



## Decision and Reasons for Decision

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**Citation:** *Mewburn and Department of State Development [2015] QICmr 9 (21 April 2015)*

**Application Number:** 312074

**Applicant:** Mewburn

**Respondent:** Department of State Development

**Decision Date:** 21 April 2015

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - documents relating to planning matters and complaints - applicant contends further documents exist - planning anomalies on agricultural land and related investigations - numerous and extensive searches - whether the agency has taken all reasonable steps to locate the documents but the documents do not exist or are unlocatable - sections 47(3)(e) and 52 of the *Right to Information Act 2009 (Qld)*

## REASONS FOR DECISION

### Summary

1. The applicant applied to the then Department of State Development, Infrastructure and Planning (**Department**)<sup>1</sup> under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to various documents covering a 19 year period from 1996 to 2014.
2. The Department located 353 pages of information responsive to the application, and decided to release most of them.<sup>2</sup>
3. The applicant sought internal review of the Department's decision on the basis that it had not located any documents responsive to one aspect of her application.
4. The Department's internal review decision affirmed the original decision.<sup>3</sup>

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<sup>1</sup> Following a machinery of government change on 16 February 2015, the legislation administered by the former Department of State Development, Infrastructure and Planning has been divided between the Department of Infrastructure, Local Government and Planning and the Department of State Development. The Department of State Development is the department responsible for this external review.

<sup>2</sup> Of the 353 pages located, the Department decided to release 344 pages in full and nine pages in part. The Department refused to disclose the balance of the nine pages on the ground that disclosure would, on balance, be contrary to the public interest under section 47(3)(b) and 49 of the RTI Act.

<sup>3</sup> The Department did not make an internal review decision within 20 business days after the internal review application was made and, under section 83 of the RTI Act, was taken to have made an internal review decision affirming its initial decision. The Department confirmed this in a notice dated 18 June 2014. Referred to hereafter as the **Internal Review Decision**.

5. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.
6. For the reasons set out below, I vary the decision under review and find that access to further information is refused under section 47(3)(e) of the RTI Act on the basis that it is nonexistent or unlocatable.

## Background

7. On 17 March 2006, the applicant wrote to the then Minister for Local Government and Planning (**Minister**) about issues relating to the planning processes associated with a specified lot of land. The applicant submitted that she made a complaint '*...about subdivision on agricultural land...*' and expressed concern '*... that it was apparent that further subdivision was earmarked on addition[al] adjacent land owned by the same owners... This land was also classed as [good quality agricultural land]*'.<sup>4</sup>
8. On 11 May 2006, the Minister responded to the applicant's letter, stating that officers of the Department of Local Government, Planning, Sport and Recreation (**DLGPSR**)<sup>5</sup> had advised her that the '*...proposed development was inconsistent with the publicly notified draft planning scheme...*', and the Minister had forwarded a copy of the applicant's letter to the Mayor of Kolan Shire Council to '*...urgently investigate the situation and advise me of the outcome*'.
9. On external review, the applicant submitted that the Department should have, but failed to, locate additional documents regarding the provision of advice by Departmental officers to the Minister referred to in the Minister's response to her complaint (**Ministerial Advice Documents**); and additional documents relating to alleged '*planning anomalies on adjacent Lot 185 BON1356, ie Rural to Community to Rural purpose again*' (**Planning Documents**).
10. During the course of the external review, the Department conducted a number of additional specific searches. While a small number of additional documents were located, most of these had previously been disclosed to the applicant in response to this or other access applications.
11. Significant procedural steps relating to the application and the external review process are set out in the Appendix.

## Reviewable decision

12. The decision under review is the Department's deemed internal review decision dated 16 June 2014.

## Evidence considered

13. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).

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<sup>4</sup> Applicant's submission to OIC dated 24 October 2014.

<sup>5</sup> The Department formerly responsible for such matters.

## Issue for determination

14. The issue for determination is whether access to the Planning Documents and the Ministerial Advice Documents can be refused on the basis that they are nonexistent or unlocatable under sections 47(3)(e), 52(1)(a) and 52(1)(b) of the RTI Act.

