



Decision and Reasons for Decision

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| Citation: | <i>Poxon and Queensland Police Service [2017] QICmr 40 (31 August 2017)</i> |
| Application Number: | 312997 |
| Applicant: | Poxon |
| Respondent: | Queensland Police Service |
| Decision Date: | 31 August 2017 |
| Catchwords: | ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT DOCUMENTS - applicant submits agency has failed to locate documents relating to an internal review process - whether there are reasonable grounds to believe that the requested documents exist - whether agency has taken all reasonable steps to locate the requested documents - whether access to the requested documents can be refused on the basis that they are nonexistent - sections 47(3)(e) and 52 of the <i>Right to Information Act 2009 (Qld)</i> |

REASONS FOR DECISION

Summary

1. The applicant sought access to internal correspondence between Darling Downs District officers and correspondence between the Queensland Police Service (**QPS**) and the Office of the Minister for Police, Fire and Emergency Services (**Minister**) relating to his contact with the Minister's office in relation to the death of his brother in 2013.¹
2. QPS located 97 documents and decided to release 11 pages, part release 44 pages and refuse access to 42 pages. Access to this information was refused on the grounds that its disclosure would, on balance, be contrary to the public interest.
3. The applicant sought internal review of QPS's decision and raised a sufficiency of search issue. On internal review, QPS performed further searches within the Darling Downs District Office and located eight additional pages, which it released to the applicant subject to the deletion of information on four pages which it decided would be contrary to the public interest to disclose.
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QPS's decision. The applicant confirmed on external review that he did not seek review of the decision to refuse access to information.² Rather, he submitted that documents relating to an internal review into the handling of the investigation into his brother's death had not been located.

¹ The application was for documents between 1 May 2014 and 30 June 2014.

² In a telephone call with OIC on 21 November 2016 and 18 January 2017.

5. On external review, OIC asked QPS to conduct additional searches and make further enquiries for the requested documents. Having carefully considered the nature and extent of these further searches and enquiries, together with the information provided by the applicant, I am satisfied that access to any further information may be refused on the basis that it is nonexistent under section 47(3)(e) of the *Right to Information Act 2009* (Qld) (**RTI Act**).

Background

6. Significant procedural steps taken by OIC in conducting the external review are set out in the appendix to these reasons.

Reviewable decision

7. The decision under review is QPS's internal review decision dated 6 September 2016.

Evidence considered

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

Issue for determination

9. The applicant's brother passed away in 2013 as a result of a workplace incident and his death was the subject of a QPS investigation. The applicant made a formal complaint to QPS about its handling of the investigation into the death but was dissatisfied with QPS's response. As a result, the applicant raised his concerns with the Minister. The Minister's Chief of Staff responded to the applicant's concerns in a letter (**Chief of Staff Letter**) which relevantly provided that:³

*Upon receipt of your previous letter dated 15 April 2014 to Superintendent Vanderbyl, **an internal review was conducted by senior officers from the [QPS]**. It was determined that the investigative strategies used were considered valid and further, that the investigation process was conducted to a satisfactory standard. Whilst the cover page syntax error and erroneous location of where [another individual] identified your brother are acknowledged, the overall investigation was found to be within QPS expectations with no additional investigations required at this stage.*

[emphasis added]

10. The applicant seeks access to documents relating to the 'internal review' which is referred to in the Chief of Staff Letter, in particular, a report, memorandum or briefing note which he believes would have been created by senior police officers involved in the investigation and which he believes would have been sent to the Minister's Chief of Staff. In his view, this information is likely to have gone through the Ministerial Services Unit. The applicant submits that the Chief of Staff would rely on written information by QPS officers to inform his letter, rather than an oral briefing.
11. The issue for determination in this review is whether access to the requested documents can be refused under sections 47(3)(e) and 52 of the RTI Act on the grounds that they are nonexistent.

³ The applicant has not provided OIC with the version of the Chief of Staff Letter that he received. However, QPS located a number of versions of this letter in processing the applicant's request under the RTI Act and provided these to OIC on external review. These versions are unsigned and appear to be drafts. They vary slightly in content but the substance of the relevant paragraph of the letter which is relevant to the applicant's submissions is the same throughout each letter. It is the reference to the 'internal review' in the letter that is relevant to the applicant's case.

