



Decision and Reasons for Decision

Application Number: 210447

Applicant: Ms R Cosser

Respondent: Department of Education, Training and the Arts

Decision Date: 9 March 2009

Catchwords: **FREEDOM OF INFORMATION – Section 28A (1) of the *Freedom of Information Act 1992* (Qld) – refusal of access – agency to be satisfied documents do not exist**

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REASONS FOR DECISION

Summary

1. The applicant submits that not all documents listed in her freedom of information application have been provided to her by the Department of Education, Training and the Arts (**DETA**).
2. Having considered the parties' submissions, evidence, relevant legislation and decisions, I am satisfied that access to the documents sought can be refused under section 28A(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) on the basis that no further documents responding to the applicant's freedom of information application exist.

Background

3. By email sent on 26 September 2007 to DETA, the applicant requested access to all documents concerning and relating to her including the following (**FOI Application**):¹
 - *all documents that have been concealed from me/refused to me/not released to me for any reason in response to any earlier FOI application*
 - *including the 12 "vanished" documents 2421 F 1-12 (the 2421 numbers are on the top right hand side of the documents)*
 - *and the various "vanished" investigations reports, including the Grievance Stage 2 report written by Richard Ruddell and the Cairns District Office report that was concealed from me and that has now "vanished"*
 - *and all documents that explain the allegations contained in the "notes to Leigh from Desley" as recorded by Anne Mauger on 10/11/2000 (2421 F39-40)*
 - *and of the "lots of pieces of paper" that contained "a lot of allegations" as claimed by Anne Mauger and recorded by Sue Hall on 27/11/2000 (2421 F28-32)*
 - *and the Verifact report and all other reports by external agencies, as described on the webpage that I have provided for public servants: <http://www.badapplebullies.com/investigations.htm>*
 - *and the documentation of all action taken by the Department in response to the Verifact report*
 - *and all documents that record the process that Education Queensland has been conducting concerning me since Louise Rosemann met officers from the Ethical Conduct unit of Education Queensland on 23 December 2006*
 - *including all notes of meetings and all letters concerning and related to me*
 - *and all records made by Mr Edwards of the circumstances in which he provided me with information concerning a claim for compensation*
 - *during the two weeks prior to the 2001 17 February 2001 State election, I understand that Ms Anne Mauger took several days leave from her position as deputy principal of Redlynch State School to work as campaign manager for Lesley Clark. I would like a copy of Ms Mauger's leave application form.*
4. By letter dated 6 December 2007, DETA advised the applicant that it was continuing to process the FOI Application and pursuant to section 27B of the FOI Act requested an extension of time in which to make its decision.
5. By email sent on 17 December 2007, the applicant advised DETA that she agreed to an extension of time until 21 January 2008.

¹ This list is taken from the summary on pages 7 and 8 of the FOI Application.

6. By letter dated 7 January 2008, I advised the applicant that:
 - DETA had been granted an extension of time until 29 January 2008 in which to finalise its decision
 - if DETA did not advise the applicant of its decision by 29 January 2008, the applicant would be entitled to make a fresh application to this Office for external review
 - in the meantime this Office would close its file.
7. DETA did not advise the applicant of its decision by 29 January 2008 and as a consequence are deemed to have made a decision on that date refusing access to the documents sought in the FOI Application (**Deemed Refusal of Access Decision**).
8. By email sent on 22 February 2008, the applicant advised this Office that she had not received any correspondence from DETA (**External Review Application**).
9. By letters dated 6 March 2008, I advised DETA and the applicant that the applicant's External Review Application had been accepted.²

Decision under review

10. The decision under review is the Deemed Refusal of Access Decision.

Steps taken in the external review process

11. By letter dated 27 March 2008, DETA advised this Office that it had located a number of documents responsive to the FOI Application, some of which it was prepared to fully release to the applicant.
12. By letter dated 2 April 2008, DETA confirmed that of the responsive documents referred to above:
 - 5,328 documents could be fully released to the applicant
 - the remainder qualify for either exemption from disclosure under sections 44(1) and 43(1) of the FOI Act or are excluded from the operation of the FOI Act in accordance with section 27(3) of the FOI Act.
13. Between April 2008 and June 2008, the applicant advised this Office that she had not yet received the documents which DETA had agreed to release to her. These emails were forwarded to DETA.
14. By email dated 5 August 2008, the applicant confirmed that DETA had provided her with copies of the relevant 5,328 documents.
15. By letter dated 30 September 2008, I provided the applicant with a preliminary view in respect of DETA's claims for exemption from disclosure of certain information under sections 27(3) and 43(1) of the FOI Act (**First Preliminary View**).
16. By email dated 27 October 2008, the applicant responded to the First Preliminary View.
17. By letter dated 30 September 2008, I sought further clarification from DETA in respect of its claim for exemption under section 44(1) of the FOI Act.

