

NSW CIVIL AND ADMINISTRATIVE TRIBUNAL

SUBMISSIONS BY RESPONDENT

ADMINISTRATIVE AND EQUAL OPPORTUNITY DIVISION

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List: Administrative Review

20 OCT 2016

File Number: 1610484

16/17

CIVIL & ADMINISTRATIVE
TRIBUNAL

PARTIES

Applicant: Philip Walker

Respondent: Roads and Maritime Services

Application

1. On 3 August 2016, the Applicant applied to the NSW Civil and Administrative Tribunal for a review of a decision made by Roads and Maritime Services in regards to a *Government Information (Public Access) Act 2009 (GIPA Act)* request determined by Roads and Maritime Services on 18 June 2016.
2. The grounds for application are expressed as follows:

"No Information" Response contrary to Information provided by Local Member's Office – R. Stokes.
3. The decision to which this application related was made by the Respondent on 18 June 2016, and it was a decision that no information was held by the agency. While this is not expressly stated, the Respondent accepts the decision was impliedly made. The Respondent understands that the Applicant seeks review under section 80(e) of the GIPA Act.

Background

4. On 1 July 2016, the Respondent received an access application under the GIPA Act from the Applicant in the following terms:

Conclusions of design and costings for overpass proposal (c/- Member Rob Stokes) Mona Vale Road East Upgrade, at intersection with Samuel Str and Ponderosa Pde (estimated at \$50 million). (Access Application)
5. The decision was due to be made by 29 July 2016. Clarinda Campbell, Manager Privacy and Information, made the decision on 18 July 2016 (**the Decision**). Ms Campbell has delegated authority to make the Decision under delegations dated 12 November 2015 from the Chief Executive.
6. The Respondent did not release any information to the Applicant on the basis that reasonable searches had not located any relevant information. The Respondent did

not limit itself by the quantum expressed in the application, and read the application broadly.

7. The Respondent did not provide details of the searches undertaken in the Decision and the Respondent relies upon the statements of Ms Campbell and Mr Matty Mathivanar in detailing the scope of those searches.
8. Additional searches have been completed subsequent to receiving the Applicant's unsigned and undated affidavit on 6 October 2016. Those searches have not revealed the existence of any documents falling within the terms of the Access Application.

Submissions

9. Section 53 of the GIPA Act relevantly provides as follows:

(1) The obligation of an agency to provide access to government information in response to an access application is limited to information held by the agency when the application is received.

(2) An agency must undertake such reasonable searches as may be necessary to find any of the government information applied for that was held by the agency when the application was received. The agency's searches must be conducted using the most efficient means reasonably available to the agency.

(3) The obligation of an agency to undertake reasonable searches extends to searches using any resources reasonably available to the agency including resources that facilitate the retrieval of information stored electronically.

...

(5) An agency is not required to undertake any search for information that would require an unreasonable and substantial diversion of the agency's resources.

10. The section requires 'reasonable' searches and does not require an 'unreasonable and substantial diversion' of resources. The Respondent submits that its searches were reasonable in the circumstances having regard to the following tests.
11. In reference to case-law, two questions must be considered in determining whether information is held by the agency:
 - a. Whether there are reasonable grounds to believe that the requested information exists and it is information of the agency; and if so,
 - b. Whether the search efforts made by the agency to locate such information have been reasonable in the circumstances. (*Hemeon v Commissioner of Police, New South Wales Police Service* [2002] NSWADT 201 (at [18]), (applying *Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464 at [19]))
12. This two stage approach has been widely followed by the current Tribunal and former Administrative Decision Tribunal in *Cunningham v NSW Ministry of Health* [2015] NSWCATAD 124; *Camilleri v Commissioner of Police, NSW Police Force* [2012] NSWADT 5 (**Camilleri**); *DQ v Commissioner of Police, NSW Police Service* [2002] NSWADT 215; *Patsalis v Commissioner of Police, New South Wales Police* [2004] NSWADT 35 (**Patsalis**); *O'Hara v North Sydney Council* [2005] NSWADT 100; and *Curtin v Vice Chancellor, University of New South Wales* (No 2) [2006] NSWADT 56.

