



Decision and Reasons for Decision

Application Number: 310354
Applicant: Middleton
Respondent: Department of Health
Decision Date: 10 June 2011

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL TO DEAL WITH ACCESS APPLICATION – EFFECT ON AGENCY’S FUNCTIONS – applicant sought external review on the basis of sufficiency of search and the agency’s refusal to deal with part of the access application to the extent that access had been granted to some documents sought in a previous application – as the access application focused on sewage issues, the agency dealt with part of the application as a request for complaints relating to sewage overflows – applicant contended access was sought to *all* complaints – on external review agency contended that dealing with a request for all complaints would be a substantial and unreasonable diversion of the agency’s resources – whether the work involved would, if carried out, substantially and unreasonably divert the agency’s resources from their use in performing its functions under section 41 of the *Right to Information Act 2009* (Qld)

Contents

REASONS FOR DECISION.....	2
Summary	2
Background.....	2
Reviewable decision	3
Issues in this review.....	3
Evidence considered	3
Relevant law	3
Findings	3
What is the scope of the access application?	3
Would dealing with the access application substantially and unreasonably divert QH’s resources from their use in its functions?	4
Conclusion.....	6
DECISION	6
APPENDIX A.....	7
Significant procedural steps.....	7
APPENDIX B	8
Relevant legislative provisions.....	8

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Health, also known as Queensland Health (**QH**), under the *Right to Information Act 2009 (RTI Act)* for access to:¹
 - a) all documentation related to [the applicant's address] dating back to 1980; including folios 1 – 157 from [her] previous RTI application – ref 0205-3000-679
 - b) all documentation for file references MI167729 MO:09002866, including correspondence to and from third parties, etc; and
 - c) documentation relating to complaints, in addition to the above, that Queensland Health has received against Brisbane City Council since 1 January 2008.
2. In response to the access application, QH's decision-maker:
 - refused to deal with items a) and b) of the access application² on the basis that all documents relevant to these items had been provided to the applicant under a previous application³
 - interpreted the scope of item c) as meaning any complaints QH had received against Brisbane City Council (**Council**) since 1 January 2008 *in relation to sewage overflow*
 - indicated that QH was unlikely to hold information regarding complaints against Council about sewage overflow incidents as QH would only become involved in the limited circumstances prescribed by the *Public Health Act 2005*,⁴ and
 - refused access to the documents sought at item c)⁵ on the basis that there were reasonable grounds to be satisfied that the documents sought did not exist.⁶
3. In her external review application, the applicant disputed QH's decision to refuse to deal with items a) and b) of her access application.⁷ She also stated that at item c) of her application she sought access to all complaints against Council; not just those concerning sewage overflows.
4. On external review, the Office of the Information Commissioner (**OIC**) conveyed to QH⁸ a view that whilst it was understandable, given the focus of the access application and the email address included in item c),⁹ that the scope of the application was interpreted as being confined to complaints in relation to sewage overflow, this did not accord with a plain reading of the access application.
5. In response, QH contended that it would be a substantial and unreasonable diversion of its resources¹⁰ to process item c) as the request would extend to any complaint received by QH about enforcement of any aspect of public health and safety for which Council is responsible. Accordingly, OIC asked QH to provide written submissions to OIC in relation to this issue.¹¹
6. For the reasons set out below, I am satisfied that QH may refuse to deal with the access application under section 41 of the RTI Act on the basis that dealing with the application would substantially and unreasonably divert QH's resources from their use by QH in performing its functions.

Background

1

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

Reviewable decision

8. The decision under review is QH's decision dated 30 August 2010.¹²

Issues in this review

9. In conducting an external review, the Information Commissioner has extensive powers¹³ which include power to:¹⁴
 - review any decision that has been made by an agency in relation to the access application concerned; and
 - decide any matter in relation to the access application that could, under the Act, have been decided by an agency.
10. Therefore, irrespective that QH has processed part of the access application and subsequently issued an access decision, the Information Commissioner can, in an appropriate circumstance, determine that an agency may refuse to deal with an access application if the effect on the agency's functions of processing the application satisfy the requirements of section 41(1)(a) of the RTI Act.
11. In this review the issue to be addressed is whether QH is entitled to refuse to deal with the access application on the basis that processing item c) of the access application would be a substantial and unreasonable diversion of QH's resources from their use in its functions.¹⁵

Evidence considered

12. Evidence, submissions, legislation and other material I have considered in reaching my decision is as disclosed in these reasons (including footnotes and appendix).