² As this External Review Application was not received by the Office in the same month that the related file (210411) was closed, a new reference number was allocated to this review.

18. By letter dated 14 October 2008, DETA responded to my letter at 17 above.
19. By letter dated 22 December 2008, I confirmed the applicant's acceptance of the First Preliminary View.
20. By letter dated 21 January 2009, I provided the applicant with a preliminary view regarding DETA's application of section 44(1) of the FOI Act and the sufficiency of its searches for documents responsive to the FOI Application (**Second Preliminary View**).
21. By emails dated 2 February 2009, 9 February 2009, 11 February 2009, 18 February 2009 and 4 March 2009, the applicant:
 - provided submissions to this Office in response to the Second Preliminary View
 - sought clarification in respect of various issues related to the review
 - indicated that she did not agree with the Second Preliminary View in respect of the sufficiency of DETA's searches.
22. By correspondence dated 2 February 2009, 11 February 2009 and 23 February 2009, I responded to the applicant's requests for clarification noted above.
23. In reaching a decision in this matter, I have taken the following into account:
 - the applicant's FOI Application and External Review Application
 - DETA's Deemed Refusal of Access Decision
 - file notes of telephone conversations between staff members of the Office and DETA
 - written correspondence provided to the Office by DETA throughout the course of the external review
 - written correspondence provided to the Office by the applicant throughout the course of the external review
 - a file note of a telephone conversation between a staff member of the Office and the applicant
 - relevant provisions of the FOI Act and other legislation, previous decisions of the Information Commissioner of Queensland and the decisions and case law from other Australian jurisdictions as identified in this decision.

Jurisdiction

24. During the course of the review the applicant has reiterated the following points:
 - a) a number of the documents DETA released to her are illegible/contain obscured matter or are poor photocopies. The applicant requests that I direct DETA to either provide her with copies of the documents or the opportunity to view the originals
 - b) DETA has not provided her with access to all the documents it said it would release to her

- c) duplicates of documents which have already been released to her should also be provided to her³
- d) she is concerned about the conduct of DETA officers and previous officers of this Office in relation to the handling of her FOI applications.⁴

25. In respect of a) and b) above, I note that:⁵

- the Office does not have jurisdiction under the FOI Act to direct DETA in the manner requested by the applicant
- DETA has confirmed it has provided the applicant with a copy of all relevant documents
- any concerns about the quality of documents provided or the non-receipt of documents should be pursued directly with DETA.

Scope of the FOI Application

26. In response to the First Preliminary View, the applicant advised that access is sought (by inspection) to the following documents:

1. specific documents that explained the 'secret reason' or the real reason why I had to be put on DWP⁶
2. file which is kept under lock in Lesley's room
3. the incomplete, work-in-progress version provided to Mr Ryan on or around 8 September 2004
4. the file containing the falsified documents⁷
5. the 2421 documents⁸
6. the grievance stage 2 report
7. records of the Education Queensland communication in any other form with the Ombudsman
8. the original Cairns District Office report discussed by Kim and Lesley in document 2875
9. the original documentation of all 'reviews'/'investigations' by external agencies, concerning and related to me
10. all remaining pages of the Verifact report
11. records of all action taken by Cairns District Office in response to Verifact report
12. documents that record the process that Education Queensland has been conducting concerning me since Louise Rosemann met officers from the Ethical Conduct Unit of Education Queensland on 23 December 2006
13. notes of the above meeting and all other meetings/discussions with the officers of the Ombudsman's department and the CMC
14. letters, emails and all forms of communication with external agencies including the Ombudsman's department and the CMC
15. a copy of Ms Mauger's leave application form⁹
16. the brief given to Mr Edwards in late 2006

³ These documents were identified by the Office as duplicates of documents already under consideration in the review. I have notified the applicant that she may access copies of the duplicates if required.

⁴ As the Office has no jurisdiction to investigate such claims, the applicant's concerns about these matters have been forwarded to the appropriate investigative body.

⁵ As previously communicated to the applicant.

