



Decision and Reasons for Decision

Application Number: 310004

Applicant: Middleton

Respondent: Building Services Authority

Decision Date: 22 September 2010

Catchwords: **RIGHT TO INFORMATION - APPLICATION FOR ACCESS TO INFORMATION - REFUSAL OF ACCESS - NON-EXISTENT DOCUMENTS** - applicant seeks access to documents relating to disciplinary action taken against building companies - agency submits that no such action taken and therefore no documents exist - whether reasonable grounds for agency to be satisfied documents do not exist - whether access can be refused under sections 47(3)(e) and 52(1)(a) of the *Right to Information Act 2009* (Qld)

RIGHT TO INFORMATION - APPLICATION FOR ACCESS TO INFORMATION - REFUSAL OF ACCESS - OTHER ACCESS AVAILABLE - applicant seeks access to transcripts of tribunal and court proceedings - agency submits that transcripts are available through court system - whether applicant can reasonably obtain other access to the transcripts - whether access can be refused under sections 47(3)(f) and 53(a) of the *Right to Information Act 2009* (Qld)

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REASONS FOR DECISION

Summary

1. The applicant applied under the *Right to Information Act 2009* (Qld) (**RTI Act**) to the Building Services Authority (**BSA**) for access to documents relating to disciplinary actions taken by the BSA in relation to two building companies.¹ The applicant's access application is one of many she has made following a sewage flooding incident at her home in 2008. The applicant is looking for information that might establish her home construction did not meet required standards.
2. BSA located and released some documents to the applicant, however, none related to disciplinary action. BSA also refused access to transcripts of court and tribunal proceedings on the basis that access is otherwise available.²
3. On external review, the applicant submitted that BSA should have located disciplinary action documents and also sought review of the decision refusing access to the transcripts. The Information Commissioner affirmed BSA's decision on the basis that:
 - disciplinary action documents sought by the applicant do not exist; and
 - transcripts can be accessed through arrangements made by another agency.

Background

4. The significant procedural steps taken during the application process and external review are set out in the Appendix.

Reviewable decision

5. The decision under external review is BSA's decision to refuse access to documents under section 47 of the RTI Act.³

Evidence relied upon

6. In reaching a decision in this external review, I have considered the following:
 - access application, external review application and supporting documents
 - BSA's decision
 - records of telephone conversations and emails exchanged between BSA officers and the applicant during processing of the access application
 - records of telephone conversations between OIC staff and the applicant and BSA during the external review
 - submissions made to OIC the applicant and BSA during the external review
 - file note of the meeting held between BSA and OIC on 6 May 2010
 - sections of the RTI Act, QBSA Act and QBT Act as referred to in this decision
 - previous decisions of the Information Commissioner of Queensland as referred to in this decision.

¹ In her application, the applicant named a building company and the director of another building company. In this decision, I have referred to the company and director collectively as the **building companies**.

² Though these documents were not specifically requested by the applicant, BSA deemed them to be relevant to the application.

³ Decision dated 25 November 2009.

The law

7. Under the RTI Act, a person has a right to be given access to documents of an agency.⁴ An agency may however refuse access if a document is nonexistent or unlocatable⁵ or if other access is available⁶. It is Parliament's intention that the grounds are to be interpreted narrowly and an agency may give access to a document even if a ground for refusal applies.⁷
8. In making this decision, I have considered whether the following grounds for refusal apply:
 - the documents are nonexistent⁸ in relation to the disciplinary action documents
 - other access is available⁹ in relation to the court and tribunal transcripts.

Nonexistent documents

9. The principles that apply when refusing access to nonexistent documents were discussed by the Information Commissioner in *PDE and the University of Queensland (PDE)*.¹⁰ In *PDE*, the Information Commissioner explained that, in order to be satisfied that documents are nonexistent, agencies must rely on their particular knowledge and experience and have regard to various key factors including:
 - administrative arrangements of government
 - structure of the agency
 - functions and responsibilities of the agency (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
 - practices and procedures of the agency (including but not limited to its information management approach)
 - other factors reasonably inferred from information supplied by the applicant including:
 - nature and age of the requested document/s; and
 - nature of the government activity the request relates to.
10. The RTI Act is silent as to how an agency is to satisfy itself that documents do not exist when relying on section 52(1)(a). When proper consideration is given to the key factors identified at paragraph 9, and a conclusion reached that the documents do not exist, it may not be necessary for an agency to conduct searches. However, where searches are used to justify a decision that documents do not exist, the agency must take all reasonable steps to locate the documents.¹¹

⁴ Section 23 of the RTI Act.

⁵ Section 47(3)(e) of the RTI Act

⁶ Section 47(3)(f) of the RTI Act

⁷ Section 47(2) of the RTI Act.

⁸ Sections 47(3)(e) and 52(1)(a) of the RTI Act.

