



Decision and Reasons for Decision

Citation:	<i>Mewburn and Department of Local Government, Community Recovery and Resilience</i> [2014] QICmr 43 (31 October 2014)
Application Number:	312075
Applicant:	Mewburn
Respondent:	Department of Local Government, Community Recovery and Resilience
Decision Date:	31 October 2014
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT DOCUMENTS - documents relating to local government and property issues and related complaints - applicant believes further documents should exist - whether the department has taken all reasonable steps to locate the documents - whether access to further documents may be refused under section 47(3)(e) of the <i>Right to Information Act 2009</i> (Qld) on the basis they are non-existent - section 52(1)(a) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied, under the *Right to Information Act 2009* (Qld) (**RTI Act**), to the Department of Local Government, Community Recovery and Resilience (**Department**), for access to documents concerning a complaint she made to the relevant Minister about her family's dealings with the Kolan Shire Council and various other complaints she made about specific properties and planning issues, between 1996-2014.
2. The Department located 398 pages and released 355 pages and 39 part pages to the applicant. The Department refused access to four pages and the remaining parts of 39 pages under section 47(3)(a) and (b) of the RTI Act on the basis that information was exempt¹, or contrary to the public interest to disclose.
3. The applicant applied to OIC for external review of the Department's decision on the grounds that documents had been '*withheld ... for bias reasons*' or '*missing*' and submitted that the '*supply of documents has been inadequate and bias*'.²

¹ Schedule 3, section 7 or 10(4) of the *Right to Information Act 2009* (Qld) (**RTI Act**).

² External review application dated 23 June 2014.

4. For the reasons set out below, I find that access to any further documents may be refused under section 47(3)(e) of the RTI Act on the basis that all reasonable steps have been taken to find the documents, but they do not exist.

Background

5. Significant procedural steps relating to the application and the external review process are set out in the Appendix.

Reviewable decision

6. The decision under review is the Department's decision dated 12 May 2014, as referred to at paragraph 2 above.

Evidence considered

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

Issue for determination

8. The issue which OIC has considered in this external review is whether the Department has taken reasonable steps to locate all documents relevant to the access application.³

Relevant law

9. Under the RTI Act, a person has a right to be given access to document of an agency.⁴ This right is subject to other provisions of the RTI Act, including grounds for refusing access to documents.⁵
10. Access to a document may be refused if the document is nonexistent.⁶ To refuse access on this basis, the decision maker must be satisfied that the document does not exist.⁷
11. The RTI Act is silent on how an agency is to satisfy itself that a document does not exist. In *PDE and The University of Queensland*,⁸ the Information Commissioner explained that, to be satisfied that a document does not exist, an agency must rely on its particular knowledge and experience, having regard to various key factors including:

- the administrative arrangements of government
- the agency structure

³ Section 130(2) of the RTI Act. By letter dated 10 July 2014, OIC advised the applicant that this was the issue OIC would consider on external review. OIC formed this view based on the nature of the submissions made in her external review application about documents being 'inadequate' and 'missing' and the absence of any specific submissions about the Department's reasons for refusing access to information. In responding to the above letter, the applicant did not contest OIC's description of the issue in the review. In an email to the applicant dated 14 August 2014, OIC again confirmed the issue in the review was whether the Department had taken all reasonable steps to locate documents relevant to her application. The applicant did not provide any response to that email to contest OIC's description of the issue in the review. For these reasons, OIC has not, in this review, considered the issue of whether access to four pages and 39 part pages may be refused under section 47(3)(a) or (b) of the RTI Act. However, in her submissions to OIC dated 13 October 2014, the applicant took issue with the Department's decision to refuse access to information on the basis of legal professional privilege. As the Department's decision to refuse access to information on the basis of legal professional privilege has not been considered by OIC in the context of this review, I have not, in these reasons for decision, taken the applicant's submissions on this issue into account.

⁴ Section 23 of the RTI Act.

⁵ Section 47 of the RTI Act.

⁶ Section 47(3)(e) of the RTI Act.

⁷ Section 52(1)(a) of the RTI Act.

⁸ (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*).