Relevant law

12. The RTI Act confers a right of access to documents of an agency,⁴ subject to limitations, including grounds for refusal of access.⁵ Access to a document may be refused if it is nonexistent.⁶ A document is nonexistent if there are reasonable grounds to be satisfied it does not exist.⁷ To be satisfied that a document does not exist, the Information Commissioner has previously recognised that an agency must rely on its particular knowledge and experience, having regard to various key factors including:
 - the administrative arrangements of government
 - the agency's structure
 - the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and other legal obligations that fall to it)
 - the agency's practices and procedures (including, but not limited to, its information management approaches); 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.⁸
13. By considering the above factors, an agency may ascertain that a particular document was not created because, for example, the agency's processes do not involve creating that specific document. In such instances, it is not necessary for the agency to search for the document. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.
14. An agency may also rely on searches to satisfy itself that a document does not exist. In those cases, all reasonable steps must be taken to locate the documents.⁹ Such steps may include enquiries and searches of all relevant locations identified after consideration of the key factors listed above.

Findings

15. In the circumstances, it is relevant for me to consider whether:
 - there is a reasonable basis to believe the requested documents exist; and
 - QPS has taken all reasonable steps to locate the requested documents in the circumstances.

Is there a reasonable basis to believe the requested documents exist?

16. I am satisfied the answer to this question is no, for the reasons that follow.
17. OIC contacted relevant officers at the Toowoomba Station¹⁰ to obtain background information relating to the content of the Chief of Staff Letter, and confirm what searches had been undertaken. OIC also carefully reviewed the content of the information located by QPS both initially and on internal review. That information reveals the following:

⁴ Section 23(1)(a) of the RTI Act.

⁵ Grounds for refusal of access are set out in section 47 of the RTI Act.

⁶ Sections 47(3)(e) and 52(1) of the RTI Act.

⁷ Section 52(1)(a) of the RTI Act.

⁸ *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]-[38]. The decision in *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld). Section 52 of the RTI Act is drafted in substantially the same terms as the provision considered in *PDE* and, therefore, the Information Commissioner's findings in *PDE* are relevant here.

⁹ As set out in *PDE* at [49]. See also section 130(2) of the RTI Act.

¹⁰ The Toowoomba Station falls within the Darling Downs District.

- The applicant made a complaint to Superintendent Vanderbyl about the QPS handling of the investigation into his brother's death and the contents of the Coronial Report prepared by Senior Constable Servin of the Toowoomba Forensic Crash Unit.¹¹
 - Superintendent Vanderbyl referred the applicant's letter to Superintendent Marcus at the Darling Downs District Office for actioning.¹²
 - Sergeant Neumann¹³ of the Darling Downs District Office forwarded the complaint to Senior Sergeant Clark, Officer in Charge of Toowoomba Road Policing Unit and direct supervisor of Senior Constable Servin, the officer who prepared the report for the Coroner, asking him to '*overview this matter and provide a response in relation to the issues raised in the letter so this matter can be considered by a Commissioned Officer please*'.¹⁴ It appears that no response was ever provided to this request.
 - Senior Sergeant Clark asked to speak to Senior Constable Servin about the matter.¹⁵ Senior Constable Servin forwarded the applicant's letter of complaint to Senior Sergeant Neumann, Officer in Charge at Toowoomba Station, for his information.¹⁶
 - Superintendent Marcus notified the applicant he had referred his complaint to the Coroner.¹⁷
 - The applicant wrote to the Minister stating he was dissatisfied with QPS's investigation into the death and the response to his complaint. He referred to his letter of 15 April 2014 and requested answers to a number of questions set out in that letter.¹⁸
 - Senior Constable Servin drafted a brief response to each of the questions raised in the applicant's initial complaint and emailed those responses to Senior Sergeant Neumann.¹⁹ Senior Sergeant Neumann then forwarded this document on to Sergeant Teasdale, A/Support Officer at the District Office.²⁰
 - The Ministerial Services Unit liaised with Superintendent Marcus and Senior Sergeant Lingwood, Coronial Support Unit, for information to include in the draft Chief of Staff Letter. The draft was amended several times before being sent to the applicant.²¹
18. I have considered whether it is likely that QPS would conduct an internal review process in relation to a complaint made about an investigation. In my view, it is unlikely. This is also consistent with Superintendent Marcus' letter on 5 May 2014 where he simply refers the complaint on to the Coroner. There is no information before me to indicate that QPS conducted an internal review in relation to the applicant's complaint or in relation to the

¹¹ On 15 April 2014. Pages 48-50 of the original documents located.

¹² On 22 April 2014. Page 51 of the original documents located.

¹³ There are two QPS officers with the surname 'Neumann' at the Toowoomba Station.

¹⁴ On 22 April 2014. Page 7 of the documents located on internal review.

¹⁵ On 22 April 2014. Page 7 of the documents located on internal review.

¹⁶ On 24 April 2014. Page 7 of the documents located on internal review.

