



Decision and Reasons for Decision

Application Number: 210529

Applicant: Dr John Pemberton

Respondent: University of Queensland

Decision Date: 23 September 2008

Catchwords: **FREEDOM OF INFORMATION - section 77(1)(a) of the *Freedom of Information Act 1992 (Qld)* - Commissioner may decide not to deal with an application for review - whether application for review is lacking substance**

FREEDOM OF INFORMATION - sufficiency of search - whether reasonable grounds to believe further relevant documents are in the possession or under the control of the agency

FREEDOM OF INFORMATION - section 25(3) of the *Freedom of Information Act 1992 (Qld)* - documents which post-date the freedom of information application

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REASONS FOR DECISION

Summary

1. In this decision, I have found that the application for review is lacking substance and therefore, this is an appropriate case in which to exercise my discretion under section 77(1)(a) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) not to deal with the application for review.

Background

2. By letter dated 24 January 2008 the Applicant applied to the University for access to the following (**FOI Application**):
 - all documents concerning the death of Dr Zhou, from his initial appointment until the date of the FOI Application, particularly documents showing:
 - the exact time and date when Dr Zhou returned to China
 - the precise date and location of his death
 - any information on the cause of his death
 - a list of viruses held by the Lions Immunology Research Centre (**Research Centre**) for the period 1991 to the date of the FOI Application including viruses held at other sites used by members of the Research Centre
 - details of any accidents or incidents within or associated with the Research Centre from 1991 to the date of the FOI Application
 - a list of all viruses held within the Molecular Biosciences Building of the University from the period 1991 to the present time
 - details of any accidents or incidents involving viruses in the Molecular Biosciences Building from 1991 to the present time including the following information:
 - the day and date of the incidents
 - the names of the viruses
 - who was infected or affected
 - whether any of those infected suffered or still suffer the after effects
 - any documents regarding a coronial inquest into the death of Dr Zhou.
3. On 17 February 2008, the Applicant reached agreement with the University to amend the scope of his FOI Application as follows:
 - the request for documents concerning Dr Zhou's death is limited to Dr Zhou's medical records or any documents discussing Dr Zhou's 'pre-existing condition'. Specifically, information relating to Dr Zhou's salary, superannuation entitlements and memorial service were excluded from the terms of the FOI Application
 - the request for lists of viruses is limited to a list of current viruses held in the former Lions Immunology Research Centre and the Molecular Biosciences Building as at the date of the FOI Application.¹
4. By letter dated 4 April 2008, Mr A Zgrajewski² informed the Applicant that he had located 451 folios in response to the FOI Application. With respect to those folios, Mr Zgrajewski decided (**Original Decision**) to:

¹ This information was extracted from Mr Zgrajewski's decision dated 4 April 2008.

² Freedom of Information Officer at the University.

- grant full access to 173 folios
- grant partial access to 278 folios because they contain matter which is:
 - exempt from disclosure pursuant to section 44(1) of the FOI Act
 - not relevant to the FOI Application and can therefore be deleted pursuant to section 27(3) of the FOI Act.

5. In the Original Decision, Mr Zgrajewski also made the following statements:

- *The only documents relating to the death of Dr Zhou is a death certificate. All other documents on his personnel file relate to his appointment as a University employee, salary, superannuation entitlements and a memorial service following his death*
- *A search of Occupational Health and Safety records was unable to identify any incident or accident reports that involve viruses used in the Molecular Biosciences Building.*
- *As previously advised, the University is unaware of any coronial inquest into Dr Zhou's death. It follows that the University had no records of this inquest.*

6. By letter dated 21 April 2008, the Applicant applied to the University for internal review of the Original Decision on the following grounds (**Internal Review Application**):

- inadequate searches were conducted for documents relating to accidents or incidents involving viruses within the Molecular Biosciences Building
- additional documents relating to the death of Dr Zhou such as accompanying correspondence to the death certificate should have been located by the University.

