

Office of the Information Commissioner (Qld)

Decision and Reasons for Decision

Application Number: 310218

Applicant: Cullen

Respondent: Department of Public Works

Decision Date: 21 January 2011

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION – REFUSAL OF ACCESS – NON-EXISTENT DOCUMENTS – applicant seeks access to documents concerning his transfer – applicant contended additional information should exist – whether there are reasonable grounds for agency to be satisfied that documents exist to the extent they should be in the agency’s possession – whether agency has taken all reasonable steps to locate the documents – whether access to documents can be refused under sections 47(3)(e) of the *Right to Information Act 2009* (Qld) on the ground set out in section 52(1)(b) of the *Right to Information Act 2009* (Qld) – whether search of backup system required by section 29 of the *Right to Information Act 2009* (Qld)

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REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Public Works (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to particular documents about his transfer from the Education Portfolio to the Business Development Portfolio in about mid 2000 and a later attempt to transfer him to the Housing Portfolio.¹ He requested that the date range for the Department's searches cover the period of '*01 January 2000 to present*'.
2. In its decision, the Department advised that it had not located any responsive documents. During the course of this external review, as a result of further searches requested by this Office, the Department located 43 pages related to the applicant, one of which is responsive to the applicant's access application. The Department has agreed to release this page to the applicant in full.
3. The applicant submits that the Department should conduct further searches of its '*electronic records*' for the documents—namely searches of its backup system.
4. After carefully considering all the submissions and evidence before me, I am satisfied that:
 - the documents sought by the applicant should be in the Department's possession
 - the Department has taken all reasonable steps to find the documents but they cannot be found and
 - on this basis, the Department may refuse access to the documents² because they are unlocatable.³

Reviewable decision

5. The decision under review is the Department's decision dated 14 April 2010.

Background

6. Relevant steps taken in the Department's and this Office's consideration of the applicant's access application are set out in the Appendix to this decision.
7. For the purpose of this decision, three persons⁴ referred to in the applicant's application, Departments' decision and both parties submissions are referred to as Officers 1, 2 and 3.

Relevant evidence

8. In making this decision, I have taken the following into account:
 - the applicant's access application and supporting material
 - the applicant's application for external review and supporting material
 - the Department's decision
 - submissions provided by the applicant
 - submissions provided by the Department

¹ Paragraph 1 of the Appendix sets out the terms of the application.

² Under sections 47(3)(e) of the RTI Act.

³ As mentioned in section 52(1)(b) of the RTI Act.

⁴ Who were, at the relevant time, employees of Project Services within the Department.

- file notes of telephone conversations between OIC staff and the applicant
- file notes of telephone conversations between OIC staff and Department staff
- relevant provisions of the RTI Act and
- previous decisions of the Information Commissioner of Queensland and other relevant case law as identified in this decision.

Relevant law

9. Under section 23 of the RTI Act, a person has a right to be given access to documents of an agency. However, this right is subject to a number of exclusions and limitations, including grounds for refusal of access.⁵
10. Section 47(3)(e) of the RTI Act sets out the following grounds for refusal of access:

47 Grounds on which access may be refused

- (3) On an application, an agency may refuse access to a document of the agency and a Minister may refuse access to a document of the Minister—
- ...
- (e) because the document is nonexistent or unlocatable as mentioned in section 52

Section 52 of the RTI Act

11. Section 52(1) of the RTI Act provides:

52 Document nonexistent or unlocatable

- (1) For section 47(3)(e), a document is nonexistent or unlocatable if—
- (a) the agency or Minister dealing with the application for access is satisfied the document does not exist; or
- Example—
a document that has not been created
- (b) the agency or Minister dealing with the application for access is satisfied—
- (i) the document has been or should be in the agency's or Minister's possession; and
- (ii) all reasonable steps have been taken to find the document but the document can not be found.

12. The Information Commissioner considered the grounds for refusal of access set out in section 52 in *PDE and the University of Queensland*⁶ (**PDE**).
13. In *PDE*, the Information Commissioner said that:⁷

... [T]he FOI Act [equivalent of section 52] address[es] two different scenarios faced by agencies and Ministers from time to time in dealing with FOI applications: circumstances where the document sought does not exist and circumstances where a document sought exists (to the extent it has been or should be in the agency's possession) but cannot be

⁵ As set out in section 47(3) of the RTI Act.

