



Decision and Reasons for Decision

Application Number: 310357

Applicant: 2TH1KV

Respondent: Department of Transport and Main Roads

Decision Date: 21 October 2011

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION – REFUSAL OF ACCESS – NONEXISTENT DOCUMENTS – applicant sought access to documents regarding employment with the agency – agency located and released some documents and found that other documents sought did not exist – agency submits some documents sought are unlocatable – whether there are reasonable grounds for agency to be satisfied documents do not exist or are unlocatable – whether agency has taken all reasonable steps to locate documents – whether access can be refused under sections 47(3)(e) and 52(1)(a) and (b) of the *Right to Information Act 2009* (Qld)

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REASONS FOR DECISION

Summary

1. On 20 February 2010 the applicant applied to the Department of Transport and Main Road's (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to various documents.¹ The terms of the applicant's request can be summarised as follows:
 - *Work file documents that are about myself obtained by Queensland Transport from a variety of sources...*
 - *Content of medical reports*²
 - *[payment documents] including Queensland Transport work payment records in court and full release of all payment documents, such as copies of all wage pay payments and higher duty relief work payments*
 - *details of destroyed work records, such as the title of the documents and what date they were destroyed and for what reason.*³
2. By letter dated 24 June 2010 the Department decided to disclose numerous documents to the applicant (**access decision**).⁴
3. By letter dated 3 August 2010, the applicant sought an internal review of the access decision on the basis the Department had failed to locate all relevant documents.
4. By letter dated 26 August 2010, the Department issued its internal review decision, affirming its access decision.
5. By letter dated 3 August 2010, the applicant applied for external review. In her external review application, the applicant restated her contention that the Department had not located all documents relevant to her access application, providing extensive submissions in support of her claims.⁵
6. During the course of the external review, the Department conducted further searches for relevant documents sought by the applicant and provided extensive submissions explaining its searches,⁶ and responding⁷ to each of the applicant's 56 submissions as contained in her external review application.
7. In summary terms, the Department advised that the additional documents sought were:

¹ The applicant emailed the Department on 15 February 2010 requesting an RTI access application form; this email also included information as to the specific documents the applicant intended to request and was read together by the Department with the subsequent application form dated 20 February 2010 in construing the terms of the applicant's request.

² RTI access application dated 20 February 2010.

³ Applicant's email dated 15 February 2010. To the extent that the access application seeks answers to questions, such as evidenced in this request, I note that the right of access under the RTI Act is to information in the form of documents and does not extend to a right to having agencies respond to an applicant's questions: see *Hearl and Mulgrave Shire Council* (1994) 1 QAR 557.

⁴ The Department decided to disclose some 1922 folios to the applicant in full and 64 in part, on the basis disclosure of segments of information would, on balance, be contrary to the public interest. The Department refused access to 153 documents, on the basis they comprised exempt information in accordance with section 48 of the RTI Act.

⁵ The relevant document comprises submissions numbered 1-40 and A-K. Additionally, the applicant lodged supplementary submissions in support of her earlier submissions by emails dated 30 November 2010 and 8 December 2010 (labelled for convenience by OIC 'L' and 'M' respectively), and further supplementary submissions dated 31 March 2011, accompanied by two ring-binders of documentation delivered to OIC on 31 May 2011, using the same labelling. I have referred to the applicant's submissions in these reasons as 'ER submissions', together with the specific number or letter as relevant. These references include the applicant's 31 March 2011 supplementary submissions, unless specifically indicated.

⁶ During the external review process the Department released a further 49 documents from a temporary employment file and 180 documents (medical reports) which the applicant had previously declined to receive.

⁷ In its submissions dated 26 November 2010. As all Departmental submissions and positions are contained in this document, I will not refer to it further.

- outside the scope of the applicant's internal review application
- unlocatable; or
- nonexistent.

