



## Decision and Reasons for Decision

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Citation:	<i>L18 and Queensland Police Service</i> [2020] QICmr 64 (2 November 2020)
Application Number:	315049
Applicant:	L18
Respondent:	Queensland Police Service
Decision Date:	3 November 2020
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - UNLOCATABLE DOCUMENTS - request for copy of agreement between agency and media organisation for filming of documentary series - agency could only locate a draft version of the agreement - whether agency has taken all reasonable steps to locate the signed version of the agreement - whether access to the agreement can be refused on the ground that it is unlocatable - sections 47(3)(e) and 52(1)(b) of the <i>Right to Information Act</i> 2009 (Qld)

## REASONS FOR DECISION

### Summary

1. The applicant applied to the Queensland Police Service (**QPS**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) to access an agreement between QPS and Wall to Wall Media Limited (**WTW**) '*to film a qld citizen arrest for the specific purpose of a formal Commercial agreement*'.<sup>1</sup>
2. QPS interpreted the application as seeking two documents; an agreement between QPS and WTW regarding the filming of a documentary series and a separate commercial agreement concerning advertising placement (**Second Agreement**). QPS decided<sup>2</sup> to refuse access to the requested documents on the grounds that:
  - the agreement between QPS and WTW has been or should be in the possession of QPS but could not be located; and
  - the Second Agreement did not exist.

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<sup>1</sup> The access application, made by the applicant's authorised representative on his behalf, is dated 5 September 2019 and was received by QPS on 24 September 2019. The date range of the application is 1 March 2014 to 1 January 2016.

<sup>2</sup> On 3 December 2019.

3. The applicant applied<sup>3</sup> to the Office of the Information Commissioner (**OIC**) for external review of QPS's decision to refuse access to the agreement between QPS and WTW.<sup>4</sup>
4. During the review, QPS conducted further searches and inquiries, which located an unsigned, draft copy of an agreement between QPS and WTW but did not locate the final, signed copy of the agreement (**Signed Agreement**), as sought by the applicant. QPS disclosed the located draft agreement to the applicant, without redaction.<sup>5</sup>
5. For the reasons set out below, I affirm QPS's decision to refuse access to the Signed Agreement under section 47(3)(e) of the RTI Act on the basis it cannot be located.

### Reviewable decision and evidence considered

6. The decision under review is QPS's decision dated 3 December 2019.
7. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).
8. I have also had regard to the *Human Rights Act 2019* (Qld),<sup>6</sup> particularly the right to seek and receive information.<sup>7</sup> 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.<sup>8</sup> 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 equivalent pieces of Victorian legislation:<sup>9</sup> '*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.*'<sup>10</sup>
9. Significant procedural steps relating to the external review are set out in the Appendix.

### Issue for determination

10. The issue for determination is whether access to the Signed Agreement may be refused on the basis it is unlocatable.
11. The applicant provided a number of submissions to OIC.<sup>11</sup> The applicant does not accept that the Signed Agreement cannot be located and asserts that it is being improperly withheld by QPS.<sup>12</sup> There is no evidence before me which supports this assertion. The applicant also raised concerns about the recordkeeping practices of QPS and requested that OIC prosecute QPS for failing to locate the Signed Agreement.<sup>13</sup> 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.<sup>14</sup>

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<sup>3</sup> On 4 December 2019.

<sup>4</sup> The applicant did not seek review of QPS's decision concerning the Second Agreement. Accordingly, this decision does not consider that issue.

<sup>5</sup> OIC sought the views of WTW on disclosure of the draft agreement, in accordance with the third party consultation process under the RTI Act. However, WTW did not respond to OIC's invitation to express its views on disclosure of the draft agreement.

<sup>6</sup> Referred to in these reasons as the **HR Act**, and which came into force on 1 January 2020.

<sup>7</sup> Section 21 of the HR Act.

<sup>8</sup> *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].

<sup>9</sup> *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>10</sup> *XYZ* at [573].

<sup>11</sup> As set out in the Appendix.

<sup>12</sup> In telephone conversations between OIC and the applicant on 13 March 2020 and 28 October 2020, the applicant asserted that QPS did not obtain a court approval which the applicant believes was required for QPS to enter the agreement; the applicant submits this is the reason why QPS is withholding the Signed Agreement. The validity or otherwise of the agreement is not a matter which is within my jurisdiction and therefore, I have not considered this submission any further.

<sup>13</sup> Telephone conversation between OIC and the applicant on 11 August 2020.

<sup>14</sup> Section 130(2) of the RTI Act.

However, the Information Commissioner has no jurisdiction to prosecute QPS as the applicant has requested. Therefore, that issue has not been considered any further in these reasons. Below, I have considered the applicant's submissions and addressed them, to the extent they are relevant to the issue for determination.

