



Decision and Reasons for Decision

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| Citation: | <i>Hennessy and Minister for Health and Minister for Ambulance Services</i> [2016] QICmr 15 (21 April 2016) |
| Application Number: | 312740 |
| Applicant: | Hennessy |
| Respondent: | Minister for Health and Minister for Ambulance Services |
| Decision Date: | 21 April 2016 |
| Catchwords: | ADMINISTRATIVE LAW - INFORMATION PRIVACY - REFUSAL OF ACCESS - UNLOCATABLE DOCUMENTS - applicant contends additional documents exist - whether Minister has taken all reasonable steps to locate the documents but the documents cannot be found - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) - sections 47(3)(e) and 52(1)(b) of the <i>Right to Information Act 2009</i> (Qld) |

REASONS FOR DECISION

Summary

1. The applicant applied to the Minister for Health and Minister for Ambulance Services (**Minister**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for a broad range of documents relating to the re-classification of his employment position with a Hospital and Health Service (**HHS**).
2. The Minister's Office did not locate any documents within the scope of the access application and therefore refused access on the ground that they did not exist.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review on the basis that the Minister's Office had failed to locate relevant documents.
4. For the reasons set out below, the decision under review is affirmed and access to the documents sought is refused on the basis that they are unlocatable under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(b) of the *Right to Information Act 2009* (Qld) (**RTI Act**).

Background

5. Due to the broad range of documents sought by the applicant, the Department of Health (**Department**) considered that the applicant's employing HHS may hold responsive information and with the HHS's consent, it transferred part of the access application to the HHS.
6. Significant procedural steps taken in this matter are set out in the Appendix to this decision.

Reviewable decision

7. The decision under review is the decision dated 15 January 2016 made by an officer of the Department under the authority of the Minister.

Evidence considered

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

Relevant law

9. Under the IP Act, a person has a right to be given access to documents of an agency or Minister.¹ However, this right is subject to provisions of the RTI Act including the grounds on which an agency or Minister may refuse access to documents.² Access to a document may be refused if the document is nonexistent or unlocatable.³ 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.⁴ A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.⁵
10. 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 including:⁶
- the administrative arrangements of government
 - the agency structure
 - the agency's functions and responsibilities (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.⁷
11. When proper consideration is given to relevant factors, it may be unnecessary for searches to be conducted. However, if an agency or Minister relies on searches to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the requested documents. The key factors identified above are also relevant to a consideration of whether an agency or Minister has taken all reasonable steps before concluding that documents are unlocatable.⁸

Findings

12. The Minister's Office located no documents which responded to the applicant's access application. Accordingly in this review, I have had particular regard to the nature of the requested documents, searches undertaken for those documents and the recordkeeping

¹ Section 40 of the IP Act.

² Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent it could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under the RTI Act.

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

⁴ Section 52(1)(b) of the RTI Act.

⁵ Section 52(1)(a) of the RTI Act.

⁶ *PDE and The University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*). Although *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld), the requirements of that section are replicated in section 52 of the RTI Act.

⁷ *PDE* at [37] - [38].

⁸ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [20] - [21].

practices and procedures of the Minister's Office in the context of the applicant's submissions. The submissions, in summary, are:⁹

- correspondence has been received from the Department and the applicant has had telephone conversations with ministerial staff since initially writing to the Minister on 1 May 2015
- Departmental Incoming Correspondence Cover Sheets separately released to the applicant - as a result of the part transfer of the access application mentioned in paragraph 5 above - indicate that the Department is systematically creating a paper trail
- it is not credible that all correspondence and records are not held in the Minister's Office. There must be records of communications between various staff members in the Minister's Office (including the Chief of Staff) and/or the Minister's Office and the Department; and
- to suggest that the Minister's Office holds no documents implies that the Minister's Office is essentially acting as an alternative voice for Departmental staff.

13. While not relevant to the information access issues I must address under the IP and RTI Acts in this decision, I acknowledge the applicant's concerns that he has received different information from the Minister's Office and Departmental staff about an investigation into a complaint he has made.¹⁰

14. On external review, the Minister's Chief of Staff provided OIC with a signed Search Certification Form confirming that searches were undertaken of electronic records using the search terms of the applicant's full name and alternatively his surname. No records were located. Further, the Minister's Office submits:¹¹

The only documents that have been [in] the Minister's office are those documents prepared by the Department including briefing notes and letters to Mr Hennessy. These documents are caught by other parts of the RTI request. These documents are filed in departmental records and are not kept within the Minister's office.

...

Please note Ministerial Office records only date from 16/2/15 so no searches have covered dates prior to the change of government.¹²

15. The Minister accepts that his Office would have been in possession of documents relevant to the scope of the access application at some time but in accordance with its usual record keeping practices any responsive documents held would have been returned to the Department for retention and storage. While the applicant disputes the credibility of this practice, it does accord with OIC's experience in dealing with matters involving requests for Ministerial documents that relate particularly to operational functions of an agency, in this case health practitioner employment issues in an HHS. Further, receipt by the applicant of Ministerial Office documents from the employing HHS¹³ as a result of the part transfer of his access application, support the submission received from the Minister's Office about its record keeping practices.