8. For the reasons set out below, I am satisfied that the Department may refuse the applicant access to the additional documents sought as:

- certain documents are outside the scope of the applicant's access application;
- there are otherwise reasonable grounds for the Department to be satisfied documents requested by the applicant do not exist;⁸ or are unlocatable.⁹

Background

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

Reviewable decision

10. The decision under review is the Department's internal review decision dated 26 August 2010.

Issues in the review

11. The issues to be addressed in this external review are:

- the scope of the applicant's request; and
- whether the Department is entitled to refuse access to various documents sought by the applicant, on the basis that those documents are nonexistent¹⁰ or unlocatable.¹¹

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 appendices).

Relevant law

13. Under the RTI Act a person has a right to be given access to documents of an agency¹² the subject of a valid access application,¹³ subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.¹⁴ Relevantly, the RTI Act provides that access to a document may be refused¹⁵ if the document is nonexistent or unlocatable.¹⁶

⁸ Under section 52(1)(a) of the RTI Act.

⁹ Under section 52(1)(b) of the RTI Act.

¹⁰ Under section 52(1)(a) of the RTI Act.

¹¹ Under section 52(1)(b) of the RTI Act. In her response dated 31 March 2011, the applicant indicated she accepted certain of the Department's 26 November 2010 explanations for the absence of certain types of documents initially the subject of sufficiency of search contentions (see ER Submissions 7, 8, 11, 22 and 34). These documents are accordingly not in issue in this review. In any event, I note the Department's submissions that, despite searches, no relevant documents could be located, such that access could otherwise be refused to these documents under section 52 of the RTI Act, on the basis set out in the balance of these reasons.

¹² Section 23 of the RTI Act.

¹³ See section 24 of the RTI Act.

¹⁴ As set out in section 47 of the RTI Act.

¹⁵ Section 47(3)(e) of the RTI Act.

¹⁶ Under section 52 of the RTI Act.

Findings

What is the scope of the access application?

20. The applicant's access application relevantly requested access to:

Work file documents that are about myself obtained by Queensland Transport from a variety of sources...

21. The applicant contends the Department has failed to locate and deal with:¹⁷

- various documents comprising 'staff meeting minutes' for meetings of the Nambour office and minutes of the office's Workplace Health and Safety (WHS) Committee, 'customer feedback forms'¹⁸ the applicant contends she was told would be placed on her work file and a 'Workplace Health and Safety submission' concerning injury rehabilitation delays the applicant contends she prepared and submitted to her manager,¹⁹ and
- 'Government standards and guidelines' relating to ill health retirement of an employee under section 85 of the *Public Service Act 2008* (Qld) (**section 85 process**).²⁰

22. The Department submits that these documents are outside the scope of the applicant's access application and are not therefore in issue in this review.

23. The general right of access contained in the RTI Act must be exercised in accordance with the Act. The right of access is confined to documents specified in an access application²¹ and in existence on the day the agency receives the application.²² An applicant cannot expand the terms of an access application on external review without the consent of the relevant agency.

24. Accordingly, the question as to whether relevant documents must be considered in this external review depends on whether the applicant requested those documents in her access application.

25. The Department submits documents of the first kind described in paragraph 21 are 'in-house work documents' relating to the general administration and management of the Nambour customer service centre as a whole, none of which would require placement on an individual employee's 'work file' or personnel record.

26. I accept the Department's submission in this regard. The applicant sought work file documents about herself. The documents described at the first dot point of paragraph 21 are all properly characterised as documents concerning the management of the Nambour office as a whole, including its interactions with members of the public and observance and discharge of WHS obligations. While certain documents of this kind – for example, meeting minutes, or customer feedback forms – may contain incidental references to an employee²³ (in the context of office operational issues and

¹⁷ ER Submission numbers 4, 9, 13, 14, 30 and L.

¹⁸ Completed by licensing customers who had dealings with the applicant, recording customer satisfaction with the applicant's performance of her duties.

