



Decision and Reasons for Decision

Application Number: 310127

Applicant: Whittaker

Respondent: Public Service Commission

Decision Date: 23 November 2010

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION – REFUSAL OF ACCESS – NON-EXISTENT DOCUMENTS – DOCUMENTS DESTROYED – applicant seeks access to documents concerning his employment – applicant contends additional information should exist – whether there are reasonable grounds for agency to be satisfied that documents do not exist – whether agency has taken all reasonable steps to locate the documents - whether access to documents can be refused under sections 47(3)(e) and 52(1)(a) of the *Right to Information Act 2009* (Qld)

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REASONS FOR DECISION

Summary

1. The applicant seeks access to certain information under the *Right to Information Act 2009* (Qld) (**RTI Act**) and submits that the Public Service Commission (**PSC**) has not located and provided him with all responsive documents.
2. Having considered all the submissions and evidence before me, I am satisfied that:
 - no additional responsive documents exist, and
 - access to additional documents can be refused under sections 47(3)(e) and 52(1)(a) of the RTI Act.

Reviewable decision

3. The decision under review is PSC's internal review decision dated 17 February 2010.

Issue for determination

4. The only issue remaining for determination is the sufficiency of PSC's searches in relation to the access application. More specifically, whether:
 - there are reasonable grounds for PSC to be satisfied that no additional documents responding to the access application exist, and
 - all reasonable steps have been taken by PSC to find the additional documents sought.

Applicant's submissions

5. In summary, the applicant submits that:
 - on receipt of the access application, PSC failed to search the appropriate areas of the agency
 - PSC failed to properly process the access application, given:
 - the large number of documents located on internal review
 - the accidental release of a document which was claimed to be subject to legal professional privilege
 - the credibility of PSC's searches is questionable, because an email sent at 12:11pm on 1 June 2009 was located, but an email sent at 5:07pm the same day was not located
 - PSC failed to locate the following specific documents which could reasonably be expected to exist:
 - notes taken by the previous Chief Executive of PSC at a meeting which the applicant attended
 - documents concerning consultation between the previous Chief Executive of PSC and the Director-General of the Department of Community Safety
 - advice referred to in an email sent to the applicant by the Executive Director, Chief and Senior Executive Service

- a list of former Senior Public Servants that the applicant was informed existed and was circulating within the Public Service

6. The applicant also submits that if some documents do not exist:

- because they were not created, PSC may have breached terms under the applicant's contract of employment
- because they were destroyed, PSC may have required permission from the State Archivist to undertake such destruction.¹

PSC's submissions

7. In summary, PSC submits that:

- searches were conducted by PSC following receipt of the access application and receipt of the internal review application
- PSC acknowledges that its search results have been inconsistent and submits that:
 - initial searches focused on the Chief and Senior Executive Service as matters relating to the employment of Chief Executives and Senior Executives are usually dealt with on a confidential basis by that area
 - broader searches were undertaken on internal review² due to additional information provided by the applicant in his internal review application
- in relation to specific concerns raised by the applicant:
 - enquiries with the previous Chief Executive of PSC revealed that no formal notes were taken at the meeting referred to by the applicant, only 'jottings' which did not form part of a departmental record and were destroyed
 - no documents were created (nor were they required to be created) in relation to the consultation between the previous Chief Executive of PSC and the Director-General of the Department of Community Safety
 - the advice referred to in an email to the applicant was not actually created
 - no list responsive to the applicant's description exists, other than the information already provided to the applicant
 - PSC's network provider (**Mincom**) advises that the retention period for email backup logs is 51 weeks and data more than 51 weeks old is overwritten. However, emails stored in an employee's personal inbox may be held for an indefinite period. In answer to the applicant's question, the June 2009 email which was located came from a personal inbox and the one which could not be located was not held in a personal inbox and was too old to exist on a backup log.

Searches conducted by PSC

8. Specifically, PSC advises that it has undertaken the following searches:

- upon receipt of the access application, search requests were sent to:
 - the Executive Director, Chief and Senior Executive Service

¹ Please note that this Office has no jurisdiction to undertake an investigation into these matters raised by the applicant.

² Which I note resulted in an additional 164 documents being located.

- the Executive Director, Workforce Policy Unit
- upon receipt of the internal review application, further search requests were sent to:
 - the Executive Director, Corporate and Communication
 - the Manager, Corporate Unit
 - the Executive Director, Chief and Senior Executive Service
 - the Executive Assistant, Office of the Commission Chief Executive
 - the Executive Assistance, Deputy Chief Executive Office
- upon receipt of the external review application, search requests were sent to:
 - the Administration Officer, Corporate Unit
 - the Executive Assistant, Office of the Commission Chief Executive
- electronic searches were conducted of PSC's electronic document records system (**TRIM**) using the term '*Neil Whittaker*'
- the Workforce Policy Unit searched its network drive using the search terms '*Neil Whittaker*' and '*Neil Joseph Whittaker*'
- the Chief and Senior Executive Service searched email accounts and hard copy office files using the term '*Neil Whittaker*' and requested the Department of Community Safety to provide emails between a staff member at PSC and a staff member of that Department
- the Office of the Commission Chief Executive searched the previous Chief Executive's email account (including archived items) and network drive, using the term '*Neil Whittaker*'
- the Office of the Deputy Chief Executive searched the Deputy Chief Executive's emails using the term '*Neil Whittaker*'
- the Executive Director of Corporate and Communication contacted the previous Chief Executive who confirmed that meeting notes referred to by Mr Whittaker do not exist as they were never created
- PSC also requested searches from Mincom in an attempt to locate relevant emails.³

