



Decision and Reasons for Decision

Citation:	<i>Q94 and Department of Justice [2024] QICmr 65 (22 November 2024)</i>
Application Number:	318035
Applicant:	Q94
Respondent:	Department of Justice
Decision Date:	22 November 2024
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT DOCUMENTS - applicant contends that responsive documents should be in the agency's possession - whether there are reasonable grounds for agency to be satisfied that documents do not exist - whether access to documents may be refused under section 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> and sections 47(3)(e) and 52(1)(a) of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied¹ under the *Information Privacy Act 2009 (Qld)* (**IP Act**) to the Department of Justice and Attorney-General² (**Department**) for access to a change of identity certificate about a change of name he said occurred in 1981.
2. The Department decided³ to refuse access to the requested document on the basis that it does not exist.⁴
3. The applicant applied to the Information Commissioner for external review of the Department's decision.⁵
4. For the reasons outlined below, I affirm the Department's decision and find that access to the requested document may be refused on the basis it does not exist.

Evidence considered

5. Significant procedural steps are set out in the Appendix to this decision.

¹ Valid on 24 April 2024.

² Due to machinery of government changes that occurred subsequent to the date of the decision under review, which resulted in the Department of Justice and Attorney-General being renamed the Department of Justice and having some changes in functions. For ease of reference, I have simply referred to the relevant agency as the Department in this decision.

³ On 9 May 2024.

⁴ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the *Right to Information Act 2009 (Qld)* (**RTI Act**).

⁵ Received on 23 May 2024.

6. The evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).
7. In making this decision I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the applicant's right to seek and receive information.⁶ I consider a decision-maker will be '*respecting and acting compatibly with*' that right, and others prescribed in the HR Act, when applying the law prescribed in the RTI Act and IP Act.⁷ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between the equivalent pieces of Victorian legislation:⁸ '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*'⁹

Reviewable decision

8. The reviewable decision is the Department's decision dated 9 May 2024.

Issue for determination

9. The sole issue for determination is whether access to the requested document can be refused on the basis it is nonexistent.

Relevant law

10. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent they contain the individual's personal information.¹⁰ This right is not absolute but subject to the provisions of the IP Act and RTI Act, including grounds of refusal.¹¹ Relevantly in this review, access to a document may be refused if the document is nonexistent.¹²
11. A document will be *nonexistent* if there are reasonable grounds to be satisfied it does not exist.¹³ To be satisfied that a document does not exist, the Information Commissioner has previously explained that it is necessary to have regard to various key factors including the agency's record-keeping practices and procedures (including, but not limited to, its information management approaches).¹⁴ By considering the relevant factors, the decision maker may conclude that a particular document was not created because, for example, the agency's processes do not involve creating that specific document. In such instances, it is not necessary for the agency to search for the document. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.¹⁵

⁶ Section 21 of the HR Act.

⁷ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111]. I further note that OIC's approach to the HR Act set out in this paragraph was considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (where Judicial Member McGill saw 'no reason to differ' from our position).

⁸ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁹ *XYZ* at [573].

¹⁰ Section 40 of the IP Act.

¹¹ Section 67(1) of the IP Act provides that access may be refused in the same way and to the same extent as an agency could refuse access to the document under section 47 of the RTI Act.

¹² Section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act.

¹³ Section 52(1)(a) of the RTI Act. For example, a document has never been created.

¹⁴ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (**Pryor**) at [19] which adopted the Information Commissioner's comments in *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (**PDE**) at [37]-[38]. *PDE* addresses the application of section 28A of the repealed *Freedom of Information Act 1992* (Qld). Section 52 of the RTI Act is drafted in substantially the same terms as the provision considered in *PDE* and, therefore, the Information Commissioner's findings in *PDE* are relevant.

¹⁵ *Mewburn and Department of State Development* [2015] QICmr 9 (21 April 2015) at [19].

