



Decision and Reasons for Decision

Citation:	<i>Goodman and Department of Justice and Attorney-General</i> [2014] QICmr 4 (6 February 2014)
Application Number:	311525
Applicant:	Goodman
Respondent:	Department of Justice and Attorney-General
Decision Date:	6 February 2014
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - GROUNDS ON WHICH ACCESS MAY BE REFUSED - UNLOCATABLE AND NONEXISTENT DOCUMENTS - applicant contends additional documents exist - an agency may refuse access to a document because the document is nonexistent or unlocatable - whether the agency has taken all reasonable steps to locate the documents but the documents cannot be found or do not exist - sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Justice and Attorney-General (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to all documents relating to the establishment of the Department's Right to Information and Privacy Unit for a specific date range.
2. The Department located 1,370 pages relevant to the access application and decided to grant full access to 1,337 pages and partial access to 33 pages.
3. The applicant applied to Office of the Information Commissioner (**OIC**) for external review on the basis that the Department had not located all documents relevant to the access application. On external review, the Department located a large number of additional documents and released these to the applicant subject to the deletion of a small amount of information.
4. For the reasons set out below, I vary the Department's decision and find that it has taken all reasonable steps to locate the additional documents and there is a reasonable basis to be satisfied that any additional documents are nonexistent or unlocatable.

Background

5. Significant procedural steps relating to the application and the external review are set out in the appendix to this decision.

Reviewable decision

6. The decision under review is the Department's decision dated 23 April 2013.

Evidence considered

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

Issue for determination

8. The issue for determination is whether there is a reasonable basis to be satisfied that the additional documents the applicant contends exist are nonexistent or unlocatable.¹

Relevant law

9. Under the RTI Act, a person has a right to be given access to documents of an agency.² However, this right is subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.³ Access to a document may be refused if the document is nonexistent or unlocatable.⁴ 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.⁵ A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.⁶
10. The RTI Act is silent on how an agency can be satisfied that a document does not exist. However in *PDE and The University of Queensland*,⁷ 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 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 to which the request relates.
11. When these factors are properly considered and a conclusion reached that the document does not exist, it may be unnecessary for searches to be conducted. Alternatively, an agency may rely on searches to justify a decision that the document

¹ In its decision, the Department only considered whether access could be granted to the information it had located and not whether additional documents may exist as this issue was only raised by the applicant on external review. As the Department did not consider section 47(3)(e) of the RTI Act, I have varied the Department's decision on external review.

² Section 23 of the RTI Act.

³ As set out in section 47 of the RTI Act.

⁴ Sections 47(3)(e) and 52 of the RTI Act.

⁵ Section 52(1)(b) of the RTI Act.

⁶ Section 52(1)(a) of the RTI Act.

⁷ (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*). 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.

sought does not exist. If an agency relies on searches, all reasonable steps must be taken to locate the requested document. In determining whether all reasonable steps have been taken, regard should be had to the factors listed in *PDE* as set out above.

Findings

Applicant's submissions on the conduct of Departmental officers

12. The applicant raised concerns about the way the Department had dealt with her access application and the conduct of some of its officers on external review.⁸
13. The applicant submits that, despite her requests, the Department did not release documents to her administratively and as a result, she has been required to spend a significant amount of time and money on the RTI process. The fact that the Department did not release documents to the applicant in accordance with an administrative release scheme and instead dealt with the request under the RTI Act is not relevant to the issues in this review.
14. The applicant submits that:
 - the access application covered the notebooks of a senior officer of the RTI and Privacy Unit
 - another officer of the RTI and Privacy Unit considered these notebooks and marked the parts which were relevant to the access application
 - the senior officer did not agree with the parts that had been marked by the other officer, took back the notebooks and dismissed the officer from continuing with the task; and
 - the relevant officers of the Department show *"a fundamental lack of understanding of both the operation and objects of the [RTI Act] which makes it very difficult for me to have any confidence the searches undertaken as part of the external review process were conducted properly"*.
15. In response to the applicant's concerns on this issue, the Director of the RTI and Privacy Unit obtained a copy of the senior officer's notebooks and considered them. The Director identified a number of additional pages from the notebooks which were relevant and these have been provided to the applicant.
16. There is no evidence to indicate that the Department's processing of the access application or conduct of its officers on external review was inappropriate or that any officer of the Department has deliberately withheld documents which may be relevant to the access application.

