



Decision and Reasons for Decision

Citation:	<i>J27 and Queensland Police Service [2021] QICmr 19 (6 May 2021)</i>
Application Number:	315724
Applicant:	J27
Respondent:	Queensland Police Service
Decision Date:	6 May 2021
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - UNLOCATABLE DOCUMENTS - request for file of evidential documents previously submitted to the Attorney-General by applicant - whether agency has taken all reasonable steps to locate the file - whether access to the file 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 2009</i> (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 all records held by QPS *'in her name'*, including QPRIME.¹
2. QPS did not make a decision within the relevant processing period² and was therefore taken to have made a decision refusing access to requested information.³
3. The applicant applied⁴ to the Office of the Information Commissioner (**OIC**) for external review of QPS' deemed refusal of access to a file of *'evidential documents'*⁵ (**File**) the

¹ The access application, dated 8 July 2020, confirmed that the documents sought included Ministerial letters and applications to, or from, the applicant; QPS' 'evidence documents' relating to a QPS prosecution of the applicant; QPS and Telstra 'evidence documents' relating to the applicant's treatment from 1990-2020; QPS Ethical Standards Command and Crime and Misconduct Commission interviews, investigation, reports, emails, memos and recommendations concerning the applicant; and a particular letter sent to the Department of Transport about the applicant. By email dated 10 September 2020, the applicant provided QPS with an *'index which further describes the file of evidential documents addressed and sent by registered mail to the [Attorney-General] that will assist in the return of the Ring Binder and it's [sic] contents in the 12 pockets to me'*. The application date range is December 1987 to July 2020.

² Set out in section 18 of the RTI Act.

³ Under section 46(1)(a) of the RTI Act.

⁴ Received by post on 13 November 2020. I note that it appears the applicant did not pay an application fee to QPS in respect of the access application. However, QPS did not consult with the applicant about this non-compliance, as required under section 33(2) of the RTI Act. As QPS would have been required, under section 46(1)(b) of the RTI Act, to refund any application fee that had been paid by the applicant, I am satisfied that this review can proceed under the RTI Act and her external review application was accepted.

⁵ The applicant identified this as being a ring binder file sent by registered post to the Attorney-General (under cover of a 2 November 2019 letter) which contains *'some 120 evidential documents'* in 12 pockets, marked SW1 to SW12.

applicant believes is held by QPS.⁶ During the review, QPS conducted further searches and enquiries and was unable to locate the File. The applicant continues to seek access to the File.

4. For the reasons set out below, I vary QPS' deemed decision⁷ and find that access can be refused to the File under section 47(3)(e) of the RTI Act, on the basis it cannot be located.

Background

5. On 2 November 2019, the applicant wrote to the Attorney-General seeking a grace payment for what she considered to be a malicious prosecution. The applicant enclosed an overview, a chronology and the File with her letter.
6. On 24 January 2020, the Attorney-General's office confirmed to the applicant that her request had been referred to the Minister for Police and Minister for Corrective Services (**Police Minister**) for response. In turn, the Office of the Police Minister advised the applicant that the matters raised in her correspondence had been referred to QPS.
7. The applicant then requested return of her correspondence and the File from the Police Minister's office.⁸ The applicant submits that, although she received a copy of her previously submitted letter, chronology and overview documents from the Attorney-General's office,⁹ she did not receive the File.
8. The Department of Justice and Attorney-General (**DJAG**) advised the applicant, in respect of a separate access application, that it had sent the File to QPS and did not possess a copy of that document.

Reviewable decision and evidence considered

9. The decision under review is the decision QPS is deemed to have made refusing access to the File. The decision of DJAG is not the subject of this external review.
10. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).
11. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹⁰ 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.¹¹ 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:¹² '*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.*'¹³
12. Significant procedural steps relating to the external review are set out in the Appendix.

⁶ The applicant did not seek review of the decision QPS was deemed to have made in respect of the other categories of requested information. Accordingly, this decision is confined to consideration of the deemed refusal of access to the File.

⁷ Under section 46(1) of the RTI Act.

⁸ The applicant's submissions dated 2 and 3 May 2021 include a copy of a letter dated 20 March 2020, which the applicant submits she sent to the Police Minister's office requesting return of the File by registered person to person mail.

