



Decision and Reasons for Decision

Citation:	<i>A34 and Department of State Development, Infrastructure and Planning (Office of Industrial Relations) [2024] QICmr 61 (18 November 2024)</i>
Application Number:	317646
Applicant:	A34
Respondent:	Department of State Development, Infrastructure and Planning (Office of Industrial Relations)
Decision Date:	18 November 2024
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether agency has conducted reasonable searches - whether access to further documents may be refused on the basis they are nonexistent or unlocatable - 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 Office of Industrial Relations (**OIR**)² under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to five categories of documents held by OIR in relation to 19 businesses, educational institutions and not for profit organisations³ that he had interacted with over various date ranges within a 16 year timeframe.
2. Following consultation with OIR,⁴ the applicant agreed to exclude one of the five categories of documents.⁵
3. OIR refused to deal⁶ with the applicant's application on the basis that it did not comply with all relevant application requirements, particularly, the requirement to give sufficient information concerning the requested documents to enable the agency to identify them.⁷

¹ On 27 September 2023.

² At this time the application was made, OIR was part of the Department of Education; however, following machinery of government changes, OIR became part of the Department of State Development and Infrastructure on 18 December 2023, which in turn became the Department of State Development, Infrastructure and Planning on 1 November 2024.

³ Herein referred to as the 'entities'.

⁴ There were a number of emails between the applicant and OIR between 9 and 20 October 2023.

⁵ At point 4 of the access application.

⁶ On 23 October 2023.

⁷ Section 43(2)(b) of the IP Act.

4. The applicant applied⁸ to the Office of the Information Commissioner (**OIC**) for external review of OIR's decision. During the external review, the applicant agreed to exclude two more of the five categories of documents.⁹ As a result, the scope of the access application for the purpose of this review became the following two categories of documents held by OIR in relation to the entities that the applicant interacted with over various date ranges within the 16 year timeframe:

1. *Documents resulting from notifiable incidents, complaints or concerns; where those documents contain my personal information*
2. *Documents and documentary evidence held in relation to any Workplace Health and Safety investigations undertaken at this organisation; where those documents or documentary evidence contain my personal information*

5. For the reasons set out below, I vary OIR's decision and find that access to these documents may be refused on the ground that they are nonexistent or unlocatable.

Reviewable decision

6. The decision under review is OIR's decision dated 23 October 2023.

Evidence considered

7. Significant procedural steps relating to the external review are set out in the Appendix.
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). I have taken into account the applicant's submissions¹⁰ to the extent they are relevant to the issue for determination in this review.
9. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹¹ 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 *Right to Information Act 2009* (Qld) (**RTI Act**).¹² 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:¹³ '*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*'.¹⁴

Issue for determination

10. As noted at paragraph 3 above, OIR's decision states that it considered the applicant's access application did not provide OIR with enough information to enable it to locate the requested documents. Having carefully considered the terms of the application, I was satisfied that that the application provided sufficient detail regarding the requested documents to enable them to be identified. Accordingly, I considered that the issue for determination was not whether the application complied with the requirement that it give sufficient information concerning the requested documents for OIR to identify them;¹⁵

⁸ On 6 November 2023.

⁹ At points 3 and 5 of the access application.

¹⁰ Contained in the application for external review and in emails of 21 February 2024 and 23 September 2024.

¹¹ Section 21(2) of the HR Act.

¹² *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].

¹³ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁴ XYZ at [573].

¹⁵ Section 43(2)(b) of the IP Act.

rather it was whether those documents could be refused on the ground they were nonexistent or unlocatable. Given the particular wording of the access application in this matter, it is within this context that any lack of detail or specificity in the terms of the application may be considered, as part of assessing the reasonableness of OIR's searches and the adequacy of its explanations.

Relevant law

11. 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.¹⁶ This right is subject to limitations, including grounds for refusal of access.¹⁷
12. The Information Commissioner's external review functions include investigating whether agencies have taken reasonable steps to identify and locate documents applied for by applicants.¹⁸ However, access may be refused in circumstances where a document is nonexistent or unlocatable.¹⁹
13. A document will be *nonexistent* if there are reasonable grounds to be satisfied it does not exist.²⁰ To be satisfied that a document does not exist, the Information Commissioner has previously had regard to various key factors, including an agency's record keeping practices and procedures (including, but not limited to, its information management approaches).²¹ By considering 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 the relevant circumstances to account for the nonexistent document are adequately explained by the agency.
14. 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*'.²² 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.²³
15. 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 it, but it cannot be found. In determining

¹⁶ *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*'.

