



Decision and Reasons for Decision

Citation: *F96 and Queensland Health [2023] QICmr 36 (24 July 2023)*

Application Number: 316903

Applicant: F96

Respondent: Queensland Health

Decision Date: 24 July 2023

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - NONEXISTENT OR UNLOCATABLE DOCUMENTS - request for access to documents relating to 13 HEALTH and 134 268 telephone calls - whether agency has conducted reasonable searches - whether access to documents may be refused on the basis documents are nonexistent or unlocatable - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(e) and 52 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to 'Queensland Health – 13 Health' under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to 'my whole file' and recordings of two telephone calls.²
2. Queensland Health located three pages and one audio file (which was a recording of one of the telephone calls³) and decided⁴ to release them in their entirety. Otherwise, Queensland Health advised the applicant that, while it had undertaken searches 'for any and all calls made to 13 Health and 134 COVID (134 268) for the 11th of September 2021', it had not located any further records associated with the applicant's mobile telephone number.⁵
3. The applicant then applied to the Office of the Information Commissioner (**OIC**) for external review of Queensland Health's decision,⁶ submitting that Queensland Health had not located certain documents, including recordings of her telephone call on 11 September 2021.

¹ Access application dated 25 July 2022.

² 'Voice recordings of my call to 13 HEALTH and 134 268' on 25 August 2021 and 11 September 2021 at specified times.

³ On 25 August 2021.

⁴ Decision dated 30 August 2022.

⁵ Decision dated 30 August 2022. By email dated 2 September 2022, the applicant advised Queensland Health that the mobile telephone number it had used to conduct its searches (as stated in its decision dated 30 August 2022) was incorrect. By email dated 9 September 2022, Queensland Health notified the applicant that it had undertaken further searches using the correct number and had still not located any recording of a telephone call on 11 September 2021.

⁶ External review application dated 13 September 2022.

4. For the reasons set out below, I affirm Queensland Health's decision and find that documents relating to the applicant's telephone call on 11 September 2021 are nonexistent or unlocatable within Queensland Health.

Background

5. During the external review, the information remaining in issue was narrowed to documents relating to the applicant's telephone call on 11 September 2021.⁷
6. The applicant provided OIC with an extract from her mobile telephone billing records showing a call to 134 268 on this date at the specified time. The applicant's position is that:⁸

I most certainly did make the call and here is the extract from my Vaccine Injury Timeline

11th September

I called the Covid help line again at ... after more burning, pain in my kidney, pain in the lymph node under my arm and no sleep, I called to ask how much longer this would go on, hoping to at least get an end date if there was ever going to be one. She said Phenergan was wrong, it is a dirty antihistamine, and she did not know why Dr ... gave me that, she said to go to him and ask for a referral to see an immunologist.

Reviewable decision

7. The decision under review is the decision made by Queensland Health dated 30 August 2022.

Evidence considered

8. Significant procedural steps in this external review are set out in the Appendix.
9. The evidence, submissions, legislation and other material I have considered in reaching this decision are set out in these reasons (including the footnotes and the Appendix).
10. During the external review the applicant made submissions to OIC which raise issues that are beyond OIC's external review jurisdiction as they go to the applicant's dissatisfaction with Queensland Health, including in relation to its record-keeping practices. The applicant has been advised of the limits of OIC's jurisdiction, including that OIC cannot investigate complaints about the conduct of agencies. I have considered the applicant's submissions to the extent they are relevant to the issue for determination in this review in the context of the information remaining in issue.
11. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁹ 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 the *Right to Information Act 2009* (Qld)

⁷ OIC's correspondence dated 28 October 2022 noted that, given the applicant had addressed her application to 'Queensland Health – 13 Health', it was reasonable for Queensland Health to interpret the request for her 'whole file' as a request for all documents about the two telephone calls. In response, by submissions received on 29 October 2022, the applicant observed that she could make a fresh access application for other information. OIC's correspondence dated 14 February 2023 and 8 March 2023 then confirmed to the applicant that the only remaining issue for consideration related to documents about her telephone call on 11 September 2021.

