



## Decision and Reasons for Decision

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**Application Number:** 310373

**Applicant:** Simpson MP

**Respondent:** Department of Transport and Main Roads

**Decision Date:** 29 July 2011

**Catchwords:** RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION – REFUSAL OF ACCESS – DOCUMENTS NON-EXISTENT – applicant contended additional documents should exist – whether there are reasonable grounds for agency to be satisfied that no further documents exist – whether agency has taken all reasonable steps to locate further documents – whether access to documents can be refused under sections 47(3)(e) of the *Right to Information Act 2009* (Qld) on the ground set out in section 52(1)(a) of the *Right to Information Act 2009* (Qld)

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## REASONS FOR DECISION

### Summary

1. The applicant applied to the Department of Transport and Main Roads (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents regarding the business case for the New Queensland Drivers Licence (**NQDL**) for the period January 2002 to June 2010.
2. In response to a Charges Estimate Notice (**CEN**), the applicant revised the wording of her request (**Revised Application**) as follows:

*All correspondence and briefing notes between the Minister for Transport and the Department of Transport and Main Roads regarding the original business case for the New Queensland Drivers License and any variations to this business case, particularly concerning the cost escalation and problems of implementation of the project from January 2002 – June 2010.*

3. In its decision, the Department advised the applicant that it had located one document, comprising 106 pages, responsive to the scope of the Revised Application. The Department refused access to that document on the ground that it comprises exempt information pursuant to section 48 of the RTI Act.<sup>1</sup>
4. On external review, the applicant accepted that the document was considered by the Cabinet Budget Review Committee, and therefore was exempt information. However, the applicant submitted that there should be additional documents within the scope of her application, and the Department should have identified these. In this regard, the applicant advised that she did not intend to revise the terms of her application so significantly that only one document was within its scope,<sup>2</sup> and stated that the Department's interpretation of the Revised Application was too narrow.
5. For the reasons set out below, I vary the Department's decision and find that:
  - all reasonable steps have been taken by the Department to locate the additional documents sought; and
  - there are reasonable grounds for the Department to be satisfied that no additional documents responsive to the Revised Application exist.

### Reviewable decision

6. The decision under review is the Department's decision dated 27 August 2010.

### Background

7. Significant procedural steps relating to the application are set out in the Appendix to this decision.

### Evidence considered

8. In making this decision, I have taken into account the following:

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<sup>1</sup> In particular Cabinet information as set out schedule 3, section 1 of the RTI Act.

<sup>2</sup> That is, the document that the applicant accepted is exempt from disclosure under section 48 of the RTI Act.

- the applicant’s original access application and Revised Application
- the Department’s decision
- submissions provided by the applicant
- records and certification of searches and submissions provided by the Department
- file notes of telephone conversations between Office of the Information Commissioner (**OIC**) staff, the applicant and the applicant’s staff
- file notes of telephone conversations between OIC staff and the Department
- relevant provisions of the RTI Act; and
- previous decisions of the Information Commissioner of Queensland and other relevant case law as identified in this decision.

### Issues for determination

9. The issues to be determined in this review are:

- the scope of the applicant’s Revised Application; and
- the sufficiency of the Department’s searches to locate documents responsive to the Revised Application.

10. Each of these issues shall be dealt with separately.

### Scope of the Revised Application

11. In relation to the scope of the Revised Application, the applicant submitted that:

- the CEN issued by the Department regarding the applicant’s original access application showed 67.5 hours of processing charges at a total estimate of \$1,566
- in response to the CEN and advice from the Department that the search area was too broad, the applicant narrowed the terms of her application to the Revised Application; and
- she did not intend to narrow the terms of her application so significantly that only one document<sup>3</sup> was within its scope.

12. For the purpose of the RTI Act, a “reviewable decision”<sup>4</sup> that can be reviewed by OIC<sup>5</sup> is a decision<sup>6</sup> regarding the applicant’s access application. Necessarily, when narrowing of the access application has occurred,<sup>7</sup> the reviewable decision relates to the narrowed access application, rather than the original access application. In these circumstances, it is not possible for OIC to interpret the narrowed access application more broadly than its terms. This is the position even in circumstances where an applicant may, on receipt of the reviewable decision, consider that they have legitimate reasons for wishing to revert to broader terms.

13. Accordingly, while I acknowledge the applicant’s view that the terms of her Revised Application were limited at the suggestion of the Department, I am satisfied that:

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<sup>3</sup> That is, the document that the applicant accepted is exempt from disclosure under section 48 of the RTI Act.

<sup>4</sup> Defined in schedule 6 of the RTI Act.

<sup>5</sup> On application by the applicant under section 85 of the RTI Act.

