



Decision and Reasons for Decision

Application Number: 311064

Applicant: Vanbrogue Pty Ltd

Respondent: Department of Natural Resources and Mines

Decision Date: 17 December 2012

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL TO DEAL – previous application for same documents – whether the later application, on its face, discloses any reasonable basis for again seeking access – where the first application has been the subject of a completed external review – section 43 of the *Right to Information Act 2009 (Qld)* – section 43(3) of the *Right to Information Act 2009 (Qld)*

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of Environment and Resource Management (**Department**)² under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to certain information about water licences and riverine protection permits on a specified lot of land (the **Property**).
2. The Department located 135 relevant pages and decided³ to:
 - grant full access to 71 pages
 - refuse access in full to 11 pages under sections 47(3)(f) and 53(d) of the RTI Act on the basis that they comprise information that was commercially available
 - omit 6 pages which were identified as copy documents
 - refuse access in part to 46 pages on the basis that they comprise information that would, on balance, be contrary to the public interest to be disclosed under section 47(3)(b) of the RTI Act; and
 - delete certain information from 1 page on the basis that the information is irrelevant to the access application under section 73 of the RTI Act.
3. The applicant sought internal review⁴ of the Department's decision.

¹ By application dated 3 February 2012, received by the Department on 6 February 2012.

² Machinery of government changes in April 2012 transferred relevant responsibility from the Department Environment and Resource Management (**DERM**) to the Department of Natural Resources and Mines (**DNRM**). Accordingly, existing RTI applications and reviews involving certain applications made to DEEDI before the machinery of government changes now rest with DNRM, including this external review. For ease of reference, I will simply refer to 'the Department'.

³ By decision dated 8 March 2012.

⁴ On 27 March 2012.

4. On internal review, the Department affirmed its original decision.⁵
5. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review.⁶
6. During the course of the review, the Department identified a previous application made to the Department by the applicant, for documents concerning the Property. Accordingly, the issue of whether the Department was entitled to refuse to deal with part of the access application under section 43 of the RTI Act was considered.
7. In the circumstances, the Department is entitled to refuse to deal with the part of the access application which remains in issue in this review under section 43(3)(d)(ii) of the RTI Act.

Background

8. Significant procedural steps relating to the external review are set out in the appendix to this decision.

Reviewable decision

9. The decision under review is the Department's internal review decision dated 26 April 2012.

Evidence considered

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

Issues in this review

11. During the course of the external review, the parties informally resolved all but one issue under review.
12. Accordingly, the only issue remaining is whether the Department is entitled to refuse to deal with the access application under section 43 of the RTI Act to the extent that it seeks access to documents relating to the approval of a culvert on the Property.

Relevant law

13. Section 43 of the RTI Act applies if:⁷
 - an applicant makes an initial access application to an agency, and then a subsequent access application to the same agency seeking access to one or more of the same documents; and
 - the later application does not, on its face, disclose any reasonable basis for again seeking access to the documents.
14. Relevantly, section 43(3)(d)(ii) of the RTI Act allows an agency to refuse to deal with the later application to the extent that it seeks access to documents requested under

⁵ On 26 April 2012.

⁶ On 25 May 2012.

⁷ Section 43(1) of the RTI Act.

the first application, if the agency's decision on the first application has been the subject of a completed review (other than an internal review).

Findings

Does the later application seek access to one or more of the same documents sought under the first application?

15. Yes, for the reasons that follow.
16. On 21 January 2011, the applicant made its first application to the Department seeking access to "*all documents held by (the Department) in relation to (the Property)*" for the period 18 October 1946 to 21 January 2011.
17. The applicant subsequently lodged another application (which is the subject of this external review) seeking access to various categories of documents relating to the Property for the period 1 January 1990 to 3 February 2012. The only part of this second access application which remains under review is that which seeks access to documents relating to approval of the culvert on the Property (**Approval Documents**).
18. The applicant provided OIC with information suggesting the culvert was built in 2004.⁸
19. After carefully considering the scope of the access applications, I am satisfied that the later application seeks access to the same documents sought under the first application because the scope of the first application:
 - is for "*all documents*" relating to the Property
 - is broad enough to include Approval Documents; and
 - seeks access to documents within the relevant date range in which the culvert appears to have been constructed (and during which any approval process would have taken place, if such a process was undertaken).⁹

Does the later application, on its face, disclose any reasonable basis for again seeking access to the documents?

