



Decision and Reasons for Decision

Application Number: 310054

Applicant: P Henderson

Respondent: The Public Trustee of Queensland

Decision Date: 14 March 2011

Catchwords: RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION – REFUSAL OF ACCESS – NON-EXISTENT DOCUMENTS – applicant seeks access to documents concerning affairs of a third party– applicant contends additional information should exist – whether there are reasonable grounds for agency to be satisfied that documents do not exist – whether agency 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) of the *Right to Information Act 2009* (Qld)

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REASONS FOR DECISION

Summary

1. The applicant applied for access to certain information under the *Right to Information Act 2009* (Qld) (**RTI Act**) from the Public Trustee of Queensland (**PTQ**).
2. PTQ identified 51 pages responsive to the access application and granted the applicant full access to these pages.
3. The applicant claims that PTQ has not fully responded to his access request.
4. After carefully considering all the submissions and evidence before me, I am satisfied that:
 - no additional responsive documents exist, and
 - access to additional documents can be refused under sections 47(3)(e) and 52(1)(a) of the RTI Act.

Reviewable decision

5. The decision under review is PTQ's initial decision dated 14 December 2009.

Issue for determination

6. In his application for external review and subsequent submissions, the applicant raised a number of issues.
7. The primary issue for determination is the sufficiency of PTQ's searches in relation to the access application. More specifically, whether:
 - there are reasonable grounds for PTQ to be satisfied that no additional documents responding to the access application exist, and
 - all reasonable steps have been taken by PTQ to find the additional documents sought.
8. The remaining issues have been discussed at the conclusion of this decision.

Applicant's submissions

9. In summary, the applicant submits, with regard to the sufficiency of PTQ's searches, that PTQ failed to respond fully to his access application.

PTQ's submissions

10. In summary, PTQ submits that:
 - searches were conducted by PTQ following receipt of the access application and during the course of the external review
 - searches of the Townsville Office of PTQ (**Townsville Office**) were undertaken as the relevant third party's file (which is the subject of the access application) was managed by that Office

- no further documents exist concerning the relevant affairs of the third party as PTQ was not involved in the relevant incident, nor was the incident discussed with any officer of the PTQ.

Searches conducted by PTQ

11. Specifically, PTQ advises that it has undertaken the following searches:

- upon receipt of the access application, the Townsville Office was searched for responsive documents and:
 - responsive files were manually searched for responsive documents
 - no electronic searches of the responsive files were undertaken, as PTQ's general practice is for hard copy documents to be filed
 - a relevant officer in the Townsville Office advised the decision maker that all responsive documents had been identified
- in the course of the external review:
 - electronic searches were conducted of PTQ's electronic document records system (**CLCOR**)
 - electronic searches were conducted of the personal email accounts and 'Word' files of the officer responsible for the administration of the relevant third party's file and the relevant officer in the Townsville Office
 - no additional documents responsive to the access application were identified.

Relevant evidence

12. In making this decision, I have taken the following into account:

- the applicant's applications (both the initial access application and the external review application) and supporting material
- PTQ's decision
- file notes of telephone conversations between OIC staff and PTQ staff
- correspondence from the applicant and PTQ
- relevant provisions of the RTI Act
- previous decisions of the Information Commissioner of Queensland as identified in this decision.

Relevant law

13. Under section 23 of the RTI Act, a person has a right to be given access to documents of an agency. However, this right is subject to a number of exclusions and limitations, including grounds for refusal of access. These grounds are contained in section 47 of the RTI Act.

14. Section 47(3)(e) of the RTI Act provides:

47 Grounds on which access may be refused

... ..

(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—*

... ..

(e) *because the document is nonexistent or unlocatable as mentioned in section 52; or*

... ..

15. Section 52 of the RTI Act is also relevant and 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*

...

(b) *the agency or Minister dealing with the application for access is satisfied—*

(i) *the document has been or should be in the agency's or Minister's possession; and*

(ii) *all reasonable steps have been taken to find the document but the document can not be found.*

...

16. The Information Commissioner considered this ground for refusal of access in *PDE and the University of Queensland*¹ (**PDE**). Although this decision concerned 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 on this basis the reasoning in *PDE* is relevant to this review.

17. In *PDE*, the Information Commissioner stated that:²

*Sections 28A(1) and (2) of the FOI Act address two different scenarios faced by agencies and Ministers from time to time in dealing with FOI applications: circumstances where the document sought does not exist and circumstances where a document sought exists (to the extent it has been or should be in the agency's possession) but cannot be located. In the former circumstance, an agency or Minister is required to satisfy itself that the document does not exist. If so satisfied, the agency or Minister is not required by the FOI Act to carry out all reasonable steps to find the document. In the latter circumstance an agency or Minister is required to satisfy itself that the document sought exists (to the extent that it has been or should be in the agency's possession) **and** carry out all reasonable steps to find the document before refusing access.*

18. The Information Commissioner also found 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:

- 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:

¹ (Unreported, Queensland Information Commissioner, 9 February 2009).

² At paragraph 34.