<sup>6</sup> That is, a deemed, considered or internal review decision made by an agency or Minister—see section 45, 46 and 83 of the RTI Act.

<sup>7</sup> Under section 36 in response to a CEN (as in this external review); or alternatively, under section 42 in response to an agency or Minister’s refusal to deal with the application because of the effect on the agency’s or Minister’s functions.

- the “reviewable decision” that the applicant applied for OIC to review is the Department’s decision regarding the applicant’s Revised Application; and
  - it is not possible for OIC to interpret the Revised Application more broadly than its terms.
14. Previous OIC decisions have considered the issue of the construction and interpretation of access applications.<sup>8</sup> In such decisions,<sup>9</sup> it has been noted that the terms of an application set the parameters for an agency’s search efforts.
15. On this basis, I am satisfied that:
- the terms of the Revised Application set the parameters for the Department’s search efforts; and
  - I am required to consider the Department’s search efforts in this context.
16. In this regard, the applicant submits that:
- the Department has interpreted the scope of the Revised Application too narrowly; and
  - *‘documents over and above the actual business case which relate to cost escalations since the original business case’* should be within scope.<sup>10</sup>
17. Previously, the Information Commissioner has noted that where there is ambiguity in the terms of an application, it is rarely appropriate to apply legal construction techniques in preference to consulting with the author of the words for clarification. However, when there is no ambiguity, no such clarification is required.<sup>11</sup>
18. In this external review, I am satisfied that there is no ambiguity in the terms of the wording of the Revised Application, and that the documents sought by the applicant are:
- correspondence and briefing notes
  - between the Minister for Transport and the Department of Transport and Main Roads
  - regarding the original business case for the NQDL and any variations to this business case.
19. In relation to the applicant’s submission that *‘documents over and above the actual business case which relate to cost escalations since the original business case’* should be included in the revised scope,<sup>12</sup> I am satisfied that such documents would fall within the scope of the Revised Application to the extent that they comprise variations to the NQDL business case, but not otherwise.<sup>13</sup>
20. In response to the applicant’s concerns that the Department interpreted the Revised Application too narrowly, the Department submits that it took the following approach to identifying documents within the scope of that Revised Application:

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<sup>8</sup> While these decisions have considered the issue in the context of the *Freedom of Information Act 1992* (Qld), the principles have equal application to a consideration of the issue in the context of the RTI Act.

<sup>9</sup> *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 (Cannon) paragraph 8; *Robbins and Brisbane North Regional Health Authority* (1994) 2 QAR 30 (Robbins) at paragraph 17.

<sup>10</sup> By letter dated 16 November 2010.

<sup>11</sup> *Robbins* at paragraph 16.

<sup>12</sup> By letter dated 16 November 2010.

<sup>13</sup> *Robbins* at paragraph 17.

*Firstly, only documents detailing communications between the department and the Minister were considered as relevant ... This limitation of the scope, to only relate to communications between the Department and the Minister, was intentionally done to exclude the large volume of documents that may have been captured otherwise. The applicant was aware of this at the time of negotiating the scope of the request.*

*Secondly, the scope was limited to the original business case proposal and any variations to that proposal. As provided in the Statement of Reasons for the original RTI Decision, all subsequent briefings to the Minister were provided verbally. On this basis, [the Department] determined that no other documents exist.*

*From [the Department's] discussions with the applicant's Electoral Office staff, the information being sought was specifically communications between the Minister and the Department, that is, what had the Minister been informed of in relation [to] the business case proposal or any variations to the proposal.*

*In this case the business case proposal was refused as being exempt matter and ... no other documents relevant to the scope of the application exist. That is not to say that there are no documents relating to the NQDL business case proposal "concerning the cost escalation and problems of implementation of the project from January 2002 – June 2010", only that there are no documents that show communications between the Minister and the Department regarding this matter.<sup>14</sup>*

21. After careful consideration of the information before me, I am satisfied that the Department has not interpreted the terms of the Revised Application too narrowly.
22. Further, I am satisfied that two documents that the Department claimed were outside the scope of the Revised Application, that were produced to OIC by the Department in the course of the external review, do not fall within the terms of the Revised Application.

### **Sufficiency of search**

23. The applicant submits that there should be additional documents within the scope of the Revised Application. In this regard, she submits that:<sup>15</sup>
  - there have been significant cost escalations, as well as variations to the business plan and implementation problems, and the Minister would have been provided with documents reflecting the changes to the project
  - she would expect that there would be some briefing documents and notes to the Minister's office within the scope of the Revised Application; and
  - regarding the Department's submission that all subsequent briefings to the Minister were provided verbally, *'there would be briefing notes documenting these briefings (whether typed or hand-written) which would fall within scope of our request ... [E]ven verbal briefings to the Minister about cost escalation and problems of implementation of the project would [have] their contents minuted and documented.'*<sup>16</sup>
24. The RTI Act provides that access to a document may be refused<sup>17</sup> if the document is nonexistent or unlocatable.<sup>18</sup>

<sup>14</sup> By correspondence dated 15 December 2010.

