



Decision and Reasons for Decision

Application Number: 310762

Applicant: Wheeler

Respondent: Rockhampton Regional Council

Decision Date: 20 April 2012

Catchwords: **ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NON-EXISTENT OR UNLOCATABLE DOCUMENTS - applicant submits further documents relating to destruction of his dogs should exist - whether the agency took all reasonable steps to locate documents identified by the applicant - whether access can be refused to documents on the basis they are nonexistent or unlocatable – sections 47(3)(e) and 52(1) of the *Right to Information Act 2009* (Qld)**

Contents

REASONS FOR DECISION	2
Summary	2
Significant procedural steps.....	2
Reviewable decision	3
Material considered	3
Relevant law	3
Participants' submissions	4
Appeal Information	4
Destruction Records.....	4
Findings	5
DECISION	5
APPENDIX	6
Significant procedural steps.....	6

REASONS FOR DECISION

Summary

1. In 2009 and 2010 Rockhampton Regional Council (**Council**) declared that, under the *Animal Management (Cats and Dogs) Act 2008* (Qld), two dogs owned by the applicant were to be destroyed. The applicant applied to the Queensland Civil and Administrative Tribunal (**QCAT**) for review of Council's decisions and on review, QCAT confirmed the dog destruction orders.¹ The applicant's dogs were destroyed in 2011.²
2. The applicant applied to Council under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents regarding the destruction of his dogs between the date of the QCAT decision and the date the dogs were destroyed. The majority of documents located by Council were released to the applicant in full, subject only to the deletion of information which Council considered was the personal and private information of other individuals.³
3. The applicant then applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision on the basis that Council should have also located:
 - (i) information sent by QCAT to Council regarding appeal rights from the QCAT decision (**Appeal Information**); and
 - (ii) documentation authorising the destruction of the dogs (**Destruction Records**).⁴
4. The applicant is aggrieved that Council arranged for destruction of the dogs before the QCAT appeal period expired. The applicant submits that correspondence he received from QCAT after its decision demonstrates that Council should have received a copy of the Appeal Information and that therefore, Council was aware of the applicant's appeal rights, though still proceeded to arrange for destruction of the dogs. The applicant also submits that there should have been further documentation created by Council, following the QCAT decision, authorising destruction of the dogs.
5. On external review, Council conducted additional searches but was unable to locate the Appeal Information or any Destruction Records. Council referred to its recordkeeping practices and searches of its hardcopy files and electronic document management system to demonstrate that there was no record of the Appeal Information having been received from QCAT. Council also explained that, in accordance with its policies relating to destruction of animals, the only document it relied on to authorise destruction of the dogs was the QCAT decision and for this reason, no further documentation authorising destruction was created.
6. For the reasons set out below, I am satisfied that Council may refuse access to the Appeal Information and Destruction Records on the basis that they do not exist.⁵

Significant procedural steps

7. These are set out in the Appendix.

¹ *Wheeler v Rockhampton Regional Council* [2010] QCAT 676 (24 December 2010).

² On 4 January 2011.

³ 41 pages were located in total, 37 were released in full and 4 pages were released in part. Access was refused to information under section 47(3)(b) of the RTI Act.

⁴ Initially, the applicant also sought review of Council's decision to refuse access to parts of four pages, but elected not to pursue this issue in a telephone conversation with OIC on 25 November 2011.

⁵ Under sections 47(3)(e) and 52(1)(a) of the RTI Act.

Reviewable decision

8. The decision under review is Council's decision dated 15 August 2011.

Material considered

9. Evidence, submissions, legislation and other material I have considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).

Relevant law

10. Under the RTI Act, a person has a right to be given access to documents of an agency⁶ subject to other provisions of the RTI Act including grounds on which access may be refused. One ground for refusal of access is where documents are nonexistent or unlocatable.⁷

11. In *PDE and the University of Queensland (PDE)*⁸ 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:⁹

- administrative arrangements of government
- structure of the agency
- functions and responsibilities of the agency (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
- practices and procedures of the agency (including but not limited 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.

