



## Decision and Reasons for Decision

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Citation:	<i>Gapsa and Public Service Commission</i> [2016] QICmr 6 (11 February 2016)
Application Number:	312336
Applicant:	Gapsa
Respondent:	Public Service Commission
Decision Date:	11 February 2016
Catchwords:	ADMINISTRATIVE LAW – RIGHT TO INFORMATION – GROUNDS ON WHICH ACCESS MAY BE REFUSED – UNLOCATABLE AND NONEXISTENT DOCUMENTS – documents relating to public sector reform process – applicant believes further documents should exist – whether the agency has taken all reasonable steps to locate the documents – whether access to further documents may be refused under sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009</i> (Qld)

## REASONS FOR DECISION

### Summary

1. The applicant applied to the Public Service Commission (**PSC**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to information about the restructuring of the Queensland public sector between January 2012 and June 2013. The PSC located 59 pages and initially, refused access to four full pages and five part pages.
2. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review on the basis that the PSC had conducted insufficient searches. During the external review, the PSC agreed to grant the applicant full access to all 59 pages. The PSC also conducted further searches of its records and provided OIC with submissions about its recordkeeping systems and practices. The applicant maintained, throughout the review, that the PSC should have located vastly more documents due to its role in the public sector reform process.
3. For the reasons set out below, I find that access to any further documents may be refused under section 47(3)(e) of the RTI Act on the basis that they are either non-existent or unlocatable.

## Background

4. Significant procedural steps relating to the application and external review are set out in the Appendix to this decision.
5. During the review, the Right to Information Commissioner (**RTI Commissioner**) issued a decision, under section 94(1) of the RTI Act, that part of the external review application was lacking substance and would therefore, not be dealt with on external review.<sup>1</sup> In summary, the RTI Commissioner decided that certain submissions made by the applicant were seeking answers to questions about the legality of actions taken by the PSC with respect to the public sector reform process, rather than seeking access to further specified documents.<sup>2</sup>
6. The applicant has continued to make these submissions throughout the external review. However, I have no power to revisit the issues which were the subject of the RTI Commissioner's decision under section 94(1) of the RTI Act. Therefore, those submissions are not addressed in these reasons for decision.

## Reviewable decision

7. The decision under review is the internal review decision dated 22 December 2014.

## Evidence considered

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

## Issue for determination

9. During the review, the applicant pointed to a number of specific documents which he considered were missing.<sup>3</sup> Several of these documents were later identified as having previously been released to the applicant.<sup>4</sup> However, one email was unable to be located by the PSC in its further searches (**Missing Email**).<sup>5</sup> The applicant has also submitted throughout the review that additional policies and procedures should have been located by the PSC due to its role in the public sector reform process.
10. The issue which OIC has considered in this external review is whether the PSC has taken all reasonable steps to locate all documents relevant to the access application, including the Missing Email and policies and procedures.

## Relevant law

11. Under the RTI Act, a person has a right to be given access to documents of an agency.<sup>6</sup> This right is subject to other provisions of the RTI Act, including grounds for refusing access to documents.<sup>7</sup>

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<sup>1</sup> Letter dated 27 October 2015.

<sup>2</sup> See *Hearl and Mulgrave Shire Council* (1994) 1 QAR 557 at paragraphs 30-31.

<sup>3</sup> Including fact and information sheets provided to agencies by the PSC about managing the public sector restructuring process.

<sup>4</sup> PSC's submissions dated 17 December 2015. Copies of these documents were provided to the applicant again in the course of this external review.

<sup>5</sup> Email sent by K Armstrong, PSC, to G Rennie, DTMR, dated 13 July 2012.

<sup>6</sup> Section 23 of the RTI Act.

<sup>7</sup> Section 47 of the RTI Act.