¹⁹ In discharge of her functions as a workplace health and safety officer under section 96 of the *Workplace Health and Safety Act 1995* (Qld).

²⁰ ER submissions D and E.

²¹ A qualification implicit in section 24(2)(b) of the RTI Act, requiring applicants to provide sufficient information to allow identification of relevant documents.

²² Section 27(1) of the RTI Act.

²³ As the applicant contends relevant minutes would in relation to her: submissions dated 31 March 2011.

performance), this is distinct from documents ‘**about**’ an employee requiring placement on an employee’s personnel file.²⁴

27. Similarly, I do not consider that ‘Government standards and Guidelines’ fall within the scope of the access application because they do not comprise documents ‘about’ the applicant.²⁵
28. I am satisfied the documents described at paragraph 21 are outside the scope of the applicant’s application for documents ‘that are about myself’. These documents are not in issue in this review. I will not consider them further.²⁶

Nonexistent and unlocatable documents

29. As noted in paragraph 13, section 47(3)(e) of the RTI Act allows an agency to refuse access to documents where those documents are nonexistent or unlocatable, as mentioned in section 52 of the RTI Act. Section 52(1) of the RTI Act relevantly provides:

52 Document nonexistent or unlocatable

- (1) *For section 47(3)(e), a document is nonexistent or unlocatable if—*
- (a) *the agency or Minister dealing with the application for access is satisfied the document does not exist; or*
- ...
- (b) *the agency or Minister dealing with the application for access is satisfied—*
- (i) *the document has been or should be in the agency’s or Minister’s possession; and*
- (ii) *all reasonable steps have been taken to find the document but the document can not be found.*

30. In this case, the Department contends that certain documents sought by the applicant do not exist. The Department acknowledges that others requested by the applicant likely did exist (and thus have been in the Department’s possession) but cannot now be located.
31. Accordingly, the grounds for refusing access to documents as set out in both section 52(1)(a) and (b) of the RTI Act are relevant in this case.

²⁴ It should be noted certain other documents described as ‘minutes’ were processed by the Department and disclosed to the applicant; these documents, however, comprise as I understand, records of meetings concerning the applicant’s rehabilitation, thus directly and solely concerning the applicant, not general office management or administration.

²⁵ While not, on my construction of the applicant’s access application strictly required to, the Department did apparently disclose certain general guidelines and directives to the applicant.

²⁶ In any case, the Department also advised that ‘in house work documents’ of the kind discussed above would, if they ever existed (the Department noting that it had no record the ‘Workplace Health and Safety Submission ever existed’) would only have been held whilst in use, which is generally a 12 month period, after which they are destroyed. Despite searches of the Nambour office (and, as regards the feedback forms, the applicant’s personnel file), the Department was unable to locate any relevant documents. As such, even if these documents were in issue, I am satisfied that the Department could refuse access to them on the basis they were nonexistent or unlocatable, for the reasons explained in the balance of this decision.

32. The principles that apply when refusing access to nonexistent and unlocatable documents were detailed in *PDE and the University of Queensland*.²⁷
33. To be satisfied that documents are **nonexistent**, agencies must rely on their particular knowledge and experience and have regard to various key factors.²⁸ When proper consideration is given to these factors, it may not be necessary for an agency to conduct searches in order to satisfy itself a requested document does not exist.
34. However, if an agency does rely on searches to justify a decision that the document sought does not exist – as the Department did in this case – all reasonable steps must be taken to locate the document sought.²⁹
35. As for **unlocatable** documents, for an agency to be entitled to refuse access under section 47(3)(e) of the RTI Act³⁰ it is necessary to consider whether:
 - the document sought has been or should be in the agency’s possession?
and
 - the agency has taken all reasonable steps to find the document sought?