12. By considering the factors above, an agency may decide that a particular document was not created because, for example, the agency's processes do not require creation of the document. Where circumstances to account for a nonexistent document are adequately explained, it will not be necessary for the agency to conduct searches. If however, searches are conducted, an agency must demonstrate that it has taken all reasonable steps to locate the documents.¹⁰

⁶ Section 23 of the RTI Act.

⁷ Section 47(3)(e) and section 52 of the RTI Act. Section 52(1)(a) of the RTI Act provides that a document is nonexistent if there are reasonable grounds for the agency to be satisfied it does not exist. Section 52(1)(b) of the RTI Act provides that a document is unlocatable if there are reasonable grounds for the agency to be satisfied that it exists (to the extent that it has been or should be in the agency's possession) and all reasonable steps have been taken to find it but it cannot be found.

⁸ Unreported, Queensland Information Commissioner, 9 February 2009. Although *PDE* concerned section 28A of the 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).

⁹ *PDE* at paragraph 47.

¹⁰ *PDE* at paragraphs 49 and 53. See also section 130(2) of the RTI Act.

Participants' submissions

Appeal Information

13. To support his submission that the Appeal Information exists, the applicant provided OIC with a copy of an email he received from the Principal Case Manager of QCAT on 11 February 2011 (**QCAT Email**) which stated:

I ... attach a copy of the Appeals Information – section 121 (2) notice which I confirm was sent to all parties in the post with the Tribunal Decision and reasons on 4 January 2011.

I also confirm that the Tribunal Decision and reasons were posted on 4 January 2011 to the Applicant ... the Respondent ... and the Respondent's representative (Grant & Simpson Lawyers).

14. Council confirmed to OIC that it received a copy of QCAT's decision by email on 4 January 2011, however, this email did not attach the Appeal Information.¹¹ Council submitted that it never received the posted reasons for decision and Appeal Information, as indicated in the QCAT Email.
15. Council explained to OIC that all incoming mail is opened by the Records Management unit on the day of receipt and is then referenced, scanned and registered into its electronic document management system (**EDMS**). Council submitted that therefore, if the QCAT decision and Appeal Information had been received from QCAT in the post, there would be a record of this in EDMS. Searches of Council's EDMS however, did not reveal a record of correspondence from QCAT being received or scanned into EDMS on, or after 4 January 2011.
16. Council also provided OIC with a record of searches conducted by the Strategic Manager, personal assistant to the Strategic Manager, RTI Coordinator and Council's RTI and IP Officer.¹² This search record confirmed that, in addition to EDMS, searches were conducted of hardcopy files, the customer request system, emails, diaries and notebooks and that the Appeal Information was unable to be located in these areas.
17. In view of the reference in the QCAT Email to correspondence sent to Council's legal representatives, OIC also made enquiries with them to find out whether they had received the Appeal Information. Council's legal representative confirmed that a copy of the reasons for decision had been received from QCAT but that the Appeal Information had not been included.¹³

Destruction Records

18. The applicant submitted that he expected there to be documents generated by Council between the date of the QCAT decision and the actual destruction of the dogs. For example, he considered there should be a written authority prepared by Council providing permission to the nominated veterinary surgeon to perform the destruction.
19. Council's Strategic Manager explained to OIC that Council's processes do not require it to produce a written direction for destruction and that the QCAT decision is the only document referred to for authorisation. Council also explained that this was Council's first dealing with QCAT in relation to a dog destruction matter and that it had taken

¹¹ A copy of this email was released to the applicant pursuant to Council's decision. OIC was also provided with a copy of the email for the purpose of this review which confirmed that the Appeal Information was not included in the email.

¹² Council also provided OIC with a certification signed by the RTI Coordinator that searches had been conducted for documents responding to the access application and that all relevant documents had been provided.

