



Decision and Reasons for Decision

Citation:	<i>O82 and Department of Education [2022] QICmr 46 (25 October 2022)</i>
Application Number:	316231
Applicant:	O82
Respondent:	Department of Education
Decision Date:	25 October 2022
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - application for documents relating to applicant's employment - whether agency has conducted reasonable searches for requested electronic instant messaging - whether access to further messaging documents may be refused on the basis they are nonexistent or unlocatable - section 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> and sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of Education (**Department**) under the *Information Privacy Act 2009 (Qld)* (**IP Act**) for access to certain documents relating to his employment with the Department.
2. The Department did not make a decision within the required statutory timeframe and was therefore taken to have made a deemed decision refusing access to the requested information.²
3. The applicant then applied³ to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.
4. During the course of the external review, the Department located and disclosed documents to the applicant. The applicant was not satisfied that the Department has located the electronic instant messaging requested in his application.

¹ Access application is dated 6 May 2021. As the Department processed the access application under the IP Act, the application fee initially paid by the applicant was refunded during the course of this review.

² Under section 66(1) of the IP Act. In this regard, I note that the applicant denied the Department's third request (made on 23 July 2021) for an extension of time to continue processing the application.

³ External review application dated 27 July 2021.

5. For the reasons set out below, I vary the Department's decision and find that access to any further electronic instant messaging may be refused on the basis that it does not exist.⁴

Background

6. The original scope of the application sought nine categories of information, including the 'front information Screen' for particular documents, his training records and correspondence, meeting requests and instant messaging between named individuals.
7. After accepting the applicant's external review application in August 2021, OIC asked the Department to provide a copy of the documents located in response to the application.⁵ The Department requested further time to complete its searches for responsive documents and, on 15 November 2021, provided OIC with approximately 3,200 pages of information (**Located Documents**), which had been marked up to identify the information which the Department considered to comprised exempt, contrary to the public interest and irrelevant information. In reviewing the Located Documents, I observed that a large proportion of the documents were not relevant to the application.
8. The applicant agreed, in consultation with OIC, to narrow the scope of the application, by excluding certain items of the original scope⁶ and clarifying the terms of some of the remaining items (**Narrowed Application**).⁷ In assessing the Located Documents, I identified that less than 200 pages were relevant to the Narrowed Application. The Department disclosed most of the information within those relevant pages to the applicant.
9. Following this disclosure, the applicant raised a concern that the Department had not located the electronic instant messaging requested in item 9 of the Narrowed Application (**Messaging Documents**), namely:

Copies of [...] instant messaging between [name 1], [name 2] and [name 3] between 1 October 2020 and 14 February 2021 in which I am named [applicant name and particular versions of applicant's name]. Only correspondence in which I am named/referenced.

10. The Department conducted further searches for the Messaging Documents at my request. As a result of those further searches, a further five pages were located and disclosed to the applicant.
11. Significant procedural steps relating to the external review are set out in the Appendix.

Reviewable decision and evidence considered

12. The decision under review is the decision the Department is deemed to have made under section 66 of the IP Act.
13. 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).

⁴ Pursuant to section 67(1) of the IP Act and sections 47(3)(e) and 52 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

⁵ On 9 August 2021, OIC requested the Department provide these documents, marked up to reflect the Department's disclosure position, by 30 August 2021.

⁶ Being items 4, 5 and 6, which I had indicated to the applicant would fall outside the scope of an application made under the IP Act.

⁷ As confirmed in correspondence to the applicant dated 2 February 2022.

14. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁸ I consider that a decision-maker will, when observing and applying the law prescribed in the IP and RTI Acts, be ‘*respecting*’ and ‘*acting compatibly with*’ this right and others prescribed in the HR Act.⁹ I further consider that, having done so when reaching my decision, I have acted compatibly with and given proper consideration to relevant human rights, as required under section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between the Victorian equivalents of Queensland’s IP and RTI Acts and HR Act: ‘*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*’.¹⁰

Issue for determination

15. The issue for determination is whether access to further Messaging Documents may be refused on the ground they are nonexistent or unlocatable.¹¹
16. On external review, the applicant raised concerns with OIC about the Department’s processing of the application (and what he perceived as delays in that process) and actions taken by Department officers during his employment (including what he considers to be inconsistencies in material filed by the Department in a Workcover matter). The IP Act does not give OIC jurisdiction to investigate complaints about an agency’s conduct or processes; the way it has handled a particular application; or the way it has acted in separate complaint or litigation processes. Therefore, I cannot consider the applicant’s concerns in this regard.
17. The applicant also raised concerns about delays in the Department’s responses during this review.¹² Under the IP Act, the procedure to be taken on external review is, subject to the Act, at the discretion of the Information Commissioner.¹³ I accept that the time taken to complete this review has not met the applicant’s expectations.¹⁴ I must also acknowledge that there was a significant delay in OIC receiving responsive documents from the Department. As some of the Department’s delays during the review can be attributed to internal resourcing constraints and difficulties in retrieving some of the requested information from where it was stored, I was mindful of these circumstances when affording the Department extensions of time for their responses. However, as demonstrated in the Appendix, there were significant periods of time when the review could not be progressed due to outstanding responses from the Department, which consequently impeded the expeditious conduct of the review.
18. Finally, the applicant raised other general concerns about how the external review has been conducted.¹⁵ As noted above, the external review procedure is at the discretion of the Information Commissioner. While again acknowledging the delays that have

⁸ Section 21 of the HR Act. The applicant also considered the right to fair hearing (section 31 of the HR Act) is specifically relevant in this external review because he identified to OIC that he was involved in civil litigation, separate to this external review process. However, I note that the applicant also confirmed that he was pursuing disclosure processes available to him in those separate litigation processes.

