



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>K29 and Energex Limited ACN 078 849 055 [2022] QICmr 51 (16 November 2022)</i></b>
<b>Application Number:</b>	<b>316678</b>
<b>Applicant:</b>	<b>K29</b>
<b>Respondent:</b>	<b>Energex Limited ACN 078 849 055</b>
<b>Decision Date:</b>	<b>16 November 2022</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - request for traffic control documents relating to particular asset number - whether agency has taken all reasonable steps to locate documents - whether access to further documents may be refused on the basis that the documents do not exist or are unlocatable - sections 47(3)(e) and 52 of the <i>Right to Information Act 2009 (Qld)</i></b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied<sup>1</sup> to Energex Limited (**Energex**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) to access traffic control documents and other information relating to a particular Energex asset.
2. Energex located two documents<sup>2</sup> as relevant to the application—an Energy Queensland Working on Roadways Manual (**EQ Manual**) and a Manual of Uniform Traffic Control Devices (**Traffic Device Manual**)—and decided<sup>3</sup> to disclose those documents, subject to the deletion of irrelevant information.<sup>4</sup>
3. The applicant then applied<sup>5</sup> to the Office of the Information Commissioner (**OIC**) for external review of Energex’s decision. The applicant is dissatisfied with the documents located and disclosed to him, and believes further documents relevant to his request for ‘**TRAFFIC CONTROL DOCUMENTS (TRAFFIC PLAN, SITE SET UP)**’ exist.<sup>6</sup>

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<sup>1</sup> Access application dated 15 March 2022. The applicant subsequently clarified that he sought to access documents within the date range 1 January 2019 to 30 April 2020.

<sup>2</sup> Comprising 268 pages.

<sup>3</sup> Decision dated 21 April 2022.

<sup>4</sup> Energex also refused access to a requested risk assessment on the ground it was unlocatable.

<sup>5</sup> External review application dated 25 April 2022.

<sup>6</sup> By email dated 4 May 2022, the applicant confirmed that he was only seeking to access ‘*Traffic Control Documents, traffic plan, and site setup documents*’ in relation to the particular Energex asset. Accordingly, the information to which Energex refused access (on the ground it was unlocatable) and the information deleted from the disclosed documents (on the basis it was irrelevant) is not in issue and is not addressed in this decision.

4. For the reasons set out below, I vary Energex's decision and find that access to any further traffic control documents may be refused on the basis that they do not exist.<sup>7</sup>

### Reviewable decision and evidence considered

5. The decision under review is Energex's decision dated 21 April 2022.
6. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and the Appendix).
7. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>8</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>9</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>10</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>11</sup>
8. The significant procedural steps taken in this external review are set out in the Appendix.

### Issue for determination

9. The issue for determination is whether access to the requested traffic control documents may be refused on the basis they are nonexistent or unlocatable.
10. On external review, the applicant raised concerns about how Energex managed the works at a specific address and his belief that Energex had provided '*false information pertaining to this worksite*'.<sup>12</sup> On external review, the Information Commissioner does not have jurisdiction to interrogate the veracity of document content or investigate complaints about an agency's conduct or its processes.<sup>13</sup> I have therefore taken into account, and addressed, the applicant's submissions to the extent they are relevant to the issue for determination.

### Relevant law

11. The RTI Act provides a right to be given access to documents of an agency,<sup>14</sup> however, this access right is subject to limitations, including the grounds on which access to information may be refused.<sup>15</sup>
12. The functions of the Information Commissioner on external review include investigating and reviewing whether an agency has taken reasonable steps to identify and locate

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<sup>7</sup> Pursuant to sections 47(3)(e) and 52 of the RTI Act.

<sup>8</sup> Section 21 of the HR Act.

<sup>9</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>10</sup> *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>11</sup> *XYZ* at [573]. OIC's approach to the HR Act set out in this paragraph has recently been considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (noting that Judicial Member McGill saw '*no reason to differ*' from our position).

<sup>12</sup> Submissions dated 6 July 2022. While the applicant also contended that Energex '*covered up key points*' and '*falsely produced the parts that were irrelevant*' in the EQ Manual, in his email dated 4 May 2022, he confirmed that this document was '*freely available to the general public*' and attached the copy he had obtained.

<sup>13</sup> On 12 September 2022, I confirmed to the applicant the limits of the Information Commissioner's external review jurisdiction.

<sup>14</sup> Section 23(1)(a) of the RTI Act.

<sup>15</sup> The grounds on which an agency may refuse access are set out in section 47(3) of the RTI Act.

documents applied for by applicants.<sup>16</sup> However, access to a document may be refused if the document is nonexistent or unlocatable.<sup>17</sup>

13. A document is *nonexistent* if there are reasonable grounds to be satisfied the document does not exist.<sup>18</sup> To be satisfied of this, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors, including:<sup>19</sup>
  - the administrative arrangements of government
  - the agency structure
  - the agency's functions and responsibilities
  - 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.
14. If searches are relied on to justify a decision that 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 inquiry process an agency will be required to undertake will depend on the particular circumstances.
15. 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>20</sup> Determining whether a document exists, but is unlocatable, requires consideration of 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 again be had to the circumstances of the case and the key factors.<sup>21</sup>
16. Generally, 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>22</sup> However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable grounds to believe that the agency has not discharged its obligation to locate all relevant documents.<sup>23</sup>

## Findings

17. The applicant submitted that further traffic control documents exist because '*When a Traffic Controller is onsite they or he/she must have a site plan (How the cone and Signs are set up and documents pertaining to traffic controllers on site) at the time before commencement and during the job site and billing info for EQL. This comes under the*

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<sup>16</sup> Section 130(2) of the RTI Act. The Queensland Civil and Administrative Tribunal confirmed in *Webb v Information Commissioner* [2021] QCATA 116 at [6] that the RTI Act 'does not contemplate that [the Information Commissioner] will in some way check an agency's records for relevant documents' and that, ultimately, the Information Commissioner is dependent on the agency's officers to do the actual searching for relevant documents.

