



Decision and Reasons for Decision

Application Number: 310387 and 310432

Applicant: Secher

Respondent: James Cook University

Decision Date: 6 June 2012

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – DELETION OF IRRELEVANT INFORMATION – an agency may delete from a document information the agency reasonably considers is not relevant to the access application – information unrelated to the applicant – section 72(3) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – GROUNDS ON WHICH ACCESS MAY BE REFUSED – CONTRARY TO PUBLIC INTEREST INFORMATION – an agency may refuse access to a document to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest – information about a staff member's leave – whether disclosure would, on balance, be contrary to the public interest – section 47(3)(b) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – GROUNDS ON WHICH ACCESS MAY BE REFUSED – EXEMPT INFORMATION – an agency may refuse access to a document to the extent the document comprises exempt information – information subject to legal professional privilege – internal email and correspondence passing between the agency and its solicitor – whether the information would be privileged from production in a legal proceeding on the ground of legal professional privilege – section 47(3)(a) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – GROUNDS ON WHICH ACCESS MAY BE REFUSED – NONEXISTENT DOCUMENTS – applicant contends additional documents exist – an agency may refuse access to a document because the document is nonexistent or unlocatable – whether the agency has taken all reasonable steps to locate the documents but the documents cannot be found – section 47(3)(e) of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant seeks access to a range of documents from James Cook University (**JCU**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for specific periods of time and relating generally to her employment with JCU.
2. JCU released more than 500 pages to the applicant and refused access to a small amount of information. On internal review, JCU affirmed the initial decision to refuse access to a small amount of information and performed further searches for documents relevant to the access applications. As a result of these further searches, JCU identified a number of additional documents for release to the applicant.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of JCU's decisions to refuse access to the small amount of information (**refusal of access**) contending also that JCU had not located all relevant documents (**sufficiency of search**).
4. In relation to the refusal of access issue, JCU was entitled to:
 - delete irrelevant information as it was unrelated to the access applications; and
 - refuse access to the remaining information on the basis that:
 - its disclosure would, on balance, be contrary to the public interest; or
 - it comprises exempt information on the basis that it would be privileged from production in a legal proceeding on the ground of legal professional privilege.
5. In relation to the sufficiency of search issue, JCU has taken all reasonable steps to locate the documents sought by the applicant and there is a reasonable basis to be satisfied that no additional documents exist. In determining this, regard was had to:
 - JCU's recordkeeping practices in relation to the types of documents the applicant seeks
 - the nature and extent of the searches conducted by JCU in processing the access applications, on internal review and external review; and
 - signed certifications provided by JCU staff that all documents relating to the access applications in the relevant areas had been located.

Background

6. Significant procedural steps relating to the external reviews are set out in the appendix to this decision.

Reviewable decisions

7. The decisions under review are the decisions JCU was taken to have made on internal review affirming the initial decisions.¹

Evidence considered

8. Evidence, submissions, legislation and other material I have considered in reaching my decision are disclosed in these reasons (including footnotes and the appendix).

¹ The background to this issue is set out in the appendix.

Is JCU entitled to refuse access to the information in issue?

9. Yes, for the reasons that follow.
10. During the external review, the applicant provided extensive submissions to OIC contending that JCU cannot rely on any of the provisions cited for refusing access to the information in issue. The applicant also claimed that OIC could not reveal her submissions to JCU as it would not be in the public interest for a number of reasons and, in her view, her submissions were provided to OIC in confidence. The process on external review is open and transparent and only in very limited circumstances would the Information Commissioner receive submissions from a review participant in confidence. This is not such a case. In summary, the applicant submits that:
- JCU has fraudulently concealed information from her; and
 - JCU's actions relating to her are tainted and are for an underlying improper/illegal purpose.
11. I find that there is no evidence on the face of the information in issue to support the applicant's submissions.

