



Decision and Reasons for Decision

Application Number: 310347
Applicant: Middleton
Respondent: Queensland Urban Utilities
Decision Date: 13 May 2011

Catchwords: **ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – NONEXISTENT DOCUMENTS – applicant sought access to documents in relation to a residential sewerage issue – agency located and released some documents and found that other documents did not exist or their release would be contrary to public interest – 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) - whether disclosure of the information would, on balance, be contrary to the public interest in accordance with section 47(3)(b) of the *Right to Information Act 2009* (Qld)**

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REASONS FOR DECISION

Summary

1. The applicant applied to Queensland Urban Utilities (**QUU**)¹ under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to various documents relating to sewage flooding issues on her property.
2. QUU located and provided the applicant with a number of documents.
3. QUU refused access to:
 - some documents sought on the basis that they did not exist
 - part of an attachment to a letter dated 18 January 2009 (**Attachment**) on the basis that disclosure would be contrary to the public interest because it contained personal information; and
 - one document on the basis that disclosure would be contrary to the public interest because it detailed QUU's deliberative process.
4. In the course of the external review, both parties agreed to resolve some issues in the review. QUU agreed to provide the applicant with a copy of the document initially claimed to disclose QUU's deliberative process and the applicant narrowed the categories of documents which she says QUU had not located to the following:

Category	Particulars
Category A	A copy of QUU policies and procedures which state that 'QUU contracts cleaners to come into the property, replace carpets'
Category B	A copy of a written response that was provided to Councillor Sutton
Category C	CCTV camera footage and a related report on inspection of sewerage pipes conducted on 9 April
Category D	In relation to a meeting between the applicant and a QUU officer on 7 October 2008 – 'all documents the QUU officer made in relation to receiving advice from the Office of the Lord Mayor of [the applicant's] letter to the Lord Mayor dated 6 October 2008'

5. During the course of the external review, QUU conducted further searches for documents responding to Categories A to D and provided submissions to the Office of the Information Commissioner (**OIC**) in relation to those searches.
6. For the reasons set out below, I am satisfied that:
 - there are reasonable grounds to be satisfied that Category A to D documents do not exist and therefore QUU may refuse access to the documents sought under section 47(3)(e) of the RTI Act; and
 - access can be refused to the Attachment on the basis that disclosure would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.

¹ Formerly Brisbane water.

Background

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

Reviewable decision

8. The decision under review is QUU's decision dated 20 August 2010.²

Issues in the review

9. The remaining issues to be addressed on external review are:

- whether QUU is entitled to refuse access³ to the documents sought at paragraph 4 above on the basis that they are nonexistent under section 52(1)(a) of the RTI Act; and
- whether QUU is entitled to refuse access to the Attachment on the ground that disclosure would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.

Evidence considered

10. In reaching a decision in this external review, I have considered the following:

- the applicant's access application to QUU and external review application to OIC (including attachments)
- QUU's decision and submission to OIC dated 24 November 2010⁴
- file notes of telephone conversations between OIC officers and QUU during the external review
- email from QUU to OIC dated 17 December 2010 and email exchange between QUU and a Calamvale property owner/occupier
- the applicant's submission to OIC dated 28 January 2011
- the Attachment
- relevant sections of the RTI Act as referred to in this decision; and
- previous decisions of the Information Commissioner of Queensland as referred to in this decision.

Relevant law

11. Under the RTI Act a person has a right to be given access to documents of an agency,⁵ though this right is subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.⁶ The RTI Act provides that access to a document may be refused if the document is nonexistent or unlocatable.⁷ Access can also be refused if disclosure of information would, on balance, be contrary to the public interest.⁸

² Schedule 6 of the RTI Act provides that a decision refusing access to a document under section 47 is a reviewable decision.

³ Under section 47(3)(e) of the RTI Act. See Appendix B.

⁴ Including its attachments.

⁵ Section 23 of the RTI Act.

⁶ As set out in section 47 of the RTI Act.

⁷ See sections 47(3)(e) and 52(1)(a) of the RTI Act.

⁸ See section 47(3)(b) of the RTI Act.

Findings

Nonexistent documents

The applicant contends that QUU should hold, but has not located, documents described in Categories A to D.

Are there reasonable grounds to be satisfied that the Category A to D documents do not exist?