Searches conducted by the Department

36. As noted above, in assessing claims by an agency that documents are unlocatable, it will always be necessary to consider the adequacy of searches undertaken by the agency in an effort to locate relevant documents.
37. It will also be necessary to consider search adequacy where documents are claimed to be nonexistent and the agency has, as in this case, used searches to assist in reaching that conclusion.³¹
38. Accordingly, the adequacy of the Department’s search efforts – that is, whether it has taken all reasonable steps to locate relevant documents – is ultimately the key issue in this review.
39. The Department’s search efforts were summarised in its submission dated 26 November 2010. The Department explained that it had conducted various searches both in processing the access application and during the course of this external review. These searches have comprised inquiries with or searches of numerous Departmental divisions,³² ‘extensive’ keyword searches of electronic databases,³³ and inquiries of a private labour hire company.
40. The Department’s submissions detail a comprehensive and systematic approach to the searches undertaken and inquiries made to locate relevant documents. I accept the submissions as accurate.

²⁷ Unreported, Queensland Information Commissioner, 9 February 2009. 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).

²⁸ Summarised in *PDE* at paragraph 37.

²⁹ *Ibid.*, paragraph 47.

³⁰ On the ground set out in section 52(1)(b).

³¹ In this case, while it may not have been necessary for the Department to conduct searches for at least some of the documents claimed to be nonexistent, the Department nevertheless conducted searches for **all** documents requested by the applicant (including, as noted, documents falling outside the scope of the applicant’s access application).

³² Evidenced in some 28 pages of search requests and responses supplied with this submission.

³³ Detailed in the relevant Departmental submissions.

Are there reasonable grounds to be satisfied that various documents do not exist, or are unlocatable?

41. In short, yes.
42. I do not consider it necessary to deal separately with each of the numerous contentions raised by the applicant, nor the Department's individual responses.
43. Section 52 is aimed at providing a basis on which an agency may refuse access to documents where, in essence, it cannot identify documents requested by an applicant. In some cases, the exact ground on which an agency relies to refuse access under this provision – ie., subsection (a) or (b) – may be more significant than in others.
44. Where an agency has, however, conducted extensive searches in an effort to locate documents, and has exhausted all reasonable avenues of inquiry, the exact basis of its decision under section 52 may not be especially critical. This is because, despite reasonable search efforts, responsive documents can simply not be found. I consider this to be a case of this latter kind.
45. I consider there are reasonable grounds for the Department to be satisfied that various of the requested documents do not exist, for example:
- 'Workplace Health and Safety Officer (**WHS**) Certificate',³⁴ on the basis the Department's search inquiries disclosed no record of the applicant ever having attended relevant training necessary to obtain such a certificate³⁵
 - verbal communications,³⁶ which unless recorded³⁷ do not comprise a 'document'³⁸ to which the RTI Act may have application
 - documents supplied by the applicant to another agency,³⁹ which the Department has never had in its possession or under its control,⁴⁰ and others claimed to have been supplied by the applicant's sister⁴¹
 - documents concerning the section 85 process involving the applicant, the claimed existence of which rest on the applicant's unsubstantiated assertion the Department's decision-maker is '*unaware of Section 85 requirements and cannot comment*'.⁴²
46. There are other documents which the Department contends are nonexistent, but which either reasonable record-keeping practices⁴³ or the applicant's submissions arguably

³⁴ Which the applicant submits should exist. Having attended a WHS training course, she submits she was told the certificate would be placed on her 'work file': ER submission 1.

³⁵ During the course of this review certain training-related documents and certifications were located and disclosed to the applicant. Significantly, however, a search of the Department's corporate training attendance database by the SEQ North Training Development Officer disclosed no record of the applicant having attended the relevant training course.

³⁶ Generally, various conversations between the applicant and colleagues such as her manager or workplace injury rehabilitation officer: ER submissions 15, 17, 21 to 33, 35, 37, 40, C and J.

³⁷ The Department contacted relevant staff to enquire as to whether any records were created as a consequence of verbal communications with the applicant. The officers advised no records were generated, which in the absence of contrary evidence from the applicant, I accept.