## Relevant law

15. Under the RTI Act, a person has a right to be given access to documents of an agency.<sup>6</sup> However, this right is subject to other provisions of the RTI Act, including grounds on which an agency may refuse access to documents.<sup>7</sup>
16. Relevantly, for this review, access may be refused to documents which:
- do not exist<sup>8</sup> or
  - have been (or should be) in an agency's possession, but cannot be located.<sup>9</sup>
17. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.<sup>10</sup> A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document but it cannot be found.<sup>11</sup>
18. The RTI Act is silent on how an agency can be satisfied that a document does not exist. In a previous decision of the Information Commissioner, *PDE and The University of Queensland*,<sup>12</sup> 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 limited to information management); and
  - other factors reasonably inferred from information supplied by the applicant including:
    - the nature and age of the requested documents; and
    - the nature of the government activity to which the request relates.
19. By considering the factors above, an agency may ascertain that a particular document was not created because, for example, its processes do not involve creating the specific document. In such instances, it is not necessary for the agency to search for the document. It is sufficient that the relevant circumstances to account for the nonexistent document are explained.

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<sup>6</sup> Section 23 of the RTI Act.

<sup>7</sup> These grounds are set out in section 47 of the RTI Act.

<sup>8</sup> Section 52(1)(a) of the RTI Act.

<sup>9</sup> Section 52(1)(b) of the RTI Act.

<sup>10</sup> Section 52(1)(a) of the RTI Act.

<sup>11</sup> Section 52(1)(b) of the RTI Act.

<sup>12</sup> (Unreported, Queensland Information Commissioner, 9 February 2009) (PDE).

20. In assessing whether documents are nonexistent, an agency may also conduct searches. Where searches are conducted, an agency must demonstrate that it has taken all reasonable steps to locate responsive documents, prior to deciding that the documents are nonexistent.<sup>13</sup> In determining whether all reasonable steps have been taken, regard should be had to the factors listed in *PDE* as set out above.<sup>14</sup>

## Findings

21. The applicant contends that the Planning Documents and the Ministerial Advice Documents should exist, and should have been located by the Department.
22. The Department stated that it conducted searches to locate relevant documents. Therefore, the issue before me, in considering whether the documents are non-existent or unlocatable, is whether all reasonable steps have been taken to locate them.
23. I have reviewed the Department's search certifications for the initial processing of the access application. They show that officers of the Department's Regional Services Group spent one hour and 30 minutes searching files in the Department's current electronic document and record management system (referred to within the Department as 'The Source'),<sup>15</sup> and an officer in the Department's Planning Group spent five hours searching this system and hard copy files.<sup>16</sup>
24. On the information before me, it is evident that, as part of the Department's consideration of the applicant's application for internal review, the Department conducted additional searches using broad search terms<sup>17</sup> that captured an additional 257 documents. However, the Department's Internal Review Decision states that the decision-maker did not have time to retrieve and inspect these documents, in order to identify relevant documents and make a decision about them, before it was deemed to have made a decision affirming its initial decision.<sup>18</sup>
25. The applicant submitted, in her application for external review, that the search terms used by the Department during its consideration of her internal review application *'...used a broad net, and created a false search which was unwarranted being the search of St Kilda road, then Tirroan, then 10 lot subdivision then Mewburn which were irrelevant and non-productive. The search which created 260 documents is misleading and should have been done under the lot and plan provided (Lot 185 BON 1356) or the name of the owner [of the property] being [owner's name] which would have produced the documents immediately'*.<sup>19</sup>
26. The Department provided OIC with a schedule<sup>20</sup> regarding the searches it conducted during its consideration of the applicant's application for internal review which led to the identification of the additional 257 documents. Like the applicant, the Department submitted that many of the additional documents identified during these searches were unlikely to be relevant to the access application given the broad search terms that it had employed.

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<sup>13</sup> As set out in *PDE* at [44]. See also section 130(2) of the RTI Act.

<sup>14</sup> *PDE* at [49].

<sup>15</sup> I understand the Department uses Total Records Information Management (TRIM) and, within the Department, refers to this system as 'The Source'.

<sup>16</sup> Search verifications dated 30 January and 6 February 2014 respectively.

<sup>17</sup> Regional Services search: 'St Kilda Road'; Planning Group search: 'Tirroan'; and System Administrator search: 'Mewburn', 'Planning anomalies', '10 lot subdivision', 'Lot 185 Bon 1356' and 'Rural to Community to Rural purpose'.

<sup>18</sup> See footnote number [3].

<sup>19</sup> External review application dated 22 June 2014.

<sup>20</sup> Department's email to OIC dated 24 July 2014.

