



## Decision and Reasons for Decision

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| <b>Citation:</b>           | <i>Hon Tim Mulherin MP and the Attorney-General and Minister for Justice [2014] QICmr 21 (3 June 2014)</i>  |
| <b>Application Number:</b> | 311822  |
| <b>Applicant:</b>          | Hon Tim Mulherin MP   |
| <b>Respondent:</b>         | Attorney-General and Minister for Justice   |
| <b>Decision Date:</b>      | 3 June 2014   |
| <b>Catchwords:</b>         | <b>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – UNLOCATABLE DOCUMENTS – applicant contends additional documents relating to Boot Camps should exist – whether Minister 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) or 52(1)(b) of the <i>Right to Information Act 2009</i> (Qld) – whether search of backup system is required by section 52(2) of the <i>Right to Information Act 2009</i> (Qld)</b> |

### REASONS FOR DECISION

#### Summary

1. The applicant applied to the Attorney-General and Minister for Justice (**AG**) for *any documents regarding Boot Camps in Queensland, in particular Beyond Billabong and Operation Hard Yakka and the appointment of a probity advisor or anything relating to the probity audit of Boot Camps in Queensland.*
2. The AG's Office did not locate any documents within the scope of the access application and therefore refused access on the ground that they did not exist. This decision was affirmed on internal review.<sup>1</sup>
3. The applicant applied<sup>2</sup> for external review by the Office of the Information Commissioner (**OIC**) on the basis that the AG's Office had not taken all reasonable steps to locate documents. In support, the applicant referred to publicly available ministerial diary entries that indicated the AG had attended several meetings within the relevant timeframe to discuss Boot Camps in Queensland.
4. The AG's decision is affirmed on the basis that:
  - the documents sought by the applicant would have been in the AG's possession
  - the AG's Office has taken all reasonable steps to locate the documents but they cannot be found; and

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<sup>1</sup> By decision dated 18 November 2013.

<sup>2</sup> By application received 22 November 2013.

- therefore, access can be refused to the documents because they are unlocatable.<sup>3</sup>

## Background

5. Relevant steps taken in this matter are set out in the Appendix to this decision.

## Reviewable decision

6. The decision under review is the internal review decision dated 18 November 2013 made by an officer of the Department of Justice and Attorney-General (**Department**) under the authority of the AG.

## Evidence considered

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

## Relevant law

8. Under the *Right to Information Act 2009* (Qld) (**RTI Act**), a person has a right to be given access to documents of an agency.<sup>4</sup> However, this right is subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.<sup>5</sup> Access to a document may be refused if the document is nonexistent or unlocatable.<sup>6</sup>
9. For an agency to be entitled to refuse access to a document on the basis that it is unlocatable under section 52(1)(b) of the RTI Act, the questions to be answered are whether:
  - (i) there are reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession; and
  - (ii) the agency taken all reasonable steps to find the document.
10. Whether an agency has taken all reasonable steps is a question of fact that is to be determined based on the circumstances of each case. In *PDE and The University of Queensland*<sup>7</sup> the Information Commissioner identified various factors that assist in determining whether all reasonable steps have been taken to identify documents. These include the agency's structure, functions and general record keeping practices and procedures.<sup>8</sup> While the Information Commissioner's decision in *PDE* considered these factors in the context of whether an agency can be satisfied that documents do not exist, these factors are also relevant to a consideration of whether an agency has taken all reasonable steps before concluding that documents are unlocatable.<sup>9</sup>
11. Section 29(1) of the RTI Act provides clarification about the steps an agency or Minister must take to identify documents with respect to backup systems. It provides that an application for a document does not require an agency or Minister to search a backup

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<sup>3</sup> Under section 47(3)(e) of the RTI Act.

<sup>4</sup> Section 23 of the RTI Act.

<sup>5</sup> As set out in section 47 of the RTI Act.

<sup>6</sup> Sections 47(3)(e) and 52 of the RTI Act.

<sup>7</sup> (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.

<sup>8</sup> See *PDE* at [37].

<sup>9</sup> Earlier decisions of the Information Commissioner have considered that these factors are also relevant to considering whether all reasonable steps have been taken for the purposes of section 52(1)(b) of the RTI Act. See for example: *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010).

system.<sup>10</sup> However this does not prevent searches of a backup system if the agency or Minister considers the search appropriate.<sup>11</sup> Section 29 also notes that, while a search from a backup system is not generally required a search is required in the particular circumstances mentioned in section 52(2) of the RTI Act.

12. Section 52(2) provides that before an agency or Minister may be satisfied that a 'prescribed document'<sup>12</sup> does not exist under section 52(1)(a) of the RTI Act, a search for the document from a backup system is required, but only if the agency or Minister considers the document has been kept in, and is retrievable from, the backup system.
13. That is, section 52(2) requires that a backup system be searched *only* with respect to documents that an agency considers *do not exist* under section 52(1)(a) of the RTI Act—not documents that are *unlocatable* under section 52(1)(b) of the RTI Act.

