



Decision and Reasons for Decision

Citation:	<i>K32 and Department of the Premier and Cabinet</i> [2024] QICmr 72 (18 December 2024)
Application Number:	318004
Applicant:	K32
Respondent:	Department of the Premier and Cabinet
Decision Date:	18 December 2024
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - SCOPE OF APPLICATION - whether terms of the application can be unilaterally expanded on external review - section 43 of the <i>Information Privacy Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - applicant contends further searches required - 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)</p>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of the Premier and Cabinet (**Department**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for ‘*all documents and correspondence concerning* [applicant’s first, middle, and last name] *during the period of 14 February 2015 – 28 February 2024*’ from the Office of the Director-General (**ODG**).
2. The Department conducted searches and did not locate any responsive documents. The Department decided² to refuse access to the requested documents on the ground that they do not exist.³
3. The applicant applied to the Office of the Information Commissioner (**OIC**)⁴ for external review of the Department’s decision on the basis that he considered that the Department had not taken all reasonable steps to locate documents in response to the application.

¹ Application compliant on 7 March 2024.

² Decision dated 15 April 2024.

³ 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**).

⁴ On 12 May 2024.

4. For the reasons set out below, I affirm the Department's decision and find that access may be refused to the requested documents on the basis they do not exist.⁵

Background

5. The applicant contends the Department did not provide specifics regarding *how* the searches were conducted and what variants of search terms were used and, as such, no assessment can be made regarding whether the steps taken to search for documents are reasonable.⁶
6. The applicant provided OIC with a list of further identifiers and variations of those identifiers which he requested the Department use when conducting additional searches on external review. This list was extensive and included variations⁷ of his phone numbers, car registration details, multiple email addresses, Medicare number, healthcare card number, and an alternate surname.
7. However, in the course of the review the applicant resiled from this position regarding the extensive variations of identifiers but maintained that the Department should be required to conduct further searches generally and using the alternate surname.

Reviewable decision

8. The decision under review is the Department's decision dated 15 April 2024.

Evidence considered

9. Significant procedural steps relating to the external review are set out in the Appendix.
10. The evidence, submissions, legislation and other material I have considered in reaching this decision are included in these reasons (including footnotes and Appendix).
11. In making this decision I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the applicant's right to seek and receive information.⁸ 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 IP Act.⁹ 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 the equivalent pieces of Victorian legislation:¹⁰ '*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.*'¹¹

Issues for determination

⁵ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act.

⁶ External review application received 12 May 2024.

⁷ Including variations of, for example, the format in which a birth date might be recorded.

⁸ Section 21 of the HR Act.

⁹ *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]. I further note that OIC's approach to the HR Act set out in this paragraph was considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (where Judicial Member McGill saw 'no reason to differ' from our position).

¹⁰ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹¹ *XYZ* at [573].

12. The substantive issue for determination is whether the Department has taken all reasonable steps to locate documents responsive to the terms of the applicant's access application, and if access to the requested documents can be refused on the basis they do not exist.
13. As part of his contention that the Department has not taken all reasonable steps to locate documents responsive to the terms of his application, the applicant submitted that the Department should also conduct searches for documents using his other 'known name' and particular variations of that name. As the terms of an application are a key factor to which I must have regard when determining the issue of whether an agency's searches have been sufficient, I have also considered and made a finding on the scope of the terms of the access application.

Scope of application

Relevant law

14. The IP Act requires that an access application must '*give sufficient information concerning the document to enable a responsible officer of the agency or Minister to identify the document*'.¹²
15. There are sound practical reasons for the documents sought being clearly and unambiguously identified,¹³ including that the terms of an application set the parameters for an agency's response and the direction of an agency's search efforts.¹⁴ For these reasons the scope of an access application may not be unilaterally widened on external review.¹⁵

Applicant's submissions

16. The applicant submits that '*...it is more than reasonable for [the Department] to conduct further searches...using [applicant's alternate surname] and variants thereof as a search input.*' The applicant further submits that '*I am only really asking that content searches be conducted...using a few variants of both my known names; this represents a very reasonable request*'.¹⁶

Findings

17. As outlined in paragraph 15, it is well settled that the scope of an application sets the parameters for an agency's searches.¹⁷ I have carefully considered the wording of the access application and I am satisfied that the terms of the access application are very specific and do not include mention of the applicant's alternate surname.
18. I am satisfied that the application did not request documents and correspondence relating to the applicant's alternate surname and, as such, the Department was not required to conduct searches for documents with the alternate surname as a search term. For completion, I note that even if the alternate surname could be shown to be

¹² Section 43(2)(b) of the IP Act.

