



Parnell and Minister for Infrastructure and Transport [2011] AICmr 3 (11 April 2011)

Decision and reasons for decision of
Freedom of Information Commissioner, Dr James Popple

Applicant:	Sean Parnell
Respondent:	Minister for Infrastructure and Transport
Decision date:	11 April 2011
Application number:	MR10/00002
Catchwords:	Official documents of a Minister — Whether personal references can be official documents of a Minister — (CTH) <i>Freedom of Information Act 1982</i> s 4(1)
	Refusal of access to documents — Whether reasonable steps taken to find a document — (CTH) <i>Freedom of Information Act 1982</i> s 24A(1)

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Summary

1. I set aside the access refusal decision of the Minister for Infrastructure and Transport of 17 November 2010 and substitute my decision, under s 24A(1) of the *Freedom of Information Act 1982* (the **FOI Act**), refusing access on the basis that the documents sought do not exist.

Background

2. On 4 November 2010, Mr Sean Parnell, a journalist with *The Australian*, lodged a request under the FOI Act with Mr Anthony Albanese. Mr Parnell requested access to 'all personal or character references written and/or signed by Anthony Albanese on official letterhead since the 2007 election and held by the minister's office, either in paper or electronic form'.
3. The '2007 election' was held on 24 November in that year. Mr Albanese (the **Minister**) was the Minister for Infrastructure, Transport, Regional Development and Local Government from 3 December 2007 until 14 September 2010; since then he has been Minister for Infrastructure and Transport.
4. By email dated 17 November 2010, the Department of Infrastructure and Transport (the **Department**) advised Mr Parnell that the Department and the Minister would be unable to progress his request, on the basis that the documents sought were not covered by the FOI Act.
5. In correspondence with the Office of the Australian Information Commissioner (the **OAIC**), both the Department and the Minister's office confirmed that, although this decision was communicated to Mr Parnell by the Department, the decision was made by the Minister's FOI Coordinator on behalf of the Minister.
6. By email dated 22 November 2010, Mr Parnell sought IC review of this decision under s 54N of the FOI Act.

Decision under review

7. The decision under review is the decision made on behalf of the Minister, reported to Mr Parnell on 17 November 2010, to refuse to respond to Mr Parnell's request, on the basis that the documents sought were not covered by the FOI Act.
8. The Department characterised this decision as being 'an administrative response' and not 'a formal decision under the FOI Act'.¹ If Mr Parnell's request was not valid, because the documents sought were not covered by the FOI Act, then there was no IC reviewable decision for the purposes of Part VII of the Act. However, it is well established that it is within the power of

¹ Email from Department to OAIC, 2 December 2010.

a merit review body to decide whether its own jurisdiction has been enlivened.² Accordingly, I can consider whether Mr Parnell's request was validly made under the FOI Act and, if it was, conduct an IC review of the decision to refuse access.

9. As explained in [14] below, a personal reference signed by a minister can be a ministerial document for the purposes of the FOI Act. Accordingly the Minister's decision was 'a decision refusing to give access to a document in accordance with a request' and was, therefore, an access refusal decision (s 53A(a)). Access refusal decisions are IC reviewable decisions for the purposes of Part VII of the FOI Act (ss 54K(a) and 54L).

Application of FOI Act to ministerial documents

10. The right of access to documents under the FOI Act extends to an 'official document of a Minister' (s 11(1)(b)). Section 4(1) of the Act relevantly defines this term as 'a document that is in the possession of a Minister ... in his or her capacity as a Minister, being a document that relates to the affairs of an agency or of a Department of State'.
11. The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. Those Guidelines explain that:

The term does not extend to the personal documents of a minister or the minister's staff, documents of a party political nature, or documents held in the minister's capacity as a local member of parliament unless the correspondence concerns an agency within the minister's portfolio.³

Whether personal references can be official documents of a minister

12. In communicating the decision to Mr Parnell, the Department quoted from the definition of 'official document of a minister' in s 4(1), then used words similar to those I have quoted from the Guidelines, before concluding that the documents sought were not covered by the FOI Act.
13. The clear implication from the Department's email of 17 November 2010 is that the person making the decision on behalf of the Minister was of the view that *all* personal references signed by a minister must be personal documents of that minister, or held in the minister's capacity as a member of parliament, and therefore not official documents of a minister.

