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## Applying the legislation

GUIDELINE *Right to Information Act 2009*

### Documents non-existent or unlocatable

The *Right to Information Act 2009*<sup>11</sup> (Qld) (**RTI Act**) gives people the right to access documents in the possession or control of Queensland government agencies<sup>22</sup>. This right of access is subject to some limitations, including when documents are non-existent or unlocatable.

#### When is it appropriate to use this provision?

Section 47(3)(e) of the RTI Act allows an agency to refuse access to a document that is non-existent or unlocatable as set out in section 52.

In order to rely on section 52 the agency must be satisfied that:

- the document does not exist (for example, because it was never created)<sup>3</sup>; or
- the document has been, or should be, in the agency's possession and it cannot be located despite all reasonable steps having been taken to find the document<sup>4</sup>.

#### Transferring the application

If the reason for the document not having been created or received is that it is held by another agency, the agency that received the application should consider transferring it.

For more information, refer to OIC's Guideline [Transferring access applications](#).

#### Is the agency satisfied that the document does not exist?

To be satisfied that the document does not exist it will be necessary to consider:

- the structure, functions, responsibilities, practices and procedures of the agency
- the nature and age of the requested documents; and
- the decision maker's knowledge and experience of the agency<sup>5</sup>.

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1 And the *Information Privacy Act 2009*.

2 In this guideline agency includes a Minister.

3 Section 52(1)(a) of the RTI Act.

4 Section 52(1)(b) of the RTI Act.

5 See *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) at paragraph 37



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### Legislative record-keeping requirements

In *S13 and Queensland Police Service*<sup>6</sup> the applicant sought access to a Public Interest Disclosure (PID) Register, and sought review of the agency's decision that the document was non-existent on the grounds that the PID Act<sup>7</sup> required the agency to keep such a register. On review, the agency maintained that, while they did keep records relating to PIDs, they did not, and were not required to, keep a specific PID Register.

The Commissioner did not accept that the existence of record-keeping obligations under the PID Act established the existence of an internal PID Register and based on that, and evidence provided that such a Register did not exist, upheld the agency's decision that the document was non-existent.

If satisfied the document does not exist, the agency is not required to carry out all reasonable steps to find it.<sup>8</sup>

### Is the agency satisfied that the document is unlocatable?

To be satisfied that a document is **unlocatable**, the agency must first consider whether there are reasonable grounds to be satisfied the document has been or should be in the agency's possession or control. Once satisfied, the agency must take all reasonable steps to find it.<sup>9</sup>

### All reasonable steps

When refusing access to a document because it is unlocatable, the agency must set out why it believes the document exists and that it could not be found despite all reasonable steps being taken to find it. An explanation of the reasonable steps which were taken to locate the document must be included.

Officers in relevant operational areas will often be able to assist in meeting the obligation to take all reasonable steps to find the document, for example by providing information about the document.

### Note

When relying on information provided by other officers, decision makers must still be satisfied that the information provided is sufficient for them to make a decision that the document does not exist or cannot be located.

<sup>6</sup> [2020] QICmr 13 (28 February 2020)

<sup>7</sup> *Public Interest Disclosure Act 2010*

<sup>8</sup> See *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) at paragraph 34.

<sup>9</sup> See *2TH1KV and Department of Transport and Main Roads* (Unreported, Queensland Information Commissioner, 21 October 2011) at paragraph 30.



## Does the agency have to conduct searches to demonstrate all reasonable steps?

Not necessarily. Searches are one way an agency can demonstrate it has taken reasonable steps to find the document. Thorough searching is helpful if the decision maker has doubts about where the document could be located within the agency. However, searches alone may not disclose the existence of a document that has been or should be in the agency's possession.

To determine if a document is non-existent or unlocatable, agencies must demonstrate they have taken all reasonable *steps* to find the document, not just that reasonable searches have been undertaken.<sup>10</sup>

As mentioned above, the decision notice must explain the steps taken to find the document. Where searches were undertaken, the notice should include details of the locations searched, why those locations were chosen, and a description of how the searches were conducted. For more information, refer to the OIC's Guideline: [Searching for documents](#).

### Example

Joe Bloggs is a decision maker in the RTI Unit at the Department of Widgets. He receives an application for access to "the plant watering schedule for the Department of Widgets for the period March – June 1998".

Joe knows that his agency's approved Retention and Disposal schedule provides for the destruction of general administrative records after five years so he is fairly confident that the plant watering schedule for 1998 no longer exists.

To satisfy himself that this is the case, Joe contacts the Department's records area and they send him a copy of the Certificate of Destruction for the agency's plant watering schedules, so he knows that the document does not exist. In his prescribed written notice to the applicant, Joe explains that the document is non-existent because it was destroyed in accordance with the Department's approved Retention and Disposal schedule. He also includes a copy of the relevant Certificate of Destruction so the applicant knows that the document no longer exists.

## Must the agency search its backup systems?

No, an agency would only do so in limited circumstances.<sup>11</sup> These include where an agency intends to refuse access to a *prescribed document*<sup>12</sup> because the document does not exist and it considers the document has been kept in, and is

<sup>10</sup> See *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) at paragraph 53.

<sup>11</sup> Section 29(1) of the RTI Act.

<sup>12</sup> *Prescribed document* is a document required to be kept under the *Public Records Act 2002* that is not a document that the agency could lawfully have disposed of under that Act (section 54(2) of the RTI Act).



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retrievable from, a backup system--before refusing access, the agency must search the backup system. This requirement only applies to documents that do not exist, not to documents that exist but cannot be found.<sup>13</sup>

For additional information and assistance please refer to the [OIC Annotated Legislation for section 47\(3\)\(e\)](#) and the OIC's guidelines, or contact the Enquiries Service on 07 3234 7373 or email [enquiries@oic.qld.gov.au](mailto:enquiries@oic.qld.gov.au).

**This guide is introductory only, and deals with issues in a general way. It is not legal advice. Additional factors may be relevant in specific circumstances. For detailed guidance, legal advice should be sought.**

If you have any comments or suggestions on the content of this document, please submit them to [feedback@oic.qld.gov.au](mailto:feedback@oic.qld.gov.au).

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*Changes to legislation after the update date are not included in this document*

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<sup>13</sup> *Cullen and Department of Public Works* (Unreported, Queensland Information Commissioner, 21 January 2011) at paragraph 30.