Irrelevant information

12. The applicant applied for access to a range of information generally related to her employment with JCU. JCU refused access to parts of 11 pages of staff diary notes (**Category A information**) on the basis that the information was unrelated to the applicant and therefore was not relevant to the access applications. I have considered the Category A information and am satisfied that it does not relate to the applicant and is not relevant to the access applications. I find that JCU was entitled to delete the Category A information from the documents on this basis.²

Contrary to public interest information

13. JCU refused access to three words of an email between a JCU staff member and a staff member of Griffith University (**Category B information**) on the basis that its disclosure would, on balance, be contrary to the public interest.
14. Under the RTI Act, an individual has a right to be given access to documents of an agency.³ However, this right is subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.⁴ Relevantly, access may be refused where disclosure would, on balance, be contrary to the public interest.⁵
15. The RTI Act identifies many factors that may be relevant to deciding the balance of public interest. It also explains the steps that a decision-maker must take in deciding the public interest. To decide whether disclosing the information in issue would be

² Section 73(2) of the RTI Act.

³ Section 23 of the RTI Act.

⁴ As set out in section 47 of the RTI Act.

⁵ Sections 47(3)(b) and 49 of the RTI Act. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs, for the wellbeing of citizens generally. This means that, ordinarily, a public interest consideration is one which is common to all members of, or a substantial segment of, the community as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

contrary to the public interest, I must:⁶

- identify any irrelevant factors and disregard them
- identify relevant public interest factors favouring disclosure and nondisclosure
- balance the relevant factors favouring disclosure and nondisclosure; and
- decide whether disclosure of the information, on balance, would be contrary to the public interest.

16. In this case, the Category B information relates to a staff member's leave. I am satisfied that the Category B information comprises the personal information of the relevant staff member⁷ and its disclosure could reasonably be expected to prejudice the protection of the individual's right to privacy.⁸ These are factors favouring nondisclosure of the Category B information to which I attribute weight. I do not consider there are any factors favouring disclosure of the Category B information. I find that JCU was entitled to refuse access to the Category B information on the basis that its disclosure would, on balance, be contrary to the public interest.⁹

Legal professional privilege

17. JCU refused access to 8 pages which comprise correspondence passing between JCU and its solicitor and an internal email which refers to instructions provided to JCU's solicitor (**Category C information**) on the basis that it would be privileged from production in a legal proceeding on the ground of legal professional privilege.
18. JCU is entitled to refuse access to a document to the extent it comprises exempt information.¹⁰ Information is exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.¹¹ Information is subject to legal professional privilege if it comprises a confidential communication between a legal adviser and client or third party and is made for the dominant purpose of obtaining or providing legal advice. In some cases, communications may not be subject to legal professional privilege because privilege has been waived, either expressly or impliedly or the improper purpose exception applies.
19. The Category C information consists of correspondence passing between JCU and its solicitor seeking and conveying legal advice and an internal email which refers to instructions provided to JCU's solicitor. Having examined the communications, I am satisfied that they:
- comprise direct communications or records of communications between JCU and its solicitors
 - are confidential; and
 - were made for the dominant purpose of seeking or conveying legal advice.
20. Legal professional privilege will not apply to legal communications made in the furtherance of a fraud or crime. This exception operates to displace legal professional privilege where evidence exists that the relevant client (in this case JCU) has embarked on a deliberate course of action knowing that the proposed actions were

⁶ Section 49(3) of the RTI Act.

⁷ Schedule 4, part 4, item 6 of the RTI Act. *Personal information* is defined in section 12 of the *Information Privacy Act 2009* (Qld).

⁸ Schedule 4, part 3, item 3 of the RTI Act.

⁹ Sections 47(3)(b) and 49 of the RTI Act.

¹⁰ Sections 47(3)(a) and 48 of the RTI Act.

¹¹ Schedule 3 section 7 of the RTI Act.

contrary to law, and has made the relevant communications in furtherance of that illegal or improper purpose.¹²

21. The person alleging that privilege has been displaced by reason of an alleged illegal or improper purpose must show that it is made out in the current circumstances.¹³ In establishing improper purpose, the standard of proof is high. The High Court has observed that it *“is a serious thing to override legal professional privilege where it would otherwise be applicable”* and as a result *“vague or generalised contentions of crimes or improper purposes will not suffice.”*¹⁴
22. As noted above at paragraphs 10 and 11, I have considered the applicant’s submissions on this issue together with the Category C information. I find there is no evidence on the face of the Category C information that the particular communications were made in furtherance of any illegal or improper purpose. I am satisfied that the improper purpose exception does not preclude the application of legal professional privilege to the Category C information in the circumstances.
23. I find that JCU was entitled to refuse access to the Category C information as it comprises exempt information on the basis that it would be privileged from production in a legal proceeding on the ground of legal professional privilege.¹⁵

Is there a reasonable basis to be satisfied that no additional documents responding to the access applications exist?