## Relevant law

12. The RTI Act provides a right to be given access to documents of an agency,<sup>15</sup> however, this right of access is subject to limitations, including the grounds on which access to information may be refused.<sup>16</sup> One such ground of refusal is where a document is unlocatable.<sup>17</sup>
13. A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document but it cannot be found.<sup>18</sup>
14. Determining whether a document exists, but is unlocatable, requires a decision maker to consider whether there are reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession; and whether the agency has taken all reasonable steps to find the document. In answering these questions, regard should be had to the circumstances of the case and the following key factors:<sup>19</sup>
  - the administrative arrangements of government
  - the agency's structure
  - the agency's functions and responsibilities
  - the agency's practices and procedures; and
  - other factors reasonably inferred from information supplied by the applicant, including the nature and age of the requested documents, and the nature of the government activity to which the request relates.
15. Generally, on external review, the agency that made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.<sup>20</sup> However, where the issue of missing documents is raised, the applicant bears a practical onus to establish reasonable grounds to believe that the agency has not discharged its obligation to locate all relevant documents.<sup>21</sup>

## Findings

16. The applicant submits that, as a legal document, the Signed Agreement was required by law to be kept by QPS and it *'should never be destroyed and will not be archived until all actions associated with the document are exhausted.'*<sup>22</sup>

<sup>15</sup> Section 23(1)(a) of the RTI Act. 'Document of an agency' is defined in section 12 of the RTI Act as 'a document, other than a document to which this Act does not apply, in the possession, or under the control, of the agency whether brought into existence or received in the agency, and includes—

(a) a document which the agency is entitled to access; and

(b) a document in possession or under the control, of an officer of the agency in the officer's official capacity'.

<sup>16</sup> The grounds on which an agency may refuse access are set out in section 47(3) of the RTI Act.

<sup>17</sup> Sections 47(3)(e) and 52(1) of the RTI Act.

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

<sup>19</sup> *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [21]. See also, *F60XCX and Office of the Queensland Parliamentary Counsel* [2016] QICmr 42 (13 October 2016) at [84] and [87], and *Underwood and Minister for Housing and Public Works* [2015] QICmr 27 (29 September 2015) at [33]-[34] and [49].

<sup>20</sup> Section 87(1) of the RTI Act.

<sup>21</sup> See *Mewburn and Department of Local Government, Community Recovery and Resilience* [2014] QICmr 43 (31 October 2014) at [13].

<sup>22</sup> Applicant's email dated 10 August 2020. The applicant raised similar arguments in a conversation with OIC on 11 August 2020.

17. It is not disputed that a copy of the Signed Agreement should have been retained somewhere in QPS's recordkeeping system. In conducting searches for the Signed Agreement, QPS identified that searches for the document had commenced in 2016, presumably when it was first identified as missing from the legal file.<sup>23</sup> QPS provided information regarding communication of the draft agreement through various business units, as set out below:
- the Public Safety Business Agency (**PSBA**) Media Unit, which at the relevant time had responsibility for the media and public affairs of QPS,<sup>24</sup> received the draft agreement and referred that document to PSBA Legal Services; and
  - the draft agreement was amended by PSBA Legal Services and returned to PSBA Media Unit to be finalised in February 2015.
18. QPS also provided evidence that searches of records of the following areas/officers were conducted in an effort to locate the Signed Agreement:
- State Crime Command
  - QPS Media and Public Affairs Group (**MPAG**)<sup>25</sup>
  - Superintendent Niland<sup>26</sup>
  - Office of the Deputy Commissioners<sup>27</sup>
  - electronic records of the QPS Legal Unit<sup>28</sup>
  - archived hard copy legal file
  - QFES Legal Unit,<sup>29</sup> and
  - Commissioner's Office.
19. I accept that, given its nature, the Signed Agreement is a document which should have been retained in QPS's recordkeeping system. It seems reasonable to expect an executed legal agreement would be retained on the relevant legal file. However, searches of electronic and hard copy legal records did not locate a copy of the Signed Agreement. Given the document would be less than six years old, it appears unlikely that it would have been destroyed under a disposal authority.<sup>30</sup>
20. However, based on the evidence available to me, I am satisfied that QPS has undertaken comprehensive searches of locations where it would be reasonable to expect that the Signed Agreement would be kept. I am also satisfied that the inquiries made by QPS in an effort to locate the Signed Agreement were directed to relevant staff who were familiar with the agreement and/or involved in its creation, and who would have had requisite knowledge of applicable recordkeeping practices for such a document.
21. The applicant has asked that QPS be required to obtain a copy of the Signed Agreement from WTW for the purpose of disclosure under the RTI Act.<sup>31</sup> For the following reasons, I am satisfied that this would not be a reasonable step for QPS to take to locate the

<sup>23</sup> Submission to OIC dated 24 September 2020.