¹⁷ 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.

¹⁸ Section 137(2) of the IP Act. The Information Commissioner also has power under section 115 of the IP Act to require additional 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.

¹⁹ Sections 47(3)(e) and 52(1) of the RTI Act.

²⁰ Section 52(1)(a) of the RTI Act. For example, a document has never been created.

²¹ *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 [37]-[38]. *PDE* addresses the application of section 28A of the now 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.

²² As set out in *PDE* at [49].

²³ As set out in *PDE* at [38].

whether a document is unlocatable, it is necessary to consider the specific circumstances of each case,²⁴ and in particular, whether:

- there are reasonable grounds to be satisfied that the requested documents have been or should be in the agency's possession; and
- the agency has taken all reasonable steps to find the document.²⁵

16. 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.²⁶ However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable grounds to believe the agency has not discharged its obligation to locate all relevant documents. Suspicion and mere assertion will not satisfy this onus.²⁷

Discussion

17. During the review, OIC asked OIR to respond to a number of enquiries directed at understanding OIR's processes and record keeping practices.²⁸ From OIR's responses to these enquiries, I understand that generally:

- OIR's WorkSafe receives notifications via telephone, email and online portals. Concerns about compliance with the *Work Health and Safety Act 2011* (Qld) (**WHS Act**) or *Electrical Safety Act 2002* (Qld) are received by Assessment Services (**AAA**), a team within the Licensing and Regulatory Interventions directorate (**LARI**) which operates as a triage unit. Notifications made by the Queensland Ambulance Service, Queensland Police Service and other safety regulators may be received elsewhere within LARI and then referred to AAA.
- The wording 'notifiable concern', as used in the access application, is not OIR's terminology. OIR refers to 'events', which are either 'incidents' or 'complaints'. Anything other than an incident (notifiable or otherwise) is considered to be a complaint. Events assessed by AAA as amounting to notifiable incidents and therefore warranting further consideration are allocated to an inspector or investigator in the relevant region.
- OIR's current case management database is called **CISr**.²⁹ In CISr, an 'event' number is the primary reference number allocated to every incident and complaint processed by AAA, including matters triaged as requiring no further action.
- In CISr, OIR records information against the relevant entity,³⁰ rather than an individual.

²⁴ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [21]. See also, *F60XCX and Office of the Queensland Parliamentary Counsel* [2016] QICmr 42 (13 October 2016) at [84] and [87], and *Underwood and Minister for Housing and Public Works* [2015] QICmr 27 (29 September 2015) at [33]-[34] and [49].

²⁵ Section 52(1)(b) of the RTI Act.

²⁶ Section 100(1) of the IP Act.

²⁷ *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].

²⁸ Submissions dated 17 and 18 July 2024 and 4 October 2024.

²⁹ CISr is an abbreviation for Compliance Investigation System. For completeness, I note OIR's email dated 4 October 2024 advised that OIR expected to implement use of a new database on 11 November 2024.

³⁰ Which it refers to as a PCBU – that is, a person conducting a business or undertaking.

- OIR has a limited capacity to conduct a 'person' search using an individual's name in CISr. These searches will capture the individual only if they have been recorded as:
 - a person who submitted an incident notification
 - an injured person; or
 - a person who lodged a complaint.³¹
 - OIR may also generate an Employer History Report (**EH Report**) in CISr for entities when Workplace Health and Safety's Compliance and Field Services and/or the Electrical Safety Office have had contact with the entity through an event and/or assessment notification.
 - An EH Report does not contain all information about an event. Rather, it comprises a high level extract of all events linked to an entity including any assessments and investigations completed under an event such as:
 - start and finish date for the event number
 - name of the inspector
 - a summary of the notification³² received by AAA via Work Safe incoming phone lines or online notifications
 - details of the relevant 'supporting documents' received by AAA
 - details of action taken by the region (if applicable)—notations, date, activity (phone call, site visit, correspondence sent or received etc.) and the inspector notes
 - the investigation/inspectorate response; and
 - details of any compliance notices issued.
 - In an EH Report, information is presented by event and/or assessment, not in chronological order. Documents—for example, references to letters sent, notices issued, call recordings, notebook notes, etc – are referred to in CISr, but not linked to it. Rather, they are saved to shared files outside CISr.
18. OIC also asked OIR to conduct searches for the requested documents, and to explain these searches. OIR's responses established that:³³
- OIR conducted a 'person' search of CISr using the applicant's first and last names and this returned no results.
 - OIR also generated EH Reports in CISr for most entities identified in the application.³⁴
 - OIR was unable to generate EH Reports for some entities because there were no entries in CISr about them. The absence of entries indicates that OIR had not at any point been contacted about these entities.
 - Taking into account the content of the EH Reports – or lack of EH Reports for some entities – OIR considered that it had conducted all reasonable searches for the requested documents.