Relevant evidence

9. In making this decision, I have taken the following into account:
- the applicant's applications and supporting material
 - PSC's considered decision and internal review decision
 - file notes of telephone conversations between OIC staff and the applicant
 - file notes of telephone conversations between OIC staff and PSC staff
 - correspondence from the applicant and PSC
 - search certifications completed by PSC staff
 - records of meetings between OIC staff, the applicant and PSC staff

³ I confirm PSC's submission regarding Mincom's advice that the retention period for email backup logs is 51 weeks, after which the logs are overwritten.

- relevant provisions of the RTI Act
- previous decisions of the Information Commissioner of Queensland as identified in this decision.

Relevant law

10. Under section 23 of the RTI Act, a person has a right to be given access to documents of an agency. However, this right is subject to a number of exclusions and limitations, including grounds for refusal of access. These grounds are contained in section 47 of the RTI Act.

11. Section 47(3)(e) of the RTI Act provides:

47 Grounds on which access may be refused

... ..

(3) On an application, an agency may refuse access to a document of the agency and a Minister may refuse access to a document of the Minister—

... ..

(e) because the document is nonexistent or unlocatable as mentioned in section 52; or

... ..

12. Section 52 of the RTI Act is also relevant and provides:

52 Document nonexistent or unlocatable

(1) For section 47(3)(e), a document is nonexistent or unlocatable if—

(a) the agency or Minister dealing with the application for access is satisfied the document does not exist; or

...

(b) the agency or Minister dealing with the application for access is satisfied—

(i) the document has been or should be in the agency's or Minister's possession; and

(ii) all reasonable steps have been taken to find the document but the document can not be found.

...

13. The Information Commissioner considered this ground for refusal of access in *PDE and the University of Queensland*⁴ (**PDE**). Although this decision concerned 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 and on this basis the reasoning in *PDE* is relevant to this review.

14. In *PDE*, the Information Commissioner stated that:⁵

Sections 28A(1) and (2) of the FOI Act address two different scenarios faced by agencies and Ministers from time to time in dealing with FOI applications: circumstances where the document sought does not exist and circumstances where a document sought exists (to the extent it has been or should be in the agency's possession) but cannot be located. In the former circumstance, an agency or Minister is required to satisfy itself that the document does not exist. If so satisfied, the agency or Minister is not required by the FOI Act to carry out all reasonable steps to find the document. In the latter circumstance an agency or Minister is required to satisfy itself that the document sought exists (to the

⁴ (Unreported, Queensland Information Commissioner, 9 February 2009).

⁵ At paragraph 34.

*extent that it has been or should be in the agency's possession) **and** carry out all reasonable steps to find the document before refusing access.*

15. The Information Commissioner also found that to be satisfied that a document does not exist, it is necessary for the agency to rely upon its particular knowledge and experience with respect 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)
 - other factors reasonably inferred from information supplied by the applicant including:
 - the nature and age of the requested document/s
 - the nature of the government activity the request relates to.
16. Section 52(1)(a) is silent on the issue of how an agency is to satisfy itself that a document does not exist. However, where searches are used to substantiate a conclusion that there are reasonable grounds to be satisfied that the document does not exist, the agency must take all reasonable steps to locate the documents sought.⁶
17. As PSC undertook searches in order to satisfy itself that certain documents do not exist, it is necessary to ask the following questions:
- are there are reasonable grounds for PSC to be satisfied that additional documents do not exist, and
 - has PSC taken all reasonable steps to find the additional documents sought.

Are there reasonable grounds for PSC to be satisfied that additional documents do not exist?

18. I have carefully considered all of the submissions and evidence before me.
19. In respect of whether there are reasonable grounds for PSC to be satisfied that additional documents do not exist, I note that PSC has investigated and provided explanations for the non-existence of each of the specific additional documents sought by the applicant.
20. On the basis of the matters set out above, I find that there are reasonable grounds for PSC to be satisfied that additional documents do not exist.

Has PSC taken all reasonable steps to locate additional documents?

21. I acknowledge the applicant's frustration with the lengthy search process. However, while PSC's initial searches were limited, its subsequent search efforts have been comprehensive and have extended to contacting external service providers and former staff.

⁶ See *PDE*, particularly at paragraph 47.

22. On the basis of the matters set out above including details of PSC's searches conducted throughout the course of this review, I am satisfied that PSC has taken all reasonable steps to locate the additional documents sought and that these documents cannot be located.

DECISION

23. I vary the decision under review and find that access can be refused to the additional documents sought under sections 47(3)(e) and 52(1)(a) of the RTI Act on the basis that these documents do not exist.
24. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

Clare Smith
Right to Information Commissioner

Date: 23 November 2010