<sup>15</sup> As summarised from the request for external review dated 14 September 2010, and correspondence dated 16 November 2010 and 28 February 2011.

<sup>16</sup> By correspondence dated 28 February 2011.

<sup>17</sup> Section 47(3)(e).

<sup>18</sup> Sections 47(3)(e) and 52 of the RTI Act.

25. A document is nonexistent if there are reasonable grounds for the agency or Minister dealing with the access application to be satisfied that the document does not exist.<sup>19</sup>
26. 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*<sup>20</sup> (*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
  - 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)
  - other factors reasonably inferred from information supplied by the applicant including:
    - the nature and age of the requested document/s
    - the nature of the government activity the request relates to.
27. Alternatively, an agency may rely on searches to satisfy itself that a document does not exist. In such cases the Information Commissioner indicated in *PDE* that in order to substantiate a conclusion that there are reasonable grounds to be satisfied that the document does not exist, it may be necessary for the agency or Minister to take all reasonable steps to locate the document sought. To ensure all reasonable steps have been taken to locate documents, a decision-maker should make enquiries and undertake searches of all relevant locations, having regard to the key factors listed above.<sup>21</sup>

***What steps has the Department taken to find the documents?***

28. As mentioned above, the terms that set the parameters of the Department's search efforts are those specified in the Revised Application, and I am required to consider the Department's search efforts in the context of those terms.
29. As a part of the external review process, OIC asked the Department to make submissions regarding the searches it had undertaken in order to make its decision, and to conduct any further searches necessary to locate further documents responsive to the Revised Application.
30. In response, the Department made the following submissions:

*[S]earches were undertaken within the Enterprise Information and Systems Division (now I Division) of the Department ... The reason searches were only undertaken in this division is because it and its predecessor the Business Services Division in Queensland Transport were the areas having primary carriage of the new Queensland Drivers Licence (NQDL) project ...*

<sup>19</sup> Section 52(1)(a).

<sup>20</sup> Unreported, Queensland Information Commissioner, 9 February 2009. Note — 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.

<sup>21</sup> See *PDE* at paragraph 49.

*On receipt of your letter, I [a]gain went to I Division and asked them to prepare a detailed submission documenting all of the searches undertaken at the time and also if any additional searches could be done ...*

*Unfortunately I Division have advised that no further documents have been located that are relevant to the scope of this external review.<sup>22</sup>*

31. The following documents accompanied the Department's submissions:<sup>23</sup>

- "Document/Retrieval Request" form completed prior to the Department's decision; and
- records of additional searches and certification of such searches by the Acting Chief Information Officer of the Department's Division I in response to OIC's request.

32. In his certification of the searches, the Acting Chief Information Officer of the Department's I Division stated:

- *In May 2006, Cabinet approved the final Business Case for the NQDL initiative and approved that Expressions of Interest be sought for a Public Private Partnership.*
- *In September 2007, the Cabinet Budget Review Committee decided that a Public Private Partnership was not a viable proposition and approved the progression of the NQDL project under a traditional procurement model.*
- *No variations have been made to the original NQDL Business Case to reflect the change in the delivery of the NQDL project.*
- *No documentation was located regarding briefing material to the Minister on the Business Case and ... [it is] presume[d] that any briefings were done verbally.<sup>24</sup>*

33. In response to further queries by OIC, the Department submitted:

*... [T]he scope was limited to the original business case proposal<sup>25</sup> and any variations to that proposal. As provided in the Statement of Reasons for the original RTI Decision, all subsequent briefings to the Minister were provided verbally. On this basis, [the Department] determined that no other documents exist.*

*...*

*In this case the business case proposal was refused as being exempt matter ... no other documents relevant to the scope of the application exist. That is not to say that there are no documents relating to the NQDL business case proposal "concerning the cost escalation and problems of implementation of the project from January 2002 – June 2010", only that there are no documents that show communications between the Minister and the Department regarding this matter.<sup>26</sup>*

34. I note that, in the above submissions, the Acting Chief Information Officer of the Department's I Division *presumed* that any briefings provided to the Minister were provided verbally, whereas the Department subsequently submitted that all briefings provided to the Minister were provided verbally.

35. In response to further queries by the OIC regarding documentation recording verbal briefings provided to the Minister,<sup>27</sup> the Department advised<sup>28</sup> that additional searches

<sup>22</sup> By correspondence dated 21 October 2010.

<sup>23</sup> A copy of these documents and the Department's submissions were provided to the applicant by correspondence dated 4 November 2010.