24. Yes, for the reasons that follow.
25. In relation to the sufficiency of search issue, I need to determine whether JCU is entitled to refuse access to the additional documents the applicant believes exist on the basis that they are nonexistent.

Relevant law

26. An individual has a right to be given access to documents of an agency subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents. Relevantly, the RTI Act provides that access to a document may be refused if the document is nonexistent or unlocatable.¹⁶
27. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.¹⁷ A document is unlocatable if it has been or should be in the agency’s possession and all reasonable steps have been taken to find the document but it cannot be found.¹⁸
28. To be satisfied that documents are nonexistent, a decision maker must rely on their particular knowledge and experience and have regard to a number of key factors.¹⁹

¹² *Murphy and Treasury Department* (1998) 4 QAR 446 at paragraphs 31-42.

¹³ *Commissioner of Australian Federal Police and Another v Propend Finance Limited and Others* (1997) 188 CLR 501 (**Propend**) at 545 and 556.

¹⁴ *Propend* at 591 and 592.

¹⁵ Sections 47(3)(a), 48 and schedule 3, section 7 of the RTI Act.

¹⁶ Sections 47(3)(e) and 52 of the RTI Act.

¹⁷ Section 52(1)(a) of the RTI Act.

¹⁸ Section 52(1)(b) of the RTI Act.

¹⁹ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at paragraph 19 which adopted the Information Commissioner’s comments in *PDE and the University of Queensland* [2009] QICmr7 (9 February 2009). The key factors include: the administrative arrangements of government; the agency structure; the agency’s functions and responsibilities

When proper consideration is given to relevant factors, it may not be necessary for searches to be conducted. However, if searches are relied on to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes all reasonable steps will vary from case to case as the search and enquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances.

Findings

29. In deciding that JCU has taken all reasonable steps to locate the additional documents and that there is a reasonable basis to be satisfied that no additional documents exist, I have had regard to:
 - JCU's recordkeeping practices in relation to the types of documents the applicant sought
 - the nature and extent of the searches conducted by JCU in processing the access applications, on internal review and external review; and
 - signed certifications provided by JCU staff that all documents relating to the access applications in the relevant areas have been located.
30. The applicant believes that numerous additional documents relevant to her access applications exist and has provided extensive submissions in support of her case which reach almost a hundred pages plus attachments.²⁰ JCU performed searches for the relevant documents during its initial processing of the access applications, on internal review and twice on external review.
31. As JCU has conducted searches in response to the applicant's belief that additional documents exist, the key issue in these reviews is whether JCU has taken all reasonable steps to locate these documents. In deciding this issue, I do not consider it necessary to deal separately with each of the numerous contentions raised by the applicant, nor JCU's individual responses as to why particular documents do not exist.
32. On numerous occasions during the external review, OIC made further enquiries with JCU in response to the applicant's submissions.²¹ As a result of performing further searches on external review, JCU located a number of additional documents, many of which JCU agreed to release to the applicant. Where required, JCU responded to the applicant's specific submissions about the existence of particular documents. JCU now contends that it has taken all reasonable steps to locate any additional documents and no additional documents exist.
33. JCU provided OIC with detailed information on how its records are stored and why particular search locations were chosen in relation to the access applications. The search and inquiry process that JCU undertook in response to the access applications can be summarised as follows:
 - The RTI Coordinator sent targeted requests to JCU staff who were responsible for maintaining records in the areas where records were expected to exist and,

(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) 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 the request relates to.

²⁰ These submissions are set out in correspondence to JCU on internal review and OIC on external review and relate to a range of issues the applicant considers relevant.

²¹ Including both formal written requests and enquiries by phone.

where the records provided showed communications with other staff members, follow up requests were sent to these staff members.

