



Decision and Reasons for Decision

Application Number: 310852
Applicant: Henderson
Respondent: Department of Justice and Attorney-General
Decision Date: 19 December 2012

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – GROUNDS ON WHICH ACCESS MAY BE REFUSED – NONEXISTENT DOCUMENTS – an agency may refuse access to a document because the document is nonexistent or unlocatable – whether there are reasonable grounds for the agency to be satisfied that further documents do not exist – whether the agency has taken all reasonable steps to locate the documents but the documents cannot be found - sections 47(3)(e) and 52(1)(a) of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Justice and Attorney-General (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to 11 categories of documents.
2. The documents sought by the applicant relate to disciplinary proceedings under the *Legal Profession Act 2004* (Qld) and *Legal Profession Act 2007* (Qld) (**Legal Profession Acts**), telephone conversations between the Supreme Court Registry (**Registry**) and the Legal Practice Committee (**LPC**) or the Legal Services Commission (**LSC**) and delegations to the Department's RTI decision makers from the Registry.
3. The Department identified 70 pages responsive to the request and decided¹ to grant full access to 69 pages and refuse access to one page on the basis that its disclosure would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act. The documents located by the Department relate to category 1 and category 11. The Department did not address the remaining categories in its decision.
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision to refuse access to information and also submitted that the Department had not located all relevant documents.

¹ By decision dated 1 November 2011.

5. During the external review, additional responsive documents were located. The Department agreed to release these documents along with the single page it had refused access to, and several issues were informally resolved.² As a result, the issues under consideration in this review have been narrowed to the sufficiency of the Department's searches (**sufficiency of search issues**) in relation to categories 2, 5 to 8 and 11.³
6. In the circumstances of this review, the Department is entitled to refuse access to the documents which the applicant submits have not been located, on the basis that they do not exist.

Background

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

Reviewable decision

8. The decision under review is the Department's decision dated 1 November 2011.

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).

What is the scope of this application?

10. In his submissions, the applicant advised OIC that he had in his possession a document that he had downloaded from the LPC's website in 2009 but which had not been located by the Department in response to his access application. The applicant submitted:

In addition, I dispute that the [sic] 4 of the 5 documents supplied by [the Department]... represents the totality of the documents directly associated with the disciplinary decision of the Legal Practice Committee decision in respect to [the named solicitor].

In early 2009, the totality of the documents consisted of 8 pages which were published on the internet site of the Legal Practice Committee, which for no legally justifiable reason that I can ascertain were subsequently removed from the site by the Committee or the Legal Services Commissioner's delegate Mr R Britton.

Before that retraction, that publication constituted an intractable publication to the world at large on which I am entitled to rely.

² On 3 July 2012, OIC asked the applicant to provide further information regarding requested categories 3, 4 and 9 to assist the Department in searching for documents that respond to those categories. As the applicant did not provide the requested information, those categories are no longer in issue in this review.

On 20 August 2012 the Department released the document requested in category 10 of the application to the applicant.

³ In submissions dated 26 October 2012, the applicant raised several issues that are not addressed in this decision.

- The applicant stated that documents provided by the Department were not watermarked with 'Released under the act' as requested in the access application. The forms in which access may be given to documents are set out in section 68(1) of the RTI Act and include giving an opportunity to inspect the documents or providing copies. Whether or not copies have a watermark is not a form of access issue under section 68 of the RTI Act and is, therefore, not a reviewable decision under the RTI Act.
- The applicant stated that a letter from the LSC to the Supreme Court Registrar dated 5 February 2010 may not have been sent contemporaneously to that date. The date correspondence is sent is not a reviewable decision under the RTI Act.

...

I request that the agency now supply pages 1-4 of the 8 page publication to the world at large which are documents I am entitled to receive under my access application.

