



Decision and Reasons for Decision

Citation:	<i>S55 and Queensland Police Service [2023] QICmr 3 (30 January 2023)</i>
Application Number:	316815
Applicant:	S55
Respondent:	Queensland Police Service
Decision Date:	30 January 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - application for documents relating to death of applicant's father - whether agency has conducted reasonable searches - whether access to documents may be refused on the basis they are nonexistent or unlocatable - sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Queensland Police Service (**QPS**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to '*...all police site reports incident reports, internal memos, phone record memos, coroner's communications, witness statements, reports, and any finalised reports*' relating to the death of the applicant's father, which occurred within the Wide Bay Burnett Region, Queensland in 1986.
2. QPS conducted searches in response to the application and no documents were located as a result of those searches. Accordingly, QPS decided² to refuse access to the requested information on the ground that the documents were nonexistent or unlocatable.³
3. The applicant applied⁴ for internal review of QPS' decision. QPS conducted further searches in response to the internal review application and decided to affirm its original decision.⁵
4. The applicant then applied⁶ to the Office of the Information Commissioner (**OIC**) for external review of QPS' decision.

¹ Access application dated 16 May 2022.

² Decision dated 6 July 2022.

³ Pursuant to sections 47(3)(e) and 52 of the RTI Act.

⁴ Internal review application dated 6 July 2022.

⁵ Internal review decision dated 20 July 2022.

⁶ External review application dated 21 July 2022.

5. For the reasons set out below, I affirm QPS' decision that access to the requested information may be refused on the grounds that the documents are nonexistent or unlocatable. I am satisfied that QPS has taken all reasonable steps to locate and identify the documents applied for by the applicant.

Background

6. Significant procedural steps are set out in the Appendix to this decision.

Reviewable decision and evidence considered

7. The decision under review is QPS' internal review decision dated 20 July 2022.
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).
9. In making this decision I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information. I consider that in observing and applying the law prescribed in the RTI Act, a RTI decision-maker will be '*respecting and acting compatibly with*' this right and others prescribed in the HR Act, and that I have done so in making this decision, as required under section 58(1) of the HR Act. In this regard, I note Bell J's observations on the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: '*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

Issue for determination

10. The issue for determination is whether QPS has taken all reasonable steps to identify and locate information applied for by the applicant and if access may be refused on the ground the information is nonexistent or unlocatable.⁸
11. On external review, the applicant raised concerns about the conduct of a QPS staff member, QPS' response to his complaint about that staff member and QPS' record keeping practices. The RTI Act does not give OIC jurisdiction to investigate complaints about an agency's conduct or processes, which I explained to the applicant in my preliminary view to him.⁹ Therefore, I cannot consider the applicant's concerns in this regard.
12. I have taken account of the applicant's submissions to the extent that they are relevant to the issue for determination in this review.

Relevant law

13. The RTI Act provides a general right of access to documents of an agency,¹⁰ however, this right is subject to limitations, including grounds for refusal of access.¹¹ Access to a document may be refused if the document is nonexistent or unlocatable.¹²

⁷ *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).

⁸ Sections 47(3)(e) and 52 of the RTI Act.

⁹ Preliminary view dated 16 September 2022.

¹⁰ Section 23(1)(a) of the RTI Act. What comprises a '*document of an agency*' is defined in section 12 of the RTI Act.

¹¹ The grounds on which an agency may refuse access are set out in section 47 of the RTI Act.

14. A document is nonexistent if there are reasonable grounds to be satisfied that the document does not exist.¹³ To be satisfied documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors, including:¹⁴
 - the administrative arrangements of government
 - the agency's structure
 - the agency's functions and responsibilities¹⁵
 - the agency's practices and procedures (including, but not limited to, its information management approach); and
 - other factors reasonably inferred from information supplied by the applicant (including the nature and age of the requested documents).
15. An agency may rely on an explanation of its recordkeeping systems to justify the nonexistence of particular documents. If searches are relied on to justify a decision that documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case.
16. A document is unlocatable if a decision-maker is satisfied that the requested document has been or should be in the agency's possession, and the agency has taken all reasonable steps to find the document and it cannot be located.¹⁶ To determine if documents are unlocatable, regard should again be had to the circumstances of the case and the above key factors.¹⁷
17. Generally, 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.¹⁸ However, where an external review involves the issue of missing documents, as is the case here, the applicant has a practical onus to establish reasonable grounds to believe that the agency has not discharged its obligation to locate all relevant documents. Suspicion and mere assertion will not satisfy this onus.¹⁹

Findings

Applicant's submissions

18. In response to QPS' internal review decision, the applicant raised concerns about QPS search processes.²⁰ The applicant contends²¹ that QPS should have documents responsive to his application because:

¹² Sections 47(3)(e) and 52 of the RTI Act.