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

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

<sup>19</sup> *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 the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) at [28]. These factors were more recently considered in *Van Veendelaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017) and *P17 and Queensland Corrective Services* [2020] QICmr 68 (17 November 2020).

<sup>20</sup> Section 52(1)(b) of the RTI Act.

<sup>21</sup> *Pryor* at [21].

<sup>22</sup> Section 87(1) of the RTI Act.

<sup>23</sup> See *Mewburn and Department of Local Government, Community Recovery and Resilience* [2014] QICmr 43 (31 October 2014) at [13].

*WHS Act and Traffic Management Code of Practise 2008 (under 3.2 Risk Management)*'.<sup>24</sup>

18. On external review, Energex relied on the searches undertaken by its officers to justify its position that reasonable steps have been taken to locate traffic control documents relevant to the application.
19. Energex provided information to me about the searches it conducted in processing the application, including a search record and certification. In respect of the requested traffic control documents, that information confirmed that Energex's Brisbane Area Manager<sup>25</sup> searched Energex's online field documentation,<sup>26</sup> which is retained on an online SharePoint location where all field documentation for South East Queensland are kept—as noted in paragraph 2, only the EQ Manual and Traffic Device Manual were located by those searches. As there is no information before me to indicate that Energex's search record is not credible, I consider that an Energex officer (with requisite knowledge of applicable recordkeeping practices for the types of documents requested by the applicant) has conducted searches of the relevant location where the traffic control documents requested in the access application would be stored.
20. The Energex Manager who certified the search record also noted that section 4.4 of the EQ Manual was utilised for the subject works,<sup>27</sup> as they were assessed as '*short-term low impact works – built up areas (minor works)*', and therefore '*no site-specific traffic management documentation was required for the described short term work*'.
21. The applicant does not accept Energex's classification of the subject works and submitted:<sup>28</sup>
  - the works were 'High Risk Major Works', rather than short term low impact works, and
  - on that basis, other provisions of the EQ Manual applied to the works and required the creation of additional traffic control documents.<sup>29</sup>
22. I acknowledge that the applicant holds his own view about the nature of the subject works and the traffic control requirements which he considers to be applicable to those works. However, the issue for determination in this matter is whether Energex has taken all reasonable steps to locate the traffic control documents requested in the access application—I am not required to determine whether the nature of the subject works did, or did not, require the creation of further traffic control documents.
23. It seems reasonable to expect that, if any further traffic control documents had been created in respect of the subject works, they would have been retained with other field documentation for the subject works. As noted above, searches of the location where Energex stores those types of records only located the EQ Manual and Traffic Device Manual. The applicant's belief that further traffic control document *should* have been created is, of itself, insufficient to support a reasonable expectation that such further traffic control documents were in fact created.

<sup>24</sup> Submission dated 4 May 2022. In support of his position, the applicant's submission dated 6 July 2022 refers to the documentation requirements in section 7.1 of the '*Traffic management for construction or maintenance work Code of Practice 2008*' (which can be accessed at [https://www.worksafe.qld.gov.au/\\_data/assets/pdf\\_file/0018/22158/traffic-management-construction-cop-2008.pdf](https://www.worksafe.qld.gov.au/_data/assets/pdf_file/0018/22158/traffic-management-construction-cop-2008.pdf) ).

<sup>25</sup> In the decision under review, Energex confirmed that this officer managed the Operations Field Delivery Area for Brisbane Central.

<sup>26</sup> The search certification confirmed this was documentation '*the crew utilised to perform the short term works*'.

<sup>27</sup> That is, for the works conducted at this particular Energex asset within the timeframe specified in the access application.

<sup>28</sup> Submissions dated 6 July 2022.

<sup>29</sup> The applicant also submitted that the subject works were '*not short term under the Ergon Manual section 4.1*' and the worksite was '*not a frequently moving worksite*'.

24. Accordingly, on the material before me (including the decision under review, the applicant's submissions and Energex's search record and certification), I consider that Energex has conducted suitably targeted searches of the relevant location where it was reasonable to expect that the traffic control information requested in the access application would be found.
25. For these reasons, I am satisfied that:
- Energex has taken all reasonable steps in searching for traffic control documents responsive to the access application; and
  - access to any further traffic control documents may be refused<sup>30</sup> on the basis they are nonexistent.<sup>31</sup>

## DECISION

26. For the reasons set out above, as a delegate of the Information Commissioner under section 145 of the RTI Act, I vary Energex's decision and find that access to any further traffic control documents may be refused under section 47(3)(e) of the RTI Act, on the basis they do not exist.

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**T Lake**  
**Acting Assistant Information Commissioner**

**Date: 16 November 2022**

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<sup>30</sup> Under section 47(3)(e) of the RTI Act.

<sup>31</sup> Under 52(1) of the RTI Act.

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
25 April 2022	OIC received the external review application.
26 April 2022	OIC requested preliminary information from Energex.
28 April 2022	OIC received information from Energex, including a search record and certification.
4 May 2022	OIC received submissions from the applicant and confirmed to the applicant that he only wished to access the traffic control documents requested in the access application.
23 June 2022	OIC notified the applicant and Energex that it had accepted the external review application and conveyed a preliminary view to the applicant.
6 July 2022	OIC received the applicant's submissions.
12 September 2022	OIC conveyed a further preliminary view to the applicant.
13 September 2022	OIC received the applicant's request for a formal decision to be issued.