Whether the Department has taken all reasonable steps to locate relevant documents

17. The issue for determination is whether there is a reasonable basis to be satisfied that the additional documents the applicant contends exist are nonexistent or unlocatable. As the Department has relied on searches, it is relevant to decide whether the Department has taken all reasonable steps to locate the requested documents.
18. The applicant sought access to all documents relating to the 'establishment' of the RTI and Privacy Unit from 5 September 2011 to 27 November 2012. During the initial processing of the access application, the Department performed searches of:

⁸ In her submissions to OIC dated 24 June 2013, 19 September 2013 and 19 January 2014.

- the RTI and Privacy Unit
 - the Office of the Director General; and
 - the Office of the Assistant Director-General, Strategic Policy, Legal and Executive Services.
19. The Department's initial searches produced approximately 10,000 pages relevant to the access application. However the Department negotiated with the applicant to narrow the scope of the access application and reduce the number of relevant documents. In its decision, the Department identified 1,370 pages as relevant to the access application and granted the applicant full access to 1,337 pages and partial access to 33 pages.⁹
20. The applicant applied to OIC for external review on the basis that the Department had not located all relevant documents. The applicant provided OIC with a non-exhaustive list of almost 90 issues and submitted that, in her view, the correct approach was for the Department to conduct additional searches of the locations previously searched and search a number of additional locations which she believed would have relevant documents.
21. On external review, OIC asked the Department to conduct additional searches for relevant documents on three occasions. On the first occasion, the Department located a large number of additional documents (comprising mainly metadata of documents which had been released to the applicant) and it released these documents to the applicant in full. On the second occasion, the Department located approximately 200 additional pages, and released these pages to the applicant subject to the deletion of a small amount of information. On the third occasion, the Department located one additional page which it released in full.
22. OIC provided the applicant with a copy of the Department's submissions which provide specific explanations in relation to certain types of documents which the applicant believes are missing. For example, the Department explained that much of the business of a workplace occurs over the phone and in meetings and there are not always documents that reflect discussions, particularly during a time of change, where decisions need to be made quickly and that evidence of a conversation in a notebook does not always mean there will be a trail of documents relating to that conversation.
23. However, in deciding the relevant issues, I do not consider it necessary to deal separately with each of the applicant's submissions nor the Department's specific responses as to why particular documents do not exist or cannot be located. The relevant question is whether the Department has taken all reasonable steps to locate documents relevant to the access application. This does not require me to make separate findings about the Department's search efforts in relation to each of the many documents the applicant believes exist.
24. I have carefully considered:
- the applicant's submissions
 - the extent and nature of the information that has been located by the Department and released to the applicant
 - the Department's submissions particularly in relation to its recordkeeping practices for the types of documents to which the applicant seeks access and explanations as to why particular documents do not exist or cannot be located

⁹ The Department raised concerns on external review about the very broad scope of the access application and submits that the word 'establishment' in this context could be interpreted narrowly or broadly. The Department interpreted the application as relating to the staffing of the unit, that is, the composition of the positions and their levels. I consider the Department's interpretation of the scope of the access application has been appropriate in the circumstances.

- the nature and extent of the searches conducted by the Department in processing the access application and on external review; and
 - the signed certifications provided to OIC by Departmental officers.
25. In response to the issues raised by the applicant on external review, the Department submits that:
- it performed searches of each of the units identified in the applicant's submissions
 - these searches and enquiries took approximately 106 hours to complete
 - it located and agreed to release a number of additional documents to the applicant
 - searches were performed by senior officers in most cases; and
 - the Department performed electronic searches and hardcopy searches including the email accounts and notebooks of particular named officers.
26. The Department has spent more than 100 hours conducting searches for documents relevant to the access application. These searches include physical and electronic searches of specific locations. Departmental officers also provided OIC with signed search certifications which identify the searches performed and confirm that all documents in their possession have been located. In my view, the Department's approach to these searches was appropriate based on the nature of the information the applicant requested and the Department's recordkeeping practices. I accept the Department's evidence in relation to its search efforts and enquiries. I also accept the search certifications as further evidence that the Department has taken all reasonable steps to find documents.
27. Having reviewed all of the material before me, and in view of the extensive nature of the Department's searches in processing the access application and on external review, I am satisfied that:
- the Department has taken all reasonable steps to locate the relevant documents; and
 - there is a reasonable basis to be satisfied that any additional documents do not exist or cannot be located.¹⁰

