



'R' and Department of Immigration and Citizenship [2012] AICmr 32 (27 November 2012)

Decision and reasons for decision of
Privacy Commissioner, Timothy Pilgrim

Applicant: 'R'

Respondent: Department of Immigration and Citizenship

Decision date: 27 November 2012

Application number: MR12/00029

Catchwords: Freedom of Information — Whether reasonable steps taken to find documents — (CTH) *Freedom of Information Act 1982 s 24A (1)*
Freedom of Information — Public interest conditional exemption — personal information — (CTH) *Freedom of Information Act 1982 s 47F*

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Summary

1. I affirm the decision of the Department of Immigration and Citizenship (the **Department**) of 22 February 2012, to refuse the applicant access under the *Freedom of Information Act 1982* (the **FOI Act**). The Department took all reasonable steps to find documents falling within the scope of the applicant's request and correctly refused access to documents relating to third parties.

Background

2. On 17 November 2011, the applicant applied to the Department for access to documents it held about him. In particular the applicant requested access to:

A record of my application for refugee status under humanitarian in 1993. The accurate record of the results of federal court decision, in 1993 of my application for refugee status under humanitarian ground.
3. The Department made a decision on the applicant's freedom of information request which was released in two parts.
4. On 12 December 2011, the Department released the first part of its decision to the applicant. The Department identified six department files as falling within the scope of his request. Three files were released in full. Documents within two files were released with redactions to remove third party information under s 47F of the FOI Act, because they contained personal information relating to third parties. The applicant was refused access to one file under s 24A (b)(ii) of the FOI Act because the file no longer existed, as it had been destroyed.
5. On 19 December 2011, the Department released the second part of its decision to the applicant. The Department identified two department files and one set of case notes as falling within the scope of his request. The two department files and the case notes were released with redactions to remove third party information under s 47F of the FOI Act, because they contained personal information relating to third parties.
6. By email dated 24 January 2012, the applicant sought Information Commissioner review (IC review) of the Department's two original decisions under s 54N of the FOI Act.
7. On 25 January 2012, the applicant applied to the Department for an internal review.
8. On 22 February 2012, the Department made a decision on the applicant's internal review request. The Department identified more documents as falling within the scope of his request. The additional documents were released in full to the applicant. The Department varied its decision of 19 December 2011, by releasing further information from within two files that were considered exempt in part under s 47F of the FOI Act. One page was considered exempt under s 22 (1)(a)(ii) of the FOI Act as it was irrelevant to the request. The

Department upheld the 12 December 2011 decision and the remainder of the 19 December 2011 decision.

9. The Office of the Australian Information Commissioner confirmed that the Department had made an internal review decision dated 22 February 2012.
10. The IC review commenced on 9 August 2012.

Decision under review

11. The decision under IC review is the decision of the Department of 22 February 2012, to refuse the applicant's request. The applicant does not seek IC review of the documents released to him in full.

Whether reasonable steps taken to find a document

12. The applicant contends that the Department has failed to provide him with documents that it held, and which are within the scope of his request, because the Department conducted an inadequate search of its records or has refused to acknowledge the existence of the document. The applicant's focus has been on a Federal Court decision made in 1993 which he claims granted him refugee status on humanitarian grounds.
13. Section 24A (1) of the FOI Act 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.
14. The Australian Information Commissioner has issued Guidelines under s 93A of the FOI Act to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. The Guidelines explain that:

The FOI Act is silent about what an agency or minister must do in terms of searching for documents that may be relevant to a request. Agencies should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's environment. 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.

The Information Commissioner considers that, as a minimum, an agency should conduct a search by using existing technology and infrastructure to conduct an electronic search of documents, as well as making enquiries of those who may be able to help locate the documents.¹

The search conducted by the Department

15. The Office of the Australian Information Commissioner sought information from the Department about the searches it had conducted for documents containing the information sought by the applicant. The Department described its initial search as follows:
 - searches were made on the Department's systems such as its Integrated Client Service Environment (ICSE) database and its Total Records Information Management (TRIM) file management database
 - enquiries were made with the Department's litigation section in relation to any Federal Court decisions or orders regarding the applicant
 - a search on the internet was also made to search for a 1993 Federal Court decision relating to the applicant
16. The Department advised that refugee applications and decisions are recorded in TRIM files which typically consist of a hybrid of physical files and electronic documents stored in TRIM against the file reference number. In 1993, the period when the applicant lodged his application, file numbers were also recorded in TRIM, however the documents were solely physical files.
17. TRIM indicated that one departmental file was archived prior to being destroyed on 12 November 2002. No further searches were made for this file as the Department's contractor managing its records indicated the file was destroyed.
18. The Department's internet search and its litigation section were unable to locate the document as described by the applicant.

¹ Guidelines, [3.43] and [3.45], footnotes omitted.