Relevant law

13. 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. The limited circumstances in which dealing with an access application will be contrary to the public interest are set out in sections 40, 41 and 43 of the RTI Act.
14. Relevantly, section 41 of the RTI Act¹⁶ permits an agency to refuse to deal with an access application if it considers the work involved in dealing with the application would substantially and unreasonably divert the resources of the agency from performing its functions.¹⁷

Findings

What is the scope of the access application?

15. In its decision on the access application QH refused to deal with the application to the extent that access was sought to documents that were the subject of a previous access application. Further, based on the nature of the applicant's request at item c) and the email address included in the application (sewerageoverflow@[applicant's email

address]), the decision-maker considered that the request was confined to complaints received by QH since 1 January 2008 against Council in relation to sewage overflows.

16. In response to OIC's requests for submissions, QH contended that:

- it could be logically inferred from the email address provided by the applicant that she was seeking complaints against Council in relation to sewage overflow incidents; and
- if all complaints against Council since 1 January 2008 are within the scope of the access application, the work involved in locating and reviewing all complaints would be a substantial and unreasonable diversion of QH's resources.

17. I consider that the decision-maker's interpretation of the access application was understandable given the contextual factors. However, taking into account the applicant's contention that her request was not confined to matters concerning sewage overflows and a plain reading of the terms of the application, I am satisfied that the applicant's request at item c) is for **all** 'documentation relating to complaints that QH has received against Brisbane City Council since 1 January 2008.'

Would dealing with the access application substantially and unreasonably divert QH's resources from their use in its functions?

18. The answer to this questions is 'yes' for the reasons set out below.

19. To determine whether dealing with the access application would substantially and unreasonably divert QH's resources from their use in performing its functions, I:

- a) **must not** have regard to any reasons the applicant gives for applying for access or any belief I may hold about what the applicant's reasons are for applying for access.¹⁸
- b) **must** have regard to the resources that QH would need to use for the following:¹⁹
 - identifying, locating or collating any documents in QH's filing system
 - making copies, or edited copies of any documents
 - deciding whether to give, refuse or defer access to any documents, including resources that would have to be used in examining any documents or conducting third party consultations,²⁰ and
 - notifying any final decision on the application.

20. The applicant has indicated in correspondence to OIC that she is seeking information to assist with litigation she has initiated.²¹ I have not taken this into account in my considerations.

21. The applicant contends that:

- OIC staff need to visit QH and inspect its database to ascertain a 'definite figure' for the number of documents to be processed; and
- QH cannot refuse to deal with her access application under section 41 of the RTI Act because it has not complied with section 42 of the Act and she should not be disadvantaged because QH breached the Act.²²

22. I do not accept the applicant's first contention. I accept QH's evidence as set out at paragraph 26 below. I do not consider it necessary to inspect QH's records.

23. In relation to the applicant's second point, I note that section 42 of the RTI Act sets out a number of procedural steps an agency must take before refusing to deal with an access application. These steps include giving the applicant a written notice stating its intention to refuse to deal with the application, advising the applicant of the consultation period and explaining the effect of particular paragraphs in section 42. This provision prescribes a process whereby an applicant is given an opportunity to consult with agency staff, with a view to making their application in a form that enables the agency to deal with the application.
24. I accept the applicant's submission that QH has not satisfied the prerequisites set out in section 42 of the RTI Act. This is because the issue has only arisen on external review. Once the matter is on external review, the RTI Act does not provide any mechanism to remedy this circumstance.
25. I turn now to consider the resourcing that would be involved in processing the access application.
26. QH submits that the work that would be involved in undertaking searches for *all 'documentation relating to complaints that QH has received against Brisbane City Council since 1 January 2008'* would substantially and unreasonably divert QH's resources from their other functions for the following reasons:
- within QH, both public health and environmental health are decentralised services provided via regional offices situated throughout Queensland
 - these services deal with a wide range of health related matters that may also involve local government including complaints about water,²³ rubbish, pest management, air quality, weed control, food safety, smoking, animals²⁴ and public health issues involving State/local government cooperation²⁵
 - while it can be assumed that complaints against Council would most likely be made by Brisbane residents, complaints could potentially be made by persons from other areas of the State (for example, in relation to issues that may have arisen while they were visiting Brisbane)
 - undertaking searches for all complaints made to QH against Council would require searches to be undertaken in all QH offices
 - QH has three regional service hubs for public and environmental health services, including seventeen local offices (**regional offices**)
 - QH has not yet implemented a department-wide records management system and each of the regional offices maintains its own files
 - RecFind²⁶ searches only extend to records held within QH's Corporate Offices such as the Office of the Director-General, Division of the Chief Health Officer, Corporate Services and the Ethical Standards Unit and none of the regional offices' records are captured in the corporate RecFind database; and
 - files are maintained under broad subject headings, and therefore manual searches would be required to identify the documents requested by the applicant.
27. In short, QH submits that *'the sheer breadth of subject matter about which complaints could relevantly be made (as illustrated by the examples [above]), and the number of regional and local offices involved, would make [relevant searches] a prohibitively resource-intensive exercise'*.
28. I accept QH's submissions at paragraph 26 above regarding the extent and manner of searches required to locate all documentation responding to the applicant's request in order to process the access application. I consider that the searches required would