¹⁷ On 5 May 2014. Page 52 of the original documents located.

¹⁸ On 12 May 2014. Pages 4-5 of the original located documents.

¹⁹ On 13 May 2014. Page 6 of the documents located on internal review.

²⁰ On 15 May 2014. Page 6 of the documents located on internal review. In a telephone conversation on 12 December 2016, Senior Sergeant Neumann advised OIC that the Support Officer for the District Office liaised with Ministerial Services and this is evident from the information originally located.

²¹ Between 13 May 2014 and 10 June 2014. Pages 55, 58-63, 73-78, 88, 92 and 95 of the original located documents and page 6 of the documents located on internal review.

investigation into the death of his brother, other than the reference to an ‘internal review’ in the Chief of Staff Letter.

19. I have also considered whether there was an internal review when the Minister’s office became involved. I agree that the Minister’s Chief of Staff would not have been able to write to the applicant without some input from senior QPS officers and it is reasonable to query whether this input was provided in writing. However, on the information currently available to me, there is nothing to indicate that an internal review was conducted at this stage or that documents relating to an internal review process exist.
20. Instead I consider it reasonable and likely that the QPS input into the Chief of Staff Letter was provided as follows:
 - by Superintendent Marcus’ involvement in the drafting process²²
 - information was provided by Senior Sergeant Lingwood about the Workplace Health and Safety investigation and Coronial investigation²³
 - Senior Constable Servin’s answers to the questions raised by the applicant; and
 - the Coronial Report prepared by Senior Constable Servin.
21. It is also relevant to note that Senior Sergeant Clark appears to have met with Senior Constable Servin towards the end of April 2014 to discuss the complaint and the applicant’s questions.²⁴ However I do not consider that this was the ‘internal review’ referred to in the Chief of Staff Letter.
22. In summary, and on the information currently available, I consider it reasonable to expect that the Chief of Staff relied solely on the information identified above to complete the letter to the applicant. This is also consistent with the content of the letter – that is, the letter to the applicant is not any more detailed and it addresses the same type of information which is contained in the above sources. In my view, this addresses the applicant’s submission that there would have been some form of written information provided to the Chief of Staff to inform the content of the letter.
23. While it is not uncommon for letters of this type to have input from the relevant district officer who would generally possess the most detailed knowledge, it appears that the words used in the Chief of Staff Letter in this instance, may have been an inaccurate representation of QPS’s process. I can offer no explanation as to why the Chief of Staff Letter referred to an ‘internal review’ when QPS records appear to demonstrate such a process did not occur. There is no other evidence to indicate that an internal review was conducted and I am satisfied that the circumstances outlined above adequately account for the nonexistence of the requested documents.
24. For these reasons, I find there is no reasonable basis to believe that QPS conducted an internal review or that any documents relating to an internal review exist. However, for completeness, I will also consider whether QPS has taken all reasonable steps to locate the requested documents, particularly because QPS has relied on searches to support its position that the requested documents do not exist.

Has QPS taken all reasonable steps to locate the requested documents in the circumstances?

25. I am satisfied the answer to this question is yes, for the reasons that follow.

²² Pages 55, 58-63, 73-78, 92 and 95 of the original located documents and page 6 of the documents located on internal review.

²³ Page 59 and 62-63 of the original located documents.

²⁴ Page 7 of the documents located on internal review.

26. QPS's decisions do not detail the nature and extent of searches and enquiries performed to locate the requested documents. The internal review decision merely states that further searches were performed in the Darling Downs District Office and further documents were located. OIC made enquiries with QPS on several occasions and requested further searches be performed. Those enquires and searches did not locate the requested documents.
27. In summary, QPS made enquires with the QPS officers involved in the background to this matter and conducted searches as follows:
- Superintendent Marcus checked his official diary for the relevant period and advised that there were no records of this matter. He also searched his email system using names and relevant dates but could find no records of correspondence as far back as May 2014. In his view, any relevant emails would be searchable.²⁵ He also explained that he recollects detailing the file to the local Officer in Charge for a draft response and would have then returned the information to the Minister's office and their Chief of Staff in the required format, as is normal practice.²⁶
 - Senior Sergeant Reynolds, Brief Manager, advised that he reviewed the file on completion of the investigation and before it went to the Coroner but did not hold any documents relating to the matter prior to forwarding this file to the Coroner. He also advised that this is a standard procedure by the Brief Manager and is a review completed at the conclusion of all coronial matters prior to the files being forwarded to the Coroner.²⁷
 - Senior Sergeant Neumann advised that he obtained a copy of the applicant's complaint and Senior Constable Servin's responses for the purpose of responding to the applicant's phone calls to the station but that this process did not constitute an internal review and that he was not otherwise involved in the matter.²⁸ Senior Sergeant Neumann also certified that he did not have any documents relevant to the application and had no involvement in the correspondence referred to in the application.²⁹
 - Sergeant Neumann searched the file server and located the emails which were the subject of QPS's decisions.³⁰ Sergeant Neumann also advised OIC that she had located all Ministerial correspondence.³¹
 - Senior Sergeant Clark searched his archived emails between April 2014 and July 2014 but did not locate any further documents.³²
 - Senior Constable Servin searched his emails and did not locate any relevant documents.³³
28. I consider it reasonable to expect that if the requested documents exist, they would be held by the above officers given their role and seniority within QPS.

