



Decision and Reasons for Decision

Citation:	60CDYY and Department of Education and Training [2017] QICmr 52A (7 November 2017)
Application Number:	313113
Applicant:	60CDYY
Respondent:	Department of Education and Training
Decision Date:	7 November 2017
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL TO DEAL WITH APPLICATION - EFFECT ON AGENCY'S FUNCTIONS - whether work involved in dealing with the application would, if carried out, substantially and unreasonably divert resources of the agency from their use by the agency in performing its functions - sections 41 and 42 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Education and Training (**Department**)¹ under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents about his children, who were students at various schools, covering a period of approximately 8 years.
2. The Department notified the applicant, under section 42 of the RTI Act, that it intended to refuse to deal with the access application under section 41 of the RTI Act.² The Department invited the applicant to either confirm or narrow the scope of the access application.
3. The applicant confirmed the scope, advising the Department that he intended to proceed with the application in its current form.³ The Department then refused to deal with the access application on the basis that the work involved in dealing with it would substantially and unreasonably divert the Department's resources from their use in the performance of the Department's functions.⁴
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for an external review of the Department's decision.
5. For the reasons set out below, I affirm the Department's decision.

¹ By access application dated 17 November 2016.

² By letter dated 8 December 2016.

³ By email from the applicant to the Department, also dated 8 December 2016.

⁴ Under section 41(1)(a) of the RTI Act.

Background

6. The applicant's access application sought the following documents created from the time of the applicant's first child's attendance at a particular State school until the date of the access application, being 17 November 2016:
- 1) *All school, telephone and email records pertaining to [Person A] and [Person B] at [School One].*
 - 2) *All school, telephone and email records pertaining to [Person A] and [Person B] at [School Two].*
 - 3) *All school, telephone and email records pertaining to [Child A], [Child B] and [Child C] at [School Two], [School One], [School Three], [Unit].*
 - 4) *Records of internal departmental telephone conversations and records of conversations pertaining to [Child A], [Child B], [Child C], [Person A] and [Person B].*
 - 5) *The written medical authorisation provided to the Principal [Principal's name] of [School Two] by a medical practitioner authorising her and or any staff employed at [School Two] to administer Ritalin and or any other prescribed and over the counter medication to [Child B].*
 - 6) *Telephone records including records of conversation between the Principal [Principal's name] and or staff employed at [School Two] with any and all medical practitioners involved with the three children [Child A], [Child B] and [Child C].*
 - 7) *All letters, notices, telephone records and records of conversation between [Principal's name] and or staff employed at [School Two] and the Department of Veterans Affairs.*
 - 8) *All records pertaining to bullying upon the three children, [Child A], [Child B] and [Child C] at [School Two].*
 - 9) *All records pertaining to measures taken by the Principal [Principal's name] and or staff to address the learning difficulties of the three children [Child A], [Child B] and [Child C] including any and all suggested courses of action and intervention to improve the children's learning.*

Significant procedural steps

7. Significant procedural steps taken in the review are set out in the Appendix to this decision.

Reviewable decision

8. The decision under review is the Department's decision dated 13 December 2016.

Evidence considered

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

Issue for determination

10. The issue for determination is whether the work involved in dealing with the applicant's access application would, if carried out, be a substantial and unreasonable diversion of the Department's resources.

Relevant law

11. Parliament intends that an agency receiving an access application will deal with that application unless dealing with the application would, on balance, be contrary to the public interest.⁵ Sections 40, 41 and 43 of the RTI Act state the only circumstances in which Parliament considers it would, on balance, be contrary to the public interest to deal with an access application. Relevantly, section 41(1)(a) of the RTI Act permits an agency to refuse to deal with an access application if the agency considers the work involved in

⁵ Section 39 of the RTI Act.

dealing with the application would, if carried out, substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions.