⁶ This issue was the subject of an earlier FOI application to DETA.

⁷ This issue was addressed in an earlier external review of the Office.

27. I have carefully considered the terms of the FOI Application and note that the applicant has previously made FOI applications to DETA seeking access to many of the same or similar documents. I also note the applicant's submission that she does not consider DETA's past searches to have been sufficiently thorough.
28. To access a document under the FOI Act an applicant must make an application in accordance with the requirements of section 25(2) of the FOI Act. In doing so the applicant is required to '*provide sufficient information concerning the document to enable a responsible officer of the agency or the Minister to identify the document*'.¹⁰ Accordingly, the scope of an FOI application is determined by the terms of the application. Although the scope can be amended by a subsequent agreement between the applicant and the agency whilst processing the application, an applicant cannot unilaterally enlarge the scope of an FOI application.¹¹

Issues in the Review

29. DETA submits that it has undertaken all reasonable steps to find the documents sought by the applicant in the FOI Application.
30. The applicant does not accept the adequacy of DETA's searches and states she has reasonable grounds (in the context of a public interest disclosure) for believing that in some cases, DETA did not conduct any searches.
31. Accordingly, the issue to be determined in this review is whether, in respect of the documents still sought by the applicant, there are reasonable grounds for DETA:
- to be satisfied that the documents sought by the applicant do not exist
 - to refuse access to these documents under section 28A(1) of the FOI Act.

Relevant law

32. Sections 28A(1) and (2) of the FOI Act provide:

28A Refusal of access—documents nonexistent or unlocatable

- (1) *An agency or Minister may refuse access to a document if the agency or Minister is satisfied the document does not exist.*

Example—

documents that have not been created

- (2) *An agency or Minister may refuse access to a document if—*

⁸ In the applicant's letter of 27 October 2008, she also requested access to original documents 2361 and 2469. However, as these documents were not sought in the FOI Application, they fall outside the scope of this review.

⁹ As noted in an email to DETA dated 27 November 2007, the applicant withdrew her application for this document.

¹⁰ Section 25(2)(b) of the FOI Act.

¹¹ In this respect, I note that on several occasions during the course of this review, the applicant has requested access to documents which fall outside the scope of the FOI Application and this external review. While such requests do not form part of the matters for determination in this review, given the broad and extensive searches which DETA has undertaken, I note that if these documents existed, it is likely that they too would have been located as a result of DETA's searches.

- (a) *the agency or Minister is satisfied the document has been or should be in the agency's or Minister's possession; and*
- (b) *all reasonable steps have been taken to find the document but the document can not be found.*

Examples—

- *documents that have been lost*
- *documents that have been disposed of under an authority given by the State Archivist.*

33. In *PDE and the University of Queensland*¹² (**PDE**) the Acting Information Commissioner indicates that:¹³

*Sections 28A(1) and (2) of the FOI Act address two different scenarios faced by agencies and Ministers from time to time in dealing with FOI applications: circumstances where the document sought does not exist and circumstances where a document sought exists (to the extent it has been or should be in the agency's possession) but cannot be located. In the former circumstance, an agency or Minister is required to satisfy itself that the document does not exist. If so satisfied, the agency or Minister is not required by the FOI Act to carry out all reasonable steps to find the document. In the latter circumstance an agency or Minister is required to satisfy itself that the document sought exists (to the extent that it has been or should be in the agency's possession) **and** carry out all reasonable steps to find the document before refusing access.*

'Satisfied'

34. In *PDE* the Acting Information Commissioner also considered how an agency is to satisfy itself as to the non-existence of documents sought by an applicant and found that to be satisfied that a document does not exist, it is necessary for the agency to rely upon its particular knowledge and experience with respect to various key factors including:

- the administrative arrangements of government
- the agency structure
- the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
- the agency's practices and procedures (including but not exclusive to its information management approach)
- other factors reasonably inferred from information supplied by the applicant including:
 - the nature and age of the requested document/s
 - the nature of the government activity the request relates to.

35. To be satisfied under section 28A(2) of the FOI Act that a document can not be found, an agency must take all reasonable steps to locate a document. Section 28A(1) is silent on the issue of how an agency is to satisfy itself that a document does not exist. When proper consideration is given to the key factors discussed at paragraph 345 above and a conclusion reached that the document sought does not exist, it may be unnecessary for the agency to conduct searches. However, where searches are used

¹² (Unreported, Office of the Information Commissioner, 9 February 2009).