- the nature and age of the requested document/s
 - the nature of the government activity the request relates to.
19. Section 52(1)(a) of the RTI Act is silent on the issue of how an agency is to satisfy itself that a document does not exist. However, where searches are used to substantiate a conclusion that there are reasonable grounds to be satisfied that the document does not exist, the agency must take all reasonable steps to locate the documents sought.³
20. As PTQ undertook searches in order to satisfy itself that certain documents do not exist, it is necessary to ask the following questions:
- are there reasonable grounds for PTQ to be satisfied that no additional documents exist, and
 - has PTQ taken all reasonable steps to locate additional documents.

Are there reasonable grounds for PTQ to be satisfied that additional documents do not exist?

21. I have carefully considered all of the submissions and evidence before me.
22. In respect of whether there are reasonable grounds for PTQ to be satisfied that additional documents do not exist, I note that PTQ has provided explanations for the non-existence of additional documents sought by the applicant.⁴
23. On the basis of the matters set out above, I find that there are reasonable grounds for PTQ to be satisfied that additional documents do not exist.

Has PTQ taken all reasonable steps to locate additional documents?

24. PTQ searched the relevant Office for responsive documents. While initially only manual searches were undertaken, its subsequent search efforts extended to PTQ's electronic filing system and personal email and 'Word' accounts. PTQ's searches have been comprehensive.
25. On the basis of the matters set out above including details of PTQ's searches conducted throughout the course of this review, I am satisfied that PTQ has taken all reasonable steps to locate additional documents.

Other Issues

26. In addition to his contentions concerning the sufficiency of PTQ's searches the applicant raised the following issue:
- PTQ's decision was not signed and therefore 'lacks status'
 - The initial decision maker, as a sub-delegate of the PTQ's delegate, did not have the power to make the decision for the principal officer of the PTQ
27. As this decision is a fresh decision under the RTI Act, and determines whether access to the documents may be refused pursuant to sections 47(3)(e) and 52(1)(a) of the RTI Act, the two additional matters raised by the applicant have no bearing on this decision.

³ See *PDE*, particularly at paragraph 47.

⁴ PTQ indicates that it was not involved in the relevant decision concerning the third party.

However, for the sake of completeness I make the following comments on the above two issues.

28. In regard to the issue of the unsigned decision I note that notice of a decision must be by way of a prescribed written notice (**PWN**). The required content of a PWN is outlined in section 191 of the RTI Act. That section stipulates that the PWN must contain details such as the day the decision was made, the name and designation of the person making the decision and the reasons for the decision. The section does not stipulate that the PWN must be signed.
29. In this case the decision maker confirmed that the PWN of the decision was the unsigned letter dated 14 December 2009⁵. Additionally, the decision maker advised that the PWN of the decision was unsigned due to administrative oversight.⁶
30. I have reviewed the PWN of decision dated 14 December 2009 and it complies with the requirements of section 191 of the RTI Act.
31. In my view, by operation of section 191 of the RTI Act, a failure on the part of a decision maker to sign the PWN does not result in the PWN of a decision being invalid or 'lacking status'. However, it would be best practice to sign a PWN of a decision.
32. As to the issue of the validity of a decision made by a sub-delegate of the delegate, the applicant asserted that the Latin maxim *delegatus non potest delegare* applies. The Latin maxim means, one to whom power is delegated cannot himself further delegate that power.
33. Section 30 of the RTI Act states:

30 Decision-maker for application to agency

- (1) *An access application to an agency must be dealt with for the agency by the agency's principal officer.*
- (2) *The agency's principal officer may delegate the power to deal with the application to another officer of the agency.*
- (3) *Also, for an agency other than a local government, the agency's principal officer may, with the agreement of another agency's principal officer, delegate the power to deal with the application to the other agency's principal officer.*
- (4) *The principal officer of the other agency may subdelegate a power delegated to him or her under subsection (3).*

...

34. Section 30(3) of the RTI Act allows a principal officer of an agency to delegate the power to deal with an access application to the principal officer of another agency. That power can then be validly subdelegated under section 30(4) of the RTI Act.
35. In this case the principal office of PTQ delegated the power to deal with the applicant's application to the principal officer of the Department of Justice and Attorney-General (**DJAG**). The principal officer of DJAG then subdelegated the delegated power to the decision maker.

⁵ Confirmed by the decision maker to a member of staff of this Office on 14 March 2011.

⁶ Ibid

36. Staff of this Office obtained copies of the following instruments of delegation:
- delegation dated 17 November 2009 under section 30 of the RTI Act by the principal officer of PTQ, to the principal officer, the Director-General, of DJAG, to deal with the applicant's access application dated 9 November 2009⁷, and
 - delegation dated 21 September 2009 under section 30 of the RTI Act by the principal officer of DJAG to the decision maker to deal with access applications made under the RTI Act in relation to delegations referred by another principal officer under section 30 of the RTI Act,
37. I have reviewed the above instruments of delegation and subdelegation and both instruments are valid and comply with the requirements of section 30 of the RTI Act.
38. I am of the view that in passing section 30 of the RTI Act Parliament clearly intended to allow subdelegation of certain powers in certain circumstances under the RTI Act, thus overriding the Latin maxim referred to by the applicant. Accordingly I consider that the decision was validly made by an appropriately appointed delegate.

DECISION

39. I vary the decision under review and find that access can be refused to the additional documents sought under sections 47(3)(e) and 52(1)(a) of the RTI Act on the basis that these documents do not exist.
40. 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: 14 March 2011

⁷ This delegation instrument authorised the sub-delegation of the delegated powers.