¹³ *Rolfe and Banana Shire Council* (Unreported, Queensland Information Commissioner, 9 October 2009) at [104].

¹⁴ *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 (**Cannon**) at [8].

¹⁵ *Robbins and Brisbane North Regional Health Authority* (1994) 2 QAR 30 at [17]; *Arnold and Redland City Council* (Unreported, Queensland Information Commissioner, 17 October 2013) at [17].

¹⁶ Submission dated 23 October 2024.

¹⁷ *Cannon* at [8] cited in *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) at [33]; *Van Veenendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017) at [15] and *Ciric and Queensland Police Service* [2018] QICmr 30 (29 June 2018) at [20].

'known' by agency staff,¹⁸ that would not have imparted an obligation on the Department to include it in the search terms for the access application. The parameters for the agency's response and relevant searches are set by the specific terms of the application. The Department correctly construed the terms of the access application to only search for documents which related to the specific name provided in the access application.

Nonexistent documents

Relevant law

19. Under the IP Act, an individual is entitled to access documents containing their personal information.¹⁹ The right of access is not absolute and is subject to the provisions of the IP Act, including the grounds for refusing access.²⁰ Access to a document may be refused²¹ if the document is nonexistent or unlocatable.²²
20. Relevantly, a document will be *nonexistent* if there are reasonable grounds to be satisfied it does not exist.²³ To be satisfied that a document does not exist, the Information Commissioner has previously found that a decision maker may have regard to various key factors, including the agency's record-keeping practices and procedures (including, but not limited to, its information management approaches).²⁴ 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.
21. 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*'.²⁵ 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.²⁶
22. The functions of the Information Commissioner on external review include investigating and reviewing whether an agency has taken reasonable steps to identify and locate documents applied for by applicants.²⁷ The Queensland Civil and Administrative

¹⁸ There is no indication in the material before me that this is the case.

¹⁹ Section 40 of the IP Act.

²⁰ Including section 67(1) of the IP Act.

²¹ Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent it could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under the RTI Act.

²² 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.

²³ Section 52(1)(a) of the RTI Act. For example, a document has never been created.

²⁴ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [16]-[21] 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 repealed *Freedom of Information Act 1992* (Qld). 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.

²⁵ As set out in *PDE* at [49].

²⁶ As set out in *PDE* at [38].

²⁷ Section 137(2) of the IP Act.

Tribunal confirmed in *Webb v Information Commissioner*²⁸ 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.

23. The Information Commissioner also has power to require additional searches to be conducted by an agency during an external review.²⁹ Following the decision in *Webb*, the Information Commissioner recently confirmed that in assessing an agency’s searches, the relevant question is whether the agency has taken all *reasonable* steps to identify and locate responsive documents, as opposed to all *possible* steps.³⁰

Onus on review

24. 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.³¹ Where the issue of missing documents is raised on external review, the agency must demonstrate that all reasonable steps have been taken to identify and locate relevant documents.³² However, if the applicant maintains further documents exist, the applicant bears a practical onus of demonstrating that the agency has not discharged its obligation. Suspicion and mere assertion will not satisfy this onus.³³

Department’s searches and submission

25. The Department provided a summary of the searches conducted which demonstrated that searches were conducted by the ODG and the executive correspondence unit (**ECU**)³⁴ within email accounts, ‘TRIM’³⁵ and the ODG Correspondence Tracker. The search terms used included the applicant’s email address, and variations of the applicant’s name provided with the application.³⁶
26. The Department submits that it conducted searches of all current email accounts of ODG,³⁷ however notes that ‘*even though all department documents (including emails) should be saved to TRIM...the response would not cover any outlook accounts of previous staff of the ODG in the relevant time period (in the unlikely case an email may not have been saved to TRIM)*’.³⁸ Consequently, the Department arranged for the IT Manager to conduct ‘department wide’ searches of **all** outlook accounts³⁹ using specified keywords⁴⁰ (this search included archived email accounts). The Department confirmed that no emails responding to the scope of the application were located, and the IT Manager advised ‘*I believe your search criteria would be enough to capture relevant email records pertaining to the RTI applicant*’.⁴¹

²⁸ [2021] QCATA 116 at [6] (*Webb*).