³⁸ As that concept is defined in section 12 of the RTI Act.

³⁹ Relevantly, a '*large folder of amendments*' delivered to the Office of the Premier, which the applicant contends she requested be forwarded to the Department and received confirmation same occurred: ER submission 38.

⁴⁰ The Department stating it had not received these documents and having advised the applicant it would not 'chase' the Office of the Premier for same.

⁴¹ ER submission 36, the Department advising it held '*no evidence*' of verbal or written contact with the applicant's sister and the applicant's evidence comprising only assertions to the contrary.

⁴² Applicant's submission dated 31 March 2011, responding to the Department's detailed submission on this issue dated 26 November 2010, which noted the considerable number of documents relating to the section 85 process disclosed to the applicant both consequent to the initial decision and during external review, and additional 'keyword' searching undertaken on external review of various Departmental databases using the applicant's name, which disclosed no further documents.

⁴³ For example, an application for worker's compensation the applicant contends she signed after an incident in the workplace and left with a colleague in an otherwise incomplete form (ER submission 16). While the Department contends it is likely any

suggest should have been in the Department's possession or under its control.⁴⁴ Access to documents of this kind should debatably be refused on the basis that relevant documents are unlocatable, rather than nonexistent.

47. There are still more documents which, as noted, the Department concedes it did or may have once possessed, but which cannot now be located, for example:
- various job applications, payment records, leave applications, higher duty documents, training requests etc. spanning the period 1996 to 1998,⁴⁵ and statistics relating to the applicant's workers' compensation claims for the period 1996-1999,⁴⁶ destroyed in accordance with relevant archival retention and disposal schedules, and
 - numerous emails sent by the applicant to the Department, but which were received while the applicant's email address was subject to a 'block', consequently diverted automatically to a server without being delivered to addressees, and subsequently deleted, again automatically, after one to three weeks.⁴⁷
48. The Department submits it has undertaken all reasonable steps in an effort to locate all documents, ie. by way of the search inquiries outlined in paragraph 39. No further documents can be located. As mentioned in paragraphs 43-44, the basis of refusal – ie. that the sought documents are nonexistent or unlocatable – is, in this instance, essentially immaterial as the practical consequence of the Department's position is that *'[a]ll avenues for searches have been explored and have now been exhausted'*.⁴⁸ All documents that could be located have been identified and dealt with under the RTI Act.
49. As noted in paragraph 40, I accept the Department's submissions as to its search efforts and inquiries. Having carefully reviewed those submissions, together with the submissions lodged by the applicant, I am satisfied that the Department has taken all reasonable steps to locate relevant documents, and that there are reasonable grounds for it to be satisfied that no further documents responding to the applicant's access application exist, or can be located.
50. The applicant has submitted that 'the amount of missing documentation is worrying and does not comply with Government standards and Government accountability'.⁴⁹

such document was in turn supplied to another entity (Workcover), it would seem unusual at face value for a file copy not to be retained.

⁴⁴ Such as, for example, records supplied by the applicant to Dove Personnel in pursuit of Departmental employment (see ER submission 2). The Department made inquiries of Dove, which relevantly advised that material supplied to it by a candidate is not generally onforwarded to an employer such as the Department; nevertheless the applicant contends she was expressly advised by Departmental officers during an interview process that relevant documents would be obtained from Dove. Other documents which *may* have existed are those concerning negotiations between the Queensland Public Sector Union (QPSU) and the Department (the subject of ER submissions 39 and M). The applicant claims that in November 2002 she 'received notice from the Queensland Public Sector Union that negotiations were taking place for my reinstatement with Queensland Transport', and that 'union emails confirm meetings took place about me between my employer and my union while I was still a Government employee.' (ER submissions 39 and M respectively). The applicant contends that accordingly, documents regarding these negotiations should exist in the Department's possession or under its control. The applicant supplied me with what appear to be extracts from QPSU emails, dated 15 November 2002 (sent at 12:00PM) and 7 January 2003, in which the QPSU officer essentially advised the QPSU could not assist the applicant in the absence of her supplying a medical certificate testifying to her capacity to return to work. Somewhat incongruously, however, there is a further email dated 15 November 2002 (sent 3:50PM), in which the officer notes receipt of a 'faxed medical clearance' which the QPSU would 'supply to the Department at my next meeting'. In any event, the Department's search efforts failed to identify any relevant documents.

