



Decision and Reasons for Decision

Application Number: 310260
Applicant: Middleton
Respondent: Department of Environment and Resource Management
Decision Date: 30 May 2011

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL TO DEAL WITH ACCESS APPLICATION – EFFECT ON AGENCY’S FUNCTIONS – applicant sought external review on the basis of sufficiency of search – agency located a large volume of additional documents on external review – agency contended that dealing with the additional documents would be a substantial and unreasonable diversion of the agency’s resources – whether the work involved in dealing with the access application would, if carried out, substantially and unreasonably divert the agency’s resources from their use in performing its functions under section 41 of the *Right to Information Act 2009* (Qld)

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REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Environment and Resource Management (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to:¹
 - all documentation on file for BNE1767/38; and
 - all documentation relating to all reported sewage flooding incidents for [the applicant's address] including incidents on 19 December 1988 and 8 June 1991. Period 30 May 1987 to 12 April 2010.
2. In response to the access application, the Department's decision-maker advised the applicant that:²
 - the Department had located 380 pages of which, 152 pages were copies and 12 pages were irrelevant to the access application; and
 - they had decided to release 202 pages in full and 14 pages in part.
3. In her external review application, the applicant questioned the sufficiency of the Department's searches, contending that the Department holds more documents responding to her access application.
4. During the course of the external review, the Department conducted further searches for documents responding to the access application and provided submissions to the Office of the Information Commissioner (**OIC**) in relation to those searches.
5. In its further searches the Department identified an additional 44 files (**additional files**), which it estimates contain at least 12 900 pages.
6. The Department:
 - contends that it would be a substantial and unreasonable diversion of its resources to process the additional files due to the volume of documents involved; and
 - submits it is unlikely to hold information regarding reports of past sewage overflows at the applicant's property as such events '*would not fall under the Department's regulatory jurisdiction unless there was a risk of environmental harm to the surrounding receiving environment*'.
7. For the reasons set out below, I am satisfied that the Department may refuse to deal with the access application under section 41 of the RTI Act on the basis that dealing with the application would substantially and unreasonably divert the Department's resources from their use by the Department in performing its functions.

Background

8. Significant procedural steps relating to the application and external review are set out in Appendix A.

¹ By application dated 13 April 2010 (**access application**).

² It appears though from the schedule that the decision was to release 202 pages in full and 1 in part. Irrelevant information was removed from 19 pages and 151 pages were copies.

Reviewable decision

9. The decision under review is the Department's decision dated 19 May 2010.³

Issues in the review

10. The issue to be addressed in this external review is whether the Department is entitled to refuse to deal with the access application on the basis that processing the additional files would be a substantial and unreasonable diversion of the Department's resources.

Evidence considered

11. In reaching a decision in this external review, I have considered the following:

- the applicant's access application to the Department and external review application to OIC
- the Department's decision dated 19 May 2010 and submissions to OIC on 3 August 2010, 30 November 2010 and 3 December 2010
- the applicant's submissions to OIC dated 28 January 2011 and 10 February 2011, including attached emails exchanged between the Department and the applicant between 24 May 2010 and 12 August 2010
- letter from the Department to the applicant dated 20 May 2010; and
- relevant sections of the RTI Act as referred to in this decision.

Relevant law

12. 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.

13. Relevantly, section 41 of the RTI Act⁴ 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.⁵

Findings

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

14. The answer to this question is 'yes' for the reasons set out below.

15. On receipt of the access application the Department processed the application, subsequently issuing a decision on access. In processing the access application, the Department reviewed file BNE1767 Volume 38, which the applicant specifically identified in her access application. The Department found that this file did not include any documents about sewage spills. Through its searches, the Department located

³ The decision-maker allowed full access to the majority of the information sought. Access was refused to a small amount of personal information. A decision refusing access to a document under section 47 of the RTI Act is a reviewable decision; Schedule 6.

⁴ Refer to Appendix B.

⁵ Section 41(1)(a) of the RTI Act.

relevant documents and the applicant was given access to substantially all of this information (see paragraph 2 above).

