



## Decision and Reasons for Decision

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**Application Number:** 310890

**Applicant:** Fennelly

**Respondent:** Redland City Council

**Decision Date:** 21 August 2012

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NON-EXISTENT DOCUMENTS - applicant contended that further responsive documents should be in the agency's possession - whether there are reasonable grounds for agency to be satisfied that further documents do not exist - whether access to documents can be refused under section 47(3)(e) of the Right to Information Act 2009 (Qld) on the ground set out in section 52(1)(a) of the Right to Information Act 2009 (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS - applicant contended scope of her application should be interpreted to include internal emails - construction of scope of access application made under section 24 of the Right to Information Act 2009 (Qld)

### REASONS FOR DECISION

#### Summary

1. The applicant applied to Redland City Council (**Council**) under the *Right to Information Act 2009 (RTI Act)* for access to correspondence from Council to the State Government and other third parties about a proposed, but cancelled, employment precinct, the Thornlands Integrated Employment Area (**TIEA**).<sup>1</sup> The applicant owns land that would have been within the TIEA that the applicant says declined in value because of the TIEA's cancellation.
2. Following correspondence between the applicant and Council, the scope of the terms of the application was settled as:<sup>2</sup>

*Between 30 June 2005 to 31 December 2009: All faxes, letters, notes (including briefing notes), emails, submissions (private and public) or any written or noted verbal communications (other than those already in the public domain) from the Redland City Council (as an entity) or any or all individual councillors (in either an official or private capacity) to the State government, State government Ministers, State departments and*

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<sup>1</sup> By application dated 15 September 2011, received 16 September 2011.

<sup>2</sup> Email from the applicant to Council dated 14 November 2011; Council's decision notice dated 22 December 2011.

*officers of State departments as well as any other organisations and lobby groups (either registered or of a laissez-fair nature), who were included in any correspondence or communications relating to land that was designated as the Thornlands Integrated Employment (sic) Area within the Springacre Road, Boundary Road, Taylor Road and Woodlands Drive precinct.*

3. Council located 217 responsive pages of documents, of which 55 were released in full, 22 were released in part and 140 were withheld from release.
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision,<sup>3</sup> raising two issues: that the processing cost of the application was disproportionately high compared to the number of documents released (the **costs** issue), and that not all documents responsive to her request were located and provided (the **sufficiency of search** issue). Following an explanation from OIC that the costs issue was outside OIC's jurisdiction,<sup>4</sup> the applicant agreed to pursue only the sufficiency of search issue at external review.
5. In support of her claim that more documents should exist, the applicant provided OIC with signed statutory declarations that recorded a conversation between the applicant and a Queensland Minister, suggesting that submissions had been made by Council to the State government about the TIEA. OIC requested that Council conduct further searches for documents recording those submissions.<sup>5</sup>
6. The searches located a small number of documents responsive to the applicant's request (but not the submissions about the TIEA that the statutory declarations suggested would exist). These responsive documents were released to the applicant.
7. The applicant also identified a consultancy firm that she believed had done work for Council in relation to the TIEA. Following further searches by Council, additional documents were located and released to the applicant.<sup>6</sup>
8. On the basis of Council's initial and further searches, OIC conveyed to the applicant a preliminary view that Council had taken all reasonable steps to locate documents responsive to the applicant's access application.<sup>7</sup>
9. The applicant contested OIC's preliminary view, arguing that the scope of the terms of her application had been construed too narrowly by Council and OIC, and that many more documents should have been released. Further, she argued that the discovery of additional documents in the course of the external review suggested that Council's searches were inadequate.
10. It is the decision of this Office that Council correctly construed the scope of the access application, and is entitled to refuse access to the documents the applicant alleges have not been located, on the basis that they do not exist.

## Background

11. Significant procedural steps relating to the application are set out in the Appendix to this decision.

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<sup>3</sup> By correspondence dated 22 December 2011, received 3 January 2012.

<sup>4</sup> Section 86 of the RTI Act.

<sup>5</sup> Under section 102 of the RTI Act.

<sup>6</sup> Although many of these documents were not strictly within the scope of the applicant's RTI request, she expressed an interest in obtaining them and Council agreed to release them to her.

<sup>7</sup> By letter dated 16 July 2012.