7. By letter dated 12 May 2008, Mr D Porter³ responded to the Internal Review Application as follows:

- Dr Zhou's death certificate was provided to the University as an attachment to a letter concerning his superannuation benefits⁴ and therefore, that letter was not within the scope of the FOI Application
- apart from the death certificate, the University does not hold any documents concerning Dr Zhou's medical records or 'pre-existing condition'
- additional inquiries were made and further searches were conducted for documents relating to any accidents or incidents involving viruses within the Molecular Biosciences Building from 1991 to present
- the Occupational Health and Safety Unit observed as follows with respect to this part of the FOI Application:

A search for relevant records was undertaken by 3 senior officers in the Occupational Health and Safety Unit, which comprises a search of all electronic records back to 1995 and a manual search of all hard copy reports from 1991 to 1995;

Any record that mentioned 'virus' as well as any record with 'biological agent' were provided to the FOI Officer to consider as part of [the] FOI application;

There are no incident reports for an incident of Hendra Virus from 1997 as suggested because in 1997 the Occupational Health and Safety Unit did not have any biological safety resources and most issues were dealt with by the Institutional Biosafety Committee.

³ Secretary and Registrar at the University.

⁴ On 17 February 2008, the FOI Application was amended so as to exclude any documents relating to Dr Zhou's superannuation entitlements, salary and memorial service.

- the FOI Officer searched the Biosafety Committee minutes for 1997 and identified a number of items relating to Equine Morbillivirus (commonly known as **Hendra Virus**). However, the minutes did not relate to an incident or accident and therefore, those documents fall outside the scope of the FOI Application
 - the FOI Officer conducted an additional thorough search of Records Management Services and could not find any documents relating to incidents involving the Hendra Virus
 - the FOI Officer did locate a file which contained information concerning an investigation by the Criminal Justice Commission into a complaint the Applicant had made to them regarding the Hendra Virus but those documents are not within the scope of the FOI Application because they do not relate to specific incidents or accidents involving the Hendra Virus.
8. On the basis of the observations, inquiries and searches set out in paragraph 7 of this decision, Mr Porter issued the Internal Review Decision in which he found that:
- the University holds no further documents responsive to the FOI Application
 - the University has discharged its obligations under the FOI Act
 - the Original Decision should be affirmed.
9. By letter dated 28 May 2008, the Applicant applied to this Office for external review on the following grounds (**External Review Application**):
- inadequate searches were conducted by the University for documents concerning the death of Dr Zhou
 - the University has produced no documents to support the explanation of Dr Zhou's death given by Professor Ian Frazer in The Australian Article
 - the University should hold documents relating to meetings concerning, and copies of documents supplied to The Australian for the purpose of publishing The Australian Article⁵.

Steps taken in the preliminary assessment

10. By letter dated 5 June 2008, this Office informed the Applicant that preliminary inquiries were being made of the University regarding the External Review Application and that this Office would contact him again once those inquiries were complete.
11. By letter dated 10 June 2008, the University provided this Office with copies of documents relevant to the FOI Application, including all correspondence exchanged between the Applicant and the University during the processing of the FOI Application.
12. By letter dated 26 August 2008, I informed the Applicant that I had formed the view that his External Review Application was lacking substance on the following bases:
- there are no reasonable grounds to believe that the following documents are in the possession or under the control of the University:
 - additional documents concerning the death of Dr Zhou, or
 - documents relating to Professor Frazer's comments in The Australian Article

⁵ The article which appeared in on pages 1 and 6 of The Weekend Australian on 3 May 2008. The Applicant provided this Office with a copy of the Australian Article under cover of the External Review Application.

- any documents produced in response to the FOI Application which led to the publication of The Australian Article (if such documents in fact exist) would post-date the FOI Application and are therefore, not within the scope of the FOI Application due to the operation of section 25(3) of the FOI Act.
13. Based on the reasons set out in paragraph 12 of this decision, I informed the Applicant that I considered this to be an appropriate case in which to exercise my discretion under section 77(1)(a) of the FOI Act not to deal with the External Review Application (**Preliminary Assessment**).
 14. In my letter dated 26 August 2008, I invited the Applicant, if he did not agree with the Preliminary Assessment, to provide me with submissions in response. I specifically requested the Applicant to provide any evidence he had in his possession to substantiate his beliefs about biosafety problems in University laboratories which he alleges contributed to Dr Zhou's death.
 15. By letter dated 1 September 2008⁶, the Applicant made submissions in response to the Preliminary Assessment and provided a document in support of his contentions regarding biosafety problems at the University.

