



## Decision and Reasons for Decision

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**Application Number:** 210904

**Applicant:** DSR

**Respondent:** The University of Queensland

**Decision Date:** 4 August 2009

**Catchwords:** ADMINISTRATIVE LAW - FREEDOM OF INFORMATION – SECTION 77(1)(a) of the *Freedom of Information Act 1992* (Qld) - COMMISSIONER MAY DECIDE NOT TO REVIEW – applicant seeks access to documents ‘used in determination of an email’ about him – whether terms of the applicant’s application are sufficient to enable documents to be identified - whether external review application is misconceived.

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## REASONS FOR DECISION

### Summary

1. The applicant seeks access to documents 'used in determination of an email' concerning him. The email referred to was previously released to the applicant by UQ under the *Freedom of Information Act 1992 (Qld)* (**FOI Act**).
2. I have decided not to deal with the applicant's external review application under section 77(1)(a) of the FOI Act on the basis that the application is misconceived.

### Background

3. By letter dated 15 May 2009 (**FOI Application**), the applicant applied to the University of Queensland (**UQ**) for access to:

*Documents relating to [myself]. These documents are: the documents used in determination of a folio released 10 October 2005. Being an email between the two Warrens in which it is stated, 'Health Services staff need to understand there is no such thing as a 'psychological emergency', and, 'the QPS have powers to deal with him under the Mental Health Act', and, 'Health Services role is to provide counselling post incident.'*

4. By letter dated 5 June 2009, Ms F Parke, UQ's Freedom of Information Officer and Legislative Counsel, asked the applicant to clarify the description of the documents to which he was seeking access (**Clarification Request**).
5. The applicant responded by letter dated 12 June 2009 (**Response**). The letter attached a copy of the email referred to in the FOI Application (**Email**) and another document that appears to have been released under the FOI Act on 10 October 2005.
6. By letter dated 20 July 2009 the applicant applied to the Office of the Information Commissioner (**Office**) for external review (**External Review Application**).
7. As UQ has not issued a notice under section 25A(3) of the FOI act and has not made a decision on the access application within the appropriate period, UQ's principal officer is deemed to have refused access to documents sought in the applicant's application.<sup>1</sup>

### Steps taken in the external review process

8. In a telephone discussion with a staff member of the Office on 28 July 2009, Ms Parke indicated that no decision had been made regarding the applicant's FOI Application and that UQ was still unable to determine what documents the applicant was seeking.
9. By email dated 28 July 2009 UQ provided the Office with a copy of the Response and a draft letter to the applicant prepared by Ms Parke.
10. In making my decision in this matter, I have taken the following into account:
  - the applicant's FOI Application and External Review Application
  - the Clarification Request and Response
  - the draft letter to the applicant referred to at paragraph 9 above

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<sup>1</sup> Section 27(5) of the FOI Act.

- file note of a telephone conversation between Ms Parke and a staff member of this Office on 28 July 2009
- relevant legislation as referred to in this decision
- relevant decisions of the Information Commissioner, Queensland, as referred to in this decision.

## Findings

### Relevant Law

11. The FOI Act was repealed by the *Right to Information Act 2009 (RTI Act)*<sup>2</sup> which commenced on 1 July 2009.<sup>3</sup> However, because the FOI Application was made under the FOI Act and has not yet been finalised, for the purposes of this decision, I am required to consider the application of the FOI Act and not the RTI Act.<sup>4</sup>

12. Section 77(1) of the FOI Act provides:

**77 Commissioner may decide not to review**

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

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

...

*[my emphasis]*

13. Section 25(2)(b) of the FOI Act relevantly provides:

**25 How applications for access are made**

...

(2) *The application must:*

...

(b) *provide sufficient information concerning the document to enable a responsible officer of the agency to the minister to identify the document;*

...

### Findings of fact and application of the law

#### Is the FOI Application misconceived?

14. The term 'misconceived' is not defined in the FOI Act. However, the expression 'frivolous, vexatious, misconceived or lacking in substance'<sup>5</sup> appears in various pieces of Australian legislation and the meaning of the individual terms in this sequence has been considered in a number of cases in various jurisdictions.<sup>6</sup>

15. In *Leach and Department of Police*<sup>7</sup> (**Leach**) I discussed a number of these cases,

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<sup>2</sup> Section 194 of the RTI Act.

<sup>3</sup> With the exception of sections 118 and 122 of the RTI Act.

<sup>4</sup> Section 199 of the RTI Act.

<sup>5</sup> Though it is noted that 'lacking substance' is the term used in section 77(1)(a) of the FOI Act.

<sup>6</sup> See for example: *State Electricity Commission of Victoria v Rabel* [1998] 1 VR 102 and *Cocks Macnish v Biundo* [2004] WASCA 194.