<sup>24</sup> And the Queensland Fire and Emergency Service (**QFES**).

<sup>25</sup> The QPS search records indicate that the unit's electronic media log, MPAG correspondence system and hard copy files were searched.

<sup>26</sup> Identified as having been involved in the agreement originally.

<sup>27</sup> Including but not limited to the Deputy Commissioner (Strategy, Policy and Performance) (**DCSPP**). QPS search records indicate searches were undertaken of QPS's Objective system, a DCSPP File server and email records (using a variety of search terms).

<sup>28</sup> Using a variety of search terms.

<sup>29</sup> Which has responsibility for PSBA.

<sup>30</sup> Generally, the Queensland Police Service Retention and Disposal Schedule requires that agreements of a commercial nature be retained for seven years after lapsing of the agreement or its last action, whichever is later. This seven year retention period is reflected in the current Queensland State Archive General Retention and Disposal Schedule (which can be accessed at: <<https://www.forgov.qld.gov.au/schedules/general-retention-and-disposal-schedule-grds>>).

<sup>31</sup> In a conversation with the applicant on 11 August 2020.

document. Even if WTW does hold a copy of the Signed Agreement,<sup>32</sup> it would not constitute a '*document of an agency*' for the purpose of the RTI Act, as it is not in QPS's possession and nor is there any evidence that it is under QPS's control.<sup>33</sup> There is also nothing before me<sup>34</sup> to indicate that QPS has a present legal entitlement to take physical possession of a copy of the Signed Agreement from WTW. On this basis, even if a copy of the Signed Agreement is held by WTW, it would not constitute a document of an agency under the RTI Act, nor would it be a reasonable step for QPS to take in satisfying section 52(1)(b) of the RTI Act.

22. I acknowledge that obtaining a copy of the Signed Agreement is important to the applicant and that this will be a disappointing outcome. However, based on the searches and inquiries undertaken by QPS<sup>35</sup>, I am satisfied that:

- QPS has taken reasonable steps to locate the Signed Agreement
- the Signed Agreement is a document that *should be* in QPS's possession but cannot be found; and
- access to the Signed Agreement may be refused on the basis that it is unlocatable.<sup>36</sup>

## DECISION

23. I affirm QPS's decision to refuse access to the Signed Agreement under section 47(3)(e) on the basis that it is unlocatable, in accordance with section 52(1)(b) of the RTI Act.

24. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**K Shepherd**  
**Assistant Information Commissioner**

**Date: 2 November 2020**

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<sup>32</sup> I have no evidence of this available to me.

<sup>33</sup> See footnote 15 above and *Queensland Newspapers Pty Ltd and Ipswich City Council* [2015] QICmr 30 (26 November 2015) at [35].

<sup>34</sup> Including the terms of the located draft agreement.

<sup>35</sup> Including search certifications provided by QPS.

<sup>36</sup> Under sections 47(3)(e) and 52(1)(b) of the RTI Act.

## APPENDIX

### Significant procedural steps

Date	Event
4 December 2019	OIC received the application for external review.
6 February 2020	OIC advised the applicant and QPS that the external review application had been accepted and asked QPS to provide further information.
4 March 2020	OIC provided an update to the applicant.
5 March 2020	OIC received the requested information from QPS, including a copy of the located draft agreement.
6 March 2020	QPS provided details of the further inquiries it was undertaking.
10 March 2020	QPS confirmed additional searches had not located the Signed Agreement.
13 March 2020	OIC spoke with the applicant and received the applicant's submissions.
27 March 2020	The applicant requested a copy of the located draft agreement but confirmed the request for the Signed Agreement.
16 April 2020	OIC wrote to QPS requesting further information about the searches it had conducted and asked QPS to consider disclosing the located draft agreement in the interests of promoting informal resolution of the review.
28 April 2020	The applicant requested a copy of the located draft agreement and the Signed Agreement.
1 May 2020	OIC received requested search information from QPS. QPS agreed to disclose the located draft agreement, subject to consultation being undertaken with WTW.
15 June 2020	OIC provided an update to the applicant.
6 July 2020	OIC consulted WTW concerning the proposed disclosure of the located draft agreement.
31 July 2020	OIC conveyed a preliminary view to the applicant and asked QPS to provide a copy of the located draft agreement to the applicant.
10 August 2020	OIC received the applicant's submissions.
11 August 2020	QPS provided a copy of the draft agreement to the applicant. OIC spoke with the applicant and received the applicant's submissions.
27 August 2020, 24 September 2020 and 26 October 2020	OIC received further information from QPS concerning the outcome of its further searches and inquiries.
28 October 2020	OIC spoke with the applicant and provided an update on the status of the review.