



Decision and Reasons for Decision

Citation:	<i>B50 and Department of Justice and Attorney-General</i> [2024] QICmr 33 (7 August 2024)
Application Number:	318020
Applicant:	B50
Respondent:	Department of Justice and Attorney-General
Decision Date:	7 August 2024
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - SCOPE OF APPLICATION - application to access certain filed police reports - whether certain further documents sought by the applicant fall outside the scope of the application - sections 40 and 43 of the <i>Information Privacy Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - application to access certain filed police reports - whether agency has conducted reasonable searches - whether access to further documents may be refused on the basis they are nonexistent or unlocatable - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009</i> (Qld)</p>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of Justice and Attorney-General (**Department**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) to access a report against a named individual, which the applicant filed at a particular police station,² and any report which the named individual filed against the applicant.³
2. The Department located one page as relevant to the access application and decided to disclose that page to the applicant.⁴

¹ By email to the Department dated 8 March 2024 (**access application**), which included the applicant's prior email chain with Victim Assist Queensland (**VAQ**). VAQ is part of the Department of Justice and Attorney-General and provides information and advice for victims of crime, including information about support services, victim's rights and financial assistance.

² On or around 1 September 2018.

³ The access application became valid on 8 March 2024, as confirmed by the Department in its 12 March 2024 letter to the applicant. By email dated 12 March 2024, the applicant confirmed the scope of the access application, as set out in the Department's 12 March 2024 letter, and also agreed to exclude duplicates.

⁴ Decision dated 22 April 2024.

3. The applicant sought internal review of that decision, as he considered more documents should have been made available to him.⁵ On internal review, the Department decided that it did not hold any additional documents relevant to the access application.⁶
4. The applicant then applied to the Office of the Information Commissioner (**OIC**) for review of the Department's decision.⁷
5. For the reasons set out below, I vary the Department's internal review decision and find that:
 - certain additional documents sought by the applicant fall outside the scope of the access application; and
 - access may be refused to any further documents relevant to the access application on the ground that they are nonexistent.⁸

Background

6. The significant procedural steps taken during this review are set out in the Appendix.

Reviewable decision

7. The decision under review is the Department's internal review decision dated 20 May 2024.

Evidence considered

8. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix).
9. Generally, it is necessary that decision makers have regard to the *Human Rights Act 2019* (Qld) (**HR Act**), as section 11(1) of the HR Act provides that '[a]ll individuals **in Queensland** have human rights' (my emphasis). The applicant does not reside in Queensland. However, at times relevant to the information requested in the access application he did reside in Queensland. On the basis of this nexus to Queensland, I have also had regard to the HR Act, particularly the right to seek and receive information.⁹ I consider a decision-maker will be '*respecting and acting compatibly with*' these rights and others prescribed in the HR Act, when applying the law prescribed in the IP Act and the RTI Act.¹⁰ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.¹¹

⁵ Applicant's email dated 22 April 2024.

⁶ Internal review decision dated 20 May 2024.

⁷ External review application dated 20 May 2024.

⁸ Under section 67(1) of the IP Act and sections 47(3)(e) and 52 of the *Right to Information Act 2009* (Qld) (**RTI Act**). Section 67(1) of the IP Act sets out that an agency may refuse access to information in the same way and to the same extent that the agency could refuse access to the document under section 47 of the RTI Act were the document the subject of an access application under the RTI Act.

⁹ Section 21(2) of the HR Act.

¹⁰ *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 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 OIC's position).

¹¹ I also note the following observations made by Bell J in *XYZ* at [573], on the interaction between equivalent pieces of Victorian legislation (namely, the *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)): '*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.*'

Issues for determination

10. External review under the IP Act is a merits review process¹² of government decisions about access to, and amendment of, documents. The IP Act also empowers the Information Commissioner to make any decision in respect of an access application that could have been made by the agency.¹³ As such, in making a decision on external review, the Information Commissioner¹⁴ may rely on provisions in the IP Act and RTI Act which are different to those relied upon by the agency in the decision under review.
11. On external review, the applicant raised generalised concerns about the adequacy of the Department's search for documents relevant to the access application.¹⁵
12. Accordingly, the issues for determination in this review are whether:
 - certain further documents sought by the applicant fall outside the scope of the access application; and
 - the Department has taken all reasonable steps to locate documents relevant to the access application which are in the Department's possession, or under its control, and whether the Department may therefore refuse access to further relevant documents on the basis they do not exist or cannot be located.

