



Decision and Reasons for Decision

Application Number: 310467

Applicant: Bade

Respondent: Gympie Regional Council

Decision Date: 14 February 2012

Catchwords: RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION – REFUSAL OF ACCESS – DOCUMENTS NOT IN POSSESSION – applicant contended additional documents should be in the agency’s possession – whether agency has taken all reasonable steps to locate the additional documents – whether access can be refused under section 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. On 30 September 2010, the applicant made an application (**Access Application**) to Gympie Regional Council (**Council**) under the *Right to Information Act 2009 (RTI Act)* seeking access to documents relating to obligations on parties with an interest in fulfilling Condition 1.1 of the Negotiated Decision Notice for DA10181 (**Condition 1.1**).¹
2. Council located 29 pages and decided to release 7 pages in full and refuse access to 22 pages in full.
3. The applicant applied for external review alleging that further documents responsive to his application must exist. As a result of further searches requested during the external review, Council located a further 16 pages and proposed to refuse access in full to all pages.
4. As a result of informal negotiations conducted by this Office during the course of the review, the issues remaining for determination in this external review are:
 - whether the searches conducted by Council to locate information responsive to the access application are sufficient to establish that they do not exist
 - whether additional documents sought by the applicant (**Specific Additional Documents**) are within the scope of the access application; and
 - whether Council can refuse access to 12 of the further pages located, comprising five documents (**Five Additional Documents**), on the basis that they are outside the scope of the access application.
5. After carefully considering all of the evidence and submissions before me, I am satisfied that:
 - the Specific Additional Documents sought by the applicant are outside the scope of the access application
 - the Five Additional Documents have been properly characterised by Council as being outside the scope of the Access Application; and
 - access to further documents may be refused on the basis that all reasonable searches have been conducted and the documents do not exist.

Significant procedural steps

6. Significant procedural steps relating to the application are set out in the Appendix.

Reviewable decision

7. The decision under review is Council's decision dated 16 November 2010.

¹ Development Application DA10181 for the Material Change of Use of Premises – Extractive Industry (Extension to an Existing Quarry) (**DA10181**) was submitted by Sunshine Coast Quarries Pty Ltd (**SCQ**). DA10181 was approved by Council on 6 June 2006 with conditions. Following negotiations between Council and SCQ, a Negotiated Decision Notice for DA10181 was issued on 22 October 2008. This resulted in the deletion of the original Condition 1.1 and the insertion of a new Condition 1.1. Condition 1.1 deals with the contribution to be made by SCQ towards improvement of Moy Pocket Road as a result of increased traffic generated by the relevant development.

Evidence considered

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

Scope of the Access Application

9. The applicant has requested access to:

All documents relating to obligations on all parties with an interest directly or indirectly with fulfilling of assessment manager's conditions section 1.1 conditions be satisfied prior to commencement of approved use in the negotiated decision notice for DA10181.

Formal documents and internal memos.

Timeframe July 2007 to September 2010.

10. During the course of the external review, the applicant has made various submissions regarding the documents he is seeking. It is therefore necessary to address the issue of the scope of the Access Application as the additional documents sought may be outside the scope of the terms of the Access Application.
11. Previous decisions of this Office have considered the issue of the construction and interpretation of access applications.² These decisions³ specify that the terms of an application will set the parameters for an agency's search efforts and that an applicant cannot unilaterally expand the terms of an application.
12. Additionally, in *Robbins* the Information Commissioner 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, in the circumstances of that case the Information Commissioner was satisfied that there was no ambiguity in the terms of the application that required clarification.⁴
13. I consider that in this case there is no ambiguity in the terms of the Access Application. It is clear from the terms of the Access Application that the applicant seeks documents:
- that comprise formal documents and internal memos
 - which were created between July 2007 and September 2010; and
 - that relate to an obligation on a party, either directly or indirectly who has an interest in fulfilling Condition 1.1.
14. Condition 1.1 states:

In accordance with Planning Scheme Policy 11: Roadworks Contributions a contribution is to be paid towards road improvements as a result of the increased traffic generated by this development. The amount is currently assessed at \$190 740, however will be indexed every 12 months from the date of this decision notice in accordance with ABS ANZSIC Index Class 4121.

