



Decision and Reasons for Decision

Citation:	<i>P25 and Department of Transport and Main Roads [2024]</i> QICmr 30 (2 July 2024)
Application Number:	317431
Applicant:	P25
Respondent:	Department of Transport and Main Roads
Decision Date:	2 July 2024
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - application for documents in relation to an alcohol ignition interlock device installed in applicant's vehicle - whether agency has taken all reasonable steps to locate requested documents - whether access to further documents can be refused on the basis that they are nonexistent - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of Transport and Main Roads (**Department**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for documents in relation to the interlock device (**interlock**) installed in his motor vehicle.² Shortly after,³ the applicant amended the scope of his application to include a copy of the court order issued requiring him to have an interlock fitted in his vehicle.
2. The Department located and released 37 documents⁴ and refused access to any further documents on the basis that they are nonexistent.⁵
3. The applicant applied⁶ for internal review of the Department's decision and the Department affirmed its original decision.⁷

¹ Application received on 5 April 2023 and made valid on 17 April 2023 after certified evidence of the applicant's identification was provided.

² The date range of the application was 1 January 2022 and 5 April 2023.

³ On 20 April 2023.

⁴ The documents were released in full with the exception of two signatures from the applicant's birth certificate.

⁵ Decision dated 24 May 2023.

⁶ On 12 June 2023.

⁷ Internal review decision dated 5 July 2023.

4. The applicant then applied⁸ to the Office of the Information Commissioner (**OIC**) for external review of the Department's internal review decision on the basis that further documents should have been located.
5. During the review, the Department located two further documents⁹ which were disclosed to the applicant.
6. For the reasons set out below, I affirm the Department's decision and find that access to further documents may be refused on the basis they are nonexistent.

Background

7. An interlock, as referred to in the applicant's application, is an alcohol ignition interlock – that is, *'a device that, when fitted to a motor vehicle, prevents the vehicle from being started unless the device is provided with a specimen of a person's breath containing either no alcohol or less than a particular concentration of alcohol'*.¹⁰
8. The Alcohol Ignition Interlock Program (**Program**) applies to drivers who are convicted of certain high-risk drink driving offences.¹¹ Government information published online about the Program includes the following explanation:¹²

You will need to participate in the interlock program if you are convicted of a high-risk drink driving offence and your licence is disqualified.

The interlock program is a performance-based program where your interlock use is monitored and data from your interlock will be sent to us. Your interlock data will need to show that all breath tests have been provided and returned 'no alcohol' readings, and that all scheduled interlock services have been attended—otherwise your time in the program will be extended.

9. When the driver's disqualification period ends,¹³ they are issued with a licence that is subject to an interlock condition, requiring their participation in the Program.
10. The Program is for 12 months, during which the driver must get their interlock serviced at scheduled appointments, to enable the Department to receive data from the interlock. The first eight months of the Program is a 'learning period' and the last four months is a 'performance period'.
11. During the performance period, the use of the interlock is monitored by the Department. If the interlock detects alcohol during this time, or there is a permanent lockout due to a failure to attend a scheduled interlock service appointment:
 - the interlock provider will tell the Department
 - the four month performance period will restart (each time)
 - time in the interlock program will be extended.

⁸ On 13 July 2023.

⁹ Comprising data transmitted to the Department for the 'learning period' up to 5 April 2023. Note - 'learning period' is explained at paragraph 10.

¹⁰ See definition in section 91I of the *Transport Operations (Road Use Management) Act 1995* (Qld) (**TORUM Act**).

¹¹ See definition of 'drink driving offence' in section 91I of the TORUM Act. [The offences include an offence under section 79(1F)].

¹² Queensland Government website information about road safety, regarding drink and drug driving and interlocks in particular, at <<https://www.qld.gov.au/transport/safety/road-safety/drink-driving/interlocks>> viewed 13 June 2024.

¹³ Or if they are issued with a restricted (work) licence during their disqualification period. See section 91K(1) and (2) of the TORUM Act.