12. The answer to this question is 'yes' in respect of each of the four categories of documents sought, for the reasons that follow.
13. 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.⁹
14. The RTI Act is silent on how an agency/Minister can be satisfied that a document does not exist. However, in *PDE and the University of Queensland (PDE)*¹⁰ the Information Commissioner explained that, to be satisfied that a document does not exist, the agency/Minister must rely on its particular knowledge and experience, having regard to various key factors including:
 - administrative arrangements of government
 - structure of the agency
 - functions and responsibilities of the agency (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
 - practices and procedures of the agency (including but not limited 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; and
 - the nature of the government activity the request relates to.
15. When these key factors are properly considered and a conclusion reached that the document does not exist, it may be unnecessary for the agency to conduct searches.
16. However, if the agency relies on searches to justify a decision that the document sought does not exist, all reasonable steps must be taken to locate the requested document.¹¹
17. I consider each category of document sought in turn below.

Category A documents

18. In a letter from QUU to the Department of Environment and Resource Management dated 18 January 2009¹² QUU states '*QUU contracts cleaners to come into the*

⁹ Section 52(1)(a) of the RTI Act.

¹⁰ Unreported, Queensland Information Commissioner, 9 February 2009. Although *PDE* concerned section 28A of the now repealed *Freedom of Information Act 1992* (Qld), the requirements of that section are replicated in section 52(1) of the RTI Act and therefore, the reasoning in *PDE* can be applied in the context of the RTI Act. See also *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010).

¹¹ See *PDE*.

¹² The year 2009 is a typographical error, it should be 2010.

property, replace carpets'. The applicant contends that QUU must therefore be in possession of policies or procedures which contain this statement.

19. On external review, QUU indicated that it does not have any policies or procedures which contain the statement at paragraph 18 above, indicating:¹³

At the time Jardine Lloyd Thompson (Jardines) was Brisbane City Council's Insurer. Jardines and GAB Robins (GAB) entered into an agreement for GAB to conduct assessment of damages to properties affected by malfunction of Council infrastructure i.e. damage from water bursts or sewage overflows. QUU would assist with trauma management issues such as clean-ups, accommodation etc if required.

20. In support of its submission, QUU provided OIC with a copy of its 'Procedure for management and reporting of house floodings' (**House Floodings Procedure**). Relevant to this access application, the House Floodings Procedure provides that:¹⁴

- if the sewage incident is restricted to the exterior of the building, QUU's Duty Officer assesses the damage and arranges for repair and clean up by QUU staff
- if the sewage incident has caused damage to the interior of the building, QUU's Duty Officer contacts GAB
- GAB then assists the householder with insurance advice, assesses the damage and arranges assistance for the householder, including cleaning
- only if GAB requests QUU's assistance, does QUU arrange for QUU staff to assist in the clean-up as required by GAB; and
- if GAB calls on QUU for assistance, QUU does not engage or 'contract' any third parties to assist in the clean-up as this is the role of GAB.

21. Given the wording of QUU's letter dated 18 January 2009, it is understandable that the applicant believed QUU would have a policy containing similar wording. However, QUU has confirmed to OIC staff that the statement at paragraph 18 above does not accurately reflect QUU's procedures. The House Floodings Procedure confirms this.

22. In response to OIC's preliminary view that there are reasonable grounds to be satisfied that the Category A documents do not exist, the applicant contended:¹⁵

QUU has policies and procedures for cleaners in relation to sewage overflows and they have not been provided as requested. Please have the policies and procedures provided.

23. A person's right to access documents is subject to the RTI Act provisions and is confined to those documents which are sought in the access application. The relevant part of the applicant's access application provides:

[QUU's] letter dated 18 January 2009 to Department of Environment and Resource management includes:

"QUU contracts cleaners to come into the property, replace carpets"

*This application seeks a copy of your policies and procedures **which state the above.***

[my emphasis]

¹³ In its submissions of 24 November 2010.

¹⁴ OIC included the relevant parts of the Procedure, detailed at paragraph 20 above, in its preliminary view to the applicant dated 28 January 2011. The applicant has also received a copy of the procedure in full.

¹⁵ In her submissions of 28 January 2011.

24. Having regard to the terms of the access application, I find that the applicant's request for QUU policies and procedures for '*cleaners in relation to sewage overflows*' is outside the scope of the access application and therefore cannot be considered in this review.
25. In view of the matters discussed at paragraph 21 above, I am satisfied that QUU may refuse access to Category A documents as there are reasonable grounds to be satisfied that the Category A documents do not exist.

