



Decision and Reasons for Decision

Application Number: 310545

Applicant: Bentley

Respondent: Murweh Shire Council

Decision Date: 30 April 2012

Catchwords: **RIGHT TO INFORMATION – REFUSAL OF ACCESS – NONEXISTENT OR UNLOCATABLE DOCUMENTS – applicant sought access to documents regarding construction of the Charleville levee bank – agency located and released some documents – applicant contended that further documents should exist – whether there are reasonable grounds to be satisfied that 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 8 March 2010, the applicant applied to the Murweh Shire Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to the:

“Complete file flood mitigation and levy bank systems – as constructed as was sighted at Murweh Council office – in Alfred St Charleville – I want to inspect the entire file – I want a copy of the file in its entirety – I spoke to Neil Polglase (director of Corporate Services) who showed the file to myself and Len Schouten and then withdrew the file and informed us that we would need to apply for access in this manner – this information is required within seven days of this date. I want to review all correspondence leading up to and including flooding from 1990 through 2010.”

2. By decision dated 16 December 2010, Council granted full access to 3024 pages and refused access to 17 pages (comprising information about valuations and compensation paid to landholders) on the basis that their disclosure would, on balance, be contrary to the public interest.¹
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision² and submits that:
 - Council has not located all documents responsive to his access application; and
 - further documents relating to the expenditure and allocation of monies for the construction of the Charleville levee bank should exist.³
4. On external review, Council provided comprehensive submissions⁴ regarding the sufficiency of its searches and advised that all relevant information about levee banks including costings, has been released to the applicant. Additionally, Council claimed that the 17 pages to which access was refused were also exempt on the basis that their disclosure would found an action for breach of confidence.⁵
5. OIC provided a preliminary view to Council that some information to which access had been refused should be released. Council accepted this view.
6. OIC provided a preliminary view⁶ to the applicant advising that:
 - Council agrees to release additional information;⁷
 - Council is entitled to refuse access to the remaining information to which access was refused (that is, the remaining parts of the seventeen pages) on three grounds;⁸ and

¹ Council specifically relied on the public interest factor found in schedule 4, part 3, item 3 of the RTI Act in relation to the protection of an individual's right to privacy.

² The application for external review was received on 4 February 2011, 32 days after the date of Council's decision. *Note* - the Information Commissioner exercised her discretion and accepted this application outside the 20 business day timeframe required by section 88(1)(d) of the RTI Act.

³ Other concerns about the form in which access was granted to documents and discrepancies in the exact number of documents released to the applicant by Council were initially raised by the applicant. The applicant agreed not to pursue those external review issues on 9 March 2011 in a telephone conversation between the applicant and an OIC officer.

⁴ Dated 28 March 2011.

⁵ See schedule 3, section 8 of the RTI Act and Council's submission dated 4 March 2011.

⁶ Dated 31 October 2011.

⁷ These pages have now been released to the applicant by Council subject to the deletion of exempt and contrary to public interest information pursuant to sections 74 and 75 of the RTI Act.

⁸ Pursuant to sections 47(3)(b) and 49 of the RTI Act (contrary to public interest for part of page 1), sections 47(3)(a) and 48 and schedule 3, section 8(1) of the RTI Act (disclosure would found an action for breach of confidence for some information on page

- the additional documents sought by the applicant do not exist or are unlocatable, therefore Council is entitled to refuse access to them under section 47(3)(e) of the RTI Act on the grounds set out in sections 52(1)(a) and (b) of the RTI Act.
7. In response, the applicant made no submissions regarding the refusal of access to the remaining information in the seventeen pages but objected to OIC's preliminary finding regarding the sufficiency of Council's searches.
 8. Accordingly, Council's refusal of access to the remaining information in the seventeen pages is no longer in issue and the only issue for determination in this review is the sufficiency of Council's searches.
 9. After carefully considering all of the relevant information before me, I am satisfied that the additional documents sought by the applicant do not exist or are unlocatable and that Council is therefore entitled to refuse access to them under section 47(3)(e) of the RTI Act on the grounds set out in sections 52(1)(a) and (b) of the RTI Act.