²⁹ Under section 115 of the IP Act.

³⁰ *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].

³¹ Section 100(1) of the IP Act.

³² Section 52(1) of the RTI Act.

³³ *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36].

³⁴ Which sits within ODG.

³⁵ The Department’s electronic document management system.

³⁶ Including first name and surname, and first name, middle name, and surname.

³⁷ During the specified timeframe in the access application.

³⁸ Submission dated 12 July 2024.

³⁹ Specifically including any email addresses from the “@premiers.qld.gov.au” email server.

⁴⁰ The searches were conducted for emails within the timeframe specified in the access application. The keywords for the search included the applicant’s first, middle, and last name; first and last name; Mr. [Surname] (with full stop), Mr [Surname] (without full stop); and the applicant’s email address as provided in the access application.

⁴¹ Submission dated 12 July 2024.

27. As outlined in paragraph 25, the Department also conducted searches in the ODG Correspondence Tracker and TRIM by using the applicant's supplied email address, and variations of the name provided in the access application. ECU conducted a TRIM keyword (title search) based on the applicant's provided name, and a contact location search and a document content search based on supplied email address. The Department further explained:⁴²

*The **ODG Correspondence Tracker** is internal to the ODG only: is a record in teams / onedrive of all incoming hard copy correspondence (including briefing notes) for the DG's signature.*

***TRIM** is the department's electronic document management system*

- *if correspondence is received (or sent), a **contact location** is created for the person – usually surname, first name, and whatever contact details are available (phone etc)*
- *a **document content search** searches the content of a document – effective for emails; word docs; scanned documents if scanned with optical character recognition (OCR) which is how correspondence received by ECU is scanned.*

[sic]

28. The Department submits that 'the searches would have returned any relevant documents',⁴³ however, no documents were located.

Applicant's submission

29. On external review, the applicant's submissions generally related to which of his personal identifiers (and their format) were used in searches, how the searches were conducted, and the level of detail provided by the Department regarding the searches. For example:⁴⁴

... [the Department should] 'better explain the searches previously undertaken within TRIM and the ODG Correspondence Tracker...it does not appear [the Department] has spent much time looking for documents within the scope of my request.'

...a title search within TRIM using my name is unlikely to reveal any documents held by the ODG concerning myself as it is extremely unlikely any document held by the ODG concerning me would be titled according to my name... In addition, I have never emailed the ODG so conducting a content search within TRIM using my email address represents an ineffective search method.

...ODGs response regarding searches conducted within the ODG Correspondence Tracker are intertwined with its response regarding searches that were conducted within TRIM and Outlook. No real particulars are given, and it is my view that the ODG should be required to include some level of specificity in its responses...

30. The applicant also submitted⁴⁵ that the Department should be required to conduct searches within any of its 'tangible document storage locations' and against 'non-electronic documents'.

Findings

31. On the basis of my finding at paragraph 18, I have not further considered the applicant's contention that the Department should be required to conduct searches

⁴² In the decision notice dated 15 April 2024 and submission dated 12 July 2024.

⁴³ Submission dated 12 July 2024.

⁴⁴ Submission dated 23 October 2024.

⁴⁵ External review application dated 12 May 2024.

using the alternate surname in relation to whether all reasonable steps have been taken to locate documents.

