



Decision and Reasons for Decision

Citation:	<i>O37 and Department of Justice [2025] QICmr 40 (19 June 2025)</i>
Application Number:	318201
Applicant:	O37
Respondent:	Department of Justice
Decision Date:	19 June 2025
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS OF AN AGENCY - request for policy and procedure documents concerning the Queensland Civil and Administrative Tribunal - whether requested documents are documents of the Department of Justice under section 12 of the <i>Right to Information Act 2009</i> (Qld) - whether access to further documents can be refused on the ground they are nonexistent or unlocatable - 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 Department of Justice (**Department**)² to access the following documents:
 1. *List of all current QCAT Policies.*
 2. *Copies of any QCAT Registry Policies/Procedures that relate to:*
 - a) *the Registry altering the Parties to a proceeding (including without Orders from the Tribunal to do so)*
 - b) *the Registry changing the Jurisdiction of a proceeding (including without Orders from the Tribunal to do so)*
 - c) *how the President decides to extend the time to provide reasons (about a decision) - including what documentation must be recorded*
 - d) *how the Members are appointed to a proceeding - including what records are made of decisions to appoint members to proceedings*
 - e) *how the qualifications/experience of Members are confirmed prior to their appointment to a proceeding*
 - f) *how Directions & Decisions Notices are supposed to be labelled (so as to not confuse the 2 types of notices) - since directions do not have to have reasons provided, but reasons for Decisions must be provided on request*

¹ Access application dated 21 May 2024 (**Access Application**). The Access Application became compliant on 24 May 2024, when the application fee was received by the Department.

² The Department's full title, when the Access Application was received, was the Department of Justice and Attorney-General. The Department became the Department of Justice under subsequent machinery of government changes.

- g) Procedures for Registry staff regarding lodgement of Applications (including Processing initiating applications)
 - h) QCAT Transcription Staff regarding refusing to provide reasons (including documentation requirements for refusals)
 - i) Procedures for the staffing of the Appeal Tribunal - including the decision (or failure) to staff the Appeal Tribunal with Judicial Members as required by the QCAT Act
 - j) Refusing to make the full Proceeding records available at file inspections (only part of the proceeding record is provided)
 - k) Altering the Formal Proceeding records/documents (with white-out or pen & pencils notes written on the documents)
 - 3. Any QCAT Instruments of Delegations (including Registry delegations)
 - 4. DJAG Financial Delegations
 - 5. QCAT Procedure - "Fee waiver or appeal fee reduction" v.1 & v.2.
2. The Department located one document as responsive to Item 4 of the Access Application³ and decided⁴ (**Original Decision**) to provide access to that document and refuse access to the remaining requested documents (**Remaining Requested Documents**), on the basis they were nonexistent or unlocatable.
 3. The applicant applied⁵ for internal review of the Original Decision. On internal review, the Department decided⁶ (**Internal Review Decision**) to provide access to the Department's Financial Delegation Instrument and refuse access⁷ to the Remaining Requested Documents, on the basis that Items 1, 2, 3 and 5 of the Access Application sought documents of an entity to which the RTI Act did not apply.
 4. The applicant then applied⁸ to the Office of the Information Commissioner (**OIC**) for external review.
 5. For the reasons set out below, I vary the decision under review and find that access may be refused to any further documents relevant to the Access Application on the basis they are nonexistent.⁹

Background

6. In the External Review Application, the applicant submitted:

No documents have been provided. Multiple errors by both Decision maker & Internal Reviewer. Faulty QCAT Carmody Decision. Faulty OIC Decision based on Carmody. Despite the findings of misconduct by the OIC and the Judge in Carmody, DJAG Officers continue to refuse to: follow OIC Guidelines; hold proper delegations before acting; aren't conducting the actual searches or complying with the RTI Act; don't understand the difference between Administrative & Judicial Functions; understand the difference between the Tribunal & the Registry & which is part of DJAG; I also seek a refund of my application fee since the decision [sic] was deemed at law (by DJAG's failure o [sic] properly deal with what they claim is an out of scope application) QCAT Registry Officers claim that they are only behaving in accordance with their Policies. They refused to provide the Policies and instructed us to contact DJAG to obtain them. DJAG also refuses to provide them.

³ Being the Department's document titled 'Financial Instrument of Delegation issued under the Financial Accountability Act 2009 (Department's Financial Delegation Instrument).

