decision Date:** 27 February 2009

**Catchwords:** FREEDOM OF INFORMATION – whether the Information Commissioner is *functus officio*; s73- whether letters to the agency constitute FOI applications that give rise to reviewable decisions; whether the Information Commissioner will exercise a discretion to accept the applications for external review; where there is a reviewable decision accepted for review, what is the correct and preferable decision?

## Contents

REASONS FOR PRELIMINARY VIEW.....	2
Summary .....	2
Background.....	2
Decision under review .....	3
Steps taken in the external review process .....	3
Matter in issue .....	4
Preliminary View .....	5
Letter dated 13 May 2005 – External Review Application No 210548 .....	5
Letter dated 27 August 2007 – External Review Application number 210553 .....	9
Letter dated 30 August 2007 .....	10
Letter dated 3 September 2007 .....	10
Letter dated 6 September 2007 .....	11
Letter dated 24 September 2007 .....	11
Letter dated '2 November 2007 (Wrong date4 02.10.2007)' .....	12
Letter dated 18 March 2008 .....	13

## REASONS FOR DECISION

### Summary

1. The applicant's request for a review of the Information Commissioner's Delegate's Decision is beyond the power of the Information Commissioner i.e. the Information Commissioner is 'functus officio'.
2. Of the remaining seven letters sent by the applicant to the Department of Police or the Queensland Police Service (**QPS**), only the letters dated 27 August 2007 and '2 November 2007 (Wrong date4 02.10.2007)' are applications made under the *Freedom of Information Act 1992* which give rise to reviewable decisions. Applications for external review were accepted in respect of those letters.
3. In relation to the letter dated 27 August 2007, I decline to deal with the application on the basis that application concerns access to documents that have been the subject of an earlier application made by the same applicant to the same agency. The earlier applications made by the applicant, were not withdrawn, the later application has not disclosed any reasonable basis for again seeking access to the documents and earlier agency decisions were the subject of a completed review under part 5 of the *Freedom of Information Act 1992*.
4. In relation to the letter dated '2 November 2007 (Wrong date4 02.10.2007)', I decline to deal with the application on the basis that the application does not identify the documents to which access is being sought. The applicant is advised to make a fresh application to QPS which sets out clearly the documents sought.

### Background

5. By letter dated 13 May 2005 the applicant applied to QPS for all documents related to himself with respect to a lengthy list of matters including a 1991 traffic conviction, assault convictions, matters involving 'McDonald v Price', 'Smith v Price', the Department of Veteran's Affairs, the Nominal Defendant the Vietnam Veteran's Counselling Service etc. QPS failed to make a decision within the time frame prescribed by the *Freedom of Information Act 1992* (**FOI Act**).
6. By letter dated 25 July 2005 the applicant sought external review of QPS's deemed decision to refuse access.
7. By decision (**the Delegate's Decision**) dated 29 June 2007, the Delegate of the Information Commissioner decided that to the extent the application for external review sought review of QPS decisions which had been the subject of previous reviews by the Information Commissioner, or to revisit issues of 'sufficiency of search' which had been determined in previous reviews, the application was vexatious. The delegate found that the majority of issues raised in the external review application dated 25 July 2005 had already been considered in 12 previous external reviews of QPS decisions and that the applicant was seeking a re-hearing of the reviews.

8. With regard to the balance of documents considered in the Delegate's Decision, it was essentially decided the applicant:
  - should be given access to a number of documents including a tape recording of an interview with Constable McDonald and the typed summary of that interview;
  - should not be given access to a number of documents as he did not respond to the Delegate and was taken to no longer contest the refusal of access.
9. On 27 July 2007 QPS applied to the Supreme Court for a statutory order of review of the Delegate's Decision to release the tape recording of an interview with Constable McDonald and the associated summary.
10. By letter dated 27 June 2008 to the Information Commissioner the applicant requested a review of the Delegate's Decision on the basis that it contained serious errors. The applicant also asked that he be allowed an extension of time within which to make an external review application with respect to each FOI application he had made to QPS since its application for a statutory order of review.