## Reviewable decision

12. The decision under review is Council's decision of 22 December 2011.

## Evidence considered

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

## Scope of the access application

14. In submissions dated 20 July 2012, the applicant argued that the scope of the terms of her RTI request had been '*misinterpreted*'. The applicant submitted:

*The scope of my RTI application to Council requested 'all' communications (faxes, letters, emails etc) that could be obtained 'from' Redland City Council relating to [the TIEA]. 'All', refers to the various forms of communication including documents which have passed from as well as to Council within the time frame specified and which have not been provided.*

*The scope also requests various communications, '...from Redland City Council (as an entity) or any or all individual councillors (in either an official or private capacity) to ... officers of State departments.' 'Officers of State departments' includes local government officers and elected representatives who are all part of the State government organisation, so the scope requests internal Council communications which have not been released.<sup>8</sup>*

15. Previous decisions of this Office have considered the issue of the construction and interpretation of access applications.<sup>9</sup> These decisions<sup>10</sup> specify that the terms of an application will set the parameters for an agency's search efforts and that an applicant cannot unilaterally expand the terms of an application. In *Robbins* the Information Commissioner noted that where there is ambiguity in the terms of an application it is rarely appropriate to apply legal construction techniques in preference to consulting with the author of the words for clarification. However, in the circumstances of that case the Information Commissioner was satisfied that there was no ambiguity in the terms of the application that required clarification.<sup>11</sup>
16. The RTI Act sets out a charging regime whereby applicants are required to pay a portion of the cost of their application. This regime appropriately encourages applicants to focus the scope of their request on the documents that they are particularly interested in and discourages wide ranging and expensive 'fishing expeditions'. Accordingly, it is appropriate that the scope of a request, agreed between applicant and agency, limit the range of documents that the agency must search for and assess for release.
17. The scope of the applicant's RTI application as agreed between the applicant and Council<sup>12</sup> is set out at paragraph 2. On the basis of the documents that were released by Council and correspondence between Council and OIC during the course of this

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<sup>8</sup> Emphasis in original.

<sup>9</sup> While these decisions have considered the issue in the context of the *Freedom of Information Act 1992* (Qld) the principles have equal application to a consideration of the issue in the context of the RTI Act, and were recently applied in that context in *Bade and Gympie Regional Council* (Unreported, Queensland Information Commissioner, 14 February 2012).

<sup>10</sup> *Robbins and Brisbane North Regional Health Authority (1994) 2 QAR 30 (Robbins)*. *Cannon and Australian Quality Egg Farms Limited (1994) 1 QAR 491 (Cannon)* paragraph 8.

<sup>11</sup> See *Robbins* at paragraph 16.

<sup>12</sup> Email from the applicant to Council dated 14 November 2011; Council's decision notice dated 22 December 2011.

review, I consider that Council understood the key elements of the scope as set out at paragraph 2 to be:

- Correspondence or records of communications
- 'from' Council
- 'to' external third parties such as the State government or other organisations or individuals; and
- 'relating to' the TIEA.

18. In her letter of 20 July 2012, the applicant submitted that rather than limiting the scope of her application, the word 'from' referred to documents that *'could be obtained from'* Council under the RTI Act. However, the placement of the word 'from' in the scope sentence, related as it is to the word 'to', in my view unambiguously limits the scope to communications 'from' Council 'to' the nominated external parties.
19. The applicant also submitted that councillors and Council officers can be characterised as *'officers of state Departments'*, so as to bring within the scope of the access application internal Council emails (as these would be emails 'from' Council 'to' officers of state Departments).
20. Local governments (also referred to as 'councils') are constituted under section 11 of the *Local Government Act 2009* (Qld) and consist of councillors elected or appointed under that act or the *Local Government Electoral Act 2011* (Qld). Councils must appoint a chief executive officer<sup>13</sup> who may then employ additional local government employees to assist in the performance of the local government's responsibilities.<sup>14</sup> In contrast, state government departments are established as administrative units under the responsibility of particular Ministers by means of Administrative Arrangements Orders issued by the Governor in Council under section 44 of the *Constitution of Queensland 2001*. Departments (and other *'government entities'*,<sup>15</sup> the definition of which excludes local governments) employ their staff under the *Public Service Act 2008*.<sup>16</sup> For these reasons, Council officers cannot be properly characterised as *'officers of State Departments'*.
21. Although the scope of an access application should not be interpreted legalistically or narrowly, it is important that agencies be able to restrict their searches for documents with reference to an access application's scope. I am of the view that Council correctly interpreted the limits of the scope of the access application, as described in paragraph 17 above. I am satisfied that the access application's scope does not cover correspondence sent to Council or internal Council emails. It would be open to the applicant to make a fresh access application should she wish to obtain these documents.