⁴ On 25 June 2024.

⁵ By email dated 25 July 2024.

⁶ On 19 August 2024.

⁷ Pursuant to section 32(1)(b)(ii) of the RTI Act.

⁸ On 27 August 2024 (**External Review Application**).

⁹ Under sections 47(3)(e) and 52(1)(a) of the RTI Act.

7. External review is a merits review process¹⁰ and the Information Commissioner is empowered to make any decision in respect of an access application that could have been made by the agency.¹¹
8. During the review, I conveyed¹² a preliminary view to the applicant that there was no reasonable basis to expect that the Remaining Requested Documents would be in the possession, or under the control, of the Department and, therefore, access to them could be refused by the Department.¹³ The applicant was invited to provide a submission if he disagreed with that view. While the applicant confirmed his disagreement with the view,¹⁴ he did not provide any submissions in support of his position.

Reviewable decision

9. The decision under review is the Internal Review Decision.
10. As noted in paragraphs 6 above, it is the applicant's position that, as the Department did not properly deal with the Access Application, the Department was taken to have made a deemed decision and he is therefore entitled to receive a refund of the paid application fee. For the reasons that follow, I do not agree with the applicant's position. I also note that, while my factual findings below are relevant to the issue of the applicant's entitlement to a refund of the application fee, they are of no practical consequence to the reviewable issues in this matter, given the merits review nature of the external review.
11. Under section 46 of the RTI Act, where an agency does not give a written notice of decision to an applicant by the end of the processing period:
 - the agency is taken to have made a decision refusing access to the documents requested in an access application; and
 - the application fee is to be refunded to the applicant.
12. In the circumstances of this matter, I find, on a factual basis, that the processing period commenced on 24 May 2024 (when all the requirements of section 24 of the RTI Act had been met) and the Department's decision was issued within the standard processing period.¹⁵
13. Although the applicant offered no evidence of his assertion that the Department's officers did not '*hold proper delegations before acting*', I also find, on a factual basis, that both the Original Decision and Internal Review Decision were made by appropriately delegated Department officers.

¹⁰ That is, external review is an administrative reconsideration of a case which can be described as '*stepping into the shoes*' of the primary decision-maker to reach the correct and preferable decision. The Court of Appeal noted in *Commissioner of the Police Service v Shelton & Anor* [2020] QCA 96 at [12] that section 118 of the *Information Privacy Act 2009* (Qld) (**IP Act**) '*provides for the relevant form of review to be merits review*'. Similarly, in *Mokbel v Queensland Police Service* [2023] QCATA 158 at [12] and *O'Connor v Department of Child Safety, Seniors and Disability Services* [2024] QCATA 34 at [2], Judicial Member DJ McGill SC confirmed that external review under the IP Act is a merits review process. While these decisions concerned access applications made under the IP Act, they are relevant to the external review process under the RTI Act.

¹¹ Section 105(1)(b) of the RTI Act. As a result of this provision, the Information Commissioner (or their delegate) may rely on RTI Act provisions which are different to those relied upon by the agency in the decision under review.

¹² By letter dated 12 May 2025.

¹³ It is the practice of OIC to convey a preliminary view, based on an assessment of the material before the Information Commissioner or their delegate at that time, to an adversely affected participant. This is to explain the issues under consideration to the participant and affords them the opportunity to put forward any further information they consider relevant to those issues. It also forms part of the Information Commissioner's processes for early resolution of external reviews.

¹⁴ Applicant's email dated 16 June 2025.

¹⁵ Under section 18 of the RTI Act, the standard processing period for an access application is 25 business days from the day an access application is received by the agency. Pursuant to section 38(1) of the *Acts Interpretation Act 1954*, the processing period is calculated by excluding the day on which an access application was received. This was also confirmed by QCAT in *Stanway v Information Commissioner & Anor* [2019] QCATA 33 at [11]. For completeness, I also note that the Internal Review Decision was issued within the 20 business day period specified in section 83 of the RTI Act.

14. For the above reasons, I am satisfied the Department was not taken to have made a deemed decision under section 46 of the RTI Act, as contended by the applicant. Accordingly, I am also satisfied that the circumstances in which a paid application fee is required to be refunded under the RTI Act do not arise in this matter.