12. The applicant had an interlock installed by a particular interlock provider (**Provider**) in his vehicle on 7 October 2022. It was serviced on 3 November 2022 and 3 February 2023, and removed on 12 May 2023.¹⁴
13. Accordingly, during the period covered by the application:¹⁵
 - only one interlock was in use during this period
 - the Provider installed and serviced this interlock; and
 - the applicant was still in the learning period of the Program.

Reviewable decision

14. The decision under review is the Department's internal review decision dated 5 July 2023.

Evidence considered

15. Significant procedural steps taken during the external review are set out in the Appendix.
16. Evidence, submissions, legislation, and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).
17. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹⁶ 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 RTI Act.¹⁷ 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:¹⁸ '*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*'.¹⁹

Issue for determination

18. The issue for determination is whether access to further documents responsive to the access application may be refused on the basis they are nonexistent.
19. The applicant provided a number of submissions on external review²⁰ and to the extent they are relevant to the issues for determination in this review, I have addressed them below. However, some submissions concern matters that are outside of OIC's external review jurisdiction.
20. I recognise the applicant is dissatisfied with how he has been treated by the Department and interlock providers including the Provider in his attempts to obtain further information about Program requirements and the legislation governing it. The applicant has a number of concerns about the Program including what he describes as

¹⁴ At which time it was replaced with a different interlock.

¹⁵ Noting section 47(1) of the IP Act provides that an application is taken only to apply to documents that are, or may be, in existence on the day the application is received.

¹⁶ Section 21(2) of the HR Act.

¹⁷ *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].

¹⁸ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁹ XYZ at [573].

²⁰ Received 9 November 2023 and 21 February 2024.

inconsistencies between the Program and transport law. He also has security concerns in relation to his personal information and how it has been collected and managed by the interlock providers including the Provider and the Department. I do not have jurisdiction to deal with these concerns in this external review; my role is confined to conducting merits review of agency decisions on access to or amendment of information under the IP Act. Accordingly, I am unable to make any findings about these matters.²¹

Relevant law

21. 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.²² This right is subject to limitations, including grounds for refusal of access.²³
22. The Information Commissioner's external review functions include investigating whether agencies have taken reasonable steps to identify and locate documents applied for by applicants.²⁴ However, access may be refused in circumstances where a document is nonexistent or unlocatable.²⁵
23. 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:²⁶
 - the administrative arrangements of government
 - the agency's structure
 - the agency's functions and responsibilities²⁷
 - 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.
24. When proper consideration is given to the 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.

²¹ In relation to the applicant's privacy concerns, during the review, OIC informed the applicant that he may wish to speak with the Department and/or OIC's Enquiries Service to obtain general advice about his privacy rights and responsibilities.

²² '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'.

²³ 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.

²⁴ Section 137(2) of the IP Act. The Information Commissioner also has power under section 115 of the IP Act to require further 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.

²⁵ 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.

²⁶ 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].

²⁷ Particularly the legislation for which it has administrative responsibility and the other legal obligations that fall to it.

25. Generally, the agency that made the decision under review has the onus of establishing that the decision was justified or the Information Commissioner should give a decision adverse to the applicant.²⁸ 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 located all relevant documents. Suspicion and mere assertion will not satisfy this onus.²⁹

Findings

26. The Department located further documents relevant to this application during the external review and disclosed these to the applicant.³⁰ Despite this, the applicant is '*convinced this cannot be the extent of the documents responsive to [his] application*'.³¹ In particular, he states that further documents should exist, including:³²

- court issued documents or correspondence about his participation in the Program including any special requirements of that participation
- State and Federal Government issued documents or correspondence regarding his participation in the Program including special requirements of that participation
- Department issued documents or correspondence regarding his participation in the Program including any special requirements of that participation
- documents or correspondence received from the Provider regarding his participation in the Program
- information collected from the interlock including images, recordings, metadata, log files, compliance logs and summaries
- documents or correspondence from third parties in relation to his participation in the Program
- requests for data, documents or other information associated with his participation in the Program
- disclosure logs or the relevant metadata associated with any information disclosed; and
- other notes or documents associated with information disclosures.