Relevant law

13. An individual has a right under the IP Act to be given access to documents of an agency, to the extent they contain the individual's personal information.¹⁶ Section 43(2)(b) of the IP Act requires an applicant to give sufficient information concerning the document(s) sought to enable a responsive officer of the agency to locate relevant documents.
14. The IP Act access right is subject to limitations, including the grounds for refusal of access.¹⁷ One refusal ground is where a document is nonexistent or unlocatable.¹⁸
15. To be satisfied that a document does not exist, the Information Commissioner has previously identified key factors to consider, which include:¹⁹
 - the administrative arrangements of government
 - the agency's structure
 - the agency's functions and responsibilities²⁰

¹² That is, external review is an administrative reconsideration of a case which can be described as '*stepping into the shoes*' of the primary decision-maker to reach the correct and preferable decision.

¹³ Section 118(1)(b) of the IP Act.

¹⁴ Or delegate.

¹⁵ Applicant's email dated 9 July 2024.

¹⁶ Section 40 of the IP Act. '*Personal information*' is defined in section 12 of the IP Act as '*information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion*'.

¹⁷ The grounds on which access can be refused are set out in section 47 of the RTI Act. As noted above, section 67(1) of the IP Act provides that access may be refused to information in the same way and to the same extent as information may be refused under the RTI Act.

¹⁸ Sections 47(3)(e) and 52(1) of the RTI Act. 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—section 52(1)(b) of the RTI Act. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist—section 52(1)(a) of the RTI Act.

¹⁹ These factors are identified in *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 [37]-[38] (*PDE*). These factors were more recently considered in *Van Veenendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017) (*Van Veenendaal*) at [23]-[25] and *P17 and Queensland Corrective Services* [2020] QICmr 68 (17 November 2020) at [17]-[19].

- 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.
16. It may not be necessary for searches to be conducted when proper consideration is given to relevant factors. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.²¹ However, searches may be relied on to satisfy the decision-maker that a document does not exist—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.²² What constitutes reasonable steps will vary from case to case.²³
17. To determine whether a document exists, but is unlocatable, requires consideration of whether there are reasonable grounds 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 it.²⁴ In answering these questions, regard should again be had to the circumstances of the case and the key factors set out above.²⁵
18. 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.²⁶ However, where an external review involves the issue of missing documents, as is the case here, 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. Suspicion and mere assertion will not satisfy this onus.²⁷
19. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate documents applied for by applicants.²⁸ 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.²⁹

Scope of the access application

²⁰ Particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it.

²¹ For example, where a particular document was not created because 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.

²² As set out in *PDE* at [49].

²³ 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.

²⁴ Section 52(1)(b) of the RTI Act.

²⁵ *Pryor* at [21].

²⁶ Section 100(1) of the IP Act.

²⁷ *Parnell and Queensland Police Service* [2017] QICmr 8 (7 March 2017) at [23]; *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36]; *Y44 and T99 and Office of the Public Guardian* [2019] QICmr 62 (20 December 2019) at [38].

²⁸ Section 137(2) of the IP Act. The Queensland Civil and Administrative Tribunal confirmed in *Webb v Information Commissioner* [2021] QCATA 116 at [6] that the equivalent provision in 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. The Information Commissioner also has power under section 115 of the IP Act to require additional searches to be conducted during an external review.

²⁹ *S55 and Queensland Police Service* [2023] QICmr 3 (30 January 2023) at [23], cited with approval in *W55 and Brisbane City Council* [2024] QICmr 13 (17 April 2024) at [19].