12. Access may be refused to nonexistent or unlocatable documents.<sup>8</sup> A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document, but it cannot be found.<sup>9</sup>
13. To refuse access on the basis of nonexistence, the decision maker must be *satisfied* that the document does not exist.<sup>10</sup> The RTI Act is silent on how an agency is to satisfy itself that a document does not exist. In *PDE and The University of Queensland*,<sup>11</sup> 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 limited to information management); and
  - other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested documents and the nature of the government activity to which the request relates.
14. When the above factors are properly considered and a conclusion reached that the document does not exist, it may be unnecessary for an agency to conduct searches for a document. Instead, the agency may be able to provide an explanation for the document's non-existence, based on the above factors. However, an agency may also rely on searches to justify a decision that the document does not exist. If an agency relies on searches, all reasonable steps must be taken to locate the requested document.<sup>12</sup> In determining whether all reasonable steps have been taken, regard should be had to the factors listed above.<sup>13</sup>
15. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate documents applied for by applicants.<sup>14</sup> Generally, the agency that made the decision under review that has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.<sup>15</sup> However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable grounds to believe that the agency has not discharged its obligation to locate all relevant documents.<sup>16</sup>

### ***Applicant's access application and submissions***

16. The access application requested:

*'All briefing materials prepared in relation to the lawful selection processes to be used by PSC to lead reform and renewal across the Queensland Public Service (QPS) in 2012-*

<sup>8</sup> Section 47(3)(e) of the RTI Act.

<sup>9</sup> Section 52(1)(b) of the RTI Act.

<sup>10</sup> Section 52(1)(a) of the RTI Act.

<sup>11</sup> (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*).

<sup>12</sup> *PDE* at [49] to [53].

<sup>13</sup> *PDE* at [55].

<sup>14</sup> Section 130(2) of the RTI Act.

<sup>15</sup> Section 87(1) of the RTI Act.

<sup>16</sup> Section 95 of the RTI Act provides that the procedure to be followed on an external review is within the discretion of the Information Commissioner. Section 96 provides that any participant must comply with a reasonable request made by the Information Commissioner for assistance, even where that participant does not have the onus under section 87 of the RTI Act.

2013. The statutory authority in the Public Service Act 2008 and relevant Directive that was used to advise on “closed merit selection” processes used to select staff as surplus. Briefing advice on appeal processes linked to the closed merit selection processes used to advise Ministers or QPS agencies. Material identifying the “head of power” or the legal basis for public policy relating to the selection of any QPS staff as surplus.”<sup>17</sup>

17. The applicant made extensive submissions in his external review application and throughout the review. Particularly, he submitted that there ‘were no policies or procedures captured that related to the “closed merit selection”’<sup>18</sup> even though he specifically asked for those types of documents in his application. He also identified that the PSC had located ‘limited or no responsive documents (pages) from key personnel in relation to “closed merit selection”’.<sup>19</sup> The applicant also submitted to OIC that further documents would:

‘... explain deficiencies in the conduct of administration and to reveal that the “closed merit selection” process was ultra vires and was conducted contrary to the statutory authority.’<sup>20</sup>

18. The applicant also raised the following concerns:

- the majority of the 59 pages released to him ‘related to actions that only occur **after** a public servant has been lawfully selected as a surplus employee’<sup>21</sup>
- the PSC did not search its backup system, ‘despite evidence of non-compliance with statutory obligations in relation of recordkeeping of public records’
- there ‘must be documents sent by the PSC to Queensland Government agencies to inform them on how to use a closed merit selection process’; and
- there is ‘no evidence that individuals associated with the Public Service Reforms in 2012 have searched physical files, electronic files, emails, USB sticks, personal or group drives at the PSC’.<sup>22</sup>

19. The applicant provided OIC with a copy of the Missing Email, which he had previously obtained from DTMR, to support his submission that the PSC’s searches were inadequate.

20. The applicant submitted that because the PSC had responsibility to administer the *Public Service Act 2008* and related directives concerning human resource management and industrial relations relating to the public sector reform process, documents that provide ‘authority for the processes used’<sup>23</sup> should have been located. In the absence of such documents, the applicant contended that it is reasonable to conclude that the PSC has not undertaken all reasonable searches to locate responsive documents.

### **Searches conducted by PSC**

21. The 59 pages located by the PSC included:

- various briefing notes about managing employees requiring placement, workforce management initiatives, new directives affecting public service employees and the approval and repeal of directives

<sup>17</sup> Application dated 8 October 2014. The types of documents specified in the application were ‘Briefing notes, emails, reports, policies, procedures, Directives, Acts and the date range was identified as January 2012 to June 2013.

<sup>18</sup> Page 5 of external review application.

<sup>19</sup> Page 5 of external review application.

<sup>20</sup> Page 5 of external review application.

