



Decision and Reasons for Decision

Application Number: 310524

Applicant: Stiller

Respondent: Department of Transport and Main Roads

Decision Date: 4 January 2012

Catchwords: RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION – REFUSAL OF ACCESS – DOCUMENTS NOT IN POSSESSION – applicant contended photos should be in the agency’s possession – whether agency has taken all reasonable steps to locate the photos – whether access to the photos can be refused under section 47(3)(e) of the *Right to Information Act 2009* (Qld) on the ground set out in section 52(1)(b) of the *Right to Information Act 2009* (Qld)

RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION – INFORMATION COMMISSIONER MAY DECIDE NOT TO REVIEW – applicant requested that the agency create affidavits and source and provide information not in the agency’s possession – whether part of the application for external review is misconceived on the ground set out in section 94(1)(a) of the *Right to Information Act 2009* (Qld)

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REASONS FOR DECISION

Summary

1. On 6 September 2010, the applicant made an application to the Department of Transport and Main Roads (**Department**) primarily requesting the production of multiple affidavits relating to the issuing of a Queensland motor vehicle modification approval, cancellation of the approval and the applicant's subsequent attempts to have the modification re-validated, and also seeking access to certain specified documents (**Access Application**).
2. By correspondence dated 10 September 2010, the Department advised the applicant that affidavits would not be provided and confirmed the scope of the Access Application as follows:

***Part 1** – The issuing of Queensland motor vehicle modification approval No. ..., the cancellation of same and my subsequent attempts to have the original modification re-validated and other matters relating to this modification approval/cancellation.*

***Part 2** – Please provide certified copies of 1929 or 1930 road registration of this vehicle, to establish the type and passenger carrying capacity.*
3. The applicant agreed to this scope in his application for internal review. Following the Department's Internal Review Decision, the applicant applied to this Office for external review.
4. As a result of informal resolution processes conducted by the Office during the course of the external review, the Department agreed that photos of Dodge Brother motor vehicle/s shown to the applicant at a meeting in 2008 by officers of the Department (**Photos**) are within the scope of the Access Application. The issues remaining for determination relate to the Photos and further documents raised by the applicant on external review.
5. After carefully considering all of the evidence and submissions before me, I am satisfied that:
 - access to the Photos may be refused on the basis that they cannot be found;¹
 - other documents of the Department sought by the applicant on external review are not within the scope of his Access Application; and
 - the applicant's external review application is misconceived insofar as it requests that the Department make and provide certain affidavits and source and provide factory production details regarding his vehicle.

Reviewable decision

6. The decision under review is the Department's Internal Review Decision dated 20 December 2010.

¹ Pursuant to sections 47(3)(e) and 52(1)(b) of the RTI Act.

Background

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

Evidence considered

8. In making this decision, I have taken into account the following:
 - the applicant's access application, application for internal review, application for external review and supporting material
 - the Department's Decision and Internal Review Decision
 - submissions provided by the applicant
 - submissions provided by the Department
 - file notes of telephone conversations between OIC staff and the applicant
 - file notes of telephone conversations between OIC staff and the Department
 - relevant provisions of the RTI Act; and
 - previous decisions of the Information Commissioner of Queensland and other relevant case law as identified in this decision.

Remaining issues in this external review

9. As a result of informal negotiations conducted by this Office during the course of the external review, the Department agreed² that the Photos are within the scope of the Access Application.
10. The applicant was advised of the Office's preliminary view that the Department was entitled to refuse access to:
 - parts of 2 pages and all of 57 pages as disclosure of the information would infringe the privileges of Parliament³
 - parts of 2 pages and all of 3 pages as the information is irrelevant to or outside the scope of his access application⁴
 - all of 1 page on the basis that the information is subject to legal professional privilege⁵
 - the following documents on the basis that they should be in the Department's possession and all reasonable steps have been taken to find the document but they cannot be found:
 - the 1929 or 1930 road registration; and
 - the Photos.
11. The applicant was advised that if he did not make submissions by a specified date, he would be taken to accept the preliminary view in resolution of the external review.
12. The applicant made submissions in response to the preliminary view. However, the submissions only contested the preliminary view insofar as it related to the Photos,⁶ and therefore the applicant is taken to accept the preliminary view insofar as it

² Contrary to its Internal Review Decision dated 20 December 2010.

