



Decision and Reasons for Decision

Application Number: 310257

Applicant: Stiller

Respondent: Department of the Premier and Cabinet

Decision Date: 30 May 2011

Catchwords: **RIGHT TO INFORMATION – REFUSAL TO DEAL WITH ACCESS APPLICATION – EFFECT ON AGENCY’S FUNCTIONS – applicant sought access to various documents and information in relation to the Integrity and Accountability Green Paper and the Response to Integrity and Accountability in Queensland – agency refused to deal with the application under section 41 of the *Right to Information Act 2009* (Qld) – whether the work involved in dealing with the application would, if carried out, substantially and unreasonably divert resources of the agency from their use by the agency in performing its functions**

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REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Premier and Cabinet (**Department**) for various documents and information including public submissions in relation to the Integrity and Accountability Green Paper (**Green Paper**) and the Response to Integrity and Accountability in Queensland (**RIAQ**).
2. On 14 April 2010, the Department decided to refuse to deal with the application under section 41 of the *Right to Information Act 2009* (**RTI Act**) following an unsuccessful attempt to negotiate with the applicant ways to reduce the scope of the application. On internal review, the Department affirmed the initial decision (following a reassessment of the time and resources it would take to respond to the application).
3. After carefully considering all the submissions and evidence before me, I affirm the Department's decision to refuse to deal with the applicant's application.

Background

4. The applicant sought access¹ to the following in relation to the Green Paper and the RIAQ:
 - *Complete Hardcopies of all submissions made, hardcopy, electronic and other, to the Integrity and Accountability Green Paper, those posted on the internet, and those that were not posted, without deletion. I submit that the names, addresses and all other contact details are a part of my request, and relevant to the purpose of this request.*
 - *Hard copies of all comments and enquiries posted on the net, and those not posted on the net, electronic and others, made or submitted in response to the submissions and the Response, without deletions, including names, addresses and contact details. I submit that all names, addresses and contact details, are a part of this request and relevant to the purpose of this request.*
 - *Copies of all plans, notes and records related to the planning, delivery, instigation and implementation of I & A Green Paper, the submissions and the Response. This application includes all METADATA...*
5. The Department gave the applicant written notice² of its intention not to deal with the application (**Notice**). In forming this view, the Department stated that the following factors were considered:
 - to complete the applicant's request, Departmental staff from various business units would need to spend approximately 23 days collectively searching for and collating the requested information. This would include searching relevant email mailboxes, computer drives, and the Department's record management system.
 - Additional time would then need to be spent examining the documents located and conducting numerous consultations with third parties who may be concerned about the release of their information.

¹ By application dated 5 March 2010.

² Dated 31 March 2010.

6. In the Notice, the Department stated the relevant consultation provisions³ and invited the applicant to provide a written response.
7. In response⁴ to the Notice, the applicant indicated that the Department had not provided any reason for the refusal.
8. A Departmental officer subsequently contacted the applicant by telephone⁵ and suggestions were made as to how the applicant could reduce the scope of his application to remove the grounds of refusal. The applicant maintained that the scope of his application was for everything included in his original application.
9. By decision dated 14 April 2010, the Department stated that “... *the work involved in processing your original request would substantially and unreasonably divert the resources of this agency...*” and that as “...*it was not possible to reduce the scope of your request during consultation with you...*”, the Department was refusing to deal with the application pursuant to section 41 of the RTI Act.
10. The applicant sought an internal review of the Department’s decision on the basis that he believed that his “...*application has been treated in a biased and prejudiced manner, and in breach of the intent of the Act, the Object of the Act, the Legal obligation of the Act, right to access, Pro-disclosure of the Act, and the Directives of the Act.*”⁶
11. On internal review,⁷ the Department affirmed the original decision. The Department took into account the following:
 - responses received during the initial application processing from relevant areas of the Department indicated that it would take at least 23 days to locate and collate relevant material
 - the applicant maintained that the scope of his application was to remain as originally requested; and
 - relevant areas of the Department were again contacted regarding the length of time to locate and collate material responsive to the request. All areas confirmed that their initial estimates were accurate.
12. The applicant applied to the Office of the Information Commissioner (**OIC**) for an external review of the Department’s decision to refuse to deal with his application.⁸
13. During the course of the external review, the applicant indicated⁹ that he would be open to any proposals that the OIC could come up with to informally resolve this external review. Discussions were then held between OIC staff and staff of the Department¹⁰.
14. The Department agreed to process an access application in the following terms:

³ Section 42 of the RTI Act.