27. However, the search terms employed by the Department at this stage did include 'Lot 185 Bon 1356', as evidenced by the schedule. Given the applicant's submission that a search for *'the lot and plan provided (Lot 185 BON 1356) ... would have produced the documents immediately'*,<sup>21</sup> the schedule provided by the Department has some relevance in this external review. The Department's schedule confirms that the Department used 'Lot 185 Bon 1356' (among other search terms) to search both its current electronic document and record management system ('The Source') and superceded databases whose information had been migrated to the current system at the time of its inception (namely, TRIMFlow,<sup>22</sup> 'CTrac'<sup>23</sup> and 'Sustainable Planning'<sup>24</sup>). Notably, the searches of these databases using the search term 'Lot 185 Bon 1356' yielded no results.
28. Noting the applicant's submission that a search for *'the name of the owner [of the property] being [owner's name] which would have produced the documents immediately'*,<sup>25</sup> OIC requested that the Department conduct a further search using the name of the owner of the relevant parcel of land. In response, the Department stated it had located 17 pages; however, 15 of these pages comprised documents already released to the applicant under the Department's initial decision, or in response to an earlier access application made by her.<sup>26</sup> I have reviewed these documents and am satisfied that they are documents previously released to the applicant. The Department submitted that it had no objection to the release of the remaining two pages and they were released to the applicant.
29. During the review the applicant submitted that:<sup>27</sup>

*I was advised at the time by a government officer that, essentially, preferential zoning (community use) had been applied by council to lot 185 BON1356 also on agricultural land, however, this was removed at the behest of the Minister following my 2006 complaint of breaches of State Planning Policy. ... The Ministers censures included above suggests that further documents on the planning anomalies on agricultural land and the investigations around such do exist both for the 10 lot development and lot 185 BON1356.*

30. Given these submissions, OIC asked the Department to conduct further searches for the Ministerial Advice Documents, using the ministerial correspondence number appearing on both the Minister's letter to the applicant dated 11 May 2006 and a letter of the same date from the Minister to the Mayor of the Kolan Shire Council.<sup>28</sup> Further, OIC asked the Department to search using the terms 'Kolan Shire; Ministerial' and the street address for the parcel of land concerned.<sup>29</sup> The Department submitted that as a result of its searches, it identified, recalled and examined three archived hard copy files which contained 15 relevant pages; however, the 15 relevant pages comprised the documents already released to the applicant noted at paragraph 28 above.

<sup>21</sup> External review application dated 22 June 2014.

<sup>22</sup> TRIMFlow – the Department's previous electronic Document and Records Management System.

<sup>23</sup> CTrac was the Correspondence Tracking system in use at the relevant time of the applicant's complaints to the Minister and the Minister's correspondence back to the applicant in 2006.

<sup>24</sup> 'Sustainable Planning' was a database used by the Planning area of the Department in use at the relevant time of the applicant's complaints to the Minister and the Minister's correspondence back to the applicant in 2006.

<sup>25</sup> External review application dated 22 June 2014.

<sup>26</sup> Pages numbered 1, 7-9, 11, 13, 14, 15, 20-21 and 22-23 were released in response to the access application that is the subject of this external review and pages numbered 34-36 were released in response to an earlier access application made to the Department by the applicant (Department's reference number RTIP1314-078).

<sup>27</sup> Applicant's submission to OIC dated 24 October 2014.

<sup>28</sup> At page 22-23 released in response to the access application that is the subject of this external review

<sup>29</sup> Given that the street address of the subject property (rather than title reference) was used as a reference in the Minister's letter to the applicant dated 11 May 2006.

31. The Department submitted<sup>30</sup> that its further searches for Ministerial Advice Documents did not locate any written advice from DLGPSR officers to the Minister and that such advice may be unlocatable due to the:

- time that has elapsed since the advice was given
- various machinery of government changes that have occurred since this time; or
- advice being given to the Minister verbally.

32. The Department further stated:

*Whilst the letters referred by the applicant establish reasonable grounds to believe in the existence of "the advice" as stated by the Minister on 11 May 2006 in the letter's [sic] to both the applicant and Kolan Shire Council, there is no indication of specifically how, when or by whom the referred advice was delivered to the Minister. However, the responding letter from Cr Eddie Stone, Mayor, Kolan Shire Council, dated 23 May 2006 appears to address the issues raised by the subject advice, as stated by the Minister.<sup>31</sup>*

33. I have carefully considered the information provided by the Department about the searches it has undertaken. Specifically, I have considered the current and former departmental databases that have been searched, and the search terms employed when doing so. In the circumstances, I am satisfied that the Department has conducted searches in appropriate locations, having regard to the nature of the documents requested by the applicant and the Department's recordkeeping practices and systems. Further, I consider that the search terms used were appropriate and relevant. In addition, I consider the Department's explanation as to why further documents do not exist is plausible.

