



Decision and Reasons for Decision

Citation:	<i>Queensland Newspapers Pty Ltd and Ipswich City Council</i> [2016] QICmr 52 (21 December 2016)
Application Number:	312834
Applicant:	Queensland Newspapers Pty Ltd (The Courier-Mail)
Respondent:	Ipswich City Council
Decision Date:	21 December 2016
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - request for access to emails passing between journalists and a councillor - applicant contends further documents exist - whether the agency has taken all reasonable steps to locate the documents - whether access may be refused on the basis that the documents do not exist or are unlocatable - sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Ipswich City Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to:

Emails or other electronic messages mentioning the Courier Mail, the Sunday Mail or its reporters Liam Walsh or Kelmeny Fraser. It may include references just to the first name of each reporter. These messages would be sent to or from the Ipswich Mayor, Paul Pisasale. Date range: 1 April 2014 to 22 February 2016.
2. By decision dated 4 May 2016, Council's Risk and Right to Information Manager (**RTI Manager**) advised that Council had located 266 pages of responsive information. The RTI Manager decided to give the applicant full access to some pages and partial access to others. She refused access to some information on the grounds that it was personal information and its disclosure would, on balance, be contrary to the public interest.
3. By email dated 17 May 2016, the applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision. The applicant raised a number of issues about Council's decision, including the adequacy of the searches conducted by Council to locate all responsive documents. The applicant contended that further responsive documents ought to exist in Council's possession or under its control.

¹ Application dated 26 February 2016.

The applicant had raised concerns about the sufficiency of Council's searches with Council during the processing of the access application.

4. For the reasons set out below, I find that access to further documents that the applicant considers should have been located by the Council can be refused on the basis that such documents are unlocatable.

Background

5. Two journalists employed by the applicant, namely, Mr Liam Walsh and Ms Kelmeny Fraser, were involved in investigating, and writing for *The Courier-Mail* and *The Sunday-Mail*, a number of articles about various issues arising at Council, including the business dealings of the Mayor of Ipswich, Councillor (**Cr**) Paul Pisasale. As part of the investigation, the applicant made a number of RTI applications and written inquiries to Council, seeking access to information relevant to the subject of the articles.
6. The applicant then applied under the RTI Act to access any emails sent to or from Cr Pisasale between 1 April 2014 to 22 February 2016 that mentioned the names of the two reporters or the names of the two newspapers.

Council's processing of the application

7. Upon receipt of the access application, Council's Project Officer sent a memorandum dated 29 February 2016 to Council's Information and Communications Technology (**ICT**) Manager. The Project Officer set out the terms of the access application and requested that the ICT Manager conduct searches for responsive documents. She also provided the ICT Manager with a Document Retrieval Request, as well as an internal 'Search Certification' form and 'Record of Searches' form. The ICT Manager was requested to complete and return the forms, together with copies of any responsive documents he located.
8. After a number of reminders, it appears from Council's processing file that responsive documents were provided by the ICT Manager to the Project Officer on either 11 or 14 March 2016. It does not appear from the processing file that the ICT Manager returned either the completed Search Certification form or the Record of Searches form at that time.
9. On 23 March 2016, after reviewing the documents that had been located, Council's RTI Manager issued Mr Walsh, on behalf of the applicant, with a schedule that identified that Council had located 275 pages of responsive emails, as well as a Charges Estimate Notice (**CEN**) in the amount of \$625.50.
10. Mr Walsh requested that Council provide a schedule that set out the number of responsive emails located for each month of the relevant time period covered by the access application. Council's Project Officer provided this schedule on 24 March 2016. Upon receipt, Mr Walsh emailed her, querying an apparent discrepancy in the number of emails, as well as the fact that there were no emails from 2014.² In her response, the Project Officer clarified the issue about the number of emails, but did not respond to Mr Walsh's query about the absence of emails from 2014.³
11. There then followed a period during which Mr Walsh explored ways to reduce the amount of the CEN by reducing the scope of the access application. Eventually, however, he

² See Mr Walsh's email to the Project Officer dated 24 March 2016.

³ See the Project Officer's email to Mr Walsh dated 24 March 2016.

decided to retain the original scope of the access application and paid Council the full amount of \$625.50 for processing charges.