Findings

16. The External Review Application:
 - questions the adequacy of searches undertaken by the University for documents concerning the death of Dr Zhou
 - contends that the University holds documents which would further explain Professor Frazer's comments in The Australian Article about Dr Zhou's state of health
 - contends that the University holds documents which were generated in response to the FOI Application which then led to the publication of The Australian Article.
17. The Applicant's submissions in relation to the existence of additional documents concerning Dr Zhou and Professor Frazer's comments in The Australian Article raise the issue of **sufficiency of search**.
18. The Applicant's submissions with respect to documents leading to the publication of The Australian Article require analysis of the **scope of the FOI Application**.
19. I have examined both of these issues below.

Sufficiency of search

20. In reviews in which sufficiency of search is raised, the following questions are relevant:
 - (i) are there reasonable grounds to believe that the requested documents exist and are documents of the agency as that term is defined in section 7 of the FOI Actand if so
 - (ii) have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of the review.⁷

⁶ Received in this Office on 11 September 2008.

Reasonable grounds

21. In determining whether there are reasonable grounds to believe that additional relevant documents are in the possession or under the control of an agency, the Information Commissioner has previously indicated⁸ that an applicant will ordinarily need to:
- explain fully their grounds for believing that the respondent agency holds additional responsive documents
 - disclose any relevant documentary or other evidence which tends to support the existence of reasonable grounds for such a belief.

Documents concerning the death of Dr Zhou

22. In the External Review Application, the Applicant indicates that he is seeking access to documents that will '*...shed light on the mysterious and unexpected death of Dr Zhou*'. The Applicant also makes the following assertions:

Dr Zhou was a research scientist of major national and international significance. His rapid and mysterious death should have set off a chain of events including intense scrutiny of what had happened.

Dr Zhou's death was the culmination of a series of events surrounding biosafety problems in the laboratories ... at the University of Queensland St. Lucia campus.

Whoever or whatever killed Dr Zhou is still out there.

23. The Applicant contends that⁹:
- Dr Zhou's death must have been investigated by the University because he died as a result of being infected with a virus or bacterium in his work place,
- and therefore,
- further documents exist in relation to Dr Zhou's death that have not been disclosed to him.
24. The Applicant opines that Dr Zhou's death was the result of infection by a virus or bacterium which occurred in a University laboratory because of poor biosafety practices.
25. The Applicant reasons that the fact that Dr Zhou's death certificate identifies his cause of death as '*septic shock*' demonstrates that Dr Zhou was infected with a virus or bacterium in his work place.
26. Additionally, in support of his contentions, the Applicant provided this Office with a copy of a letter dated 24 September 1997 which was sent to Mr Jim Holt, Secretary of the University's Biosafety Committee by Professor John Mackenzie, Head of the University's Bioscience Department (**Professor Mackenzie Letter**). I have examined this letter and note that it concerns the following:

⁷ *Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464 at paragraphs 18-19. Referred to as *Shepherd* in this decision.

⁸ In *Ainsworth; Ainsworth Nominees Pty Ltd and Criminal Justice Commission; A (Third Party); B (Fourth Party)* (1999) 9 QAR 284 at paragraph 46.

⁹ Set out in his submissions dated 1 September 2008.

- possible contamination (from an unknown source) with the Hendra Virus of stocks of the 'J' and Mossman viruses held by the University
 - laboratory practices and testing carried out by the University on the virus stocks
 - inactivation of all stocks of 'J' and Mossman viruses
 - measures taken to confirm whether virus stocks were contaminated by the Hendra Virus.
27. The Professor Mackenzie Letter does not provide any evidence to suggest that the laboratory and biosafety practices at the University contributed to the death of Dr Zhou. Rather, it concerns an isolated incident which occurred some time prior to 19 September 1997, with respect to unconfirmed contamination of discrete virus stocks.
28. There is no evidence in the Professor Mackenzie Letter:
- that any human was contaminated with the virus concerned
 - which suggests that Dr Zhou was involved with the laboratories or viruses concerned.
29. There is no evidence before me to support the Applicant's contention that Dr Zhou's death was the result of any biosafety issues in University laboratories or that he was '*infected in the work place*'.
30. I also note that Dr Zhou's death did not occur in a University laboratory or on University premises— Dr Zhou died in China in March 1999.
31. I consider that in circumstances where a University employee (or an employee of any organisation for that matter) dies while situated in another country (not for work related purposes) the employer would not ordinarily be expected to conduct an investigation into that employee's death. It follows that I consider it is unreasonable to expect an employer to generate any documents in relation to the death of an employee who died while overseas for non-work related purposes.¹⁰
32. Ultimately, the Applicant has not provided me with any evidence to support his allegation that the University was complicit in the death of Dr Zhou due to biosafety problems in its laboratories. In the absence of any such evidence, I am satisfied that the Applicant's allegations are unsubstantiated and do not establish any reasonable grounds to believe that the University holds any further documents relating to the death of Dr Zhou.

