



Decision and Reasons for Decision

Application Number: 310865

Applicant: Vanbrogue Pty Ltd

Respondent: Rockhampton Regional Council

Decision Date: 19 December 2012

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION – REFUSAL OF ACCESS – NON-EXISTENT DOCUMENTS – applicant submits additional relevant documents should exist within the agency – whether there are reasonable grounds for agency to be satisfied that documents do not exist – whether access to documents can be refused – section 47(3)(e) of the *Right to Information Act 2009* (Qld) – section 52(1)(a) of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. By correspondence dated 5 August 2011,¹ the applicant applied to Rockhampton Regional Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to certain documents relating to three lots of land.
2. Council identified 169 documents and decided² to grant full access to those documents.
3. The applicant sought internal review³ of Council's decision, submitting that additional documents relevant to the access application should exist with Council.
4. On internal review, Council identified additional documents relevant to the access application and decided⁴ to release the additional documents by way of inspection.
5. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's internal review decision on the basis that Council had still not located all relevant documents.⁵

¹ Received by Council on 9 August 2011.

² By original decision dated 21 September 2011.

³ On 14 October 2011.

⁴ By internal review decision dated 11 November 2011.

⁵ On 9 December 2011.

6. During the course of the external review, Council undertook a number of searches and located a number of additional documents which it subsequently released to the applicant.
7. Council has provided submissions to OIC setting out locations that were searched for documents; reasons those locations were chosen; search terms used in any electronic databases and any explanation Council could provide as to why no further documents exist.
8. Council has undertaken all reasonable steps to locate documents responding to the access application.
9. In the circumstances, Council is entitled to refuse access to any further documents sought by the applicant under sections 47(3)(e) and 52(1)(a) of the RTI Act on the basis that the documents do not exist.

Background

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

Reviewable decision

11. The decision under review is Council's internal review decision dated 11 November 2011.

Evidence considered

12. Evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).

Issue in this review

13. As a result of informal resolution processes, the single issue remaining for determination is whether Council has taken all reasonable steps to locate certain documents relating to Council's decision to approve development and works applications in relation to one of the lots of land (**Permit Decision**).

Relevant law

14. Under section 23 of the RTI Act, a person has a right to be given access to documents of an agency. However, this right is subject to a number of exclusions and limitations, including grounds for refusal of access. Relevantly, an agency may refuse access to a document if the document is nonexistent or if the document cannot be located.⁶
15. The RTI Act is silent on how an agency or Minister can be satisfied that a document does not exist. However the Information Commissioner has explained⁷ that to be satisfied that a document does not exist, it is necessary for the agency to make an evaluative judgment based on its knowledge and experience with respect to various key factors including:

⁶ Sections 47(3)(e) and 52 of the RTI Act.

⁷ In *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*). 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).

- the administrative arrangements of government
 - the agency's structure, functions and responsibilities
 - the agency's practices and procedures, including but not exclusively its information management approaches; and
 - key factors within the access application or factors reasonably inferred from any other information supplied by the applicant, including the:
 - nature and age of the requested document/s; and
 - nature of the government activity the request relates to.
16. The Information Commissioner also indicated that if an agency relies on searches to satisfy itself that a document does not exist, all reasonable steps must be taken to find the document. To ensure that all reasonable steps have been taken to locate documents, a decision-maker must make enquiries and undertake searches of all relevant locations, having regard to the factors outlined above.⁸

Findings

Has Council taken all reasonable steps to locate the documents?

17. As a result of additional searches undertaken by Council on external review, further information relevant to the terms of the access application was located and provided to the applicant.⁹
18. The applicant maintains that there are grounds to expect that further relevant documents exist within Council's possession. Specifically, the applicant refers to the Permit Decision and submits:¹⁰
- in the course of undertaking earthworks, the landowner created a levee bank and borrow pit
 - the levee bank and borrow pit required approval from Council
 - the levee bank and borrow pit are related to a watercourse over which the (former) Department of Environment and Resource Management (**DERM**) has jurisdiction; and therefore
 - DERM should have been listed as a 'Concurrence Agency' in the Permit Decision.
19. Based on the above, the applicant submits that further documents should exist which explain why Council did not identify a Concurrence Agency in its Permit Decision.
20. It is relevant to note here that:
- the Permit Decision does expressly consider or approve construction of the levee bank and borrow pit; and
 - Council does not hold any documents concerning approval of the levee bank and borrow pit.¹¹

⁸ PDE at paragraph 49.

⁹ The numerous searches undertaken during the course of the external review and the additional documents located are set out in the Appendix to this decision.

¹⁰ Submissions dated 3 December 2012.

¹¹ I note that during the course of the external review, the applicant accepted OIC's view that Council was entitled to refuse access to documents concerning approval of the levee bank and borrow pit on the basis that such documents do not exist under sections 47(3)(e) and 52(1)(a) of the RTI Act.