12. By decision dated 4 May 2016, the RTI Manager advised Mr Walsh that Council had conducted comprehensive searches of its Microsoft Outlook database in locating 266 pages of responsive emails. She gave the applicant full access to some emails and partial access to others.
13. Following receipt of the decision and the release of the relevant emails, Mr Walsh contacted the RTI Manager to seek clarification about a number of issues concerning the released documents.⁴ The third issue he raised was as follows:

We're concerned about whether all documents have been provided. For instance, we requested all emails to and from the mayor involving The Courier-Mail between April 1 2014 and Feb 22 2016. I still have a copy of an email sent on 12 September 2014 to the mayor and media officer Allan Roebuck. Yet it does not appear in this RTI. (And it obviously should). We assume there might be other emails or other electronic communications in existence in relation to this – can you verify with Ipswich why the email is not picked up? Can Ipswich please go back and look at whether other emails/documents are missing?

14. In her response,⁵ the RTI Manager advised that Council had conducted generic searches on 'Courier Mail', 'Kelmeny Fraser', 'Liam Walsh' and 'Sunday Mail' and that the documentation as provided was the totality of that identified through these search parameters. She asserted that all reasonable steps had been taken to locate relevant documentation, and that if the email dated 12 September 2014 that Mr Walsh had identified was not released, it was because it was nonexistent or unlocatable under section 52 of the RTI Act.
15. On 17 May 2016, the applicant applied to OIC for review of Council's decision. The applicant raised a number of concerns about the information in issue, including expressing doubt that Council had conducted adequate searches for responsive documents.
16. Significant procedural steps relating to the application and external review are set out in the appendix to these reasons.

Reviewable decision

17. The decision under review is Council's decision dated 4 May 2016.

Material considered

18. Evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and the appendix).

Issue for determination

19. The issue for determination is whether access to certain documents that the applicant contends should have been located by Council may be refused on the ground that they are nonexistent or unlocatable.

⁴ Email dated 13 May 2016.

⁵ Email dated 17 May 2016.

Relevant law

20. Under the RTI Act, one of the grounds for refusal of access to a document is that the document sought is nonexistent or unlocatable.⁶ A document is nonexistent if there are reasonable grounds to be satisfied that it does not exist.⁷ 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 it, but it cannot be found.⁸
21. In assessing whether a document exists, but is unlocatable, it is necessary to consider:
- whether 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
 - whether the agency has taken all reasonable steps to find the document.⁹
22. In answering these questions, regard should be had to the circumstances of the case and to the following key factors:
- the administrative arrangements of government
 - the agency's 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 limited to, its information management practices and procedures); and
 - other factors reasonably inferred from information supplied by the applicant, including the nature and age of the requested documents.¹⁰

External review process

23. After receiving further information from Council that clarified a number of queries about the information in issue that the applicant had raised in its external review application, the only issue that the applicant continued to pursue on external review was the sufficiency of Council's searches. Mr Walsh reiterated the information that he had supplied to Council earlier, namely, that he had possession of an email that he and Ms Fraser had sent to Cr Pisasale dated 12 September 2014 which Council had failed to locate.
24. In order to assess whether Council had taken all reasonable steps to identify and locate all responsive documents, OIC provided Council with an OIC Search Certification form and a Record of Searches form which it asked Council to complete and return.¹¹
25. Council's RTI Manager provided OIC with the requested information under cover of letter dated 11 July 2016. The Search Certification form and Record of Searches form were completed by Council's ICT Manager. In the Search Certification form, the ICT Manager certified that he had requested Data#3, Council's Managed Service Provider, to conduct the searches for responsive documents. He did not provide the name(s) of the person(s)

⁶ Sections 47(3)(e) and 52(1)(a) and (b) of the RTI Act.

⁷ Section 52(1)(a) of the RTI Act.

⁸ Section 52(1)(b) of the RTI Act.

⁹ Section 52(1)(b) of the RTI Act.

¹⁰ *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) at [37]-[38].

¹¹ Letter dated 28 June 2016.

from Data#3 who had performed the searches.¹² By signing the Search Certification form, Council's ICT Manager also certified that, where documents had not been located, he had explained why in the attached Record of Searches form. In the Record of Searches form, the ICT Manager stated that 12 hours had been spent on 23 March 2016 searching for responsive documents 'across all Council exchange servers'. He marked 'N/A' in the column headed 'Comments/reasons why not located'.