12. The term '*substantially and unreasonably*' is not defined in the RTI Act. It is therefore appropriate to consider the ordinary meaning of these words. '*Substantial*' is relevantly defined as meaning '*considerable amount, quantity, size, etc.: a substantial sum of money*'⁶ and '*of a considerable size or value: substantial funds*'.⁷ '*Unreasonable*' is relevantly defined as meaning '*exceeding the bounds of reason; immoderate; exorbitant*'⁸ and '*immoderate; excessive: unreasonable demands*'.⁹
13. Section 42 of the RTI Act sets out a number of procedural steps that an agency must take before deciding to refuse to deal with an application on this basis. The agency must:
 - give the applicant written notice under section 42(1)(a) of the RTI Act
 - give the applicant a reasonable opportunity to consult with the agency;¹⁰ and
 - as far as reasonably practicable, give the applicant any information that would help the making of an application in a form that would remove the ground for refusal.¹¹
14. The written notice given under section 42(1)(a) of the RTI Act must:
 - state an intention to refuse to deal with the application
 - advise that, for the prescribed consultation period¹² for the notice, the applicant may consult with the agency with a view to making an application in a form that would remove the ground for refusal; and
 - state the effect of sections 42(2) to (6) of the RTI Act, which is as follows:
 - following any consultation, the applicant may give the agency written notice either confirming or narrowing the application
 - if the application is narrowed, section 41 applies in relation to the changed application, but the procedural requirements in section 42 do not apply to it
 - if the applicant fails to consult¹³ after being given the notice, the applicant is taken to have withdrawn the application at the end of the prescribed consultation period.

Procedural prerequisites

15. I have viewed the Department's Notice of Intention to Refuse to Deal¹⁴ and am satisfied that it complied with the requirements of the RTI Act, as set out in paragraph 14 above. In particular, the Notice of Intention to Refuse to Deal stated an intention to refuse to deal with the applicant's application,¹⁵ gave the applicant a reasonable opportunity to

⁶ Macquarie Dictionary, Seventh Edition.

⁷ Collins English Dictionary, Twelfth Edition.

⁸ Macquarie Dictionary, Seventh Edition.

⁹ Collins English Dictionary, Twelfth Edition.

¹⁰ Section 42(1)(b) of the RTI Act.

¹¹ Section 42(1)(c) of the RTI Act.

¹² Under section 42(6) of the RTI Act, the '*prescribed consultation period*' for a written notice under section 42(1)(a) is ten business days after the date of the notice, or the longer period agreed by the agency and the applicant (whether before or after the end of the 10 business days).

¹³ Under section 42(5) of the RTI Act, failure to consult includes the applicant not giving written notice either confirming or narrowing the application under section 42(2) of the RTI Act.

¹⁴ Dated 8 December 2016.

¹⁵ In the Notice of Intention to Refuse to Deal, the Department's decision-maker stated '*The purpose of this notice is to: (a) advise that I intend to refuse to deal with your application because the work involved in processing your application in its current form would substantially and unreasonably divert the resources of the Department; and (b) give you an opportunity to make the application in a form that would not substantially and unreasonably divert the resources of the Department, thereby enabling the Department to process your application.*'

consult with the Department¹⁶ and stated the effect of sections 42(2) to (6) of the RTI Act.¹⁷

16. The Department, as far as was reasonably practicable, also gave the applicant information that would help the making of an application in a form that would remove the ground for refusal. In particular, the Notice of Intention to Refuse to Deal suggested a number of ways the scope could be narrowed.¹⁸
17. On this basis, I am satisfied that the Department has fulfilled the relevant procedural requirements set out in paragraph 13 above.
18. Whether the work involved in dealing with an application would, if carried out, substantially and unreasonably divert the resources of an agency is a question of fact in each individual case.¹⁹ The volume of documents is not the only consideration. In each case, it is necessary to assess the work required to deal with the application in the context of the agency's other functions.

Substantial and unreasonable diversion of resources

19. The time period the applicant asked the Department to search within was from the time the applicant's first child first attended at a particular State school until the date of the access application, being 17 November 2016, a period of approximately 8 years.
20. The Notice of Intention to Refuse to Deal states that:
 - searches for relevant documents were undertaken by Schools One, Two and Three, and by the Department's North Queensland Regional Office (**Regional Office**); and
 - Schools Two and Three and the Regional Office located approximately 3000 pages²⁰ that fell within the scope of the access application, including 100 pages of emails sent and received by School Two concerning the applicant's interactions with the school regarding his children.
21. On external review, School One identified 9 responsive pages. The Department acknowledges that, given this low number of additional responsive pages, the Department's processing time estimate remains unaltered.²¹
22. The Department submits that:²²
 - in its experience, processing a single page requires two to three minutes per page
 - in calculating the time to process the pages responsive to the access application, it applied a conservative average of 3 minutes per page, and on this basis, the time required to process 3000 pages would require the Department to spend approximately 150 hours examining and marking up the pages
 - this time estimation excludes any consultation process²³ with the two identified third parties²⁴ and would increase if the Department were to undertake consultation with the third parties.

¹⁶ The Notice of Intention to Refuse to Deal dated 8 December 2016 sought a response from the applicant within ten business days.

