



Decision and Reasons for Decision

Citation:	<i>Frecklington, MP and Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships [2018] QICmr 51 (13 December 2018)</i>
Application Number:	314025
Applicant:	Mrs Deb Frecklington MP, Leader of the Opposition
Respondent:	Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships
Decision Date:	13 December 2018
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - UNLOCATABLE AND NONEXISTENT DOCUMENTS - SMS messages on mobile devices - whether respondent has taken all reasonable steps to locate documents - sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the respondent under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to '[a]ll SMS messages sent and received between Curtis Pitt, Jackie Trad and Philip Strachan about QR' between 15 February 2017 and 25 May 2018.
2. The applicant's access application was, as I understand, informed at least in part by an email from Mr Phillip Strachan to the former Treasurer and the current respondent, dated 16 February 2017, and published to Queensland Treasury's (**QT**) disclosure log.² That email includes the statement that Mr Strachan intended to '*brief you [the former Treasurer] and the Deputy Premier [the respondent] on progress verbally or via text to your mobile phones*'.
3. Searches were conducted of relevant mobile devices.³ No responsive documents were found. QT, directed to deal with RTI applications on behalf of the respondent, therefore refused access to requested SMS messages, on the grounds they were nonexistent or unlocatable.⁴
4. I am satisfied QT's decision was justified. I affirm that decision.

Background

5. Significant procedural steps taken in this external review are set out in the Appendix.

Reviewable decision

6. The decision under review is QT's decision dated 29 June 2018, made under the authority of the respondent.

¹ Application dated 25 May 2018.

² https://s3.treasury.qld.gov.au/files/TCM827_Release-for-DL.pdf, 'RTI Document No. 89'.

³ Search record dated 4 June 2018.

⁴ Section 47(3)(e) and section 52 of the RTI Act.

Evidence considered

7. Evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).

Issue for determination

8. The issue for determination is whether the respondent was justified in refusing access to requested documents under section 47(3)(e) of the RTI Act, on the grounds those documents are nonexistent or unlocatable.
9. Under the RTI Act, a document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.⁵ A document is unlocatable if it has been or should be in a Minister's possession and all reasonable steps have been taken to find the document but it cannot be found.⁶
10. To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience, having regard, as circumstances may require, to various factors, including considerations reasonably inferable from information supplied by an applicant.⁷ Similar considerations apply as regards a finding that documents are unlocatable.⁸
11. Importantly, if, as here, searches for documents are conducted, it must be shown that all reasonable steps have been taken to locate requested documents.⁹
12. Accordingly, the key issue to be resolved in this matter is whether all reasonable steps have been taken to locate the documents requested by the applicant.

Applicant's submissions

13. The applicant does not accept that all reasonable steps have been taken in this case. The applicant firstly doubted that the respondent's devices would contain requested messages:

...[S]earches performed were insufficient, as the current devices are not likely to hold all messages sent and received. It's likely that in the period from February 2017 to now, the devices may have been swapped or upgraded.

...the more complete way to search would have been for the Treasury RTI officer to have requested the Deputy Premier to produce her Telco's network records of all messages sent and received.¹⁰

14. The respondent confirmed during the review that devices had not been changed in the relevant period, which advice was conveyed to the applicant.¹¹ The applicant maintained, however, that the respondent should be required to request 'the old SMS messages' from the respondent's telecommunications services provider.¹²

Discussion and findings

15. Following receipt of the applicant's access application, the respondent's mobile devices were, as noted, searched. As also noted, these searches located no relevant documents, and on this basis the respondent refused access to requested documents, under section 47(3)(e) of the RTI Act.

⁵ Section 52(1)(a) of the RTI Act.

⁶ Section 52(1)(b) of the RTI Act.

⁷ See, for example, *Lester and Department of Justice and Attorney-General* [2017] QICmr 17 (**Lester**) (16 May 2017) and *Gapsa and Public Service Commission* [2016] QICmr 6 (11 February 2016) (**Gapsa**), adopting the Information Commissioner's comments and enumeration of relevant factors in *PDE and the University of Queensland* [2009] QICmr 7 (9 February 2009), [37].