26. Council's RTI Manager also provided OIC with a copy of the Project Officer's memorandum to the ICT Manager, dated 29 February 2016, which contained her initial request that the ICT Manager conduct searches for documents falling within the scope of the application; as well as a copy of an internal Search Certification form that the ICT Manager had apparently completed on 21 March 2016¹³ and in which he attested that:

- *searches have been conducted for the requested documents as detailed in the table*
- *all relevant documents that are located within my area of responsibility have been located and are attached*
- *where documents have not been located, I have explained why the documents do not exist or cannot be located.*

27. The 'Record of Searches' table located on the reverse side of this internal Search Certification form was not completed by the ICT Manager. It requested details about a number of items, including where and how searches were conducted; the name of the officer who conducted the searches; and whether there were documents that should have been located but were not.

28. In her covering letter to OIC dated 11 July 2016, the RTI Manager stated that an explanation of the searches undertaken by Council had already been provided to the applicant (as set out in paragraph 14 above). However, she went on to provide the following additional information:

... I consider it prudent to provide a further explanation/clarification regarding the searches conducted.

...

Based on the submission from the applicant, it appears that the sufficiency of search issue under external review relates to emails within the date range of 1 April 2014 to December 2014.

In accordance with normal IT practices, Council performs periodic backups of its email systems. When a backup is performed, emails currently in the exchange server are backed up in accordance with what [is] required for the particular exchange server used at the time of the backup.

Council performed a full back up of the system in late 2014. As a result of the system backup, emails created earlier than the date of the backup were archived and stored on backup tapes. Emails created after the date of the backup are still available on the exchange servers as they have not yet been archived and stored on backup tapes. These emails are capable of being stored without significant time or expense, and were stored for the purposes of Council's response to the Access Application.

Council changed its exchange servers around September 2015. As a result of the change, Council now uses a different exchange server to the server which was in use at the time when the emails on the late-2014 system backup were created. This means that the emails on the backup exist in a legacy system which Council does not currently use. Restoration of emails on this legacy system would require significant time and expense, and there is no guarantee that if restored, the data would be uncorrupted.

¹² The Search Certification Form requires that the name of the person who physically undertook the searches be provided, and that this person must also complete certification of his/her searches.

¹³ I have been unable to locate this Search Certification form in Council's processing file.

Council obtained an estimate from Data#3 ... of the number of hours which would be required to perform a restore [sic] of the backup tapes on the legacy system. Data#3 advised that it would require 159 man hours to perform the request. Council also understands that even if this type of restoration were undertaken, it is unclear whether the data would be intact or corrupted and inaccessible.

On that basis, and given the discretion afforded to agencies under s.29 of the RTI Act, Council decided not to restore emails from the backup tapes on the legacy systems, but instead to deal with the Access Application on the basis of the emails available other than on the backup tapes.

29. This was the first occasion on which Council advised that it had been unable to search for responsive emails across a nine month period covered by the terms of the access application (April to December 2014). OIC requested further information regarding the scope of the searches conducted by Council. I then wrote to the applicant¹⁴ to convey the information provided by Council regarding the backup of its email system and its change of exchange servers. I explained that agencies have a discretion under section 29 of the RTI Act in deciding whether or not to restore backup tapes to search for responsive documents, and that in a situation such as this, where an agency's view is that documents are unable to be located (rather than not in existence), the RTI Act does not require the agency to undertake searches of its backup system.¹⁵

The applicant's submissions

30. In his response to the information provided by Council,¹⁶ Mr Walsh expressed dissatisfaction with the actions of Council in processing the application, and with the information it had provided subsequently. Mr Walsh stated that he did not accept that Council had taken all reasonable steps to identify and locate all responsive documents, and that he required the Information Commissioner to issue a formal decision in order to finalise the review.
31. The points of concern raised by Mr Walsh were as follows:
- Council did not advise him at the time of receipt of his access application (or at any stage during the processing of the application) that a nine month period of emails was unable to be searched because they were stored on backup tapes
 - this information was only provided to OIC during the external review process
 - Council may have charged the applicant (and, potentially, other RTI access applicants) for an RTI search without explaining at the time that documents were likely to be missing; and
 - other access applications made by the applicant or related entities may have been impacted similarly by the backup issue, without Council ever disclosing the problem.
32. Mr Walsh expressed concern that a government entity was unable to retrieve easily emails dating back only two years. He also sought clarification of Council's estimate of 159 man hours to perform a restoration of the backup tapes on the legacy system. He was concerned that the estimate covered all Council systems, rather than simply Cr Pisasale's emails for the relevant period.