¹³ Section 52(1)(a) of the RTI Act.

¹⁴ *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]. These factors were more recently considered in *Van Veendendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017) and *Y20 and Department of Education* [2021] QICmr 20 (11 May 2020) at [45].

¹⁵ Particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it.

¹⁶ Section 52(1)(b) of the RTI Act.

¹⁷ *Pryor* at [20]-[21].

¹⁸ Section 87(1) of the RTI Act.

¹⁹ *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].

²⁰ In the internal review application dated 6 July 2022.

²¹ In submissions dated 14 October 2022.

- he is aware that his step-mother and her brother both provided statements about his father's death to police
- searches were conducted at Bargara Police Station, a station with limited resources, and it is more likely that searches of Bundaberg Police Station's records would be successful
- given the public nature of his father's death, it is '*highly unlikely and extremely improbable that no Queensland Police Service...report was written or no eye witness statements were taken*'; and
- QPS may have checked current and previous electronic records but if the documents have been lost or destroyed (accidentally or in accordance with a retention and disposal policy), there should be documents detailing their loss or destruction.

Searches undertaken by QPS

19. QPS has provided OIC with a copy of its search records and certifications for processing the application. The documents provided show that searches were conducted by officers at Wide Bay Burnett District Office, and the searches encompassed both Bargara Police Station and Bundaberg Police Station, as well as relevant databases where the requested documents could reasonably be expected to be located. No records were located as a result of these searches.
20. Following receipt of the applicant's internal review application, further inquiries were also made with Bargara Police Station, based on the details contained within the 'Post-Mortem Examination Report' provided by the applicant to QPS. Searches were also conducted by QPS' Information Management Unit which indicated that '*no record has ever existed on their indices in relation to this matter.*'²²
21. QPS relied on searches conducted by its officers to justify its position that reasonable steps have been taken to locate documents responsive to the applicant's application.

Analysis

22. In reaching my decision, I have considered the applicant's submissions, the scope of the access application, the searches undertaken by QPS during the original processing of the access application and the additional searches undertaken during the internal review of its original decision. I am also mindful that the documents sought, if they exist, relate to an incident that occurred just over 36 years ago, which diminishes the likelihood of their current existence and recoverability as QPS record keeping practices have changed over this period.
23. In reaching this decision, I have also had regard to Justice McGill's comments²³ that a finding that all reasonable steps have been taken by an agency is open to reach '*even if, at least in theory, further and better searches might possibly disclose additional documents.*'²⁴ That is, I must answer the question of whether QPS has taken all *reasonable* steps to identify documents, as opposed to all *possible* steps.
24. The applicant also contends that if relevant documents were lost or destroyed, there should be documents detailing this. However, even if these documents existed at some point in time and QPS was required to retain them or maintain records of their loss or destruction, QPS' searches have failed to locate them.

²² Submissions dated 20 August 2022.

²³ *Webb v Information Commissioner* [2021] QCATA 116 (**Webb**).

²⁴ *Webb* at [6].

25. On the material presently before me, I consider QPS has conducted appropriately targeted searches of locations where it would be reasonable to expect the requested information to be located. It is my view that QPS has taken all reasonable steps to locate responsive documents, and access to the requested information may therefore be refused on the ground it is nonexistent or unlocatable.²⁵

DECISION

26. For the reasons set out above, I am satisfied that QPS has taken all reasonable steps to locate and identify the documents applied for by the applicant. I therefore affirm QPS' decision and find that access to the requested information may be refused on the grounds that the documents are nonexistent or unlocatable pursuant to sections 47(3)(e) and 52 of the RTI Act.
27. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

S Martin
Assistant Information Commissioner

Date: 30 January 2023

²⁵ Under sections 47(3)(e) and 52 of the RTI Act.

APPENDIX**Significant procedural steps**

Date	Event
21 July 2022	OIC received the application for external review. OIC requested preliminary documents from QPS.
30 July to 2 August 2022	OIC received the requested preliminary documents from QPS.
4 August 2022	OIC advised the applicant and QPS that the application for external review had been accepted. OIC requested QPS provide further information.
20 August 2022	QPS provided submissions to OIC.
23 August 2022	OIC requested further information from QPS.
5 September 2022	QPS provided the further requested information to OIC.
16 September 2022	OIC conveyed a preliminary view to the applicant. The applicant advised that he wished to proceed with the review in response to OIC's preliminary view.
14 October 2022	The applicant provided verbal and written submissions in response to OIC's preliminary view.
20 October 2022	OIC conveyed a further preliminary view to the applicant. OIC provided QPS with an update. The applicant requested the matter proceed to formal decision.
27 October 2022	OIC requested QPS provide search certification and record forms and advised QPS that the matter would proceed to a formal decision.
14 December 2022	QPS provided completed search certification and record forms to OIC.