



Applying the legislation

GUIDELINE *Right to Information Act 2009 and Information Privacy Act 2009*

Assessing the terms of an access application

Section 24(2)(b) of the *Right to Information Act 2009* (RTI Act)¹ states that an RTI application must give sufficient information concerning the document to enable a responsible officer of the agency² to identify the document.

This means applicants must describe the documents they want to access clearly enough to allow the decision-maker to:

- identify the documents being applied for
- conduct searches for the documents; and
- make decisions on the documents.³

Understanding the applicant's meaning should not be approached in the same way as interpreting an Act; if there are ambiguities or the scope is unclear, decision makers should seek clarification from the applicant.⁴

Where a non-compliance decision is contemplated, decision makers must assist applicants, most of whom will not be familiar with agency documents and record keeping systems, by contacting them and providing an opportunity to help rectify any scope issues.⁵ However, applicants also have a responsibility to be clear and precise, and to work with the decision maker to make their application compliant.

Working with the applicant

An application which is potentially non-compliant because the scope is unclear should not be approached in the same way as non-compliance on purely technical grounds, eg no application fee or no ID provided.

Where a decision maker cannot identify the documents an applicant is seeking, in most cases, both decision maker and applicant will be better served by a phone call than by a lengthy non-compliance letter. A conversation can allow questions to be asked, allow an applicant to explain what they want, and allow context and clarification which could assist the decision maker in understanding the documents being sought.

In some circumstances a conversation will not be possible, and any agreed alteration to the scope should be confirmed in writing, but an initial call can prevent significant and potentially unnecessary work.

¹ And section 43(2)(b) of the *Information Privacy Act 2009* (IP Act); references to the RTI Act include references to the IP Act.

² References to an agency in this guideline includes a Minister.

³ *Lonsdale and James Cook University* [2015] QICmr 34 (15 December 2015), paragraph 9

⁴ *Ibid*, paragraph 10

⁵ Section 33 of the RTI Act.



Where the application is too broad

Where the scope of an application is too broad, it may not comply with section 24(2)(b) of the RTI Act.

Too broad versus too big

An application that is too broad, meaning specific documents cannot be identified, is not the same as one which is *too big*, meaning the specific documents it identifies may trigger the refusal to deal provisions relating to diversion of agency resources. Being too big is not, on its own, a ground of non-compliance.

Recordkeeping and document management

The specific recordkeeping and document management systems of the agency will be relevant when determining whether or not an application sufficiently describes the documents sought.⁶

Where an agency is large and decentralised, applicants may need to include additional information (eg geographical locations, relevant reference numbers, names of business units or agency officers) in their scope to make it compliant, and allow the agency to identify the documents and undertake searches.

Example

'All documents relating to my interactions with agency officers' may be a compliant application where the applicant applies to a small statutory body with only 30 officers and one office.

However, if the same application is made to a large department with multiple regional offices and a decentralised records management system, the application is likely to be non-compliant because the applicant has not provided sufficient information to allow an officer of the agency to identify in which regional office the documents may be located.

Including but not limited to and directly or indirectly

The inclusion of these words in an application will not make it noncompliant but they can be a cue to decision makers to carefully consider the scope of the application.

All documents related to [x], directly or indirectly

Whether these words make a scope non-specific enough to be noncompliant will often depend on the subject matter of [x]. Generally, documents will either relate to the nominated scope of an application or they will not. Decision makers will need to determine if the applicant, in using the words *directly or indirectly*, is

⁶ *Mewburn and Queensland Police Service* [2014] QICmr 49 (2 December 2014)



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attempting to seek access to documents about a subject they have not identified in their application but that they believe is connected to something they have mentioned.⁷

If the subject matter is clear, and all information directly *and* indirectly related to it is limited, the inclusion of the words 'directly or indirectly' will generally not make the application noncompliant as the applicant is clearly seeking information only on the nominated subject matter.

In *Bade and Gympie Regional Council*⁸ (**Bade**), the Information Commissioner found that it was clear from the terms of the access application that the applicant sought documents:

- that comprised formal documents and internal memos
- which were created between July 2007 and September 2010; and
- that related to an obligation on a party, either directly or indirectly, who had an interest in fulfilling Condition 1.1 of the assessment manager's conditions.

The Council located 29 documents within scope of the application. On review, the Information Commissioner identified that the only obligation which arose rested with a single party and additional documents located were not within the scope of the application as they related to other parties.

In *Bade*, despite the applicant's use of the words *directly or indirectly*, the scope of the application was clear because there was only one obligation to which documents could relate.

Where the subject of the application is not clear or limited, a different outcome is likely. For example, an application for 'all documents related to me, whether directly or indirectly', may raise compliance issues as decision makers cannot ordinarily be expected to determine the nature of an *indirect* connection to an applicant or something specifically nominated by an applicant.⁹ While the connection may be apparent to the applicant, if they have not actually described what they are seeking in their application, the application may not be compliant.