Category B document

26. The applicant contends that the Category B document must exist, pointing to an email¹⁶ from Councillor Sutton indicating QUU had advised her arrangements would be made to investigate the sewage issues at the applicant's property and that she (Councillor Sutton) would receive a '*written response in due course*'.
27. QUU is unable to locate a response to Councillor Sutton and indicates that:
- the Executive Coordinator, Office of the Chief Operations Officer confirms QUU did not forward a formal response to Councillor Sutton
 - searches have been conducted on its correspondence tracking system¹⁷ for Lord Mayoral and Councillor correspondence
 - searches revealed the applicant emailed her complaint to a number of people, including the Minister for Community Services and Housing and Minister for Women
 - a Senior Policy Advisor to the Minister wrote to the Chief of Staff, Office of the Lord Mayor, requesting that the applicant's complaint be investigated and that a response be provided directly to the applicant¹⁸
 - QUU's records show that the Lord Mayor responded to the applicant¹⁹
 - QUU does not know whether a copy of the Lord Mayor's response was forwarded to Councillor Sutton; and
 - QUU did not provide any form of response to Councillor Sutton.
28. The applicant contends that OIC staff would need to visit QUU and Councillor Sutton's Ward Office to be satisfied that QUU provided no written response to Councillor Sutton. I do not accept the applicant's contention. I accept QUU's submission above and do not consider it necessary to inspect records held by QUU or Councillor Sutton. The Lord Mayor's response of 24 March 2010 was provided directly to the applicant, as requested by the Minister's office. I note that the applicant wrote to Councillor Sutton on 26 March 2010,²⁰ enclosing an unopened letter she had received from the Lord Mayor, and indicating that she was no longer accepting further correspondence from the Lord Mayor. In view of this, the applicant may be unaware of the contents of the Lord Mayor's response to her email complaint.
29. In light of the searches undertaken by QUU and QUU's efforts to trace the applicant's email from point of receipt to a response being issued to the applicant by the Lord Mayor's Office, I am satisfied that QUU has taken all reasonable steps to locate the Category B document.

¹⁶ Dated 17 February 2010.

¹⁷ Referred to as CMX.

¹⁸ QUU provided a copy of this letter to OIC.

¹⁹ The Lord Mayor's response was dated 24 March 2010. This correspondence was copied to the Minister.

²⁰ This document was released to the applicant in another external review.

30. In view of the above, I find there are reasonable grounds to be satisfied that the Category B document does not exist because it was not created.

Category C documents

31. The applicant contends that QUU must hold CCTV footage of an inspection of the sewerage pipes on her property on 9 April 2008, along with a related report. In support of her contention the applicant relies on an email dated 10 November 2008²¹ (**Email**) between a QUU officer and Brisbane City Council (which includes handwritten notations) that refers to a camera inspection of sewerage pipes taking place on 9 April 2008 and a report that could have been 'extracted' in relation to that investigation.
32. The applicant submits that this issue can only be resolved by OIC staff inspecting QUU's file in situ to be satisfied that Category C documents do not exist.
33. In its decision, QUU indicates that the:
- CCTV footage of a 9 April 2008 inspection of sewerage pipes by QUU officers was conducted on a property in Calamvale; and
 - Email was misfiled on the records for the applicant's property.
34. On external review QUU provided OIC with:
- a copy of a letter from the Lord Mayor to the owner/occupant of a Calamvale property regarding a sewerage issue and inspection at that property on 10 April 2008;²² and
 - correspondence from the QUU officer who authored the Email in which the QUU officer confirms that the Email relates to the Calamvale property above and is 'totally unrelated' to the applicant's property.
35. I accept the evidence provided by QUU and am satisfied that the CCTV footage and report referred to in the Email relate to a property in Calamvale and not to the applicant's property. I do not consider it necessary to inspect QUU's files in situ.
36. QUU also submits that:
- further searches of its hard copy and electronic records²³ were conducted during the external review; and
 - all CCTV footage or related reports in relation to inspections of sewerage pipes on the applicant's property had been located and provided to her.
37. Having regard to QUU's explanation that the Email was misfiled on the records for the applicant's property and the searches conducted by QUU, I am satisfied that QUU has taken all reasonable steps to locate Category C documents and there are reasonable grounds to be satisfied that these documents do not exist.²⁴

²¹ The applicant received a copy of this email as part of the documents released to her in response to another access application.

²² I note the letter refers to an inspection on 10, rather than 9 April. However, given the QUU officer's confirmation that the inspection relates to the Calamvale property, I do not consider this material. In any event, there is a reference in an email from the QUU officer to the Calamvale property owner/occupier referring to the inspection being anticipated on 9 April 2008.

