



Decision and Reasons for Decision

Application Number: 210330

Applicant: L Sheridan

Respondent: Nanango Shire Council

Decision Date: 13 December 2007

Catchwords: **FREEDOM OF INFORMATION – sufficiency of search – no reasonable grounds to believe further responsive documents exist in the agency’s possession or control**

FREEDOM OF INFORMATION – Section 22(a) of the *Freedom of Information Act 1992 (Qld)* – applicant can reasonably get access to requested documents under another arrangement

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REASONS FOR DECISION

Summary

1. There are two issues for my determination in this review. The first is the sufficiency of searches undertaken by the Nanango Shire Council (Council) for documents requested by the applicant. The second issue is whether Council was entitled to refuse access to certain documents under section 22(a) of the *Freedom of Information Act 1992* (Qld) (FOI Act) on the basis that the applicant can reasonably get access to the requested documents under another arrangement.
2. I have carefully considered the submissions made and evidence provided by both the applicant and Council in relation to these issues. I am satisfied that there are no reasonable grounds to believe that further documents responsive to the applicant's application exist in Council's possession or control, and that Council were entitled to refuse access to the relevant documents under section 22(a) of the FOI Act.

Background

3. The applicant is a former employee of Council. By letter dated 14 June 2007 the applicant applied, through her solicitor, for access to six separate categories of documents relating to her employment.
4. Council's Chief Executive Officer Mr Shane Gray, by letter dated 15 August 2007, decided
 - to release a number of documents, subject to the deletion of certain matter under section 44(1) of the FOI Act
 - to refuse access to certain documents under section 22(a) of the FOI Act
 - that there were no documents in Council's possession or control that were responsive to certain parts of the applicant's application.
5. By letter dated 13 September 2007 the applicant wrote to this Office seeking an external review of Mr Gray's decision under Part 5 of the FOI Act.

Decision under review

6. The decision under review is the initial decision by Council's principal officer, Mr Gray, dated 15 August 2007, the details of which are listed above in paragraph 4.

Steps taken in the external review process

7. As the applicant's application for external review only contested certain parts of Mr Gray's decision, by letter dated 18 September 2007 I wrote to the applicant and requested that she confirm that she wished the external review be limited to considering:
 - the sufficiency of searches undertaken by Council for documents responsive to the two items of the applicant's initial application which were noted in her application for external review and
 - whether Council was entitled to refuse access to documents responsive to a further point of the applicant's application under section 22(a) of the FOI Act.

I also requested that the applicant provide me with further submissions in relation to her contentions.

8. The applicant responded by letter dated 9 October 2007 and confirmed that the parts of Council's decision listed in my letter dated 18 September 2007 were the only issues she wished to contest on external review. The applicant also made submissions.
9. By letter dated 8 November 2007 I advised the applicant that I had formed the preliminary view that on the material before me, there were no reasonable grounds to believe that further documents responsive to the relevant parts of her application existed in Council's possession or control, and that Council was entitled to refuse the applicant access to certain documents under section 22(a) of the FOI Act.
10. The applicant provided further submissions by facsimile dated 23 November 2007, along with a number of documents in support of those submissions.
11. By letter dated 29 November 2007 I requested Council provide a response in relation to specific issues raised by the applicant in her submissions dated 23 November 2007. Council responded to such issues by telephone on 10 and 12 December 2007.
12. In making my decision in this matter, I have taken the following into account:
 - the applicant's FOI application dated 14 June 2007 and application for external review dated 13 September 2007
 - Mr Gray's initial decision dated 15 August 2007
 - the applicant's submissions dated 9 October 2007 and 23 November 2007
 - file notes of telephone conversations between staff of this Office and Council
 - relevant provisions of the FOI Act and decisions of this Office.

Findings

Sufficiency of search

13. The applicant contends that Council has not disclosed all documents requested in her application. The applicant has consequently raised doubt as to the sufficiency of the searches undertaken by the Department to locate documents responsive to his application.
14. In relation to an external review based on sufficiency of search, the questions I must answer are¹:
 - 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.
15. 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

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

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 284² (*Ainsworth*).

16. In *Ainsworth* the Information Commissioner acknowledged that the agency carries the onus of establishing that the Information Commissioner should give a decision adverse to the applicant.³ 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 incumbent on the applicant to provide that information to the agency. The Information Commissioner said at paragraph 46:

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.

17. 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 Council's possession or control.

