



## Decision and Reasons for Decision

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**Application Number:** 310609

**Applicant:** Ott

**Respondent:** Logan City Council

**Decision Date:** 30 August 2011

**Catchwords:** **ADMINISTRATIVE LAW – INFORMATION PRIVACY ACT – application for access to an investigator’s request to the agency for a copy of the applicant’s personnel file and investigation file – section 67(1) of the *Information Privacy Act 2009* (Qld) – grounds on which access may be refused**

**ADMINISTRATIVE LAW – RIGHT TO INFORMATION ACT – whether there are reasonable grounds for the agency to be satisfied documents do not exist – whether the agency has taken all reasonable steps to locate documents – whether access 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, a Logan City Council (**Council**) employee, made a complaint to Council about a number of Council officers. Council retained Local Government Workcare (**LGW**) to investigate the applicant's complaint.
2. The applicant applied to Council under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to "all requests to Council from [a LGW Investigator] in relation to investigation file and for CD copy of my personnel file" (**Requested Documents**).
3. After conducting searches for the Requested Documents, Council decided to refuse access under section 67(1) of the IP Act and section 47(3)(e) and 52 of the *Right to Information Act 2009* (Qld) (**RTI Act**) on the basis that the Requested Documents were nonexistent or unlocatable.
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision.
5. During the course of the external review, Council conducted further searches for the Requested Documents and provided an explanation as to why the Requested Documents do not exist.
6. For the reasons set out below, I am satisfied that Council may refuse access to the Requested Documents under section 67(1) of the IP Act and section 47(3)(e) and section 52(1)(a) of the RTI Act on the basis that they do not exist.

### Background

7. Significant procedural steps relating to the application and external review are set out in the appendix to this decision.

### Reviewable decision

8. The decision under review is Council's decision dated 13 April 2011.<sup>1</sup>

### Evidence considered

9. In reaching a decision in this external review, I have considered the following:
  - the applicant's access application to Council and external review application to OIC
  - the applicant's submissions to OIC
  - Council's decision and submissions to OIC
  - file notes of telephone conversations between OIC officers and the applicant during the external review
  - file notes of telephone conversations between OIC officers and Council during the external review
  - relevant sections of the IP Act and RTI Act as referred to in this decision; and

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<sup>1</sup> Schedule 5 of the IP Act provides that a decision refusing access to a document under section 67 of the IP Act is a reviewable decision.

- previous decisions of the Queensland Information Commissioner as referred to below.

### Relevant law

10. Under the IP Act, a person has a right to access documents of an agency<sup>2</sup> subject to other provisions of the IP Act and RTI Act including the grounds on which an agency may refuse access to documents.<sup>3</sup>
11. Section 47(3)(e) of the RTI Act provides that access to a document may be refused if the document is nonexistent or unlocatable under section 52 of the RTI Act. Section 52(1)(a) of the RTI Act provides that a document is nonexistent if there are reasonable grounds for the agency or Minister dealing with the access application to be satisfied that the document does not exist.
12. The RTI Act is silent on how an agency or Minister can be satisfied that a document does not exist. However, in *PDE and the University of Queensland (PDE)* 4 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:<sup>5</sup>
  - administrative arrangements of government
  - structure of the agency
  - functions and responsibilities of the agency (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
  - practices and procedures of the agency (including but not limited to its information management approach); and
  - other factors reasonably inferred from information supplied by the applicant including:
    - the nature and age of the requested document/s; and
    - the nature of the government activity the request relates to.
13. 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 non-existent document are explained.
14. In assessing whether documents are nonexistent, an agency may also conduct searches. Where searches are conducted, an agency must demonstrate that it has

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<sup>2</sup> Section 40 of the IP Act.

<sup>3</sup> As set out in section 67 of the IP Act and section 47 of the RTI Act. Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent the agency could refuse access under section 47 of the RTI Act were the document the subject of an application under the IP Act.

<sup>4</sup> (Unreported, Queensland Information Commissioner, 9 February 2009). Although *PDE* concerned section 28A of the now repealed *Freedom of Information Act 1992* (Qld), the requirements of that section are replicated in section 52(1) of the RTI Act and therefore, the reasoning in *PDE* can be applied in the context of the RTI Act. See also *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010).

<sup>5</sup> At paragraph 47

taken all reasonable steps to locate responsive documents, prior to deciding that the documents are nonexistent.<sup>6</sup>

### **Applicant's submissions**

15. The applicant submits that there should be a record of the LGW investigator<sup>7</sup> requesting that Council provide a copy of the applicant's personnel and investigation file in relation to the complaint.
16. To support his belief that such a record exists, the applicant provided OIC with a cover note dated 14 April 2010 which appears to have been attached to the files sent by Council to the LGW investigator.
17. The applicant submits that Council's explanation as to why the Requested Documents do not exist is '*unacceptably vague if not obtuse*'.