² *Adams and Tax Agents' Board* [1976] AATA 1; *Geary and Australian Wool Corporation* [1985] AATA 98; *Christie v Queensland Industry Development Corporation* (1993) 1 QAR 1. See also Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (2010), paragraph 10.8.

³ *Guidelines*, paragraph 2.17.

14. But this will not always be true. For example, a reference on ministerial letterhead in which a minister attests to the quality of a person's work within or for a department or an agency is likely to be an official document of a minister for the purposes of the FOI Act. It would be a document in the minister's possession in his ministerial capacity, and it would relate to the affairs of a department or an agency.
15. To determine whether the documents sought by Mr Parnell are official documents of the Minister, I decided that it would be necessary to see those documents. By letter dated 7 January 2011, the OAIC asked the Minister's office to provide a schedule of documents covered by Mr Parnell's request. The Minister's FOI Coordinator replied by letter dated 21 January, advising that she had conducted a search and that no such documents exist.

Whether reasonable steps taken to find a document

16. Section 24A(1) of the FOI Act relevantly provides:

24A Requests may be refused if documents cannot be found, do not exist or have not been received

Document lost or non-existent

- (1) An agency or Minister may refuse a request for access to a document if:
 - (a) all reasonable steps have been taken to find the document; and
 - (b) the agency or Minister is satisfied that the document:
 - (i) is in the agency's or Minister's possession but cannot be found; or
 - (ii) does not exist.

17. What will amount to 'all reasonable steps' will depend on the circumstances of each request. At a minimum an agency or minister should take comprehensive steps to locate a document, having regard to:
 - the subject matter of the documents
 - the current and past file management systems and the practice of destruction or removal of documents
 - the record management systems in place
 - the individuals within an agency who may be able to assist with the location of documents, and
 - the age of the documents.⁴

⁴ *Langer and Telstra Corporation Ltd* (2002) AATA 341.

18. By letter dated 31 January 2011, the OAIC sought further information from the Minister's FOI Coordinator about the search that had been conducted. She replied by letter dated 18 February:
- (a) I confirm that a search was undertaken for documents requested by Mr Parnell; these being 'all personal or character references written and/or signed by Anthony Albanese on official letterhead since the 2007 election and held by the minister's office, either in paper or electronic form' as per his FOI request dated 4 November 2010.
 - (b) I confirm that no such references exist, as per Mr Parnell's request dated 4 November 2010. This includes, as you suggest, documents on paper files, email in or out boxes, or those saved on an electronic or personal drive. The details of the search undertaken to locate documents described in Mr Parnell's request of 4 November 2010 are set out below:
 - The search was coordinated by myself, in consultation with the Chief of Staff and Minister's executive assistant.
 - A search of the Ministerial Office filing cabinet.
 - Searches of email accounts:
 - The Minister's;
 - The Chief of Staff's; and
 - The Executive Assistant's.
 - Searches of group drive locations in the Ministerial office:
 - The office shared drive on the Department network;
 - The Minister's drive on the Department network.
 - I checked with three former members of staff who left during the period between the 2007 election and early 2011. These individuals confirmed no written reference was provided for them.
 - Additionally, it is the office's policy to not provide written character or personal references.
 - (c) This was a thorough search of all places where such a reference might be kept, irrespective of whether such documents would be relevant for the purposes of FOI ...

Findings

19. For the purposes of s 24A(1), I am satisfied that:
- the Minister has taken all reasonable steps to locate any documents that he holds that fall within the scope of Mr Parnell's request; and
 - those documents do not exist.

In coming to this view, I consider significant the advice of the Minister's FOI Coordinator that it is the policy of the Minister's office 'to not provide written character or personal references'.

Decision

20. Under s 55K of the FOI Act, I set aside the Minister's decision of 17 November 2010. In substitution for that decision, I decide to refuse Mr Parnell's request under s 24A(1) because the requested documents do not exist.

James Popple
Freedom of Information Commissioner

11 April 2011

Review rights

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. The current application fee is \$777, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.