



Decision and Reasons for Decision

Citation:	<i>Nine Entertainment Co Pty Ltd and Department of the Premier and Cabinet</i> [2023] QICmr 8 (28 February 2023)
Application Number:	316893
Applicant:	Nine Entertainment Co Pty Ltd (ACN 122 205 065)
Respondent:	Department of the Premier and Cabinet
Decision Date:	28 February 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - JURISDICTION - DOCUMENT OF AN AGENCY - request for access to Google Maps data accessible through a government-issued mobile phone - whether a 'document of an agency' under section 12 of the <i>Right to Information Act 2009</i> (Qld) - whether subject to the right of access in section 23(1) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of the Premier and Cabinet (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to Google Maps data (time and place information) stored on mobile phones issued to Queensland government officers (including the Premier) who travelled in a vehicle assigned to the Premier between 4 and 7 July 2021, and 13 July 2021.
2. The Department decided² that there was no right of access to this information under section 23(1) of the RTI Act because, if the information existed, it would not be contained in a '*document of an agency*' within the meaning of section 12 of the RTI Act. There was therefore no jurisdiction under the RTI Act for the Department to deal with the access application.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision
4. For the reasons explained below, I affirm the decision under review.

¹ Application dated 6 July 2022.

² Decision dated 11 August 2022.

Background

5. This is another in a series of applications made by the applicant seeking access to information apparently in order to investigate certain untested allegations concerning the Premier.
6. OIC has published related decisions in *Nine Entertainment Co Pty Ltd and Department of the Premier and Cabinet* [2022] QICmr 31 (21 June 2022) and in *Nine Entertainment Co Pty Ltd and Hon Anastacia Palaszczuk MP, Premier and Minister for the Olympic and Paralympic Games* [2023] QICmr 6 (7 February 2023).

Reviewable decision

7. The decision under review is as outlined in paragraph 2 above.
8. Under section 105(1)(a) of the RTI Act, the Information Commissioner has, in addition to any other power, the power to review any decision that has been made by an agency in relation to the relevant access application. This includes deciding threshold issues of jurisdiction, such as whether the access application falls within the scope of the RTI Act.³

Evidence considered

9. Evidence, submissions, legislation and other material I have considered in reaching this decision are set out in these reasons (including footnotes and the Appendix).⁴

Issue for determination

10. The right of access established by section 23(1)(a) of the RTI Act exists only in respect of documents of an agency. The issue for determination, therefore, is whether the Department was correct in finding, in effect, that there is no jurisdiction to deal with the access application because it does not request access to a 'document of an agency' within the meaning of section 12 of the RTI Act.

Relevant law

11. Section 23(1)(a) of the RTI Act provides that a person has a right to be given access to documents of an agency, such as the Department.

³ See *Christie and Queensland Industry Development Corporation* (1993) 1 QAR 1 at [5] to [16]. It is well-established that it is within the power of a merits review body to decide whether its own jurisdiction has been enlivened.

⁴ Including the *Human Rights Act 2019 (Qld) (HR Act)*, to the extent necessary to do so. The participants in this review are not 'individuals', and only individuals have human rights under the HR Act, section 11. However, Kingham J in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 at [90] indicated that where section 58(1) of the HR Act applies, there need be no mover to raise human rights issues because that section requires the relevant public entity to properly consider engaged human rights and to not act or make a decision that is not compatible with human rights. To the extent then that it is necessary to observe relevant rights under section 58(1) of the HR Act, I am satisfied that I have done so. This is because in observing and applying the law prescribed in the RTI Act, as I have done in this case, an RTI decisionmaker will be 'respecting and acting compatibly with' applicable human rights as stated in the HR Act (*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].) In this regard, I note Bell J's observations at [573] of XYZ 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.'

12. 'Document of an agency' is defined in section 12 of the RTI Act as follows:

12 Meaning of document of an agency

In this Act, 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.*

13. If the requested document is not a document of an agency under section 12, the application does not fall within the scope of the RTI Act and there is no jurisdiction to deal with it under the RTI Act.