20. As noted in paragraphs 1 and 2 above, the applicant applied to the Department to access two reports filed with police and the Department located one document which it considered to be relevant to the access application and released that document to the applicant.
21. There are sound practical reasons for the documents sought by an applicant to be clearly and unambiguously identified, as the terms of an access application set the parameters for an agency's search efforts and therefore are of primary importance where an applicant contends, as is the case in this review, that the agency has not located all relevant documents.³⁰ An applicant also cannot unilaterally expand the scope of an access application on external review.³¹
22. When seeking internal review of the Department's original decision, the applicant:³²
 - suggested that the Department should '*check the officers note book notes who wrote this report*'; and
 - requested that the Department '*check for any video recordings of [the applicant] coming in and speaking to police*'.
23. The applicant has made limited submissions on external review and has provided no information in support of the internal review request referenced above. Although it is unclear whether the applicant continues to seek further documents of this nature on external review, I have addressed this request below.
24. Having assessed the scope of the access application objectively and without undue technicality,³³ I am satisfied that the access application did not request entries from the notebooks of Queensland Police Service (**QPS**) officers or video recordings of the applicant '*coming in and speaking to police*'. I therefore find that the officer notebook entries and video recording referenced in the applicant's internal review application would, if they exist, fall outside the scope of the access application. As a result of my finding, it is unnecessary for me to consider whether these additional documents exist or whether the Department has taken reasonable steps to locate them.

The Department's searches

25. As noted above, the applicant applied to the Department to access two reports '*filed*' with police and the Department located, and disclosed, one document to the applicant.
26. In the decision under review, the Department confirmed that:

³⁰ *Usher and Department of Natural Resources and Mines* [2014] QICmr 51 at [15]. See also *Lonsdale and James Cook University* [2015] QICmr 34 (**Lonsdale**) at [9] and *Van Veenendaal* at [15]. In this regard, I also note the following observations of the Information Commissioner in *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 (**Cannon**) at [8], when addressing similar considerations under the predecessor to the RTI Act, the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**): *The terms in which an FOI access application is framed set the parameters for an agency's response under Part 3 of the FOI Act, and in particular set the direction of the agency's search efforts to locate all documents of the agency which fall within the terms of the FOI access request. The search for the relevant documents is frequently difficult, and has to be conducted under tight time constraints. Applicants should assist the process by describing with precision the document or documents to which they seek access. Indeed the FOI Act itself makes provision in this regard with s.25(2) not only requiring that an FOI access application must be in writing, but that it must provide such information concerning the document to which access is sought as is reasonably necessary to enable a responsible officer of the agency to identify the document.* These observations were also cited with approval in *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) (**O80PCE**) at [33] and *Ciric and Queensland Police Service* [2018] QICmr 30 (29 June 2018) at [20].

³¹ *8RS6ZB and Metro North Hospital and Health Service* [2015] QICmr 3 (13 February 2015) at [14], citing *Robbins and Brisbane North Regional Health Authority* (1994) 2 QAR 30 at [17]. See also *Lonsdale* at [9].

³² By email dated 22 April 2024.

³³ *Cannon* at [8] and *O80PCE* at [33].

- the types of documents requested in the access application may only be accessed by the Department to the extent they appear within records held by VAQ; and
 - no additional documents relevant to the access application were amongst the documents held by VAQ.
27. On external review, the Department provided details of the searches and inquiries it had conducted and further information about the record keeping systems which it is entitled to access.³⁴ In summary, the received information confirms that:
- the *Victims of Crime Assistance Act 2009* (Qld) (**VOCA Act**) authorises VAQ assessors to obtain certain information from QPS in relation to an act of violence for which financial assistance is sought—the types of information which can be obtained are identified in sections 65 and 66 of the VOCA Act
 - VAQ therefore does not have unfettered access to police records
 - in processing the access application, searches were conducted by the Department of the places where VAQ would reasonably expect to locate responsive documents, namely, VAQ's Electronic Documents and Records Management System (**eDocs**) and Resolve³⁵
 - those conducted searches were undertaken by a VAQ officer, using the applicant's name as the search term;³⁶ and
 - only one document was located as relevant to the access application.
28. Having reviewed the information provided by the Department, there was nothing before me to suggest that the Department was in possession of any further information relevant to the access application. Accordingly, I conveyed a preliminary view³⁷ to the applicant that the Department had conducted appropriately targeted searches of the locations it was able to access and where it was reasonable to expect that the two reports requested in the access application would be stored.
29. The applicant did not accept my preliminary view and submitted:³⁸
- Please know and note that no actual detailed analysis was provided on how they reached such conclusion and who exactly they asked and how they asked for information. Who is it who commenced the searches? More detailed analyses should have been made. DJAG can speak to other public bodies to obtain any other records that may exist.*
30. Under section 43 of the IP Act, an individual who wishes to be given access to a document of an agency, to the extent it contains the individual's personal information, may apply to the agency for access to the document. Here, the applicant applied to the Department.³⁹

³⁴ On 26 June 2024. This included a completed search record.