12. However, if such an explanation is not forthcoming, it can be established that a document does not exist by having regard to the searches and inquiries conducted by an agency. The key question then is whether those searches and inquiries amount to ‘*all reasonable steps*’.¹⁶ What constitutes reasonable steps will vary from case to case, as the search and inquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances. Such steps may include inquiries and searches of all relevant locations identified after consideration of relevant key factors.¹⁷
13. The functions of the Information Commissioner on external review include investigating and reviewing whether an agency has taken reasonable steps to identify and locate documents applied for by applicants.¹⁸ The agency that made the decision under review bears an onus to justify an adverse decision against an applicant.¹⁹ Where an external review involves the issue of missing documents, the agency must demonstrate that there is a reasonable explanation to account for the nonexistence of documents or have taken reasonable steps to identify and locate relevant documents. If the applicant maintains further documents exist, a practical onus shifts to the applicant to demonstrate that the agency has not discharged its obligation.²⁰ Suspicion and mere assertion will not satisfy this onus.²¹
14. In assessing an agency’s searches, the Information Commissioner has recently confirmed the relevant question is whether the agency has taken all *reasonable* steps to identify and locate documents, as opposed to all *possible* steps.²² This follows the approach taken by the Queensland Civil and Administrative Tribunal where His Honour Judge McGill reasoned that it is open to the Information Commissioner to reach a finding that an agency has taken all reasonable steps ‘*even if, at least in theory, further and better searches might possibly disclose additional documents.*’²³

Findings

15. The applicant has provided lengthy and detailed submissions in support of his application.²⁴ It is unnecessary to set these out in any detail here. Suffice to say that I have read and considered his submissions carefully when coming to this decision.
16. The Department provided evidence of searches of the Life Event Register, held by the Registry of Births, Deaths and Marriages, as this is where the requested document would be stored if it exists. The Department searched the names provided by the applicant in his access application. No documents were located.²⁵
17. I conveyed this information to the applicant and provided a preliminary view that the document appears not to exist.²⁶ The applicant provided further detailed submissions in response outlining his belief that documents do exist and his understanding of certain contextual events.²⁷ These submissions identify other agencies which may

¹⁶ As set out in *PDE* at [49].

¹⁷ As set out in *PDE* at [38].

¹⁸ Section 137(2) of the IP Act.

¹⁹ Section 100(1) of the IP Act.

²⁰ *Mewburn and Department of Local Government, Community Recovery and Resilience* [2014] QICmr 43 (31 October 2014) at [13].

²¹ *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36].

²² *S55 and Queensland Police Service* [2023] QICmr 3 (30 January 2023) at [23].

²³ *Webb v Information Commissioner* [2021] QCATA 116 at [5]-[6].

²⁴ Received on 23 May 2024, 10 July 2024, and 23 August 2024.

²⁵ Signed search certificate dated 7 May 2024, provided to OIC on 13 June 2024.

²⁶ On 26 June 2024.

²⁷ Received on 10 July 2024 and 23 August 2024.

have held documents but do not provide any additional information that could be used to inform further searches by the Department.

18. The question I must consider is whether all reasonable steps have been taken by the Department to locate the document the applicant seeks. Although the Department has only searched in one location—the Life Events Register—I consider the Department has undertaken appropriately targeted searches for the requested document, using appropriate search terms, in the location where the document would be if it did exist. These searches have failed to locate any relevant documents. Accordingly, I am satisfied that the Department has taken all reasonable steps and the document sought by the applicant does not exist.²⁸
19. For the sake of completeness, I note that the RTI Act provides that, before it can be established that a prescribed document does not exist, a search of a backup system is required, but only if it is considered that the document has been kept in, and is retrievable from, the backup system.²⁹ I have not requested searches of any backup system, as I do not consider it necessary to do so, as there is nothing before me to indicate that the relevant document ever existed and is stored within a backup system.

DECISION

20. For the reasons set out above, I affirm³⁰ the decision under review that access to the requested document may be refused 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 it is nonexistent.
21. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

J Williams
Assistant Information Commissioner

Date: 22 November 2024

²⁸ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act.

²⁹ Section 52(2) of the RTI Act.

³⁰ Section 123(1)(a) of the IP Act.

APPENDIX

Significant procedural steps

Date	Event
23 May 2024	OIC received the external review application. OIC requested preliminary information from the Department.
27 May 2024	OIC received the requested information from the Department.
13 June 2024	OIC received the signed search certificate from the Department.
26 June 2024	OIC advised the Department and applicant that the external review application had been accepted. OIC conveyed a preliminary view to the applicant.
10 July 2024	OIC received submissions from the applicant.
8 August 2024	OIC issued further correspondence to the applicant.
23 August 2024	OIC received submissions from the applicant.