³¹ The complainant or notifier of an incident would receive an acknowledgement of the notification if they supplied a valid email address.

³² Including the name of the notifier and their contact details, notified date and details of the injured person.

³³ Submissions dated 17 and 18 July 2024 and 4 October 2024.

³⁴ In OIR's submission dated 17 July 2024, it confirmed that the date range for each EH Report only reflects the linked assessment and event file date ranges.

19. OIC searched the EH Reports generated by OIR using the following keywords, to determine if there may be cause to review any events referred to in an EH Report: the applicant's first name and last name, first initial of applicant's first name and his last name, and a shortened version of the applicant's first name and his last name. None of these keywords returned any relevant results.
20. I then conveyed a preliminary view to the applicant.³⁵ I acknowledged that possibly OIR may have collected his personal information at some point – however taking into account:
- the absence of any of the above keywords in the EH Reports
 - the fact that the EH Reports indicated that, for some of the organisations, there were over 100 events linked to them; and
 - the absence of any information in the revised scope of his access application³⁶ that connected him to any notifiable incident or complaint

I was satisfied that OIR has taken all reasonable steps to locate relevant documents in response to his application, and that these documents may therefore be refused on the basis they are nonexistent or unlocatable.³⁷

21. In response to my preliminary view, the applicant provided an 11 page submission³⁸ which comprised particulars about circumstances that, in his view, comprised nine notifiable incidents and 19 reportable concerns, some of which may have resulted in investigations. He acknowledged that he would not be identifiable as a person who submitted an incident notification, an injured person, or a person who lodged a complaint, but contended that he would likely be mentioned in other documents accompanying the EH Reports. For the circumstances he considered comprised nine notifiable incidents, he provided brief details regarding specific circumstances,³⁹ stated that these specific circumstances occurred at some point during timeframes ranging from one month to three years, and gave the names of individuals he considered to be 'persons involved'. For what he considered to be 19 reportable concerns, his particulars did not refer to specific circumstances. Rather, these particulars stated variations on '*workplace health and safety concerns related to my enrolment at [a particular entity]*' or '*workplace health and safety concerns related to my participation in [a named activity at a particular entity]*', timeframes ranging from one month to four years, and names of 'reporting individuals' at some of the entities.
22. The applicant also separately submitted that '*searches were not conducted for archived documents (i.e. documents transferred to Queensland State Archives) or documents that may be held on older records management systems*'.⁴⁰
23. OIC conducted further searches of the EH Reports using keywords drawn from the applicant's 11 page submission (namely, the first and last names of the 'involved persons' and 'reporting individuals', as well as the nature of specific circumstances where this had been identified for the nine 'notifiable incidents'). While these searches identified that there were some instances where the named individuals were mentioned in an EH Report, these mentions occurred in the context of circumstances which bore no resemblance to any of the circumstances raised in the applicant's submission. Indeed, no events resembling any of the specific circumstances the applicant contended had

³⁵ On 2 September 2024.

³⁶ As set out at paragraph 4 above.

³⁷ Sections 47(3)(e) and 52 of the RTI Act.

³⁸ Email dated 23 September 2024.

³⁹ For the notifiable incidents: at an education facility - three physical altercations, possession of fireworks, mishandling a biospecimen in a science class, dangerous activity on a school bus, and an incident in a parking lot; and at places of business – being banned from a business, and being accused of obstructing someone with a vehicle.

