



## Decision and Reasons for Decision

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**Application Number:** 310442

**Applicant:** Anderson

**Respondent:** Department of Natural Resources and Mines

**Decision Date:** 29 June 2012

**Catchwords:** ADMINISTRATIVE LAW – RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION – REFUSAL OF ACCESS – NON-EXISTENT DOCUMENTS – applicant submits additional relevant documents should exist within the agency – whether there are reasonable grounds for agency to be satisfied that documents do not exist – whether access to documents can be refused – section 47(3)(e) of the *Right to Information Act 2009 (Qld)* – section 52(1)(a) of the *Right to Information Act 2009 (Qld)*

### REASONS FOR DECISION

#### Summary

1. By correspondence dated 25 May 2010,<sup>1</sup> the applicant applied to the Department of Environment and Resource Management (**Department**)<sup>2</sup> under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to certain documents relating to two lots of land which the applicant owns and on which a third party operates a quarry.
2. The Department identified 596 pages of relevant information and decided<sup>3</sup> to:
  - grant full access to 170 pages
  - refuse partial access to 66 pages
  - refuse access to 221 pages in full
  - delete 2 pages that were irrelevant to the access application; and
  - grant access by way of inspection to 145 pages<sup>4</sup> because access in the form requested by the applicant would involve an infringement of copyright.
3. The applicant sought internal review<sup>5</sup> of the Department's decision to refuse her access to certain information and raised specific concerns about the sufficiency of the Department's searches.

<sup>1</sup> Received by the Department on 28 May 2010.

<sup>2</sup> Machinery of government changes in April 2012 transferred relevant responsibility from the Department of Environment and Resource Management (**DERM**) to the Department of Natural Resources and Mines (**DNRM**). Accordingly, existing RTI applications and reviews involving certain applications made to DERM before the machinery of government changes now rest with DNRM, including this external review. For ease of reference, I will simply refer to 'the Department'.

<sup>3</sup> By original decision dated 5 August 2010 and 'supplementary' decision dated 13 August 2010.

<sup>4</sup> Including 8 pages to which partial access was refused.

4. On internal review, the Department decided<sup>6</sup> to release two pages of additional information and attempted to address the sufficiency of search issues raised by the applicant.
5. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's internal review decision.<sup>7</sup>
6. In all the circumstances, the additional documents sought by the applicant do not exist and the Department is entitled to refuse access to them under sections 47(3)(e) and 52(1)(a) of the RTI Act.

### **Significant procedural steps**

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

### **Reviewable decision**

8. The decision under review is the Department's internal review decision dated 5 October 2010.

### **Evidence considered**

9. The evidence, submissions, legislation and other material I have considered in reaching my decision are disclosed in these reasons (including footnotes and Appendix).

### **Issues in this review**

10. As a result of informal resolution processes, the single issue remaining for determination is whether the Department has taken all reasonable steps to locate documents responsive to the access application.<sup>8</sup>

### **Relevant law**

11. 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. Relevantly, an agency may refuse access to a document if the document is nonexistent or if the document cannot be located.<sup>9</sup>
12. The RTI Act is silent on how an agency or Minister can be satisfied that a document does not exist. However the Information Commissioner has explained<sup>10</sup> that to be satisfied that a document does not exist, it is necessary for the agency to make an evaluative judgment based on its knowledge and experience with respect to various key factors including:

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<sup>5</sup> On 10 September 2010, following discussions with the Department as a result of which the time for making an application for internal review was extended.

<sup>6</sup> By internal review decision dated 5 October 2010.

<sup>7</sup> On 3 November 2010.

<sup>8</sup> The issue of whether the Department was entitled to refuse access to certain information on the basis that its disclosure would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act was informally resolved following the release of additional information.

<sup>9</sup> Sections 47(3)(e) and 52 of the RTI Act.

<sup>10</sup> In *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*). 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).

- the administrative arrangements of government
  - the agency's structure, functions and responsibilities
  - the agency's practices and procedures, including but not exclusively its information management approaches; and
  - key factors within the access application or factors reasonably inferred from any other information supplied by the applicant, including the:
    - nature and age of the requested document/s; and
    - nature of the government activity the request relates to.
13. The Information Commissioner also indicated that if an agency relies on searches to satisfy itself that a document does not exist, all reasonable steps must be taken to find the document. To ensure that all reasonable steps have been taken to locate documents, a decision-maker must make enquiries and undertake searches of all relevant locations, having regard to the factors outlined above.<sup>11</sup>