⁶ Unreported, Queensland Information Commissioner, 9 February 2009. Note—Although *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld), the requirements of that section are replicated in section 52 of the RTI Act.

⁷ At paragraph 34.

*located. In the former circumstance, an agency or Minister is required to satisfy itself that the document does not exist. If so satisfied, the agency or Minister is not required by the FOI Act to carry out all reasonable steps to find the document. In the latter circumstance an agency or Minister is required to satisfy itself that the document sought exists (to the extent that it has been or should be in the agency's possession) **and** carry out all reasonable steps to find the document before refusing access.*

14. In *PDE*,⁸ the Information Commissioner found that to be satisfied that a document does not exist, it is necessary for the agency to rely upon its particular knowledge and experience with respect to various key factors including:
- the administrative arrangements of government
 - the agency structure
 - 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 approach)
 - other factors reasonably inferred from information supplied by the applicant including:
 - the nature and age of the requested document/s
 - the nature of the government activity the request relates to.
15. For an agency to be entitled to refuse access under section 47(3)(e) of the RTI Act on the ground set out in section 52(1)(b) of that Act, it is necessary to ask the following questions:
- are there reasonable grounds for the agency to be satisfied that additional documents exist, to the extent that they have been or should be in its possession and
 - has the agency taken all reasonable steps to find the additional documents sought.
16. In answering these questions, regard should be had to the circumstances of the case and the factors set out at paragraph 14 above.
- Are there reasonable grounds for the Department to be satisfied that the documents should be in its possession?**
17. On careful consideration of all of the information before me, I am satisfied that the answer to the first question is 'yes' and is not an issue in contention in this external review.
18. In this regard, I have paid particular regard to:
- the applicant's applications and submissions and
 - the Department's decision, which stated that *'the relevant documents may have been or should be in the [D]epartment's possession however after thorough and extensive searches the documents could not be located'* and submissions.

⁸ At paragraph 37.

Has the Department taken all reasonable steps to find the documents?

19. The Department's decision sets out the nature of the searches that it conducted to locate documents responsive to the terms of the applicant's access application prior to issuing the decision:
- hardcopy files held by Officer 1
 - Officer 1's emails
 - hardcopy files held by Officer 2
 - Officer 2's emails
 - personal hardcopy files of Officer 3
 - Project Services Corporate Human Resources hardcopy files
 - personal archived emails of Officer 3
 - Project Services Human Resources G drive
 - the applicant's personnel file in Project Services
 - Project Services General Manager's hardcopy files
 - Project Services General Manager's Tracking Database
 - Project Services General Manager's saved email folder
 - Project Services Housing Portfolio's hardcopy files
 - Project Services Housing Portfolio's G drive
 - Aurion establishment records and
 - Document Management System (**DMS**).
20. During the course of this review, at the request of this Office, the Department conducted further searches. The searches were conducted within the following business groups:
- Project Services—because the applicant had worked there
 - Human Resources (**HR**)— because Officer 3 worked in HR, specifically dealing with Project Services HR
 - QBuild—because Officer 1 and Officer 2, who previously worked within Project Services now worked in QBuild.
21. The Project Services searches examined all on-line electronic documentation stored on the network drives for Project Services in Brisbane and the Sunshine Coast Regional Office and file stores for the DMS, including documents with restricted access. The search term used for electronic searches was "cullen". The HR searches reviewed documents controlled by the HR Directorate. The QBuild searches involved a search of the archived email folders for Officer 1 and Officer 2.
22. As a result of the searches, the Department located 43 pages in Project Services related to the applicant, one of which is responsive to the applicant's access application. The Department has agreed to release this page to the applicant in full. No responsive documents were located in HR or QBuild.
23. The Department submits that no further responsive documents can be located for the following reasons:
- ... [W]hen the events occurred in [the applicant's] application, the DMS records management system did not exist. The records management system that was in use at the time only had functionality to record files and did not register individual documents or folios against each file. Therefore, it is not possible to ascertain whether the requested documents have been registered and subsequently placed on a file. However, reviews of physical hardcopy files have failed to locate any relevant documents. As such, it appears*

that the documents requested by [the applicant] may not have been placed on a file. Alternatively, the documents may have been misfiled or placed on another file and due to the limited functionality of the records management system it is impossible to determine which files the documents were placed on.