⁹ Sections 47(3)(f) and 53(a) of the RTI Act.

¹⁰ Unreported, Queensland Information Commissioner, 9 February 2009. Although *PDE* concerned section 28A of the now repealed *Freedom of Information Act 1992* (Qld), the requirements of that section are replicated in section 52(1) of the RTI Act and therefore, the reasoning in *PDE* can be applied in the context of the RTI Act. See also *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010).

¹¹ See *PDE*.

Other access available

11. In *BDP and Medical Board of Queensland; WNK (Third Party) (BDP)*¹², the Information Commissioner found that court transcripts which were available through State Reporting Bureau, upon application and payment of the relevant fee, satisfied the requirements for alternative access under section 22(a) of the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**).
12. As the requirements of section 22(a) of the repealed FOI Act are replicated in section 53(a) of the RTI Act, I consider the reasoning in *BDP* can be applied in the context of the RTI Act.

Findings**Disciplinary action documents****Are there reasonable grounds to be satisfied that the documents do not exist?**

13. The answer to this question is 'yes' for the reasons set out below.
14. Primarily, BSA submits that it holds no documents relating to disciplinary action taken against the building companies because no such action has ever been taken.
15. BSA also contends that the applicant's basis for believing that documents should exist is flawed because her interpretation of the term '*disciplinary action*' is not consistent with the meaning given to the term by BSA and its enabling legislation.¹³ The applicant relied on a dictionary definition that defines '*discipline*' as '*to correct; to chastise; to punish*'. However, BSA submits that '*disciplinary action*' has a narrower meaning in that it refers exclusively to a process carried out under the QBSA Act.¹⁴
16. The QBSA Act confers a discretion on the BSA to apply to the tribunal to conduct a proceeding to decide whether proper grounds exist for taking disciplinary action.¹⁵ Proper grounds for disciplinary action include where a licensee is bankrupt or insolvent.¹⁶ Given that BSA's power to seek disciplinary action orders is discretionary, even where a proper ground exists, BSA may elect not to apply to the tribunal for disciplinary action orders under the QBSA Act.
17. BSA explained that, in practice, only certain serious or repeated unrectified complaints will lead to disciplinary action being taken under the QBSA Act.
18. In relation to its history of dealings with the building companies, BSA explained that:
 - in 1997, as a result of one building company being declared insolvent, conditions were placed on its licence which was later cancelled; and
 - in 2001, the other building company was subject to a public examination in the Magistrates Court for the purpose of the BSA gathering financial data and determining whether the company was fit and proper to hold a BSA licence.

¹² Unreported, Queensland Information Commissioner, 19 December 2007 at paragraphs 109-110, adopting the reasoning in *JM and Queensland Police Service* (1995) 2 QAR 516 at paragraphs 21 and 28-29.

¹³ Part 7 of the *Queensland Building Services Authority Act 1991 (QBSA Act)* and part 5 of the *Queensland Building Tribunal Act 2000 (QBT Act)*. The QBSA Act applied between 1991 and 2000 and from 2003. Between 2000 - 2003, the QBT Act applied and the provisions were largely the same.

¹⁴ Under division 4, part 7 of the QBSA Act.

¹⁵ Section 88 of the QBSA Act.

¹⁶ Section 89(e) of the QBSA Act.

19. BSA acknowledged that it holds a number of documents relating to the above matters, but emphasised that the actions it took against the building companies did not constitute, nor did they lead to, disciplinary action under the QBSA Act. Therefore, in BSA's view, any documents relating to licence conditions and cancellation or the public examination are not disciplinary action documents.¹⁷ In relation to the insolvent building company, BSA explained that it chose not to pursue disciplinary action orders in the tribunal and instead, relied on its administrative processes to place conditions on and subsequently cancel the company's licence.
20. BSA submitted that if a licensee had been referred to the tribunal for disciplinary action orders, this information would appear on the licence files and internal contractor profiles in accordance with BSA's recordkeeping practices. In BSA's view, the absence of such evidence from the records further demonstrated that disciplinary action had not been taken against the building companies.
21. BSA also emphasised that documents relating to "complaints" or "disputes" are not disciplinary action documents. Correspondence exchanged between BSA and the applicant during the processing of her access application demonstrates that BSA explained this distinction to the applicant and informed her that it held a number of complaint and dispute files in relation to the building companies. However, the applicant insisted, in her dealings with BSA and during this review, that her request was for disciplinary action documents, not documents relating to disputes or complaints that were found to be groundless.¹⁸
22. Having considered the submissions made by the BSA and the applicant in this review, the terms of the access application, correspondence exchanged between the applicant and BSA and relevant sections of the QBSA Act, I am satisfied that:
- the applicant specifically sought access to documents relating to disciplinary action involving the building companies and not to documents relating to complaints or disputes
 - in interpreting the scope of the applicant's request, BSA appropriately referred to the meaning of '*disciplinary action*' under division 4, part 7 of the QBSA Act
 - the BSA's power under the QBSA Act to refer a licensee to the tribunal for disciplinary action orders is discretionary
 - cancellation of one building company's licence on the basis of insolvency and the public examination of the other company did not constitute, nor lead to, disciplinary action being taken under the QBSA Act
 - BSA's recordkeeping practices require its licence files and internal contractor profiles to identify whether a licensee has been referred to the tribunal for disciplinary action
 - the building companies' licence files and internal contractor profiles do not contain any evidence that the building companies have been the subject of disciplinary action under the QBSA Act.
23. On the basis of the above, I find that there are reasonable grounds for the BSA to be satisfied that disciplinary action documents sought by the applicant do not exist. In the circumstances of this case, it was not strictly necessary for BSA to conduct searches to be satisfied that disciplinary action documents do not exist. However, to assist the

