



## Decision and Reasons for Decision

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**Application Number:** 310242

**Applicant:** Middleton

**Respondent:** Department of Infrastructure and Planning

**Decision Date:** 25 February 2011

**Catchwords:** **ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – NONEXISTENT DOCUMENTS – applicant sought access to documents in relation to a residential sewerage issue – whether there are reasonable grounds for agency to be satisfied documents do not exist – whether agency has taken all reasonable steps to locate documents – whether access 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 applied to the Department of Infrastructure and Planning (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to a range of documents which broadly relate to sewerage and plumbing issues in her street for the period 10 August 2009 to 6 April 2010. The applicant subsequently amended her access application to exclude correspondence between her and the Department.
2. The Department advised the applicant that:
  - it had located 67 documents which were not relevant to the access application as they comprised correspondence between the applicant and the Department
  - a number of documents were available to her administratively
  - it did not locate any other documents relevant to the access application and:
    - these documents may be documents of another agency and of a Minister; and
    - she may make an access application to that agency and the Minister directly.
3. The applicant is of the view that the documents exist as documents of the Department.
4. For the reasons set out below, I affirm the Department's decision and find that:
  - the documents to which the applicant seeks access are not documents of the Department; and
  - access to the relevant documents can be refused under section 47(3)(e) of the RTI Act because they are nonexistent as mentioned in section 52 of the RTI Act.

### Background

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

### Reviewable decision

6. The decision under review is the Department's decision to refuse access to the relevant documents under section 47(3)(e) of the RTI Act because they are nonexistent.<sup>1</sup>

### Evidence considered

7. In reaching a decision in this external review, I have considered the following:
  - the applicant's access application to the Department and external review application to the Office of the Information Commissioner (**OIC**)
  - the Department's decision and submissions to OIC on 3 June 2010 and 25 February 2011
  - file notes of telephone conversations between OIC officers and the Department during the external review
  - the applicant's submission to OIC dated 14 July 2010
  - relevant sections of the RTI Act as referred to in this decision; and
  - the decision of the Information Commissioner in *PDE and the University of Queensland*<sup>2</sup> (**PDE**) as referred to below.

## Relevant law

8. Section 23 of the RTI Act provides that a person has a right to be given access to documents of an agency.
9. A document of an agency is a document in the possession, or under the control, of the agency whether brought into existence or received in the agency and includes a document to which the agency is entitled to access and a document in the possession or under the control of an officer of the agency in the officer's official capacity.<sup>3</sup>
10. Access to a document can be refused under section 47(3)(e) and section 52(1)(a) of the RTI Act where the agency dealing with the access application is satisfied the document does not exist. Section 52(1)(a) of the RTI Act will be relevant where the agency dealing with the access application is satisfied that a requested document is nonexistent because it is not a document of the agency.
11. To decide whether a document is nonexistent, I must consider:<sup>4</sup>
  - whether there are reasonable grounds to be satisfied that the requested document does not exist; and
  - if the agency conducts searches to be satisfied that a document does not exist, whether the agency has taken all reasonable steps to locate the document.
12. In *PDE* the Information Commissioner explained 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:<sup>5</sup>
  - 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.

## Findings

13. The applicant requested access to documents in the following terms for the date range 10 August 2009 to 6 April 2010:

| Category | Documents  |
|----------|--|
| A        | <i>Documentation relating to the existing sewerage pipes in [the applicant's street] with regard to upgrade or replacement. I believe the sewerage pipes were installed in 1958 and have a diameter of 150mm. For example, document received from Brisbane City Council includes: "The economic assessment is carried out over 50 years, which is the nominal life of a sewer reline."</i> |
| B        | <i>Documentation relating to planning policies and instruments that detail the maximum population capacity – or similar measure - that was estimated to satisfy the existing sewerage pipes in [the applicant's street]. If you do not have specific details for [the applicant's street] then planning policies and instruments that detail</i>   |

| Category | Documents  |
|----------|--|
|          | <i>similar circumstances or general statistics</i>   |
| C        | <i>Letter dated 5 October 2009 requested responses from State Ministers in relation to a Plumbing Report. Response dated 15 October 2009 from the Member for Bulimba contacted the Minister for Infrastructure and Planning. Therefore, I am also seeking documentation relating to this matter if it has been allocated a separate file number.</i> |

14. The Department decided that these documents are nonexistent in accordance with section 52(1)(a) of the RTI Act and on the basis that they are not documents of the Department.

15. The relevant question is therefore whether these documents exist as documents of the Department with reference to the questions set out above at paragraph 11.

***Are there reasonable grounds to be satisfied that the documents do not exist?***

16. The answer to this question is 'yes' for the reasons set out below.

**Category A and B documents**

17. During the course of the external review, the Department explained that the Category A and B documents do not exist for the following reasons:

- the Department is not involved in planning policies and instruments on population capacity of sewerage pipes or plans to upgrade or replace sewerage pipes; this is the business of the local council; and
- the Department made inquiries with Building Codes Queensland<sup>6</sup> who advised that upgrade documents and policies and instruments would be held by the relevant local council and not the Department.