⁸ Submissions received on 29 October 2022.

⁹ Section 21(2) of the HR Act.

(RTI Act).¹⁰ 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 similar pieces of Victorian legislation¹¹ 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’*.¹²

Information in issue

12. The information remaining in issue is any documents, including any recordings, relating to the applicant’s telephone call on 11 September 2021 (**Information in Issue**).

Issue for determination

13. The issue for determination is whether Queensland Health may refuse access to the Information in Issue on the ground that it is nonexistent or unlocatable.

Relevant law

14. Under the IP Act, an individual has a right to be given access to documents¹³ to the extent they contain the individual’s personal information.¹⁴ When an applicant applies to an agency,¹⁵ the right of access applies to documents of that agency. A document is a document of an agency if it is a document in the possession, or under the control, of the agency.¹⁶
15. This right of access is subject to the provisions of the IP Act and the RTI Act.¹⁷ Relevantly, an agency may refuse access to a document on the ground that it is nonexistent or unlocatable.¹⁸
16. A document will be nonexistent if there are reasonable grounds to be satisfied that it does not exist.¹⁹ To be satisfied that a document does not exist, the Information Commissioner has previously recognised that an agency must rely on its particular knowledge and experience and have regard to a number of key factors.²⁰ An agency may also rely on searches to satisfy itself that a document does not exist. In those cases, all reasonable steps must be taken to locate the document.

¹⁰ *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]. I further note that OIC’s approach to the HR Act set out in this paragraph was considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (where Judicial Member McGill saw *‘no reason to differ’* from this position).

¹¹ *Freedom of Information Act 1982 (Vic)* and the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.

¹² *XYZ* at [573].

¹³ Section 13 of the IP Act provides that a *document of an agency* means anything that is a document of an agency under the RTI Act. Section 12 of the RTI Act provides that a *document of an agency* means a document, other than a document to which the RTI Act does not apply, in the possession, or under the control, of the agency and includes a document to which the agency is entitled to access.

¹⁴ Section 40 of the IP Act.

¹⁵ Section 43 of the IP Act.

¹⁶ Section 13 of the IP Act and section 12 of the RTI Act.

¹⁷ Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent it could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under that Act.

¹⁸ Section 67(1) of the IP Act and section 47(3)(e) of the RTI Act.

¹⁹ Section 52(1)(a) of the RTI Act.

²⁰ These factors are identified in *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [19] as including the administrative arrangements of government, the agency 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. These factors were more recently considered in *Van Veenendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017) and *Y20 and Department of Education* [2021] QICmr 20 (11 May 2021) at [45].

17. A document will be 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.²¹

Findings

18. During the external review, the applicant made several submissions to OIC, and provided an extract from her mobile telephone billing records showing a call to 134 268 on 11 September 2021 at the specified time. The applicant stated that:²²

... I was put through to a registered nurse at 13 Health. She confirmed my address and phone number before giving the advice ...

I believe that because they automatically know who I am, from my phone number when I call, that it would all be on the same file.

Both calls were to the same number and followed the same process.