<sup>24</sup> By way of additional information detailed on the Certification prepared by the Acting Chief Information Officer, Information Division, Department of Transport and Main Roads on 14 October 2010.

<sup>25</sup> That is, the document that the applicant accepted is exempt from disclosure under section 48 of the RTI Act.

<sup>26</sup> Correspondence dated 15 December 2010.

<sup>27</sup> As suggested in the applicant's submissions dated 28 February 2011.

<sup>28</sup> By correspondence dated 4 July 2011.

had been undertaken to attempt to locate such documentation. However, no additional documents were located. This outcome was confirmed to the Assistant Director of Right to Information and Privacy by the Director of the NQDL project.<sup>29</sup>

36. In response to further queries by OIC regarding a statement made by an officer of the Department prior to the applicant's narrowing of the scope of her application, that *'[t]he biggest hurdle we are coming across in this situation is the first part of your request "all briefing documents to Minister's office about the New Queensland Drivers Licence ..." This part of your request is basically what is making the application so large'*<sup>30</sup>, the Department provided to OIC the series of emails in which this comment was made. On careful consideration of the information before me, I am satisfied that the officer's reference to *'briefing documents'* relates to documents attached to briefing notes, as well as briefing notes themselves, and therefore the comment is not indicative of a substantial number of briefing notes that could potentially fall within the scope of the Revised Application.

### ***Findings on sufficiency of search***

37. I consider that the locations identified by the Department as having documents responsive to the Revised Application appear reasonable based on the Department's policy and practice. The evidence before me indicates that the Department has undertaken a thorough search of these locations.
38. There is nothing before me to suggest that the records or certification of searches completed by the Department's staff are not credible.
39. However, on careful consideration of the nature and thoroughness of the Department's searches, the applicant's assertion that more documents responsive to her Revised Application should exist, given the events that occurred in the relevant period, is not sufficient evidence upon which I can make a finding that further documents falling within the scope of the Revised Application do exist.
40. In conclusion, I am satisfied that:
- the Department has undertaken searches for the documents sought by the applicant in all relevant locations, having regard to the Department's practices and procedures in relation to information management and other administrative practices
  - such searches comprise all reasonable steps to locate the documents
  - there are reasonable grounds for the Department to be satisfied that no additional documents responsive to the Revised Application exist; and
  - access may be refused pursuant to section 47(3)(e) of the RTI Act on the ground set out in section 52(1)(a) of the RTI Act that further documents do not exist.

### **DECISION**

41. I vary the decision under review by finding that access to additional documents responsive to the Revised Application can be refused under section 47(3)(e) of the RTI Act on the ground set out in section 52(1)(a) of the RTI Act.

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<sup>29</sup> Given this outcome, it is unnecessary for me to determine whether documentation recording verbal briefings provided to the Minister falls within the scope of the Revised Application.

<sup>30</sup> Referred to by the applicant in her correspondence dated 18 November 2010.



42. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

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Jenny Mead  
**Right to Information Commissioner**

**Date: 29 July 2011**

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
14 July 2010	The applicant lodges an RTI application.
28 July 2010	The Department issues its CEN.
17 August 2010	Given the charges in the CEN, the applicant revises the scope of her application.
27 August 2010	The Department issues its decision.
14 September 2010	The applicant applies to OIC for external review of the decision.
20 September 2010	The Department provides OIC with copies of relevant documents.
29 September 2010	The applicant accepts that one document considered by the Cabinet Budget Review Committee is exempt information under schedule 3, section 1 of the RTI Act.
8 October 2010	OIC confirms to the parties that the external review application has been accepted. OIC requests that the Department provide submissions addressing the extent of searches conducted during the processing of the access application.
21 October 2010	The Department provides OIC with a submission including the "Document/Retrieval Request" form completed prior to the Department's decision, and records and certification of searches requested by OIC.
4 November 2010	OIC conveys a written preliminary view to the applicant.
18 November 2010	The applicant provides a submission.
1 December 2010	OIC requests that the Department provide copies of two documents identified as being "out of scope" and submissions in support of its interpretation of the Revised Application
15 December 2010	The Department provides OIC with copies of two "out of scope" documents and a submission.
15 February 2011	OIC invites the applicant to provide a final submission.
28 February 2011	The applicant provides a final submission.
16 June 2011	OIC requests that the Department conduct further searches and provide a submission addressing the applicant's concerns about verbal briefings.
4 July 2011	The Department provides OIC with a submission.
12 July 2011	OIC requests that the Department provide information about comments regarding documents falling within the initial scope of the application made by it to the applicant prior to her revision of the scope of her application.
13 July 2011	The Department provides OIC with information regarding the context in which the comments were made.