Evidence considered

15. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes).
16. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to freedom of expression¹⁶ (which includes the right to seek and receive information). I consider a decision-maker will be '*respecting, and acting compatibly with*' this right, and others prescribed in the HR Act, when applying the law prescribed in the RTI Act.¹⁷ 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 of Bell J on the interaction between equivalent Victorian legislation,¹⁸ that '*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*'.¹⁹

Issue for determination

17. Although the applicant stated in the External Review Application that no documents were provided, I have noted above that the Department disclosed the Department's Financial Delegation Instrument to the applicant. This document was located as responsive to Item 4 of the Access Application and the applicant did not contend that any further document/s relevant to Item 4 should exist.
18. Accordingly, the only issue for determination is whether the applicant is entitled under the RTI Act to access any further documents relevant to the Access Application.

Relevant law

19. Under the RTI Act, an individual has a right to access documents of an agency.²⁰ Section 12 of the RTI Act defines a document of an agency as follows:

*In this Act, a **document**, of an agency, means a document, other than a document to which this Act does not apply, in the possession, or under the control of the agency, whether brought into existence or received in the agency, and includes—*

- (a) a document to which the agency is entitled to access; and*
- (b) a document in the possession, or under the control, of an officer of the agency in the officer's official capacity.*

20. Physical possession of a document by an agency is sufficient to meet the above requirements.²¹ The Information Commissioner has previously found that a document

¹⁶ Section 21 of the HR Act.

¹⁷ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; and *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

¹⁸ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁹ *XYZ* at [573]. This approach was endorsed by Judicial Member DJ McGill SC in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23], observing that the Information Commissioner '*was conscious [of the right to seek and receive information] and considered that the application of the Act gave effect to the requirements of the Human Rights Act. I see no reason to differ from that conclusion.*'

²⁰ Section 23 of the RTI Act.

²¹ See, for example, *Queensland Newspapers Pty Ltd and Ipswich City Council* [2015] QICmr 30 (26 November 2015) (**Queensland Newspapers**) at [15].

will be ‘*under the control of*’ an agency where the agency has a present legal entitlement to take physical possession of the document.²² The Queensland Civil and Administrative Tribunal (**QCAT**) also considered the issue of whether documents were documents of an agency in *Carmody v Information Commissioner & Ors* [2018] QCATA 14 (**Carmody No. 1**). In that matter, Justice Hoeben relevantly found²³ that (footnotes omitted):

- a) “possession” is not defined in the RTI Act or the Acts Interpretation Act 1954 (Qld). Its meaning depends upon the context in which it is used. Previous Information Commissioners have found that the word “possession”, in the context of freedom of information legislation, requires that the relevant documents be in the physical possession of an agency. The concept of possession is extended by the words “or under the control ... of”, words which have been considered by previous Information Commissioners to “convey the concept of a present legal entitlement to control the use or physical possession of a document”.
- b) “possession” must, however, be read in context and subject to the limitation that whatever possessory interest DJAG has, allows DJAG to legally provide an access applicant with those documents (see ss 23, 47(3)(e) and 68(1) RTI Act). Unlike the analogous context of disclosure (where disclosure is required even of documents not capable of being produced), the RTI Act confers a right to access documents where DJAG is able to provide a copy (or produce one). The expression “possession”, where used to describe the documents of an agency, must be construed in a way consistent with that, so as not to capture documents where DJAG is not able to in fact produce them (or where to do so would interfere with judicial independence). The High Court has held in the context of subpoenas, that the concept of “possession” assumes that a person to whom it is directed “has the ability or capacity to produce them.”

21. The access right under the RTI Act is subject to limitations. These limitations include that:

- an access application is taken to apply only to documents which are, or may be, in existence on the date an access application is received;²⁴ and
- access to a document may be refused where the document is nonexistent or unlocatable.²⁵

22. To be satisfied that a document does not exist, the Information Commissioner has previously identified a number of key factors to consider.²⁶

Discussion

23. I acknowledge the applicant’s submission about the ‘*Faulty QCAT Carmody Decision*’. While it is unclear whether the applicant’s submission relates to *Carmody No. 1*,²⁷ I note

²² *Price and the Nominal Defendant* (1999) 5 QAR 80 at [18], cited with approval in *Queensland Newspapers* at [15].

²³ At [67].

²⁴ Section 27 of the RTI Act. In this regard, I also note that the RTI Act does not require an agency to create a document requested in an access application.

