



## Decision and Reasons for Decision

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**Application Number:** 310175  
**Applicant:** Middleton  
**Respondent:** Brisbane City Council  
**Decision Date:** 13 May 2011

**Catchwords:** **ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – NONEXISTENT DOCUMENTS – applicant sought access to documents in relation to a residential sewage issue – agency located and released some documents and found that other documents sought did not exist – whether there are reasonable grounds for agency to be satisfied documents do not exist – whether agency has taken all reasonable steps to locate documents – whether access can be refused under sections 47(3)(e) and 52(1)(a) of the *Right to Information Act 2009* (Qld)**

**ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – UNLOCATABLE DOCUMENTS – agency contends one document sought is unlocatable – whether there are reasonable grounds for agency to be satisfied document is unlocatable – whether agency has taken all reasonable steps to locate document – whether access can be refused under sections 47(3)(e) and 52(1)(b) of the *Right to Information Act 2009* (Qld)**

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## REASONS FOR DECISION

### Summary

1. The applicant applied to Brisbane City Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to various documents relating to sewage flooding issues on her property.
2. Council located and provided the applicant with a number of documents. Council also refused access to some of the documents sought on the basis that those documents were either unlocatable or did not exist.
3. In her external review application, the applicant questioned the sufficiency of Council's searches, contending that Council holds more documents responding to her access application.
4. In the course of the external review, the applicant narrowed the categories of documents which she says Council has not located to the following:

| Category | Particulars   |
|----------|---|
| 1        | A letter from the applicant to Councillor Sutton dated 11 February 2008, bearing a date received stamp  |
| 2        | A hard copy 'file note' referred to in Councillor Sutton's letter to the applicant dated 21 August 2008   |
| 3        | CCTV camera footage and a related report on inspection of sewer pipes conducted on 9 April  |
| 4        | In relation to a meeting between the applicant and a Queensland Urban Utilities ( <b>QUU</b> ) <sup>1</sup> officer on 7 October 2008 – 'all documents the QUU officer made in relation to receiving advice from the Office of the Lord Mayor of [the applicant's] letter to the Lord Mayor dated 6 October 2008' |

5. During the course of the external review, Council conducted further searches for documents responding to Categories 1 to 4 and provided submissions to the Office of the Information Commissioner (**OIC**) in relation to those searches.
6. For the reasons set out below, I am satisfied that Council may refuse access to the documents sought under section 47(3)(e) of the RTI Act as there are reasonable grounds to be satisfied that:
  - the Category 1 document is unlocatable;<sup>2</sup> and
  - documents sought in Categories 2, 3, and 4 do not exist.<sup>3</sup>

### Background

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

<sup>1</sup> Formerly Brisbane Water.

<sup>2</sup> Under section 52(1)(b) of the RTI Act.

<sup>3</sup> Under section 52(1)(a) of the RTI Act.

## Decision under review

8. The decision under review is Council's decision dated 31 March 2010.<sup>4</sup>

## Issues in the review

9. The remaining issue to be addressed on external review is whether Council is entitled to refuse access<sup>5</sup> to the documents sought at paragraph 4 above on the basis that they are either nonexistent or unlocatable.<sup>6</sup>

## Evidence considered

10. In reaching a decision in this external review, I have considered the following:

- the applicant's access application to Council and external review application to OIC
- the applicant's submissions to OIC dated 29 April 2010 and 16 February 2011
- Council's decision and submission to OIC dated 19 January 2011
- file notes of telephone conversations between OIC officers and Council during the external review
- letter from Councillor Sutton to the applicant dated 21 August 2008
- email between a QUU officer and Council dated 10 November 2008 and supporting correspondence<sup>7</sup>
- email from a QUU officer dated 27 July 2010
- QUU submission to OIC dated 24 November 2010
- relevant sections of the RTI Act as referred to in this decision; and
- previous decisions of the Information Commissioner of Queensland as referred to below.

## Relevant law

11. Under the RTI Act, a person has a right to be given access to documents of an agency,<sup>8</sup> though this right is subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.<sup>9</sup> The RTI Act provides that access to a document may be refused<sup>10</sup> if the document is nonexistent or unlocatable.<sup>11</sup>

## Nonexistent document

12. A document is nonexistent if there are reasonable grounds for the agency or Minister dealing with the access application to be satisfied that the document does not exist.<sup>12</sup>

13. The RTI Act is silent on how an agency/Minister can be satisfied that a document does not exist. However, in *PDE and the University of Queensland (PDE)*<sup>13</sup> the Information

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<sup>4</sup> A decision refusing access to a document under section 47 of the RTI Act is a reviewable decision; Schedule 6.

<sup>5</sup> Under section 47(3)(e) of the RTI Act.