Reviewable decision

10. The decision under review is Council's decision dated 16 December 2010.

Evidence considered

11. The evidence, submissions, legislation and other material I have considered in reaching my decision is disclosed in these reasons (including footnotes and Appendix).

Relevant law

12. Under the RTI Act a person has a right to be given access to documents of an agency the subject of a valid access application⁹, subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.¹⁰
13. The RTI Act allows an agency to refuse access to documents where the agency is satisfied that those documents are nonexistent or cannot be located following all reasonable steps having been taken to locate them.
14. The Information Commissioner considered the grounds for refusal of access set out in section 52 in *PDE and the University of Queensland*¹¹ (**PDE**).
15. In *PDE*, the Information Commissioner said that:¹²

... [T]he FOI Act [equivalent of section 52] address[es] two different scenarios faced by agencies and Ministers from time to time in dealing with FOI applications: circumstances where the document sought does not exist and circumstances where a document sought exists (to the extent it has been or should be in the agency's possession) but cannot be located. In the former circumstance, an agency or Minister is required to satisfy itself that the document does not exist. If so satisfied, the agency or Minister is not required by the FOI Act to carry out all reasonable steps to find the document. In the latter circumstance an agency or Minister is required to satisfy itself that the document sought exists (to the

2 and all of the information on pages 3 to 12) and section 47(3)(a) and 48 of schedule 3, section 7 of the RTI Act (legal professional privilege attaches to all of the information on pages 13 to 17).

⁹ See sections 23 and 24 of the RTI Act.

¹⁰ As set out in section 47 of the RTI Act.

¹¹ 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.

¹² At paragraph 34.

extent that it has been or should be in the agency's possession) and carry out all reasonable steps to find the document before refusing access.

16. The Information Commissioner also found¹³ that to be satisfied that a document does not exist, it is necessary for the agency to rely upon its particular knowledge and experience with respect 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.
17. If an agency relies on searches to justify a decision that the document sought does not exist, the Information Commissioner indicated in *PDE* that all reasonable steps must be taken to locate documents. Enquiries and searches of all relevant locations having regard to the key factors listed above should take place.¹⁴
18. As for unlocatable documents, for an agency to be entitled to refuse access under section 47(3)(e) of the RTI Act ¹⁵ it is necessary to consider whether:
- the document/s sought has been or should be in the agency's possession?
and
 - the agency has taken all reasonable steps to find the document/s sought ?

Were searches conducted by Council?

19. As noted above, when assessing claims by an agency that documents are unlocatable or that documents are nonexistent, it is always necessary to consider the adequacy of searches undertaken by an agency in an effort to locate relevant documents.
20. Council's search efforts were explained in its submission dated 28 March 2011. The search certification sheet and search record table show that comprehensive and systematic searches were undertaken. I accept the submission as accurate.
21. The specific searches undertaken were of:
- every folder in every filing cabinet, book shelf and cupboard of the engineering offices at Council's office during an 8 hour search
 - all filing cabinets and shelves in the archived records storage area within the Charleville Airport complex during a 6 hour search

¹³ See *PDE* at paragraph 37.

¹⁴ At paragraph 49.

¹⁵ On the ground set out in section 52(1)(b) of the RTI Act.

- all archive boxes in the records storage shed at the rear of Council Chamber during a 4 hour search; and
 - the Electronic Document and Records Management System (**EDRMS**) operated by Council, named Dataworks, for all documents with 'levee'¹⁶ in the title during a 3 hour search.
22. Council's submission also explains that the areas searched represented all storage and archive locations (both physical and electronic) maintained by Council. Moreover, in relation to each search undertaken, clear reasons are provided about whether or not documents were located in the differing locations. The reasons cited are as follows:
- the engineering offices at the Council office were the sole repository of relevant documents with in excess of 3000 pages of information found in manila folders and lever arch files
 - the Charleville Airport complex held no relevant documents because the records held at this location predate planning, design and construction of the levee bank but it was checked
 - the records storage shed at the rear of Council chambers held no relevant documents as it holds personnel and rates assessment documents but it was checked; and
 - the EDRMS, Dataworks, held no relevant documents because levee bank documentation was all held by the engineering officer at the relevant time. Also, the EDRMS was implemented in 2006 by which time the levee bank construction project was nearly complete, but the EDRMS was checked.

