

Information Sheet - Missing documents

Sometimes, an access applicant believes that there are (or should be) documents held by an agency which it has not located and processed under the FOI Act. In effect, the applicant is claiming that the agency has not made sufficient searches or inquiries to locate all documents which fall within the terms of the FOI access application.

The questions that the Commissioner must answer in a 'sufficiency of search' review are:

- whether there are reasonable grounds to believe that the documents (which the applicant believes have not been located by the agency) do exist and are documents of the agency; and if so,
- whether the search efforts made by the agency to locate those documents have been reasonable in all the circumstances of the case.

What is a 'document of an agency'?

The FOI Act defines a 'document of an agency' in s.7. The definition includes:

- a document in the possession or under the control of the agency, whether it was created by the agency or received by the agency from some other source;
- a document to which the agency is entitled to access (even if that document is not actually in its possession at the time); and
- a document held by an officer of the agency in his or her official capacity.

Documents in an agency's filing or record system, and on the agency's computer databases, would usually be documents of the agency. So would files or documents created or held by officers in the course of their work (including their official diaries).

What is involved in a 'sufficiency of search' review?

In 'sufficiency of search' reviews, the Commissioner will often ask the applicant to provide the following types of information:

- (a) details of the applicant's reasons for believing that the agency has additional documents that fall within the terms of the FOI access application;
- (b) copies of any evidence which supports the applicant's claims (such as an agency document which refers to the existence of other documents that appear to fall within the terms of the FOI access application); and
- (c) details of any further searches or inquiries which the applicant believes the agency could reasonably be asked to make in an effort to locate additional documents, including any information the applicant has about where such documents could, or should, be held.

The Commissioner can then:

- (a) require the agency to conduct further searches, or make further inquiries;
- (b) make further inquiries directly to officers or former officers of the agency, or to other people who may have relevant information;
- (c) require the agency, or specified officers, to provide evidence about the alleged additional documents.

What are the possible outcomes of a 'sufficiency of search' review?

Not all 'sufficiency of search' applications result in the applicant being given access to additional documents. There are a number of possible outcomes:

- The agency may locate some or all of the additional documents the applicant claims should exist. The Commissioner may then make a decision on access to those documents.
- The Commissioner may be satisfied that there are no reasonable grounds to believe that the agency has possession or control of any additional documents, after the agency has made additional searches and inquiries, and/or explained the reasons for not having documents the applicant believes it should have.
- Additional documents may exist, but have been legitimately transferred to another agency. In that case, those documents are no longer 'documents of the agency' to which the applicant applied, and that agency cannot be required to give the applicant access.
- Additional documents may exist, but have never been in the agency's possession, and the agency has no right of access to them. This could include documents held by an independent consultant hired by the agency. Some documents, such as the consultant's final report, might be held by the agency, but working documents may remain the property of the consultant (and be outside the application of the FOI Act).
- Additional documents may once have existed, but have been disposed of by the agency. No agency could keep all its documents indefinitely, and many documents become irrelevant to operational requirements with the passage of time. The State Archivist authorises Retention and Disposal schedules, covering the various categories of documents held by agencies and local councils, which permit the destruction of various categories of documents after a specified time period has elapsed.
- Further documents may have existed, and should still exist, in the agency's possession, but they cannot be located. If the Commissioner is satisfied that all reasonable searches and inquiries have been made by the agency to locate the documents, and there is no further evidence as to their present whereabouts, the Commissioner would make a finding to that effect.
- An applicant may believe that documents are covered by the terms of an access application, but the agency contends that they are not. The Commissioner will decide that issue according to a fair and objective reading of the terms of the relevant access application. If the alleged additional documents fall outside the terms of the access application, the agency would be entitled to require the applicant to lodge a fresh access application for the documents.
- An applicant may complain about missing documents, and inquiries establish that the documents do exist, but they came into the possession or control of the agency after the date the access application was made. Such documents fall outside the scope of the access application, and the agency would be entitled to require the applicant to lodge a fresh access application for the documents.

Further reading

If you want to read more about 'sufficiency of search' you can go to the Commissioner's website at www.infocomm.qld.gov.au. Some cases you might like to look at are:

- about the basic approach to 'sufficiency of search' issues: *Re Shepherd and Department of Housing, Local Government and Planning* (94007)
- about "documents of an agency": *Re Price and Nominal Defendant* (99003) at paragraph 18 and following; and *Re Holt and Reeves and Education Queensland* (98004) at paragraphs 18-28.

Information Sheets are introductory only. They deal with issues in a general way. Additional factors may be relevant in particular cases. Detailed consideration of the exemption provision is set out in the cases referred to in the Information Sheet. The Information Commissioner considers each case on its merits.