## Findings

### ***Are there reasonable grounds for the AG's Office to be satisfied that the documents have been or should be in its possession?***

14. The requested documents relate to an issue about which the AG attended several meetings and made public announcements.<sup>13</sup> Both the AG's Office and applicant agree that in the circumstances, it is reasonable to expect the AG would have been in possession of documents relevant to the scope of the access application at some time.<sup>14</sup>
15. Having considered the evidence before me, I am satisfied that there are reasonable grounds to expect that the documents sought by the access applicant *have been* in the AG's possession. However, as explained below, I also note that the usual record keeping practice in relation to such documents is to forward them to the Department for storage and retention and not to retain these documents in the AG's possession.

### ***Has the AG's Office taken all reasonable steps to find the documents?***

16. The AG's Office provided OIC with search records<sup>15</sup> certified by its Chief of Staff confirming that it has undertaken the following searches:
  - searches of emails, notebook entries and diary entries of AG Office staff
  - direct discussions with officers responsible for documents held in the AG's Office
  - searches of its electronic file management system using the search terms "bootcamp", "boot", "camp" and "boot camp"
  - searches of bookshelves, binders, desks, drawers, filing cabinets and other storage areas of the AG's Office; and
  - searches of all other electronic files and computer disks.

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<sup>10</sup> Schedule 6 of the RTI Act defines "backup system" to mean 'a system that has, for disaster recovery purposes, copied electronic data onto a separate data storage medium, for example, onto a backup tape'.

<sup>11</sup> Section 29(2) of the RTI Act.

<sup>12</sup> A prescribed document is defined in section 52(4) of the RTI Act as: (a) a document required to be kept under the *Public Records Act 2002* (Qld); and (b) not a document that the agency or Minister could lawfully have disposed of under the *Public Records Act 2002* (Qld).

<sup>13</sup> For example, see the Ministerial Media Release dated 21 August 2013 available from: <http://statements.qld.gov.au/Statement/2013/8/21/boot-camps-ready-to-roll-out>.

<sup>14</sup> As indicated by the applicant in the external review application dated 20 November 2013 and in the submission of the AG's Office to OIC dated 23 April 2014.

<sup>15</sup> On 19 December 2013 and again on 30 January 2014.

17. On external review the AG's Office also conducted searches of the AG's Outlook calendar.<sup>16</sup> The AG's Office identified additional documents from its Outlook records relating to the scope of the access application and provided these to the applicant.<sup>17</sup>
18. In response to a request from OIC to clarify its record keeping practices, the AG's Office explained that:<sup>18</sup>
- *the Attorney-General's diary available publicly on the internet is simply an extract of the electronic diary (on Outlook)*
  - *there is no hard copy or paper diary held in the AG's Office*
  - *there are no notes taken during meetings and that anything of note arising from a meeting would most likely be handled over the phone with departmental officers*
  - *any decision arising from a meeting would be contained in departmental paperwork seeking the Attorney's approval that would then be returned to the Department; and*
  - *if any note had been made, it would have been of a temporary nature, and would have been discarded by an officer once it had been actioned.*
19. During this external review the applicant also brought to OIC's attention an email that was tabled in the Queensland Parliament by the AG on 20 May 2014. This email was sent by the Director-General of the Department to the AG's Chief of Staff with the subject heading *Boot Camps* and within the timeframe of the access application. As this email was within the scope of the access application, OIC sought additional submissions from the AG as to why this email was not identified by the searches conducted by the AG's Office.
20. In response, the AG's Office explained that the relevant email was retained by the Director-General of the Department and not the AG's Office. The AG's Office also confirmed that emails of this type, particularly those sent or received by the Chief of Staff are usually deleted once they have been read or actioned and that is why the relevant email was not identified.<sup>19</sup>
21. The applicant contends that as the AG's Office does not retain relevant emails searches should also be undertaken of backup tapes. Specifically the applicant submits:<sup>20</sup>
- There is a significant probability that the Attorney-General and Minister for Justice has created or received an email relating to boot camps in Queensland and a thorough search of the backup tapes should be undertaken to ascertain if any documents fall within the scope of (the access application).*
22. The applicant submits that section 52(2) of the RTI Act applies and that the AG's Office is required to search its backup system for relevant emails.<sup>21</sup>

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<sup>16</sup> In a phone discussion with OIC on 5 February 2014 the applicant indicated that it did not accept that the AG's Office did not hold any documents within the scope of its request and submitted that at least diary entries should exist for the numerous meetings that appeared in the AG's publicly available diary entries.

<sup>17</sup> This disclosure of documents occurred in two stages over the course of the external review. The applicant identified that some relevant meetings in the first set of Outlook entries had been overlooked. The AG's Office then conducted searches for those missing dates and provided the corresponding Outlook records to the applicant.

<sup>18</sup> In its submissions dated 31 January 2014.

<sup>19</sup> AG's submissions dated 28 May 2014.

<sup>20</sup> Applicant submissions dated 26 March 2014. In this submission, the applicant makes reference to the definition of a Ministerial Record in the *Public Records Act 2002* (Qld) and to the Queensland Ministerial Handbook to suggest AG Office staff would have created relevant emails and known of the potential for these emails to be recovered for the purposes of an RTI application.