⁴ By reply email dated 31 March 2010.

⁵ On 12 April 2010.

⁶ By correspondence dated 22 April 2010.

⁷ Internal review decision dated 24 May 2010.

⁸ Received on 15 June 2010.

⁹ During a telephone conversation with an OIC officer on 19 July 2010.

¹⁰ On 18 and 20 August 2010.

“Copies of submissions made to the Queensland Government’s Integrity and Accountability Green Paper except those submissions published in full. That is:

- *Information which was removed from published submissions; and*
- *Submissions which were not published.”*

15. The proposed reduced scope was conveyed to the applicant and a written response was received advising that the proposed reduced scope was insufficient to proceed with as it did not cover the purpose of his application.¹¹

16. The applicant’s final submission in support of his application is summarised as follows:¹²

- In rejecting the Department’s decision to refuse to deal with his application on the basis that the scope was too broad, the applicant relied on section 441 of the *Criminal Code Act 1899* (Qld) which *“...makes it quite clear that the fraudulent falsification of records is a serious criminal matter.”*
- In support of his assertion of criminal falsification, the applicant provided a copy of a letter received by him from P.J. Vidgen, Deputy Director-General Governance, Department of Premier and Cabinet dated 15 February 2010 which states *“All public submissions are available to be viewed or downloaded from the Integrity and Accountability website...”* and *“In relation to your request regarding your submission dated 4 September 2009 (Vilification), my correspondence of 2 November 2009 advised that it was assessed against the guidelines and consequently was not published on the website.”*
- The applicant contends that should the OIC *“...give consideration to supporting the [Department of Premier and Cabinet] in their falsification of records...”* that the OIC should consider section 10 of the *Criminal Code Act 1899* (Qld) in relation to accessories after the fact.
- The applicant concluded by stating *“I hereby take the opportunity to emphatically declare that I still wish to have my original application considered in its fullness, and will consider any deviation to be worthy of measure against Section 10 of the [Criminal Code] Act.”*

Reviewable decision

17. The decision under review is the Department’s internal review decision dated 24 May 2010.

Evidence considered

18. 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 decisions
- 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

¹¹ By correspondence and reply both dated 26 August 2010.

¹² Dated 21 September 2010.

- relevant provisions of the RTI Act and *Information Privacy Act 2009 (IP Act)*; and
- previous decisions of the Information Commissioner of Queensland and other relevant case law as identified in this decision.

Preliminary issue

19. While I note the applicant asserts that the Department is falsifying records in relation to the Green Paper and RIAQ, such matters are not within my jurisdiction to deal with. The RTI Act gives people a right of access to documents that exist and are in the possession or under the control of government agencies, such as the Department. The RTI Act does not provide jurisdiction to investigate the contents of documents to determine whether or not there has been a breach of compliance with other legislation nor does it permit a review of Departmental records management practices to ensure they are being applied correctly.
20. My role in this review is therefore limited to determining whether the Department's decision to refuse to deal with the applicant's access application is permitted under the RTI Act.

Relevant law

21. Parliament intends that an agency receiving an access application will deal with that application unless dealing with the application would, on balance, be contrary to the public interest. The limited circumstances in which dealing with an access application will be contrary to the public interest are set out in sections 40, 41 and 43 of the RTI Act.
22. Relevantly, section 41 of the RTI Act permits an agency to refuse to deal with an access application if it considers the work involved in dealing with the application would substantially and unreasonably divert the resources of the agency from performing its functions.¹³
23. Before making a decision to refuse to deal with an application, section 42 of the RTI Act provides that an agency must state in writing to the applicant its intention to refuse to deal with the application and offer a period for the applicant to consult with the agency, with a view to amending an application to remove the grounds for refusal.
24. Sections 41 and 42 of the RTI Act are set out in the Appendix.

Findings

Did the Department complete the prerequisites before refusing to deal with the application?

25. The answer to this question is 'yes' for the reasons that follow.
26. Section 42 of the RTI Act sets out a number of procedural steps an agency must comply with before refusing to deal with an access application. These steps include giving the applicant a written notice stating its intention to refuse to deal with the application, advising the applicant of the consultation period and explaining the effect of particular paragraphs in section 42.