² 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.

³ *Robbins and Brisbane North Regional Health Authority (1994)* 2 QAR 30 (**Robbins**). *Cannon and Australian Quality Egg Farms Limited (1994)* 1 QAR 491 (**Cannon**) paragraph 8.

⁴ See *Robbins* at paragraph 16.

As an alternative to the contribution, and as offered by the applicant, Council will accept the supply of road base to Council sufficient to complete the upgrading of Moy Pocket Road to a 8.0 metre wide bitumen sealed standard from its intersection with Lowe Road to the access to the development at such time as the work is undertaken by Council.

Should the option of supplying road base be preferred, prior to commencement of the use a written undertaking from the developer is to be submitted to Council to confirm such a commitment.

15. The applicant has submitted that obligations arising under Condition 1.1 extend to the provision of the road base by SCQ to the party that constructs the road upgrade, whether that is Council or Queensland Water Infrastructure (**QWI**). The applicant submits that documents regarding this later arrangement fall within the scope of his Access Application.⁵
16. I have carefully considered Condition 1.1 and I am satisfied that the only obligation which arises rests with SCQ as the applicant in the development application. It is charged with deciding which contribution option is preferred by it. If the option of supplying road base is preferred SCQ must then provide Council with a written undertaking, prior to commencing use, subject of the development application, to confirm SCQ's commitment to supply the road base when the work is undertaken by Council.
17. I am also satisfied that SCQ has fulfilled Condition 1.1. By correspondence dated 5 December 2008⁶, SCQ advised Council that it elected the alternative contribution of supplying road base. SCQ provided an undertaking confirming it's commitment to providing the road base. I am satisfied that this document is the 'written undertaking' required by Condition 1.1.
18. On the basis of the information before me, the only party with an obligation arising under Condition 1.1 of the Negotiated Decision Notice, either directly or indirectly, is SCQ.

Sufficiency of Search

Relevant law

19. The RTI Act provides that access to a document may be refused if the document is nonexistent or unlocatable.⁷ 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.⁸
20. 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*⁹ (**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

⁵ Verbal submissions provided on 16 December 2011 and written submission dated 9 January 2012.

⁶ Released to the applicant as page 2 of the documents located by Council.

⁷ Sections 47(3)(e) and 52 of the RTI Act.

⁸ Section 52(1)(a) of the RTI Act.

⁹ 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.

- 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); 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.
21. 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.¹⁰

Applicant's submissions

22. In seeking an external review, the applicant submitted¹¹ in summary that SCQ's letter dated 5 December 2008 is not a formal legal document detailing its offer and that other documents, including references to other parties such as QWI, expressing a more formal legal fulfilment of the condition must exist. The applicant also rejected the exemptions relied upon by Council in refusing access as being questionable and unable to be maintained. Finally, the applicant submitted that because a section of Moy Pocket Road was slated for improvement in the near future, documents about that improvement must exist.
23. Following further searches conducted by Council, and release of a letter dated 19 June 2008 from Groundwork Plus (**Groundwork Plus Letter**)¹² and a In Committee Record¹³, the applicant made further lengthy submissions about why further documents relevant to the Access Application should exist and should have been located by Council¹⁴.
24. Those submissions repeated statements made in the original submissions and in general, rejected the position of Council that QWI was not a party to the fulfilment of Condition 1.1. Rather, it was submitted that any documents relating to the upgrade of the relevant section of Moy Pocket Road are relevant to the Access Application.

¹⁰ See *PDE* at paragraph 49.

¹¹ In correspondence dated 24 November 2010.

¹² The applicant was initially refused access to this letter in full. As a result of informal negotiations conducted during this external review, Council released the letter to the applicant in full.

¹³ The applicant was initially refused access to the In Committee Record in full. Following informal negotiations by this Office during the course of the external review, Council released the In Committee Record to the applicant in full.

¹⁴ As summarised from correspondence date 29 November 2011 and 9 January 2012.

Has Council taken all reasonable steps to locate documents?

