



Decision and Reasons for Decision

Application Number: 311242

Applicant: Manning

Respondent: Queensland Police Service

Decision Date: 16 May 2013

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – GROUNDS ON WHICH ACCESS MAY BE REFUSED – NONEXISTENT DOCUMENTS – an agency may refuse access to a document because the document is nonexistent or unlocatable – whether there are reasonable grounds for the agency to be satisfied that further documents do not exist – whether the agency has taken all reasonable steps to locate the documents but the documents cannot be found – sections 47(3)(e) and 52(1)(a) of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied under the *Right to Information Act 2009* (Qld) (**RTI Act**) to the Queensland Police Service (**QPS**) for access to the 'transcript', 'audio file' and 'log of call' of an identified 000 call made on 21 May 2007.
2. QPS identified two pages in response to the access application and decided to refuse access to those pages on the grounds that it could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation.¹ QPS did not locate any other documents in response to the request.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QPS' decision to refuse access to the two pages located. During external review, sufficiency of search issues were also considered.
4. In the circumstances, QPS' decision is varied and access to the two pages located is refused on the basis that the two pages are outside the scope of this review and QPS is entitled to refuse access to the documents requested on the basis that they are nonexistent or unlocatable.

¹ In accordance sections 47(3)(a) and schedule 3, section 10(1)(d) of the RTI Act.

Background

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

Reviewable decision

6. The decision under review is QPS' decision dated 12 October 2012.

Evidence considered

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

What is the scope of this application?

8. The applicant requested access to the 'transcript', 'audio file' and 'log of call' of an identified 000 call made on 21 May 2007. I have reviewed the two pages located by QPS and although they relate to the identified 000 call, I am satisfied that these pages cannot properly be described as a 'transcript', 'audio file' or 'log of call'. Rather these pages relate to police action taken following, and as a result of, the 000 call. Therefore, I am satisfied that the two pages located by QPS are not within the scope of the access application.
9. On 20 March 2013, OIC conveyed a view to the applicant that the two pages located by QPS were not within the scope of the access application. In response to OIC's view the applicant submitted² that:

[OIC has] not considered the grounds of the appeal, but rather go off on [its] own agenda and refuse the documents ... on grounds that were not up for inspection in this appeal process.... This is not the matter that this has been brought to [OIC] for...It was not put to [OIC] to decide the relevance of these documents in question.

10. I do not accept the applicant's submissions on this issue. I acknowledge that QPS initially decided that the two pages responded to the access application. However, on external review section 105 of the RTI Act empowers OIC to consider whether documents are within the scope of an access application, regardless of whether the agency decided that the documents were within scope or whether the issue was raised by the applicant on external review.
11. The applicant also submitted that:³

In [OIC's] determination of whether the information contained in the documents was relevant to my request I would argue that there could not be a document with out a complaint from the number to 000 or there would not have been a charge laid. A transcript or any information related to the 000 call... must have been logged somewhere or again the event did not happen and no charges would have been laid.

12. In the access application the applicant did not request access to, nor do I have any evidence before me that QPS agreed to expand the scope of the applicant's application to all documents referencing or referring to the identified 000 call. An agency is only required to conduct searches which respond to the terms of the access application and it is not possible for an applicant to unilaterally expand the scope of the access

² By email dated 2 May 2013.

³ By email dated 4 April 2013.

application.⁴ I am therefore satisfied that the scope of the access application is limited to the 'transcript', 'audio file' and 'log of call' of the identified 000 call made on 21 May 2007. The two pages located by QPS do not fit this description so cannot be considered in this review.

13. I have considered whether QPS is entitled to refuse access to the 'transcript', 'audio file' and 'log of call' on the basis that they are nonexistent or unlocatable below.

Is there a reasonable basis to be satisfied that no additional documents responding to the access application exist?

14. Yes, for the reasons that follow.

Relevant law

15. Under the RTI Act, a person has a right to be given access to documents of an agency.⁵ However, this right is subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.⁶ Relevantly, the RTI Act provides that access may be refused to documents that are nonexistent or unlocatable.⁷ A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.⁸ 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.⁹

16. The RTI Act is silent on how an agency or Minister can be satisfied that a document does not exist. However in *PDE and the University of Queensland*¹⁰ (*PDE*), 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 the request relates to.

17. 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.

⁴ See for example *Bade and Gympie Regional Council* (Unreported, Queensland Information Commissioner, 14 February 2012) at paragraph 11 and *Fennelly and Redland City Council* (Unreported, Queensland Information Commissioner, 21 August 2012) at paragraph 15.

⁵ Section 23 of the RTI Act.

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

⁷ Sections 47(3)(e) and 52 of the RTI Act.

⁸ Section 52(1)(a) of the RTI Act.