⁹ Submissions dated 7 April 2021.

¹⁰ Section 21 of the HR Act.

¹¹ *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].

¹² *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹³ *XYZ* at [573].

Issue for determination

13. The issue for determination is whether access to the File may be refused, on the basis it is unlocatable, under section 47(3)(e) of the RTI Act.
14. The applicant provided a number of submissions to OIC,¹⁴ as she does not accept that QPS cannot locate and return the File to her.¹⁵ The applicant contends that QPS is deliberately withholding the requested records¹⁶ *'knowing they were related to litigation and using stonewalling tactics to deliberately interfere with the court statutes of limitation'*.¹⁷ There is no evidence before me which supports this assertion. To a large extent, the applicant's submissions relate to her historical interactions with, and complaints against, QPS.
15. The applicant also raised concerns about the manner in which she has been treated by QPS subsequent to making her external review application.¹⁸ Under the RTI Act, the Information Commissioner has jurisdiction to review decisions made by government agencies about access to information and, in this review, I am only considering the applicant's entitlement to access the File under the RTI Act. On external review the Information Commissioner cannot investigate complaints about an agency's conduct and I therefore cannot address many of the concerns the applicant has raised about her inability to previously obtain information from QPS or about how QPS has treated her. I have considered the applicant's submissions, and addressed them below, to the extent they are relevant to the issue for determination.

Relevant law

16. The RTI Act provides a right to be given access to documents of an agency,¹⁹ however, this right of access is subject to limitations, including the grounds on which access to information may be refused.²⁰ One ground of refusal is where a document is unlocatable.²¹
17. 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.²² The RTI Act is silent on what constitutes 'all reasonable steps'.²³ In determining whether all reasonable steps have been taken to locate a document, the relevant agency's knowledge and experience must be considered, including key factors such as:
 - the administrative arrangements of government
 - the agency structure
 - the agency's functions and responsibilities

¹⁴ As set out in the Appendix.

¹⁵ If the File was able to be located then the forms of access are outlined in section 68 of the RTI Act and include, for example, a reasonable opportunity to inspect the document, or providing a copy of the document.

¹⁶ The applicant described this as *'deliberate hobbling'* in the external review application, her submissions attached to an email dated 10 February 2021. and in a conversation with this Office on 2 March 2021.

¹⁷ External review application.

¹⁸ In an email dated 10 February 2021.

¹⁹ 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'.

²⁰ The grounds on which an agency may refuse access are set out in section 47(3) of the RTI Act.

²¹ Sections 47(3)(e) and 52(1) of the RTI Act.

²² Section 52(1)(b) of the RTI Act.

²³ Section 130(2) of the RTI Act provides that the Information Commissioner's functions on external review include investigating and reviewing whether agencies have taken reasonable steps to identify and locate documents applied for by applicants.

- 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.²⁴

Findings

18. The applicant contends that:
- QPS is aware that the records she has applied for are '*now intended for litigation*'²⁵
 - she has to assume those records have been destroyed;²⁶ and
 - given the sensitive nature of the File contents, a hard or scanned copy of the File should have been retained by QPS.²⁷
19. QPS confirmed to OIC that it had received documents relevant to the applicant's grace payment claim (including the File) in January 2020. It is therefore not in dispute that the File has been in the possession of QPS. Accordingly, the question for me to determine is whether **all reasonable steps** have been taken to find the File, in order for it to be considered unlocatable under section 52(1)(b) of the RTI Act.
20. On external review, QPS relied on searches and enquiries conducted by its officers to justify its position that reasonable steps have been taken to locate the File and provided information about those searches and enquiries to OIC. QPS submitted²⁸ that:
- the applicant's grace payment claim was referred to the QPS Legal Unit
 - searches for the File were conducted of relevant QPS databases (including the server and databases of the Legal Unit, physical files and archived files) where it was reasonable to expect the File would be stored and enquiries were made with the legal officer who had carriage of the applicant's grace payment claim
 - on 24 April 2020, QPS posted the applicant's original grace payment claim documents, including the File, to her via ordinary post and this was confirmed in the QPS mail register; and
 - while QPS retained copies of certain correspondence,²⁹ it did not keep a scanned or hard copy of the File before posting it to the applicant.
21. The applicant confirmed to OIC that she has not received the File and that there was '*no tracking found in the Postal System for a parcel from*' QPS.³⁰ She contests that the File was posted to her as claimed by QPS, as she does not believe that '*any sensible Qld Govt Public Servant in the Police Minister' Office (or elsewhere) would send a File of such sensitive and confidential documents by ordinary post to anyone*'.³¹
22. Given the steps taken by QPS to locate the File, I am satisfied that QPS has undertaken comprehensive searches of locations where it would be reasonable to expect the File would be kept and has provided an explanation for why the information remains unlocatable. That is, QPS' submissions indicate that the File requested by the applicant