- 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 limited to information management); and
 - other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested documents and the nature of the government activity to which the request relates.
12. When the above factors are properly considered and a conclusion reached that the document does not exist, it may be unnecessary for an agency to conduct searches for the document. Instead, the agency may be able to provide an explanation for the document's non-existence, based on the above factors. However, an agency may also rely on searches to justify a decision that the document does not exist. If an agency relies on searches, all reasonable steps must be taken to locate the requested document.⁹ In determining whether all reasonable steps have been taken, regard should be had to the factors listed above.¹⁰
13. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate documents applied for by applicants.¹¹ Generally, the agency that made the decision under review that has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.¹² However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable grounds to believe that the agency has not discharged its obligation to locate all relevant documents.¹³

Applicant's submissions

14. The applicant submits¹⁴ that the Department should have located documents relating to various property-related complaint matters involving Kolan Shire Council and/or Bundaberg Regional Council (**Council**)¹⁵ including:
- (1) letters sent by Kolan Shire Council *'regarding sending out of police for forcible removal from a dwelling and breaking up the septic system to prevent living the shed'*
 - (2) any documents relating to *'illegal quarrying by the neighbours with council involvement'*
 - (3) documents regarding *'proof of canine control council registration'*; and
 - (4) investigations involving non-government and other Commonwealth and State government agencies, including the Royal Society for Prevention of Cruelty to Animals, Centrelink, the Department of Environment, and the Department of Primary Industries.
15. The applicant also raised concerns that the Department's filing system is *'antiquated and inadequate'* and considers the *'insufficient filing system'* means it is likely that other documents relevant to her application do exist.¹⁶

⁹ PDE at [49] to [53].

¹⁰ PDE at [55].

¹¹ Section 130(2) of the RTI Act.

¹² Section 87(1) of the RTI Act.

¹³ Section 95 of the RTI Act provides that the procedure to be followed on an external review is within the discretion of the Information Commissioner. Section 96 provides that any participant must comply with a reasonable request made by the Information Commissioner for assistance, even where that participant does not have the onus under section 87 of the RTI Act.

¹⁴ External review application dated 23 June 2014.

¹⁵ The *Local Government Reform Implementation Act 2007* (Qld) amalgamated the Shires of Burnett, Isis and Kolan to form the Bundaberg Region on 15 March 2008.

¹⁶ Applicant's submission to OIC dated 13 October 2014.

Department's searches

16. As set out above, the Department released over 350 pages to the applicant.¹⁷ To locate those documents, the Department submitted that it undertook the following searches:

- officers in the Department's Southern Region area spent over eight hours searching the Department's electronic database, using the applicant's name in the fields 'author's name', 'title' and 'notes'
- officers in the Department's Right to Information unit searched using criteria including the applicant's name, 'Mewburn complaint', 'Kolan Shire', 'Minister Local Government' and variations of these terms
- an experienced officer conducted a search of the name 'Mewburn' in the current correspondence system; and
- the Department's Source¹⁸ administrator assisted with historical searches on the Department's (including the Department's former manifestations)¹⁹ record keeping databases, using the search criteria 'Mewburn' in the 'anyword' function.

17. The Department submitted that it 'has made every attempt to locate historical material related to this request', however:

Significant factors inhibit the locating and retrieval of historical department documents, these include the lack of technology relating to electronic recording techniques and methods during that time and therefore the retrieval abilities of these documents. In addition this is compounded with Machinery of Government changes.²⁰

Findings

18. In her access application, the applicant sought access to documents relating to her complaints involving Kolan Shire Council and specific properties within her local area, and her communications with the relevant Minister about Kolan Shire Council. The Department located numerous documents comprising general Ministerial correspondence and released these to the applicant.²¹

19. The Department is responsible for administering local government legislation²² and also for coordinating programs to build preparedness for and resilience to natural disasters.²³ Services provided by the local government area of the Department include administering the councillor conduct complaints management and referral process in accordance with legislation and administering funding for essential infrastructure under the Local Government Grants and Subsidies Program.²⁴ The Community Recovery and Resilience service area coordinates and manages community recovery initiatives and undertakes activities to enhance and build resilience to future natural disasters.²⁵

20. Taking into account the nature of the documents requested in the access application and the Department's functions and legislative responsibilities, as described at

¹⁷ The Department acknowledged that 65 of those documents, comprising general Ministerial correspondence, were located as a result of an additional file reference number provided by the applicant.

¹⁸ Source (also known as TRIM) is the Department's Electronic Document and Records Management System that is used to capture, control and locate corporate records and information in accordance with the *Public Records Act 2002* and Recordkeeping – Information Standard 40.