- JCU made specific enquiries with numerous staff members within various units of JCU. These staff members provided information detailing the extent and nature of the searches performed, the result of these searches and certifications that all documents relating to the access applications in the relevant areas had been located.
 - These staff members conducted physical searches of hardcopy documents such as work diaries, notebooks and handwritten notes of meetings and performed electronic searches of relevant databases within particular units, three email systems, laptops and shared drives using several search terms and the applicant's name.
 - The search certifications indicate that on external review alone JCU staff spent more than 50 hours performing searches for additional documents relevant to the access applications.
34. Based on JCU's knowledge of its organisational structure and recordkeeping practices, JCU performed targeted searches and made enquiries with relevant staff to locate documents relevant to the access applications. Where these documents suggested the existence of more documents, JCU conducted further enquiries with relevant staff. JCU's submissions detail a targeted, comprehensive and systematic approach to the searches undertaken and enquiries made to locate the additional documents. The approach taken was appropriate with reference to the nature of the information sought by the applicant and JCU's record keeping practices. I accept JCU's evidence as to its search efforts and enquiries.
35. JCU also provided signed search certifications by relevant staff that all documents relating to the access applications in the possession of JCU have been located. I accept these certifications as further evidence that JCU has taken all reasonable steps to find relevant documents.
36. Having reviewed JCU's submissions, together with the submissions lodged by the applicant, I am satisfied that JCU has taken all reasonable steps to locate relevant documents, and that there is a reasonable basis to be satisfied that no additional documents responding to the access applications exist.²²

DECISION

37. As JCU located additional documents on external review, I vary the decisions under review, but find, for the reasons set out above, that:
- JCU was entitled to:
 - delete the Category A information under section 73(2) of the RTI Act; and
 - refuse access to the Category B and C information under sections 47(3)(a) and 47(3)(b) of the RTI Act
 - as JCU has now taken all reasonable steps to locate relevant documents, access to further documents the applicant contends exist can be refused under sections 47(3)(e) and 52(1)(a) of the RTI Act.

²² Sections 47(3)(e) and 52(1)(a) of the RTI Act.

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

Suzette Jefferies
Assistant Information Commissioner

Date: 6 June 2012

APPENDIX**Significant procedural steps**

External review 310387	
Date	Event
21 April 2010	JCU received the first access application under the RTI Act.
7 July 2010	It appears that JCU did not issue a decision within the required timeframe and was taken to have made a decision refusing access to the requested information. However, JCU continued to process the access application and issued a decision to the applicant.
30 July 2010	The applicant applied for internal review.
1 September 2010	JCU did not issue an internal review decision within the required timeframe and was taken to have affirmed the original decision. However, JCU continued to process the access application and issued a decision to the applicant.
27 September 2010	OIC received the external review application.
28 September 2010	OIC notified JCU that the applicant had applied for external review and asked JCU to provide a number of procedural documents relevant to the review.
29 September 2010	JCU provided the requested procedural documents.
6 October 2010	OIC notified JCU and the applicant that the external review application had been accepted. OIC asked JCU to provide a copy of the documents in issue and a number of other procedural documents. OIC asked the applicant to provide submissions.
20 October 2010	OIC received the applicant's submissions.
21 October 2010	OIC received a copy of the requested documents from JCU.
12 November 2010	OIC asked JCU to provide submissions on searches performed in relation to both access applications by 30 November 2010.

External review 310432	
Date	Event
28 May 2010	JCU received the second access application under the RTI Act.
11 August 2010	It appears that JCU did not issue a decision within the required timeframe and was taken to have made a decision refusing access to the requested information. However, JCU continued to process the access application and issued a decision to the applicant.
1 September 2010	The applicant applied for internal review.
1 October 2010	JCU did not issue an internal review decision within the required timeframe and was taken to have affirmed the original decision. However, JCU continued to process the access application and issued a decision to the applicant.
28 October 2010	OIC received the external review application.
4 November 2010	OIC notified JCU that the applicant had applied for external review.
12 November 2010	OIC notified JCU that the external review application had been accepted. OIC asked JCU to provide a copy of the documents in issue and to perform further searches for relevant documents. OIC asked

External review 310432	
Date	Event
	JCU to provide submissions by 30 November 2010.
17 November 2010	OIC notified the applicant that the external review application had been accepted.

