



Decision and Reasons for Decision

Citation:	<i>Soley and Office of the Health Ombudsman</i> [2015] QICmr 32 (9 December 2015)
Application Number:	312550
Applicant:	Soley
Respondent:	Office of the Health Ombudsman
Decision Date:	9 December 2015
Catchwords:	ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – NONEXISTENT DOCUMENTS – applicant contends a number of prescriptions exist – whether agency has taken all reasonable steps to locate the documents but the documents do not exist – section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) – sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant made a complaint to the Office of the Health Ombudsman (**OHO**) about the service he received from a doctor at a public hospital. OHO considered the applicant's complaint and notified him that it had decided to take no further action.
2. The applicant made an application to OHO under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to a number of documents which were identified in OHO's decision letter including clinical records which the hospital provided to OHO and certain prescriptions which the applicant believes exist.
3. OHO decided to release 262 pages to the applicant in full and two pages in part subject to the deletion of a small amount of personal information.
4. The applicant applied for internal review of the original decision on the grounds that OHO had not located a number of prescriptions which he believed OHO obtained from the hospital as part of the investigation into his complaint. As OHO did not make a valid internal review decision, OHO's principal officer was taken to have made a decision affirming the original decision under section 97(2) of the IP Act.
5. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of OHO's decision. For the reasons addressed below, access to the information in issue can be refused under sections 47(3)(e) and 52(1)(a) of the *Right to Information Act 2009* (Qld) (**RTI Act**) as it is nonexistent.

Background

6. Significant procedural steps relating to the external review are set out in the appendix.

Reviewable decision

7. The decision under review is OHO's deemed affirmation of the original decision.

Evidence considered

8. Evidence, submissions, legislation and other material I have considered in reaching my decision are disclosed in these reasons (including footnotes and appendix).
9. The applicant provided submissions to OIC on various occasions. I have addressed those submissions in these reasons only to the extent they are relevant to the issue for determination.

Issue for determination

10. The issue for determination on external review is whether access to the information in issue can be refused under section 67(1) of the IP Act and section 47(3)(e) of the RTI Act as it is nonexistent.¹

Information in issue

11. The information which is the subject of this review comprises three prescriptions which the applicant believes were obtained by OHO from the hospital as part of the investigation into his complaint (**Requested Prescriptions**).²

Relevant law

12. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent the documents contain the individual's personal information. However, this right is subject to limitations, including grounds for refusal of access.³ Access to a document may be refused if the document is nonexistent.⁴
13. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.⁵ To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors.⁶
14. When proper consideration is given to relevant factors, it may not be necessary for searches to be conducted. However, if searches are relied on to justify a decision that

¹ The applicant did not apply for external review of OHO's decision to refuse access to parts of two pages.

² The applicant specifically identifies these prescriptions as: (a) the original script which he presented to the hospital pharmacy on 24 March 2014 (b) a copy of this original script with repeats on it which he says was rejected by the hospital pharmacy on 7 April 2014 and (c) the script completed by a specific doctor and presented to the hospital pharmacy on 7 April 2014.

³ 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 it could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under the RTI Act.

⁴ Sections 47(3)(e) and 52(1)(a) of the RTI Act.

⁵ Section 52(1)(a) of the RTI Act.

⁶ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at paragraph 19 which adopted the Information Commissioner's comments in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009). The key factors include: 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 to which the request relates.

the documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case as the search and enquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances.

Findings

Is there a reasonable basis to believe the Requested Prescriptions exist?

15. No, for the reasons that follow.
16. The access application to OHO was for documents identified in OHO's decision letter including clinical records provided to OHO by the hospital. Page 2 of the decision letter lists the information the decision-maker relied on during the assessment which includes '*Medical records from [the hospital], covering the period 26 February 2014 to 12 March 2014*'. The applicant indicated that the dates on the Requested Prescriptions are 24 March 2014 and 7 April 2014. Therefore, as the Requested Prescriptions fall outside the timeframe identified in the decision letter, they would not appear to have been included in the clinical records which the hospital provided to OHO for its assessment.
17. The applicant refers to an email he received from a Patient Liaison Officer at the hospital on 26 May 2014 which relevantly provides:

Dr [X] advises 4 items were dispensed to you by the hospital pharmacy on the 24 March 2014, all prescribed by Dr [Y]. Therefore we are unable to substantiate that these prescriptions were declined by the pharmacy. It is noted that a further prescription written by Dr [Z] was dispensed by the Hospital pharmacy on 7 April 2014.