Findings

19. Department files indicate that the applicant was a party to a legal proceeding under the name of *Zhang De Yong v Minister for Immigration, Local Government and Ethnic Affairs* [1993] FCA 489. These proceedings were brought by Zhang as representative proceedings on behalf of all people who had sought determination of their status as refugees pursuant to the Migration Act 1958.
20. The proceedings covered those people whose applications had been refused since 4 March 1992, and who had sought review of the decision to refuse their applications, which on or before 30 June 1993, again had been refused. As the applicant was refused refugee status at the time, his legal representative had listed him as a party. A copy of this decision was provided to the applicant.
21. The *Zhang case* dealt with issues of natural justice and did not address or decide upon the applicant's refugee status. The applicant has denied all knowledge of being a party to these proceedings and has reiterated his belief that a decision was made by the Federal Court of Australia in 1993, granting him refugee status on humanitarian grounds. The *Zhang case* is the only Federal Court of Australia proceeding dated in 1993 that the Department has been able to locate as within the scope of his request.
22. The Department located several Federal Court of Australia orders made in 2005, concerning the applicant's refugee status and copies of these have been provided to the applicant.
23. The applicant contends that in July 1993, the Federal Court of Australia made a decision, granting him refugee status on humanitarian grounds and that in August 1993, there was an order to release him from detention. The applicant asserts that the Department has a copy of this decision and that 'there was a deliberately cover up information of. The federal court proceeding in 1993.'
24. Documentation indicates that the applicant lodged an application for refugee status in April 1993, which was refused in May 1993. The applicant lodged an appeal in May 1993, which was refused in June 1993. In June 1993, a deportation order was issued against the applicant but it was not executed pending resolution of the *Zhang case*. For the same reason, documentation indicates the applicant was released from detention in August 1993, pending the outcome of the *Zhang case*. There is no indication that the Federal Court of Australia made a decision in 1993, about the applicant's refugee status.
25. In these circumstances it is unlikely that such a decision exists and as such, documentation released to the applicant supports the Department's view that the Federal Court of Australia decision he refers to cannot be located or does not exist.

26. The Department released all documentation it was able to locate as within the scope of the applicant's request, excluding material considered exempt or that did not exist.
27. The Department's initial search would not have been adequate on its own. As the Guidelines explain, an agency should also make enquiries of those who may be able to help locate the documents.² The additional searches that the Department undertook (enquiring of the litigation section and the Federal Court of Australia's internet website) met that requirement.
28. I make no criticism of the Department's action to destroy the file as it appears it was done in accordance with its Records Disposal Authority, as it was more than 10 years old. However, the Department indicated that this file had previously been released to the applicant prior to it being destroyed, with a number of exemptions applied. Given that the Department's contractor managing its records indicated the file was destroyed on 12 November 2002, I believe this explains why the Department was unable to locate the file.
29. For the purposes of s 24A (1) of the FOI Act, I am satisfied that:
 - the Department took all reasonable steps to find documents it held and which fell within the scope of the applicant's request, and
 - some of those documents:
 - were in the Department's possession but cannot be found, or
 - do not exist.

Personal privacy exemption (s 47F)

30. Section 47F (1) of the FOI Act provides:

47F Public interest conditional exemptions—personal privacy

General rule

- (1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

31. Section 4 of the FOI Act provides that personal information means 'information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.'
32. The Office of the Australian Information Commissioner guidelines explain that:

² *Guidelines*, [3.45].

The personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy.³ The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals. The test does not however amount to the public interest test of s 11A (5), which follows later in the decision making process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again when assessing the public interest balance.⁴

33. In its decisions dated 12 and 19 December 2011, the Department applied exemptions to some documents under s 47F of the FOI Act because the information related to third parties. The Department's decision of 22 February 2012 upheld the exemptions.
34. The applicant is seeking information exempt under s 47F of the FOI Act as he does not believe it is information relating to third parties, but that it solely relates to his personal information or information identifying the existence of the Federal Court of Australia decision made in 1993.
35. From the description of the documents provided by the Department, the information in the documents not provided to the applicant would be information recorded in a material form about individuals whose identities are apparent from that information.
36. Where exemptions have been applied, I am satisfied they contain personal information of third parties. The personal information ranges from a driver's licence, bank statement, property receipts, names and faxes belonging to third parties held in the same detention centre as the applicant. Also exempt is the personal information of third parties who requested ministerial intervention, whose names and details appear in the same schedule as that of the applicant. Case notes include the name and details of a third party not connected to the applicant. Other personal information exempt is the signatures of third parties who visited the detention centre where the applicant resided and visitor application forms to visit a detainee, other than the Applicant.
37. This information is not already well known, and is not otherwise publicly accessible.⁵ Disclosure of the personal information would lead to the third parties being identified. The third parties have not given consent to their personal information being released and could not be consulted due to absence of contact details. It is not reasonable to assume that the third parties would reasonably expect their personal information to be disclosed to the applicant.

3 See *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437.

4 *Guidelines*, [6.126].

5 *Guidelines* [6.127].

Findings

38. On this basis I agree that some documents contain information and/or opinions about individuals who are not the applicant, and are therefore conditionally exempt under s 47F of the FOI Act.

The public interest test (s 11A (5))

39. I must now consider whether disclosure of the personal information would be contrary to the public interest.
40. Section 11A (5) of the FOI Act provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest'.
41. Section 11B (3) of the FOI Act lists factors that favour access when applying the public interest test.⁶ The Guidelines include a non-exhaustive list of further factors that favour access.⁷ None of these factors are applicable to this IC review.

Findings

42. In this case the public interest in maintaining an individual's right to privacy outweighs any public interest that could be claimed in disclosure to the applicant.

Decision

43. Under s 55K of the FOI Act, I affirm the Department's decision of 22 February 2012.

Timothy Pilgrim
Privacy Commissioner

27 November 2012

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 \$816, 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.

6 These are whether access to the document would promote the objects of the FOI Act; inform debate on a matter of public importance; promote effective oversight of public expenditure; or allow a person to access his or her own personal information.

7 *Guidelines* [6.25].