#### **Decision under review**

11. Each letter forwarded by the applicant to the Office of the Information Commissioner (**the Office**) is analysed to ascertain whether the letters constitute an FOI application that gives rise to a reviewable decision.

#### **Steps taken in the external review process**

12. By letter dated 30 June 2008 and with reference to the applicant's request for a review of the Delegate's Decision, the Acting Information Commissioner advised the applicant of the avenues of appeal in circumstances where he was aggrieved by a decision of the Information Commissioner. The applicant was also asked to provide copies of FOI applications in respect of which he was seeking an external review and the basis on which he sought any extension of time.
13. By letter dated 2 July 2008 the applicant referred the Office to '*a deemed refusal of my FOI applications contained in my enclosed copy of letters to the Queensland Police Commissioner, through his solicitors.*' Attached to the applicant's letter were eight letters dated 13 May 2005, 27 August 2007, 30 August 2007, 3 September 2007, 6 September 2007, 24 September 2007 "*2 November 2007 (Wrong date 02.10.2007)*" and 18 March 2008. The applicant has sought an extension of time in which to make an external review application, if necessary. The letter dated 13 May 2005 related to the applicant's request for a review of the Delegate's Decision. The other letters related to his application for an external review concerning FOI applications made since 27 July 2007.
14. By letter dated 3 July 2008 the applicant was advised with respect to his request for a review of Delegate's Decision that he had already been advised of his appeal avenues and that as the function of the Information Commissioner had been discharged, nothing remained to be done i.e. the Information Commissioner was *functus officio*. With respect of his application for external review, the applicant was advised that the Office had written to QPS seeking a status report on its processing of any FOI application.
15. By letter dated 3 July 2008 the Acting Information Commissioner wrote to QPS advising it that the Office was *functus officio* with respect to the FOI application dated

13 May 2005 and seeking a status report on the FOI applications made since 27 July 2007.

16. QPS subsequently telephoned the Office to clarify which of the applicant's letters might constitute FOI applications. It was agreed that QPS focus any submissions it made on the letters dated 27 August 2007 and '2 November 2007 (Wrong date4 02.10.2007)'.
17. On 16 July 2008 QPS telephoned the Office to confer on QPS's plans to proceed with the FOI application made after the application for statutory order of review by identifying and processing those documents that were not considered previously at external review. The Acting Information Commissioner was not opposed to QPS initiating that course of action.
18. By letter dated 28 July 2008 QPS wrote to the Office advising its views with respect to the letters dated 27 August 2007 and '2 November 2007 (Wrong date4 02.10.2007)'.
19. The applicant submitted that the reason of *functus officio* did not apply to his request for a review of the Delegate's Decision as administrative decisions can be re-made in certain circumstances.
20. A preliminary view dated 13 February 2009 was sent to the applicant and written submissions were requested by 27 February 2009. A copy of the preliminary view was provided to QPS on 16 February 2009. No further submissions were sought from QPS.
21. No written submissions were received from the applicant.

#### **Matter in issue**

22. With respect to the letter dated 13 May 2005, the question is: Does the Information Commissioner have the power to vary or revoke an external review decision?
23. With respect to the remaining seven letters, the questions to be answered are; which, if any, constitute FOI applications out of which reviewable decisions arise?
24. In relation to any reviewable decisions, will the Information Commissioner exercise a discretion to accept the application for external review out of time?
25. If an application for external review is accepted, what is the correct and preferable view?

#### **The law**

26. Section 72 of the FOI Act requires external review proceedings to be conducted with as little formality and technicality, and with as much expedition, as the requirements of the Act and a proper consideration of the matters before the Commissioner permits. As the applicant has requested a statement of reasons in relation to the decision that the Information Commissioner is *functus officio* and has stated that the *Acts Interpretation Act* gives the Information Commissioner the power to amend or repeal external review decisions, some consideration of the legal issue is given in this decision.