<sup>6</sup> In accordance with section 52(1) of the RTI Act.

<sup>7</sup> Comprising an email between two QUU officers detailing searches undertaken and a letter from the Office of the Lord Mayor to the owner of the Calamvale property reporting on the 9 April 2008 CCTV inspection.

<sup>8</sup> Section 23 of the RTI Act

<sup>9</sup> As set out in section 47 of the RTI Act.

<sup>10</sup> Section 47(3)(e).

<sup>11</sup> Sections 47(3)(e) and 52 of the RTI Act at Appendix B.

<sup>12</sup> Section 52(1)(a).

<sup>13</sup> 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

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:

- 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:
  - the nature and age of the requested document/s; and
  - the nature of the government activity the request relates to.

14. When these key factors are properly considered and a conclusion reached that the document does not exist, it may be unnecessary to conduct searches.
15. However, if an agency relies on searches to justify a decision that the document sought does not exist, all reasonable steps must be taken to locate the requested document.<sup>14</sup>

### ***Unlocatable document***

16. If there are reasonable grounds to be satisfied that an agency/Minister has had or should have the document sought, access can only be refused if all reasonable steps are taken to locate the document.<sup>15</sup>
17. What comprises all reasonable steps will vary according to the particular circumstances of the matter, but will be informed by the key factors identified in paragraph 13 above, particularly with respect to the agency/Minister's record keeping and document retention practices and procedures.
18. Importantly, agencies are not required to retain all records indefinitely. The *Public Records Act 2002* (Qld) sets out legislative requirements for the creation, retention and disposal of public records. The Queensland State Archivist issues Information Standards, guidelines, Public Records Briefs, and retention and disposal schedules relating to managing and disposing of public records. Retention and disposal schedules set out how long certain records must be retained by agencies and when and how records can be destroyed at the expiry of the minimum retention period.<sup>16</sup>

## **Findings**

### ***Are there reasonable grounds to be satisfied that the documents in issue do not exist or are unlocatable?***

19. The answer to this question is 'yes' in respect of each of the four categories of documents sought for the reasons that follow.

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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).

<sup>14</sup> See *PDE*.

<sup>15</sup> Section 52 (1)(b) of the RTI Act.

<sup>16</sup> Retention and disposal schedules must be approved by the State Archivist.

### **Category 1 – unlocatable document**

20. The applicant is seeking access to a date stamped copy of her 11 February 2008 letter. The applicant contends that the Category 1 document must be in Council's possession and should be provided to her because:
- she received a letter from Councillor Sutton dated 11 February 2008 acknowledging receipt of her letter of that date; and
  - in the course of external review the Morningside Ward Office provided Council with an email stating '*please find attached relevant letters...*'<sup>17</sup> and the applicant believes a copy of her 11 February 2008 letter is one of the 'relevant letters'.
21. I am satisfied that the applicant's letter of 11 February 2008 has been in Council's possession, as its receipt was acknowledged in Councillor Sutton's correspondence of the same day. Therefore I must consider whether Council has taken all reasonable steps to locate the Category 1 document.
22. As to the applicant's contention that the letter is attached to Council's email referred to in paragraph 20 above, I have reviewed the letters attached to the email and the Category 1 document was not one of these documents.<sup>18</sup>
23. In seeking to locate the Category 1 document, Council requested that searches be undertaken by the Morningside Ward office, being the location at which the document ought to be held.
24. In response to Council's request, the Morningside Ward Office conducted searches of its electronic and hardcopy records during the processing of the access application and during the external review, however, the Category 1 document was not located. I note also that the Morningside Ward Office had previously searched for the Category 1 document approximately six months after the letter was received by the Morningside Ward Office.<sup>19</sup>
25. The Morningside Ward Office has repeatedly searched for the requested document. Both electronic and hard copy records have been interrogated. In the circumstances I am satisfied that Council has taken all reasonable steps to locate the Category 1 document.
26. In view of the above, I am satisfied that:
- the Category 1 document has been in Council's possession;
  - Council has taken all reasonable steps to locate the Category 1 document;
  - the Category 1 document is unlocatable; and
  - access to this document can be refused under sections 47(3)(e) and 52(1)(b) of the RTI Act.

### **Category 2 - nonexistent document**

27. The applicant contends that the Category 2 document must be within Council's possession because in her letter dated 21 August 2008 Councillor Sutton specifically refers to 'notes on (the applicant's) file'.

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<sup>17</sup> Referring to letters it located during its search for the Category 1 document.

<sup>18</sup> The attached correspondence being letters from Councillor Sutton to the applicant dated 11 February 2008 and 21 August 2008.

<sup>19</sup> The applicant contacted the Morningside Ward Office directly to obtain a copy of the Category 1 document.