16. In response to a request from OIC for additional searches, the Department identified the additional files (BNE1767 Volumes 1 to 37 and STH1410 Volumes 1 to 6) as *possibly* containing documents that respond to the access application. I note though that the Department had previously explained to the applicant that:⁶
- section 320 of the *Environmental Protection Act 1994* places an obligation on individuals and organisations to notify the Department of any incident that has **caused or has threatened to cause material or serious environmental harm** [*my emphasis*]
 - under its recently finalised operational policy, an obligation to report sewage spills to the Department only arises if the overflow results in an observable environmental impact, poses a threat to public health and/or the discharge is likely to impact a sensitive environment; and
 - *'taking the above criteria into consideration, overflows that have occurred at your premises in the past would not fall under the Department's regulatory jurisdiction unless there was a risk of environmental harm to the surrounding receiving environment. The overflows [at your property and neighbouring properties] have been confined to the dwelling and/or backyard area and therefore pose a risk to public health and amenity rather than environmental harm. The Department believes overflows of this nature would be more appropriately addressed by Queensland Health.'*
17. In response to OIC's further enquiries about the additional files, the Department contends:⁷
- the applicant's request was limited to all documents on file BNE1767 Volume 38 and did not encompass the additional volumes; and
 - if the additional files are within the scope of the access application, the work involved in reviewing the additional files would be a substantial and unreasonable diversion of the Department's resources from it performing its functions.
18. The terms of the access application, as set out in paragraph 1 above, clearly extends beyond file BNE1767 Volume 38 to include a request for *'documentation relating to all reported sewerage flooding incidents for [the applicant's address], including incidents on 19 December 1988 and 8 June 1991. Period: 30 May 1987 to 12 April 2010'*. The Department's decision-maker did not view the access application as being confined to BNE1767 Volume 38 and clearly took account of additional documents that were located and identified as being relevant to the application. It was only on external review that the additional files were located and identified as possibly being relevant to the access application. These documents were therefore not considered by the decision-maker.
19. In conducting an external review, the Information Commissioner has extensive powers⁸ which include power to:⁹

⁶ By letter dated 20 May 2010.

⁷ Dated 30 November 2010.

⁸ As set out in Chapter 3, Part 9, Division 5 of the RTI Act.

⁹ Section 105(1) of the RTI Act.

- review any decision that has been made by an agency in relation to the access application concerned; and
- decide any matter in relation to the access application that could, under the Act, have been decided by an agency.

Therefore, irrespective that the Department has purported to deal with the access application, the Information Commissioner can, in an appropriate circumstance, determine that an agency may refuse to deal with an access application if the effect on the agency's functions of processing the application satisfy the requirements of section 41(1)(a) of the RTI Act.

20. To determine whether dealing with the access application would substantially and unreasonably divert the Department's resources from their use in performing its functions, I:
- a) **must not** have regard to any reasons the applicant gives for applying for access or any belief I may hold about what the applicant's reasons are for applying for access.¹⁰
 - b) **must** have regard to the resources that the Department would need to use for the following:¹¹
 - 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;¹² and
 - notifying any final decision on the application.
21. The applicant has indicated in correspondence to the OIC that she is seeking information to assist with litigation she has initiated.¹³ I have not taken this into account in my considerations.
22. The applicant contends that the Department:
- must hold more documents responding to her access application as sewage flooding has occurred at her property 'for many years';¹⁴ and
 - cannot refuse to deal with her access application under section 41 of the RTI Act because it has not complied with section 42 of the Act and she should not be disadvantaged because the Department breached the Act.¹⁵
23. I do not accept the applicant's first contention. The applicant seeks documents relating to reports of sewage flooding incidents for [the applicant's address]. Given the Department's limited and specific role and responsibilities in relation to sewage flooding incidents, as explained at paragraph 16 above, I consider it quite unlikely that the Department holds documents concerning reports of past sewage flooding incidents.

¹⁰ Section 41(3) of the RTI Act.