³ Under section 47(3)(a) and schedule 3, section 6(c) of the RTI Act.

⁴ The Department previously refused access to this information on the basis that the information was exempt on the ground that disclosure of the information would infringe the privileges of Parliament under sections 47(3)(a) and 48 and schedule 3, section 6(c) of the RTI Act.

⁵ Under section 47(3)(a) and schedule 3, section 7 of the RTI Act.

⁶ While the applicant also raised concerns that additional documents should have been located by the Department, I am satisfied that the documents do not fall within the scope of the Access Application.

addressed the other issues listed at paragraph 10. above in resolution of those aspects of the external review.

13. Otherwise, the applicant's submissions stated that this Office should:
 - initiate specified criminal charges against specified persons regarding non-provision of the Photos
 - require that the Department search for and provide other documents of the Department sought by the applicant on external review
 - require Department staff to make and provide affidavits addressing specified issues, and to locate, obtain and provide factory production details regarding his vehicle.
14. In relation to the first of these three submissions, I am satisfied that the criminal charges suggested by the applicant do not appear relevant in the circumstances, nor does the Information Commissioner have jurisdiction to initiate them.
15. Accordingly, the issues remaining for determination in this review are:
 - whether the Department is entitled to refuse access to the Photos on the basis that they cannot be found
 - whether certain documents sought by the applicant on external review are within the scope of his Access Application; and
 - whether the Department should make and provide certain affidavits or source and provide factory production details regarding his vehicle.

The Photos

Relevant law

16. The RTI Act provides that access to a document may be refused if the document is nonexistent or unlocatable.⁷ 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.⁸
17. 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*⁹ (*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

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

⁸ Section 52(1)(a) of the RTI Act.

⁹ Unreported, Queensland Information Commissioner, 9 February 2009. Note — 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.

- 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.
18. Alternatively, an agency may rely on searches to satisfy itself that a document does not exist. In such cases the Information Commissioner indicated in *PDE* that in order to substantiate a conclusion that there are reasonable grounds to be satisfied that the document does not exist, it may be necessary for the agency or Minister to take all reasonable steps to locate the document sought. To ensure all reasonable steps have been taken to locate documents, a decision-maker should make enquiries and undertake searches of all relevant locations, having regard to the key factors listed above.¹⁰

Has the Department taken all reasonable steps?

19. The Photos were produced by two departmental officers during a meeting with the applicant in 2008 regarding why the Department would not revalidate approval of modifications to the applicant's vehicle.
20. In response to queries regarding the searches for the Photos conducted by the Department, the Department advised as follows:¹¹

I made enquiries with the officers of the department, [.....] and [.....]. They advise that the photos were randomly obtained from the internet and copies were not retained. Therefore the particular photos shown to Mr Stiller cannot be provided.

21. The Department was able to provide this Office with internet addresses that contain pictures which the two departmental officers say are very similar to those shown to the applicant. However, the Department was not able to confirm that these were the photos shown to the applicant in 2008.
22. The internet addresses were subsequently provided to the applicant by this Office.
23. In response, the applicant submitted:¹²

As [the Department] chose to produce these two photos as evidence relating to a matter in dispute, they would have been well aware that it was necessary to keep hard copies of same in their files. There is the very real possibility that [the Department] have access to these photos but are not prepared to produce copies of them.

Conclusion

24. On careful consideration of all the information before me, I am satisfied that:
- the Photos should be in the Department's possession
 - the Department has undertaken searches for the Photos sought by the applicant in all relevant locations, having regard to the Department's practices and procedures in relation to information management and other administrative practices, and therefore has taken all reasonable steps to locate the Photos
 - there are reasonable grounds for the Department to be satisfied that the Photos cannot be found; and

¹⁰ See *PDE* at paragraph 49.

¹¹ By correspondence dated 14 November 2011.

¹² By correspondence dated 6 December 2011.

