Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	***C81 and Griffith University*** **[2024] QICmr 47 (2 October 2024)**
Application Number:	**317940**
Applicant:	**C81**
Respondent:	**Griffith University**
Decision Date:	**2 October 2024**
Catchwords:	**ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether agency has conducted reasonable searches - whether access to documents may be refused on the basis they are nonexistent - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(e) and 52(1)(a) of the *Right to Information Act 2009* (Qld)**

REASONS FOR DECISION

Summary

1. The applicant applied to Griffith University (**University**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to two categories of documents, between 1 January 2016 and 31 December 2017, as follows:[1]

    1) documents relating to any allegations/disclosures made against the applicant (and any actions or investigations taken into any such allegations/disclosures) relating to sexual assault/harassment/bullying/discrimination; [2] and
    2) documents identifying the applicant in connection with Workplace Health and Safety incidents and complaints (both notifiable and not notifiable).[3]

2. The University conducted unsuccessful searches and inquiries in an effort to locate any responsive documents. It therefore decided to refuse access to the requested information on the ground that it was nonexistent under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the *Right to Information Act 2009* (Qld) (**RTI Act**).[4]

[1] Application received by the University on 7 February 2024.
[2] (**Category 1 documents**).
[3] (**Category 2 documents**).
[4] Decision dated 15 March 2024.

3. The applicant applied to the Office of the Information Commissioner (**OIC**) for review of the University's decision.[5] The applicant contended that the University had not conducted all reasonable searches and inquiries in an effort to locate responsive documents.

Reviewable decision

4. The decision under review is the decision of the University dated 15 March 2024.

Evidence considered

5. Significant procedural steps relating to the external review are set out in the Appendix.

6. 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 account of the applicant's submissions to the extent that they are relevant to the issues for determination in this review.[6]

7. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.[7] 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 RTI Act.[8] 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:[9] '*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*.*'[10]

Issue for determination

8. The issue for determination is whether the University is entitled to refuse access to the requested documents on the ground that they are nonexistent.

Relevant law

9. Access to a document may be refused[11] if the document is nonexistent or unlocatable.[12]

10. A document will be *nonexistent* if there are reasonable grounds to be satisfied it does not exist.[13] To be satisfied that a document does not exist, the Information Commissioner has previously had regard to various key factors, including the agency's record-keeping practices and procedures (including, but not limited to, its information

[5] Application received on 12 April 2024.
[6] Including in the external review application and a submission dated 6 August 2024.
[7] Section 21 of the HR Act.
[8] *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].
[9] *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[10] *XYZ* at [573].
[11] 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 the RTI Act.
[12] Section 67(1) of the IP Act and sections 47(3)(e) and 52 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. 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.
[13] Section 52(1)(a) of the RTI Act. For example, a document has never been created.

management approaches).[14] By considering the 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 that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.

11. 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'*.[15] 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.[16]

12. 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 whether a document is unlocatable, it is necessary to consider the specific circumstances of each case,[17] and in particular whether:

- there are reasonable grounds for the agency 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.[18]

13. The agency that made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.[19] Where the issue of missing documents is raised on external review, the agency must demonstrate that reasonable steps have been taken to identify and locate relevant documents.[20] However, if the applicant maintains further documents exist, the applicant bears a practical onus of demonstrating that the agency has not discharged its obligation. Suspicion and mere assertion will not satisfy this onus.[21]

Discussion

14. In support of his contention that the University had not conducted all reasonable searches and inquiries in an effort to locate responsive documents, the applicant provided a six page submission (in conjunction with his external review application) discussing various policies and publications of the University, both past and present, and identifying *'key people and decision makers'* pursuant to those policies whom the applicant contended should reasonably be expected to hold responsive documents.

---

[14] *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.
[15] As set out in *PDE* at [49].
[16] As set out in *PDE* at [38].
[17] *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].
[18] Section 52(1)(b) of the RTI Act.
[19] Section 100 of the IP Act.
[20] Section 137(2) of the IP Act.
[21] *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36].