## **Sufficiency of Council's search**

### ***Relevant law***

22. The RTI Act provides that access to a document may be refused if the document is nonexistent or unlocatable.<sup>17</sup> A document is nonexistent if there are reasonable

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<sup>13</sup> Section 194 of the *Local Government Act 2009* (Qld).

<sup>14</sup> Section 196 of the *Local Government Act 2009* (Qld).

<sup>15</sup> As defined in section 24 of the *Public Service Act 2008* (Qld).

<sup>16</sup> Primarily under section 119 of the *Public Service Act 2008* (Qld).

<sup>17</sup> Sections 47(3)(e) and 52 of the RTI Act.

grounds for the agency or Minister dealing with the access application to be satisfied that the document does not exist.<sup>18</sup>

23. 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*<sup>19</sup> (*PDE*), 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 exclusive 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.
24. When these factors are properly considered and a conclusion reached that the document does not exist, it may be unnecessary for searches to be conducted.
25. Alternatively, an agency may rely on searches to justify a decision that the document sought does not exist. If an agency relies on searches, all reasonable steps must be taken to locate the requested document. In determining whether all reasonable steps have been taken, regard should be had to the factors listed in *PDE*.

### ***Applicant's submissions***

26. In her application for external review, the applicant submitted that the number of documents located was low considering the TIEA was '*an issue which [Council] has stated for two and a half years was dealt with in an open and accountable process*'.
27. At various points during the course of this external review the applicant nominated specific categories of documents that she thought should be held by Council. These were:
- Submissions or other representations from Council to the State Government regarding the TIEA (the existence of which was suggested by statutory declarations provided to OIC by the applicant),<sup>20</sup> which the applicant submitted were most likely to be recorded in emails from four named Councillors<sup>21</sup>
  - Documents relating to a consultancy firm that completed a 'structure plan' for the TIEA prior to its cancellation<sup>22</sup>

<sup>18</sup> Section 52(1)(a) of the RTI Act.

<sup>19</sup> Unreported, Queensland Information Commissioner, 9 February 2009. Note — Although *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld), the requirements of that section are replicated in section 52 of the RTI Act.

<sup>20</sup> Applicant's submissions to OIC dated 22 April 2012.

<sup>21</sup> Telephone discussion between the applicant and OIC on 23 April 2012, confirmed in submissions from the applicant dated 24 April 2012.

<sup>22</sup> Applicant's submissions to OIC dated 24 May 2012 and 6 June 2012.

- A submission to a Code of Conduct review panel dated 25 May 2010 relating to the TIEA;<sup>23</sup> and
- A written submission from Councillor Debra Henry to the South East Queensland Regional Plan (**SEQRP**) review using her Council signature block.<sup>24</sup>

***Has Council taken all reasonable steps to locate these documents?***

28. In response to the access application, Council conducted a search for relevant documents. The search is recorded in a search certification form<sup>25</sup> that describes automated and manual searches conducted by five Council officers between 4 October and 18 November 2011. These searches consisted of electronic searches of the mailboxes of Redland City Councillors and three Council employees who were involved in the TIEA project, keyword searches of the electronic files, and manual searches by officers of the Land Use Planning unit. Council stated that the Land Use Planning unit is the Council work unit whose functions and responsibilities are most relevant to the TIEA.<sup>26</sup>
29. The search certification form indicates that Council officers spent 26 hours searching for documents.
30. The applicant provided OIC with statutory declarations recording a meeting between a Queensland Minister, the applicant, and other concerned residents.<sup>27</sup> Comments attributed to the Minister in the statutory declarations suggest that Council had made representations to the State Government about the TIEA.
31. The applicant nominated four individual Councillors whom she believed were most likely to have made those representations, and agreed with OIC that further searches for those documents should be focussed on the email record of those councillors.<sup>28</sup>
32. Council conducted further searches. Council RTI officers completed a keyword search using keywords nominated by the applicant, and councillor support staff completed search certifications that record manual searches for relevant documents. A small number of emails within the scope of the RTI application were located and released to the applicant, but none of those documents were of the type suggested to exist by the statutory declarations (representations about the TIEA to the State Government).
33. In May the applicant raised a new sufficiency of search issue.<sup>29</sup> The applicant identified a firm that had completed a minor consultancy related to the TIEA for Council, and queried the absence of correspondence relating to that consultancy within the documents released. OIC requested that Council search for such documents.<sup>30</sup> Following additional searches, Council located 71 pages of documents and released those pages to the applicant.<sup>31</sup>

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<sup>23</sup> Applicant's submissions to OIC dated 7 August 2012.