- access may be refused on the basis that the Photos cannot be found.¹³

The document sought on external review

25. The applicant's submissions stated that this Office should seek copies of specified types of documents from the Department:

... QT records of my complaints to them regarding their falsification of records and documentation of their response. ...

... I hand delivered a letter each week to security at 85 George Street. Forty six letters in total. Some were addressed to the Minister for Transport, some to the Director-General of QT, and several to various other members of QT staff. ... Will you please ask QT to provide me with copies of these missing letters and internal comment generated by them? ...

26. On careful consideration of all the information before me, I am satisfied that the documents specified by the applicant do not fall within the scope of the Access Application as confirmed by the Department and agreed to by the applicant in his application for internal review.

Affidavits and factory production details

27. The applicant's submissions stated that this Office should require Department staff to make and provide affidavits addressing specified issues, and to locate, obtain and provide factory production details regarding his vehicle.

28. On careful consideration of all the information before me, I am satisfied that:

- the Department is not required to make and provide the affidavits sought by the applicant, nor to locate, obtain and provide the factory production details regarding his vehicle, by section 68(1)(e) or any other provision of the RTI Act; and
- accordingly, the applicant's external review application is misconceived insofar as it seeks the affidavits and factory production details
- on this basis, I may refuse to deal with this part of the applicant's external review application under section 94(1)(a) of the RTI Act.

DECISION

29. I vary the Internal Review Decision by finding that:

- the Department is entitled to refuse access to the Photos under sections 47(3)(e) and 52(1)(b) of the RTI Act
- the documents sought by the applicant from the Department on external review are outside the scope of his Access Application; and
- the applicant's external review application insofar as it requests that the Department create and provide affidavits and source and provide factory production details is misconceived and will not be further dealt with under section 94(1)(a) of the RTI Act.

¹³ Pursuant to sections 47(3)(e) and 52(1)(b) of the RTI Act.

30. 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: 4 January 2012

APPENDIX

Significant procedural steps

Date	Event
8 September 2010	The Department receives the applicant's RTI application dated 6 September 2010.
10 September 2010	The Department confirms the scope of the Access Application.
27 October 2010	<p>The Department locates 2,324 pages and decides (Decision) to:</p> <ul style="list-style-type: none"> • in relation to Part 1 of the Access Application: <ul style="list-style-type: none"> ○ grant full access to 2,256 pages ○ refuse access to 2 pages on the basis that the information is subject to legal professional privilege ○ refuse access to 62 pages on the basis that disclosure of the information would infringe the privileges of parliament; and • in relation to Part 2 of the Access Application: <ul style="list-style-type: none"> ○ refuse access on the basis that the Department does not hold any documents responsive to the applicant's request.
22 November 2010	The applicant applies to the Department for an internal review. In his application, he requests that the Department supply him with copies of the Photos.
20 December 2010	The Department decides (Internal Review Decision) to affirm the Decision and advises the applicant that the Photos were not within the scope of the Access Application and therefore could not be considered.
15 January 2011	The applicant applies to OIC for external review.
9 February 2011	OIC informs the Department and the applicant that the external review application has been accepted.
10 February 2011	The Department provides OIC with copies of relevant documents.
15 February 2011	The applicant provides a submission in support of his case.
17 October 2011	OIC seeks the Department's clarification regarding the relevant documents and requests copies of certain pages released to the applicant.
18 October 2011	The Department provides OIC with clarification about the relevant documents and provides a copy of the requested pages.
2 November 2011	OIC writes to the Department requesting further information and conveys a written preliminary view on some of the issues in the external review. OIC invites the Department to provide a response to the requests for further information and, if it contests the preliminary view, to provide a submission in support of its case by 16 November 2011.
15 November 2011	The Department provides the requested information and a submission. The Department agrees to release some additional information to the applicant and agrees that the Photos are within scope of the Access Application.
23 November 2011	OIC advises the applicant that the Department has agreed to release some additional information and conveys a written preliminary view. OIC invites the applicant to provide submissions in support of his case by 7 December 2011 if he contests the preliminary view.

	OIC requests that the Department release the additional information to the applicant.
6 December 2011	The applicant provides a submission.