²³ Specifically QUU has indicated that it has searched its CMX and Ellipse electronic records systems for Category C documents.

²⁴ In accordance with section 52(1)(a) of the RTI Act.

Category D documents

38. On 6 October 2008, the applicant wrote to the Lord Mayor about the sewerage issues. On 7 October 2008, a QUU officer met with the applicant regarding the sewerage issues. The applicant seeks access to all documents the QUU officer made in relation to his being advised by the Lord Mayor's office of the applicant's letter.
39. QUU submits that the QUU officer's attendance at the applicant's property occurred independently of her letter to the Lord Mayor's Office. QUU indicates²⁵ that it is highly unlikely that the applicant's letter could have been brought to the attention of the QUU officer prior to his meeting with the applicant on 7 October 2008, that is, the same day it was received.²⁶
40. The applicant contends that even if the QUU officer did not receive the letter, its contents could have been conveyed to him by telephone, email or facsimile. She also says that when they met, the QUU officer quoted parts of her letter to the Lord Mayor.²⁷ Specifically, to support her contention that the QUU officer had knowledge of her letter the applicant says that in her letter to the Lord Mayor she mentioned legislation relating to disconnecter traps and that she would have a plumber check the traps and that at their meeting the QUU officer said to her '*save your money and don't have the disconnecter traps checked*'. In my view, even if this evidence is accepted, it is unremarkable that the QUU officer might make such a statement, given the very specific nature of the applicant's concerns and I consider it does not establish that the QUU officer was privy to the applicant's letter.
41. QUU provided an email with its submission²⁸ to OIC in which the relevant QUU officer explained that he:
- visited the applicant on 7 October 2008 as a customer service requirement suggested by QUU management; and
 - had no knowledge of the applicant's letter of 6 October 2008 to the Lord Mayor's Office prior to meeting with the applicant.
42. I accept QUU's submissions and the evidence of the QUU officer at paragraphs 39 and 41 above and consider on that basis:
- the QUU officer did not have knowledge of the applicant's letter of 6 October 2008 to the Lord Mayor's Office prior to meeting with the applicant
 - therefore did not create any documents responding to Category D; and
 - there are reasonable grounds to be satisfied that the Category D documents do not exist.
43. In any event, QUU has searched for any documents between the relevant QUU officer and the Office of the Lord Mayor. Specifically QUU searched its CMX database, which is the system QUU ordinarily uses to record any correspondence. The only correspondence located relating to the applicant is a draft letter to the applicant.²⁹ The

²⁵ In an email between QUU officers dated 27 July 2010 provided with QUU's submission dated 24 November 2010 to OIC.

²⁶ Given that the letter would need to be processed by Council in accordance with processes for dealing with incoming correspondence.

²⁷ I acknowledge the applicant's submission that this discussion took place in the presence of a witness, though the applicant provided no specific evidence of this.

²⁸ Dated 24 November 2010.

²⁹ In an email dated 27 July 2010.

applicant has since been provided with a copy of this document,³⁰ though I note this was not a Category D document.

44. On the basis of the above, I am satisfied that QUU may refuse access to the Category D documents under section 52(1)(a) of the RTI Act as there are reasonable grounds to be satisfied that documents sought in Category D do not exist.

Refusal of access

45. QUU refused access to the Attachment on the basis that disclosure of this information would be contrary to the public interest as it contains the personal information of individuals other than the applicant.

Would disclosure of the Attachment, on balance, be contrary to public interest?

46. Yes, for the reasons that follow.
47. Access can be refused if disclosure of the information sought would, on balance, be contrary to public interest.³¹
48. In determining whether disclosure of the Attachment would, on balance, be contrary to public interest, I must:
- identify and disregard irrelevant factors
 - identify factors favouring disclosure of the information in the public interest
 - identify factors favouring nondisclosure of the information in the public interest
 - balance the relevant factors favouring disclosure and nondisclosure and
 - decide whether disclosure of the information would, on balance, be contrary to public interest.

Irrelevant factors

49. No irrelevant factors arise in this case.

Factors favouring non-disclosure in the public interest

50. QUU has identified the following factors as favouring non-disclosure:
- disclosure of the information could reasonably be expected to cause a public interest harm;³² and
 - disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy.³³
51. I also consider that that disclosure of the information in issue could reasonably be expected to impact on the value and marketability of affected properties.

³⁰ Which QUU originally refused access to on the basis that it would be contrary to the public interest if released as the document detailed the deliberative process of QUU.