⁴⁰ Email dated 23 September 2024.

occurred at particular entities were recorded in EH Reports generated regarding those entities. Further, as already noted at paragraph 19, keyword searches of various iterations of the applicant's name identified no mention of him in the EH Reports – and therefore it was not possible for workplace health and safety concerns related to '*my enrolment at [a particular entity]*', or '*my participation in [a named activity at a particular entity]*', to be evident from the EH Reports.

24. Finally, OIC undertook steps to clarify why, in another application made by the applicant (also the subject of external review), some OIR officers responded to the OIR decision maker's requests to conduct searches by searching 'event notification spreadsheets' and two past records management systems, in addition to CISr. In terms of the spreadsheets, I accept OIR's advice⁴¹ that these spreadsheets are an administrative tool that some region/business units use to track the status of and next steps for current matters; that CISr contains more detail than the spreadsheets; and that it would be highly unlikely that the spreadsheets would contain a reference to the applicant when CISr does not. In terms of the two past records management systems, having carefully examined the EH Reports generated from CISr, I observe consistency in the nature and level of detail of entries recorded against relevant entities, not only across the 16 year timeframe specified in the applicant's scope, but also over about 10 years prior to the beginning of this timeframe.

Findings

25. In considering the issue for determination, I am required to consider OIR's explanations regarding its record keeping processes, and whether all reasonable steps to locate the requested documents have been taken. Necessarily, the explanations and steps taken are considered with reference to the particular terms of the access application – that is, the revised scope noted at paragraph 4 above.
26. I have not accepted the applicant's 11 page submission as a further narrowing of the scope, regarding which the explanations and steps taken should be assessed. Opportunities to narrow and particularise scope were extended both by OIR⁴² and by OIC during consultation in the earlier stages of this review.⁴³ It is regrettable that the applicant did not engage more with these earlier opportunities, and was only prompted to do so on receipt of a preliminary view that all reasonable searches had been conducted. I am satisfied that, as a result of these earlier opportunities, procedural fairness requirements do not call upon me to treat the belatedly provided particulars as a further narrowing of the scope of the applicant's application, against which the explanations provided by OIR and steps taken to search for documents must be assessed.
27. In the circumstances, I do not accept that the applicant's 11 page submission provides any basis upon which it could be reasonable to request that OIR use the particulars offered therein to cast a wider net for documents outside CISr. I consider that the completion of the further searches of the EH Reports using information from that submission concluded, if not exceeded, all reasonable searches for the requested documents.
28. In terms of the explanations and steps taken, I note:

⁴¹ Emails dated 4 October 2024 and 15 November 2024.

⁴² Email dated 9 October 2023.

⁴³ Letter dated 6 February 2024.

- OIR has conducted targeted searches for relevant documents based on its knowledge of its structure, functions, practices and procedures (including its record-keeping and information management systems)
 - OIR was unable to generate EH Reports for some of the entities raised by the applicant
 - this indicates that OIR has not been contacted about those entities at all, let alone regarding matters which may involve the applicant
 - for the other entities raised by the applicant, OIR was able to generate EH Reports, and OIC conducted keyword searches of them using the applicant's name and information provided by him
 - these searches returned no results and provided no information about other possible search locations or inquiries
 - the applicant has provided no cogent evidence to support a reasonable belief that OIR ought to hold relevant documents; and
 - in particular, the circumstances raised in the applicant's 11 page submission which, in his view, comprised nine notifiable incidents appear unlikely to have met the statutory definition of notifiable incident⁴⁴ – so, even if OIR had been contacted about these circumstances (which does not appear to be the case, as noted at paragraph 23 above), it is reasonable to expect that they would be relatively unlikely to be prioritised for investigation.
29. Given these circumstances, it would, in my opinion be unreasonable to require OIR to spend further time and resources to locate and search each document referenced in every event associated with each of the generated EH Reports, to conduct further keyword searches using different iterations of the applicant's name, to check if he is mentioned in any of those documents. I cannot see how this could be viewed as reasonable, based on merely the applicant's assertions about the types of incidents or complaints that he submitted should or may have been reported to or documented with OIR, and moreover taking into account the relatively high level, non-specific nature of the revised scope noted at paragraph 4 above.
30. In relation to any possibility that responsive documents may be identified via an 'event notification spreadsheet' or an older records management system, I note that:
- CISr captures *all* events that are linked to an entity name or number
 - in contrast, 'event notification spreadsheets' contain relatively brief information used by some work units use to track current matters, and it would be highly unlikely that they would contain a reference to the applicant when CISr does not
 - based on the consistency of entries in the EH Reports generated from CISr dating back to over 10 years prior to the beginning of the 16 year timeframe specified in the applicant's scope, it is reasonable to conclude that CISr contains all relevant entries, including any that may have initially been recorded in past systems; and
 - accordingly, further searches of the 'event notification spreadsheets' or past records systems are not reasonably required in the circumstances of this review.
31. In summary, on the information before me, I am satisfied that the information provided by OIR that describes the various searches and inquiries it has conducted in an effort to locate relevant documents, as well as the searches completed by OIC, were reasonable in the circumstances. I maintain the view that, if any relevant documents were to exist in OIR's possession, it is reasonable to expect that these searches and inquiries would have located such documents, or, at the least, located information that may have identified other relevant avenues of search and inquiry.

