



## Decision and Reasons for Decision

---

Citation:	<i>S92 and Department of Justice [2025] QICmr 23 (6 May 2025)</i>
Application Number:	318386
Applicant:	S92
Respondent:	Department of Justice
Decision Date:	6 May 2025
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether agency has conducted reasonable searches - whether access to documents may be refused on the basis they are nonexistent - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52(1)(a) of the <i>Right to Information Act 2009</i> (Qld)

## REASONS FOR DECISION

### Summary

1. The applicant applied<sup>1</sup> to Department of Justice (**Department**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to documents between December 2022 and January 2023 in the following terms:  
  
*Required EOI [Evidence of Identity] document as supplied for, (but not utilised for), IP Application 230257 (DJAG's reference).*
2. Other details provided by the applicant in his application were that, *'The relevant passport copy was sent to [Department's email address] at 17:08 on Friday 30 December 2022. NB. As the department continues to falsely claim this EOI was never supplied (including in a sworn statement by [a Departmental officer], you cannot also avail yourself to [sic] the considerations of the "Carmody defence".'*
3. By decision dated 19 December 2024, the Department refused access to the requested document under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the *Right to Information Act 2009* (Qld) (**RTI Act**) on the ground that it was nonexistent. The Department found that there was no Evidence of Identity document (**EOI**) in the Department's possession or under its control that was supplied by the applicant, but not used, for IP application 230257. In conjunction with its decision, the Department gave the applicant administrative access (that is, access outside the scope of the IP Act) to several pages of electronic file management information to demonstrate that the

---

<sup>1</sup> Application received on 16 November 2024 and made valid on 18 November 2024.

applicant's EOI, received by the Department on 30 December 2022, was applied to, and used for, IP application 230257.<sup>2</sup>

4. The applicant applied for internal review of the Department's decision.<sup>3</sup> The internal review decision affirmed the initial decision.<sup>4</sup>
5. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.<sup>5</sup>
6. For the reasons explained below, I decide to affirm the Department's decision under review.

### Reviewable decision

7. The decision under review is the Department's internal review decision dated 9 January 2025.

### Evidence considered

8. Significant procedural steps relating to the external review are set out in the Appendix.
9. 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). I have taken account of the applicant's submissions to the extent that they are relevant to the issues for determination in this review.<sup>6</sup>
10. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), 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 IP Act and 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>

### Issue for determination

11. The issue for determination is whether the Department is entitled to refuse access to the requested document under the IP Act on the ground that it is nonexistent.

<sup>2</sup> These included a screenshot showing that an email received from the applicant on 30 December 2022, containing an attachment titled '*Signed Passport Copy – Copy 1.pdf*' had been stored within an eDocs folder created for application 230257 on 3 January 2023, as well as a copy of the attachment itself (the certified copy of the applicant's passport).

<sup>3</sup> By email on 19 December 2024.

<sup>4</sup> Dated 9 January 2025.

<sup>5</sup> The application for external review was received by OIC on 19 December 2024, the same date upon which the applicant also applied to the Department for internal review of its initial decision. OIC notified the applicant that it had accepted his application for external review on 23 January 2025, following the Department issuing its internal review decision on 9 January 2025.

<sup>6</sup> Contained in the applicant's email of 2 April 2025.

<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].

## Relevant law

12. Access to a document may be refused if the document is nonexistent or unlocatable.<sup>11</sup>
13. 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, including:<sup>12</sup>
  - the administrative arrangements of government
  - the agency's 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. 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 key factors listed in paragraph 13 above.<sup>13</sup>
16. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps (as opposed to all possible steps)<sup>14</sup> to identify and locate documents applied for by applicants.<sup>15</sup> 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>16</sup> However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable grounds to be satisfied that the agency has not discharged its obligation to locate all relevant documents. Suspicion and mere assertion will not satisfy this onus.

## Submissions

17. Upon commencement of the external review, the Department was asked to provide material supporting the searches and inquiries it had conducted in an effort to locate any

<sup>11</sup> Section 67(1) of the IP Act and sections 47(3)(e) and 52 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.

<sup>12</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).

<sup>13</sup> *Pryor* at [21].

<sup>14</sup> *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].

<sup>15</sup> Section 137(2) of the IP Act. The Information Commissioner also has power under section 115 to require additional searches to be conducted during an external review.

