



Information Sheet

INFORMATION SHEET - *Right to Information Act 2009* and *Information Privacy Act 2009*

Non-existent or unlocatable documents – a guide for external review applicants

Overview

The *Right to Information Act 2009 (RTI Act)*¹ gives people a right to access documents of an agency, subject to some limitations which allow the agency to refuse access.² One situation when an agency can refuse access is if the document is nonexistent or unlocatable. This is set out in section 52 of the RTI Act.

This issue may also be raised if you believe the agency has not done everything it reasonably can to find the documents you applied for.

When does section 52 let the agency refuse access to a document?

Section 52(1) of the RTI Act allows an agency to refuse access if:

- The document sought in the access application does not exist (for example, because it was never created).
- The document sought did or does exist but cannot be located (for example, where a document is lost or has been destroyed under a retention and disposal schedule approved by the State Archivist).

What will OIC ask for on external review?

If you believe a document exists and the agency has not adequately searched for this document, you may ask the Office of the Information Commissioner (**OIC**) to review the agency's decision to refuse you access.

One of the Information Commissioner's external review functions is to investigate whether the agency has taken all reasonable steps to identify and locate all documents requested by an applicant.

If an agency refuses access because a document is nonexistent or unlocatable OIC will require the agency to provide evidence to justify its claim. In some cases OIC may also ask you to provide information about the document, why you

¹ Chapter 3 of the *Information Privacy Act 2009* also gives a right of access to documents which contain your personal information.

² And Section 67 of the *Information Privacy Act 2009 (IP Act)*.



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believe this document exists, and why you consider the agency has not performed adequate searches for this document.

This information will help the OIC make appropriate enquiries and specifically target any additional searches they ask the agency to conduct. General assertions that there must be more documents, without any supporting evidence, will not generally be enough for the OIC to require further searches. Where OIC asks you for more information, you are required to assist OIC in its inquiries. Where you do not cooperate with a reasonable request of OIC, the Information Commissioner may decide not to continue with external review.

Can I ask for extra documents at external review?

You cannot ask for more documents at external review than you applied for originally.

It is not unusual for documents released under an RTI application to raise new issues or suggest that there may be other documents of interest to the applicant. If this happens you will have to make a new RTI application to the agency; you cannot ask for those extra documents as part of your external review.

Documents that do not exist

As part of considering an agency's claim that a document does not exist, OIC will consider whether there are reasonable grounds to be satisfied that the requested document does not exist.

The RTI Act does not list any criteria for what constitutes *reasonable grounds*. However the Information Commissioner has said that to satisfy itself that a document does not exist an agency must rely on its knowledge and experience about the structure and arrangement of government and the agency, its functions, responsibilities, practices and procedures. For example, the Information Commissioner may consider the functions of the agency in forming a view on whether the requested documents are in existence.

The agency does not have to search for the document if it decides, based on the above factors, that the document in question was never created. It is sufficient that the relevant circumstances to account for the non-existent document are plausible and explained.

If, however, the agency establishes that the document was or should have been created, it must take all reasonable steps to locate the document.

What are 'reasonable steps' is assessed on a case by case basis. On external review, OIC will ordinarily ask the agency to provide specific information about the relevant record keeping systems and the searches conducted.



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Under the RTI Act, the Information Commissioner has broad powers and can require an agency to conduct a particular further search, or further searches, for a document.³ OIC does not attend agency premises to conduct searches.⁴ If necessary, the Information Commissioner can require an agency's Chief Executive Officer to appear at a public hearing to explain unanswered questions.⁵ If a public hearing is held, you will be invited to attend.

Documents that were or are in existence, but which cannot be located

If an agency has had the document in issue, or if they should have it, access can only be refused if **all reasonable steps** have been taken to locate the document and it cannot be located. As set out above, what is reasonable is assessed on a case by case basis.

Does an agency have to keep every document it creates?

No, it does not. There are specific rules about when documents must be retained, and for how long, and when they can be destroyed. These are set out in the *Public Records Act 2002* (Qld), Information Standards, guidelines, Public Records Briefs, and retention and disposal schedules.

Retention and disposal schedules set out how long certain records must be retained by agencies and when and how records can be destroyed at the expiry of the minimum retention period. OIC may have regard to the relevant retention and disposal schedule if the agency has relied on these to explain why documents cannot be located.

For additional information and assistance please refer to *Sufficiency of search – a guide for agencies* and other OIC guidelines, or contact the Enquiries Service on 07 3234 7373 or email enquiries@oic.qld.gov.au.

This information sheet is introductory only, and deals with issues in a general way. It is not legal advice. Additional factors may be relevant in specific circumstances. For detailed guidance, legal advice should be sought.

If you have any comments or suggestions on the content of this document, please submit them to feedback@oic.qld.gov.au

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Changes to legislation after the update date are not included in this document

³ Section 102 of the RTI Act.

⁴ OIC officers may, if necessary, inspect documents at agency premises.

⁵ As occurred in Thomson and Lockyer Valley Regional Councils (210896), 23 September 2010.