⁴⁴ Section 35 of the WHS Act.

32. As to the applicant's contention that it is reasonable for searches of Queensland State Archives (**QSA**) records to be conducted because there is a possibility that relevant records may have been transferred to QSA, I note that there is nothing before OIC to indicate that OIR located anything in its records to suggest that relevant documents ever existed. It follows that there can be no reasonable basis for expecting that relevant records were transferred to QSA. This is mere speculation by the applicant and does not discharge the practical onus on him. I also note that, even if it were accepted that such records existed, their relatively young age and their likely status as documents that would not be designated for permanent retention⁴⁵ count against QSA holding any relevant documents. In any event, QSA⁴⁶ is subject to the IP Act and a separate access application can be made by the applicant if he wishes to do so.
33. For these reasons, having carefully considered OIR's explanations regarding its record keeping processes and the searches that have occurred, I am not satisfied that there is any cause to request OIR to conduct further searches for the requested documents – that is, documents responsive to the revised scope noted at paragraph 4 above.
34. Accordingly, I am satisfied that OIR has discharged the onus upon it to demonstrate that all reasonable steps have been taken to identify and locate these documents. I am not satisfied that the applicant has discharged the practical onus on him to demonstrate that OIR has not taken all such reasonable steps.
35. In these circumstances, I consider there are reasonable grounds for me to be satisfied that relevant documents are nonexistent or cannot be located within OIR.

DECISION

36. For the reasons explained above, I vary the decision under review and find that access to the requested documents may be refused under section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.
37. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

A Rickard
Assistant Information Commissioner

Date: 18 November 2024

⁴⁵ See the Queensland Government website *Industrial Relations Regulation Retention and Disposal Schedule* at <https://www.forgov.qld.gov.au/information-and-communication-technology/recordkeeping-and-information-management/recordkeeping/disposal-of-records/search-for-a-retention-and-disposal-schedule/industrial-relations-regulation-retention-and-disposal-schedule> (accessed on 13 November 2024).

⁴⁶ Following machinery of government changes on 1 November 2024, QSA is now part of the Department of Justice.

APPENDIX

Significant procedural steps

Date	Event
6 November 2023	OIC received the application for external review from the applicant. OIC requested preliminary documents from OIR.
9 November 2023	OIC received the preliminary documents from OIR.
1 December 2023	OIC advised the applicant that the application for external review had been accepted.
6 February 2024	OIC conveyed a preliminary view to the applicant.
21 February 2024	OIC received a submission from the applicant.
23 April 2024	OIC requested further information from OIR about its searches.
24 May 2024	OIC received a submission from OIR and the EH Reports.
31 May 2024	OIC received a further submission from OIR.
18 June 2024	OIC requested further information from OIR about its searches.
17 July 2024	OIC received a response from OIR and a further EH Report.
18 July 2024	OIC received a further response from OIR.
2 September 2024	OIC conveyed a second preliminary view to the applicant.
23 September 2024	OIC received a submission from the applicant.
3 October 2024	OIC contacted OIR to confirm information provided about the search information provided by OIR.
4 October 2024	OIC received a response from OIR.
7 November 2024	OIC contacted OIR to confirm information provided by OIR about its processes and recordkeeping.
13 November 2024	OIC received a response from OIR.
15 November 2024	OIC sought and received clarification from OIR regarding aspects of its response.