19. Queensland Health also made a number of submissions to OIC, which stated that:²³

- all telephone calls of the nature described by the applicant were first received by Smart Service Queensland (**SSQ**), within the Department of Communities, Housing and Digital Economy (**CHDE**)
- given the apparent duration of the applicant's telephone call,²⁴ it is unlikely that the call would have progressed beyond the initial discussion with SSQ to Queensland Health
- documents relating to telephone calls with SSQ only are held by CHDE and Queensland Health does not have possession or control of such documents
- in response to the access application, Queensland Health made some enquiries with CHDE about whether SSQ could locate the applicant's telephone call on 11 September 2021, however, these enquiries relied on CHDE's cooperation as Queensland Health's memorandum of understanding with CHDE did not give Queensland Health any entitlement to or control over such documents
- calls which are transferred to Queensland Health were received by the Health Contact Centre (**HCC**), regardless of whether the caller initially dialled 134 COVID (134 268 43) or 134 268²⁵
- Queensland Health conducted searches of the HCC's Clinical Decision Support System, Lowcode
- Queensland Health also retrieved and reviewed data from an overarching demographic system, Centricity
- Queensland Health's original searches of Lowcode used the applicant's mobile telephone number to search calls on 11 September 2021,²⁶ while Queensland Health's further searches²⁷ searched the broader date range of 10-12 September 2021
- Queensland Health's further searches also included searches of Centricity for the entire month of September 2021, using different search terms – specifically the applicant's name including an alternative spelling of her first name, the

²¹ Section 52(1)(b) of the RTI Act.

²² Email to OIC dated 19 March 2023.

²³ Submissions dated 12 October and 13 December 2022, and 18 January, 28 March and 26 April 2023.

²⁴ Three minutes, based on Queensland Health's understanding of the mobile telephone billing records provided by the applicant.

²⁵ OIC sought Queensland Health's clarification on this point as the applicant had raised concerns in an email dated 19 March 2023 that the number searched by Queensland Health was 134 COVID (134 268 43) rather than 134 268. OIC advised the applicant of Queensland Health's submissions on this point in an email dated 28 April 2023.

²⁶ Which Queensland Health confirmed were conducted in its submissions dated 26 April 2023.

²⁷ Requested by OIC on 22 December 2022 and conducted by Queensland Health on 11 January 2023.

- applicant's year of birth, and the *'Reason of call'* field based on the applicant's description of the call
- Queensland Health's further searches also included searches of the HCC's abandoned call logs during the relevant period – however, there were no calls abandoned on 11 September 2021 around the time specified in the applicant's application;²⁸ and
 - despite these searches, Queensland Health was unable to locate any documents relating to the applicant's telephone call on 11 September 2021.
20. Dealing with sufficiency of search cases of this kind generally requires OIC to consider whether there are reasonable grounds for suspecting that further documents exist in an agency's possession or under its control, and whether the agency has taken all reasonable steps to identify the requested documents.²⁹
21. Here, however, I must first consider an alternative explanation. Queensland Health's submissions suggest the possibility that the applicant's telephone call was *not* transferred by SSQ to the HCC, in which case CHDE – not Queensland Health – would be the agency in possession or control of any recording of the call.³⁰ If I could be satisfied that the applicant's call was *not* transferred, the review could be decided on the basis that the Information in Issue is not a document of Queensland Health for the purpose of the IP Act.
22. This observation was conveyed to the applicant during the review.³¹ In response,³² the applicant maintained that she spoke with a registered nurse and provided OIC with an extract from her 'Vaccine Injury Timeline' in which she had recorded that, during the call, this nurse *'said Phenergan was wrong, it is a dirty antihistamine, and she did not know why Dr ... gave me that, she said to go to him and ask for a referral to see an immunologist'*. The applicant also stated that *'[a]t no time when I have called [Queensland] Health, was I informed I was speaking to someone other than [Queensland] Health'*. Given these submissions, it is my understanding that the applicant maintains that the recording should be held by Queensland Health.
23. I have carefully considered both parties' submissions. In my opinion, Queensland Health's submissions which suggest that the call was not transferred are somewhat equivocal, while the applicant's submissions also raise some ambiguity. In these circumstances, there is insufficient material before me to support a finding regarding whether or not the call was transferred.
24. It is therefore appropriate that I revert to this key question: whether Queensland Health has taken all reasonable steps to locate the Information in Issue. If, as contended by the applicant, the call was transferred to the HCC, and Information in Issue is therefore a document of Queensland Health, this question is determinative – as it usually is in such circumstances. Alternatively, if the call was *not* transferred, and any recording of it remains with CHDE, this question will nonetheless arrive at an outcome that is, in practical terms, consistent with the recording being a document of CHDE – that is, an

²⁸ Which Queensland Health advised captures all situations where a nurse abandons a telephone call before creating a patient file.