¹⁹ The Department was established on 4 February 2013 under *Administrative Arrangements Amendment Order (No. 1) 2013*.

²⁰ Department's submission to OIC dated 19 August 2014.

²¹ See footnote 16 above.

²² Including the *Local Government Act 2009*, *Local Government Electoral Act 2011*, *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (Part 9, Div 2, and Part 10) and *City of Brisbane Act 2010*. See *Administrative Arrangements Order (No. 1) 2014* <https://www.qld.gov.au/about/how-government-works/government-responsibilities/>.

²³ Department's 2013-2014 Annual Report <http://www.dlg.qld.gov.au/about-us/annual-report-lg.html>, page 4 (**Annual Report**).

²⁴ See Annual Report, page 5.

²⁵ See Annual Report, page 5.

paragraphs 18 and 19 above, I am satisfied that the Department used relevant and sufficiently broad search terms to locate information responding to the application. I also consider that the Department conducted thorough searches in appropriate locations having regard to the nature of the documents sought by the applicant, the significant age of some of the documents and the relationship between the Department's functions and responsibilities and the subject matter of the access application.

21. The additional documents sought by the applicant concern neighbourhood complaints and issues relating to animal registration and septic systems. Generally, these types of matters fall within the jurisdiction of the relevant local council. For this reason, I consider it is reasonable to expect that documents relating to items (1) to (3), if they exist, would be held by Council.²⁶ There is no information available to OIC to suggest that Council²⁷ was required to provide the Department with any documents about its dealings with the applicant on those matters. The relationship between local councils and the Department is such that local councils manage their own complaints processes. The Department's role is limited by its functions and responsibilities, as prescribed by relevant legislation, eg the *Local Government Act 2009* (Qld). Based on the information available to OIC, the documents at (1) to (3) above do not appear to have any connection with the Department's legislative functions and responsibilities.
22. I am also satisfied that the documents described at (4), in paragraph 14 above, would, if they exist, be held by other entities, eg Centrelink and/or other Queensland government departments. Based on the information available to OIC, I am unable to see any connection between such documents and the functions and responsibilities of the Department. Therefore, I am satisfied it is not reasonable to expect those documents would be held by the Department.
23. On the basis of the above, I find that the Department has taken all reasonable steps to locate documents responding to the access application and that any further documents do not exist, in accordance with section 52(1)(a) of the RTI Act. Therefore, I am satisfied that access to any further documents may be refused under section 47(3)(e) of the RTI Act.

DECISION

24. I affirm the decision under review and find that access to any further documents may be refused under section 47(3)(e) of the RTI Act on the basis that they do not exist.
25. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

K Shepherd
Assistant Information Commissioner

Date: 31 October 2014

²⁶ I acknowledge the applicant's submission that she has previously applied to Council for access to information under the RTI Act and that Council was unable to locate the information she requested. However, as the applicant did not provide OIC with a copy of her previous RTI Act application to Council or a copy of Council's decision, I am unable to confirm whether the specific documents sought in this application were the subject of a previous application to Council.

²⁷ Or its predecessor, Kolan Shire Council.

APPENDIX

Significant procedural steps

Date	Event
20 January 2014	The Department received the access application.
12 May 2014	The Department issued its decision on the access application.
23 June 2014	OIC received the application for external review (dated 22 June 2014).
24 June 2014	OIC notified the Department of the external review application and asked the Department to provide procedural documents.
26 June 2014	The Department provided OIC with relevant procedural documents.
10 July 2014	<p>OIC informed the applicant and the Department that the application had been accepted for review and confirmed that the issue OIC would consider in the review was whether the Department had taken all reasonable steps to locate documents relevant to the application.</p> <p>OIC asked the Department provide further documents and information about the searches it undertook in processing the application.</p>
22 July 2014	The Department provided OIC with relevant documents and information about its searches.
31 July 2014	OIC asked the Department to provide a further submission about its searches.
14 August 2014	OIC provided the applicant with a written update on the status of this review and confirmed that the issue OIC was considering in this review was whether the Department had taken all reasonable steps to locate documents relevant to her application.
19 August 2014	The Department provided OIC with a submission about its searches.
11 September 2014	OIC conveyed a written preliminary view to the applicant that access to any further documents may be refused under section 47(3)(e) of the RTI Act on the basis that further documents do not exist.
13 October 2014	The applicant advised OIC that she contested the preliminary view and provided a submission in support of her case.