²⁵ Email to OIC on 12 May 2017 and search certification dated 25 July 2017.

²⁶ Email to OIC on 12 May 2017.

²⁷ Telephone call with Sergeant Neumann on 4 January 2017, email from Sergeant Neumann to OIC on 17 January 2017 and Search certification from Senior Sergeant Reynolds dated 19 July 2017.

²⁸ Phone call with OIC on 12 December 2016

²⁹ Search certifications dated 13 July 2017 and 25 July 2017.

³⁰ Email to OIC on 15 November 2016.

³¹ In a telephone call with OIC on 4 January 2017.

³² Search certifications dated 13 July 2017 and 27 July 2017.

³³ Search certifications dated 13 July 2017 and 27 July 2017.

29. I note that searches have not been undertaken within the Ministerial Services Unit. However, I do not consider it *necessary* for QPS to perform searches within the Ministerial Services Unit as:
- I am satisfied that any documents which the Ministerial Services Unit would have received in relation to the matter, are likely to have been created by the QPS officers who have been involved in performing searches for these documents and would have been located in the searches QPS has performed; and
 - the documents which QPS located in response to the application included correspondence with the Ministerial Services Unit.³⁴
30. In light of all of the available evidence, I find that QPS's searches have been appropriately targeted and comprehensive. QPS has made enquiries with the relevant officers and has taken all reasonable steps to locate the requested documents, particularly in view of my finding that there is no reasonable basis to believe that QPS conducted an internal review of the applicant's complaint or that any documents relating to an internal review exist.

DECISION

31. For the reasons set out above, I vary³⁵ the decision under review and find that access to the requested documents may be refused on the basis they are nonexistent under sections 47(3)(e) and 52(1)(a) of the RTI Act.
32. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act

Tara Mainwaring
Acting Assistant Information Commissioner

Date: 31 August 2017

³⁴ As confirmed by Sergeant Neumann in her telephone conversation with OIC on 4 January 2017.

³⁵ The decision under review is varied because QPS did not make a decision on this specific issue in its decision.

APPENDIX

Significant procedural steps

| Date | Event |
|------------------|---|
| 7 October 2016 | OIC received the external review application. OIC notified QPS that the external review application had been received and requested various procedural documents. |
| 14 October 2016 | OIC received the requested documents from QPS. |
| 27 October 2016 | OIC notified QPS and the applicant that the external review application had been accepted and asked QPS to provide a copy of the located documents. |
| 15 November 2016 | OIC received the requested documents from QPS. |
| 21 November 2016 | The applicant discussed the review with OIC. |
| 12 December 2016 | OIC spoke with Senior Sergeant Neumann to obtain further information relevant to the review. |
| 4 January 2017 | OIC spoke with Sergeant Neumann to obtain further information relevant to the review. |
| 11 January 2017 | OIC requested further information from QPS. |
| 17 January 2017 | OIC received the requested information from QPS. |
| 18 January 2017 | The applicant notified OIC that he did not seek external review of the decision to refuse access to certain information within the located documents. |
| 10 February 2017 | OIC conveyed a preliminary view to the applicant and invited him to provide submissions supporting his case. |
| 26 February 2017 | The applicant notified OIC that he did not accept the preliminary view and provided submission supporting his case. |
| 16 March 2017 | The applicant discussed the review with OIC. |
| 23 March 2017 | OIC requested further submissions from QPS. |
| 12 May 2017 | OIC received submissions from QPS. |
| 16 May 2017 | OIC confirmed with the applicant that the preliminary view had not changed and invited him to provide any further and final submissions supporting his case. |
| 17 May 2017 | The applicant discussed the review with OIC. |
| 19 June 2017 | OIC requested further submissions from QPS. |
| 14 July 2017 | OIC received submissions from QPS. |
| 17 July 2017 | OIC requested further submissions from QPS. |
| 31 July 2017 | OIC received submissions from QPS. |