¹³ At paragraph 34.

to substantiate a conclusion that the document does not exist, the agency must take all reasonable steps to locate the documents sought.¹⁴

36. Therefore, in applying section 28A(1) of the FOI Act, it is relevant to ask whether:
- there are reasonable grounds to be satisfied that the requested documents do not exist
 - as DETA used searches to satisfy itself that the requested documents sought do not exist, it is necessary to consider whether DETA has taken all reasonable steps to find these documents.

Applicant's Submissions

37. During the course of this review, the applicant has made a number of written submissions to the Office. I have summarised those submissions as follows:

- The applicant considers her FOI Application requests access to specific documents which it should be obvious to FOI officers are missing.
- The applicant believes 'falsified' documents have been removed from her files and placed on new files.
- The applicant has reasonable grounds to believe that DETA's search efforts in response to earlier FOI applications have been less than reasonable, for example she states:

My feeling is that the documents that I requested in September 2003 have never really been searched for.

- The applicant requests that DETA liaise on her behalf with other government departments to locate documents which may have been provided to those departments by staff of DETA.

DETA's Submissions

38. DETA submits that all documents held by it (relating to the applicant) that were created or received prior to 23 March 2006 were the subject of the applicant's earlier finalised FOI applications and any issues surrounding those documents have been resolved.

39. Upon receipt of the FOI Application, DETA required searches to be conducted for all documents concerning the applicant that were created or received by DETA between 23 March 2006 and 27 September 2007 by the following officers and their respective units/branches/divisions:

- Deputy Director-General, Education
- Deputy Director-General, Corporate Strategy and Resourcing
- Assistant Director-General, Education Queensland
- Assistant Director-General, Shared Services
- Assistant Director-General, Strategic Human Resources
- Director, Ethical Standards Unit
- Regional Executive Director, Far North Queensland Region
- Executive Director Schools, Cairns Coastal District Office
- Director, Legal and Administrative Law Branch

¹⁴ See PDE.

40. DETA also requested that searches be conducted by the Office of the Minister for Education, Training and the Arts.
41. As a consequence of these searches, DETA located 5,454 documents and fully released the majority of those documents (5,238) to the applicant.
42. In summary, DETA submits that:
 - all documents held by it relating to the applicant and captured by the FOI Application are contained within the 5,454 located documents
 - all reasonable steps have been taken to locate all documents sought by the applicant, but some documents cannot be located because they were either never created or do not exist in DETA's possession.

Findings on material questions of fact

43. Having considered the parties' submissions, I make the following findings of fact:
 - the applicant suspects the existence of further documents and is distrustful of DETA's handling of her FOI applications
 - in some cases the applicant requests copies of documents which have been found to qualify for exemption under the FOI Act, however the applicant has not contested the relevant exemption claim
 - although the applicant does not consider that DETA's searches have been adequate, her submissions on this point:
 - relate to earlier reviews and comprise her reasons for believing that previous FOI applications were handled inappropriately
 - do not address the adequacy of DETA's searches for documents responding to the current FOI Application
 - DETA has conducted extensive searches for any document within its possession concerning the applicant
 - a significant number of documents were located by DETA in its searches and provided to the applicant.

Are there reasonable grounds to be satisfied that the requested documents do not exist?

44. For DETA to determine whether there are any additional documents responding to the FOI Application and to satisfy itself that the documents sought by the applicant do not exist, it is appropriate for DETA to have regard to the key factors that relate to the FOI Application. In this instance those key factors include:
 - the nature of the request as well as the dates specified
 - the location at which the records would have been recorded and stored
 - any alternative locations or systems in which the documents sought by the applicant may be stored.
45. I accept that in view of the applicant's previous freedom of information applications and the way in which the current FOI Application is framed, DETA undertook broad searches in all locations where it considered documents responsive to the FOI Application would exist.

46. In the circumstances, I am satisfied that:
- DETA has taken all reasonable steps to find documents relating to the applicant
 - any documents sought by the applicant in the current FOI Application which have not been provided to the applicant during the course of the review or do not qualify for exemption under the FOI Act, do not exist for the purposes of section 28A(1) of the FOI Act.

DECISION

47. For the reasons set out above, I set aside the decision under review and in substitution find that DETA is entitled to refuse access to the documents sought in the FOI Application under section 28A(1) of the FOI Act on the basis that any additional documents sought do not exist.
48. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

Assistant Commissioner Henry

Date: 9 March 2009