27. Section 73 of the FOI Act states:

**73 Applications for review**

- (1) *An application for review must-*
  - (a) *be in writing; and*
  - (b) *specify an address of the applicant to which notices may be sent under this Act; and*
  - (c) *give particulars of the decision for review; and*
  - (d) *be made within 28 days from the day on which written notice of the decision is given to the applicant, or within the longer period the commissioner allows.*
- (2) *The application may contain particulars of the basis on which the applicant disputes the decision under review.*
- (3) *A person is not entitled to apply to the commissioner for review of a decision (other than a decision of a Minister or the principal officer of an agency) unless—*
  - (a) *an application has been made (whether by the person or another person) under section 52 or 60 in relation to the decision; and*
  - (b) *the person has been informed of the result of that review or the period of 28 days mentioned in section 52(6) or 60(6) has ended.*

**Decision**

28. The decisions with respect to each of the eight letters attached to the applicant's application for external review are set out in turn.

***Letter dated 13 May 2005 – External Review Application No 210548***

- 29. The letter dated 13 May 2005 constitutes the FOI application made to QPS in 2005 and in respect of which a reviewable decision was 'deemed' to have been made by the statute. The QPS deemed decision to refuse access to documents was subject to external review and decision. The Delegate's Decision is presently the subject of an application for a statutory order of review before the Supreme Court.
- 30. By letter dated 27 June 2008 the applicant requested a review of the Delegate's Decision on the basis that it contained serious errors. The applicant submits administrative decisions can be re-made in certain circumstances.
- 31. My decision is that I have no power to amend or repeal any external review decision. In considering the bases for review submitted by the applicant, I do not agree with them. Reasons for these views follow.
- 32. The Delegate's Decision is a valid, final decision made in accordance with the requirements of the FOI Act. The requirements of section 89 of the FOI Act have been met. Importantly, the decision was conveyed to both the applicant and the respondent, QPS. It was lawfully made, the Delegate holding the necessary delegation and the conduct of the review conforming to the requirements of procedural fairness.

33. The applicant claims the decision contains serious errors. In his letter dated 27 June 2008 the applicant states:

*I also request that you take an opportunity to review the improper decision by **the Delegate (my words)** not to review the Police matter as she amongst other serious errors claimed I was vexatious and all previous decisions had been done with fairness etc.*

34. With respect to the applicant's claim that the Delegate "claimed he was vexatious", the Delegate did not decide that the applicant was vexatious. The Delegate decided that the application (not the applicant) for external review was vexatious given 12 previous applications for external review had been made by the same applicant concerning the same documents. The serious error upon which the applicant seeks a review of the Delegate's Decision can be characterised as no more than the applicant not agreeing with the Delegate's Decision that his application was vexatious. Such an issue provides no ground for a review of the Delegate's Decision by me.
35. By letter dated 21 August 2006 the Information Commissioner's Delegate afforded the applicant the opportunity of making submissions in relation to her preliminary view that part of the external review application was vexatious.
36. In response to the Delegate's preliminary view that part of his application was vexatious, to the extent it had been the subject of previous decisions and should not be dealt with further by the Information Commissioner, the applicant made two submissions dated 30 August 2006 and 7 September 2006. The applicant stated he did not accept the preliminary view. The applicant's further submissions were mere claims that the decision maker was biased, corrupt, dirty, crooked and tainted etc. The decision that that part of the application was vexatious was subsequently made by the Delegate.
37. The applicant was given ample opportunity to be heard. There was no procedural error.
38. In his letter dated 3 July 2008 the applicant also states:

***The Delegate (my words)** and others believed the corruption would continue with everything to be brushed over again. With respect, there is a constitutional right for me to have previous decisions looked at again by the same judge if a decision has been corrupted by unlawful activity.*

39. It appears that the other form of serious error claimed by the applicant is that the Delegate's Decision was corrupted by unlawful activity, and that the Delegate was complicit in not allowing the corruption to be discovered by refusing to review a matter that had already been subjected to 12 previous reviews. No reasonable person would expect a thirteenth external review of achieving an outcome not previously achieved by the applicant in the previous 12 reviews.
40. There is no information or evidence of any corruption or criminal activity or unlawful conduct of any kind in the exercise of delegated powers. There is no information or evidence that the Delegate's Decision was corrupted by unlawful activity. The making of mere allegations of corruption without any form of substantiation or credible information provides no basis for review of the Delegate's Decision.
41. As the applicant has already exercised his right to an external review with respect to his FOI application dated 13 May 2005, and the review was finalised, the Office has

discharged its responsibility and has nothing left to do. There are no errors in the decision that may make it invalid.