<sup>21</sup> Page 1 of submissions to OIC dated 19 January 2016.

<sup>22</sup> Page 16 of submissions to OIC dated 19 January 2016.

<sup>23</sup> Page 17 of submissions to OIC dated 19 January 2016.

- proposed framework for managing employees requiring placement
  - emails attaching drafts of the directive *'Early retirement, redundancy and retrenchment'*; and
  - emails between the PSC and other agencies about the employees requiring placement register and the appeals process.
22. The internal review decision states that the PSC took the following steps to identify documents in response to the access application:
- searches were conducted of email accounts, TRIM<sup>24</sup>, hard copy records using key words and manual reviews of documents
  - searches were undertaken within the functional areas of the PSC that may have held relevant documents, being Workforce Policy and Legal, Workforce Strategy and the Performance, Industrial Relations areas; and
  - searches were also conducted by individual officers who may have had involvement with the production of documents on topics relevant to the access application.<sup>25</sup>
23. On external review, the PSC submitted a search certification form<sup>26</sup> to OIC stating that:
- searches had been conducted in TRIM for relevant letters, emails, briefing notes, reports and other information; and
  - the search criteria included subjects such as briefing notes, emails, directives and other information on: employees requiring placement; directives related to redundancy and retrenchment; closed merit selection and head of power (mentioned in briefs and directives).
24. The PSC explained that it uses TRIM to save email correspondence about business decisions or information relating to significant projects/programs. The PSC confirmed that it searched TRIM twice for information responding to the application.
25. The PSC also asked the Information Services Team in DPC<sup>27</sup> to specifically search for the Missing Email. However, it was unable to be located. The PSC did not make direct inquiries with the author of the Missing Email as she left Queensland Government employment in early 2015.

## Findings

26. The applicant sought access to a broad range of documents used by the PSC in relation to the public sector reform process, particularly, materials relating to the "closed merit selection" processes. The thrust of the applicant's submissions on external review has been that there should be vastly more documents due to the *'central role'* of the PSC in the reform process.<sup>28</sup> The applicant firmly believes that the PSC should hold more policies and procedures about administering and implementing the closed merit selection processes used to select public service staff as surplus.
27. The PSC played a key role in the renewal of the public sector during 2012-2013, by *'leading reform and renewal across the sector, driving the cultural change required to*

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<sup>24</sup> Electronic Document and Record Management System (**EDRMS**), managed by the Department of Premier and Cabinet (**DPC**).

<sup>25</sup> Internal review decision, pages 7-8.

<sup>26</sup> Dated 24 February 2015, signed by the Director, Business Services, PSC.

<sup>27</sup> This team is responsible for managing the TRIM system.

<sup>28</sup> Submissions to OIC dated 20 January 2016.

*achieve it, and supporting government agencies through the process.*<sup>29</sup> The released documents show that the PSC prepared directives, information sheets and guidelines for agencies to use in managing organisational change and effecting staff placements during the reform process.<sup>30</sup>

28. As set out above, the PSC located various briefing materials, information sheets and communications relating to managing the reform process, workplace change and employee placement. In the circumstances of this case, I am satisfied that the types of documents located by the PSC on this application represent those documents which it would be reasonable to expect the PSC to hold in relation to the subject matter of the application, having regard to the nature of the PSC's functions and responsibilities in relation to the public sector reform process. Having carefully reviewed the content of the released documents, I am also satisfied that they do not point to the existence of any further documents which have not been located by the PSC.
29. The TRIM system is the PSC's primary storage location for documents and communications relating to projects and programs administered by the PSC. In view of the types of documents the applicant is seeking and the subject matter of the application, I am satisfied that the PSC's searches of TRIM should have identified all relevant documents.
30. The Missing Email is a document which should be in the possession of the PSC. The evidence available to OIC indicates that it should have been saved into TRIM, but that this did not occur. As it was not stored in accordance with the PSC's usual recordkeeping practices, I find that the Missing Email is unlocatable. I do not agree with the applicant's view that the PSC's inability to locate this email indicates that its searches have been inadequate. I am satisfied that the PSC has taken all reasonable steps to locate the Missing Email, having regard to its recordkeeping practices and procedures. As the applicant already has a copy of the Missing Email in his possession, I do not consider it would be reasonable for the PSC to undertake any further steps to locate a copy of this document. I am also satisfied that searches of the backup system are not required in this case.<sup>31</sup>
31. I acknowledge the applicant's firmly held belief that the PSC should hold more documents about a project of such significance. Throughout this review the applicant has provided extensive submissions to OIC to support his contention that more documents should be held by the PSC to substantiate this process.
32. However, aside from the applicant's assertions, there is no evidence available to OIC that indicates the existence of additional documents. The PSC has explained that it stores all documents and correspondence relating to business decisions and significant projects on TRIM. The PSC searched TRIM using terms that were consistent with the information the applicant provided in his access application. The documents it located through these searches have been released in their entirety to the applicant. These documents do not point to the existence of any additional documents. I am also unable to identify any additional searches that the PSC could reasonably be required to perform in response the particular terms of the access application.
33. Having had regard to the *PDE* factors in this particular case, I am satisfied that the PSC has conducted searches which were reasonable based on the nature of the information requested by the applicant, the PSC's recordkeeping practices and

