



## Decision and Reasons for Decision

---

<b>Citation:</b>	<b><i>S12 and Department of Energy and Public Works [2023] QICmr 35 (18 July 2023)</i></b>
<b>Application Number:</b>	<b>317213</b>
<b>Applicant:</b>	<b>S12</b>
<b>Respondent:</b>	<b>Department of Energy and Public Works</b>
<b>Decision Date:</b>	<b>18 July 2023</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether access to requested documents may be refused on the basis they are nonexistent - whether agency has taken reasonable steps to establish that requested documents are nonexistent - sections 47(3)(e) and 52(1)(a) of the <i>Right to Information Act 2009</i> (Qld)</b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied<sup>1</sup> to the Department of Energy and Public Works (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents between 1989 and January 2023 described as:  
  
**[(neighbouring property)]**  
*The QBUILD drainage plans complying with the Code as per the Act for the current backyard drainage from the dwelling roof downpipes downstream to the point of discharge. The QBUILD drainage plans along the common boundary fence including the metal drain becoming concentrated groundwater into [applicant's property] backyard under the fence. [(Part 1)]*  
*The septic system plans since [neighbouring property] was built 1989. The maintenance records for the septic system point of discharge. [(Part 2)]*
2. The Department decided<sup>2</sup> to refuse access to the requested documents under sections 47(3)(e) and 52(1)(a) of the RTI Act on the ground that they were nonexistent.
3. The applicant applied<sup>3</sup> for internal review of the Department's decision.

---

<sup>1</sup> On 13 January 2023.

<sup>2</sup> Decision dated 20 February 2023.

<sup>3</sup> On 20 and 23 February 2023.

4. In its internal review decision,<sup>4</sup> the Department released three documents<sup>5</sup> to the applicant in relation to Part 1 of the access application and upheld the original decision in relation to Part 2 of the access application
5. The applicant applied<sup>6</sup> to the Office of the Information Commissioner (**OIC**) for external review of the Department's internal review decision refusing access to documents responding to Part 2 of the access application.
6. I affirm the decision under review by finding that access to the documents requested by the applicant at Part 2 of the access application may be refused under section 47(3)(e) and section 52(1)(a) of the RTI Act.

## Background

7. The applicant has experienced ongoing drainage issues at her property which she contends is due to run-off/overflow from neighbouring properties. She has made a number of complaints to the Department and other government agencies about these issues over a number of years.

## Reviewable decision

8. The decision under review is the Department's internal review decision dated 20 March 2023.

## 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 my decision are set out in these reasons (including footnotes and the appendix). I have taken account of the applicant's submissions<sup>7</sup> to the extent that they are relevant to the issues for determination in this review.
11. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>8</sup> 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 the *Information Privacy Act 2009* (Qld).<sup>9</sup> 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:<sup>10</sup> '*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.*'<sup>11</sup>

---

<sup>4</sup> Dated 20 March 2023.

<sup>5</sup> Comprising:

- a letter from the local council dated 7 June 2022 confirming works had been completed in accordance with the legislated drainage requirements
- a revised plan for the neighbouring property regarding a spoon drain pit pump; and
- a site plan for the neighbouring property.

<sup>6</sup> On 30 March 2023.

<sup>7</sup> Contained in the application for external review and in emails of 12, 22 and 23 May 2023 and 12 June 2023.

<sup>8</sup> Section 21(2) of the HR Act.

<sup>9</sup> *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]. OIC's approach to the HR Act set out in this paragraph has recently been considered and endorsed by QCAT Judicial Member McGill in *Lawrence v Queensland Police Service* [2022] QCATA 134, noting that he saw '*no reason to differ*' from our position ([23]).

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

<sup>11</sup> **XYZ** at [573].

## Issue for determination

12. The issue for determination is whether the Department was entitled to refuse access to the documents requested at Part 2 of the access application on the basis that they are nonexistent under section 52(1)(a) of the RTI Act.

## Relevant law

13. The RTI Act permits an agency to refuse access to information where the requested information is nonexistent or unlocatable.<sup>12</sup>
14. A document will be *nonexistent* if there are reasonable grounds to be satisfied it does not exist.<sup>13</sup> To be satisfied that a document does not exist, the Information Commissioner has previously had regard to various key factors including the agency's record-keeping practices and procedures (including, but not limited to, its information management approaches).<sup>14</sup> 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.
15. 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*'.<sup>15</sup> 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.<sup>16</sup>

## Findings

16. The Department provided<sup>17</sup> OIC with records of the searches conducted by QBuild, together with a Council Services plan for the neighbouring property. This information reveals that no documents were located regarding a septic system at the neighbouring property because it is connected to the sewer maintained by the local council and does not have a septic system.
17. Given that the available information establishes that the neighbouring property does not have a septic system, I consider it follows that it is reasonable to find that no documents exist which relate to the applicant's request for documents about a septic system at the neighbouring property.
18. For the reasons explained above, I am satisfied that the Department has adequately explained why the documents sought by the applicant at Part 2 of the access

---

<sup>12</sup> Sections 47(3)(e) and 52(1) of the RTI Act.

<sup>13</sup> Section 52(1)(a) of the RTI Act. For example, a document has never been created.

<sup>14</sup> *Isles and Queensland Police Service* [2018] QICmr 27 (7 June 2018) at [15] which adopted the Information Commissioner's comments in *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [27]-[28]. *PDE* addresses the application of section 28A of the now repealed FOI Act. 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.

<sup>15</sup> As set out in *PDE* at [29].

<sup>16</sup> As set out in *PDE* at [28].

<sup>17</sup> On 2 June 2023.

application do not exist, and has taken all reasonable steps to establish the nonexistence of the documents.

**Decision**

19. I affirm the decision under review by finding that access to the documents requested by the applicant in Part 2 of the access application may be refused under section 47(3)(e) and section 52(1)(a) of the RTI Act.
20. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

---

**Shiv Martin**  
**Assistant Information Commissioner**

**Date: 18 July 2023**

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
30 March 2023	OIC received the application for external review.
31 March 2023	OIC received the preliminary documents from the Department.
11 May 2023	OIC wrote to the applicant about her application for external review.
12 May 2023	OIC received submissions from the applicant.
19 May 2023	OIC wrote to the applicant about her application for external review.
22 May 2023	OIC received submissions from the applicant. OIC wrote to the applicant about her application for external review.
23 May 2023	OIC received submissions from the applicant.
30 May 2023	OIC advised the parties that the application had been accepted and requested from the Department information about the searches conducted and a copy of the documents released to the applicant in accordance with the internal review decision.
2 June 2023	OIC received the requested information from the Department.
12 June 2023	OIC expressed a preliminary view to the applicant.
12 June 2023	OIC received submissions from the applicant.