¹⁷ Despite this, BSA decided to release a number of documents to the applicant in relation to BSA's inquiries and investigations into the financial situations of the building companies.

¹⁸ Notwithstanding, the applicant informed OIC that she was considering making a fresh access application to BSA for all complaint documents relating to the building companies.

applicant, BSA undertook searches and provided OIC with the following information on its searches and recordkeeping practices.

24. BSA explained that since 2001, its electronic records have been stored in a case management system and electronic database records management system. For pre-2001 matters, files are held in hardcopy in BSA's archives. As to the particular searches conducted, BSA submitted as follows:
- requests for searches were sent by BSA's RTI Officer to debt recovery, compliance and legal departments
 - each department conducted searches of electronic and hard copy records within its area of responsibility
 - BSA's RTI Officer searched BSA's archives for relevant hardcopy documents and located licence and dispute files relating to the building companies.
25. I am satisfied that in conducting searches, BSA appropriately had regard to its enabling legislation, its structure and functions and relevant recordkeeping practices and procedures.
26. Accordingly, I find that access to documents relating to disciplinary action can be refused under section 47(3)(e) and 52(1)(a) of the RTI Act on the basis that the documents do not exist.

Transcripts

27. In its decision, BSA stated that the transcripts sought by the applicant could be obtained through Auscript Pty Ltd¹⁹ or the Magistrates Court²⁰.
28. OIC made enquiries with the Brisbane Magistrates Court and the Queensland Civil and Administrative Tribunal (**QCAT**)²¹ as to the availability of the transcripts.²² Those enquiries confirmed that the transcripts can be obtained through the Magistrates Court and QCAT upon application to the Magistrates Court and payment of the relevant fee.
29. Based on the above evidence and relevant law, I find that access to the transcripts can be refused under sections 47(3)(f) and 53(a) of the RTI Act on the basis that other access to these documents is available through QCAT and the Magistrates Court.

DECISION

30. I affirm BSA's decision to refuse access to the extent that the disciplinary action documents do not exist and other access to the transcripts is available.

Julie Kinross
Information Commissioner

Date: 22 September 2010

¹⁹ For that part of the 2001 public examination proceeding conducted in the Queensland Building Tribunal (**QBT**).

²⁰ For that part of the 2001 public examination proceeding conducted in the Brisbane Magistrates Court.

²¹ The QBT has since been replaced by QCAT.

²² OIC did not make enquiries with the private sector entity Auscript Pty Ltd.

Appendix

Significant procedural steps

Date	Event
6 August 2009	Applicant applies to BSA for disciplinary action documents relating to builder (and various other documents).
25 November 2009	BSA informs applicant of its decision. Access to some information is refused on the basis that other access to documents is available or that disclosure would, on balance, be contrary to the public interest.
2 December 2010	Applicant applies to the Office of the Information Commissioner (OIC) for external review on basis that further disciplinary action documents relating to the builder should have been located.
12 January 2010	BSA provides OIC with written submissions as to its searches and reasons why further documents relating to 'disciplinary action' were not located.
1 April 2010	BSA provides further oral submissions to OIC in relation to the meaning of 'disciplinary action'. OIC conveys these submissions to the applicant by telephone.
8 April 2010	OIC requests submissions from the applicant and provides applicant with a copy of BSA's written submissions.
16 April 2010	Applicant lodges final submissions with OIC.
6 May 2010	Meeting held between BSA officers and OIC staff.
9 July 2010	BSA provides OIC with further written submissions.
2 August 2010 - 9 August 2010	OIC makes inquiries with Brisbane Magistrates Court and QCAT as to availability of the transcripts.
6 August 2010	Brisbane Magistrates Court confirms transcripts are available upon application and payment of a fee.
12 August 2010	OIC obtains further oral submissions from BSA.
2 September 2010	QCAT confirms to OIC that the transcripts are available upon application.