<sup>16</sup> Section 100(1) of the IP Act.

documents responding to the terms of the access application.<sup>17</sup> The Department responded<sup>18</sup> by advising that it had conducted a search of both its electronic records system (**eDocs**) using the application reference supplied by the applicant (IP 230257), and its RTI administration email inbox using the applicant's name as the search term:

*The only location such a form of identification would be located is in RTIAdministration@justice.qld.gov.au and the relevant eDocs file (#230257/0001). There is no hard copy application for this application as all communication was electronic (refer to attached document).*<sup>19</sup>

*Once the email has been saved into eDocs it is deleted from the RTI administration inbox.*

*As is evidenced by the documents provided to the applicant, and your office, the evidence of ID was attached to 230257, therefore it **was used** for this application.*

*FYI - Application 230257 was decided to be non compliant with the application requirements of the Information Privacy Act 2009 because the applicant did not provide sufficient information to enable us to identify the documents they were seeking to access, not because of a failure to provide sufficient identification.*

[Department's emphasis]

18. I communicated this information to the applicant in a letter dated 13 March 2025. I expressed the preliminary view that, based on the information and supporting documentation supplied by the Department, the Department's decision under review appeared correct, and ought to be affirmed by OIC.
19. In a telephone call on 26 March 2025, and in a subsequent email on 2 April 2025, the applicant rejected the veracity of the information provided by the Department, and disputed my preliminary view:

*Unfortunately your letter dated 13 March 2025 puts me in a position I seem to find myself in frequently in these applications - an agency, the OIC, or (as in this case) both make a false statement, and the onus is then put on me to disprove that false statement if I want the application to proceed.*

*There are a number of documents which disprove what you have stated, some of which the OIC already posses [sic]. And while I would obviously have to produce those if this application proceeds to QCAT, I don't have the time to collate them all today.*

*This application is an extremely simple one. As I see it, (and I'm happy to be corrected on this), there are 3 points for the OIC to consider.*

Question 1: *Was the passport copy supplied as Evidence of Identity for IP Application 230257 (DJAG/DoJ's reference) supplied at the time the application was lodged?*

Response 1: *Yes. After denying the receipt of this on a multitude of occasions, DoJ have now finally admitted that they had it all along, although they have infuriatingly now also taken the position that they knew that they had it along by claiming that it "was attached to application 230257 on 3 January 2023".*

*Either way, this point is (finally) no longer in dispute*

Question 2: *Is it contrary to the public interest to release the document to me?*

<sup>17</sup> Letter dated 23 January 2025.

<sup>18</sup> Email of 26 January 2025.

<sup>19</sup> The Department provided a screenshot of the File Folder for IP application 230257 which showed that the check box for 'Physical File Created' had not been ticked.

Response 2: Obviously not

Question 3: Was the passport copy provided on 30 December 2025 utilised as Evidence of Identity for IP Application 230257?

Response 3: No, and there is evidence supporting this, including documents that the OIC itself holds in relation to Privacy Complaint No. [reference number] (OIC's reference).

*While DoJ have presumably been happy to mislead the OIC in relation to the nature of this matter, they pursued me to re-supply the document in question throughout January 2023 and into February 2024, continually asserting that I had never supplied it. These occasions included 2 in person discussions on 2 different dates in the entry of the State Law Building at 50 Ann Street, Brisbane City.*

*I should still have the voice recording from the first time they bailed me up at the State Law Building for my ID (after they also now say "was attached to application 230257 on 3 January 2023"). However it's not one I currently have labelled, and I don't have time to go looking for it today.*

*However the attached excerpt from the recording of my meeting with [a Departmental officer] on 8 February 2023 proves that - **more than a month after they now claim the document in question "was attached to application 230257 on 3 January 2023" - they were in fact still claiming on 8 February 2023 they had not yet received it.***

[applicant's emphasis]

20. The applicant attached part of a voice recording of a conversation which he asserted occurred between himself and a Departmental officer on 8 February 2023 in the foyer of the State Law Building and which he labelled 'First 3 minutes after sitting down'.
21. The applicant's contentions were put to the Department for response. In its response,<sup>20</sup> the Department provided a chronology of events concerning its receipt and handling of IP application 230257, and supplied supporting documents. The relevant chronology was conveyed to the applicant in my letter dated 8 April 2025 as follows:
  - 30 December 2022 5.08pm – application 230257 received
  - 30 December 2022 5.08pm – certified ID received from applicant via email
  - 3 January 2023 11.40am – application file 230257 created
  - 3 January 2023 11.43am – certified ID received on 30 December 2022 added to application file 230257
  - 5 January 2023 9.09am – letter (dated 4 January 2023) sent to applicant on application 230257 with a request for further details to assist in identifying the documents sought
  - 5 January 2023 8.31pm – response received from applicant
  - 9 January 2023 2.15pm – clarification email sent to applicant
  - 9 January 2023 3.43pm – response received from applicant
  - 11 January 2023 1.01pm – response sent to applicant
  - 9 February 2023 11.27am – email sent to applicant on applications 230257 and 230264.
22. I also stated as follows to the applicant, based on the documents supplied by the Department:

*The letter dated 4 January 2023 and sent to you on 5 January 2023 indicates that the Department regarded your application as noncompliant because it provided insufficient information to enable the requested documents to be identified and relevant searches to be conducted. There is no mention, in the five bullet points listed in the letter, of any issue concerning non-provision of an EOI.*

<sup>20</sup> On 4 April 2025.