⁹ Section 52(1)(b) of the RTI Act.

¹⁰ (Unreported, Queensland Information Commissioner, 19 February 2009) at paragraph 28. 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.

18. Alternatively, an agency may rely on searches to justify a decision that the document 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*.

Findings

19. The applicant requested access to the 'transcript', 'audio file' and 'log of call' of an identified 000 call made on 21 May 2007. As discussed above, QPS located two pages which I have decided are not in scope. QPS did not locate any other documents, in particular, QPS did not locate a transcript or audio recording of the identified 000 call (**Audio Recording**).
20. During the processing of the access application, QPS searched the following areas:
- Maryborough Station
 - Maryborough District Radio Electronics Section; and
 - Maryborough District Information Management System.
21. As well as conducting the searches set out at paragraph 20, QPS made the following submissions to OIC:¹¹
- QPS keeps an audio log of 000 calls and there was an audio recording of the 000 call the applicant was seeking.
 - Although QPS keeps an audio log of 000 calls, it is not standard practice to keep a separate written log of these calls.
 - QPS' Retention and Disposal Schedule provides that voice logging tapes of telephone calls must be retained for six months. Following this six month period the tapes can be destroyed by re-using the tape. This does not apply if the tape is required for use in yet to be finalised court proceedings or appeal processes.
 - Inquiries with the Officer in Charge, Radio and Electronics Section, Maryborough District, reveal that the 000 calls for the relevant time period would no longer be held because the timeframe had expired, making the Audio Recording, and any details about it, unavailable.
 - Searches of the Maryborough Station RACAL Audio Tap Log Book confirm that the audio tape holding the Audio Recording was re-used in January 2009.
 - QPS have no record of any request from an investigating officer for a copy of the Audio Recording to be made.
 - If a copy of the Audio Recording was made, the investigating officer or prosecutor would have been required to retain the copy until the 28 day appeal period had elapsed following the hearing of the applicant's matter. After the 28 day appeal period had elapsed, all arresting officers have an obligation to dispose of all exhibits. Therefore, if a copy of the Audio Recording was made, it is likely that it would have been disposed of once the 28 day appeal period had elapsed.
 - It is not standard practice to transcribe 000 calls; 000 calls are only transcribed if a specific request is made to the Maryborough District Radio Electronics Section.
 - QPS have no record of any request for the Audio Recording to be transcribed.
22. In addition, we have carefully reviewed the Transcript of Proceedings of the applicant's related matter held at Maryborough Magistrates Court and there is no reference to any transcript of the Audio Recording being made or the Audio Recording being played in, or admitted as evidence to, the Court.

¹¹ By letters dated 28 November 2012, 18 December 2012 and 11 January 2013 and by phone conversation on 18 March 2013.

23. Based on the above information, I am satisfied that QPS has taken all reasonable steps to locate the requested documents, having regards to its searches and its record-keeping practices and procedures and therefore QPS is entitled to refuse access to:
- the Audio Recording because it is unlocatable; and
 - the remaining documents sought because they are nonexistent.

DECISION

24. For the reasons set out above, I vary the decision under review and find that access may be refused on the basis that the two pages located by QPS are not within the scope of the access application and QPS is entitled to refuse access to the documents requested on the basis that they are nonexistent or unlocatable.
25. I have made this decision as a delegate of the Acting Information Commissioner, under section 145 of the RTI Act.

Lisa Meagher
Acting Assistant Information Commissioner

Date: 16 May 2013

APPENDIX**Significant procedural steps**

Date	Event
26 September 2012	QPS received the access application.
12 October 2012	QPS made its decision under the RTI Act.
1 November 2012	OIC received the application for external review.
9 November 2012	OIC notified QPS and the applicant that the external review application had been accepted. OIC also asked QPS to provide copies of the documents to which access was refused and the evidence QPS relied on to reach its decision regarding a serious act of harassment or intimidation.
3 December 2012	OIC received the requested information and documents. OIC asked QPS to provide submissions detailing the nature and extent of its searches for documents relating to the access application.
20 December 2012	OIC received QPS' partial submissions.
16 January 2013	OIC received QPS' remaining submissions.
21 January 2013	OIC asked QPS to provide further information.
24 January 2013	OIC received the requested information.
8 March 2013	OIC asked QPS to provide further information.
18 March 2013	OIC received the requested information.
20 March 2013	OIC conveyed a view to the applicant about the sufficiency of search and scoping issues in this review and invited the applicant to provide submissions supporting his case by 5 April 2013 if he did not accept OIC's view.
4 April 2013	OIC received the applicant's submissions in response to OIC's view.
1 May 2013	OIC conveyed a further view to the applicant confirming and clarifying our view.
2 May 2013	OIC received the applicant's submissions in response to OIC's further view.