¹⁷ The Notice of Intention to Refuse to Deal summarised the effects of these provisions.

¹⁸ Including by reducing the timeframe of the access application, narrowing the scope of the application to one or two of the topics listed in the access application, and/or by excluding certain categories of documents, such as correspondence sent or received by the applicant.

¹⁹ *Davies and Department of the Prime Minister and Cabinet* [2013] AICmr 10 (22 February 2013) at [28].

²⁰ The Department confirmed, in response to OIC's inquiry, that the word 'documents' used in its correspondence refers to pages.

²¹ Email from Department dated 28 March 2017.

²² In the Notice of Intention to Refuse to Deal.

²³ Under section 37 of the RTI Act.

²⁴ Person A and Person B.

23. The applicant does not dispute the Department's processing estimate. The applicant submits that the Department had '*created the numerous hours they allegedly believe it will take them to provide me with the requested documents*', through having '*created the large file upon my children*' and having failed to involve the applicant and provide the information he had requested.²⁵
24. Under section 41(3)(a) of the RTI Act, in deciding whether to refuse, under section 41(1), to deal with an access application, an agency must not have regard to any reasons the applicant gives for applying for access. On external review, OIC stands in the shoes of the decision-maker. Paragraphs 1-18 of the applicant's external review application list the applicant's reasons for seeking the requested documents. I have not taken these paragraphs into account in considering whether the Department may refuse to deal with the application.
25. While an agency is required to consider how much time an access application is likely to take to process, a precise assessment is not required, as such an assessment may, in itself, substantially and unreasonably divert the agency's resources. Accordingly, an estimate is acceptable.²⁶ In conducting a merits review of the Department's decision, it is necessary for me to determine whether the Department's processing estimate is reasonable.
26. The requested information concerns three children and three schools. Assessing whether all, part or none of a particular document may be disclosed may entail consideration of other documents and a variety of issues, for example, determining the weights to be accorded to the privacy interests of various individuals; and time taken to mark up redactions will vary from document to document, depending on whether a document is partly or fully redacted, or released in its entirety. In the present circumstances, I accept that the probable processing time per page is about three minutes. On this basis, I consider that the Department's estimate that it would take approximately 150 hours to process the approximately 3000 responsive pages, is reasonable.
27. The Department submits that it would take additional time to consult with the two third parties, Person A and Person B. It appears, from the terms of the access application, that some of the responsive information concerning, for example, complaints about the medication provided to Child B, and allegations of bullying of all three children, may be recorded in association with information about other individuals. Accordingly, the requested information may contain information about individuals who it may be appropriate to consult, in addition to Person A and Person B.
28. I note, however, that consultation under section 37 of the RTI Act is required only in respect of information an agency proposes to release. It is often contrary to the public interest to release to an applicant the personal information of another individual, including in some circumstances, information about an applicant's own child. If the Department were to take this view in its access decision, it may be unlikely that extensive third party consultation would occur. I therefore consider it appropriate, in the absence of an estimate from the Department, to allow only a small extra amount of time - ten hours - for third party consultation.
29. The Department has located the responsive documents and these have been provided to its RTI Unit. However, the Department has not provided its estimate of the time taken in locating and providing the documents. It advises that the majority of the documents were provided on a USB from School Two.²⁷ School Two had previously scanned the

²⁵ Email to OIC from the applicant dated 20 January 2017.

²⁶ Refer to *McIntosh v Victoria Police (General)* [2008] VCAT 916 at paragraph [10].

²⁷ Telephone conversation with OIC on 9 October 2017.

hard copies of the documents, which were the subject of a subpoena, into electronic format. Schools One and Three and the Regional Office provided the RTI Unit with hard copies of responsive documents they held, totalling approximately several hundred documents. Based on this, I estimate it is appropriate to allow approximately eight hours for these four locations to identify and provide responsive documents to the RTI Unit.

30. It is also not uncommon for access requests seeking information about multiple individuals and over multiple years, as is the case here, to require further searches, after reviewing initial search results. Therefore I consider it reasonable, particularly in light of the decentralised nature of the agency, its structure and record keeping arrangements, to allow an additional period of twenty hours, to assess if all responsive documents have been located. This allowance includes the time it may reasonably take to review relevant Departmental retention and disposal schedules, and, if necessary, to conduct further searches and make inquiries to locate, and collate, any additional documents.
31. The Department has not provided its estimate of the likely time required to prepare a written decision. In the absence of such submissions, I consider it appropriate to allow a modest estimate of fifteen hours to prepare a written decision.
32. Based on the above, I consider the time the Department may spend in locating, collating, examining, marking up, consulting third parties and deciding on access to the information the applicant seeks is likely to approximate 203 hours.