<sup>21</sup> Applicant's submissions dated 26 March 2014.

23. In response, the AG's Office explained that<sup>22</sup>:

*...not all emails held in a Ministerial email account could be considered as 'prescribed documents', as any ephemeral documents could lawfully be disposed...<sup>23</sup> This creates a situation where potentially hundreds or thousands of documents held on a backup system would need to be searched in order to identify potentially few, if any prescribed documents...*

*...It is normal practice for staff of the Office of the Attorney General and Minister for Justice to forward all documentation (including prescribed documents), relating to departmental activities (including the current application scope regarding boot camps) to the Department of Justice and Attorney-General for retention and management...*

24. Submissions of the applicant and AG's Office in relation to the question of whether backup searches are required centre on whether the requested documents are 'prescribed documents' that can reasonably be retrieved from the backup system. However, my findings on the application of section 52(2) in this case are not based on this issue due to the specific wording of that section.
25. A search of a backup system is required under section 52 of the RTI Act only if documents are thought to be non-existent under section 52(1)(a). I do not consider that the requested documents are non-existent.
26. In this matter, I am satisfied that the requested documents have been in the possession of the AG. Accordingly, the remaining question for me to determine is whether all reasonable steps have been taken to find these documents in order for them to be considered unlocatable under section 52(1)(b) of the RTI Act.
27. On careful consideration of the searches conducted, I am satisfied that the AG's Office has used its knowledge of factors such as organisational structure, its functions and responsibilities, its internal practices and procedures and the nature of the documents sought to appropriately identify all relevant locations to search. In doing so, I am satisfied that AG's Office has taken all reasonable steps to locate the requested documents.
28. I am also satisfied that searches of backup tapes are not required under section 52(2) of the RTI Act nor would it be a reasonable step as the AG's Office has explained that all documents relevant to departmental activities including the Boot Camp issue, are retained and managed by the Department.
29. Taking into account all of the information set out above, I am satisfied that:
- it is reasonable to expect that the documents sought by the applicant have been in the possession of the AG at some time
  - the AG's Office has taken all reasonable steps to locate the documents and they cannot be found
  - the documents are unlocatable under section 52(1)(b) of the RTI Act; and
  - the AG can refuse access to the documents under section 47(3)(e) of the RTI Act.

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<sup>22</sup> AG's submissions dated 23 April 2014.

<sup>23</sup> With reference to section 7 of the *Public Records Act 2002* (Qld).

## **DECISION**

30. I affirm the decision under review and find that the AG can refuse access to the documents sought under section 47(3)(e) of the RTI Act on the ground set out in section 52(1)(b) of the RTI Act.
31. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**J S Mead**  
**Right to Information Commissioner**

**Date: 3 June 2014**

## APPENDIX

### Significant procedural steps

| Date              | Event   |
|-------------------|---|
| 18 September 2013 | The AG's Office received the applicant's access application under the RTI Act.  |
| 15 October 2013   | The AG's Office issued its decision on the access application.  |
| 21 October 2013   | The applicant applied to the AG's Office for internal review of its decision dated 15 October 2013.   |
| 18 November 2013  | The AG's Office issued its internal review decision.  |
| 22 November 2013  | OIC received the applicant's application for external review.   |
| 27 November 2013  | OIC notified the AG's Office and the applicant that the application for external review had been accepted and requested submissions.  |
| 20 December 2013  | The AG's Office provided OIC with the requested submissions.  |
| 20 January 2014   | OIC wrote to the AG's Office requesting further information.  |
| 31 January 2014   | The AG's Office provided OIC with the requested information.  |
| 13 February 2014  | OIC asked the AG's Office to provide information regarding the existence of documents relating to a list of specified meetings attended by the Attorney General.  |
| 7 March 2014      | The AG's Office provided OIC with the requested information and newly located documents relating to the list of specified meetings. The AG's Office agreed to release the newly located documents to the applicant. OIC wrote to the applicant informing him that the AG's Office had located further documents which it would release to the applicant and conveying the preliminary view that all reasonable steps had now been taken to identify documents responding to the access application. OIC invited the applicant to provide submissions supporting his case. |
| 26 March 2014     | The applicant provided submissions seeking searches of back-up tapes.   |
| 28 March 2014     | OIC wrote to the AG's Office requesting further searches be undertaken.   |
| 23 April 2014     | The AG's Office provided OIC with a response to OIC's request.  |
| 29 April 2014     | OIC informed the applicant that further documents had been located and conveyed the preliminary view that back up searches were not required to be undertaken by the AG's Office. The applicant requested a formal decision.  |
| 7 May 2014        | The applicant contacted OIC for an update on the review. OIC confirmed the reasons for its preliminary view.  |
| 21 May 2014       | The applicant made additional submissions to OIC regarding an email tabled in Queensland Parliament. OIC wrote to the AG's Office conveying the submissions made by the applicant and seeking a response.   |
| 28 May 2014       | The AG's Office made additional submissions to OIC.   |
| 29 May 2014       | OIC conveyed the submissions made by the AG's Office to the applicant.  |
| 30 May 2014       | The applicant contacted OIC to seek further clarification of OIC's view.  |