



Decision and Reasons for Decision

Application Number: 270025

Applicant: Master N

Respondent: Department of Education and Training

Decision Date: 22 December 2010

Catchwords: **ADMINISTRATIVE LAW – INFORMATION PRIVACY ACT - APPLICATION FOR ACCESS TO INFORMATION – REFUSAL OF ACCESS – applicant sought access to information on behalf of her son – whether document nonexistent or unlocatable – whether access to documents can be refused under section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(e) and 52(1) of the *Right to Information Act 2009* (Qld)**

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REASONS FOR DECISION

Summary

1. Ms H applied to the Department of Education and Training (**Department**) on behalf of her son (the **applicant**)¹ to access various documents relating to the applicant.
2. Having considered all the submissions and evidence before me, I am satisfied that in respect of the documents sought by the applicant under section 67(1) of the *Information Privacy Act 2009* (Qld) (**IP Act**) the Department is entitled to rely on section 52(1)(a) of the *Right to Information Act 2009* (Qld) (**RTI Act**) to refuse access to the documents under section 47(3)(e) of the RTI Act because the documents do not exist.

Background

3. Significant procedural steps are set out in the Appendix.

Reviewable Decision

4. The decision under review is the Considered Decision referred to in paragraph 2 of the Appendix.

Evidence relied upon

5. In making my decision in this matter, I have taken the following into consideration:
 - the IP Application and the External Review Application
 - the Considered Decision
 - file notes of telephone conversations between staff members of this Office and Ms H during the course of this review
 - file notes of telephone conversations between staff members of this Office and the Department during the course of this review
 - correspondence received from the Department and Ms H during the course of this review
 - relevant sections of the IP and RTI Act
 - previous decisions of the Information Commissioner of Queensland and decisions and case law from other Australian jurisdictions as identified in this decision.

Issues in this review

6. By letter dated 30 August 2010,² Ms H indicated that she (on behalf of the applicant) still sought access to documents in relation to:
 - a) her call to the District Office in November 2007

¹ In the Access Application Ms H applied for access to documents on behalf of her son in accordance with section 45 of the IP Act. Schedule 5 of the IP Act confirms that Ms H's son is the 'applicant' for the purpose of the Access Application.

² In response to Assistant Information Commissioner Corby's preliminary view.

- b) Behaviour Advisory Team (**BAT**) observational notes made by Mark Fleming
 - c) her son's suicide attempt in December 2007.
7. As Ms H's letter does not dispute any other matter considered in Assistant Information Commissioner Corby's preliminary view, I have proceeded on the basis that the only issue that remains to be addressed in this external review is the sufficiency of the Department's searches for the above documents.
8. Accordingly, the issues to be determined in this decision are whether there are reasonable grounds to be satisfied that:
- the documents do not exist; or
 - the Department's searches for the documents have been satisfactory in the circumstances; and
 - access to the documents may be refused under section 52(1) of the RTI Act.

Applicable law

9. Under section 40 of the IP Act, a person has a right to be given access to documents of an agency, to the extent they contain the individual's personal information.
10. Notwithstanding the right of access provision noted above, access may be refused to requested information under section 67(1) of the IP Act which provides:

67 Grounds on which access may be refused

- (1) *An agency may refuse access to a document of the agency and a Minister may refuse access to a document of the Minister in the same way and to the same extent the agency or Minister could refuse access to the document under the Right to Information Act, section 47 were the document to be the subject of an access application under that Act.*

11. Section 67(1) of the IP Act operates in conjunction with section 47 of the RTI Act which sets out grounds on which access to information may be refused. For the purpose of this review, the ground in section 47(3)(e) of the RTI Act is relevant as it concerns nonexistent or unlocatable documents:

47 Grounds on which access may be refused

- ...
(3) *On an application, an agency may refuse access to a document of the agency and a Minister may refuse access to a document of the Minister—*
...
(e) *because the document is nonexistent or unlocatable as mentioned in section 52; or*
...

12. Section 52 of the RTI Act provides:

52 Document nonexistent or unlocatable

- (1) *For section 47(3)(e), a document is nonexistent or unlocatable if—*
- (a) *the agency or Minister dealing with the application for access is satisfied the document does not exist; or*
Example—
a document that has not been created
 - (b) *the agency or Minister dealing with the application for access is satisfied—*

- (i) *the document has been or should be in the agency's or Minister's possession; and*
- (ii) *all reasonable steps have been taken to find the document but the document can not be found.*

13. Under the repealed³ *Freedom of Information Act 1992* (Qld) (**FOI Act**), the equivalent of section 52(1) of the RTI Act was section 28A of the FOI Act.⁴ In applying section 52(1) of the RTI Act, the principles relevant to the application of section 28A of the FOI Act are relevant.