42. Once a decision on an external review is made, the only provision in the FOI Act authorising or empowering the Commissioner to alter a decision is found in section 89A which allows the Commissioner at any time to correct an error in a decision if the Commissioner considers there is an obvious error and the error resulted from an accidental slip or omission.
43. The applicant is not seeking a correction of an obvious error in the Delegate's Decision and it follows that the Commissioner has no power under the FOI Act to set aside, vary or correct the Delegate's Decision on the basis that it contained some serious error.
44. The applicant has contended that section 24 AA of the *Acts Interpretation Act 1954* (Qld) permits the Commissioner to review, uphold, vary or set aside the Delegate's Decision.
45. Section 24AA of the *Acts Interpretation Act 1954* provides as follows:

***24AA Power to make instrument or decision includes power to amend or repeal***

*If an Act authorises or requires the making of an instrument or decision—*

- (a) *the power includes power to amend or repeal the instrument or decision; and*
  - (b) *the power to amend or repeal the instrument or decision is exercisable in the same way, and subject to the same conditions, as the power to make the instrument or decision.*
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46. The application of section 24AA of the Acts must be considered in light of the *Acts Interpretation Act 1954* as a whole. Section 24AA may be displaced wholly or partly, by a contrary intention appearing in any Act. (See section 4 of the *Acts Interpretation Act 1954*.)
  47. The question is whether or not there is a contrary intention in the FOI Act that displaces wholly or partly the authority provided by section 24AA to amend or repeal the Delegate's Decision.
  48. In *Queensland Newspapers Pty Ltd v Stjernqvist* [2007] 1 Qd R 171 Douglas J, without deciding the point, doubted that any power conferred by section 24AA could be used "as a substitute for the appeal process or the power of review given by the *Judicial Review Act 1991*" in respect of orders made by the Magistrates Court under section 12 of the *Bail Act 1980* prohibiting the publication of evidence or information decisions about a bail application. Because of the *quasi judicial* nature of the Information Commissioner's decisions, a similar doubt must arise in the context of the FOI Act, with the decisions of the Information Commissioner being reviewable under the *Judicial Review Act 1991*.
  49. In *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing* (unreported) [2008] QSC 305, Jones J found that where a legislative scheme was directed to the making of a determination such that it called for finality in respect of any decision made under the scheme, the legislation expressed a "contrary intention" for the purposes of sections 4 and 24AA of the *Acts Interpretation Act 1954*, as it would "offend against the spirit of the legislation and the clear intention of the legislature for a decision, once made, to be the subject of arbitrary reconsideration or repeal. Section 89 of the FOI Act requires the Commissioner to make a written decision at the end of a review. As the FOI Act makes clear that a determination by the FOI Commissioner calls for finality

in respect of any decision made under the scheme, the FOI Act expresses the necessary “contrary intention” for the purposes of sections 4 and 24AA of the *Acts Interpretation Act 1954*.

50. The limitation of the Commissioner’s powers to the express powers conferred by section 89A of the FOI Act, the power of review given by the *Judicial Review Act 1991* provides a sufficient basis for me to form the view that the Commissioner does not have any power to vary, revoke or affirm an external review decision.
51. This approach is otherwise more generally supported by the common law. Gummow J considered the history of similar provisions in the *Acts Interpretation Act 1901* (Cth) in *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 where he noted