⁹ See *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; and *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

¹⁰ **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).

¹¹ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

¹² The applicant’s concerns included what he considered to be the motives of the Department, and its staff, for these delays.

¹³ Section 108(1)(a) of the IP Act.

¹⁴ To the extent the applicant had expected the requested information would be disclosed and available for his use in the Workcover matter, I note that the right to access in the IP Act was not intended to replicate, or serve as an adjunct to, court disclosure processes.

¹⁵ For example, on 17 August 2022, the applicant questioned why a notice pursuant to section 116 of the IP Act had not been issued to the Department. I responded to this, and certain other concerns, on 24 August 2022.

occurred, I am satisfied that this external review has been conducted in accordance with the requirements of the IP Act.¹⁶

19. I have taken account of the applicant's submissions to the extent that they are relevant to the issue for determination in this review.

Relevant law

20. Under section 40 of the IP Act, an individual has a right to be given access to documents of an agency to the extent they contain the individual's personal information.¹⁷ This right is subject to limitations, including grounds for refusal of access.¹⁸
21. 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.¹⁹ However, access may be refused where a document is nonexistent or unlocatable.²⁰
22. To be satisfied that a document is nonexistent, an agency must rely on their particular knowledge and experience and have regard to a number of key factors which include:²¹
- the administrative arrangements of government
 - the agency's structure
 - the agency's functions and responsibilities²²
 - 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.
23. 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 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.

¹⁶ Including those in section 108(1)(b) of the IP Act.

¹⁷ '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'.

¹⁸ 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.

¹⁹ Section 137(2) of the IP Act. The Information Commissioner also has power under section 115 of the IP Act to require additional searches to be conducted during an external review. 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.

²⁰ Sections 47(3)(e) and 52(1) 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. 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.

²¹ 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]. These factors were more recently considered in *Van Veenendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017) and *P17 and Queensland Corrective Services* [2020] QICmr 68 (17 November 2020).

²² Particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it.

24. To determine whether a document exists, but is unlocatable, the RTI Act 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 relevant key factors.²³
25. 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.²⁴ 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. Suspicion and mere assertion will not satisfy this onus.²⁵

Findings

26. After the applicant raised a concern that requested Messaging Documents had not been located, the Department:
- conducted further searches for those documents, at my request;²⁶ and
 - located 5 additional pages as a result of the further searches and disclosed those pages to the applicant, together with a copy of the Search Certification and Records Form completed in respect of those further searches (**Search Certification**).²⁷
27. As noted in paragraph 9, the applicant requested electronic instant messaging about himself between three identified officers. The Search Certification confirms that the Department's further searches were undertaken by a Computer Systems Officer from the Department's Information Security Services Unit, using the key words nominated in item 9 of the Narrowed Application. Taking into account the Department's submission that two of the three identified officers are no longer employed with the Department, I consider it was appropriate for the further searches to be undertaken by an officer with appropriate skills and knowledge about accessing the records of former employees.²⁸
28. The Search Certification also confirms that:
- the additional 5 pages were located as a result of a search of the '*Corporate mailbox backups restored from tape*'; and
 - the Microsoft Purview/365 Compliance Center '*was used to search for any Microsoft teams chatlogs*', however, the search was unable to '*pull Exchange Online records for Microsoft Teams chat history*'.²⁹

²³ Pryor at [21].

²⁴ Section 100(1) of the IP Act.

²⁵ 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].

²⁶ The request was made by email dated 24 June 2022.

²⁷ On 17 August 2022. A small amount of personal information was redacted from the documents the Department sent to the applicant, however, that redacted information is not in issue in this decision.

²⁸ I also consider that searches being completed by an officer other than those listed in the Narrowed Application adds an extra level of transparency to the searches which were carried out.

²⁹ The Search Certification records the following information in this regard: '*No capacity for searching Exchange Online data for the subjects' Teams history. As per our ACE (Automation & Cloud Engineering) team, who handle the Exchange platform: "Teams stores chat data in Exchange Online and we don't have that enabled for the vast majority of users." To the best of my knowledge, there are currently no available tools to retrieve the subjects' Teams history, if such logs exist.*'