Submissions

14. In its decision, the Department stated as follows:

The type of information (location history) that may be contained in Google Maps data is stated in the 'Google Privacy and Terms' as follows:

"Google Privacy and Terms

Depending on the Google products and services that you use and your settings, Google may be saving location information to your Google Account.

...

Google Location History

If you opt in to Location History and your device is reporting location, the precise location of your signed-in devices will be collected and stored, even when you're not actively using a Google product or service. This helps create your Timeline where Location History data is stored, and may be used to power future recommendations on Google. You can review, edit, and delete what's saved in your Timeline at any time.

Turning on Location History provides more personalized experiences across Google restaurants suggested in Google Maps based on dining spots you've visited, real-time information about the best time to leave for home or work in order to beat the traffic, and albums in Google Photos automatically created from places you've visited.

If a person has a Google account it is not dependent on a device, it uses all web and app activity and is not something the department manages or would have access to, and it is not a requirement of a person's role to have a Google account.

In summary, for the reasons explained above Google Maps data (showing time and location) from phones of Government Staff (including the Queensland Premier) would not comprise a document of the Department of the Premier and Cabinet for the purposes of section 23(1)(a) of the RTI Act and your request cannot be dealt with under the Act. ...

15. In its external review application, the applicant argued as follows:

Regardless of whether Google Maps data is held in a cloud account or on an employee's device, I expect that the Department of Premier and Cabinet is entitled to access that data pursuant to the employment contract it has agreed with each of its employees. I expect this to be the case whether an employee performs work on a personal electronic device or an electronic device owned by the Department. Provided the employee is using the device to perform their duties, that would amount to an officer of the Department acting in their official capacity.

The fact that Google Maps data is not dependent on a device does not impact the Department's ability to access it using that device.

16. During the course of the review, OIC sought clarification from the Department regarding statements made in its decision.⁵ The Department was asked to confirm or clarify the following:

1. that if an officer holds a Google account, it is held in a purely private capacity and that no official/employment-related business is transacted via that account; and
2. that if an officer with a government-issued phone were to hold a Google account in a private capacity, there is nothing in their employment contract that would give their employer a legal entitlement to access any location tracking data that may be captured by that account.

17. The Department responded⁶ as follows to these two points:

1. *I confirm that it is not a requirement of a ministerial officer's role to have a Google Account. Ministerial staff members, where appropriate, are provided with a phone. A Google account is not provided as part of the suite of products offered to ministerial offices and is not a requirement for a ministerial officer's role. The Queensland Ministerial Handbook states "If a communication is received in a private email account that relates to ministerial portfolio-related business it must be forwarded from the private email account to the official ministerial email account within 20 days of receipt of the email. If a response is required, a ministerial email account should be used to respond"; and*
2. *There is nothing explicit in a ministerial staff member's employment contract that would give their employer access to location tracking data on a government-issued phone that may be captured by that account.*

18. Following consideration of the further information provided by the Department, OIC wrote to the applicant⁷ to communicate this information and to express the preliminary view that any documents containing the information that the applicant sought to access could not be regarded as 'documents of an agency' within the meaning of section 12 of the RTI Act.

19. The applicant disputed OIC's preliminary view and submitted as follows:

- the fact that there is nothing in an officer's employment contract that gives their employer a legal right to access location tracking data on a government-issued phone does not mean that the employer does not have a legal right of access to this information: Departmental policy would enable it to direct an officer to give the Department access to any data held on a government-issued phone in circumstances where the terms of the relevant Department policy may not be incorporated into the officer's contract
- even if this is not the case, the Department would be able to give the officer a lawful and reasonable direction to disclose the information from their Google accounts
- information about the location of officers during their work hours is sufficiently connected with the relevant officers' employment duties to require access – evidence of an officer's location is intrinsically related to the performance of their duties for reasons including that it indicates where the officer is working

⁵ OIC letter dated 5 October 2022.

⁶ Email of 14 November 2022.

⁷ Letter dated 22 November 2022.