27. The applicant further submitted that:³³

- it is unlikely only eight rows of data was collected by the Department from the Provider over approximately seven and a half months of program activity
- the Department requires participants to bring their vehicles to the service centre at regular intervals (including during the learning period), so that program data can be downloaded and verified
- the data collected by the interlock is extensive and the Department is responsible for reviewing the data to ensure participants are following the rules of the performance-based program
- the information located on external review reveals that the Department only receives data which confirms a non-compliance event occurred—not 'actual data' to assess the non-compliance event such as biometric data, location data, Blood Alcohol Content (**BAC**) data and event log data; and

²⁸ Section 100(1) of the IP Act.

²⁹ *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].

³⁰ On 31 January 2024.

³¹ Submission received 21 February 2024.

³² Submission received 9 November 2023 and 21 February 2024.

³³ Submission dated 21 February 2024.

- the Department states that the data it collects is necessary to assess compliance (to ensure participants are following the rules), however, no data was located.

28. In response to the applicant's submissions, the Department explained that:³⁴

- there are three main systems that hold interlock data:
 - a portal accessible to interlock providers (**Portal**)
 - the Department's PDS Hub, which comprises an interface between providers and the Department; and
 - the Transport Information Customer Access (**TICA**) database, which is the Department's licensing system that is updated from the PDS Hub.
- all interactions with the interlock are held in the Portal.
- the PDS Hub receives summarised records in relation to installation, services, handset changes, removal and any violations from the Portal.³⁵
- the PDS Hub sends records relating to installation, removal and any violations in the performance period to TICA.
- a customer can request copies of their records from an interlock provider, however, information will only be provided in circumstances where that provider can confirm that the person interacting with the interlock is the program participant. Any usage of the interlock by a different person will not be shared with the program participant.
- where a violation occurs in the performance period, a notice is sent to the participant advising of the detection and confirming that, if they disagree with the performance period being reset, they have 28 days to notify the Department and seek a review.
- where a violation is disputed, the Department requests that the interlock provider provide full details of the event log pertaining to the matter notified. Where this event relates to a positive breath sample, the event log includes the BAC reading at the time of the failed test/s.
- the only violations captured for the applicant occurred during his learning period as he did not enter the performance period until 13 June 2023. There are no actions or penalties for violations during the learning period of the Program.

29. The Department also provided a copy of its search records which show that searches were conducted in the Customer Services Branch in the Customer Services, Safety and Regulation Division by a Senior Advisor and approved by the Principal Advisor from the Interlock Processing Unit, Technical Hub (**Unit**).³⁶ The search certifications state that the following systems were searched:

- TICA
- Case Management System (PDS Hub)
- G: Drive; and
- Microsoft Outlook mailboxes

using the applicant's customer reference number, email address and first and last names as keywords.

30. The Department explained that the Unit is custodian of the Alcohol Ignition Interlock Program (also known as AIIP) inbox which sits within the Customer Services Branch in the Customer Services, Safety and Regulation Division. The Unit is responsible for:

³⁴ Submission dated 27 May 2024 and 30 May 2024.

³⁵ The term 'violation' relates to a 'relevant event' as defined in section 91VA of the TORUM Act – that is, a detection of a specimen of the person's breath containing alcohol; or a permanent lockout due to a failure to attend a scheduled interlock service appointment.

³⁶ The Interlock Processing Unit sits within the Customer Service Operations area of the Customer Services Branch in the Customer Services, Safety and Regulation Division at the Department.