⁴⁵ ER submissions 3, 6, 10, 20, 27, 29, F, G and J.

⁴⁶ ER submissions 40 and J.

⁴⁷ Others which may have existed – such as documents concerning her workplace rehabilitation program (see generally ER submissions 12 and 30) and accident investigation reports (ER submission 5) – cannot, despite relevant searches, be found.

⁴⁸ Submission dated 26 November 2010.

⁴⁹ Comments of this nature appear throughout the applicant's submission dated 31 March 2011.

51. The Information Commissioner's jurisdiction in this review is to consider whether the Department's decision was made in accordance with the RTI Act. Where documents requested in an application under the RTI Act cannot be located, an agency may refuse access provided the statutory requirements (as discussed in this decision) are satisfied. On this point, I note that agencies are not required to keep all records indefinitely.⁵⁰ Importantly, records may be destroyed at the expiry of the minimum retention period prescribed the relevant retention and disposal schedule and this appears to be the case in relation to some of the documentation sought by the applicant.⁵¹

DECISION

52. On the basis of the above, I affirm the Department's decision to refuse access to the requested documents under the RTI Act as:
- some of the documents the applicant is seeking are not within the scope of the access application and not in issue in this review;
 - the Department has taken all reasonable steps to locate all documents responding to the access application;
 - no further documents either exist or can be located which respond to the access application; and
 - the Department is therefore entitled to refuse the applicant access to the documents sought under section 47(3)(e) and sections 52(1)(a) and (b) of the RTI Act.
53. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Suzette Jefferies
Assistant Information Commissioner
Date: 21 October 2011

⁵⁰ The *Public Records Act 2002* (Qld) sets out legislative requirements for the creation, retention and disposal of public records.

⁵¹ In accordance with the General Retention and Disposal Schedule of Administrative Records (QDAN245 – Version 5, relevant to the time period of the applicant's request), issued by the Queensland State Archivist.

APPENDIX**Significant procedural steps**

Date ⁵²	Event
15 February 2010	The applicant applied to the Department under the RTI Act for access to a range of 'work file' documents relating to her employment with the Department.
24 June 2010	The Department issued its access decision refusing access to some documents.
3 August 2010	The applicant applied to the Department for internal review of the Department's access decision.
26 August 2010	The Department issued its internal review decision affirming its access decision.
1 September 2010	The applicant applied to OIC for external review of the Department's internal review decision. ⁵³
24 September 2010	OIC informed the Department and the applicant that the external review application had been accepted for review.
27 September 2010	OIC received submissions from the applicant.
29 September 2010	OIC received submissions from the applicant.
28 October 2010	OIC received submissions from the applicant.
17 November 2010	The Department released further documents to which access was previously refused.
23 November 2010	The Department provided further documents to the applicant, which she had previously declined to receive.
26 November 2010	OIC received submissions from the Department.
30 November 2010	OIC received submissions from the applicant.
8 December 2010	OIC received submissions from the applicant.
10 December 2010	OIC received submissions from the applicant.
3 February 2011	OIC received submissions from the Department.
18 March 2011	OIC conveyed a written preliminary view to the applicant, inviting her, if she did not accept the preliminary view, to provide submissions in support of her case.
31 March 2011	OIC received submissions from the applicant.
31 May 2011	OIC received attachments to applicant's submissions of 31 March 2011.

⁵² Of correspondence or relevant communication unless otherwise indicated.

⁵³ Received 3 September 2010.