- the use by an officer of a government vehicle provides sufficient connection to their employment duties; and
- if the Google account is used on a device owned or paid for by the Department, or otherwise used by the officer to perform their duties, the Department would have a present legal entitlement to access Google account data held on it, including Google Maps data.

Discussion

20. The meaning of ‘*document of an agency*’ was discussed by the Queensland Civil and Administrative Tribunal (QCAT) in the *Carmody* series of decisions.⁸ Justice Hoeben decided as follows:
- 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. As such, His Honour limited the concept of ‘physical possession’ to instances where the agency is legally able to produce the requested documents.
22. I have considered the information provided by the Department, as well as the applicant’s submissions. I am not satisfied that the Department has a present legal entitlement under the RTI Act to access, produce or control the use or physical possession of, a Minister’s, or Ministerial officer’s, Google account and the information captured by that account, including location data.
23. I would note at the outset that the applicant’s submissions appear to be directed at establishing a right of access to the location tracking data of Ministerial staff (pursuant to their employment terms and conditions), rather than the Premier. The basis upon which the applicant contends that any Google account location tracking data relating to the Premier (if it exists) is a document of the Department is unclear. I assume that the applicant is seeking to argue that, because the Department supplies Information Technology (IT) hardware (including mobile phones), as well as IT infrastructure and support to Ministers, the requested information should properly be regarded as a document of the Department because the Department has an entitlement to control the physical possession of the Premier’s phone (and, presumably, the information accessible via the phone). I do not accept the correctness of that proposition for the reasons outlined in the *Carmody* decisions concerning the meaning of ‘physical

⁸ See, for example, *Carmody v Information Commissioner & Ors (No 4)* [2018] QCATA 17 at [66].

possession', as discussed above. For the reasons explained more fully below, regardless of the fact that both the Premier and her staff may use Department-issued mobile phones, I am not satisfied that Google Maps location data that may be captured and accessible via those phones is information that can properly be regarded as being in the physical possession, or under the control, of the Department.

24. In terms of physical possession, location data collected via a person's Google account is not physically stored on the government-issued device – the device is simply a means by which the account-holder can access and view the information. The data is stored either in the Cloud or via the Google Maps app and can only be accessed by the account-holder logging in to their Google account. While location tracking data captured by a Google account may be able to be accessed via a government-issued device,⁹ I do not accept that the information is in the physical possession of the Department. For the reasons discussed in the *Carmody* decisions, as noted above, I am not satisfied that the Department is legally able to produce that information and provide an access applicant with access to it under the RTI Act.
25. The Department advised that Ministerial officers are not required to hold a Google account as part of their employment duties, and that a Google account is not provided as part of the suite of products offered to Ministerial officers. The Department further advised that any official communication relating to Ministerial portfolio-related business that is received in a private email account must be forwarded to the official ministerial email account within 20 days of receipt of the email, and that if a response is required, a Ministerial email account should be used to respond. This supports the Department's position that where a Ministerial officer chooses to have a Google account (or any other private email account, etc), it is Departmental policy that it is not to be used for work-related purposes. It is therefore properly regarded as being held by the person in a private capacity unless it can be demonstrated otherwise.
26. The applicant disputes the view that there is an insufficient connection between Google Maps data that may be captured by a Ministerial officer's government-issued mobile phone and the performance by an officer of their work duties. He argues that where a person is physically located when they are working may be relevant to the discharge of their employment obligations such as to give their employer a right of access to data on their phone that captures this information (presumably, even if that data is captured by an account held by the officer in a private capacity). He also relies upon the fact that he is seeking information related to the use of a government vehicle, which provides another employment-related connection.
27. I accept that there may be circumstances where an employee's location is relevant to the discharge of their work duties. Where that is the case, however, the onus lies on the employer to establish, in its terms and conditions of employment, a right of access to such information. In this case, the Department has confirmed that Ministerial staff who are issued with a mobile phone are not required, as part of their employment terms and conditions,¹⁰ to hold a Google account, or to have location tracking turned on at all times during work hours. It has also confirmed that, even if this data were to be captured by an employee's Google account, there is no specific provision in the terms and conditions of employment to establish a right of access to the data.
28. In the absence of such a provision, I am not satisfied that there is sufficient evidence before me to establish a legal entitlement to access such data, notwithstanding that the

⁹ This assumes that the officer's device has location services turned on; that the officer has a Google account to which they have signed in; and that they have opted in to 'Location History' in their account.