Correspondence

18. The applicant requested access to:

Copies of all correspondence (including written memoranda of all kinds plus file notes of verbal reports) between Shane Gray, Michael Hunter, Mary Green, the Mayor Reg McCallum and the Nanango Shire Councillors either singly or collectively, concerning the deployment of Leigh Sheridan to the Visitor Information Centre.

19. In her application for external review, the applicant stated that she had been advised by an unnamed source, that Mr Gray had a conversation with Ms Mary Green regarding the applicant's redeployment to the Visitor Information Centre and that this conversation was described in an email sent by Mr Gray. I requested that the applicant provide a further specific submission in relation to this contention, but the applicant responded that the source of that information did not wish to be identified and that consequently no further information could be provided.
20. In my letter dated 8 November 2007 I advised the applicant that on the basis of her submission, there were no reasonable grounds to believe that further documents responsive to this part of her application should exist. I invited the applicant to provide further submissions, if it was the case that she did not accept my preliminary view.

² At paragraph 46

³ Section 81 of the FOI Act

21. In response the applicant provided, with her submission dated 23 November 2007, copies of an email and a memorandum sent by Mr Gray to Livingstones, a human resources consulting firm retained by Council. The email and the memorandum refer to conversations which occurred between Mr Gray and other persons listed in this part of the applicant's application. The applicant stated that Council's failure to disclose these documents was of concern, and also submitted that the email and memorandum inferred a possibility that other documents referring to similar conversations exist.
22. As mentioned, the email and the memorandum provided by the applicant refer to conversations which occurred between the persons listed in the applicant's application, but I do not consider that the documents provided by the applicant fall within the scope of this part of the applicant's application. The email and the memorandum are not correspondence between the persons listed, and merely suggest that conversations about the applicant's deployment to the Visitor Information Centre took place.
23. I requested that Council confirm whether there are any written records of these conversations in its possession which are correspondence between the persons listed. I also requested that Council advise me whether its normal practice is to confirm such conversations in written correspondence.
24. Council responded that each of the persons listed in this part of the applicant's application had been contacted and each advised that they had not made any written records of conversations which may have taken place. Council submits that it is not the usual practice of Councillors or Council employees to confirm informal conversations in correspondence, due primarily to the small number of staff employed by Council. Council also submitted that the deployment of a staff member to a different area of Council is an operational matter and that accordingly, Councillors would not ordinarily be consulted or formally notified in relation to the movement of staff.
25. On the basis of the information before me, I am satisfied that:
 - it is not usual for Councillors or Council staff to record conversations in writing as a matter of course
and
 - each of the persons listed in this part of the applicant's application have been consulted as to whether they had retained any further responsive documents and have confirmed they do not hold any responsive documents.
26. The applicant has produced documents which show that conversations regarding the applicant's deployment to the Visitor Information Centre took place. However, apart from suggesting that the documents provided infer that further responsive documents exist, the applicant has not provided any information or documents that provide evidence to the contrary of the finding I have made in paragraph 25 above.
27. Accordingly, I am satisfied that there are no reasonable grounds to believe that further documents exist in Council's possession or control. Additionally, I am satisfied that the searches conducted by Council for documents responsive to this part of the applicant's request have been reasonable in all the circumstances of the case.

Diary Entries

28. The applicant requested access to:

Copy of work diary entries/file notes from Shane Gray's work diary 2004, 2005, 2006, 2007 that refer to the following subjects: Leigh Sheridan, Iris Crumpton, Audrey Sampson, Michael Hunter, Nanango Library, Val Hooper.

29. The applicant's application for external review stated that she had confirmation from other sources that documents responsive to this part of her application exist, but could not provide any further details.
30. On 8 November 2007 I advised the applicant of my preliminary view that this submission did not raise reasonable grounds to believe that further responsive documents exist in Council's possession or control.
31. The applicant subsequently provided a copy of a file note made by Mr Gray of a meeting he had with the applicant dated 1 February. The applicant contends that there should be a notation in Mr Gray's diary relating to this meeting. The applicant made the following submission:

One would assume that as Shane Gray convened the discussion in question that he would have made a notation in his diary so that other appointments would not have been made at that time.