21. Council provided extensive submissions regarding the searches it undertook for relevant documents when it processed the access application and on external review. Relevantly, Council submitted that:
- any documents or correspondence relating to the land, including documents concerning approval of the levee bank or borrow pit, would be located on the Infrastructure Operations Unit's (**IO Unit**) database¹²
 - Council searched the relevant database¹³
 - Council also searched the physical files relating to the relevant property¹⁴
 - Council officers who undertook searches certified that all areas of Council where relevant documents could reasonably be expected to be located had been searched;¹⁵ and
 - no further relevant information was located.¹⁶
22. On careful consideration of all the evidence before me, including Council's submissions about its searches, I am satisfied that Council has undertaken all reasonable steps to satisfy itself that no further documents responding to the access application exist, including undertaking comprehensive searches and enquiries.
23. Taking into account all of the information set out above, I am satisfied that:
- there are reasonable grounds for Council to be satisfied that no further documents exist; and
 - access may be refused to any additional information on the basis that further documents do not exist.¹⁷

DECISION

24. I affirm the decision under review and find that Council is entitled to refuse access to the documents sought under sections 47(3)(e) and 52(1)(a) of the RTI Act.
25. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Clare Smith
Right to Information Commissioner

Date: 19 December 2012

¹² In a telephone conversation between OIC staff and an officer of the IO Unit on 3 September 2012.

¹³ Submissions dated 15 October 2012.

¹⁴ Submissions dated 15 October 2012.

¹⁵ Submissions dated 15 October 2012.

¹⁶ Other than the additional relevant information which was provided to the access application on external review.

¹⁷ Pursuant to section 47(3)(e) of the RTI Act on the ground set out in section 52(1)(a) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
9 August 2011	By correspondence dated 5 August 2011, the applicant sought access to “ <i>all documents</i> ” in relation to three lots of land.
21 September 2011	Council advised the applicant that it had located 169 relevant documents and decided to grant full access to those documents.
14 October 2011	The applicant applied to Council for internal review of its decision on the basis that further relevant documents should exist with Council.
11 November 2011	Council advised the applicant that it had located additional documents relevant to the access application and decided to release those documents to the applicant by way of inspection (Internal Review Documents).
30 November 2011	The applicant attended Council to inspect the Internal Review Documents.
9 December 2011	The applicant applied to the OIC Office of the Information Commissioner (OIC) for external review of Council’s decision on the grounds that “ <i>searches undertaken of (Council’s) files are still deficient</i> ” and “ <i>(t)here are still documents missing</i> ”.
13 December 2011	By email, Council released some of the Internal Review Documents to the applicant.
22 December 2011	As a result of the Internal Review Documents released to the applicant, OIC asked the applicant to confirm whether it wished to pursue the external review.
19 January 2012	By correspondence, the applicant advised OIC that it wished to continue the external review and “ <i>remains concerned about the sufficiency of (Council’s) searches and is of the belief that there are documents still missing</i> ”. The applicant provided submissions in support of its concerns.
10 February 2012	By correspondence, the applicant provided further submissions concerning the sufficiency of Council’s searches.
17 May 2012	By correspondence, OIC requested Council undertake further searches as necessary to locate any additional documents responding to the access application and provide a submission setting out: <ul style="list-style-type: none"> • locations that were searched for documents • reasons those locations were chosen (including reference to any relevant record keeping policies and/or practices) • search terms used in any electronic databases; and • if no further documents could be located, any explanation Council could offer as to why no further documents exist.
17 May 2012	By correspondence, OIC updated the applicant on the process of the external review and requested a copy of information referred to in the applicant’s earlier submissions.
23 May 2012	By correspondence, the applicant provided OIC with a copy of information referred to in its earlier submissions and made further submissions about the sufficiency of Council’s searches.
30 May 2012	By correspondence dated 23 May 2012, Council responded to OIC’s request dated 17 May 2012 and provided submissions on the sufficiency of its searches. Council also provided additional documents that it had identified as responsive to the access application.
15 June 2012	By correspondence, OIC requested Council undertake further searches, and provide a submission about its searches for, specific documents.
21 June 2012	By correspondence, Council responded to OIC’s request dated 15 June 2012 and provided additional documents that had been identified as responsive to the access application.
2 August 2012	By correspondence, OIC advised the applicant that Council had located additional documents for release on external review and also conveyed OIC’s view to the applicant that Council was entitled to refuse access to any further documents under sections 47(3)(e) and 52(1)(a) of the RTI Act on the basis that

	Council had undertaken all reasonable steps to locate further documents and no such documents exist.
3 August 2012	Council agreed to release the additional documents located on external review, to the applicant.
16 August 2012	By correspondence, the applicant advised that it did not accept OIC's view in relation to the sufficiency of Council's searches in relation to the levee bank and borrow pit on Lot 2 and related approval documents or correspondence.
30 August – 3 September 2012	OIC made enquiries with the relevant business unit about the sufficiency of searches for relevant documents.
25 September 2012	OIC requested Council undertake specific searches which were identified in the course of OIC's enquiries with the relevant business unit.
22 October 2012	By correspondence dated 15 October 2012, Council responded to OIC's request dated 25 September 2012 and provided additional documents that had been identified as responsive to the access application.
16 November 2012	OIC requested Council release the additional documents provided to OIC on 22 October 2012, to the applicant.
20 November 2012	By correspondence, OIC conveyed its view to the applicant that Council was entitled to refuse access to any further documents under sections 47(3)(e) and 52(1)(a) of the RTI Act on the basis that Council had undertaken all reasonable steps to locate further documents and no such documents exist.
3 December 2012	By correspondence dated 30 November 2012, the applicant advised OIC that it did not accept OIC's view in relation to the sufficiency of Council's searches in relation to documents explaining why no Concurrence Agency was identified in the Permit Decision.