¹³ Section 41(1)(a) of the RTI Act.

27. The steps taken by the Department, as set out at paragraphs 4 to 9 above, are evidence of the Department's compliance with the requirements of section 42.
28. Specifically the Department:
- issued a written notice to the applicant stating its intention not to deal with the access application
 - invited the applicant to consult with the Department on the terms of the application to remove the grounds of refusal
 - allowed the prescribed consultation period; and
 - stated the effect of subsections (2) to (6) of section 42 of the RTI Act.

Would dealing with the application substantially and unreasonably divert the Department's resources from their use in its functions?

29. The answer to this question is 'yes' for the reasons that follow.
30. In determining whether dealing with the application would substantially and unreasonably divert the Department's resources from its functions, the Department:
- a) **must not** have regard to any reasons the applicant gives for applying for access or the Department's belief about what the applicant's reasons are for applying for access.¹⁴
 - b) **must** have regard to the resources that would be used for the following:¹⁵
 - identifying, locating or collating any documents in the Department's filing system
 - making copies, or edited copies of any documents
 - deciding whether to give, refuse or defer access to any documents, including resources that would have to be used in examining any documents or conducting third party consultations;¹⁶ and
 - notifying any final decision on the application.
31. In relation to a) above, there is no evidence before me to suggest that the Department has had regard to such factors and I am therefore satisfied that the Department has not had regard to such factors.
32. In relation to b) above, in its dealings with the applicant and OIC, the Department has provided the following information about its estimation of the resources involved in processing the application:
- *identifying, locating or collating any documents in the Department's filing system and making copies, or edited copies, of any documents*
 - the Department has identified nine business areas within the Department which hold documents responsive to the applicant's application

¹⁴ Section 41(3) of the RTI Act.

¹⁵ Though this is not an exhaustive list: section 41(2) of the RTI Act.

¹⁶ Under section 37 of the RTI Act.

- eight business areas hold a total minimum of 8,164 documents within the scope of the application which it is estimated, on average, comprise 4 pages each¹⁷
 - one business area holds 3 documents comprising 504 pages in total
 - the approximate number of pages is therefore 33,160¹⁸
 - it is estimated that it would take, collectively, 23 days to locate and prepare all of the documents; and
 - in addition to the above documents, a search for relevant material in the Office of the Director-General would require access to long archived material and would take an administrative assistant two to three days.
- *deciding whether to give, refuse or defer access to any documents, including resources that would have to be used in examining any documents or conducting third party consultations*
 - the Department's Right to Information & Privacy Unit consists of the Manager, who is the only delegated decision maker, and an administrative officer
 - it is estimated that if it takes a minimum of one minute to review each page, the review process would occupy the decision maker exclusively for a minimum of 553 hours, or 15.3 weeks (if based on a 7 hour day)
 - the documents contain the personal information of third parties and the review process would involve a careful consideration of each page and the redaction of information; and
 - as the documents contain the information of numerous third parties, consultation will be required to be undertaken and it is estimated that there may be in excess of 20 parties to be consulted which will take some considerable time.
33. In summary, the Department estimates that the time involved in processing the application is as follows:
- 23 days to locate, collate and prepare the documents identified
 - 2 to 3 days for an administrative assistant to conduct a search of the Office of the Director-General for relevant material
 - a minimum of 15.3 weeks for the delegated decision maker to review the documents; and
 - some considerable time to consult with in excess of 20 third parties.
34. The Department's RTI & Privacy Unit consists of the Manager, who is the only delegated decision maker, and one full-time administrative officer.
35. The Department's 2009-2010 Annual Report states that as at 30 June 2010, the Department employed 684 full time equivalent employees.¹⁹

¹⁷ The Department advised the OIC that a number of documents were examined and the number of pages in each document in this selection ranged from one page to 43 pages. The Department has nominated an average of 4 pages per document.

¹⁸ (8,164 documents x 4 pages each = 32,656 pages) plus 504 pages = 33,160 pages.

¹⁹ At page 58.