18. I have carefully considered the Department's submissions and am satisfied that:

- the subject matter of the Category A and B documents does not form part of the functions or responsibilities of the Department
- the Category A and B documents were not created or received by the Department
- there are reasonable grounds for the Department to be satisfied that the Category A and B documents do not exist as documents of the Department.

**Category C documents**

19. In relation to the Category C documents, the applicant believes that *"the Premier and several State Ministers have written that they have contacted the Minister and those letters and responses would or should be on file"*.

20. During the course of the external review, the Department explained that:

- the Category C documents do not exist within the Department because any correspondence addressed to the Minister for Infrastructure and Planning would be received by the Minister's Office and processed through its independent record keeping systems rather than the Department's systems
- it receives correspondence from the Minister's Office only if it is referred to the Department
- in this instance, the Department located correspondence that had been referred to it from the Minister's Office, but these documents were not relevant to the

access application as they did not fall within the relevant date range or comprised correspondence either to or from the applicant.

21. On this basis, I am satisfied that:

- the Category C documents were not received by the Department
- there are reasonable grounds for the Department to be satisfied that the Category C documents do not exist as documents of the Department.

***Has the Department taken all reasonable steps to locate the documents?***

22. The answer to this question is 'yes' for the reasons set out below.

23. In relation to the Category C documents, the Department explained to OIC that:

*The initial search discovered only correspondence from Ms Middleton and to Ms Middleton. A further search was conducted ... of our records system and confirmation was again sought from the area responsible for Ms Middleton's correspondence and no emails or briefing notes, at all, were found in the course of this search.*

24. During the processing of the access application, the Department searched the following locations for documents falling within the relevant date range:

- the Department's common computer drive with Building Codes Queensland
- the Department's correspondence tracking system referred to as Trimflow by searching the title and document content using the following search terms:
  - the applicant's last name
  - the word 'sewerage'
  - the name of the applicant's street; and
  - the number of the applicant's house
- the Department's record keeping system referred to as The Source by searching the title of the record using the following search terms:
  - the applicant's last name
  - the word 'sewerage'
  - the name of the applicant's street; and
  - the number of the applicant's house
- relevant hardcopy files held by the Department.

25. These searches did not locate documents within the date range and relevant to the access application.

26. I am satisfied that the Department's search and enquiry process has been appropriate in the circumstances and that the Department has taken all reasonable steps to locate the relevant documents.

**Conclusion**

27. For the reasons set out above, I find that:

- there are reasonable grounds for the Department to be satisfied that the requested documents do not exist as documents of the Department; and

- the Department has taken all reasonable steps to locate the requested documents.

## **DECISION**

28. I affirm the Department's decision to refuse access to the requested documents under section 47(3)(e) and section 52(1)(a) of the RTI Act on the basis that the documents are nonexistent as documents of the Department.
29. I have made this decision as a delegate of the Information Commissioner under section 145 of the RTI Act.

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**Jenny Mead**  
**Right to Information Commissioner**

**Date: 25 February 2011**

**APPENDIX****Significant procedural steps**

| Date             | Event  |
|------------------|--|
| 6 April 2010     | The applicant applies to the Department under the RTI Act for access to a range of documents which broadly relate to sewerage and plumbing issues in her street.   |
| 24 May 2010      | The Department decides that no documents relevant to the access application exist.   |
| 28 May 2010      | The applicant applies to OIC for external review of the decision.  |
| 3 June 2010      | The Department provides OIC with information on the searches performed for documents relevant to the access application.   |
| 22 June 2010     | <p>OIC informs the Department and the applicant that the external review application has been accepted for review.</p> <p>OIC conveys to the applicant the preliminary view that access to the relevant documents can be refused under section 47(3)(e) and section 52 of the RTI Act because they are nonexistent. OIC invites the applicant to provide submissions in support of her case if she does not accept the preliminary view.</p> |
| 14 July 2010     | The applicant advises OIC that she does not accept the preliminary view and provides submissions in support of her case.   |
| 22 July 2010     | The Department provides OIC with further submissions by telephone on the searches performed for documents relevant to the access application.  |
| 6 January 2011   | The Department provides OIC with further submissions by telephone in support of its case.  |
| 25 February 2011 | The Department provides OIC with written submissions on the searches performed for the requested documents.  |

<sup>1</sup> Schedule 6 of the RTI Act provides that a decision refusing access to a document under section 47 is a reviewable decision.

<sup>2</sup> (Unreported, Queensland Information Commissioner, 9 February 2009).

<sup>3</sup> Section 12 of the RTI Act.

<sup>4</sup> The Information Commissioner considered this ground for refusal of access in *PDE* in the context 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 and therefore the reasoning in *PDE* is relevant to this review.

<sup>5</sup> At paragraphs 37 and 38.

<sup>6</sup> Which forms part of the Department.