



Decision and Reasons for Decision

Citation:	<i>K82 and Gladstone Regional Council [2023] QICmr 23 (31 May 2023)</i>
Application Number:	317136
Applicant:	K82
Respondent:	Gladstone Regional Council
Decision Date:	31 May 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether access to requested documents may be refused on the basis they are nonexistent - whether agency has taken reasonable steps to establish that requested documents are nonexistent - sections 47(3)(e) and 52(1)(a) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. By application dated 24 January 2023, the applicant applied to Gladstone Regional Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents between January 1988 and December 1993 described as follows:
 - *document showing type of septic system installed at [three residential addresses]*
 - *document showing recommended maintenance of septic system installed at [three residential addresses]; and*
 - *maintenance records of septic systems installed for [three residential addresses].*¹
2. By decision dated 17 February 2023, Council decided to refuse access to the requested documents under sections 47(3)(e) and 52(1)(a) of the RTI Act on the grounds that they were nonexistent.
3. On 17 February 2023, the applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision.²
4. I affirm the decision under review by finding that access to the documents requested by the applicant may be refused under section 47(3)(e) and section 52(1)(a) of the RTI Act.

¹ As confirmed in an email from Council to the applicant on 25 January 2023, following a telephone conference with the applicant on 25 January 2023.

² As Council's decision was made by its Chief Executive Officer, there was no right of internal review: see section 81 of the RTI Act.

Background

5. The applicant has experienced ongoing drainage issues at her property which she contends is due to run-off/overflow from neighbouring properties. She has made a number of complaints to Council and other government agencies about these issues over a number of years.

Reviewable decision

6. The decision under review is Council's decision dated 17 February 2023.

Evidence considered

7. Significant procedural steps relating to the external review are set out in the appendix.
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). I have taken account of the applicant's submissions³ to the extent that they are relevant to the issues for determination in this review.
9. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁴ 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 and the *Information Privacy Act 2009* (Qld).⁵ 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:⁶ '*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.*'⁷

Jurisdiction of OIC

10. OIC's jurisdiction under the RTI Act is limited to conducting a merits review of the relevant agency's decision and deciding whether to affirm, vary, or set aside that decision.⁸
11. Many of the issues raised by the applicant fall outside the jurisdiction of OIC. It appears that she seeks to have the history of her dealings with Council and other government agencies about drainage issues at her property reviewed, and the veracity of the information supplied to her by Council investigated. However, OIC has no jurisdiction to consider or deal with these issues under the RTI Act.

Issue for determination

12. The only issue for determination is whether Council was entitled to refuse access to the requested documents on the basis that they are nonexistent under section 52(1)(a) of the RTI Act.

³ Contained in the application for external review and in emails of 27 March 2023 and 10 May 2023.

⁴ Section 21(2) of the HR Act.

⁵ *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].

⁶ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁷ *XYZ* at [573].

⁸ Section 110(1) of the RTI Act.

Relevant law

13. The RTI Act permits an agency to refuse access to information where the requested information is nonexistent or unlocatable.⁹
14. A document will be *nonexistent* if there are reasonable grounds to be satisfied it does not exist.¹⁰ To be satisfied that a document does not exist, the Information Commissioner has previously had regard to various key factors including the agency's record-keeping practices and procedures (including, but not limited to, its information management approaches).¹¹ By considering the relevant factors, the decision maker may conclude that a particular document was not created because, for example, 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. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.
15. The Information Commissioner may also take into account the searches and inquiries conducted by an agency, in determining whether a document is nonexistent. The key question then is whether those searches and inquiries amount to '*all reasonable steps*'.¹² 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 which of the key factors are most relevant in the particular circumstances. Such steps may include inquiries and searches of all relevant locations identified after consideration of relevant key factors.¹³

Discussion

16. In processing the access application, Council made enquiries with Development Services and also undertook searches of relevant building and development electronic files (including plumbing) for the properties referred to in the access application. A relevant Council officer certified that no document existed that showed that these properties are connected to a septic system. To the contrary, extracts from building applications, and sewerage and drainage plans for the relevant properties (copies of which Council provided to OIC) establish that the properties are connected to Council's sewer main.
17. Furthermore, I note that Council has given the applicant administrative access to the sewerage plans, drainage plans and locations of the 'jump ups' (the connection between Council's sewer and a property) for the properties referred to in the access application, establishing that the properties do not have septic systems but are connected to the sewer.¹⁴

Finding

18. For the reasons explained, I am satisfied that Council has adequately explained why the documents sought by the applicant do not exist, and has taken all reasonable steps to establish the nonexistence of the documents.

⁹ Sections 47(3)(e) and 52(1) of the RTI Act.

¹⁰ Section 52(1)(a) of the RTI Act. For example, a document has never been created.

¹¹ *Isles and Queensland Police Service* [2018] QICmr 27 (7 June 2018) at [15] which adopted the Information Commissioner's comments in *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]-[38]. *PDE* addresses the application of section 28A of the now repealed FOI Act. Section 52 of the RTI Act is drafted in substantially the same terms as the provision considered in *PDE* and, therefore, the Information Commissioner's findings in *PDE* are relevant.

¹² As set out in *PDE* at [49].

¹³ As set out in *PDE* at [38].

¹⁴ See Council's email to the applicant on 14 February 2023.

DECISION

19. I affirm the decision under review by finding that access to the documents requested by the applicant may be refused under section 47(3)(e) and section 52(1)(a) of the RTI Act.
20. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Rachel Moss
Principal Review Officer

Date: 31 May 2023

APPENDIX

Significant procedural steps

Date	Event
17 February 2023	OIC received the application for external review.
22 February 2023	OIC received the preliminary documents from Council.
13 March 2023	OIC advised the parties that the application had been accepted.
22 March 2023	OIC received search information from Council.
27 March 2023	OIC received an email and attachments from the applicant.
9 May 2023	OIC expressed a preliminary view to the applicant.
10 May 2023	OIC received an email and attachment from the applicant.