### Has the Department taken all reasonable steps to locate the documents?

14. As a result of additional searches undertaken by the Department on external review, further information relevant to the terms of the access application was located and provided to the applicant.<sup>12</sup>
15. The applicant maintains that there are grounds to expect that further relevant documents exist within the Department's possession. Specifically, the applicant submits<sup>13</sup> that the following information could reasonably be expected to exist:
- (a) An email to the Quarry Operator forwarding any Development Approvals (**DA**) and Permits for the relevant land. This expectation is based on an email from the Quarry Operator to the Senior Environmental Officer requesting this information.
  - (b) Material Change of Use (**MCU**) application or approval, or amendment to the relevant DA. This expectation is based on an email (**Released Email**) dated 8 February 2010 from the Senior Environmental Officer to the Quarry Operator which discusses whether an 'environmentally relevant activity' will occur as a result of the Quarry Operator's activities on the land and if so, whether an application for an MCU or amendment to the DA will be required.
16. The Department provided extensive submissions regarding the searches it undertook in processing the access application and on external review, including that:
- any documents or correspondence relating to the lots of land or the quarry would be located on the physical files for those lots of land which is held by the Environmental Services Unit (**ESU**)<sup>14</sup>
  - the Department searched the relevant physical files<sup>15</sup>
  - the Department also searched the physical files relating to different lots of land on which the Quarry Operator undertakes activities and no additional relevant information was located<sup>16</sup>
  - the ESU's electronic files were recently migrated from the local drive to the 'Keeper' filing system<sup>17</sup> and while the information filed in Keeper should be

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<sup>11</sup> PDE at paragraph 49.

<sup>12</sup> The numerous searches undertaken during the course of the external review and the additional documents located are set out in the Appendix to this decision.

<sup>13</sup> Submissions dated 22 June 2012.

<sup>14</sup> Submissions dated 14 December 2010.

<sup>15</sup> Submissions dated 14 December 2010.

<sup>16</sup> Submissions dated 14 December 2010.

<sup>17</sup> In a telephone conversation with OIC staff and ESU Officer on 30 May 2012.

identical to that located on the local drive, searches were undertaken of both systems<sup>18</sup>

- the Manager of the ESU certified that all areas of ESU where relevant documents could be reasonably be expected to be located had been searched;<sup>19</sup> and
- searches of six ESU officers' email accounts identified as relevant during the course of the external review (including that of the Senior Environmental Officer) were undertaken by the Department's Information Communication and Technology (ICT) Systems and Services unit for correspondence to or from the Quarry Operator.<sup>20</sup>

17. On the basis of the above, I am satisfied that an email to the Quarry Operator attaching DAs and Permits – as outlined in paragraph 15(a) – does not exist within the Department. This is particularly so given the Department's comprehensive searches for emails between the Quarry Operator and Departmental officers, including the Senior Environmental Officer.<sup>21</sup>
18. I have considered the applicant's submission that the Released Email suggests an application for MCU or amendment to the DA – as outlined in paragraph 15(b) – would be required and therefore those documents should exist within the Department. The Released Email discusses the possibility of an MCU or amendment to the DA being required in a very preliminary manner and does not suggest that an application for MCU or amendment to the DA actually occurred. Moreover, I am satisfied that the Department has searched all locations where these documents would be located, if they existed.<sup>22</sup>
19. On careful consideration of all the evidence before me, including the Department's submissions about its searches, I am satisfied that the Department has used its knowledge of key factors such as the Department's structure, functions and responsibilities, the internal practices and procedures of the ESU and the nature and age of the documents sought to appropriately identify and search all relevant locations where information may be located. On that basis, I am satisfied that the Department has undertaken all reasonable steps to satisfy itself that no further documents responding to the access application exist, including undertaking comprehensive searches and enquiries

## Findings

20. Taking into account all of the information set out above, I am satisfied that:
  - there are reasonable grounds for the Department to be satisfied that no further documents exist; and
  - access may be refused to any additional information on the basis that further documents do not exist.<sup>23</sup>

<sup>18</sup> Submissions dated 9 March 2012, 17 March 2012, 7 June 2012.

<sup>19</sup> Submissions dated 9 March 2012 and 7 June 2012.

<sup>20</sup> 18 November 2011, 17 May 2012, 8 June 2012.

<sup>21</sup> While the applicant's concern relates to **correspondence**, it is relevant to note the Department's advice that DAs and Permits are required to be kept on a register under section 540 of the *Environmental Protection Act 1994* (Qld). Therefore, DAs and Permits are available to the applicant for a fee under that arrangement.

<sup>22</sup> The Department advised the OIC on 25 June 2012 that while an application for MCU would not be contained on the register mentioned in Footnote 21, any approved MCU or amended DA is required to be kept on that register pursuant to the *Environmental Protection Act 1994* (Qld).

<sup>23</sup> Pursuant to section 47(3)(e) of the RTI Act on the ground set out in section 52(1)(a) of the RTI Act.