14. In *PDE and the University of Queensland*⁵ (**PDE**) the Information Commissioner considered the application of section 28A of the FOI Act and stated that:

*Sections 28A(1) and (2) of the FOI Act address two different scenarios faced by agencies and Ministers from time to time in dealing with FOI applications: circumstances where the document sought does not exist and circumstances where a document sought exists (to the extent it has been or should be in the agency's possession) but cannot be located. In the former circumstance, an agency or Minister is required to satisfy itself that the document does not exist. If so satisfied, the agency or Minister is not required by the FOI Act to carry out all reasonable steps to find the document. In the latter circumstance an agency or Minister is required to satisfy itself that the document sought exists (to the extent that it has been or should be in the agency's possession) and carry out all reasonable steps to find the document before refusing access.*⁶

15. In *PDE* the Information Commissioner also considered how an agency was to satisfy itself as to the non-existence of documents sought by an applicant and indicated 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.

Section 52(1) of the RTI Act

16. In respect of the documents identified at paragraph 6 above, the Department has indicated the documents are either nonexistent or unlocatable under section 52(1) of the RTI Act.

³ As of 1 July 2009.

⁴ Section 52(1)(a) of the RTI Act is equivalent to section 28A(1) of the FOI Act and section 52(1)(b) of the RTI Act is equivalent to section 28A(2) of the FOI Act.

⁵ Unreported, Queensland Information Commissioner, 9 February 2009.

⁶ At paragraph 34.

17. An agency may refuse access to a document under section 52(1)(a) of the RTI Act if it is satisfied that the document does not exist.⁷
18. For an agency to be entitled to refuse access to a document on the basis of section 52(1)(b) of the RTI Act, the questions to be answered are:
 - (i) are there reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession?
 - (ii) has the agency taken all reasonable steps to find the document?⁸
19. I will firstly consider the application of section 52(1)(a) of the RTI Act in respect of the particular documents still being sought by the applicant.

Section 52(1)(a) of the RTI Act

20. As noted above a claim under section 52(1)(a) of the RTI Act will only succeed if the agency is satisfied that the document does not exist.
21. 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, the Information Commissioner has previously indicated 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.⁹

Ms H's call to the District Office

22. Ms H states that she made a call to the District Office in November 2007 regarding the BAT Team and refers to folio 5 (of file I) which states 'Mum complained at DO.'
23. Although I accept that folio 5 (of file I)¹⁰ confirms Ms H made contact with the District Office in 2007, it does not suggest nor substantiate that a document, by way of a record of the call was created by the Department.
24. In relation to this request, the Department conducted electronic and physical searches for the requested document/s at the District Office. Despite these searches the Department was unable to locate any further documents relating to this phone call.
25. Given the Department's searches for this document/s and the lack of evidence as to the existence of any further documents concerning this phone call, I am of the view that access to the documents sought may be refused under section 52(1)(a) of the RTI Act on the basis that the document does not exist.

⁷ To be satisfied that a document does not exist under section 52(1)(a) of the RTI Act, section 52(2) of the RTI Act requires an agency or Minister to search its backup system for the prescribed documents if the agency or Minister considers the document has been kept in, and is retrievable from the backup system. As there is no evidence to suggest that the documents sought by Ms H are retrievable from a backup system, the Department is not obliged to carry out these searches.

⁸ See *PDE* at paragraph 44. In answering these questions, regard should be had to the circumstances of the case and the factors set out in paragraph 15

⁹ See *PDE* at paragraph 49.

¹⁰ Comprising student updates by the Guidance Officer for 2007 and 2008

BAT observational notes made by Mark Fleming

26. Ms H requests notes and observations made by Mark Fleming (who works for BAT) and submits that a number of staff at the State School had informed her that Mark Fleming had been at the school in 2007 to observe her son.
27. Although folio 5 (of file I) states that BAT would work with the applicant and folio 14 (of file I) indicates that Mark Fleming was providing professional mentoring with some staff, neither document confirms that Mark Fleming was working with the applicant or that he made any notes or documented observations about the applicant.
28. During the course of this review the Department consulted Mark Fleming, who confirmed:
 - the applicant was not formally referred to him as a behaviour teacher at the relevant time
 - the school chose to provide support for the applicant via SEP (special education program) staff
 - he did not do a formal observation of the applicant.
29. Notwithstanding Mr Fleming's comments above, the Department conducted physical and electronic searches at the BAT office located at the State School. These searches located one document comprising a 'service summary 2006.' A copy of this document with irrelevant matter deleted was provided to Ms H during the course of the external review.
30. In the absence of any information to the contrary, I am satisfied that the specific document/s sought by Ms H do not exist and accordingly access may be refused under section 52(1)(a) of the RTI Act.