¹⁰ Ministerial staff are employed under the *Ministerial and Other Office Holder Staff Act 2010* (Qld). Section 10(1) provides that a person is employed on the terms and conditions stated in the person's contract of employment.

person may be using a government-issued phone. The fact that location data tracking information is not required to be captured by Ministerial staff and made available to their employer indicates that it is not regarded as relevant to the discharge of employment-related duties. Furthermore, presumably not all Ministerial staff members are issued with mobile phones. There would therefore be no capacity to track the location of those officers during work hours, lending support to the Department's position that location tracking data is not regarded as information connected to the discharge of employment duties, and that officers are not required, as part of their terms and conditions of employment, to capture it and make it accessible.

29. The applicant contends that there is a general legal entitlement to give a Ministerial officer a lawful and reasonable direction to disclose information from their Google accounts, regardless of whether or not there is an explicit provision in their terms and conditions of employment. I accept that there is an implied term in every contract of employment that requires an employee to obey the lawful and reasonable directions of their employer.¹¹ Whether or not a direction to disclose location tracking data captured by a Google account held by an employee in a private capacity would constitute a 'lawful and reasonable direction' is not a question within OIC's jurisdiction. It will depend on the circumstances surrounding the issuing of the direction and the reasons for it.¹² But, in any event, whether or not such a direction can lawfully be issued in particular circumstances does not equate to establishing a right of access to such information under the RTI Act. As the Information Commissioner has previously stated:

*I accept that it was the legislature's intention that an agency should take steps to bring into its physical possession, for the purpose of dealing with a valid FOI access application, any requested document in respect of which the agency has a present legal entitlement to possession. However, I do not accept that it was the legislature's intention that an agency should have to take some additional step in order to put itself into a position where it has a legal entitlement to take possession of a document, in order to respond to an FOI access application for that document.*¹³ (My emphasis.)

30. Formulating a reasonable direction and establishing its lawfulness would, in my view, comprise an 'additional step' of the kind the Information Commissioner has identified as being insufficient to amount to a present legal entitlement to possession.

Finding

31. In summary, for the reasons explained, to the extent that the information that the applicant seeks to access exists, I am not satisfied that it would be contained in a document of the Department within the meaning of section 12 of the RTI Act.

DECISION

32. I affirm the decision under review that the access application falls outside the scope of the RTI Act because it does not request access to 'documents of an agency' as defined in section 12 of the RTI Act. The right of access contained in section 23(1) of the RTI Act is therefore not enlivened.

¹¹ *Grant v BHP Coal Pty Ltd (No 2)* [2015] FCA 1374.

¹² What is reasonable in the circumstances is essentially a question of fact and a range of factors may be relevant: see *Briggs v AWH* (2013) IR 231 159; [2013] FWCFB 3316. See also *The King v Darling Island Stevedoring and Lighterage Company Limited; Ex Parte Halliday and Sullivan* (1938) 60 CLR 601 at 622: *But what is reasonable is not to be determined, so to speak, in vacuo. The nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument, in this case an award, governing the relationship, supply considerations by which the determination of what is reasonable must be controlled.*

¹³ *Price and the Nominal Defendant* (1999) 5 QAR 80 at [27].

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

Rachel Moss
Principal Review Officer

Date: 28 February 2023

APPENDIX

Significant procedural steps

Date	Event
6 September 2022	OIC received the external review application OIC requested preliminary information from the Department
8 September 2022	OIC received preliminary information from the Department
15 September 2022	OIC advised the parties that the external review application had been accepted
5 October 2022	OIC requested further information from the Department
14 November 2022	OIC received the requested information from the Department
22 November 2022	OIC communicated a preliminary view to the applicant
8 December 2022	OIC received a submission from the applicant