be extensive, ranging as they would across multiple topic areas, and that, as much of the searching in QH's many regional offices would need to be undertaken manually, the time involved in conducting such searches would be very substantial. In addition to searching for relevant documents, processing the application would require further time to collate and consider the documents and complete the other tasks identified in section 41(2) of the RTI Act.

29. In view of the above, I consider that processing the access application would both substantially and unreasonably divert QH's resources from their use by QH in performing its functions.²⁷

Conclusion

30. For the reasons set out above, I find that:

- dealing with the access application would be a substantial and unreasonable diversion of QH's resources; and
- QH is entitled, under section 41 of the RTI Act, to refuse to deal with the access application.

DECISION

31. I set aside QH's decision and in substitution decide that QH may refuse to deal with the access application under section 41 of the RTI Act.
32. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

Jenny Mead
Right to Information Commissioner

Date: 10 June 2011

APPENDIX A**Significant procedural steps**

Date²⁸	Event
22 July 2010	The applicant applied to QH under the RTI Act for a range of documents including documents related to her property and complaints QH had received against Brisbane City Council.
30 August 2010	QH issued its decision (access decision).
30 August 2010	The applicant applied to OIC for external review of the access decision.
14 September 2010	OIC informed QH and the applicant that the external review application had been accepted for review.
27 September 2010	QH provided OIC with submissions.
2 November 2010	OIC requested further submissions from QH.
19 November 2010	OIC received submissions from QH.
23 November 2010	OIC requested further submissions from QH.
17 December 2010 - 7 March 2011	OIC followed up with QH a number of times regarding submissions requested on 23 November 2010.
10 March 2011	OIC received further submissions from QH.
11 April 2011	OIC conveyed a written preliminary view to the applicant and invited the applicant to provide submissions in support of her case if she did not accept the preliminary view.
20 April 2011	OIC received submissions from the applicant in response to the preliminary view.

APPENDIX B

Relevant legislative provisions

Section 41 of the RTI Act provides:

41 Effect on agency's or Minister's functions

- (1) *An agency or Minister may refuse to deal with an access application or, if the agency or Minister is considering 2 or more access applications by the applicant, all the applications, if the agency or Minister considers the work involved in dealing with the application or all the applications would, if carried out—*
 - (a) *substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions; or*
 - (b) *interfere substantially and unreasonably with the performance by the Minister of the Minister's functions.*
- (2) *Without limiting the matters to which the agency or Minister may have regard in making a decision under subsection (1), the agency or Minister must have regard to the resources that would have to be used--*
 - (a) *in identifying, locating or collating any documents in the filing system of the agency or the Minister's office; or*
 - (b) *in deciding whether to give, refuse or defer access to any documents, or to give access to edited copies of any documents, including resources that would have to be used--*
 - (i) *in examining any documents; or*
 - (ii) *in consulting in relation to the application with a relevant third party under section 37; or*
 - (c) *in making a copy, or edited copy, of any documents; or*
 - (d) *in notifying any final decision on the application.*
- (3) *In deciding whether to refuse, under subsection (1), to deal with an access application, an agency or Minister must not have regard to--*
 - (a) *any reasons the applicant gives for applying for access; or*
 - (b) *the agency's or Minister's belief about what are the applicant's reasons for applying for access.*

Section 42 of the RTI Act provides:

42 Prerequisites before refusal because of effect on functions

- (1) *An agency or Minister may refuse to deal with an access application under section 41 only if-*
 - (a) *the agency or Minister has given the applicant a written notice--*
 - (i) *stating an intention to refuse to deal with the application; and*
 - (ii) *advising that, for the prescribed consultation period for the notice, the applicant may consult with the agency or Minister with a view to making an application in a form that would remove the ground for refusal; and*
 - (iii) *stating the effect of subsections (2) to (6); and*
 - (b) *the agency or Minister has given the applicant a reasonable opportunity to consult with the agency or Minister; and*
 - (c) *the agency or Minister has, as far as is reasonably practicable, given the applicant any information that would help the making of an application in a form that would remove the ground for refusal.*
- (2) *Following any consultation, the applicant may give the agency or Minister written notice either confirming or narrowing the application.*
- (3) *If the application is narrowed, section 41 applies in relation to the changed application but this section does not apply to it.*

- (4) *If the applicant fails to consult after being given notice under subsection (1), the applicant is taken to have withdrawn the application at the end of the prescribed consultation period.*
- (5) *Without limiting subsection (4), the applicant is taken to have failed to consult if, by the end of the prescribed consultation period, the applicant has not given the named officer or member written notice under subsection (2).*
- (6) *In this section--*
- prescribed consultation period***, for a written notice under subsection (1)(a), means--
- (a) *the period of 10 business days after the date of the notice; or*
- (b) *the longer period agreed by the agency or Minister and the applicant whether before or after the end of the 10 business days mentioned in paragraph (a).*

¹ By application dated 22 July 2010 (**access application**).

² Under section 43 of the RTI Act.

³ OIC reference 310300.

⁴ Stating specifically that

- *investigation of sewage overflow is the responsibility of local government, rather than the State government; and*
- *QH can only take action under the Public Health Act 2005 if the local government does not administer and enforce the Act. This only applies if the chief executive is reasonably of the opinion there is a significant risk to public health from a public health risk in a local government's area and is satisfied that the local government has not done, or sufficiently done, a thing in the administration or enforcement of the Act.*

⁵ Adopting QH's narrowed interpretation of the scope of item c).

⁶ Under sections 47(3)(e) and 52(1)(a) of the RTI Act.

⁷ This was understandable as in an earlier review OIC had indicated that certain documents, which appeared to be relevant to the applicant's concerns, could only be accessed under a fresh application as these documents were outside of the date range specified in the access application. However, during this external review it was identified that there had been a misunderstanding between OIC and QH regarding the relevance of these documents. Therefore, although the applicant broadened the date range, the balance of the files identified in the earlier application remained outside the scope of the subsequent access application because they did not concern the applicant's address or the file identified in the access application. Therefore, the only documents within the scope of the application were documents the applicant had received previously. This was explained to the applicant in QH's letter of 19 November 2010 and OIC's letter of 11 April 2011 setting out a preliminary view.

⁸ By telephone on 23 November 2010.

⁹ sewerageoverflow@[applicant's email address].

¹⁰ Under section 41 of the RTI Act.

¹¹ By telephone on 23 November 2010.

¹² A decision refusing access to a document under section 47 of the RTI Act is a reviewable decision; Schedule 6.

¹³ As set out in Chapter 3, Part 9, Division 5 of the RTI Act.

¹⁴ Section 105(1) of the RTI Act.

¹⁵ Although QH refused to deal with items a) and b) of the access application under section 43 of the RTI Act (previous application for same documents), given my conclusion that QH is not required to deal with the access application (in its entirety) under section 41 of the RTI Act, it is unnecessary for me to consider the application of section 43 of the RTI Act.

¹⁶ Refer to Appendix B.

¹⁷ Section 41(1)(a) of the RTI Act.

¹⁸ Section 41(3) of the RTI Act.

¹⁹ Though this is not an exhaustive list: section 41(2) of the RTI Act.

²⁰ Under section 37 of the RTI Act.

²¹ Letter to OIC dated 11 October 2010.

²² Applicant's letter to OIC dated 18 April 2011.

²³ Including swimming pools (both public and residential), rainwater tanks (mosquito control), grey water and sewerage.

²⁴ Including hygiene requirements and health hazards.

²⁵ Including immunisation, needle exchange, mosquito-borne diseases and emergency management.

²⁶ QH's records management system.

²⁷ Section 41(1)(a) of the RTI Act.

²⁸ Of correspondence or relevant communication unless otherwise stated.