The applicant's suicide attempt in December 2007

31. Ms H seeks documentation about '[the applicant] cutting himself in class with a knife' also known as '[the applicant's] suicide attempt – December 2007.' She refers to a document dated 5 December 2007 as released to her by the Department during the course of this review which states "on a very recent occasion, [the applicant] was cutting himself in class with a knife and unexpectedly expressed that he wanted to kill himself."
32. Given the gravity of the described incident and the fact that an incident report was able to be located by the Department for a similar incident involving the applicant in 2008, the OIC requested that the Department provide further information on its searches for responsive documents.
33. In its response the Department confirmed that:
 - a) at the time of the alleged suicide attempt its policy for reporting risks of harm to students¹¹ did not require the school to compile an incident report or specific documentation
 - b) the policy described at a) above was replaced on 25 January 2008 by policy SMS-PR-012 Student Protection which places different reporting requirements on state schools.

¹¹ HS-17 Student Protection.

34. Notwithstanding the fact that there was no obligation on the school to create an incident report or similar document at the relevant time, the Department undertook more detailed searches at the relevant school of all known places that records relevant to the request would be kept. No documents relating to the incident were able to be located in these searches.
35. I have reviewed the Department's policy: HS-17 Student Protection¹² and confirm it placed no obligation on a school to complete a formal reporting process in circumstances of student self harm. This may be contrasted with the position under policy SMS-PR-012 Student Protection which requires the completion of a standardised form that is then sent to the Executive Director (Schools), Student Services Division and in some cases, the Department of Child Safety.
36. Although it would be expected that formal documentation of such a serious incident would exist, in the absence of such a requirement at the relevant time, I am satisfied that the Department's searches for the responsive document were adequate. I consider that access to the document/s sought may be refused under section 52(1)(a) of the RTI Act on the basis that the document/s do not exist.

Section 52(1)(b) of the RTI Act

37. Although it seems the Department has also relied on section 52(1)(b) of the RTI Act to refuse the applicant access to the requested documents, in view of my findings above concerning the application of section 52(1)(a) of the RTI Act, I do not consider a claim under section 52(1)(b) of the RTI Act is relevant in these circumstances given there is no evidence that the documents exist.

DECISION

38. I affirm the reviewable decision and find that access can be refused to the documents under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act on the basis that the documents sought do not exist.
39. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Clare Smith
Right to Information Commissioner

Date: 22 December 2010

¹² Which commenced on 16 July 2006.

Appendix
Significant procedural steps

1. By application dated 24 August 2009 (**Access Application**), Ms H made an application to the Department under the IP Act for access to a number of documents on behalf of her son (the applicant, Master N).
2. By written notice dated 1 October 2009 (**Considered Decision**), the Department identified 626 documents responsive to the Access Application and decided to:
 - grant full access to 482 folios
 - grant partial access to 61 folios
 - refuse access to 83 folios.
3. The Department also notified Ms H that it had decided to rely on section 69 of the IP Act to neither confirm nor deny the existence of particular documents.
4. By application dated 26 October 2009, Ms H applied to the Office of the Information Commissioner (**OIC**) for external review of the Considered Decision (**External Review Application**).
5. During the course of the external review, the OIC required the Department to conduct further searches for the documents Ms H claims should have been provided to the applicant and to provide submissions in support of its case setting out the extent of searches it has undertaken.
6. By letter dated 15 December 2009, the Department forwarded Ms H a number of additional documents it had located during the course of the external review.
7. By letter dated 27 July 2010, Assistant Information Commissioner Corby indicated to Ms H that it was her preliminary view that:
 - of the information located by the Department, parts of it either comprised exempt information under section 48 of the RTI Act, comprises information the disclosure of which would, on balance, be contrary to the public interest under section 49 of the RTI Act or is irrelevant to the terms of the Access Application
 - the remainder of the information sought is nonexistent or unlocatable as mentioned in section 52 of the RTI Act.
8. By letter dated 30 August 2010, in response to the preliminary view, Ms H indicated a tacit acceptance of the preliminary view but identified that she was still seeking access to a number of documents.