## **DECISION**

21. I affirm the decision under review and find that the Department is entitled to refuse access to the documents sought under sections 47(3)(e) and 52(1)(a) of the RTI Act.
22. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**Acting Assistant Information Commissioner L Lynch**

**Date: 29 June 2012**

## APPENDIX

### Significant procedural steps

Date	Event
28 May 2010	By application dated 25 May 2010, the applicant sought access to documents relating to Lot 67 on CP LN1741 and Lot 93 on CP LN801012 from 1 July 2006 to 25 May 2010.
5 August 2010	<p>The Department informed the applicant that it had located 596 pages in response to the access application and decided to:</p> <ul style="list-style-type: none"> <li>• grant full access to 170 pages</li> <li>• refuse partial access to 58 pages</li> <li>• grant access by way of inspection to 178 pages because access in the form requested by the applicant would involve an infringement of copyright (<b>Copyright Documents</b>)</li> <li>• refuse access to 188 pages which were available by other means; and</li> <li>• delete 2 pages that were irrelevant to the access application.</li> </ul>
13 August 2010	The Department issued a 'supplementary decision' varying its original decision in relation to the Copyright Documents by refusing access to 8 pages in part and 33 pages in full.
20 August 2010	The applicant applied to the Department for internal review of its original and supplementary decisions.
10 September 2010	Following discussions between the Department and the applicant's representative, the time in which the applicant could make an application for internal review was extended. The applicant withdrew her application for internal review dated 20 August 2010 and made a new internal review application raising specific concerns about the sufficiency of the Department's searches.
5 October 2010	The Department decided to release two additional pages to the applicant and responded to the applicant's submissions in relation to the sufficiency of its searches.
3 November 2010	The applicant applied to the Office of the Information Commissioner ( <b>OIC</b> ) for external review of the Department's decision on the grounds that " <i>searches undertaken by (the Department) are still deficient</i> " and challenging the grounds for the Department's decision to refuse access to certain information.
30 November 2010	<p>OIC requested the Department undertake further searches as necessary to locate any additional documents responding to the access application and provide a submission setting out:</p> <ul style="list-style-type: none"> <li>• locations that were searched for documents</li> <li>• reasons those locations were chosen (including reference to any relevant record keeping policies and/or practices)</li> <li>• search terms used in any electronic databases; and</li> <li>• if no further documents can be located, any explanation the Department can offer as to why no further documents exist.</li> </ul>
14 December 2010	<p>The Department provided OIC with submissions on sufficiency of search.</p> <p>The Department responded to OIC's request dated 30 November 2010 and provided additional documents that it had identified as responsive to the access application (<b>Additional Photographs</b>).</p>
29 March 2011	The applicant provided further submissions in support of its external review application.
4 August 2011	By telephone conversation with staff of the OIC, the applicant's representative confirmed that the applicant sought external review of the Department's searches and its grounds for refusing access to tonnage information located on two pages ( <b>Tonnage Information</b> ).

4 August 2011	OIC requested the Department release the Additional Photographs to the applicant and undertake any further searches and inquiries necessary to locate and assess additional documents responsive to the access application; or to otherwise address the issues raised in the applicant's submissions.
2 September 2011	The Department provided submissions in response to OIC's request dated 4 August 2011. The Department also advised that it provided the Additional Photographs to the applicant by letter dated 11 August 2011.
9 September 2011	By telephone conversation with the Department, OIC conveyed its preliminary view that disclosure of the Tonnage Information would not, on balance, be contrary to the public interest and advised that OIC would consult with a relevant third party on its disclosure. The Department accepted the preliminary view.
15 September 2011	By correspondence, the OIC consulted with a third party and sought its views on disclosure of the Tonnage Information. OIC also indicated that unless the third party notified its objection to disclosure by 29 September 2012, OIC would proceed on the basis that it did not object to disclosure of the Tonnage Information.
29 September 2011	The due date for the third party to provide its view on disclosure of the Tonnage Information passed and the third party was taken to not object to disclosure.
6 October 2011	By telephone conversation with the Department, OIC requested further submissions on sufficiency of search and advised that the third party did not object to disclosure of Tonnage Information.
7 October – 12 October 2011	OIC contacted officers of the Department's Environmental Services Unit ( <b>ESU</b> ) and Information Communication and Technology Services ( <b>ICT Services</b> ) to make further enquires about the sufficiency of the Department's searches.
12 October 2011	By correspondence OIC requested the Department release the Tonnage Information to the applicant.
26 October 2011	The Department provided additional documents located by the Department's ESU business unit ( <b>Environmental Services Documents</b> ) and further submissions on its searches.
2 November 2011	By telephone conversation OIC sought the Department's view on disclosure of the Environmental Services Documents.
7 November 2011	The Department provided OIC with marked up copies of the Environmental Services Documents reflecting the Department's view on disclosure of those documents.
10 November 2011	OIC requested the Department release the Environmental Services Documents to the applicant (in accordance with the marked up copies provided on 7 November 2011). OIC also requested the ICT Service undertake searches for documents responsive to the access application.
18 November 2011, 8 December 2011	The Department provided OIC with 222 pages located as a result of the Department's ICT Services' searches. However by correspondence dated 8 December 2012, the Department advised that these 222 pages had been identified and considered under the Department's initial decision.
14 December 2011	By telephone conversation with the applicant's representative, OIC conveyed the preliminary view that the Department had undertaken all reasonable steps to locate documents responding to the access application and there were reasonable grounds to be satisfied that no further documents exist.
14 December 2011	OIC contacted the applicant's representatives to convey an oral preliminary view in regard to the sufficiency of search issue, that the Department had now undertaken all reasonable steps.
17 January 2012	By correspondence to the applicant's representatives, OIC confirmed its preliminary view on sufficiency of search as conveyed by telephone conversation on 14 December 2012.