*...there was “an inconvenient common law doctrine of somewhat uncertain extent to the effect that a power conferred by statute was exhausted by its first exercise”...however, s33(1) of the Acts Interpretation Act 1901 (Cth)...provides that where an Act confers a power or imposes a duty, then unless the contrary intention appears, the power may be exercised and the duty shall be performed “from time to time as occasion requires”. But in any given case, a discretionary power reposed by statute in the decision maker may, upon a proper construction, be of such a character that it is not exercisable from time to time and it will be spent by the taking of such steps or the making of the statements or representations in question, treating them as a substantive exercise of the power. The result is that when the decision maker attempts to resile from his earlier position, he is prevented from doing so not from any doctrine of estoppel, but because his power to do so is spent and the proposed second decision would be ultra vires. The matter is one of interpretation of the statute conferring the particular power in issue.*

52. Chesterman J considered a number of authorities illustrating the application of similar provisions in other Australian jurisdictions and the United Kingdom in *Firearm Distributors Pty Ltd v Carson and Ors* [2001] 2 Qd R 26. His Honour found at paragraph 32 an “underlying reasoning”

*that where a power is adjudicative in nature, affecting rights or liabilities, it can only be exercised once, such a view would accord with the law relating to arbitral awards and judicial pronouncements. The common law very early insisted that an arbitrator could not vary or recall an award. The rule was very strict.*

53. Decisions of the Information Commissioner are adjudicative in nature, and following Chesterman J’s reasoning, this provides a further basis on which to decline the applicant’s request to review the Delegate’s Decision.
54. In *Ping v Medical Board of Queensland* [2004] 1 Qd R 282 Moynihan J at 284 held that where an Act required a statutory body to decide or elect to proceed by one of two alternative courses, then, having chosen one course, section 24AA could not operate to authorise the statutory body to repeal the decision and elect to proceed by the alternative course.
55. In the Court of Appeal decision *Re Petroulias* [2005] 1 Qd R 643 McMurdo P at 655 thought it arguable that the power found in section 24AA could be used by the Registrar of the Court to review and re-exercise a decision to register a solicitor, where the decision had been based on mistaken facts. In expressing this view, Her Honour noted:

*With very limited exceptions such as fraud or clear statutory statements, administrative decisions, once given effect by communication to the affected party, are irrevocable:*



*Goulding v Chief Executive, Ministry of Fisheries.*<sup>1</sup> *This is because the decision-making power is spent.*<sup>2</sup>

56. In light of all of the above judicial authority it appears clear to me that once the decision making power of the Commissioner has been exercised, the power is spent. The Commissioner may not amend or repeal an external review decision under section 24 AA of the AIA.
57. My decision therefore is that the applicant's submission that section 24AA of the *Acts Interpretation Act* 1954 cannot be accepted and I must conclude that his request for a review of the Delegate's Decision is beyond the power of the Commissioner and that the Information Commissioner is *functus officio* in these circumstances.

**Letter dated 27 August 2007 – External Review Application number 210553**

58. The applicant's letter dated 27 August 2007 is addressed to the 'Commissioner of Police c/- Mr Colin Strofield', the then QPS solicitor and requests '*all documents related to myself, and or my family and or my property and or also related to other agencies such as the Department of Veteran Affairs/Vietnam Veterans Counselling Service etc to a proper record in your agency and documents to myself.....I request these documents under FOI and to be both viewed and supplied on computer disc*'.
59. In its submissions QPS state that the applicant's letter dated 27 August 2007 was not dealt with by the FOI Unit but directed to QPS solicitors in accordance with the applicant's address on the letter. QPS understood the letter to be further submissions in relation to his FOI application of 13 May 2005 and as that matter had been the subject of an external review conducted by the Office of the Information Commissioner, it was not treated as a separate 'fresh' application. On a re-examination of the letter, QPS conceded that the letter was a fresh FOI application. QPS submitted that as the letter dated 27 August 2007 sought the same documents the applicant sought in his FOI application dated 13 May 2005, it was open to it to refuse to deal with this 'application' under s29B(4)(a)(ii) of the FOI Act.