25. Council was asked to conduct further searches following the applicant's request for external review. Council advised¹⁵ that they had located a further 16 pages comprising:
- the Groundwork Plus Letter
 - the Five Additional Documents comprising:
 - correspondence dated 20 July 2010 from Council to a third party
 - correspondence dated 19 July 2010 from a third party to Council
 - correspondence dated 2 July 2010 from Council to a third party
 - an extract from a Works and Services Committee Meeting; and
 - an extract from a Draft Budget.
26. Council has submitted that the Five Additional Documents are not within the scope of the access application. This is discussed below in paragraph 33 to 36.
27. In relation to the applicant's submissions that QWI has an interest in fulfilling Condition 1.1 and relevant documents from QWI must exist, Council submitted:
- Council does not hold any QWI documents
 - discussions with QWI about its intentions regarding Moy Pocket Road were verbal only
 - no hard copy documents or agreements regarding this matter are held by Council
 - no agreement was ever entered into between QWI and Council as the Traveston Dam project did not proceed; and
 - Council's Director of Engineering, Mr Bob Fredman, has stated that it is his intention to upgrade a section of Moy Pocket Road at some future date as resources allow and QWI is not involved.
28. Council also provided OIC with a record of searches table setting out the searches conducted by relevant Council officers and four signed search certifications completed by relevant Council officers.
29. In relation to documents of QWI, the search certification provided by the General Manager of Council's Design Department states that no additional documents were located and that if the documents existed, that they would be held by QWI, not Council.

Are the Specific Additional Documents sought within scope of the access application?

30. Given my interpretation of the terms of the access application set out at paragraph 13, the applicant has sought access to documents relating to obligations on SCQ arising from Condition 1.1
31. On this basis, the scope of the access application does not extend to cover documents regarding:
- negotiations between parties that resulted in Condition 1.1

¹⁵ By correspondence dated January 2011 and received by this Office on 4 January 2011.

- the upgrading of the section of Moy Pocket Road mentioned in Condition 1.1
 - QWI as it does not hold any obligations under Condition 1.1; or
 - the supply of the road base to Council.
32. Accordingly, I am satisfied that the Specific Additional Documents sought by the applicant are not within the scope of the Access Application.

Are the Five Additional Documents within scope of the access application?

33. I have carefully considered the Five Additional Documents and note the following:
- they relate to the Moy Pocket Road Maintenance Special Charge
 - the charge was levied under section 971(1) of the *Local Government Act 1993*; and
 - the charge is not related to any obligations arising as a result of Condition 1.1.
34. The applicant has submitted that these documents are relevant to the scope of his access application as:¹⁶

...it is reasonable to conclude ... that they contain a balanced plan of upgrading the pavement surface ... and then details of how it is proposed to fund the maintenance costs over the life of the pavement surface ...

Effectively how and in what timeframe Council plans to now fund the upgrade of the road and in particular the section covered by Condition 1.1 is directly relevant to the ability of the proponent Sunshine Coast Quarries PLTD [sic] now owned by Boral, will fulfil their obligation under Condition 1.1. (applicant's emphasis)

35. As detailed above at paragraphs 9 to 18, the only party with an obligation under Condition 1.1 is SCQ and these obligations do not extend to the upgrading of Moy Pocket Road by SCQ.
36. Accordingly, I am satisfied that the Five Additional Documents are not within scope of the Access Application and Council is entitled to refuse the applicant access to them.

Conclusion – sufficiency of search

37. Upon careful consideration of all the information before me, I am satisfied that:
- Council has undertaken searches for documents responsive to the Access Application in all relevant locations, having regard to Council's practices and procedures in relation to information management and other administrative practices
 - Council has taken all reasonable steps to locate the documents
 - there are reasonable grounds for Council to be satisfied that no additional documents responsive to the Access Application exist; and
 - access may be refused on the basis that further documents do not exist.¹⁷

¹⁶ By correspondence dated 9 January 2012.

¹⁷ Pursuant to section 47(3)(e) of the RTI Act on the ground set out in section 52(1)(a) of the RTI Act.

DECISION

38. I vary the decision under review by finding that:

- the Specific Additional Documents sought by the applicant from Council during the external review are outside the scope of the Access Application
- the Five Additional Documents located by Council during the external review are outside the scope of the Access Application; and
- Council is entitled to refuse access to further documents sought by the applicant on the basis that further documents do not exist.