External reviews 310387 and 310432	
Date	Event
25 November 2010	JCU requested further time to provide submissions to OIC. OIC agreed to extend the time for JCU to respond until 10 December 2010.
21 December 2010	OIC received submissions from JCU.
4 January 2011	OIC received submissions from JCU.
28 June 2011	OIC received submissions from the applicant.
30 June 2011	OIC received submissions from the applicant.
6 July 2011	OIC received submissions from the applicant.
21 July 2011	OIC received submissions from JCU.
22 July 2011	OIC received submissions from JCU.
29 July 2011	OIC received submissions from JCU.
17 August 2011	OIC received submissions from JCU.
18 August 2011	OIC received submissions from JCU.
19 August 2011	OIC received submissions from JCU.
14 September 2011	OIC conveyed a preliminary view to JCU and asked JCU to perform further searches for relevant documents. OIC asked JCU to provide submissions by 28 September 2011. OIC conveyed a preliminary view to the applicant and invited her to provide submissions supporting her case by 28 September 2011.
22 September 2011	JCU requested an extension of time until 11 October 2011 to respond to the preliminary view.
23 September 2011	OIC agreed to extend the time for JCU to respond until 11 October 2011.
27 September 2011	The applicant notified OIC that she did not accept the preliminary view and provided submissions supporting her case. The applicant asked that OIC not disclose her submissions to JCU.
11 October 2011	OIC received submissions from JCU. JCU requested a further extension until 18 October 2011 to provide the remaining submissions.
13 October 2011	OIC granted JCU the requested extension.
18 October 2011	OIC received submissions from JCU. JCU requested a further extension until 25 October 2011 to provide the remaining submissions.
19 October 2011	OIC granted JCU the requested extension.
25 October 2011	JCU requested a further extension until 28 October 2011 to provide the remaining submissions.
27 October 2011	OIC granted JCU the requested extension.
28 October 2011	JCU requested a further extension until 18 October 2011 to provide the

External reviews 310387 and 310432	
Date	Event
	remaining submissions.
31 October 2011	OIC granted JCU an extension until 4 November 2011.
4 November 2011	JCU provided submissions and OIC made further enquiries with JCU in relation to the information provided.
8 November 2011	JCU provided submissions and OIC made further enquiries with JCU in relation to the information provided.
10 November 2011	JCU provided submissions and OIC made further enquiries with JCU in relation to the information provided.
11 November 2011	OIC received submissions from JCU.
15 November 2011	OIC received submissions from JCU.
17 November 2011	OIC received submissions from JCU.
24 November 2011	OIC received submissions from JCU.
29 November 2011	OIC received submissions from JCU.
5 December 2011	<p>OIC took steps to consult with Griffith University in relation to the possible disclosure of information. OIC invited Griffith University to provide submissions by 12 December 2011.</p> <p>OIC asked JCU to disclose to the applicant a number of documents it had located during the external review.</p>
9 December 2011	OIC conveyed a second preliminary view to the applicant and invited her to provide submissions supporting her case by 9 January 2012.
12 December 2011	<p>Griffith University notified OIC that it did not object to disclosure of the relevant document to the applicant.</p> <p>The applicant requested an extension of time until 27 January 2012 to provide submissions supporting her case.</p>
13 December 2011	<p>OIC asked JCU to disclose further information to the applicant on the basis that Griffith University did not object to the information being disclosed to the applicant.</p> <p>OIC granted the applicant the requested extension.</p>
24 January 2012	The applicant notified OIC that she did not accept the preliminary view and provided submissions supporting her case. The applicant asked that OIC not disclose her submissions to JCU.
7 February 2012	OIC explained to the applicant that the next step in progressing these reviews is for OIC to assess her submissions and to put those submissions (or at least their substance) to JCU in respect of any issue where OIC forms a view adverse to JCU. OIC asked the applicant whether she wished to continue with these reviews.
20 February 2012	OIC received the applicant's submissions. The applicant advised she wished to proceed with the external reviews but maintained her objection to OIC revealing her submissions to JCU.
28 February 2012	OIC made further enquiries with JCU.
2 March 2012	OIC received submissions from JCU.
16 March 2012	OIC received submissions from the applicant.