²⁴ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [[19]-[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].

²⁵ Submissions attached to the applicant's email dated 10 February 2021.

²⁶ External review application.

²⁷ Submissions dated 7 April 2021.

²⁸ Submissions received 10 March 2021 and 18 March 2021.

²⁹ Namely, the 24 January 2020 letter which the Attorney-General's office sent to the applicant and the applicant's 2 November 2019 letter to the Attorney-General (together with its attached overview and chronology).

³⁰ Submissions dated 7 April 2021.

³¹ Submissions dated 7 April 2021. The applicant made similar submissions by email dated 2 May 2021.

was returned to her by ordinary post on 24 April 2020. I am also satisfied that the inquiries made by QPS in an effort to locate the File were directed to relevant staff who were familiar with the matter and who would have had requisite knowledge of applicable record keeping practices for such a document.

23. 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 File would be kept. I am also satisfied that the inquiries made by QPS in an effort to locate the File were directed to relevant staff who were familiar with the matter and who would have had requisite knowledge of applicable recordkeeping practices for such a document.
24. I understand the File is important to the applicant and she is disappointed that the File was not located. I also acknowledge the applicant's concern that in posting back a file of such significance, it would have been prudent of QPS to have sent this information to the applicant in a form that can be tracked (i.e. registered post). However, there is no evidence before me to suggest that any further searches or steps can be taken by QPS to locate the File.
25. I also do not consider that the applicant's submission that QPS *should* have retained a copy of the File reasonably leads to a conclusion that such a copy exists within QPS' record keeping systems. QPS has specifically submitted in this external review that while QPS retained copies of certain correspondence,³² it did not keep a scanned or hard copy of the File before posting it to the applicant.
26. Accordingly, the applicant's submissions above do not impact upon my finding that the File is, on the evidence before me, unlocatable. Having carefully considered the information available to me,³³ I am satisfied that:
 - QPS has taken all reasonable steps to locate the File; and
 - access to the File may be refused on the basis that it is unlocatable.³⁴

DECISION

27. I vary QPS' deemed decision and find that access to the File can be refused under section 47(3)(e) of the RTI Act on the basis that it is unlocatable, in accordance with section 52(1)(b) of the RTI Act.
28. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

S Martin
Assistant Information Commissioner

Date: 6 May 2021

³² Namely, the 24 January 2020 letter which the Attorney-General's office sent to the applicant and the applicant's 2 November 2019 letter to the Attorney-General (together with its attached overview and chronology).

³³ Including submissions received from the applicant and QPS.

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

APPENDIX**Significant procedural steps**

Date	Event
13 November 2020	OIC received the application for external review.
23 December 2020	OIC advised the applicant and QPS that the external review application had been accepted.
12 January 2021	OIC asked QPS to conduct searches and enquiries to determine whether QPS held the File.
9 February 2021	OIC provided an update to the applicant.
10 February 2021	OIC received the applicant's submissions.
2 March 2021	OIC spoke with the applicant to provide an update.
2 and 6 March 2021	OIC received the applicant's further submissions.
10 March 2021	QPS confirmed that it had been unable to locate the File and provided details of the searches it had undertaken.
18 March 2021	QPS provided further details of the searches and enquiries it had undertaken.
30 March 2021	OIC conveyed a preliminary view to the applicant.
7 and 15 April 2021	OIC received the applicant's further submissions contesting the preliminary view (including supporting information).
2 and 3 May 2021	OIC received the applicant's further submissions contesting the preliminary view (including supporting information).