32. Having considered the applicant's submissions⁴⁶ and the information provided by the Department,⁴⁷ I am satisfied that the Department has taken all reasonable steps to locate documents responsive to the terms of the applicant's access application.
33. I note the applicant's submission that the agency has not satisfied the onus that sufficient searches have been undertaken. However, importantly, once the Information Commissioner⁴⁸ is satisfied that all reasonable steps have been taken by the agency, it is the applicant who then bears a practical onus of establishing that a reasonable basis to expect that documents responsive to the terms of the access application exist in the possession or control of the Department and therefore that further searches are warranted. In this regard I note that the applicant merely takes issue with the nature of the searches undertaken rather than putting forward information that demonstrates that the Department actually has any documents about him (such as, for example, any relevant dates of contact, or staff names/positions with whom he had contact within ODG). Indeed, by his own admission, the applicant has '*never emailed ODG*'.⁴⁹
34. I am not persuaded by the applicant's submission that a search of TRIM using his name would be unlikely to yield results as it is unlikely they would be titled according to his name. I accept the Department's submission that if correspondence is received (or sent) then a 'contact location' is created for the person which usually includes the surname, first name, and whatever contact details are available. There is no information before me to indicate any reason to believe that documents relating to the applicant (if they existed) would be stored in variance to the standard practice. Additionally, the document content search of TRIM would find documents containing the applicant's details, even if the usual 'contact location' practice were varied. Thus, if documents existed, it is reasonable to conclude they would have been located by the searches undertaken by the Department.
35. I do not accept the applicant's submission that it would be reasonable for the Department to conduct searches within its '*tangible document storage locations*'. The extensive searches conducted of the ODG Correspondence tracer, TRIM and Outlook located no documents, and there is no indication that any hardcopy documents responsive to the application exist.⁵⁰ The applicant also has not provided any evidence or information which would indicate that he has had any contact with ODG which would have resulted in any hardcopy documents being created. In the circumstances, I do not consider it is reasonable or necessary for the Department to have conducted searches of physical documents.
36. Although the Information Commissioner may require an agency to conduct further searches for a document,⁵¹ I do not consider that it is warranted in this case on the basis that:
 - the Department has conducted targeted searches for documents based on its knowledge of its structure, functions, practices and procedures (including its record-keeping and information management systems)

⁴⁶ External review application dated 12 May 2024 and submission dated 23 October 2024.

⁴⁷ Submission dated 12 July 2024.

⁴⁸ Or the Information Commissioner's delegate.

⁴⁹ As detailed above in paragraph 29 from the applicant's submission dated 23 October 2024.

⁵⁰ Noting the Department's process of recording incoming correspondence in the ODG Correspondence Tracker.

⁵¹ Section 115 of the IP Act.

- those searches have yielded no results nor provided information about other possible search locations or inquiries; and
- the applicant has provided no cogent evidence to support a reasonable belief that the Department holds responsive documents.⁵²

37. In the circumstances of the present matter, I am satisfied that if any responsive documents exist, it is reasonable to expect that the conducted searches would have located those documents, or, at the very least, located information that may have identified other relevant avenues of search or inquiry.⁵³ In the absence of specific evidence or cogent argument from the applicant pointing to the existence of documents,⁵⁴ I am satisfied that the Department has taken all reasonable steps to identify and locate documents responsive to the terms of the applicant's access application and there is a reasonable basis to conclude that documents responding to the terms of the access application do not exist.

38. I therefore find that access to the requested documents may be refused on the basis that they are nonexistent under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act.

DECISION

39. For the reasons set out above, I affirm the decision under review by finding that access to the requested information may be refused under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act on the basis they do not exist.

40. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

V Corby
Assistant Information Commissioner

Date: 18 December 2024

⁵² As per *C81 and Griffith University* [2024] QICmr 47 (2 October 2024).

⁵³ For the sake of completeness, I note that the RTI Act provides that, before it can be established that a prescribed document does not exist, a search of a backup system is required, but only if it is considered that the document has been kept in, and is retrievable from, the backup system. I have not requested searches of any backup system, as I do not consider it necessary to do so, as there is nothing before me to indicate that the relevant document ever existed and is stored within a backup system.

⁵⁴ *G46 and Queensland Police Service (No. 2)* [2020] QICmr 73 (7 December 2020) at [38].

APPENDIX**Significant procedural steps**

Date	Event
12 May 2024	OIC received the external review application.
13 May 2024	OIC requested the department provide procedural documents and information.
20 May 2024	The Department provided the requested procedural documents.
2 July 2024	OIC advised applicant and the Department the external review had been accepted. OIC asked the Department to provide the record of searches conducted and a submission addressing the searches.
12 July 2024	The Department provided search records and a submission.
1 October 2024	OIC requested further search records from the Department.
4 October 2024	OIC received a submission from the Department.
9 October 2024	OIC conveyed a preliminary view to applicant.
23 October 2024	OIC received a submission from applicant.