¹³ Council's legal representative explained that the applicant had raised this issue at the costs hearing of the QCAT proceeding and that thorough searches of their records for the Appeal Information were conducted at that time.

QCAT's decision to mean that destruction of the dogs was authorised, and that no further steps were required by Council.

20. Council's Operations Manager also provided OIC with information about the process that would have been followed in this particular case:
- once he received notice from QCAT confirming the dog destruction orders he called two Council officers to take the dogs to the vet be destroyed
 - these Council officers would have called the vet, made an appointment and explained why they were bringing the dogs in and that they had permission to do so through QCAT; and
 - Council officers would have presented to the vet in Council uniform and a Council vehicle and were not required to provide written authority as Council had contracted with certain vets to provide services for the destruction of animals.

Findings

21. I acknowledge that the applicant remains significantly aggrieved that Council proceeded to arrange destruction of his dogs before the QCAT appeal period had expired. However, OIC does not have jurisdiction to investigate the actions taken by Council in relation to destruction of the applicant's dogs. OIC's jurisdiction in this review is limited to considering whether the Appeal Information and Destruction Records are nonexistent or unlocatable under the relevant provisions of the RTI Act.
22. In relation to the Appeal Information, I consider that Council's searches demonstrate that there is no record of Council ever having received this document and that therefore, there are reasonable grounds for Council to be satisfied that the document does not exist. I acknowledge that the QCAT Email indicates that the Appeal Information was posted to Council on 4 January 2011. However, I am satisfied that if the Appeal Information had been received through the post, Council's searches of EDMS would have revealed a record of this. As no record was able to be located either in EDMS or searches of Council's hardcopy records and other electronic systems, I am satisfied that the Appeal Information does not exist within Council's records and that therefore, access to the Appeal Information may be refused.
23. In relation to the Destruction Records, I consider that Council has provided a reasonable explanation of its processes relating to the destruction of dogs following orders given by QCAT to account for the non-existence of Destruction Records. Accordingly, I am satisfied that Council may refuse access to the Destruction Records on the basis that they do not exist.

DECISION

24. I affirm Council's decision to refuse access to the Appeal Information and Destruction Records under section 47(3)(e) of the RTI Act on the basis that the documents are nonexistent under section 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.

K Shepherd
Assistant Information Commissioner

Date: 20 April 2012

APPENDIX**Significant procedural steps**

Date	Event
12 July 2011	The applicant lodged an access application under the RTI Act.
15 August 2011	Council issued its decision.
9 September 2011	The applicant applied to OIC for external review.
29 September 2011	OIC accepted the application for external review and asked Council to provide submissions about the searches conducted on the application.
3 October 2011	The applicant confirmed to OIC that he was seeking external review of Council's decision to refuse access to parts of four documents and considered that further documents should have been located.
12 October 2011	Council provided OIC with a signed certification and submission in relation to its searches.
17 October 2011	Council provided OIC with copies of all documents located in response to the access application (41 pages).
24 November 2011	The applicant provided OIC with a signed authority for his mother to act on his behalf in the external review.
24 November 2011	OIC conveyed an oral preliminary view to the applicant on the issues in the review. The applicant accepted the preliminary view only in relation to the information to which access was refused under section 47(3)(b) of the RTI Act. The applicant did not accept that further documents could not be located.
28 November 2011	Council's Strategic Manager provided oral submissions to OIC in relation to the Appeal Information and Destruction Records.
8 December 2011	OIC conveyed a written preliminary view to the applicant that access to the Appeal Information and Destruction Records may be refused under section 47(3)(e) of the RTI Act on the basis that they were nonexistent or unlocatable under section 52(1) of the RTI Act.
20-23 December 2011	The applicant provided submissions contesting the preliminary view.
9 January 2012	Council's Strategic Manager and Operations Manager provided oral submissions to OIC in relation to the existence of Destruction Records and related Council processes.
18 April 2012	Council's legal representative in the QCAT hearing provided oral submissions to OIC about the existence of the Appeal Information.