29. Following the Department's disclosure of the additional 5 pages and the Search Certification, I invited the applicant to identify any further information he was seeking to access in the review.³⁰ The applicant did not identify any further Messaging Documents he sought to access.³¹ I then conveyed my preliminary view to the applicant that the Department had taken all reasonable steps to locate the Messaging Documents.³² The applicant has not sought to contest the adequacy of the Department's further searches for that information.
30. Having reviewed the terms of item 9 of the Narrowed Application, the applicant's concerns that the Messaging Documents have not been located and the Department's search submissions,³³ I consider that the Department has conducted appropriately targeted searches of locations where it would be reasonable to expect the Messaging Documents would be stored. Further, after receiving the information referenced in paragraph 26, the applicant has not indicated that he holds any belief that further Messaging Documents would exist.
31. In view of this, there is nothing before me to support an expectation that any additional Messaging Documents exist. Accordingly, I am satisfied that the Department has taken all reasonable steps to locate documents relevant to item 9 of the Narrowed Application and access to any further Messaging Documents may be refused on the basis they do not exist.³⁴

DECISION

32. For the reasons set out above, as a delegate of the Information Commissioner, under section 139 of the IP Act, I vary the Department's deemed decision and find that access to any further Messaging Documents may be refused on the basis they are nonexistent.³⁵

T Lake
Acting Assistant Information Commissioner

Date: 25 October 2022

³⁰ By email dated 16 August 2022.

³¹ While the applicant did request metadata in respect of a particular document, a screenshot of that information had been previously located and disclosed to the applicant in response to item 1 of the Narrowed Application. I confirmed this in my letter to the applicant dated 24 August 2022.

³² By email dated 8 September 2022.

³³ Including the Search Certification.

³⁴ Under section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act.

³⁵ Under section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
27 July 2021	OIC received the external review application.
9 August 2021	OIC notified the applicant and the Department that the external review had been accepted and asked the Department to provide a copy of the responsive documents and a submission outlining any grounds for refusal the Department considered to be relevant.
23 August 2021	OIC received the applicant's submissions (including an update request) and responded to the applicant.
31 August 2021	The Department requested an extension of time to provide the requested information, outlining difficulties encountered in retrieving certain information.
1 September 2021	OIC granted the Department's requested extension and notified the applicant of that granted extension. OIC received the applicant's further submissions (including his concerns about the granted extension) and responded to the applicant.
2 September 2021	OIC received the applicant's further submissions and requested certain information about the external review process.
3 September 2021	OIC responded to applicant's request for information about the external review process.
6 October 2021	The Department requested a further extension of time to provide the requested information, outlining the located documents and difficulties encountered in locating certain email attachments. OIC granted the Department's further requested extension. OIC received the applicant's request for an update.
11 October 2021	OIC provided an update to the applicant.
28 October 2021	OIC contacted the Department about its overdue response.
1 November 2021	The Department requested a further extension of time to provide the requested information, referencing the large volume of located documents.
3 November 2021	OIC granted the Department a final extension of time to provide the requested documents.
15 November 2021	OIC received requested documents and submissions from the Department.
13 December 2021	OIC provided an update to the applicant.
6 January 2022	OIC provided a further update to the applicant and received a further submission from the applicant.
20 January 2022	OIC asked the Department to address the applicant's concerns about non-refund of an application fee.
1 February 2022	The applicant requested an update. In a telephone call with the applicant, OIC discussed the status of the external review, and the applicant confirmed his agreement to narrow the terms of the application.
2 February 2022	OIC confirmed the Narrowed Application with the applicant and received the applicant's response.
4 March 2022	OIC received the applicant's request for an update.

Date	Event
15 March 2022	OIC requested the Department confirm its disclosure views for the pages identified as relevant to the Narrowed Application, provide further copies of documents with missing text and process the applicant's requested refund of the application fee. OIC provided an update to the applicant.
4 April 2022	In a telephone call with the applicant, OIC provide an update. OIC received the applicant's further submissions and contacted the Department about its overdue response.
5 April 2022	OIC provided an update to the applicant, both in writing and in a telephone call. OIC received the Department's requested an extension of time to respond to OIC, due to staff absences. OIC granted the Department some, but not all, of the requested extension.
11 April 2022	OIC received the Department requested response.
12 April 2022	OIC received the applicant's request for an update about steps taken in the review. The Department confirmed that documents had been sent to the applicant by express post.
13 April 2022	OIC provided an update to the applicant.
29 April 2022	OIC received the applicant's submissions about missing Messaging Documents.
24 June 2022	OIC requested search information from Department concerning the Messaging Documents.
12 July 2022	OIC provided an update to the applicant.
18 July 2022	The Department requested a short extension of time to respond to OIC and OIC granted the Department's requested extension.
28 July 2022	OIC contacted the Department about its overdue response and received an update about difficulties in accessing located additional documents.
2 August 2022	OIC received the located additional documents from the Department and requested search certifications and submissions from the Department.
9 and 11 August 2022	OIC contacted the Department about its overdue response.
14 August 2022	OIC received the further requested information from the Department.
16 August 2022	OIC requested that the Department provide the applicant with additional located documents and the Search Certification. OIC provided an update to the applicant.
17 August 2022	OIC received the applicant's further submissions. The Department confirmed additional information had been sent to the applicant.
24 August 2022	OIC provided an update to the applicant.
8 September 2022	OIC conveyed a preliminary view to the applicant regarding the sufficiency of the Department's searches for the Messaging Documents and confirmed a formal decision would be issued to finalise the external review.