



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>Gapsa and Department of Transport and Main Roads [2014] QICmr 38 (23 September 2014)</i></b>
<b>Application Number:</b>	<b>311929</b>
<b>Applicant:</b>	<b>Gapsa</b>
<b>Respondent:</b>	<b>Department of Transport and Main Roads</b>
<b>Decision Date:</b>	<b>23 September 2014</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – NONEXISTENT DOCUMENTS – policy, procedure and process documents – applicant contends further documents exist – whether all reasonable steps taken to locate documents but the documents do not exist – sections 47(3)(e) and 52(1)(a) of the <i>Right to Information Act 2009 (Qld)</i></b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied to the Department of Transport and Main Roads (**Department**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to a range of information about policies and procedures, including the closed merit selection process, relating to the Department of Transport and Main Roads Reform Process (**TMR Reform Process**).
2. The Department decided to grant full access to 114 pages of documents located in response to the access application.<sup>1</sup> The applicant sought internal review of that decision on the basis that the Department had failed to find all relevant documents. A further 41 responsive pages were located on internal review. The Department decided to release these pages in full to the applicant, and also considered that all reasonable steps had been taken to locate relevant documents.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's internal review decision, raising concerns about the sufficiency of the Department's searches for relevant documents. Searches conducted on external review located 160 further pages and these were released in full to the applicant.

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<sup>1</sup> Subject to the removal of certain mobile telephone numbers which the applicant did not seek.

4. For the reasons set out below, I affirm the Department's decision and find that access to any additional documents can be refused, under sections 47(3)(e) and 52(1)(a) of the RTI Act, on the basis that they do not exist.

### Background

5. The applicant is a former employee of the Department and is concerned about the legitimacy of the process used to identify individuals as surplus employees during a process described as the TMR Reform Process.
6. Significant procedural steps are set out in the Appendix.

### Reviewable decision

7. The decision under review is the Department's internal review decision dated 20 January 2014.

### Evidence considered

8. The evidence, submissions, legislation and other material considered in reaching this decision is disclosed in these reasons (including footnotes and Appendix).

### Issue for consideration

9. The sole issue for determination<sup>2</sup> is whether access can be refused to any additional documents on the basis that they are nonexistent under sections 47(3)(e) and 52(1)(a) of the RTI Act.

### Relevant law

10. Under the RTI Act, a person has a right to be given access to documents of an agency.<sup>3</sup> However, this right is subject to other provisions of the RTI Act, including the grounds on which an agency may refuse access to documents.<sup>4</sup> Access to a document may be refused if the document is nonexistent.<sup>5</sup> A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.<sup>6</sup>
11. Whether there are reasonable grounds to be satisfied that a document does not exist is a question of fact to be determined based on the circumstances of each case. In *PDE and University of Queensland*,<sup>7</sup> the Information Commissioner explained that to be satisfied about the nonexistence of documents, an agency must rely on its particular knowledge and experience in the context of key factors including:
  - the administrative arrangements of government
  - the agency's structure

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<sup>2</sup> As confirmed in OIC's letter to the applicant dated 5 March 2014. The applicant's external review application also raised a number of concerns about the Department's processing of the internal review application. OIC considered that the decision-making process on internal review accorded with the requirements of the RTI Act and accordingly, the applicant was advised that no further action would be taken by the OIC in relation to his processing concerns.

<sup>3</sup> Section 23 of the RTI Act.

<sup>4</sup> As set out in section 47 of the RTI Act.

<sup>5</sup> Sections 47(3)(e) and 52 of the RTI Act.

<sup>6</sup> Section 52(1)(a) of the RTI Act.

<sup>7</sup> (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) [37]-[38]. The decision in *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld). Section 52 of the RTI Act is drafted in substantially the same terms as the provision considered in *PDE* and, therefore, the Acting Information Commissioner's findings in *PDE* are relevant here.

- 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 approaches); and
  - other factors reasonably inferred from information supplied by the applicant, including:
    - the nature and age of the requested document/s; and
    - the nature of the government activity to which the request relates.
12. An agency may also rely on searches to satisfy itself that documents do not exist. The Acting Information Commissioner indicated in *PDE* that if an agency does rely on searches to justify a decision that documents do not exist, all reasonable steps must be taken to locate the documents.<sup>8</sup> Such steps may include enquiries and searches of all relevant locations identified after consideration of the key factors listed above in paragraph 11.

## Findings

13. The applicant submits<sup>9</sup> that the Department failed to explain in its internal review decision why it was satisfied the following documents had not been located:
- briefing material to the Director-General relating to the TMR Reform Process or material seeking authorisation for the process from the accountable officer
  - briefing material about sections of the *Public Service Act 2008* (Qld) used to undertake the closed merit selection process
  - emails between nominated Departmental officers on particular dates
  - documents about the Public Service Commission's findings in relation to its review of the closed merit selection process
  - agendas of meetings held between the Department and unions in relation to the TMR Reform Process
  - other documentation relevant to the TMR Reform Process, such as the Divisional Reform Coordinator Toolkit
  - drafts of documents relating to the TMR Reform Process
  - any policy or procedure about use of the closed merit selection process; and
  - documents that establish the legitimacy of the process used to identify individuals as surplus employees.
14. The applicant contends<sup>10</sup> that with nothing having been found within the above categories of information, a reasonable person would conclude that searches must have been insufficient.
15. Overall, in processing the original application and on internal and external review, the Department has spent approximately 12 hours searching for relevant documents.<sup>11</sup> The following is a summary of the searches conducted on the access application and on internal review:

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<sup>8</sup> *PDE* [49].

<sup>9</sup> In his external review application dated 17 February 2014.

<sup>10</sup> In his external review application dated 17 February 2014.