28. Council indicates in its submissions<sup>20</sup> that Councillor Sutton's reference to 'notes on (the applicant's) file' is to entries made into the electronic system used by the Morningside Ward Office. Council also indicates that this is the Morningside Ward Offices' usual procedure to record telephone contact with constituents.
29. In support of its submission, Council indicates that:
- in accordance with the Morningside Ward Office's usual administrative practices, any notes of discussions between the applicant and staff of the Morningside Ward Office would be recorded in the relevant computer system; and
  - on 31 March 2010 a print out of the electronic record of the applicant's discussion with an officer of the Morningside Ward Office on 7 February 2008 was provided to the applicant.
30. I have considered Councillor Sutton's letter to the applicant of 21 August 2008. There is no indication in that letter that Councillor Sutton was referring to a hardcopy 'file note' of discussions with the applicant.
31. Having regard to the Morningside Ward Office's usual administrative practices for recording telephone conversations, there are reasonable grounds to be satisfied that the Category 2 document does not exist as no hard copy file note was created.

### **Category 3 – nonexistent documents**

32. The applicant indicates that on 9 April 2008 the sewerage pipes on her property were inspected. She contends that Council must hold CCTV footage of this inspection along with a related report.
33. In support of her contention the applicant relies on an email dated 10 November 2008<sup>21</sup> (**Email**) between a QUU officer and Council (which includes handwritten notations) that refers to a camera inspection of sewerage pipes taking place on 9 April 2008 and a report that could have been 'extracted' in relation to that investigation.
34. The applicant submits that this issue can only be resolved by OIC staff inspecting Council's file in situ to be satisfied that Category 3 documents do not exist.
35. In its decision, Council indicates that the:
- CCTV footage of a 9 April 2008 investigation of sewerage pipes by QUU officers was conducted on a property in Calamvale; and
  - Email was misfiled on the records for the applicant's property.
36. On external review Council provided OIC with:
- copies of documents showing that the relevant sewerage inspection on 9 April 2008 took place on a property in Calamvale; and
  - correspondence from the QUU officer who authored the Email in which the QUU officer confirms that the Email is 'totally unrelated' to the applicant's property.

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<sup>20</sup> Dated 19 January 2011.

<sup>21</sup> The applicant received a copy of this email as part of the documents released by Council in response to her access application.

37. I accept the evidence provided by Council and am satisfied that the CCTV footage and report referred to in the Email relate to a property in Calamvale and not to the applicant's property. I do not consider it necessary to inspect Council's files in situ.
38. Council also submits that it has consulted QUU in the course of another external review concerning the applicant<sup>22</sup> to ensure that:
- further searches of QUU's hard copy and electronic records<sup>23</sup> were conducted during external review; and
  - all CCTV footage or related reports in relation to inspections of sewerage pipes on the applicant's property had been located.
39. Having regard to Council's explanation that the Email was misfiled on the records for the applicant's property and the searches conducted by QUU, I am satisfied that Council has taken all reasonable steps to locate Category 3 documents and, in accordance with section 52(1)(a) of the RTI Act, there are reasonable grounds to be satisfied that these documents do not exist.

#### **Category 4 - nonexistent documents**

40. On 6 October 2008, the applicant wrote to the Lord Mayor about the sewerage issues. Council indicates that the applicant's letter was received on 7 October 2008. Also on 7 October 2008, a QUU officer met with the applicant regarding the sewerage issues. The applicant seeks access to all documents the QUU officer made in relation to his being advised by the Lord Mayor's office of the applicant's letter.
41. Council submits it was advised by QUU that the QUU officer's attendance at the applicant's property occurred independently of her letter to the Lord Mayor's Office. In further support of its position, Council indicates that in accordance with the factors outlined in *PDE*, having regard to the usual practice and procedures of the Lord Mayor's Office for processing incoming mail, it is highly unlikely that the applicant's letter could have been brought to the attention of the QUU officer prior to his meeting with the applicant on 7 October 2008, that is, the same day it was received.
42. The applicant contends that even if the QUU officer did not receive the letter, its contents could have been conveyed to him by telephone, email or facsimile. She also says that when they met, the QUU officer quoted parts of her letter to the Lord Mayor.<sup>24</sup> Specifically, to support her contention that the QUU officer had knowledge of her letter, the applicant says that in her letter to the Lord Mayor she mentioned legislation relating to disconnecter traps and that she would have a plumber check the traps and that at their meeting the QUU officer said to her 'save your money and don't have the disconnecter traps checked'. In my view, even if this evidence is accepted, it is unremarkable that the QUU officer might make such a statement, given the very specific nature of the applicant's concerns and I consider it does not establish that the QUU officer was privy to the applicant's letter.
43. In another external review the applicant has also requested the Category 4 documents from QUU. In that review QUU provided an email with its submission to OIC<sup>25</sup> in which the relevant QUU officer explained that he:<sup>26</sup>

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<sup>22</sup> The applicant and QUU are currently parties to another external review with OIC in relation to similar documents.