<sup>24</sup> Applicant's submissions to OIC dated 7 August 2012.

<sup>25</sup> Dated 16 February 2012.

<sup>26</sup> Telephone conversation between OIC staff member and a Council officer on 21 August 2012.

<sup>27</sup> Applicant's submissions to OIC dated 22 April 2012.

<sup>28</sup> Email from applicant to OIC dated 24 April 2012.

<sup>29</sup> Applicant's submissions to OIC dated 24 May 2012 and further submissions dated 6 June 2012.

<sup>30</sup> By letter dated 27 June 2012.

<sup>31</sup> Many of the documents Council released to the applicant did not strictly fall within the scope of her request – discussed at paragraphs 14 to 21 above – but all located documents were nonetheless released by Council, so that the applicant would not need to lodge a fresh request should she wish to obtain them.

34. OIC wrote to the applicant<sup>32</sup> advising her that it was OIC's preliminary view that Council's searches were (including the additional searches conducted on external review) sufficient.
35. The applicant did not accept the preliminary view. As well as the scope submissions detailed at paragraph 14 above, the applicant submitted that:<sup>33</sup>

*I do not believe that the searches have released sufficient documents relevant to my scope ... the most recent set of documents released by Council were provided only after I specifically requested those particular documents based on my knowledge of the situation. It is reasonable to suggest that these documents do not exist in isolation and that other relevant documents exist but have not been released.*

36. On 7 August 2012 the applicant provided further correspondence, in which she submitted that the two categories of documents listed last at paragraph 27 above should be held by Council.

### **Findings on sufficiency of Council's search**

37. In my view Council conducted multiple wide ranging searches to locate documents responsive to the applicant's access application. On external review Council conducted further searches in response to specific submissions made by the applicant.
38. In relation to Council's searches in general, I am satisfied that Council has taken all reasonable steps to find documents responsive to the applicant's access application. Council has searched its email record and electronic files for relevant key words, and officers working in the Land Use Planning unit conducted searches. I note Council's submission that the Land Use Planning unit is the work unit whose functions and responsibilities are most relevant to the TIEA,<sup>34</sup> and there is no information before me to suggest that this was not the appropriate location to search. Having regard to the factors outlined in *PDE*, I am satisfied that Council took all reasonable steps to locate responsive documents. Although additional documents were located in the course of this external review, I do not think that this leads to the conclusion that, as the applicant suggests, '*other relevant documents exist but have not been released.*'
39. In relation to the specific categories of 'missing' documents identified by the applicant during the course of this external review,<sup>35</sup> my findings are as follows:
  - Submissions to the State Government from Council regarding the TIEA: Council has taken all reasonable steps to find such documents and is entitled to conclude that these documents do not exist.<sup>36</sup>
  - Documents relating to a consultancy firm who completed a 'structure plan' of the TIEA: Council has located these documents and released them to the applicant.<sup>37</sup>
  - A submission to a Code of Conduct review panel dated 25 May 2010 relating to the TIEA: this document is outside the date range of the access application<sup>38</sup> and so (if it exists) is not within the access application's scope.

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<sup>32</sup> Letter dated 16 July 2012.

<sup>33</sup> By letter dated 20 July 2012.

<sup>34</sup> See paragraph 28.

<sup>35</sup> See paragraph 27.

<sup>36</sup> See paragraph 30 – 32.

<sup>37</sup> See paragraph 33.

<sup>38</sup> 30 June 2005 to 31 December 2009.

- A written submission from Councillor Debra Henry to the SEQRP review using her Council signature block: Council has taken all reasonable steps to find such documents and is entitled to conclude that these documents do not exist.<sup>39</sup>

## **DECISION**

40. I vary the decision under review by finding that:

- Internal emails and correspondence sent to Council are outside the scope of the access application
- The submission to a Code of Conduct review panel dated 25 May 2010 is (if it exists) outside the scope of the access application; and
- Council is entitled to refuse access to the remainder of documents sought by the applicant and not located by Council pursuant to sections 47(3)(e) and 52(1)(a) of the RTI Act on the basis that they do not exist.