<sup>29</sup> PSC Annual Report, 2012-2013, page 6 available at <http://www.psc.qld.gov.au/publications/subject-specific-publications/annual-report.aspx>

<sup>30</sup> These documents were released to the applicant initially by the PSC and again, on external review.

<sup>31</sup> Section 52(2) and (3) of the RTI Act.

organisational structure and its functions and responsibilities in the public sector reform process. I am unable to identify any specific searches that the PSC could reasonably conduct in order to identify additional documents. I am therefore satisfied that the PSC does not hold any further documents in response to the application.

34. Based on the evidence available to OIC in this review, I find that:

- the PSC has taken all reasonable steps to locate documents relevant to the access application;
- access to the Missing Email may be refused as it is unlocatable; and
- access to any further documents, including policies and procedures relating to the closed merit selection process, may be refused on the basis that they do not exist.

## DECISION

35. I affirm the decision under review and find that the PSC is entitled to refuse access to further documents under sections 47(3)(e) and 52(1) of the RTI Act on the basis that they are nonexistent or unlocatable.

36. 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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K Shepherd  
**Assistant Information Commissioner**

**Date: 11 February 2016**

## APPENDIX

### Significant procedural steps

Date	Event
8 October 2014	PSC received the access application.
28 November 2014	PSC issued its initial decision in respect of the access application.
1 December 2014	The applicant applied for internal review of the initial decision.
22 December 2014	PSC issued its internal review decision.
<b>7 January 2015</b>	<b>OIC received the application for external review of PSC's decision.</b>
7 January 2015	OIC notified the applicant that the external review application had been received.  OIC notified PSC of the external review application and asked PSC to provide procedural documents by 14 January 2015.
10 February 2015	PSC provided OIC with additional information.
11 February 2015	OIC informed the applicant and PSC that the application had been accepted for external review. OIC requested that PSC provide, by 25 February 2015, a copy of the documents located in response to the access application, its search records and certifications, and other relevant documents.
24 February 2015	PSC provided OIC with the requested documents.
20 March 2015	OIC received the applicant's submissions.
14 July 2015	OIC conveyed a written preliminary view to the applicant and invited him to provide submissions by 28 July 2015.
28 July 2015	OIC received the applicant's submissions.
3 August 2015	OIC received the applicant's submissions.
22 October 2015	OIC conveyed its written preliminary view to PSC on the refusal of access issues in this review, and invited PSC to provide submissions by 22 October 2015 if it did not accept the preliminary view.
27 October 2015	OIC conveyed a written preliminary view to the applicant and invited him to provide submissions by 11 November 2015. In this letter OIC also informed the applicant of the RTI Commissioner's decision that part of his application was lacking substance and would not be dealt with on external review.
4 November 2015	PSC notified OIC that it would provide the applicant with full access to all 59 documents.
10 November 2015	OIC received the applicant's submissions.
25 November 2015	OIC sought additional submissions from the PSC by 17 December 2015.
17 December 2015	OIC received PSC's submissions.
24 December 2015	OIC conveyed a written preliminary view to the applicant and invited him to provide final submissions by 19 January 2016.
19 January 2016	OIC received the applicant's submissions.
20 January 2016	OIC received the applicant's submissions.
21 January 2016	OIC asked PSC to provide additional search information.
21 January 2016	PSC provided OIC with the requested additional information.