²⁹ *J6Q8CH and Office of the Health Ombudsman* (No. 2) [2019] QICmr 27 (6 August 2019).

³⁰ Here, I note that, at Queensland Health's request, CHDE undertook some enquiries. The extent of these enquiries is not evident on the material before me – nor am I required to consider this question, given Queensland Health is the respondent agency in this review. There is nothing to suggest that Queensland Health proposed or CHDE consented to part transfer of the application to CHDE under section 57 of the IP Act. In any event, the definition of 'reviewable decision' for the purpose of the IP Act does not include a decision to propose or consent to such a transfer.

³¹ OIC's correspondence dated 28 October 2022 and 14 February 2023.

³² Submissions received on 29 October 2022.

outcome where all reasonable steps fail to yield a copy of the recording within Queensland Health.

25. Based on the information before me, I find that Queensland Health has undertaken searches of its systems where it would be reasonable to expect the Information in Issue to be found. I further find that these searches have been comprehensive. The searches were conducted across date ranges that, given the particular circumstances, provided reasonable margins around the specified date and time of the call, and also included searches of calls received around the relevant period that were abandoned by the HCC before patient files were created. Further, when conducting its searches, Queensland Health employed a variety of appropriate search terms which could reasonably be expected to identify and locate the Information in Issue, should it be held by Queensland Health.
26. In these circumstances, I consider there are reasonable grounds for me to be satisfied that further relevant documents do not exist or cannot be located within Queensland Health.

DECISION

27. For the reasons set out above, I affirm Queensland Health's decision and find that documents, including any recordings, relating to the applicant's call on 11 September 2021 are nonexistent or unlocatable within Queensland Health.³³
28. 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: 24 July 2023

³³ Section 67(1) of the IP Act, and sections 47(3)(e) and 52 of the RTI Act.

APPENDIX**Significant procedural steps**

Date	Event
13 September 2022	OIC received the application for external review.
14 September 2022	OIC requested preliminary documents from Queensland Health.
16 September 2022	OIC received preliminary documents from Queensland Health.
10 October 2022	OIC advised the applicant and Queensland Health that the external review application had been accepted. OIC requested Queensland Health provide submissions setting out its position.
12 October 2022	Queensland Health made submissions to OIC.
28 October 2022	OIC conveyed a preliminary view to the applicant.
29 October 2022	The applicant made submissions to OIC.
9 November 2022	OIC requested Queensland Health provide further information.
23 and 30 November 2022	Queensland Health sought and received an extension of time to provide the further information.
13 December 2022	Queensland Health made submissions to OIC.
22 December 2022	OIC requested that Queensland Health undertake further searches.
18 January 2023	Queensland Health made submissions to OIC regarding its further searches.
14 February 2023	OIC conveyed a further preliminary view to the applicant.
26 February 2023	The applicant made submissions to OIC and requested that OIC issue a formal decision.
8 March 2023	OIC confirmed its preliminary view to the applicant.
14 March 2023	The applicant made submissions to OIC verbally.
19 March 2023	The applicant made submissions to OIC and confirmed that she wanted to proceed to a formal decision.
28 March 2023	OIC sought clarification from Queensland Health regarding an aspect of Queensland Health's submissions and Queensland Health made submissions to OIC verbally.
21 April 2023	OIC sought confirmation from Queensland Health regarding OIC's understanding of its submissions.
26 April 2023	Queensland Health made submissions to OIC.
28 April 2023	OIC conveyed Queensland Health's submissions to the applicant and invited the applicant to provide further information.
25 May 2023	The applicant confirmed to OIC that she wanted a formal decision.