41. 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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**V Corby**  
**Assistant Information Commissioner**

**Date: 21 August 2012**

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<sup>39</sup> See paragraph 30 – 32. Although these searches were conducted before the applicant made her submission about this specific document, this document would have been found if it existed and was locatable, as Councillor Henry was one of the councillors whose records were searched for any relevant correspondence sent to the Queensland Government.



## APPENDIX

### Significant procedural steps

Date	Event
16 September 2011	<p>Council received the access application, which requested access to:</p> <p><i>From 30 June 2005 and 29 July 2009: All faxes, letters, notes, emails, submissions (private) or any other written material from RCC or individual councillors to state government relating to land in Taylor Woodland Boundary, Springacre Drive, Thornlands.</i></p> <p><i>For clarity: All faxes, letters, notes, emails, submissions (private) or any other written material from Redland City Council or individual councillors to the State Government, or any member of the State Government, relating to land in the Taylor, Woodland, Boundary, Springacre Road precinct at Thornlands.</i></p>
14 November 2011	<p>Applicant requested that the scope of her application be amended to:</p> <p><i>Between 30 June 2005 to 31 December 2009: All faxes, letters, notes (including briefing notes), emails, submissions (private and public) or any written or noted verbal communications (other than those already in the public domain) from the Redland City Council (as an entity) or any or all individual councillors (in either an official or private capacity) to the State government, State government Ministers, State departments and officers of State departments as well as any other organisations and lobby groups (either registered or of a laissez-fair nature), who were included in any correspondence or communications relating to land that was designated as the Thornlands integrated Employment Area within the Springacre Road, Boundary Road, Taylor Road and Woodlands Drive precinct.</i></p>
22 December 2011	<p>Council issued its decision notice based on the amended scope proposed by the applicant. Council's decision notice stated that it had located 217 responsive pages of documents, of which 55 were released in full, 22 were released in part and 140 were withheld from release.</p>
3 January 2012	<p>OIC received the applicant's request for external review of Council's decision on the basis that the cost of the application was disproportionately high compared to the number of documents released (the <b>costs</b> issue), and that not all responsive documents were located and provided (the <b>sufficiency of search</b> issue).</p>
11 January 2012	<p>OIC wrote to the applicant confirming that it would consider the sufficiency of search issue but that the costs issue was outside jurisdiction (per section 86 of the RTI Act).</p>
11 January 2012	<p>OIC requested that Council provide copies of all documents located as responsive to the applicant's request and a record of its searches.</p>
20 January 2012	<p>Council provided 217 pages of responsive documents to OIC.</p>
16 February 2012	<p>Council provided a record of its searches to OIC.</p>
20 April 2012	<p>OIC provided the applicant with a copy of the search record.</p>
20 April 2012	<p>Applicant provided submissions to OIC in relation to the scope of the access application.</p>
22 April 2012	<p>Applicant provided submissions to OIC on the sufficiency of search issue. The applicant provided copies of statutory declarations recording a meeting between land owners and the Minister for Infrastructure and Planning that suggested that the State Government had received private submissions from Council or Councillors regarding the TIEA.</p>
26 April 2012	<p>OIC wrote to Council to request that further searches be conducted.</p>
10 May 2012	<p>Council provided the result of its further searches to OIC.</p>
24 May 2012	<p>The applicant provided submissions to OIC regarding the sufficiency of search</p>

	issue, referring to documents that should be held by Council relating to a consultancy firm that completed a 'structure plan' for the TIEA.
25 May 2012	OIC wrote to Council asking it to consider releasing the emails located in its further searches and identified as within scope.
31 May 2012	Council provided submissions to OIC in relation to the emails located in the further searches, agreeing to release all emails in full to the applicant.
6 June 2012	Applicant provided submissions to OIC regarding the scope of the access application.
11 July 2012	Council provided documents related to the consultancy firm to OIC.
16 July 2012	OIC asked Council to release the consultancy firm documents to the applicant.
16 July 2012	OIC issued a preliminary view to the applicant stating that Council was entitled to conclude no further documents existed.
20 July 2012	Applicant provided submissions to OIC on the possible existence of further documents and the scope of the access application.
7 August 2012	Applicant provided further submissions to OIC on the possible existence of further documents.