32. The applicant has also provided copies of several memorandums authored by Ms Joanne Wallace regarding conversations she had with the applicant, and contends that even though the conversations took place between the applicant and Ms Wallace, Ms Wallace would have met with Mr Gray to discuss the matter and that subsequently a record of any meeting would be in Mr Gray's diary.
33. I requested that Council advise me whether Mr Gray keeps a work diary, either in hard copy or electronic form. Council provided the information that Mr Gray has both a hard copy and electronic work diary for each of the years listed in this part of the applicant's application which is kept by Mr Gray's secretary. Council submits however, that it has examined each of the electronic and hard copy diaries and there are no entries which mention Leigh Sheridan, Iris Crumpton, Audrey Sampson, Michael Hunter, Nanango Library or Val Hooper. Council submits that Mr Gray's diaries were used infrequently, due, again, to the small number of Council employees and the ease with which they could communicate in person.
34. The file note of the meeting between Mr Gray and the applicant dated 1 February, provided by the applicant begins *'I called Ms Sheridan to my office...'*. I consider that this statement indicates that the meeting was an impromptu rather than pre-arranged meeting and would not necessarily have been diarised in order to avoid conflicting appointments. Council has confirmed that there is no record of this meeting in either Mr Gray's hard copy or electronic diary. Additionally, Council submits that Mr Gray's diaries were infrequently used and if Mr Gray and Ms Wallace met to discuss the subjects listed in this part of the applicant's application, such meetings may not have been diarised.
35. While I note that it may generally be unusual for the Chief Executive Officer of a local authority to only infrequently use work diaries, I accept Council's submission that due to the small number of Council employees, informal meetings between staff are common and records of those meetings are not generally made. Additionally, I am

satisfied that Council has examined each of the relevant diaries and found no responsive entries. The applicant's submissions show that meetings with, and regarding the applicant occurred, but they do not show that there are file notes or diary entries in Mr Gray's work diaries which refer to the subjects listed in this part of the applicant's application.

36. On this basis, I do not consider that there are reasonable grounds to believe that documents responsive to this part of the applicant's request exist in Council's possession or control. I am also satisfied that the searches undertaken by Council have been reasonable in all the circumstances of the case.

Section 22(a) of the FOI Act

37. Section 22(a) of the FOI Act provides as follows:

22 Documents to which access may be refused

An agency or Minister may refuse access under this Act to—

(a) a document the applicant can reasonably get access to under another enactment, or under arrangements made by an agency, whether or not the access is subject to a fee or charge

38. The applicant requested access to:

Copies of all monthly Nanango Shire Library Reports 1990-2006 (these are the reports that are included in the monthly agendas that are given to Council before the meetings)

39. In its decision dated 15 August 2007 Council refused access to documents responsive to this request on the basis that Council meeting agendas and supporting documentation are available to the public by inspection on request, and copies available to purchase under section 36(2)(c) of the *Local Government Act 1993*.
40. As the applicant contended that despite several attempts, she had not been able to gain access to Library Reports, I requested that the applicant outline why her attempts to access Library reports had been unsuccessful. The applicant responded by reiterating that 'numerous attempts to obtain these reports through the proper channels have been refused'.
41. In my letter dated 8 November 2007 I advised the applicant that I had confirmed with Council that Library Reports as appended to meeting agendas are available to the public for inspection and copying on payment of a photocopying fee. Additionally, I advised the applicant that Council submits that it is unaware of any attempts by the applicant to access the documents refused under section 22(a) of the FOI Act since Council's decision in that respect. On this basis I advised the applicant of my preliminary view that Council were entitled to refuse access to Library Reports under section 22(a) of the FOI Act.
42. The applicant's response to my preliminary view was that she had obtained copies of the relevant Library Reports by subpoena issued by the Industrial Magistrates Court. However, the applicant has not withdrawn her objection to Council's decision regarding section 22(a) of the FOI Act.
43. I accept Council's submission that Library Reports are available to the public on request. The applicant has not provided any information regarding unsuccessful attempts made to access Library Reports after Council's decision was issued. On the

material before me there is no basis to believe that the requested documents are not available for inspection on request, and for copying on payment of a photocopying fee. Accordingly, I am satisfied that Council was entitled to refuse access to the requested documents under section 22(a) of the FOI Act.

DECISION

44. I affirm the decision of Council's principal officer, Mr Gray, dated 15 August 2007 that:

- there are no reasonable grounds to believe that further documents responsive to the applicant's request exist in Council's possession or control
- Council's searches were reasonable in all the circumstances of the case and
- access to Library Reports should be refused under section 22(a) of the FOI Act.

R Rangihaeata
Acting Information Commissioner

Date: 13 December 2007