*Your response on 5 January 2023 sought to clarify the terms of your request.*

*The Department's email of 9 January 2023 again requested that you provide information in response to the five listed bullet points to assist the Department to identify the documents to which you sought access. Again, there is no mention of any issue concerning your EOI.*

*Your response on 9 January 2023 sought to provide a response to the five bullet points, stating, 'I trust this additional information will assist you with acknowledging that the application was in fact compliant when it was lodged'.*

*The Department's email of 11 January 2023 maintained that it was not possible, on the information you had provided to date, to identify the documents to which you sought access.*

*The Department's email on 9 February 2023 confirmed that application 230257 had certified identification, but that the Department was seeking sufficient information from you to enable it to identify the documents you were seeking to access.*

23. I reiterated my preliminary view that, based on the chronology of events and the documentary evidence supplied by the Department, the Department's decision to refuse access to the requested document on the ground that it was nonexistent ought to be affirmed by OIC. I stated that I considered that the Department had satisfactorily demonstrated, through its eDocs system, that the EOI that the applicant supplied by email on 30 December 2022 (immediately following lodgement by the applicant of IP application 230257) was applied to that application when staff returned from leave and created the electronic file for the application on 3 January 2023:

*The Department utilised that EOI to create the application file for 230257 and to then write to you on 4 January 2023 to request that you provide further information about the documents you were seeking to access. There is nothing in any of the correspondence exchanged between you and the Department regarding application 230257 that indicates that there was any dispute that you had supplied a valid EOI for application 230257, nor that it had been utilised by the Department for application 230257. The Department confirmed this in its email to you on 9 February 2023.*

24. In response to the applicant's contention that disclosure to him of his EOI would not, on balance, be contrary to the public interest, I advised the applicant that the only issue that OIC had jurisdiction to determine in the review was whether the Department's decision under review – that access to the requested document may be refused under the IP Act because it is nonexistent – should be affirmed, varied or set aside. The public interest balancing test does not apply in those circumstances. In any event, I also noted that the Department's internal review decision dated 9 January 2025 indicated that the Department had already given the applicant administrative access to a number of documents, including the EOI that he had supplied to the Department by email on 30 December 2022 (see paragraph 3 above).
25. The applicant responded by email on 9 April 2025, requesting that OIC proceed to issue a formal decision in order to finalise the review.

## Findings

26. I have considered the applicant's submissions, including the voice recording that he supplied and which he states is part of a recording he made of a conversation between himself and a Departmental officer about unspecified IP applications and the provision or otherwise of EOI in connection with those applications. However, I am not satisfied that the recording establishes that there are reasonable grounds for believing that the

Department holds a document that responds to the terms of the access application in this review.

27. In respect of the applicant's contention that I should have regard to documents (unspecified in nature and relevance) that he supplied as part of a privacy complaint he has made, I note that the external review and privacy functions of OIC are separate and are conducted independently of each other. In an external review, the onus is upon an applicant to provide any documents upon which they wish to rely in support of their case and to explain the relevance of those documents to the issue to be determined in the external review. Furthermore, as I have already noted, where an agency relies on searches and inquiries to justify a decision that the requested document does not exist, the issue for OIC to determine is whether those searches and inquiries have been reasonable in all the circumstances. However, based upon his submission set out in paragraph 19 above, it appears that the applicant is seeking a determination or resolution of an ancillary factual dispute between himself and the Department regarding the provision or otherwise of his EOI to the Department in connection with his various access applications.
28. Based on the material before me, I am satisfied that the Department has discharged the onus upon it to demonstrate that it has taken all reasonable steps to identify and locate the document applied for by the applicant. The chronology and documentary evidence provided by the Department supports its decision that the requested document is nonexistent because there is no document in the Department's possession or under its control that comprises an EOI that was supplied, but not used, for IP application 230257. Having regard to the applicant's submissions, I am not satisfied that he has discharged the practical onus upon him to establish reasonable grounds to be satisfied that the Department has not discharged its obligation to search for, and locate, all responsive documents.

## **DECISION**

29. For the reasons explained, I affirm the decision under review refusing access to the requested document under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act on the ground that it is nonexistent.
30. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

---

R Moss  
Principal Review Officer

**Date: 6 May 2025**

## APPENDIX

### Significant procedural steps

Date	Event
19 December 2024	OIC received a purported application for external review from the applicant
20 December 2024	OIC asked the Department to supply preliminary documents OIC received the preliminary documents as well as advice from the Department that the applicant had also applied for internal review
22 January 2025	OIC asked the Department to provide a copy of its internal review decision OIC received a copy of the internal review decision
23 January 2025	OIC advised the parties that the application for review had been accepted OIC requested that the Department provide additional information in support of its decision
26 January 2025	OIC received additional information from the Department
13 March 2025	OIC conveyed a preliminary view to the applicant
26 March 2025	OIC received a telephone call from the applicant
2 April 2025	OIC received a submission from the applicant
3 April 2025	OIC discussed the applicant's submission with the Department and requested that the Department provide documents supporting its chronology of events
4 April 2025	OIC received additional information from the Department
8 April 2025	OIC conveyed a further preliminary view to the applicant
9 April 2025	OIC received an email from the applicant requesting that OIC proceed to a decision