Would the impact on the Department's functions be substantial and unreasonable?

33. Yes. I am satisfied that processing the access application would substantially and unreasonably impact the Department's functions for the reasons set out below.
34. As noted above, I consider that the Department's initial estimate, as set out in the Notice of Intention to Refuse to Deal, that approximately 3000 documents are responsive to the access application, was reasonable.²⁸
35. While the access application covers a wide time frame,²⁹ it lists specific topics and particular issues in respect of which information is sought. I consider that there is a sufficiently precise description to enable the Department to locate the documents sought, however, the expansive eight year time frame and number of persons to whom the documents relate would require some effort on the part of the Department.
36. I consider my estimates for the process of locating, collating, assessing, marking up, consulting third parties and deciding on access to the approximately responsive 3,000 documents, totalling about 203 hours, are appropriate in the circumstances of this application. This equates to approximately 28 working days for one decision-maker³⁰ working full-time on the application, and performing no other work on any other matters over this period.
37. Given the Department's estimate of the time required to deal with the application, and considering the Department's capacity to devote resources to processing applications under the RTI Act and *Information Privacy Act 2009* (Qld) relative to its other functions, I am satisfied that the work involved in dealing with the access application, in particular taking a decision-maker offline for such a long period to process the application, would,

²⁸ Paragraph [26].

²⁹ As noted in paragraph [6] above.

³⁰ I note that, under section 18 of the RTI Act, the standard '*processing period*' for making a decision under the RTI Act is 25 business days, and ten business days would be added to this processing period if it were necessary to consult with third parties – although, as noted in paragraph 28, it is possible but not certain that consultation may be required. It is relevant to have regard to this timeframe when considering whether the time involved in processing a single access application will have a substantial impact on an agency's resources.

if carried out, substantially divert the resources of the Department from their use in the performance of its functions.

38. I consider the impact of undertaking the work to process the access application would be substantial, due to the matters considered in paragraphs 34 to 37 above, and this diversion of the Department's resources is unreasonable.

Conclusion

39. For the reasons set out above, I am satisfied that:

- the Department satisfied the procedural steps set out in section 42 of the RTI Act
- the work involved in dealing with the access application would, if carried out, substantially and unreasonably divert the Department's resources from their use in its functions; and
- accordingly, the Department was entitled to refuse to deal with the access application under section 41(1)(a) of the RTI Act.

DECISION

40. For the reasons set out above, I affirm the Department's decision to refuse to deal with the access application under section 41(1)(a) of the RTI Act.

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

L Lynch
A/Right to Information Commissioner

Date: 7 November 2017

APPENDIX

Significant procedural steps

Date	Event
13 December 2016	OIC received the external review application.
14 December 2016	OIC notified the applicant and the Department of its receipt and requested that the Department provide OIC with relevant procedural information.
11 January 2017	OIC received the requested procedural information from the Department.
19 January 2017	OIC notified the applicant that his external review application had been accepted and conveyed a preliminary view to the applicant that the Department was entitled to refuse to deal with the access application on the basis that processing it would substantially and unreasonably divert the Department's resources.
20 January 2017	OIC received an email from the applicant containing submissions and contesting OIC's 'decision'.
23 January 2017	OIC wrote to the applicant clarifying that OIC's letter dated 19 January 2017 was not a final decision and that that letter informed the applicant of OIC's preliminary view. OIC invited the applicant to provide any submissions.
1 March 2017	OIC wrote to the applicant noting that OIC had received no submissions in response to OIC's correspondence dated 23 January 2017. OIC confirmed that its preliminary view remained unchanged and invited the applicant to provide any information he wished OIC to take into consideration. OIC informed the applicant that in the absence of any communication from the applicant by that date, OIC would make a written decision to finalise the review.
1 March 2017	OIC received an email from the applicant reiterating submissions made in the applicant's email dated 20 January 2017.
16 March 2017	OIC requested that the Department provide OIC with further relevant procedural information.
28 March 2017	OIC received the requested further procedural information from the Department.
5 April 2017	OIC wrote to the applicant noting that submissions made in the applicant's email dated 1 March 2017 reiterated the applicant's previous submissions. OIC informed the applicant that its preliminary view remained unchanged and OIC would make a written decision.
6 April 2017	OIC received an email from the applicant requesting OIC's written reasons for decision.
9 October 2017	OIC requested, and the Department provided, further relevant procedural information.