34. Further, I note that the Minister's letter to the applicant dated 11 May 2006 informs the applicant that:

*The State Government has not been involved in the development assessment and decision making process undertaken by Council ... due to the time since Council approved the development application on 22 February 2005, under the IPA the opportunity for me to exercise my powers in relation to this particular proposal has lapsed.<sup>32</sup>*

35. On this basis, it appears that, if further documents relating to the Planning Information and the Ministerial Advice exist, they may be held by other agencies.

36. Given the Department completed searches using the applicant's search terms (that is, the title reference 'Lot 185 Bon 1356' and the name of the owner of the parcel of land concerned), and search terms that could reasonably be expected to locate any documents associated with the letter from the Minister to the applicant dated 11 May 2006, I am unable to identify any further searches that the Department could reasonably be asked to undertake.

37. In these circumstances, I am satisfied that the Department has taken all reasonable steps to locate additional documents relating to the Planning Documents and the Ministerial Advice Documents, and I consider that access to such documents may be

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<sup>30</sup> Department's letter to OIC dated 13 January 2015.

<sup>31</sup> Department's letter to OIC dated 13 January 2015.

<sup>32</sup> Letter from the Minister to the applicant dated 11 May 2006.

refused under section 47(3)(e) of the RTI Act, on the basis that they are nonexistent and/or unlocatable.<sup>33</sup>

## DECISION

38. I vary the decision under review and find that access to the Ministerial Advice Documents and Planning Information is refused under section 47(3)(e) of the RTI Act.
39. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

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**Assistant Information Commissioner Corby**

**Date:** 21 April 2015

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<sup>33</sup> Section 52 of the RTI Act.

**APPENDIX**

**Significant procedural steps**

<b>Date</b>	<b>Event</b>
20 January 2014	The Department received the access application.
8 April 2014	The Department issued its decision on the access application.
19 May 2014	The Department received the application for internal review.
16 June 2014	The Department is taken to have made its Internal Review Decision.
18 June 2014	The Department issued notice of its Internal Review Decision in accordance with section 83(3) of the RTI Act.
22 June 2014	OIC received the application for external review.
23 June 2014	OIC notified the Department of the external review application and asked the Department to provide procedural documents.
26 June 2014	The Department provided OIC with the relevant procedural documents.
10 July 2014	OIC informed the applicant and the Department that the application had been accepted for external review. OIC asked the Department to provide the documents it located in processing the access application and on internal review, and information about the searches or enquiries undertaken while processing the access application.
22 July 2014	The Department provided OIC with the documents it located in processing the access application, information about the searches or enquiries undertaken while processing the access application and a submission on disclosure of the documents it identified on internal review.
24 July 2014	The Department provided OIC with a schedule listing the documents it located on internal review, and informed OIC that these documents had not been retrieved from archives.
4 August 2014	OIC asked the Department to conduct additional searches using the name of the owner of the parcel of land concerned.
18 August 2014	The Department provided OIC with documents it located in its searches using the name of the owner of the parcel of land concerned.
2 September 2014	OIC asked the Department to provide OIC with information and a submission about its searches using the name of the owner of the parcel of land concerned.
22 September 2014	The Department provided OIC with information and a submission about its searches using the name of the owner of the parcel of land concerned.
10 October 2014	OIC conveyed a written preliminary view to the applicant that access to further information may be refused under section 47(3)(e) of the RTI Act on the basis that it is nonexistent.
24 October 2014	The applicant advised OIC that she contested the preliminary view, and provided submissions in support of her case.
3 December 2014	OIC asked the Department to conduct additional searches for the Ministerial Advice Documents using the street address of the subject property as a search term.
13 January 2015	The Department provided OIC with information and a submission about its additional searches for the Ministerial Advice Documents.
18 February 2015	OIC conveyed a written preliminary view to the applicant that access to the Ministerial Advice may be refused under section 47(3)(e) of the RTI Act on the basis that it is nonexistent or unlocatable and that the next step in this review would be a written decision.