



## **Decision and Reasons for Decision**

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**Application Number:** 310061

**Applicant:** Henderson

**Respondent:** Department of Justice and Attorney-General

**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 third party correspondence– 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 seeks access to certain documents of the Office of the Legal Friend (**OLF**), Office of the Adult Guardian (**OAG**) and the Guardianship and Administration Tribunal (**GAAT**) under the *Right to Information Act 2009* (Qld) (**RTI Act**).
2. The application was processed by the Department of Justice and Attorney-General (**DJAG**) as the Department responsible for these three entities.
3. DJAG initially released 52 documents to the applicant and refused access to 454 folios.
4. During the course of this external review, DJAG agreed to release the additional 454 folios to the applicant.
5. The applicant has been provided with copies of all documents located and DJAG's relevant submission including 4 pages of attachments detailing the searches undertaken.
6. The applicant submits that DJAG has not located all relevant communications with third parties including the Public Trust Office.
7. Having considered the submissions and evidence before me, I am satisfied that:
  - DJAG conducted comprehensive searches and has taken all reasonable steps to locate additional documents
  - there are reasonable grounds to be satisfied that no additional 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

8. The decision under review is DJAG's initial decision dated 1 December 2009.

### Relevant evidence

9. In making this decision, I have taken the following into account:
  - the applicant's applications and supporting material
  - DJAG's considered decision
  - file notes of telephone conversations between staff of this Office and DJAG
  - correspondence from the applicant and DJAG
  - relevant provisions of the RTI Act
  - previous decisions of the Information Commissioner of Queensland as identified in this decision.

## Background

10. In his external review application, the applicant states that:

...  
... *the bases of my application for external review are:*

(a) *The interpretation and conclusion of the decision maker under the head Previous Application for same documents...*

...[and]

(b) *Sufficiency of search*

*The documents disclosed do not include details of all communications with third parties, including the Public Trust Office.*

...

11. Point (a) was resolved with DJAG agreeing to release 454 additional documents.
12. The applicant submits that point (b) is not resolved by this further release.
13. On this basis, sufficiency of search remains an issue for determination in this review.
14. In external reviews involving sufficiency of search issues, it is important to identify the documents which an applicant considers have not been located at the outset of the review. This is particularly so this Office can ensure that any further searches it asks an agency to conduct are directed to appropriate areas.
15. As the external review application does not provide detailed information about the information which the applicant claims has not been located, the applicant was asked to provide submissions:
  - identifying the particular documents which the applicant says have not been located
  - setting out the grounds on which the applicant's contention that additional documents should have been located are based.
16. In response to this request, the applicant raised concerns about the onus in sufficiency of search matters and indicated that it should rest with the relevant agency.
17. I confirm that generally, it is the agency which made the decision under review that has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.<sup>1</sup> However, I also note that the Information Commissioner can reasonably request a participant to provide assistance in relation to a review, even where the participant does not have the onus under section 87 of the RTI Act.<sup>2</sup>
18. The applicant has not provided this Office with any specific information of the type requested.

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<sup>1</sup> Section 87(1) of the RTI Act and the exception set out in section 87(2) of the RTI Act.

<sup>2</sup> Section 96(2) of the RTI Act.

## Applicant's submissions

19. In summary, the applicant submits that:

- not all responsive documents have been located, and
- without sworn statutory declarations setting out the searches conducted by relevant agencies, he does not accept that the searches conducted are sufficient.

## DJAG submissions

20. Given the issues in this review, this Office asked DJAG to provide details of:

- locations that were searched for documents
- reasons those locations were chosen
- search terms used in any electronic databases, and
- if no further documents can be located, an explanation as to why no further documents exist.

21. In its submission<sup>3</sup> in response, DJAG provided 4 pages of attachments detailing the searches conducted and advised that:

...

### *Searches for relevant documents*

*Given the terms of the applicant's access application, a search request was initially issued to the Office of the Adult Guardian. As disclosed in the Department's decision, an OAG officer responded as follows:*

*I have inquired from the OAG data base as well as from an officer who was employed here when the Office of the Adult Guardian came into being in 2000.*

*There is no record of a file of any kind for [the third party] which indicated that the Adult Guardian was never appointed as a guardian for him nor was there an investigation in regard to [the third party].*

*The files from the legal friend did not come across to the Office of the Adult Guardian. GAAT may have a better idea as to where they went.*

*A further search request was issued to the GAAT (selected for searches given the terms of the applicant's access application). The A/Principal Registrar Tribunals responded to this request, supplying the Department's RTI & Privacy Unit with documents contained on GAAT file no. 608 relating to [the third party], entitled 'Part B – Hearings'.*

*The decision-maker made enquiries as to the possible existence of further responsive documents by email ... to the A/Registrar, GAAT. ... These further enquiries disclosed the existence of the 454 documents contained on 'Part A' of GAAT file no. 608.*

*The documents contained on the entire GAAT file consist of a considerable amount of documentation created or received by the IDCCQ [Intellectually Disabled citizens Council of Queensland], the Legal Friend [OLF], court documentation, and correspondence. Once part A had been located and reviewed, there did not appear to be anything suggesting the existence of further potential responsive documents.*

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<sup>3</sup> I note that by letter dated 4 August 2010, this Office provided the applicant with a copy of DJAG's submission including 4 pages of attachments relevant to searches conducted.