¹⁴ Letter dated 19 September 2016.

¹⁵ See sections 52(2) and (3) of the RTI Act.

¹⁶ Email dated 28 October 2016.

Council's response

33. Council was invited to respond to the issues raised by the applicant. In a letter dated 9 November 2016, Council's RTI Manager:
- stated that, until Council had completed its searches, it was not in a position to advise Mr Walsh that a nine month period of emails was unable to be searched
 - asserted that Mr Walsh was on notice/aware of the unlocatable documentation as at 24 March 2016 when he received Council's schedule of documents, but that he decided to proceed with the RTI and to pay the processing charges regardless
 - advised that she commenced employment with Council on 22 February 2016 and was unaware of any RTI application since that time that would have raised an issue concerning backup tapes; and
 - advised that the estimate of 159 man hours to restore the backup tapes was provided by Data#3 and invited OIC to contact Council's ICT Manager directly to discuss the work involved.

Discussion

34. Mr Walsh has expressed dissatisfaction with the information that Council provided when it was processing the access application. Mr Walsh specifically queried the absence of emails for 2014 in his email to Council dated 24 March 2016. Council did not respond to this issue. He raised it again in his email to Council dated 13 May 2016 when he specifically identified the email dated 12 September 2014 as missing from the documents provided by Council. In its response,¹⁷ Council explained the search parameters that it had used, and asserted that all reasonable steps had been taken to locate responsive documentation. No mention was made of the backup tape issue. There is nothing in Council's processing file to indicate that Mr Walsh's concerns about the missing email (or the absence of responsive documents generally between the period April 2014 and December 2014) were referred to Council's ICT Manager for further investigation or clarification.
35. Council asserts that Mr Walsh was aware from 24 March 2016 that no documents between April 2014 and December 2014 had been located, and that he nonetheless chose to pursue the application. However, I note that while Mr Walsh may have been aware that no documents for this period had been located by Council, he was not aware that this was due to the fact that Council had not conducted any searches for the period.
36. Council also asserts that it could not have advised Mr Walsh at the time of receipt of his access application that the period of April 2014 to December 2014 was unable to be searched because Council was not aware of that issue until searches had been undertaken. This response fails to explain why, when the searches were completed (by 14 March 2016), Mr Walsh was still not informed by Council of the issue.
37. Council also asserted in its letter to OIC dated 11 July 2016 that Council had already explained to Mr Walsh the searches that had been undertaken, and that the additional information about the backup tapes that Council was now providing to OIC was simply by way of '*clarification/explanation*'. It would appear, however, that the extent of the information that was provided by Council to Mr Walsh in its email dated 17 May 2016 about the searches that had been conducted by Council was as follows:

Searches of Council's ICT system was [sic] conducted by the ICT Manager and involved searches on the following terms – "Courier Mail", "Kelmeny Fraser", "Liam Walsh", "Sunday Mail".

¹⁷ Email dated 17 May 2016.