²⁵ Sections 47(3)(e) and 52(1) 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. 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.

²⁶ These factors include the administrative arrangements of government; the agency’s structure, the agency’s functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it); the agency’s practices and procedures (including but not exclusive to its information management approach); and other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates. The factors were identified in *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] (**PDE**). They were more recently considered in *Van Veenendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017) at [23]-[25] and *P17 and Queensland Corrective Services* [2020] QICmr 68 (17 November 2020) at [17]-[19].

²⁷ The *Carmody No. 1* decision was the first in a series of six decision issued by Justice Hoeben.

that QCAT's decision in *Carmody No. 1* is a decision of the Appeal Tribunal which, pursuant to section 119 of the RTI Act, hears and determines appeals of OIC's decisions on a question of law. I therefore regard Justice Hoebe's findings in *Carmody No. 1*, including those referenced in paragraph 20 above, as binding on OIC.²⁸ I can identify no ground in this review upon which the findings referenced in paragraph 20 above could be distinguished.²⁹ I therefore consider that I am required to follow those findings on the issue of whether documents are documents of an agency.

24. Item 4 of the Access Application sought the *Department's* Financial Delegations Instrument. It was reasonable to expect that a document of this nature would be a document of the Department, as it relates (generally) to the exercise of the Department's powers and functions.
25. In contrast:
 - Item 1 of the Access Application requested a list of all QCAT current policies—that is, a list of QCAT policies which were in effect as at 21 May 2024 (when the Department received the Access Application); and
 - Items 2, 3 and 5 of the Access Application seek copies of various QCAT policies or procedures which the applicant considers should exist.³⁰
26. QCAT, and its registry, were established under the QCAT Act³¹ and QCAT is a separate entity to the Department for the purpose of the RTI Act. Contrary to the applicant's assertion, neither QCAT, nor its registry, are part of the Department.
27. Although the Remaining Requested Documents may (or may not) exist in the record-keeping systems of QCAT, the applicant has not explained why he considers they would be in the Department's possession or be under the Department's control.

Findings

28. Both the Original Decision and the Internal Review Decision confirm that, although the Department conducted searches for responsive documents, the Department's Financial Delegation Instrument was the only document located by the Department. In the Original Decision, the Department confirmed that it held no further responsive documents that it could 'access and consider for disclosure under the RTI Act'.
29. Given the nature of the Remaining Requested Documents, there is nothing before me to suggest that the Remaining Requested Documents, if they existed, would be in the possession of the Department, or that the Department would have any legal entitlement to take possession of them. The Department otherwise appears to have discharged its obligation to search for, and deal with, the documents it does possess or control. On

²⁸ Applying the doctrine of statutory precedent or *stare decisis* which requires that a lower court must follow the binding precedent of a court higher than it in the same judicial hierarchy: *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) CLR 107 at [11]. See also *TAJ (costs)* [2023] QCAT 133 at [39] for a discussion of the application of the doctrine of precedent where the Appeal Tribunal decision is made by a judicial member of the Tribunal.

²⁹ In this regard, I note that, apart from the External Review Application, the applicant did not provide any submission to OIC about the findings in *Carmody No. 1*.

³⁰ In this regard, I note that:

- QCAT publishes certain policies and procedures on its website (refer, for example, to documents which may be accessed at <https://www.qcat.qld.gov.au/about-qcat/right-to-information/our-policies> and <https://www.qcat.qld.gov.au/about-qcat/complaints>)
- the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act) and the *Queensland Civil and Administrative Tribunal Rules 2009* legislatively prescribe certain requirements and processes for QCAT proceedings; and
- relevant fees and allowances for proceedings before QCAT are prescribed by the *Queensland Civil and Administrative Tribunal Regulations 2019*.

³¹ Refer to sections 161 and 207 respectively.

that basis, I find that the Department is entitled to refuse access to any additional documents relevant to the Access Application, on the basis they do not exist.

DECISION

30. For the reasons set out above, as a delegate of the Information Commissioner under section 145 of the RTI Act, I vary the Department's decision and find that access to any further document relevant to the Access Application may be refused on the basis they are nonexistent.³²

T Lake
Principal Review Officer

Date: 19 June 2025

³² Under sections 47(3)(e) and 52(1)(a) of the RTI Act.