Reasonable Grounds to believe existence of information

13. In accordance with the test enunciated above, there must be reasonable grounds to believe the requested information exists, and it is Roads and Maritime's information. The Applicant bears an onus in identifying these reasonable grounds. In *Camilleri* Judicial Member Isenberg held "it is not enough for the Applicant to merely assert non-compliance on the basis of a general distrust of the agency".
14. In his statement, Mr Richard Hine acknowledges a conversation between himself and a member of NSW Minister for Planning Mr Stokes' electorate office in which the issue of an overpass is briefly raised (Hine Statement at [13]). Mr Hine states that he did not take a file note of this conversation. He also states that he did not carry out any formal costings by way of documentation for an overpass on the basis that the proposal was raised informally, and was not a viable proposal for the relevant intersection (Hine Statement at [14]-[16]). In that context, and for the purposes of that discussion, Mr Hine indicated an approximate costs amount based on his experience and familiarity with project costs.
15. Mr Hine has also taken steps to have additional searches completed encompassing all correspondence that would relate to the Applicant and the Intersection (Hine Statement at [6]). Copies of documents found in that search are annexed to Mr Hine's statement. Those documents do not fall within the terms of the Access Application.
16. In his statement, Mr Mathivanar points out that he does "not consider that an overpass is suitable for the Intersection" and that this forms part of the reason why he considers it unlikely that costings would have been completed (Mathivanar Statement at [7]). This view is re-iterated by Mr Hine in his statement (Hine Statement at [14]).
17. The Respondent submits that Mr Hine and Mr Mathivanar's evidence is sufficient to satisfy the Tribunal that there are no reasonable grounds to believe that there is any document in Roads and Maritime's control that responds to the application.

The Respondent's searches

18. Even if the Tribunal finds that there are reasonable grounds to believe the information exists, it is submitted that the Respondent's searches were reasonable and that further searches would be futile, particularly where additional searches have been undertaken following receipt of the Applicant's material on 6 October 2016.
19. Ms Campbell's evidence provides a number of reasons for the fact that any documents relating to the Application would be held by the Infrastructure Development Division. This evidence is based on the knowledge of Roads and Maritime's functions that Ms Campbell has gained over the last two years (Ref Campbell statement at [5]).
20. Furthermore, the Respondent has a well-organised electronic record management system, in which no records were located relating to the Access Application.
21. In *Camilleri*, referring to *Patsalis*, Judicial Member Isenberg stated at [15]:

In Patsalis at [63] President OConnor said that the standard of search which an agency is obliged to conduct is simply whether reasonable searches have occurred. The fact that there may be weaknesses in an agency's searches, or that there may be failures in its record-keeping processes, did not necessarily lead to the conclusion that the search had not been reasonable, or sufficient, or adequate: see also O'Hara. In Patsalis, the documents to which the applicant sought access had existed but were subsequently lost. Numerous searches were conducted but failed to find them and,

ultimately, his Honour concluded at [59] that 'it would be a waste of time to ask the agency to do any more searches'.

22. The Campbell, Mathivanar and Hine statements reveal that the Respondent has undertaken searches in good faith endeavouring to locate the information sought by the Applicant. This has included searches subsequent to receipt of the Applicant's evidence to ensure there were no outstanding documents that were inadvertently not identified in the initial searches.

23. The evidence is that there are no records responding to the Application. It is submitted that the only conclusion available to the Tribunal is that the Respondent's searches have been reasonable. It would be futile and beyond the 'reasonable search' required to direct the Respondent to conduct the same or further searches.

Costs

24. The Respondent submits the usual rule, that each party bear its own costs, be applied in this case (section 60 *Civil and Administrative Tribunal Act 2013*)

Hearing on the papers

25. The Respondent submits that the Tribunal should exercise its discretion to hear the matter on the papers so as to avoid further time or expense being applied to the case.

A handwritten signature in black ink, appearing to read 'L. Brignull', is written over a horizontal line.

Lauren Brignull on behalf of Christopher Diekman

Deputy General Counsel

Roads and Maritime Services