18. I have carefully considered this email and consider it likely that at least two of the three Requested Prescriptions do exist and may be documents of the hospital.⁷ However, the issue for determination on external review, is whether the Requested Prescriptions are *documents of OHO*. This email does not indicate that the hospital provided any of the Requested Prescriptions to OHO. The hospital and OHO are separate and unrelated agencies. OHO is unable to obtain a copy of the Requested Prescriptions from the hospital now in response to the applicant's request under the IP Act. This is because an application is taken only to apply to documents that are, or may be, in existence within the agency on the day the application is received.⁸
19. The applicant submits that he spoke with a particular OHO officer and that this officer indicated she had obtained the Requested Prescriptions. OIC asked OHO about this issue and OHO explained that there was no record in its files that the OHO officer had in fact obtained copies of the Requested Prescriptions from the hospital.
20. Having carefully considered the information available to me, I am not satisfied there is any evidence which indicates that OHO did receive the Requested Prescriptions from the hospital.

Has OHO taken all reasonable steps to locate the Requested Prescriptions?

21. Yes, for the reasons that follow.
22. As OHO also relied on searches to justify its position that the Requested Prescriptions do not exist, it is relevant for me to consider whether it has taken all reasonable steps to locate the Requested Prescriptions.

⁷ I have previously advised the applicant that, if the Requested Prescriptions exist, they would be in the possession of the hospital and that he may wish to make an application to the relevant agency for a copy of the Requested Prescriptions.

⁸ Section 47 of the IP Act.

23. OHO performed additional searches for the Requested Prescriptions on external review and provided search certifications to OIC completed by two officers. OHO explained that:
- it had spent an additional two hours searching for the Requested Prescriptions and these searches covered its electronic complaints management and general document management systems and physical files
 - it had located and considered all of the applicant's clinical records which it had received from the hospital
 - it did not hold any prescriptions other than those already located and released to the applicant; and
 - there was no record in its files of OHO having obtained copies of the Requested Prescriptions from the hospital.
24. Based on this information, I am satisfied that OHO's search and enquiry process has been sufficiently targeted and appropriate having regard to the circumstances. In my view, OHO has taken all reasonable steps to locate the Requested Prescriptions.
25. The applicant contends that OHO is deliberately withholding the Requested Prescriptions to protect an individual and is being dishonest with OIC. There is no evidence before me, other than the applicant's assertion, that this is the case.

Conclusion

26. Having carefully considered the information available to me, I am not satisfied there is any evidence which indicates that OHO did receive the Requested Prescriptions from the hospital. This is supported by the fact that OHO has conducted comprehensive and targeted searches for the Requested Prescriptions and has been unable to locate them.

DECISION

27. I vary⁹ the decision under review and find that OHO was entitled to refuse access to the Requested Prescriptions 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 they do not exist.
28. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Tara Mainwaring
Acting Assistant Information Commissioner

Date: 9 December 2015

⁹ The decision is varied because OHO was deemed to have affirmed the original decision under section 97(2) of the IP Act.

APPENDIX

Significant procedural steps

Date	Event
2 June 2015	OHO received the application under the IP Act.
1 July 2015	OHO issued its original decision to the applicant.
7 July 2015	OHO received the internal review application. As OHO did not make a valid internal review decision, OHO's principal officer was taken to have made a decision affirming the original decision under section 97(2) of the IP Act.
17 August 2015	OIC received the external review application.
19 August 2015	OIC asked the applicant to identify the decision and agency which were the subject of his external review application. The applicant provided the requested information.
20 August 2015	OIC asked OHO to provide various procedural documents by 27 August 2015.
25 August 2015	OIC received the requested information from OHO.
2 September 2015	OIC notified the applicant and OHO that the external review application had been accepted. OIC asked OHO to provide information on the searches it had performed by 16 September 2015.
16 September 2015	OIC received the requested information from OHO.
7 October 2015	OIC conveyed its preliminary view to the applicant by phone. The applicant did not accept the preliminary view. OIC confirmed its preliminary view to the applicant in writing and invited him to provide submissions supporting his case by 21 October 2015.
9 October 2015	The applicant requested OIC provide further information about OHO's search process. OIC provided the requested information.
11 October 2015	OIC received the applicant's submissions.
13 October 2015	OIC received the applicant's submissions.
14 October 2015	OIC received the applicant's submissions.
16 October 2015	OIC received the applicant's submissions.
5 November 2015	OIC wrote to the applicant addressing his submissions and confirming the preliminary view. The applicant was invited to provide any further submissions supporting his case by 20 November 2015.
6 November 2015	OIC received the applicant's submissions.