- interlock exemption applications
 - interlock-related show cause processes
 - monitoring interlock driver records
 - Financial Assistance Scheme applications; and
 - interstate licence transfers.
31. The Department stated that searches were not undertaken within other business divisions because all documents relating to the applicant and his interlock would be held by this Unit.
 32. In respect of the applicant's request for a copy of the court order issued to him to have an interlock fitted in his vehicle, the search certification states that the Unit does not hold copies of court orders and that '*court orders do not contain any details about interlocks, as it is legislated for licensing and not court ordered*'. Following review of applicable legislation,³⁷ I agree that interlocks are required by legislation, not court order, when a person is convicted certain drink driving offences. Consistent with this, government information published online about getting a licence with an interlock condition makes no mention of any requirement to provide a copy of a court order to the Department.³⁸
 33. Having reviewed the terms of the access application, the applicant's submissions, the search submissions provided by the Department³⁹ and its decisions,⁴⁰ I consider that the Department's submissions about the two stage nature of the Program, the greater relevance of violation event information in the latter performance period, the nature of information transferred from Provider to PDS Hub and from PDS Hub to TICA database, and the timing of those transfers, are not only consistent with information located by the Department – they also provide a reasonable explanation as to why no further documents of the types raised by the applicant were found in the PDS Hub or TICA database (or elsewhere). I am satisfied that the Department has conducted comprehensive searches of the locations where it would be reasonable to expect the types of information requested in the application to be stored. I am also satisfied that searches were performed and approved by officers who have relevant knowledge of the Program (one of the officers' works in the Unit and the other in a division of the Unit) and are best placed to understand where relevant documents would be located.
 34. Taking into account the documents that were located by the Department, there is nothing before me, other than the applicant's assertions, to support an expectation that further relevant documents exist. Accordingly, I am satisfied that the Department has taken all reasonable steps to locate documents relevant to the access application and access to further documents may be refused on the basis that they do not exist.⁴¹
 35. I understand that the applicant considers particular documents *should* exist as a function of the Program's operation, however, the nonexistence of such documents is a matter he may wish to discuss with the Department. I am unable to investigate or address that issue as doing so is beyond OIC's external review jurisdiction.

³⁷ Chapter 5, part 3B of the TORUM Act and chapter 12 of the *Transport Operations (Road Use Management – Driver Licensing) Regulation 2021*.

³⁸ Queensland Government website information at <<https://www.qld.gov.au/transport/safety/road-safety/drink-driving/interlocks/getting-an-interlock>> viewed 13 June 2024.

³⁹ Dated 14 November 2023, 29 January 2024 and 27 May 2024.

⁴⁰ Dated 24 May 2023 and 5 July 2023.

⁴¹ Under 67(1) of the IP Act and section 47(3)(e) of the RTI Act.

36. In relation to the applicant's request for metadata,⁴² as the application did not expressly include a request for metadata, the application is taken not to include metadata.⁴³ This information has therefore not been considered in this external review.

DECISION

37. For the reasons set out above, as a delegate of the Information Commissioner, under section 139 of the IP Act, I affirm the Department's internal review decision and find that access to further documents may be refused on the basis that they are nonexistent.⁴⁴

A Rickard
Assistant Information Commissioner

Date: 2 July 2024

⁴² Conveyed in his submission received on 9 November 2023.

⁴³ Section 48 of the IP Act.

⁴⁴ 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
13 July 2023	OIC received the applicant's application for external review.
	OIC notified the Department and the applicant that the application for external review had been received and requested procedural documents from the Department.
	OIC received the requested procedural documents from the Department.
19 October 2023	OIC notified the applicant that the application for external review had been accepted and conveyed a preliminary view to the applicant.
20 October 2023	OIC notified the Department that the application for external review had been accepted
9 November 2023	OIC received submissions from the applicant.
13 November 2023	OIC requested a copy of the documents released to the applicant and further information about the searches undertaken from the Department.
14 November 2023	OIC received the requested information from the Department. The Department advised that two further documents had been located and it did not object to disclosure of them.
25 January 2024	OIC requested further information from the Department about the Program.
29 January 2024	OIC received further information from the Department.
30 January 2024	OIC conveyed a preliminary view to the applicant.
31 January 2024	The Department disclosed two further documents to the applicant.
21 February 2024	OIC received submissions from the applicant.
21 May 2024	OIC requested further information to confirm its understanding of some of the located information and regarding the Department's searches for responsive documents.
27 May 2024	OIC received further information from the Department.
29 May 2024	OIC requested further information to confirm its understanding of some of the further information provided by the Department.
30 May 2024	OIC received the requested further information from the Department.