Documents relating to Professor Fraser's comments in the Australian Article

33. In the External Review Application, the Applicant contends that:

Evidently Professor Fraser knew something that Dr Zhou's wife ... did not know,

The university has produced no documents to support the explanation of Dr Zhou's death given by Professor Fraser to the Weekend Australian.

34. I have examined The Australian Article and note that Professor Frazer is quoted as saying that Dr Zhou suffered bouts of '*tiredness*'.

¹⁰ I do however acknowledge that some personnel documents may be generated by the employer to show that the employee is no longer in employment by the organisation. However, the scope of the applicant's FOI Application did not extend to such documents.

35. In the External Review Application, the Applicant did not identify any types of documents which he believes the University should hold in relation to Professor Frazer's comments in the Australian Article.
36. On the information available to me, I have not been able to identify any documents which I consider it reasonable to believe the University would have in its possession or under its control in this regard. Generally speaking, I would not expect a colleague to keep records about the state of health of a fellow colleague.

Summary

37. Based on the information before me, I am satisfied that there are no reasonable grounds to believe that the University has in its possession or under its control:
- further documents concerning the death of Dr Zhou
 - documents which relate to or further explain Professor Frazer's comments in The Australian Article about Dr Zhou's state of health.
38. As I have found that there are no reasonable grounds to believe any additional relevant documents are in the possession or under the control of the University, it is unnecessary for me to address the second question posed in *Shepherd*.¹¹

Scope of the FOI Application

39. In the External Review Application, the Applicant submits that The Australian Article was:
- ...cobbled together in response to my FOI application. If this was stage managed, then the University of Queensland should have working documents relating to meetings and any possible written documents supplied to the Australian Newspaper.*
40. I have interpreted that submission as a request by the Applicant for access to documents which, following receipt of the FOI Application, were generated by the University and resulted in the publication of The Australian Article.
41. I am satisfied that any such documents would fall outside the scope of the FOI Application due to the operation of section 25(3) of the FOI Act. That section provides:

25 How applications for access are made

...

(3) The application is taken only to apply to documents that are, or may be, in existence on the day the application is received.

42. Any documents which the University generated following receipt of the FOI Application and which led to the publication of The Australian Article (if such documents in fact exist) would **post-date** the FOI Application and are therefore, outside the scope of the FOI Application.

¹¹ See paragraph 20 of this decision.

Section 77 of the FOI Act

43. This section relevantly 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 the application, or the part of the application, is frivolous, vexatious, misconceived or lacking substance; or

...

44. I am satisfied that the External Review Application is lacking substance based on the following:

- there are no reasonable grounds to believe that additional documents concerning the death of Dr Zhou or relating to Professor Frazer's comments in The Australian Article are in the possession or under the control of the University
- documents produced in response to the FOI Application which led to the publication of The Australian Article (if such documents in fact exist) would post-date the FOI Application and are therefore, not within the scope of the FOI Application due to the operation of section 25(3) of the FOI Act

45. Accordingly, pursuant to section 77(1)(a) of the FOI Act, I decide not to deal with the External Review Application.

DECISION

46. Pursuant to section 77(1)(a) of the FOI Act, I decide not to deal with the External Review Application because I am satisfied that it is lacking substance on the following bases:

- there are no reasonable grounds to believe that additional documents concerning the death of Dr Zhou or documents relating to Professor Frazer's comments in The Australian Article are in the possession or under the control of the University
- any documents produced in response to the FOI Application which led to the publication of The Australian Article (if such documents in fact exist) would post-date the FOI Application and are therefore, not within the scope of the FOI Application due to the operation of section 25(3) of the FOI Act.

47. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

Assistant Commissioner Corby

Date: 23 September 2008