DECISION

28. I vary the Department's decision and, for the reasons set out above, find that there is a reasonable basis to be satisfied that any additional documents do not exist or cannot be located in accordance with sections 47(3)(e) and 52 of the RTI Act.
29. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

L Lynch
Assistant Information Commissioner

Date: 6 February 2014

¹⁰ Sections 47(3)(e) and 52 of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
27 November 2012	The Department received the access application.
23 April 2013	The Department issued the decision under the RTI Act.
18 May 2013	The applicant applied to OIC for external review of the Department's decision.
21 May 2013	OIC asked the Department to provide relevant procedural documents by 28 May 2013.
22 May 2013	The Department provided OIC with a copy of its decision.
29 May 2013	OIC notified the applicant and the Department that the external review application had been accepted.
3 June 2013	OIC asked the applicant to provide a submission identifying all of the documents she believed had not been located by the Department by 25 June 2013.
13 June 2013	OIC asked the Department to provide a copy of the documents which were released to the applicant by 27 June 2013.
23 June 2013	OIC received the requested documents from the Department.
24 June 2013	OIC received the requested submissions from the applicant.
11 September 2013	OIC asked the Department to conduct further searches for the additional documents identified by the applicant and to provide a submission detailing its search efforts by 26 September 2013. OIC conveyed a preliminary view to the applicant and invited her to provide submissions supporting her case by 26 September 2013 if she did not accept the preliminary view.
19 September 2013	The applicant notified OIC she did not accept OIC's preliminary view and provided submissions supporting her case.
20 September 2013	The Department requested an extension of time to provide the requested submissions to OIC.
23 September 2013	OIC agreed to extend the time for the Department to provide its submissions until 10 October 2013.
3 October 2013	OIC received the Department's submissions and the Department notified OIC that it had located additional documents.
4 October 2013	OIC asked the Department to indicate by 10 October 2013 whether it agreed to release the additional documents to the applicant.
14 October 2013	The Department advised OIC that it had agreed to release the additional documents to the applicant. OIC asked the Department to release these documents to the applicant by 21 October 2013.
30 October 2013	OIC asked the Department to conduct further searches for additional documents and to provide a submission detailing its search efforts by 20 November 2013.
20 November 2013	The Department requested an extension of time to provide the requested submissions to OIC. OIC agreed to extend the time for the Department to provide its submissions until 27 November 2013.
29 November 2013	OIC received the Department's submissions. The Department notified OIC

Date	Event
	that it had located additional documents which it agreed to release to the applicant in full.
3 December 2013	OIC asked the Department to provide a copy of the additional documents to OIC.
10 December 2013	OIC received the additional documents from the Department.
7 January 2014	<p>OIC asked the Department to release the additional documents to the applicant by 15 January 2014 subject to the deletion of a small amount of information.</p> <p>OIC telephoned the applicant to notify her that additional information would be released to her and to convey a preliminary view in relation to the remaining issues. The applicant did not accept OIC's preliminary view.</p>
8 January 2014	OIC conveyed its preliminary view on the remaining issues to the applicant in writing and invited her to provide submissions supporting her case by 23 January 2014 if she did not accept the preliminary view.
19 January 2014	The applicant notified OIC she did not accept OIC's preliminary view and provided submissions supporting her case.
24 January 2014	<p>OIC asked the Department to conduct further searches for additional documents and to provide a submission detailing its search efforts by 7 February 2014.</p> <p>The Department notified OIC it had located an additional document which it agreed to release to the applicant in full.</p>
29 January 2014	OIC asked the Department to release the additional document to the applicant by 5 February 2014 and notified the applicant that the additional information would be released to her by that time.