³¹ Section 47(3)(b) of the RTI Act.

³² Schedule 4, Part 4, section 6 of the RTI Act – public interest harm factor.

³³ Schedule 4, Part 3, item 3 of the RTI Act.

Factors favouring disclosure in the public interest

52. QUU considered that disclosure of the information in issue could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest.³⁴
53. The applicant contends³⁵ that the properties in question would have non-compliant plumbing that would cause sewage overflows into the dwelling and that withholding that information from residents would cause public interest harm.
54. The applicant also argues that:
- QUU should satisfy the OIC that residents have been formally advised of the non-compliant plumbing and the relevant properties have since been rectified and plumbing is now compliant and they are no longer at risk.*
- If QUU has not advised relevant residents accordingly, then third party consultation should be undertaken immediately in the interests of public health and safety.*
- If residents are agreeable to having their contact details provided, I would make contact as support from another who has experienced the trauma of sewage overflows.*
55. The applicant's submission above indicates that she has misunderstood the purpose of third party consultation under the RTI Act. The RTI Act requires an agency or Minister to consult with a third party where disclosure of the information in issue may reasonably be expected to be of concern to that third party.³⁶ In this case, QUU did not consult because it did not propose to disclose the Attachment.

Balancing the factors

56. I am satisfied that disclosure of the Attachment could reasonably be expected to prejudice individuals' privacy and reveal personal information of persons other than the applicant by disclosing residential addresses which have experienced sewerage issues. I also consider that releasing this information could reasonably be expected to negatively affect the value and marketability of properties by revealing sewerage and associated maintenance issues on those properties.
57. I accept QUU's submission that disclosure of the information could contribute to an informed debate. However, I consider in this instance, given the significant intrusion on personal privacy that would flow from disclosing information of this nature, greater weight should be accorded to the factors favouring non-disclosure.
58. The applicant's contention that withholding plumbing and sewage information from residents would cause public interest harm and her request that QUU advise residents through third party consultation, misconceives the purpose of the RTI Act, which is concerned with access to and release of documents. I therefore consider that the applicant's submissions should be given no weight in balancing the public interest factors.
59. Accordingly, I find that although the factor favouring disclosure in the public interest warrants some weight, greater weight is to be accorded to the factors favouring non-

³⁴ Schedule 4, Part 2, section 2 of the RTI Act.

³⁵ In her submissions in response to the preliminary view dated 28 January 2011.

³⁶ Section 37 of the RTI Act.

disclosure, and on balance, disclosure of the information in issue would be contrary to the public interest under section 47(3)(b) of the RTI Act.

Conclusion

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

- there are reasonable grounds to be satisfied the Category A to D documents are nonexistent in accordance with section 52(1)(a) of the RTI Act and access can be refused under section 47(3)(e); and
- access can be refused to the Attachment on the basis that disclosure would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.

DECISION

61. On the basis of the above, I affirm QUU's decision to refuse access to the:

- Category A to D documents under sections 47(3)(e) and 52(1)(a) of the RTI Act on the basis that the documents sought do not exist; and
- Attachment on the basis that disclosure would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.

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

Jenny Mead
Right to Information Commissioner

Date: 13 May 2011

APPENDIX A**Significant procedural steps**

Date³⁷	Event
7 July 2010	The applicant applied to QUU for access to a range of documents under the RTI Act.
20 August 2010	QUU issued its RTI Decision refusing access to some documents.
20 August 2010	The applicant applied to OIC for external review of the RTI Decision.
6 September 2010	OIC informed QUU and the applicant that the external review application had been accepted for review.
24 November 2010	OIC received submissions from QUU.
28 January 2011	OIC conveyed a written preliminary view to the applicant, inviting her, if she did not accept the preliminary view, to provide submissions in support of her case.
3 February 2011	OIC received submissions from the applicant.

³⁷ Of correspondence or relevant communication unless otherwise indicated.

APPENDIX B

Relevant provisions of the RTI Act

Section 47 of the RTI Act provides:

47 Grounds on which access may be refused

- (1) *This section sets out grounds on which access may be refused.*
- (2) *It is the Parliament's intention that –*
 - (a) *the grounds are to be interpreted narrowly; and*
 - (b) *an agency or Minister may give access to a document even if a ground on which access may be refused applies.*
- (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 –*
 - ...
 - (b) *to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest under section 49; or*
 - (e) *because the document is nonexistent or unlocatable as mentioned in section 52; or*
 - ...

Section 52 of the RTI Act 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*

Example—

a document that has not been created

....