In respect to email correspondence requested by [the applicant], reviews of physical hardcopy files have failed to locate any relevant documents. As such, it appears that the emails may not have been printed and placed on hardcopy files. Checks of current staff email accounts have also failed to locate any relevant documents. Backup tapes would need to be searched in order to retrieve emails.

24. The Department submits that it is not necessary, nor appropriate, to search its backup tapes for the requested documents.
25. However, the applicant submits that:
- the Department should search its backup system and
 - in failing to do so, the Department has ‘*opted not to exercise due diligence*’.
26. In these circumstances, it is necessary to consider the RTI Act provisions relating to backup systems.

Searches of backup systems

27. The RTI Act defines “backup system” to mean ‘*a system that has, for disaster recovery purposes, copied electronic data onto a separate data storage medium, for example, onto a backup tape*’.⁹
28. Section 29 of the RTI Act provides:

29 Application not for backup system documents

- (1) *An access application, however expressed, for a document does not require an agency or Minister to search for the document from a backup system.*
- (2) *However, subsection (1) does not prevent an agency or Minister searching for a document from a backup system if the agency or Minister considers the search appropriate.*

Note—

While a search for a document from a backup system is not generally required before refusing access on the ground that the document is nonexistent or unlocatable, a search is required in the particular circumstances mentioned in section 52(2).

29. Accordingly, the RTI Act requires a search of a backup system only in the circumstances set out in section 52(2) of the RTI Act.¹⁰ Section 52(2) provides:

52 Document nonexistent or unlocatable

- ...
- (2) *Before an agency or Minister may be satisfied under subsection (1)(a) that a prescribed document does not exist, a search for the document from a backup system is required, but only if the agency or Minister considers the document has been kept in, and is retrievable from, the backup system.*

⁹ Schedule 6 of the RTI Act.

¹⁰ *Before an agency or Minister may be satisfied under subsection (1)(a) that a prescribed document does not exist, a search for the document from a backup system is required, but only if the agency or Minister considers the document has been kept in, and is retrievable from, the backup system.*

30. That is, section 52(2) requires that a backup system be searched only with respect to documents that may not exist—not documents that exist but cannot be found.
31. Otherwise, according to section 29(2) of the RTI Act, a backup system search occurs only if the relevant agency considers the search “appropriate”.
32. In considering whether or not a backup system search is appropriate, an agency may take into account factors including:
 - the nature and age of the requested document
 - the length of time it would take to undertake the search and
 - any costs that may be incurred by the agency as a result of undertaking a search of the backup system.
33. In relation to these factors, the Department submits that:¹¹
 - *As the request spans 10 years, technology (hardware/software) has changed several times and any need to access data from tapes stored prior to our current technology environment will require technology from that period in which the backup was completed. Costs unknown.*
 - *In order for the [Department] to search for data and email [sic] for the period specified we would need to create an environment including legacy tape readers and identify enough disk space. An approximate cost would involve around 600 individual restores and searches from tapes each consisting of approximately four hours. An absolute minimum cost would be approximately \$108,000.*
34. Given the inapplicability of section 52(2) of the RTI Act to documents that cannot be found, and on careful consideration of the technological difficulties, time and cost involved in searching backup tapes specified by the Department in the particular circumstances of this review, I am satisfied that:
 - the RTI Act does not require that the Department undertake a search of its backup system and
 - such a search is not appropriate in the circumstances.
35. However, I acknowledge the applicant’s frustration with the search processes undertaken by the Department. It is noted that the Department’s failure to locate documents responsive to the applicant’s application indicates that the Department did not maintain adequate hardcopy files at the relevant time. In this regard, it is hoped and expected that the Department is utilising its current DMS so as to ensure that, in future, documents of a similar nature can be searched for and located both physically and electronically.