36. The task of locating and preparing the documents alone is quite a substantial task given that the documents are held by nine separate business areas within the Department. The Department has submitted that this task alone would take the nine business areas collectively 23 days to complete.
37. While the Department has identified that there are approximately 33,160 pages responsive to the applicant's application, I am of the view that a portion of these pages may already be in the public arena or may not contain information which is exempt under the RTI Act, thus reducing the actual number of pages requiring a detailed assessment by the Department's delegated decision maker.
38. However, even if a conservative approach was taken in revising the Departments estimate were taken, and the number were halved, the number of pages the delegated decision maker would need to review would be 16,580 pages, and the process of making a proper assessment of the pages would still take a minimum of 7.25 weeks.
39. In relation to the pages that would need to be reviewed by the Department's decision maker, I am satisfied that they would need to be carefully checked and any exempt information redacted. The redactions would then need to be checked. Consultation would also need to be undertaken if the Department proposed to release information which might be of concern to a third party.
40. In view of the number and type of documents involved, the number of business units of the Department involved, the administrative processes needed to identify and deal with the documents and the consultation required, on the evidence before me, I am satisfied that dealing with the applicant's application would amount to a substantial and unreasonable diversion of the Department's resources from their use in the Department's functions.

DECISION

41. For the reasons set out above, I affirm the Department's decision to refuse to deal with the application under section 41 of the RTI Act on the basis that it would substantially and unreasonably divert the Department's resources from their use by the agency in performing its functions.
42. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Jenny Mead
Right to Information Commissioner

Date: 30 May 2011

APPENDIX

Relevant provisions of the RTI Act

Section 41 of the RTI Act provides:

41 Effect on agency's or Minister's functions

- (1) *An agency or Minister may refuse to deal with an access application or, if the agency or Minister is considering 2 or more access applications by the applicant, all the applications, if the agency or Minister considers the work involved in dealing with the application or all of the applications would, if carried out—*
 - (a) *substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions; or*
 - (b) *interfere substantially and unreasonably with the performance by the Minister of the Minister's functions.*
- (2) *Without limiting the matters to which the agency or Minister may have regard in making a decision under subsection (1), the agency or Minister must have regard to the resources that would have to be used—*
 - (a) *in identifying, locating or collating any documents in the filing system of the agency or the Minister's office; or*
 - (b) *in deciding whether to give, refuse or defer access to any documents, or to give access to edited copies of any documents, including resources that would have to be used—*
 - (i) *in examining any documents; or*
 - (ii) *in consulting in relation to the application with a relevant third party under section 37; or*
 - (c) *in making a copy, or edited copy, of any documents; or*
 - (d) *in notifying any final decision on the application.*
- (3) *In deciding whether to refuse, under subsection (1), to deal with an access application, an agency or Minister must not have regard to—*
 - (a) *any reasons the applicant gives for applying for access; or*
 - (b) *the agency's or Minister's belief about what are the applicant's reasons for applying for access.*

Section 42 of the RTI Act provides:

42 Prerequisites before refusal because of effect on functions

- (1) *An agency or Minister may refuse to deal with an access application under section 41 only if—*
 - (a) *the agency or Minister has given the applicant a written notice—*
 - (i) *stating an intention to refuse to deal with the application; and*
 - (ii) *advising that, for the prescribed consultation period for the notice, the applicant may consult with the agency or Minister with a view to making an application in a form that would remove the ground for refusal; and*
 - (iii) *stating the effect of subsections (2) to (6); and*
 - (b) *the agency or Minister has given the applicant a reasonable opportunity to consult with the agency or Minister; and*

- (c) *the agency or Minister has, as far as is reasonably practicable, given the applicant any information that would help the making of an application in a form that would remove the ground for refusal.*
- (2) *Following any consultation, the applicant may give the agency or Minister written notice either confirming or narrowing the application.*
- (3) *If the application is narrowed, section 41 applies in relation to the changed application but this section does not apply to it.*
- (4) *If the applicant fails to consult after being given notice under subsection (1), the applicant is taken to have withdrawn the application at the end of the prescribed consultation period.*
- (5) *Without limiting subsection (4), the applicant is taken to have failed to consult if, by the end of the prescribed consultation period, the applicant has not given the named officer or member written notice under subsection (2).*
- (6) *In this section—*
 - prescribed consultation period, for a written notice under subsection (1)(a), means—*
 - (a) *the period of 10 business days after the date of the notice; or*
 - (b) *the longer period agreed by the agency or Minister and the applicant whether before or after the end of the 10 business days mentioned in paragraph (a).*