## Sufficiency of searches

22. 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.
23. I note that section 47(3)(e) of the RTI Act provides that access to a document may be refused because the document is nonexistent or unlocatable and section 52 of the RTI Act sets out when a document is nonexistent or unlocatable.
24. The Information Commissioner considered sufficiency of search in *PDE and the University of Queensland*<sup>4</sup> (*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.
25. In *PDE*, the Information Commissioner explained 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:
    - the nature and age of the requested document/s
    - the nature of the government activity the request relates to.
26. 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.<sup>5</sup>
27. As DJAG undertook searches in order to satisfy itself that further relevant documents do not exist, it is necessary to ask the following questions:
- has DJAG taken all reasonable steps to locate additional documents, and
  - are there reasonable grounds for DJAG to be satisfied that no additional documents exist.

### ***Has DJAG taken all reasonable steps to locate additional documents?***

28. The applicant seeks certain documents of the OLF, the OAG and the GAAT.

<sup>4</sup> (Unreported, Queensland Information Commissioner, 9 February 2009).

<sup>5</sup> See *PDE*, particularly at paragraph 47.

29. In summary, I note that DJAG has undertaken the following searches:
- upon receipt of the access application, DJAG requested the OAG undertake searches for responsive documents – OAG located no relevant OAG documents and advised that the Adult Guardian was never appointed as guardian for the relevant third party
  - following searches undertaken by OAG, DJAG requested the GAAT undertake searches – GAAT located one responsive file, titled ‘Part B’ and following further enquiries by DJAG as to the existence of a corresponding ‘Part A’ to that file, a file titled ‘Part A’ was located.<sup>6</sup>
30. I also note that the GAAT files provided to the applicant contain a significant number of documents including:
- documents of the OLF (which is no longer in existence)
  - documents of the IDCCQ
  - court documentation, and
  - correspondence with third parties.
31. On the basis of the matters set out in this decision and in the absence of specific information regarding the documents which the applicant states have not been located, I am satisfied that:
- in determining where and which searches to undertake, DJAG has appropriately taken into account the relevant factors set out in *PDE* including:
    - the nature of the government activity to which the application relates
    - the structure, functions, responsibilities and information management arrangements of relevant entities including an entity which no longer exists (OLF)
  - DJAG requested comprehensive searches from relevant entities and areas, and
  - DJAG has taken all reasonable steps to locate additional documents.

***Are there reasonable grounds for DJAG to be satisfied that no additional documents exist?***

32. I have carefully considered all of the submissions and evidence before me.
33. In respect of whether there are reasonable grounds for DJAG to be satisfied that no additional documents exist, I note that:
- DJAG has provided explanations for the non-existence of additional documents sought by the applicant, for example there are no reasonable grounds to expect that additional OAG documents exist, as it appears the Adult Guardian was never appointed as guardian for the relevant third party (whose affairs are the subject of the application)
  - it is evident that DJAG’s continued enquires as to the location of files that appeared to be missing, resulted in further documents being located by GAAT which have been provided to the applicant and which include relevant documents

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<sup>6</sup> I confirm that both Part A and Part B of the GAAT file have been provided to the applicant.

of the OLF (which is no longer in existence), the IDCCQ, court documents and correspondence with third parties as sought by the applicant.

34. Taking into account the significant number of documents located and provided to the applicant, the nature and content of those documents and the comprehensive nature of the searches conducted in response to the access application, I am also satisfied on the evidence before me that there are reasonable grounds for DJAG to be satisfied that no additional documents exist.
35. With respect to the applicant's assertion that statutory declarations are necessary to establish that the searches conducted are sufficient, I am satisfied that procedure on external review is within the discretion of the Information Commissioner<sup>7</sup> and in the circumstances of this review, it is unnecessary for DJAG to provide a statutory declaration containing the information already provided by way of submission and detailed annexure.

## **DECISION**

36. 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 such documents do not exist.
37. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**Jenny Mead**  
**Right to Information Commissioner**

**Date: 14 March 2011**

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<sup>7</sup> Section 95 of the RTI Act.