Conclusion

36. As set out above, I am satisfied that a search of the Department’s backup system is neither required nor appropriate.
37. On careful consideration of the searches that the Department has conducted, set out at paragraphs 19 to 21 above, and all evidence before me, I am satisfied that the Department has used its knowledge of factors such as organisational structure, the

¹¹ The information that comprises these submissions was obtained by the Department from its advice from its Information Services Directorate.

functions and responsibilities of its business groups, its internal practices and procedures and the nature and age of the documents sought¹² to appropriately identify all relevant business groups to search and persons with whom to make enquiries. In doing so, I am satisfied that:

- the Department has conducted comprehensive searches for the documents sought by the applicant and
- such searches comprise all reasonable steps to locate them.

Findings

38. Taking into account all of the information set out above, I am satisfied that:

- the documents sought by the applicant should be in its possession
- the Department is not required to search its backup system for the documents and such a search is not appropriate in the circumstances
- the Department has taken all reasonable steps to locate the documents and they cannot be found
- the documents are unlocatable for the purpose of section 52(1)(b) of the RTI Act
- the Department can refuse access to the documents under section 47(3)(e) of the RTI Act.

DECISION

39. I affirm the decision under review and find that the Department can refuse access to the documents sought under section 47(3)(e) of the RTI Act on the ground set out in 52(1)(b) of the RTI Act

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

Jenny Mead
Right to Information Commissioner

Date: 21 January 2011

¹² As noted at paragraph 37 of *PDE*.

Appendix

1. By application dated 18 February 2010, the applicant sought access to documents as follows:

[The applicant]... was transferred from management duties (in the Education Portfolio to the Business Development Portfolio about mid-2000) to provide advice and assistance on the Integrated Planning Act within Project Services and a later attempt was made by [Officer 1] to contrive a transfer of [the applicant] from there to the Housing Portfolio, aborted after [the applicant's] objection to [Officer 2].

A condition of [the applicant's] acceptance of the initial transfer was the reclassification [of] his position from PO4 grade (at least) to PO5 grade.

1. letters, memos, emails, etc – particularly between [the applicant] and [Officer 1]; and
2. creation of Housing Portfolio PO4 Town Planner Position (2002/03); and
3. memo (12/08/2003) from [the applicant] to [Officer 1], copied to [Officer 2] & [Officer 3]? and subsequently.

2. The applicant requested that the Department's searches cover the period of '01 January 2000 to present'.

3. By letter dated 14 April 2010, the Department:

- set out the nature of the searches that it conducted to locate documents responsive to the terms of the applicant's access application
- advised that it had not located any responsive documents and
- decided to refuse access on the basis that *'the relevant documents may have been or should be in the [D]epartment's possession however after thorough and extensive searches the documents could not be located'*.

4. In his application for external review dated 13 May 2010 and submissions dated 26 July and 9 August 2010, the applicant submitted that:

- Information independently provided to him is that the documents should exist.
- In particular, there should be email communications between himself and Officer 1 which occurred prior to, and discussed matters mentioned in, a 'missing' memorandum (a copy of which he has provided to the Department).
- The Department should search *'electronic records'*—that is, its backup system.
- The Department *'has opted not to exercise due diligence in searching the electronic records as requested'*.

5. On 4 June 2010, this Office requested that the Department conduct further searches for documents responsive to the terms of the applicant's access application and provide submissions and certified record sheets in relation to the searches conducted. By correspondence dated 28 June 2010, the Department complied with this request.

6. In its response, the Department advised that searches of its network drive and current DMS resulted in location of 19 documents (comprising a total of 43 pages) related to the applicant. The Department submitted that the first 42 pages were outside the scope of the access application. The applicant was provided with a copy of the

Department's submissions and did not make any submissions in response regarding this issue.

7. The Department accepted that page 43 was within the scope of the access application and did not object to the release of this page to the applicant.
8. On 31 October 2010, this Office requested further submissions from the Department regarding the technology necessary to search backup tapes and the time and cost involved in doing so. By correspondence dated 31 October 2010, the Department responded to this request.