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

23. In short, yes.
24. The applicant submits that he has not received *"any of the relevant costings"* and that *"the Murweh Council and its officers have deliberately withheld the information relating to costings"* and the *"alleged Queensland water infrastructure levy bank report that the Murweh mayor advised the Charleville (sic) about, does not appear to exist."*¹⁷
25. 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.
26. Council submits it has undertaken all reasonable steps in an effort to locate all documents, i.e., by way of the search inquiries outlined in paragraph 21. No further documents can be located. As noted in paragraph 20, I accept Council's submission about its search efforts as accurate.
27. The scope of the access application is very broad and it covers an extensive period of time, 20 years. In this context, I find it impossible to determine with precision whether further documents are unable to be found because they cannot be located or because they never existed. However, in this instance, the basis of refusal – that the sought documents are nonexistent¹⁸ or unlocatable¹⁹ – is essentially immaterial as the

¹⁶ The Council submission dated 28 March 2011 also advises that the word 'levee' was not searched on case sensitive basis.

¹⁷ Page 1 of submissions dated 2 December 2011.

¹⁸ Under section 52(1)(a) of the RTI Act.

¹⁹ Under section 52(1)(b) of the RTI Act.

practical consequences of Council's position is that "*information provided to Mr Bentley comprised everything we could find with regard to costs, design, construction and public consultation pertaining to the Levee bank.*"²⁰ All documents that could be located have been identified and dealt with under the RTI Act.

28. I am also satisfied that Council's searches have been carried out in a systematic way taking into account the factors identified in *PDE*.²¹ Having carefully reviewed Council's submissions, together with the submissions lodged by the applicant, I am satisfied that Council has taken all reasonable steps to locate relevant documents and that there are reasonable grounds for me to be satisfied that no further documents responding to the applicant's access application exist or can be located.

DECISION

29. On the basis of the above, I vary Council's decision to refuse access to the requested documents under the RTI Act and find that:
- Council 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
 - Council 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.
30. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

Acting Assistant Information Commissioner Lynch

Date: 30 April 2012

²⁰ Paragraph 2, point d) of the submission dated 28 March 2011.

²¹ See paragraphs 13 and 14 of this Decision.

APPENDIX**Significant procedural steps**

Date²²	Event
8 March 2010	The applicant applied to Council under the RTI Act for access to the complete file concerning the construction of the Charleville levee bank.
16 December 2010	Council issued its access decision granting access to 3024 pages of information and refusing access to 17 pages of information.
4 February 2011	The applicant applied to OIC for external review of Council's original decision.
3 March 2011	OIC informed Council and the applicant that the external review application has been accepted for review.
4 March 2011	OIC received submissions from Council.
17 March 2011	OIC requested further submissions from Council.
28 March 2011	OIC received submissions from Council.
6 April 2011	OIC received submissions from the applicant.
21 October 2011	OIC conveyed an oral preliminary view to Council.
31 October 2011	OIC conveyed a written preliminary view to the applicant inviting him, if he did not accept the preliminary view to provide submissions in support of his case.
16 November 2011	OIC conveyed to Council advice that the applicant had not responded to OIC's preliminary view and that OIC's file would be closed.
16 November 2011	OIC advised the applicant that its file had closed.
17 November 2011	The applicant telephoned OIC to advise that its correspondence of 31 October 2011 was received on 16 November 2011.
18 November 2011	OIC advised the applicant that the external review would be reopened.
18 November 2011	OIC advised Council that the external review would be reopened.
2 December 2011	OIC received submissions from the applicant.
27 April 2012	OIC received submissions from the applicant.
30 April 2012	OIC received further submissions from the applicant.

²² Of correspondence or relevant communication unless otherwise indicated.