31 January 2012	The applicant advised OIC that it did not accept the preliminary view conveyed by correspondence dated 17 January 2012 and raised specific concerns with the sufficiency of the Department's searches.
1 February 2012, 3 February 2012	By telephone conversation with the applicant's representatives on 1 February 2012 and by correspondence dated 3 February 2012, OIC requested clarification from the applicant regarding specific concerns with the sufficiency of the Department's searches.
10 February 2012	The applicant provided OIC with further submissions clarifying the basis for its concerns about the sufficiency of the Department's searches.
24 February 2012	OIC requested the Department undertake further searches for: <ul style="list-style-type: none"> <li>any relevant documents located in email accounts of Departmental officers identified by the applicant; and</li> <li>any audio or visual recordings of meetings between the applicant and the Department which were identified by the applicant.</li> </ul> <p>OIC also wrote to the applicant's representatives and confirmed that it had requested the Department provide submissions on the above searches</p>
9 March 2012	The Department provided a submission in response to OIC's request dated 24 February 2012, including search certifications and advice on the Department's filing practices. The Department also advised that no additional documents had been located as a result of additional searches.
30 April 2012	By telephone conversation OIC advised the applicant's representative of its view that all possible search locations had been identified and searched by the Department.
1 May 2012	OIC made further enquiries with the Department requesting additional searches of email accounts of the Departmental officers specified in the request dated 24 February 2012.
17 May 2012	The Department provided OIC with copies of 106 pages of emails located as a result of further searches ( <b>Further Emails</b> ).
21 May 2012, 22 May 2012	By telephone conversation and by correspondence, OIC consulted a third party that we identified could reasonably be expected to be concerned by disclosure of the Further Emails. The third party did not object to disclosure of the Further Emails to the applicant.
29 May 2012	By correspondence, the OIC consulted with a third party and sought its views on disclosure of the Further Emails. OIC also indicated that unless the third party notified its objection to disclosure by 31 May 2012, OIC would proceed on the basis that it did not object to disclosure of the Further Emails.
28-30 May 2012	OIC made a series of enquiries with ESU in Rockhampton. As a result, an additional document was located ( <b>Compliance Inspection Report</b> ) and an additional email account was identified that may hold information relevant to the access application.
30 May 2012	OIC sought the Department's views on disclosure of the Compliance Inspection Report and requested the Department undertake searches of the additional email account identified by ESU.
31 May 2012	The due date for the third party to provide its view on disclosure of the Further Emails passed and the third party was taken to not object to disclosure.
6 June 2012	OIC sought clarification from ESU about its filing system and possible areas where relevant documents could be located. OIC also requested certification that all relevant searches of that area had been undertaken.
7 June 2012	The Manager of ESU provided a completed search certification to OIC.
7 June 2012	OIC requested search certification from ICT Services about searches requested by OIC correspondence dated 30 May 2012.



8 June 2012	The Department confirmed that no additional emails were located as a result of further enquiries with the Department's ICT Services and provided search certification from ICT Services. The Department also agreed to release the Compliance Inspection Report.
12 June 2012	By telephone conversation, OIC informed the applicant that the Department had located the Further Emails and Compliance Inspection Report and had agreed to release them to the applicant. The OIC also advised the applicant of its preliminary view that the Department had undertaken all reasonable steps to locate documents and no further documents could be located.
13 June 2012	OIC requested the Department release the Further Emails and Compliance Inspection Report to the applicant by 15 June 2012.
13 June 2012	By correspondence to the applicant's representatives, OIC confirmed its preliminary view as conveyed by telephone conversation on 12 June 2012.
22 June 2012	The applicant advised OIC that it did not accept the preliminary view conveyed by correspondence dated 13 June 2012 and identified two additional documents which it submitted could reasonably be expected to exist within the Department's possession.
25 June 2012	OIC made additional enquiries with ESU in relation to the two specific issues raised by the applicant in submissions dated 22 June 2012.