<sup>11</sup> Having regard to the Department's search records and submissions received 10 March 2014, 4 April 2014 and 20 June 2014.

Location	Searches performed
Office of the Director-General	Emails and local drives
Legal Services	Document Management System, Practice Evolve <sup>12</sup> and legal files
Ethical Standards	Emails, local drives and case files
Human Resources	Emails, local drives and reform team drives

16. In conducting further searches on external review at OIC's request, the Department searched the backup system email accounts of former Departmental employees identified by it as most likely to hold relevant information due to their involvement in the TMR Reform Process. Broad keyword searches using the terms 'Reform', 'Reform Process', 'Reform Plan', 'Reform Planning', 'Closed Merit' and 'Closed Merit Process' were conducted of the email accounts of former relevant officers, being the:

- Director-General
- Deputy Director-General, Corporate and Human Resources; and
- General Manager, Human Resources and Governance.

17. As outlined in paragraphs 2 and 3, further documents were found on both internal and external review and all have been released to the applicant in full. The Department explained in its submission<sup>13</sup> that it is now satisfied that all reasonable steps have been taken to locate relevant documents. Its Human Resources unit—the area with overall responsibility for the TMR Reform Process—advised that:

*With regard to the reform process, discussions were largely verbal briefings and decisions were not formally documented. Therefore, any decision regarding the direction and approval of the reform are not documented.*

18. In response, the applicant submits<sup>14</sup> that in the information released to him:

*... the process identified as "closed merit" has no documentation. There is no definition of "closed merit"; no legislative (Act) or regulatory (Directive) basis for what provided the lawful "head of power" for the "closed merit" process.*

19. The applicant also submits that no related briefing material was located, and further, that statements issued by Deputy President Bloomfield of the Queensland Industrial Relations Commission in an industrial relations matter between a union and the Department were not provided to him. The applicant submits that the Department's statement is misleading because it is contrary to recommendations issued by Deputy President Broomfield about consultation. He asserts, in summary, that relevant verbal briefings, as explained by the area with overall responsibility for the TMR Reform Process, defy basic obligations in respect of decision-making, transparency and accountability.

20. I have no jurisdiction under the RTI Act to consider either the actions of the Department in undertaking the TMR Reform Process or actions at all connected to any matter before the Queensland Industrial Relations Commission. Nor is there any evidence before me that the Department has provided misleading information to OIC on external review.

21. In relation to verbal briefings, I am satisfied—despite the applicant's dissatisfaction with the use of such an approach—that they were a tool utilised by the Department which

<sup>12</sup> The Department's legal practice management software program.

<sup>13</sup> Dated 20 June 2014.

<sup>14</sup> In his submission dated 30 July 2014.

likely resulted in fewer documents being created that might have been responsive to the access application. I am unable to identify any reasonable basis upon which to base a request for further searches having regard to:

- the emphasis on verbal briefings
- the volume of documents already located
- the extent of searches conducted so far, including in the locations identified by the Department as most likely to hold responsive documents; and
- the absence of any substantive evidence that such searches were deficient.

22. Therefore, with reference to the factors outlined in *PDE*, I consider that the Department has taken all reasonable steps to identify documents in response to the access application. Accordingly, I am satisfied that the Department is entitled to refuse access to additional documents on the basis that they are nonexistent.<sup>15</sup>

## DECISION

23. For the reasons set out above, I affirm the decision under review and find that the Department is entitled to refuse access to additional documents on the basis that they are nonexistent under sections 47(3)(e) and 52(1)(a) of the RTI Act.

24. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**L Lynch**  
**Assistant Information Commissioner**

**Date: 23 September 2014**

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<sup>15</sup> Under sections 47(3)(e) and 52(1)(a) of the RTI Act.

## APPENDIX

### Significant procedural steps

Date	Event
25 October 2013	The Department received the applicant's access application.
13 December 2013	The Department issued its decision, granting full access to the 114 located pages, subject to the removal of certain mobile telephone numbers which the applicant did not seek.
18 December 2013	The Department received the applicant's internal review application, in which the applicant raised sufficiency of search issues.
20 January 2014	The Department issued its internal review decision, granting full access to the 41 located pages, and considering that all reasonable steps had been taken to locate relevant documents.
17 February 2014	OIC received the application for external review of the Department's decision.
19 February 2014	OIC notified the Department of the external review application and requested procedural documents in relation to the application.
25 February 2014	The Department provided OIC with the requested procedural documents and the documents located initially and on internal review.
5 March 2014	OIC notified the applicant and the Department that OIC had accepted the external review application. OIC requested that the Department provide a copy of its search records.
10 March 2014	OIC received a copy of the Department's search records.
2 April 2014	OIC telephoned and wrote to the Department, requesting further information in relation to its searches.
4 April 2014	The Department telephoned and wrote to OIC, summarising the searches which had been undertaken.
6 May 2014	OIC wrote to the Department, requesting further information in relation to its searches, and asking that additional searches be conducted, if necessary.
19 May 2014 and 5 June 2014	OIC granted the Department extensions of time to respond to OIC's letter dated 6 May 2014.
20 June 2014	OIC received a submission from the Department, explaining the context of the TMR Reform Process and providing the further 160 pages located by the Department's additional searches.
16 July 2014	OIC issued the applicant with a preliminary view that no further documents exist, and invited the applicant to make submissions if he contested the preliminary view.
17 July 2014	The Department advised OIC it had posted the applicant a copy of the 160 pages located on external review.
30 July 2014	OIC received a submission from the applicant.
9 September 2014	OIC advised both the applicant and the Department that OIC's preliminary view remained as set out in the letter dated 16 July 2014, and OIC would proceed to prepare a formal decision.