⁸ *Lester*, [15], citing *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [21].

⁹ Having regard to the factors stated in *PDE*, as they may arise: *Gapsa*, [14], citing *PDE*, [49]-[53]. See also section 130(2) of the RTI Act.

¹⁰ Applicant's external review application.

¹¹ Respondent's email submission dated 23 October 2018 and OIC's letter to the applicant dated 23 October 2018.

¹² Submission dated 25 October 2018.

16. There is nothing before me to call into question the respondent's account of its search efforts – and the results of those efforts – which I accept as accurate. Given:

- the nature of the documents requested (SMS messages); and
- the fact that there is no conclusive evidence any such messages were ever created,¹³

I consider that all reasonable steps to locate requested documents – ie, searches of devices that would have sent or received any such messages – have been taken.

17. Access to requested documents may therefore be refused, under section 47(3)(e) of the RTI Act, on the basis those documents are nonexistent or unlocatable within the meaning of section 52(1) of the RTI Act.

18. In reaching this finding, I have taken into account Mr Strachan's suggestion that he may contact the respondent by way of mobile phone text message. Mr Strachan's advice in this regard was, however, equivocal; SMS message is one of two communication methods proposed in his email. Of itself, I do not consider Mr Strachan's statement calls into question the decision under review.¹⁴

19. I have also had regard to the applicant's submissions, as canvassed at paragraphs 13 and 14 above.

20. Regarding 'swapping' of devices, it is not clear to me that a mere change in device would render inaccessible messages sent or received through accounts or services accessed via that device, and its replacements. In any event, this is not a matter on which I need to dwell: as noted above, the respondent has confirmed that there was no change in device.

21. As for the submission that the respondent should be required to request the '*old SMS messages*' from its telecommunications services provider: in view of considerations recorded above, I do not consider that reasonable search efforts require any such inquiry.

22. There is, as noted, nothing conclusively establishing that there ever existed any '*old SMS messages*' of the kind requested by the applicant. In these circumstances, searches of the actual devices that may have sent or received such messages adequately discharge the obligation on the respondent to take all reasonable steps to locate documents.¹⁵

DECISION

23. I affirm the decision under review.

24. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act

Louisa Lynch
Right to Information Commissioner

Date: 13 December 2018

¹³ It being the case, as regards 'received' messages, that Mr Strachan only suggested that he may communicate by way of SMS message – a point discussed further below.

¹⁴ And do not consider that his email advice amounted to an '*undertaking*' to communicate via SMS, as submitted by the applicant in 12 November 2018 submissions.

¹⁵ Noting, too, that there is a real question as to whether SMS messages that may be held by a third party telecommunications provider would comprise a 'document of a Minister' within the meaning of section 13 of the RTI Act – an issue on which I am not required to make a finding, but in relation to which OIC has previously found to the contrary: *1L2FOK and Department of Transport and Main Roads* [2018] QICmr 35 (14 August 2018), at [46]-[47] (considering the substantially similar concept of 'document of an agency', stated in section 12 of the RTI Act).

APPENDIX

Significant procedural steps

Date	Event
5 July 2018	OIC received the external review application.
6 July 2018	OIC requested procedural documents from QT.
13 July 2018	OIC received the requested documents from QT.
19 July 2018	OIC notified the applicant and QT that it had accepted the external review application.
19 September 2018	OIC requested and received search records from QT.
20 September 2018	OIC requested further information concerning status of devices.
5 October 2018	OIC received further information from QT.
18 October 2018	OIC requested further information from QT concerning status of devices.
23 October 2018	OIC received requested information from QT. OIC wrote to the applicant, conveying a preliminary view requested information was nonexistent/unlocatable.
25 October 2018	OIC received submissions from the applicant.
6 November 2018	OIC wrote to the applicant, reiterating OIC's 23 October 2018 preliminary view.
12 November 2018	OIC received further submissions from the applicant.