³⁵ In its submission dated 26 June 2024, the Department explained that:

- (i) Resolve is an internal client management database, which captures information related to a client's application for financial assistance and the decision-making process that follows; and
- (ii) emails are saved to eDocs by VAQ in accordance with the *Public Records Act 2002* (Qld).

³⁶ The Department's search record also confirms that the searches were conducted for documents relevant to the agreed scope of the access application.

³⁷ It is the practice of OIC to convey a preliminary view, based on an assessment of the material before the Information Commissioner or her delegate at that time, to an adversely affected participant. This is to explain the issues under consideration to the participant and affords them the opportunity to put forward any further information they consider relevant to those issues. It also forms part of the Information Commissioner's processes for early resolution of external reviews.

³⁸ By email dated 9 July 2024.

³⁹ The Department is an agency for the purpose of the IP Act.

31. The IP Act defines a document of an agency⁴⁰ as anything that is a document of an agency under the RTI Act. Section 12 of the RTI Act relevantly states that:

*In this Act, **document**, of an agency, means 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 to which the agency is entitled to access; and*
- (b) a document in the possession, or under the control, of an officer of the agency in the officer's official capacity.*

32. The term 'possession' as used in section 12 of the RTI Act requires nothing more than the relevant documents be in the physical possession of an agency.⁴¹ The Information Commissioner has previously explained that a document will be 'under the control' of an agency where the agency has a present legal entitlement to take physical possession of the document.⁴²
33. Having reviewed the terms of the access application and the submissions received from the applicant and the Department, I consider that the Department has conducted appropriately targeted searches of locations where it would be reasonable to expect the reports requested in the access application would be stored within the Department's record keeping systems.
34. Further, taking into account the provisions of the VOCA Act referenced above, there is nothing before me which suggests that the Department has any present legal entitlement to take physical possession of any further documents which may be relevant to the access application. The IP Act does not, as the applicant suggested, require the Department to contact other agencies to obtain documents relevant to the access application. While further report/s relevant to the access application may, or may not, exist within QPS' records, I am satisfied any such further report, if it exists, is not a document in the possession, or under the control, of the Department.
35. Accordingly, I am satisfied that:
- the Department has taken all reasonable steps to locate documents relevant to the access application; and
 - access to any further documents relevant to the access application may be refused on the basis they do not exist.⁴³

DECISION

36. For the reasons set out above, I vary the Department's decision and find that:
- certain additional documents requested by the applicant fall outside the scope of the access application; and
 - access may be refused to any further documents relevant to the access application on the ground that they are nonexistent.⁴⁴

⁴⁰ In section 13 of the IP Act.

⁴¹ *Kalinga Woolloowin Residents Association Inc. and Department of Employment, Economic Development and Innovation; City North Infrastructure Pty Ltd (Third Party)* (Unreported, Queensland Information Commissioner, 19 December 2011) and *Kalinga Woolloowin Residents Association Inc and Brisbane City Council and Ors* (Unreported, Queensland Information Commissioner, 9 May 2012), each applying *Holt and Reeves and Education Queensland and Anor* (1998) 4 QAR 310.

⁴² *Queensland Newspapers Pty Ltd and Ipswich City Council* [2015] QICmr 30 (26 November 2015) at [15], citing with approval *Price and the Nominal Defendant* (1999) 5 QAR 80 at [18].

⁴³ Under section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act.

⁴⁴ Under section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act.

37. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

T Lake
Principal Review Officer

Date: 7 August 2024

APPENDIX

Significant procedural steps

Date	Event
20 May 2024	OIC received the external review application and the applicant's email submission.
12 June 2024	OIC notified the applicant and the Department that the application for external review had been accepted and requested information from the Department.
26 June 2024	OIC received the requested information from the Department.
8 July 2024	OIC conveyed a preliminary view to the applicant and invited the applicant to provide a submission if he wished to contest that view.
9 July 2024	OIC received the applicant's submission contesting the preliminary view.
11 July 2024	OIC wrote to the applicant to confirm the preliminary view and notify the applicant that a decision would be issued to finalise the external review.