**Does the letter constitute an FOI application out of which a reviewable decision arises?**

60. It is clear on its face that the letter dated 27 August 2007 is an FOI application. As QPS did not process the application within the statutory time frames, QPS was deemed to have refused access to documents on or about 12 October 2007. This is a reviewable decision.

**Will the Information Commissioner exercise a discretion to accept the external review application out of time?**

61. As QPS did not recognise the FOI application as an application under the FOI Act, it did not process the application or give the applicant the required notice under section 27(5A) of the FOI Act notifying him of the deemed decision and his right of external review. As the applicant did not receive the prescribed notice, the 28 day statutory period within which he was required to make an application for external review did not commence. Section 73 of the FOI Act requires applications for review to be made within 28 days from the date an applicant is given notice of the decision. It might be open to argue on a technical reading of the provision that because no notice had been

<sup>1</sup> [2004] 3] NZLR. 173, 182-83 [30], 185-186 [42]-[43]

<sup>2</sup> *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR, 193, Gummow J at 211

given, the applicant is not entitled to an external review of QPS's decision. However, a procedural failure of this kind should not be used to disentitle an applicant, only to cause the inconvenience of re-applying for external review, once QPS had been asked to meet its lawful requirements under the FOI Act. On this basis, the external review application is accepted.

**What is the correct and preferable view?**

62. Under section 29B of the FOI Act an agency may refuse to deal with an application under section 29B if an applicant applies to an agency for access to documents that have been the subject of an earlier application made by the same applicant to the same agency. I am satisfied from an examination of the wording in the letters dated 13 May 2005 and 27 August 2007 that:
- the applicant is requesting the same documents subject of an earlier application made by the applicant
  - the earlier application was not withdrawn
  - the later application has not disclosed any reasonable basis for again seeking access to the documents and
  - that the earlier agency decision was the subject of a completed review under part 5 of the FOI Act. On that basis I have decided to set aside the agency's deemed decision to refuse access to documents and make a decision to refuse to deal with the application under section 29B.

**Letter dated 30 August 2007**

63. The letter dated 30 August 2007 is addressed to "The Commissioner of Police c/- Mr Colin Strofield" and concerns the QPS application for a statutory order of review. In it the applicant states:

*'In this current matter (meaning the judicial review) on the 03.08.07, you will remember I attempted to make submissions to Justice Daubney but was abruptly cut off. I was in fear of his position, his manner and demeanour at the time. I am not attempting to screw up a court matter with unnecessary requests..... Do I have to make an FOI application for such documents of your agency so that I may form an opinion as to what I may do in this matter before the Court. (my emphasis)*

**Does the letter constitute an FOI application out of which a reviewable decision arises?**

64. It is this last statement, underlined by me, which makes it clear that this letter is not an FOI application but a request for documents in the context of the application for a statutory order of review presently before the Supreme Court.
65. As the letter is not an FOI application, no reviewable decision arises. No entitlement to an external review under section 73 of the FOI Act arises in the absence of an FOI application, internal review and/or a deemed decision by the agency.

**Letter dated 3 September 2007**

66. The letter dated 3 September 2007 is addressed to "The Commissioner of Police c/- Mr Colin Strofield" and commences:

*I am not willing to sign a document at the moment that states I am ready for trial when I am clearly not ready. I am hoping parties to this matter will see sense and supply the requested documents etc.*

**Does the letter constitute an FOI application out of which a reviewable decision arises?**

67. The letter dated 3 September 2007 is a letter to the Commissioner of Police refusing to sign a Readiness for Trial certificate in relation to the QPS application for a statutory order of review. While the letter makes a request for information, the fact that the letter is directed to QPS's solicitor and clearly canvasses procedural issues concerning the judicial review on foot, and the requested information includes documents of the Information Commissioner to which the applicant is aware the FOI Act does not apply, the letter cannot be considered to be an FOI application.
68. Consequently, my decision is that there is no reviewable decision. The applicant is therefore not entitled under section 73 of the FOI Act to an external review.

***Letter dated 6 September 2007***

69. The letter dated 6 September 2007 is addressed to "The Commissioner of Police c/- Mr Colin Strofield" further to the letter of 3 September 2007. It attaches a copy of a letter the applicant sent to the solicitors for the Information Commissioner in the context of the judicial review.