<sup>23</sup> Specifically QUU has indicated that it has searched its CMX and Ellipse electronic record systems for Category 3 documents.

<sup>24</sup> I acknowledge the applicant's submission that this discussion took place in the presence of a witness.

<sup>25</sup> Dated 24 November 2010.

<sup>26</sup> Dated 27 July 2010 and provided to OIC by QUU in the course of another external review.



- visited the applicant on 7 October 2008 as a customer service requirement suggested by QUU management; and
  - had no knowledge of the applicant's letter of 6 October 2008 to the Lord Mayor's Office prior to meeting with the applicant.
44. I accept Council's submissions and the evidence of the QUU officer at paragraphs 41 and 43 above and consider that on this basis:
- the QUU officer did not have knowledge of the applicant's letter of 6 October 2008 to the Lord Mayor's Office prior to meeting with the applicant;
  - therefore no documents responding to Category 4 could have been created
  - there are reasonable grounds to be satisfied the Category 4 documents do not exist.
45. In any event, QUU has searched for any documents between the relevant QUU officer and the Office of the Lord Mayor. Specifically searches were conducted of QUU's CMX database, which is the system ordinarily used by QUU to record any correspondence. These searches indicated that the only correspondence relating to the applicant on QUU's CMX database was a draft letter to the applicant.<sup>27</sup> The applicant has since been provided with a copy of this document, though I note this was not a Category 4 document.
46. On the basis of the above, I am satisfied that Council may refuse access to the Category 4 documents under sections 47(3)(e) and 52(1)(a) of the RTI Act.

## Conclusion

47. For the reasons set out above, I find that there are reasonable grounds to be satisfied the:
- Category 1 document is unlocatable and therefore access can be refused under sections 47(3)(e) and 52(1)(b) of the RTI Act; and
  - Category 2, 3 and 4 documents are nonexistent and therefore access can be refused under sections 47(3)(e) and 52(1)(a) of the RTI Act.

## DECISION

48. On the basis of the above, I affirm Council's decision to refuse access to the requested documents under section 47(3)(e) and sections 52(1)(a) and (b) of the RTI Act on the basis that the documents sought do not exist or are unlocatable.
49. I have made this decision as a delegate of the Information Commissioner under section 145 of the RTI Act.

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**Jenny Mead**  
**Right to Information Commissioner**  
**Date: 13 May 2011**

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<sup>27</sup> In an email dated 27 July 2010.

**APPENDIX A****Significant procedural steps**

| <b>Date<sup>28</sup></b> | <b>Event</b>   |
|--------------------------|--|
| 3 February 2010          | The applicant applied to Council under the RTI Act for a range of documents which broadly relate to sewage overflow issues at her residence.   |
| 31 March 2010            | Council located and released a number of documents to the applicant and refused access to some requested documents on the basis that they were nonexistent or unlocatable. <sup>29</sup>   |
| 12 April 2010            | The applicant applied to OIC for external review of Council's decision of 31 March 2010 to refuse access to some of the requested documents.   |
| 19 April 2010            | OIC informed Council and the applicant that the external review application had been accepted for review.  |
| 29 April 2010            | OIC received submissions from the applicant.   |
| 19 January 2011          | Council provided OIC with submissions and further information on the searches performed for documents relevant to the access application.  |
| 11 February 2011         | OIC conveyed a written preliminary view to the applicant that Council had taken all reasonable steps to locate the documents in issue and there were reasonable grounds to be satisfied that the: <ul style="list-style-type: none"> <li>• Category 1 document is unlocatable; and</li> <li>• Category 2 to 4 documents are nonexistent</li> </ul> OIC invited the applicant to provide submissions in support of her case if she did not accept the preliminary view. |
| 16 February 2011         | OIC received submissions from the applicant.   |

<sup>28</sup> Of correspondence or relevant communication unless otherwise indicated.

<sup>29</sup> OIC granted Council an extension of time to process the access application.

## APPENDIX B

### Relevant legislative provisions

#### **47 Grounds on which access may be refused**

- (1) *This section sets out grounds on which access may be refused.*
- (2) *It is the Parliament's intention that –*
  - (a) *the grounds are to be interpreted narrowly; and*
  - (b) *an agency or Minister may give access to a document even if a ground on which access may be refused applies.*
- (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; or*
  - ...

#### **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.*

*Examples –*

*a document that has been lost*  
*a document that has been disposed of under an authority given by the State Archivist*

*Note –*

*Under the Public Records Act 2002, section 13, it is an offence to dispose of a public record without authority.*

...