11. The document the applicant referred to as pages 1 to 4 of the 8 page publication was a discipline application dated 27 January 2009 filed by the LSC in the Brisbane Secretariat of the LPC.
12. In his access application the applicant requested 11 categories of documents; six of which remain in issue in this review. In the access application the applicant did not request access to, nor do I have any evidence before me that the Department agreed to expand the scope of the applicant's application to, '*documents directly associated with the disciplinary decision of the Legal Practice Committee decision in respect to [the named solicitor]*'.
13. An agency is only required to conduct searches which are responsive to the terms of the access application and it is not possible for an applicant to unilaterally expand the scope of the access application.⁴
14. I am satisfied that the discipline application does not fall within any of the 11 categories set out in the access application and therefore it is outside the scope of this review.

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

15. Yes, for the reasons that follow.

Relevant law

16. Under the RTI Act, a person has a right to be given access to documents of an agency.⁵ However, this right is subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.⁶ Relevantly, the RTI Act provides that access may be refused to documents that are nonexistent or unlocatable.⁷ A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.⁸
17. The RTI Act is silent on how an agency or Minister can be satisfied that a document does not exist. However in *PDE and the University of Queensland*⁹ (*PDE*), the Information Commissioner explained that, to be satisfied that a document does not exist, an agency must rely on its particular knowledge and experience, having regard to various key factors including:

- the administrative arrangements of government
- the agency structure

⁴ See for example *Bade and Gympie Regional Council* (Unreported, Queensland Information Commissioner, 14 February 2012) at paragraph 15 and *Fennelly and Redland City Council* (Unreported, Queensland Information Commissioner, 21 August 2012) at paragraph 11.

⁵ Section 23 of the RTI Act.

⁶ As set out in section 47 of the RTI Act.

⁷ Sections 47(3)(e) and 52 of the RTI Act.

⁸ Section 52(1)(a) of the RTI Act.

⁹ (Unreported, Queensland Information Commissioner, 19 February 2009) at paragraph 28. 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.

- 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.
18. When these factors are properly considered and a conclusion reached that the document does not exist, it may be unnecessary for searches to be conducted.
19. Alternatively, an agency may rely on searches to justify a decision that the document sought does not exist. If an agency relies on searches, all reasonable steps must be taken to locate the requested document. In determining whether all reasonable steps have been taken, regard should be had to the factors listed in *PDE*.

Findings

Applicant's submissions

20. The applicant submits that:
- the Department's searches were not sufficient; and
 - he does not accept that the Department was acting candidly by stating the requested documents do not exist.¹⁰

Department's searches

21. During the processing of the access application, the Department undertook searches of the following areas:
- the Client Relations and Records Management Unit of the Supreme and District Court
 - the Supreme, District and Land Court Services Unit of the Supreme and District Court; and
 - the Queensland Civil and Administrative Tribunal.
22. On external review, the Department conducted further searches in the Client Relations and Record Management Unit of the Supreme and District Court and the Supreme, District and Land Courts Service.

Categories 5 and 6

23. The applicant requested access to:
- all letters to the LPC from the Supreme Court Registrar (**Registrar**) or the Registrar's delegate concerning disciplinary notices under the Legal Profession Acts;¹¹ and
 - all other letters received from the LPC or the LSC regarding the issue of notice of disciplinary result against a named solicitor.¹²

¹⁰ By letter dated 30 October 2012.

¹¹ Category 5.

24. As well as conducting the searches set out at paragraph 21, the Department made the following submissions to OIC.
- It is not the practice of the Registry to provide any written confirmation of receipt of the LPC's correspondence and advice received from the LPC confirms that it has never received any reply correspondence from the Registry since its commencement in December 2004.
 - There is no information sharing agreement between the LSC or the LPC and the Supreme Court other than pursuant to the *Legal Profession Act 2007* (Qld) and any Practice Directions issued by the Chairperson of the LPC.
 - The Registry only receives a copy of the order and not the file as the disciplinary file is retained by the LPC.
 - Once the order is made by the LPC, the respondent is then given 28 days to appeal the decision. If there is no appeal, a copy of the order is forwarded to the Registry.
 - The LPC only conducts hearings in Brisbane and therefore the orders are always filed in the Brisbane Supreme Court Registry.
25. Based on the above information, I am satisfied that it is not the practice of the Registry to correspond with the LPC or the LSC about disciplinary notices, except to receive a copy of any order made in proceedings and that there is a reasonable basis to be satisfied that the requested documents do not exist.