**Does the letter constitute an FOI application out of which a reviewable decision arises?**

70. On its face the letter reveals no request for information and cannot be considered an FOI application.
71. Consequently my decision is that there is no reviewable decision. The applicant is therefore not entitled under section 73 of the FOI Act to an external review.

***Letter dated 24 September 2007***

72. The letter dated 24 September 2007 is addressed to "The Commissioner of Police c/- Mr Colin Strofield" asking:

*Has my Freedom of Information application made in my letter dated the 27 August 2007 been overlooked?*

**Does the letter constitute an FOI application out of which a reviewable decision arises?**

73. The letter attaches a copy of a letter the applicant wrote to solicitors for the Information Commissioner concerning QPS's application for a statutory order of review and an accusation that the Information Commissioner and staff had improperly accessed information from the Department of Veteran's Affairs several years ago.
74. On its face the letter is not an FOI application but a follow up letter to the applicant's FOI application dated 27 August 2007. Consequently my decision is that there is no reviewable decision. The applicant is therefore not entitled under section 73 of the FOI Act to an external review.

**Letter dated '2 November 2007 (Wrong date4 02.10.2007)'- External Review No 210554**

75. The letter dated '2 November 2007 (Wrong date4 02.10.2007)' is addressed to "The Commissioner of Police c/- Mr Colin Strofield" and asks:

*Has my Freedom of Information application made in my letter dated the 27.08.07 been overlooked?????*

76. QPS in its submission has stated:

*An examination of the facsimile of 2 November 2007 indicates that it is not a separate matter but is a follow up inquiry to the facsimile dated 27August 2007.*

**Does the letter constitute an FOI application out of which a reviewable decision arises?**

77. The applicant is writing to follow up the processing of his FOI application. However the applicant also seeks to expand the scope of his FOI application when he states:

*So that relevant documents and information is not left out, please adjust the FOI application to this date and answer same. **FOI Police catch up 02.10.2007.***

In my view such an expansion of scope should have been treated as a fresh FOI application by QPS as the applicant appears to be seeking additional documents to those requested by letter dated 27 August 2007. As QPS did not process the application within the statutory time frame, QPS was deemed to have refused access to documents on or about 17 December 2007. This gives rise to a reviewable decision.

**Will the Information Commissioner exercise a discretion to accept the external review application out of time?**

78. As QPS did not recognise the FOI application as an application under the FOI Act, it did not process the application or give the applicant the required notice under section 27(5A) of the FOI Act notifying him of the deemed decision and his right of external review. As the applicant did not receive the prescribed notice, the 28 day statutory period within which he was required to make an application for external review did not commence. As the applicant did not receive the prescribed notice, for reasons similar to those given above, the discretion to accept the application is not necessary to be exercised and the procedural error of the prescribed notice not issuing will be overlooked so as not to inconvenience the applicant.

**What is the correct and preferable view?**

79. It is not clear from the applicant's correspondence what additional documents he is seeking under FOI. Section 25(2) of the FOI Act requires FOI applications to provide sufficient information concerning the document to enable a responsible officer of the agency to identify the document/s sought. Additionally, section 73 of the FOI Act requires applicants to give particulars of the decision for review. As the application for external review does not contain the required particulars, the application should not be accepted. The preferable course in my view is for the applicant to make a fresh FOI application to QPS which clearly identifies the documents he is seeking.

***Letter dated 18 March 2008***

80. The letter dated 18 March 2008 advises the Commissioner of Police that the letter dated 2 October 2007 should have been the 2 November 2007. The applicant also mentions an enclosed copy of documents which should be read by QPS when viewing a DVD he also sent.

**Does the letter constitute an FOI application out of which a reviewable decision arises?**

81. On its face this letter is not an FOI application. There is no reviewable decision giving rise to any external review rights.

---

**Julie Kinross**  
**Acting Information Commissioner**

**Date: 27 February 2009**