Including, but not limited to

The same general principle applies to the phrase *including but not limited to*. Where the words attach to, for example, the type of documents sought, eg 'all documents, including, but not limited to, briefing memos, file notes, emails and audio recordings', it raises no issues as 'all documents' already includes the sub-class of listed documents.

⁷ *Cannon and Australian Quality Egg Farms Ltd* 30 May 1994 (1993 S0094), paragraph 12 (**Cannon**)

⁸ 14 February 2012 (310467)

⁹ *Cannon*, paragraph 12



However, where they attach to the subject matter of the documents, they have the potential to infinitely expand a scope. For example, where an applicant applies for 'all documents about an agency's actions in North Queensland, including but not limited to investigations into vegetation clearing, noise complaints, and illegal dumping' the inclusion of the phrase effectively makes the scope cover documents about everything the agency has done in North Queensland.

It will be necessary to carefully consider the impact the phrase has on the specifically identified subject matter, and whether its addition creates an additional class or classes of documents which the decision maker cannot reasonably identify. It will also be relevant to consider the effect it will have on searches.

Where the scope requires the decision maker to identify the documents that the applicant seeks to access

The applicant must make their application in a way that allows the decision maker to identify the documents the applicant is seeking. The onus is on the *applicant* to identify the documents they want to access, not the decision maker.

If the scope will require the decision maker to choose what documents the applicant should receive, or to undertake detailed investigation or analysis to identify the documents the applicant wants to access, the application will not be compliant. Applications of this kind may be explicit or implicit.

As mentioned previously, working with an applicant to clarify scope is always recommended. Also, agencies must not take an overly technical approach when interpreting scope. When searching for and considering documents potentially responsive to an application, some degree of investigation and analysis will always be required.

Explicit

If the applicant asks the decision maker to nominate the documents the applicant is to receive, the application will, in most cases, be noncompliant. For example, the applicant may request the agency to select a set number of responsive documents or to pick them at random or use other words that place the onus on the agency to select the specific documents that an applicant is to receive.

This should be distinguished from situations where an applicant nominates specific documents by way of a number, for example 'the first 10' in a series or 'the six most recent'.

Implicit

Where the wording of the application requires the intervention of the decision maker before the documents can be identified, it will most likely be noncompliant. The most commonly required intervention is of an analytical or investigative nature. This will most often arise where an applicant applies for information that shows an outcome that is not clear on the face of a specific document, and which



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requires the decision maker to independently verify something, make a determination, revisit or 'retry' a matter, or undertake an entirely subjective assessment.

For example:

- *All documents which show the wrongdoing done to me by the Business Unit.*
- *All evidence to support allegations and comments made about me to the police about the offence I was charged with.*
- *Any files about incidents of serious injury that happened at a specific location (where 'serious injury' is not a defined term and would require the decision maker to make a value judgement about whether an injury is serious or not).*

Applications of this kind are different from applications for, for example, 'all documents about the Minister's reasons for cancelling the road development', or 'all information about why I didn't get the job' as in those cases the decision maker does not have to undertake an analysis, conduct an investigation, or draw conclusions to determine what the applicant is seeking.

Where the application seeks answers to questions

The RTI Act creates a right to apply for access to documents. It does not create a right to have questions answered or to have answers to questions extracted from documents.¹⁰ However, where an access application seeks to ask questions, it is appropriate to treat the application as a request for documents containing the answers to those questions. This will only be suitable where, taking into account the nature of the questions, it is both possible and reflects the applicant's intentions in framing their application.¹¹

If it is not suitable to interpret the application as a request for documents, the application will not be compliant with section 24(2)(b). In those circumstances, the decision maker could:

- assist the applicant to rework their scope into an application for documents; or
- direct the applicant to the relevant part of the agency to have their questions answered.

Where the application is not for documents

Applications must be for documents. If the applicant applies for:

- access to physical plant or equipment¹²

¹⁰ *Hearl and Mulgrave Shire Council* (1994) 1 QAR 557, paragraph 30

¹¹ *Ibid*, Paragraph 32

¹² See for example *Price and Director of Public Prosecutions* (1997) 4 QAR 157 where the applicant sought access to a pair of tinsnips and the Information Commissioner held that they were not a document.



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- descriptions of events, clothing, or items
- a meeting with agency officers
- access to email accounts, servers, or electronic devices rather than the documents they contain; or
- anything else that is clearly not a document

—then the application will not be valid.

For additional information and assistance please refer to the OIC's guidelines, or contact the Enquiries Service on 07 3234 7373 or email enquiries@oic.qld.gov.au.

This guide 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