16. I have also considered the applicant's submission about telephone conversations he has had with staff in the Minister's Office. OIC's enquiries confirm that the applicant had spoken with the Departmental Liaison Officer (**DLO**).¹⁴ The DLO is an employee of the

⁹ Contained in the applicant's external review application dated 2 February 2016 and email submission dated 9 March 2016.

¹⁰ Applicant's submission to OIC dated 9 March 2016.

¹¹ Received from the Department on 4 March 2016.

¹² The Queensland Ministerial Handbook, parts 2.3.3 and 2.3.4 (pages 26-7), 17 March 2014, states that Ministerial records of one Minister are not ordinarily transferred into the possession of an incoming Minister, and the incoming Minister will have no right to access to the records of a past government of a different political party. For this reason, documents of the former Minister responsible for the health portfolio are not documents of the current Minister for the purposes of the RTI Act.

¹³ Noted by the applicant in the submission dated 9 March 2016.

¹⁴ Department's oral submission conveyed to OIC on 13 April 2016.

Department whose role it is to facilitate and coordinate information provided to the Minister's Office, including correspondence. As a result, I consider that any record of the DLO's conversations with the applicant, if made, will be held by the Department.

17. I have also considered the Departmental Incoming Correspondence Cover Sheets disclosed to the applicant that he submits indicate a systematic paper trail. The cover sheets record, among other things, a reference number assigned to the incoming correspondence, the signatory of the response if one is to be given,¹⁵ whether a briefing note to the Minister is required, and instructions on treatment generally may also be recorded.
18. I agree with the applicant that these indicate a system designed to track and record receipt of correspondence and the how it is to be dealt with. However I do not consider that it can also be inferred from the existence of this system that documents that may be in the possession of the Minister's Office at a point in time to record conversation or for review, discussion or execution that relate to agency operational issues are retained by the office in the longer term for storage.
19. While I am satisfied that documents that respond to the access application may have been in the possession of the Minister at some time I am also satisfied that the Minister's Office has used its knowledge of factors such as organisational structure, its functions and responsibilities, its internal practices and procedures and the nature of the documents sought to appropriately identify all relevant locations to search. As a result, I am satisfied that the Minister has taken all reasonable steps to locate the requested documents but that they cannot be located within the Minister's Office.
20. Taking into account all of the information set out above, I am satisfied that:
 - it is reasonable to expect that documents sought by the applicant have been in the possession of the Minister at some time
 - the Minister's Office has taken all reasonable steps to locate the documents and they cannot be found
 - the documents are unlocatable under section 52(1)(b) of the RTI Act; and
 - the Minister can refuse access to the documents under section 67(1) of the IP Act and section 47(3)(e) of the RTI Act.

DECISION

21. I affirm the decision under review and find that the Minister can refuse access to the documents sought under section 67(1) of the IP Act and section 47(3)(e) of the RTI Act on the ground set out in section 52(1)(b) of the RTI Act.
22. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

L Lynch
Assistant Information Commissioner

Date: 21 April 2016

¹⁵ For example Minister, Chief of Staff, Principal Policy Officer, HHS or Department.

APPENDIX

Significant procedural steps

| Date | Event |
|------------------|---|
| 7 December 2015 | The Minister's Office received the applicant's access application. |
| 16 December 2015 | The Department wrote to the applicant acknowledging receipt of his access application and advising that, under section 57 of the IP Act, it had transferred part of the applicant's access application to the employing Hospital and Health Service. |
| 14 January 2016 | The Department telephoned the applicant and requested an extension of time of one day to issue its decision. The applicant approved the extension. |
| 15 January 2016 | The Department made its decision that the Minister's Office did not possess any documents within the scope of the application and access was, therefore, refused on the basis that the documents were nonexistent under section 47(3)(e) and 52(1)(a) of the RTI Act. |
| 2 February 2016 | OIC received the applicant's application for external review. OIC requested the Department to provide relevant procedural documents. |
| 12 February 2016 | OIC received the requested procedural documents from the Department. |
| 16 February 2016 | OIC advised the applicant and the Department that the external review application had been accepted. OIC requested the Department to provide a submission on the searches undertaken of the Minister's Office to locate the documents sought by the applicant and reasons why no documents had been located. |
| 4 March 2016 | OIC received the requested submissions from the Department. |
| 8 March 2016 | OIC telephoned the applicant and conveyed a preliminary view that access may be refused to the documents because they cannot be found. |
| 9 March 2016 | OIC received the applicant's submission that he disagreed with OIC's preliminary view and requesting OIC issue a formal decision. |
| 10 March 2016 | OIC wrote to the applicant and the Department advising that the OIC would issue a formal decision under section 110 of the RTI Act. |
| 13 April 2016 | OIC requested further information from the Department about the searches undertaken for documents sought by the applicant and the Department provided an oral submission in response. |