Category 2

26. The applicant sought access to a copy of the Registrar's reply to a letter from the LSC dated 5 February 2010.
27. It is clear on the face of the letter from the LSC that the LSC expected a response; the Complaints Manager at the LSC asked the Registrar to file an order in the Supreme Court and to return a sealed copy of the order to the LSC.
28. Following searches, the Department submitted to OIC that the letter was not responded to due to an administrative oversight.
29. Taking into account the searches the Department has undertaken, together with the Department's submission and the extent of information sharing between the Registry and the LSC referred to above, I am satisfied that:
- there are reasonable grounds for concluding that the Department did not respond to the LSC's letter; and
 - accordingly, there is a reasonable basis to be satisfied that this document does not exist.

¹² Category 6.

Category 7

30. The applicant requested access to letters sent to and from the State Archivist concerning authorisation to dispose of or to retain correspondence about all disciplinary issues including correspondence about the named solicitor.
31. The Department submitted to OIC that:
 - there was no correspondence sent to or received from the State Archivist about the disposal or retention of any correspondence regarding the named solicitor; and
 - correspondence about disciplinary matters referred from the LPC is not currently covered by any retention or disposal schedule.¹³
32. Based on the above information, I am satisfied that the Department does not hold any correspondence to or from the State Archivist about the disposal or retention of correspondence and there is a reasonable basis to be satisfied that these documents do not exist.

Category 8

33. The applicant requested access to contents of telephone memoranda recording conversations between the Registry and the LPC or the LSC during the years 2009 and the date the Department received the access application.¹⁴
34. The applicant told OIC that a named officer from the Supreme and District Courts had advised the applicant that he had contact with the LPC. The applicant submitted that there should, therefore, be a documentary record of the officer's contact with the LPC. The applicant attached a letter from the named officer to the applicant¹⁵ which did not include any reference to the officer's contact with the LPC.
35. The applicant also attached a letter¹⁶ from an unnamed correspondence officer at the Supreme and District Courts to the applicant which confirmed that the correspondence officer had been in contact with the LPC.
36. As well as conducting the searches set out at paragraph 21, on external review the Department made enquiries with the named officer and conducted further searches in the Client Relations and Record Management Unit of the Supreme and District Court and the Supreme, District and Land Courts Service.
37. As a result the Department located a small number of pages showing the correspondence officer's contact with the LPC. The Department released these documents to the applicant.¹⁷
38. The Department did not locate any documents showing the named officer's contact with the LPC. The Department informed OIC that the named officer did not make any contact with the LPC and provided OIC with internal correspondence to and from the named officer concerning the officer's contact with the applicant. The correspondence provided to OIC does not contain any reference to the named officer's contact with, or

¹³ The Department provided the applicant with a copy of the general Disposal Authorities for the Supreme Court, Land Court and District Court by letter dated 20 August 2012.

¹⁴ The Department received the access application on 29 September 2011.

¹⁵ Dated 23 September 2012.

¹⁶ Dated 14 June 2011.

¹⁷ By letter dated 3 December 2012.

his intention to contact, the LPC. The named officer stated that he did not create, nor have in his possession, any file notes or other form of records relating to the applicant.

39. The Department did not locate any other documents recording conversations between the Registry and the LPC or the LSC during the relevant period.
40. I am satisfied on the above information that the Client Relations and Record Management Unit and the Supreme, District and Land Courts Service of the Supreme and District Court are the appropriate places for the Department to have searched for documents recording conversations between the Registry and the LPC or the LSC during the relevant period.
41. Based on the above information, including the information provided by the Department in relation to the extent of information sharing between the Registry and the LSC,¹⁸ I am satisfied that the Department has taken all reasonable steps to locate any further relevant telephone memoranda¹⁹ and that there is a reasonable basis to be satisfied that these documents do not exist.