### **Council's submissions**

18. Council does not dispute that it provided the LGW investigator with the applicant's investigation file and personnel file on 14 April 2010.
19. With respect to the arrangement that exists between Council and LGW, Council has explained that:
  - the LGW investigator is regularly retained by LGW to investigate workplace grievances relating to Council;
  - Council generally sends documents through to LGW in response to a verbal request from the LGW investigator;
  - it is not standard practice for the LGW investigator to issue Council with a written request for files relevant to his investigations; and
  - generally, Council officers do not make records of all telephone discussions with the LGW investigator.
20. Council also advised OIC that its Employee Relations Program Leader is Council's point of contact for the LGW investigator.
21. In a telephone discussion with OIC on 24 June 2011, Council's Employee Relations Program Leader explained that:
  - generally, prior to conducting an investigation and collecting any witness statements, the LGW investigator telephones him to request the relevant files
  - he is in very regular telephone contact with the LGW investigator and, for this reason, does not make records of all discussions; and
  - in some instances the LGW investigator will meet with the Employee Relations Program Leader directly and while taking his statement in relation to the incident also obtains the relevant files.
22. In relation to the workplace investigation involving the applicant, the Employee Relations Program Leader was unable to recall the exact date or details of the conversation, given that it occurred over a year ago and also due to the regularity in which he is in contact with the LGW investigator. However, he explained that given the date on which the files were sent to the LGW investigator and the date on which his witness statement was signed, he would expect that the LGW investigator requested

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<sup>6</sup> As set out in *PDE* at paragraph 44. See also section 137(2) of the IP Act.

<sup>7</sup> A private sector employment consultancy organisation contracted by Council.

the relevant files in a telephone discussion which occurred shortly prior to 14 April 2010.

23. In the course of the external review, the Employee Relations Program Leader provided a signed statement dated 10 May 2011 confirming that the LGW investigator made a verbal request for the applicant's personnel and investigation files which was not recorded by Council. The Employee Relations Program Leader has also confirmed that he has searched his personal records and emails to confirm that he did not receive any written request from the LGW investigator and submits that this was the outcome he expected given that it is his general practice not to create file notes of telephone calls with the LGW investigator.
24. In addition to the explanation proved by the Employee Relations Program Leader, Council has also conducted searches of the following locations in the People and Culture Unit of Council on two separate occasions:<sup>8</sup>
  - the email archiving system (known as Archive Manager)
  - the electronic document management system; and
  - hardcopy files .

## Findings

25. I have carefully considered the submissions made by Council and the applicant in the course of the external review.
26. I accept that the information provided by Council in relation to its general practices when dealing with LGW investigators, and the specific details provided by the Employee Relations Program Leader in relation to this particular investigation, indicate that Council mostly corresponds with LGW informally, and primarily through telephone contact.
27. Based on my careful consideration of Council's submissions, I am also satisfied that it is not Council's standard practice to send workplace investigation files to LGW only in response to written requests or to keep records of every telephone conversation that occurs.
28. In the circumstances, having regards to the factors outlined above in *PDE*, I am satisfied that:
  - Council has provided a reasonable explanation as to why the Requested Documents do not exist; and
  - Council has taken all reasonable steps in searching for the Requested Documents to be satisfied that they do not exist.
29. For the reasons set out above, I am satisfied that the Requested Documents do not exist.

## DECISION

30. I affirm Council's decision to refuse access to the Requested 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 Requested Documents do not exist.

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<sup>8</sup> Each search was conducted by two separate Council officers who have certified that the searches conducted did not locate the Requested Documents.

31. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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

**Date: 30 August 2011**

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
8 April 2011	The access applicant applies to Council for <i>“all requests to Council from [a LGW investigator] in relation to investigation file and for CD copy of my personnel file”</i> .
13 April 2011	Council decides to refuse access to the Requested Documents on the basis that they are nonexistent or unlocatable.
18 April 2011	The applicant applies to OIC for external review of Council's decision.
21 April 2011	A staff member of OIC telephones the applicant and Council to clarify the background to the external review.
21 April 2011	Council provides submissions in support of its case.
3 May 2011	A staff member of OIC telephones the applicant to convey Council's submissions.
4 May 2011	The applicant telephones a staff member of OIC to provide further submissions in support of his case.
6 May 2011	OIC notifies Council and the applicant that the external review application has been accepted. OIC requests that Council provide submissions on the searches conducted and certifications.
10 May 2011	Council provides the requested submissions and search records.
12 May 2011	OIC sends the applicant a copy of Council's submissions and search certifications.
18 May 2011	The applicant's solicitor provides submissions in support of his client's case.
26 May 2011	OIC notifies the applicant's solicitors that it will proceed to make further enquiries with Council about the searches conducted for the Requested Documents.
24 June 2011	A staff member of OIC telephones Council's Employee Relations Program Leader who provides further submission in support of Council's case.
14 July 2011	OIC conveys a preliminary view to the applicant and invites the applicant to provide submissions in support of his case by 28 July 2011 if he does not accept the preliminary view.
26 July 2011 22 August 2011	The applicant's solicitor provides submissions in support of the applicant's case.