38. It is not clear whether the ICT Manager was aware of the backup issue when the searches for relevant documents were completed and he failed to inform the RTI Manager, or whether he was unaware of the issue because Data#3 performed the searches and did not advise him.¹⁸ In any event, a communication breakdown within Council occurred. It would appear that Council either did not identify the issue about the backup tapes, or failed to disclose the issue, until July 2016, when OIC made inquiries. Even when the applicant identified a specific responsive document that Council ought to have located, Council did not take any additional steps to investigate or clarify the issue.
39. When OIC requested that Council provide Search Certification and Record of Search forms during the external review process, Council's ICT Manager disclosed that the searches had not been conducted by Council officers, but by an external consultant. He did not identify the employee(s) of Data#3 who conducted the searches, or provide any certification from them. Moreover, there are a number of discrepancies in the dates of the relevant documentation. Council's processing file shows that copies of responsive documents had been provided by the ICT Manager to the RTI Manager by 14 March 2016. However, the Record of Searches completed by Council's ICT Manager at the request of OIC states that searches were conducted on 23 March 2016. In addition, the internal Search Certification completed by the ICT Manager, which attested to the results of the searches, is dated 21 March 2016. Furthermore, although he was clearly aware at the time of completing OIC's Search Certification form on 11 July 2016 that Mr Walsh had identified a missing email, and that no searches across a nine month period had been conducted because of the backup issue, the ICT Manager nevertheless entered 'N/A' in the column that requested comments or reasons as to why responsive documents had not been located.
40. The decision issued by Council on 4 May 2016 states that Council had conducted '*comprehensive searches*' of its Microsoft Outlook database and these searches were conducted by the '*ICT Branch of the Finance and Corporate Services Department*'. Neither statement appears to be accurate on the information before me. It is not clear to me how, at the time Council gave its decision, it was satisfied that all reasonable steps had been taken to locate responsive documents when the ICT Manager had not returned a completed Record of Searches, and the applicant had raised a query about a lack of documentation for 2014 which Council had not responded to. Had Council followed up on these issues at the relevant time, they may have been clarified for the applicant prior to Council giving its decision, and an application for external review of Council's decision avoided.
41. As regards the issue for determination in this review – whether Council has taken all reasonable steps to identify and locate all responsive documents – I accept that Council has a discretion under section 29 of the RTI Act in deciding whether or not to restore backup tapes to search for responsive documents; and that in a situation such as this, where an agency's view is that a document is unable to be located (rather than not in existence), the RTI Act does not require the agency to undertake searches of its backup system under sections 52(2) and (3) of the RTI Act.
42. Accordingly, based on the information provided by Council on 11 July 2016, I accept that the email dated 12 September 2014, identified by Mr Walsh but unable to be located by Council, was subject to a backup by Council of its IT system in late 2014 and is stored on backup tapes. There is nothing in the RTI Act that requires Council to search the backup tapes for this email or further responsive documents. As such, I am satisfied

¹⁸ As Council's ICT Manager, it is reasonable to expect that he should have been aware of the backup tape and change of exchange server issues given that they had occurred relatively recently.

that all reasonable searches for further documents have been conducted and access may be refused as they are unlocatable for the purposes of the RTI Act.

DECISION

43. For the reasons set out above, I vary Council's decision and find that access to further documents that the applicant considers should have been located by Council can be refused under sections 47(3)(e) and 52(1)(b) of the RTI Act.
44. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Clare Smith
Right to Information Commissioner

Date: 21 December 2016

Appendix
External Review 312834 – *Queensland Newspapers Pty Ltd and Ipswich City Council*
Significant Procedural Steps

Date	Event
26 February 2016	Ipswich City Council (Council) received the access application.
4 May 2016	Council issued its decision in response to the access application.
17 May 2016	Office of the Information Commissioner (OIC) received the application for external review of Council's decision.
18 May 2016	OIC wrote to Council and requested that relevant procedural documents be provided.
19 May 2016	OIC received the requested procedural documents from Council.
1 June 2016	OIC informed the applicant and Council that the application had been accepted for external review. OIC requested that Council provide OIC with marked up copies of the documents in issue.
6 June 2016	OIC received the requested documents from Council.
28 June 2016	OIC requested that Council provide information about the searches that it conducted for responsive documents.
11 July 2016	OIC received the requested information from Council.
27 July 2016	OIC wrote to Council to convey a preliminary view about certain issues, including the scope of the application, and sufficiency of search.
3 August 2016	Council responded to OIC's preliminary view.
22 August 2016	OIC wrote to Council regarding documents that Council had decided were out of scope.
12 September 2016	Council advised OIC that it had given the applicant access to additional documents.
19 September 2016	OIC updated the applicant and conveyed a preliminary view regarding the sufficiency of search information provided by Council. The applicant requested an extension of time until 31 October 2016 to respond to OIC's preliminary view.
20 September 2016	OIC granted the applicant's request for an extension of time.
28 October 2016	The applicant wrote to OIC to advise that it sought a formal decision by OIC in order to finalise the review. It also raised a number of concerns about the information provided by Council.
2 November 2016	OIC conveyed the applicant's concerns to Council and invited Council to respond.
9 November 2016	OIC received Council's response.