<sup>7</sup> (Unreported, Queensland Information Commissioner, 26 June 2009).

considered the dictionary definitions of 'misconceived' and 'conceived'<sup>8</sup> and said that:<sup>9</sup>

*... under section 77(1)(a) of the FOI Act, the Information Commissioner may decide not to deal with an application for review if satisfied that the application is conceived wrongly. That is, it proceeds from a misunderstanding or an idea, notion or belief on the part of the applicant that is plainly wrong, such that the applicant's case is so hopeless that it should be summarily brought to an end and/or they are unable to show that they have more than a remote possibility of a well-founded claim, or in other words, where there is no real basis on which the external review can proceed.*

### **Posing questions**

16. The right of access conferred by the FOI Act is not a right of access to information, but a right of access to information contained in the form of documents which exist in the possession or control of a particular agency or Minister, at the time that a valid access application under the FOI Act is lodged with that agency or Minister. In *Hearl and Mulgrave Shire Council* (1994) 1 QAR 557 the Information Commissioner (**Hearl**) said:<sup>10</sup>

*[it is not] improper for an agency to provide answers to questions asked of it, or extract answers to questions from documents in its possession, if it is prepared to do so in the interests of assisting a member of the public.*

However, in making a formal determination in *Hearl* the Information Commissioner also stated that:

*The FOI Act is not an Act which gives persons a legally enforceable right to obtain answers to questions asked of government agencies, or even to have government agencies extract answers to questions from documents in their possession. The legally enforceable right conferred by s.21 of the FOI Act is a right to be given access under the Act, and subject to the Act to documents of an agency and official documents of a Minister.*

17. In this external review, the applicant seeks access to:

*Documents relating to [myself]. These documents are: the documents used in determination of a folio released 10 October 2005. Being an email between the two Warrens in which it is stated, 'Health Services staff need to understand there is no such thing as a 'psychological emergency', and, 'the QPS have powers to deal with him under the Mental Health Act', and, 'Health Services role is to provide counselling post incident.'*

18. Because UQ did not understand which documents the applicant was seeking in the FOI Application, by letter dated 5 June 2009, Ms Parke asked the applicant to clarify the description of the documents to which he sought access.

19. The applicant provided UQ with a copy of the Email and said in his Response:

*I request documents used in determination of page 25, October 10 2005 FOI release. **As these documents don't exist** I suggest you get [.....] and or [.....] to give you about \$80,000 to extend the time period as long as possible here's a hint, third party consultation, that will give you another length of time. [my emphasis]*

20. The applicant goes on to say:

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<sup>8</sup> At paragraph 20.

<sup>9</sup> At paragraph 21.

<sup>10</sup> At paragraph 30.

*I will also request a privacy breach investigation on file 134 October 10 2005 FOI Release. To be specific why [.....] was getting reports from Health Centre, why this is written in [.....]'s handwriting and why the original document was tampered with. Gosh I sent a copy to forensic document examiner. I would also request why documents being emailed were deleted from my email account on 24 November 2005. Give my regards to [.....] and [.....].*

21. The tone and content of the Response clearly convey that the applicant is aggrieved about a number of issues with UQ.
22. The applicant's Response at paragraph 20 above comprises a series of questions. Although the FOI Application is not specifically framed as a question, when read together with the applicant's Response at paragraph 19 above, it is apparent that the applicant's FOI Application is actually a question, albeit a rhetorical one:<sup>11</sup>

*Why, or on what basis, did the author of the Email make the statements contained in the email?*

23. The applicant's clear and unequivocal response to Mr Parke's Clarification Request – *that the documents sought do not exist* – is intended, in my view, to underscore the applicant's perception that there was no basis for the Email. The Response is not intended to clarify the documents the applicant is seeking because the applicant is not seeking access to documents but rather is posing a question to UQ which is intended to make his point that there was no basis for the email.
24. The applicant can seek answers to his questions in relation to his dealings with UQ or ask UQ to explain why a particular course of action was taken. However, as explained in *Hearl*, whilst the FOI Act confers a legally enforceable right (subject to the Act) to be given access under the Act to documents of an agency, the Act does not require an agency to provide answers to an applicant's questions.
25. In my view the interchange between the applicant and UQ in relation to the FOI Application, is from the applicant's perspective, merely a forum for pursuing his grievance with UQ. Therefore, despite a request for clarification, UQ is not able to process the FOI Application.
26. UQ's draft letter dated 28 July 2009 again asks the applicant to clarify the documents he is seeking. In his External Review Application, the applicant requests communication by video-link 'if the OIC needs to contact [him] for clarification of request'.
27. In external reviews circumstances sometimes do arise in which it is appropriate for the Office to seek clarification of the documents requested in an FOI Application. However, having considered the circumstances in this matter, I am satisfied that further requests for clarification would be futile. This is because, as I have explained above, the FOI Application is wrongly conceived in that it is not a genuine request for documents, but rather, a means by which the applicant seeks to voice his grievance with UQ.

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<sup>11</sup> That is, a question that is for effect only and which is not intended to illicit an answer.

## **Conclusion**

28. In view of the above, I am satisfied that:
- the FOI Application is wrongly conceived
  - there is no real basis on which this review can proceed
  - the applicant's External Review Application is misconceived.

## **DECISION**

29. For the reasons set out above, I have decided not to deal with the applicant's External Review Application under section 77(1)(a) of the FOI Act, on the basis that the application is misconceived.
30. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

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**Suzette Jefferies**  
**Acting Assistant Commissioner**

**Date: 4 August 2009**