20. On its face, the later application discloses no reasonable basis for the applicant to again seek access to the Approval Documents.
21. During the course of the external review, the applicant made submissions about the sufficiency of the Department's searches for documents responding to the access application. Relevantly, the applicant referred to a Departmental Record of Meeting dated 24 November 2011 which indicates that the culvert was built in 2004 as a basis to expect that the Approval Documents are held by the Department.
22. In the course of considering the sufficiency of the Department's searches for other documents (which are no longer in issue in this review), OIC sought the Department's response to the applicant's submission in relation to the relevant Departmental Record of Meeting. A Departmental officer from the relevant business unit advised OIC¹⁰ that the Department:

⁸ A Record of Meeting dated 24 November 2011 released to the applicant by the Department which indicates the culvert was built in 2004.

⁹ See paragraph 22 of this decision.

¹⁰ By telephone conversation with OIC staff on 3 September 2012.

- was unaware of the existence of the culvert before the meeting on 24 November 2011
- was advised by the land owner that the culvert was constructed in 2004
- did not approve the culvert's construction; and
- does not consider the culvert required Departmental approval.

23. I have carefully considered the applicant's basis for seeking access to Approval Documents and am not satisfied in the circumstances that the access application discloses a reasonable base for again seeking access to these documents. Moreover, based on the Department's submissions set out in the preceding paragraph, I consider it reasonable to conclude in any event that no Approval Documents are held by the Department.

Has the Department's decision on the first application been the subject of a completed review?

24. The Department's decision on the first application was the subject of a completed external review by the OIC.¹¹ Accordingly, section 43(3)(d)(ii) of the RTI Act applies.
25. I am satisfied that the Department is entitled to refuse to deal with the later application to the extent that it seeks access to documents sought under the first application on the basis set out above.

DECISION

26. I vary the Department's decision by finding that the Department is entitled to refuse to deal with the part of access application remaining in issue under section 43(3)(d)(ii) of the RTI Act.
27. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Assistant Information Commissioner Corby

Date: 17 December 2012

¹¹ External review reference 310694 was finalised by OIC on 8 May 2012.

APPENDIX

Significant procedural steps

Date	Event
6 February 2012	By application to the Department dated 3 February 2012, the applicant sought access to information created after 1 January 1990, concerning water licences and riverine protection permits relating to specified lots of land.
8 March 2012	<p>The Department advised the applicant that it had located 135 relevant pages and decided to:</p> <ul style="list-style-type: none"> • grant full access to 71 pages • refuse access in full to 11 pages under sections 47(3)(f) and 53(d) of the RTI Act on the basis that they comprised information that was commercially available • omit 6 pages which were identified as copy documents • refuse access in part to 46 pages on the basis that they comprised information that would, on balance, be contrary to the public interest to be disclosed under section 47(3)(b) of the RTI Act; and • delete certain information from 1 page on the basis that the information was irrelevant to the access application under section 73 of the RTI Act.
27 March 2012	By correspondence the applicant applied to the Department for internal review of its decision on the basis that further relevant documents should exist with the Department.
26 April 2012	The Department affirmed its original decision on internal review.
25 May 2012	By correspondence, the applicant applied to OIC for external review of the Department's decision on the grounds that " <i>searches undertaken of (the Department's) files are still deficient</i> " and " <i>(t)here are documents still missing</i> ".
31 May 2012	<p>OIC requested the Department undertake further searches as necessary to locate any additional documents responding to the access application and provide a submission setting out:</p> <ul style="list-style-type: none"> • locations that were searched for documents • reasons those locations were chosen (including reference to any relevant record keeping policies and/or practices) • search terms used in any electronic databases; and • if no further documents could be located, any explanation the Department could offer as to why no further documents exist.
6 June 2012	The Department provided OIC with submissions on the sufficiency of its searches. The Department also submitted that part of the access application sought access to information already sought in a previous application made to the Department by the applicant.
7 June 2012	OIC made enquiries with the Department regarding the scope of the previous access application.
30 August 2012 – 3 September 2012	OIC made enquiries with the relevant business unit about the sufficiency of searches for relevant documents. The relevant business unit submitted that no further documents existed relevant to the access application and provided relevant information about its processes.
27 September 2012	By correspondence, OIC conveyed a preliminary view to the applicant that the Department was entitled to refuse to deal with part of the access application under section 43(3)(d)(ii) of the RTI Act; and that the Department was entitled to refuse access to any additional documents under sections 47(3)(e) and 52(1)(a) of the RTI Act on the basis that the Department had undertaken all reasonable steps to locate further documents and no such documents exist.
9 October 2012	The applicant wrote to OIC indicating that it did not accept the preliminary view in relation to the refusal to deal issue, but otherwise accepted OIC's view in relation to the sufficiency of the Department's searches.