Category 11

42. The applicant requested access to all delegations under the RTI Act since its inception from the chief executive officer of the Registry to the Department's decision makers.
43. The Department provided OIC with the following information about its practices and procedures:
 - all RTI Act decision making delegations to officers within the Department are made by the Director-General, Department of Justice and Attorney-General or the Attorney-General and Minister for Justice;²⁰ and
 - the Registry is a branch of the Department and therefore, it is not required to issue its own separate RTI Act delegations to the Department's decision makers.
44. Based on the above information, I am satisfied that separate RTI Act decision making delegations from the Registry are not required and that there is a reasonable basis to be satisfied that these documents do not exist.

DECISION

45. I vary the decision under review and find, for the reasons set out above, that access to the further documents the applicant contends exist can be refused under sections 47(3)(e) and 52(1)(a) of the RTI Act.
46. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Lisa Meagher
Acting Assistant Information Commissioner

Date: 19 December 2012

¹⁸ Set out in detail above in relation to categories 5 and 6.

¹⁹ In addition to the further pages located by the Department and released to the applicant by letter dated 3 December 2012.

²⁰ The Department released 69 pages of delegations to the applicant in full in accordance with the decision dated 1 November 2011.

APPENDIX**Significant procedural steps**

Date	Event
29 September 2011	The Department received the access application.
1 November 2011	The Department issued its decision to the applicant (Department's decision).
28 November 2011	OIC received the applicant's application for external review of the Department's decision.
16 December 2011	<p>OIC notified the applicant in writing that the external review application had been accepted.</p> <p>OIC notified the Department that the external review application had been accepted and requested a copy of the document to which access was refused.</p> <p>OIC asked the Department for submissions about the sufficiency of search issues.</p>
10 February 2012	Department provided OIC with a copy of the document to which access was refused and submissions about the sufficiency of search issues.
14 March 2012	OIC asked the Department for further submissions about the sufficiency of search issues.
29 March 2012	Department provided OIC with further submissions about the sufficiency of search issues.
18 May 2012	OIC asked the applicant for further information about categories 3, 4 and 9 to enable the Department to conduct searches for the requested documents.
22 May 2012	OIC again asked the applicant for further information about categories 3, 4 and 9 to enable the Department to conduct searches for the requested documents and requested a response by 25 May 2012.
3 July 2012	<p>OIC again asked the applicant for further information about categories 3, 4 and 9 to enable the Department to conduct searches for the requested documents.</p> <p>OIC advised the applicant that if a response was not received by 17 July 2012 it would no longer consider those categories in the review.</p>
10 August 2012	<p>OIC conveyed a view to the Department on the sufficiency of search issues and asked the Department to conduct further searches and have relevant officers complete search certifications. OIC asked the Department to release the document requested in category 10 of the access application on the basis that the Department did not object to its disclosure.</p> <p>OIC advised the applicant that as he had not provided further information about categories 3, 4 and 9 of the access application, those categories would no longer be considered on external review.</p>
20 August 2012	The Department released the document requested in category 10 of the application to the applicant.
7 September 2012	The Department provided OIC with submissions on the sufficiency of search issues and additional documents responsive to the access application.
25 September 2012	<p>OIC conveyed a view to the applicant on the sufficiency of search issues and invited the applicant to make submissions if he did not agree with the view.</p> <p>OIC asked the Department to release the document responsive to category 1 of the application (including its attachment) on the basis that the Department no longer objected to its disclosure.</p>
27 September 2012	The Department released the documents responsive to category 1 of the

	application to the applicant.
1 November 2012	The applicant advised OIC that he did not accept the view and provided submissions on the sufficiency of search issues and raised other concerns.
6 November 2012	OIC asked the Department to conduct further searches for documents requested in category 8 of the access application.
19 November 2012	The Department provided OIC with submissions on the sufficiency of search issue and additional documents responsive to category 8 of the access application. The Department advised OIC that it did not object to disclosing those documents to the applicant.
27 November 2012	OIC asked the Department to release the documents responsive to category 8 of the access application to the applicant.
3 December 2012	The Department released the documents responsive to category 8 of the application to the applicant.