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

Louisa Lynch
Acting Assistant Information Commissioner

Date: 14 February 2012

APPENDIX

Significant procedural steps

Date ¹⁸	Event
1 October 2010	Council receives the applicant's RTI application (Access Application).
16 November 2010	Council locates 29 pages and decides (Decision) to release 7 pages in full and refuse access to 22 pages in full.
24 November 2010	The applicant applies to OIC for external review of Council's Decision.
14 December 2010	<p>OIC informs Council and the applicant that the external review application has been accepted. Council is requested to complete the following steps:</p> <ul style="list-style-type: none"> • conduct any further searches Council identified as necessary to locate the requested documents • provide an explanation as to why any of the category of documents identified by the applicant are outside the scope of the Access Application • certify the records sheets • provide a submission on the outcome of the searches; and • provide specific submissions on whether Council holds any documents involving Queensland Water Infrastructure within scope of the Access Application.
4 January 2011	<p>Council provides OIC with copies of relevant documents and a submission on further searches undertaken which is supported by signed search certifications and records of searches.</p> <p>Council advises OIC that a further 16 pages have been located.¹⁹ Council proposes to refuse access to all 16 pages in full.</p>
17 February 2011	Council provides OIC with copies of third party consultation documents relating to the further pages located.
2 November 2011	OIC conveys a written preliminary view to Council regarding the In Committee Record ²⁰ and the Groundwork Plus Letter . ²¹ OIC invites Council to provide submissions in support of its case by 16 November 2011 if the view is contested.
3 November 2011	OIC conveys a written preliminary view to the applicant regarding the sufficiency of Council's searches, information which is outside the scope of the Access Application ²² and refusal of access. ²³ OIC invites the applicant to provide submissions in support of his case by 17 November 2011 if the view is contested.
7 November 2011	Council provides a submission.
11 November 2011	The applicant requests an extension of time within which to provide a submission.
15 November 2011	OIC grants the applicant an extension until 2 December 2011 to provide

¹⁸ Of correspondence or relevant communications unless otherwise stated.

¹⁹ Numbered pages 30 to 45.

²⁰ Comprising pages 3 to 18.

²¹ Comprising pages 30 to 33.

²² Comprising pages 34 to 45.

²³ Comprising pages 24 to 29.

	a submission in support of his case.
16 November 2011	<p>OIC consults with a third party regarding the In Committee Record and the Groundwork Plus Letter. OIC invites the third party to participate in the external review and to provide a submission by 30 November 2011 if the third party objects to release of the In Committee Record and the Groundwork Plus Letter.</p> <p>OIC writes to Council confirming the preliminary view contained in correspondence dated 2 November 2011 and seeks clarification from Council regarding Council's submission dated 7 November 2011.</p>
17 November 2011	Council advises OIC that Council accepts OIC's preliminary view regarding the In Committee Record and the Groundwork Plus Letter.
29 November 2011	The applicant provides a submission in support of his case (received by OIC on 30 November 2011).
5 December 2011	<p>OIC requests Council to release the In Committee Record and the Groundwork Plus Letter to the applicant and forwards a copy of this correspondence to the third party.</p> <p>OIC advises the applicant that OIC has requested Council to release the In Committee Record and the Groundwork Plus Letter.</p> <p>Council advises OIC that Council has released to the applicant the In Committee Record and the Groundwork Plus Letter.</p>
13 December 2011	OIC conveys a second written preliminary view to the applicant regarding the scope of the external review and a further preliminary view in relation to pages 24 to 29 of the pages located by Council. OIC invites the applicant to provide submissions in support of his case by 20 December 2011 if the view is contested.
16 December 2011	<p>The applicant provides verbal submissions in support of his case.</p> <p>The applicant requests an extension of time within which to provide a written submission.</p> <p>OIC grants the applicant an extension until 13 January 2012 to provide a submission in support of his case.</p>
9 January 2012	The applicant provides a submission in support of his case (received by OIC on 11 January 2012). The applicant does not contest the preliminary view regarding the Legal Advice being outside the scope of the access application.