¹¹ Though this is not an exhaustive list: section 41(2) of the RTI Act.

¹² Under section 37 of the RTI Act.

¹³ Letter to OIC dated 11 October 2010.

¹⁴ As stated in her external review application dated 10 June 2010.

¹⁵ Applicant's letter to OIC dated 10 February 2011.

24. In relation to the applicant's second point, I note that section 42 of the RTI Act sets out a number of procedural steps an agency must take 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. This provision prescribes a process whereby an applicant is given an opportunity to consult with agency staff, with a view to making their application in a form that enables the agency to deal with the application.
25. I accept the applicant's submission that the Department has not satisfied the prerequisites set out in section 42 of the RTI Act. This is because the issue has only arisen on external review. Once the matter is on external review, the RTI Act does not, unfortunately, provide any mechanism to remedy this circumstance.
26. I turn now to consider what resourcing would be involved in processing the access application.
27. The Department indicates that:¹⁶
- each volume of BNE1767 would be a minimum height of 3cm;¹⁷ and
 - at an average of 100 pages per centimetre, or 300 pages per volume, Volumes 1 to 37 would contain approximately 11 100 pages and STH1410 Volumes 1 to 6 would contain around 1 800 pages.
28. The Department submits¹⁸ that had the additional files been identified when the access application was being processed, it would have considered the time involved in reading and considering approximately 12 900 pages would be a substantial and unreasonable diversion of the Department's resources due to the volume of documents involved. Though the Department did not make submissions on the resources that would be used in completing the remaining matters which I must have regard to and which are identified in paragraph 20 above, such activities would require resources additional to those involved in considering the relevant documents.
29. I accept the Department's submissions regarding the volume of documents involved in dealing with the access application. Even the initial stages of processing these documents would require an agency officer to read and assess each document to determine its relevance to the access application.
30. Taking into account the time that would be required to consider the documents, given their volume, together with the extremely low likelihood of these documents containing any information responding to the access application, as discussed in paragraph 16 above, I consider that processing the access application would both substantially and unreasonably divert the Department's resources from their use by the Department in performing its functions.¹⁹

Conclusion

31. For the reasons set out above, I find that:
- dealing with the access application would be a substantial and unreasonable diversion of the Department's resources; and

¹⁶ Provided during the course of external review and dated 30 November 2010.

¹⁷ As this is the point at which a new file is created.

¹⁸ In its submissions of 30 November 2010.

¹⁹ Section 41(1)(a) of the RTI Act.

- the Department is entitled, under section 41 of the RTI Act, to refuse to deal with the access application.

DECISION

32. I set aside the Department's decision and in substitution decide that the Department may refuse to deal with the access application under section 41 of the RTI Act.
33. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

Jenny Mead
Right to Information Commissioner

Date: 30 May 2011

APPENDIX A**Significant procedural steps**

Date²⁰	Event
13 April 2010	The applicant applied to the Department under the RTI Act for a range of documents which broadly related to sewage overflow issues at her residence.
19 May 2010	The Department issued its decision (access decision) having located and released a number of documents to the applicant.
10 June 2010	The applicant applied to OIC for external review of the access decision dated 19 May 2010.
25 June 2010	OIC informed the Department and the applicant that the external review application had been accepted for review.
3 August 2010	The Department provided OIC with submissions.
9 November 2010	OIC requested further submissions from the Department.
1 December 2010	OIC received submissions from the Department.
16 December 2010	OIC received further submissions from the Department.
28 January 2011	OIC conveyed a written preliminary view to the applicant and invited the applicant to provide submissions in support of her case if she did not accept the preliminary view.
3 February 2011	OIC received a letter from the applicant seeking clarification on the different interpretation adopted by OIC and the Department on the scope of the application.
4 February 2011	OIC responded to the applicant's request for clarification.
14 February 2011	OIC received submissions from the applicant in response to OIC's preliminary view.

²⁰ Of correspondence or relevant communication unless otherwise stated.

APPENDIX B

Relevant legislative provisions

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 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).*