15. At the commencement of the review, OIC asked the University to explain the searches and inquiries it had conducted during the processing of the application in an effort to locate responsive documents. This information was then communicated to the applicant in a preliminary view letter dated 18 July 2024:

> ***Category 1 documents***
>
> *The Manager of Student Integrity conducted a search of your student file as well as the student misconduct files contained on G:Drive using your name as the search term. No responsive documents were located. The Manager advised as follows:*
>
> 1. There are no records of allegations of student misconduct against [the applicant].
> 2. There are no documents or materials, as there are no allegations of misconduct made against [the applicant].
> 3. There are no warnings issued against [the applicant].
> 4. There are no allegations issued against [the applicant].
> 5. There are no documents held by the Student Misconduct Committee, Registrar or Deputy Registrar pertaining to student misconduct allegations against [the applicant].
> 6. There is no Meta-data, as there are no documents.
>
> *The Manager also noted that outcomes of misconduct processes are recorded on a student's unofficial transcript and that if an exclusion penalty is applied, this also appears on the student's official transcript. No such notations are recorded.*
>
> ***Category 2 documents***
>
> *Using your name as the search tool, the Associate Director, Health and Wellbeing, conducted a search of the University's injury management system, as well its current (from 2017 to present) and historical (from 2012) GSafe systems which record all historical incidents, accidents and events. No responsive records were located.*

16. Having regard to the terms of his access application and the searches conducted by the University, I expressed to the applicant a preliminary view that the searches appeared to be appropriately targeted and should reasonably have been expected to locate any information falling within the terms of the access application, if any such information were to exist. I noted that the searches and inquiries had yielded no documents, and nor did they identify any avenue of potential further inquiry. I advised the applicant that I considered it reasonable to expect that, if any responsive information falling within either of the two categories contained in the access application were to exist, there would be a reference contained on the applicant's student file, particularly given the serious nature of the incidents described in the access application.

17. I further advised the applicant that I did not consider, on the information presently before me, that the applicant had discharged the practical onus upon him of showing that the University's searches were inadequate. He had provided no evidence to support a view that there were missing documents, nor provided any indication as to why it was reasonable to believe that the University would hold any documents falling within the terms of the access application (such as, for example, dates or details of any incidents, complaints etc, or other persons involved in such incidents or complaints). I stated that the search provisions in the IP Act were not to be used by an applicant to, in effect, facilitate a 'fishing exercise' in circumstances where reasonably targeted searches by an agency had located no documents, and the applicant had provided no evidence to support a reasonable belief that responsive documents ought to exist.

18. In the event that he did not accept my preliminary view, the applicant was asked to:

    - provide evidence that supported his belief that documents falling within the terms of the access application ought reasonably be expected to exist in the University's possession, including dates and details of any incidents, and the identity of any other person/s involved in the incidents, etc; and
    - identify any other searches or inquiries that the applicant considered it would be reasonable to ask the University to undertake in connection with the evidence provided in response to the preceding bullet point.

19. The applicant did not accept my preliminary view and provided a submission,[22] however, he did not provide the requested evidence.[23] The submission continued to contend that the University had not discharged its onus of demonstrating that reasonable steps had been taken to identify and locate responsive documents. The applicant argued that, *'at a minimum'*, it was reasonable for the University to conduct further searches as follows:

    For Category 1) documents:

    1. *'The business systems maintained by Student Life that record and manage information associated with sexual assault, sexual harassment, harassment, bullying and discrimination'*
    2. Queensland State Archives (**QSA**) (on the basis that the University may have transferred responsive documents to QSA).

    For Category 2) documents:

    1. QSA (again, on the basis that the University may have transferred responsive documents to QSA).

20. The applicant also complained that he had been given insufficient information about what type of searches the University had conducted, other than being advised that his name had been used as the *'input parameter'*:

    > *…the explanations I have been given regarding the searches undertaken by Griffith have been simplistic; there really isn't enough detail to assess the competency of their searches. Explanations are needed to help the applicant (and the OIC) determine if the agency has indeed taken all reasonable steps to find the documents subject of a request and without the necessary detail, no accurate determinations can be made. Slight variations in the way searches are performed (particularly those conducted against electronic records management systems) can result in vastly different outcomes and I consider the explanations provided by agencies in relation to their searches to be the most important aspect of information privacy application processes.*
    >
    > *For example, in the OIC's preliminary view notice it was stated that my name was used as a search term for searches conducted against student misconduct files and those contained on G:Drive. From my understanding, most records management systems accept party searches, title searches or content searches as their basic input parameters. As you can understand, simply entering my name into a title search wouldn't result in documents relevant to me being located; this is because documents aren't generally titled according to a person's name.*

[22] Dated 6 August 2024.
[23] In a telephone conversation with OIC on 1 August 2024, the applicant stated that he believed that the University must hold responsive documents because he had been unsuccessful in securing employment since graduating and he considered that this must be due to adverse information of some nature about him contained in the University's records.

Findings

21. Under section 137(2) of the IP Act, the Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate requested documents. The Queensland Civil and Administrative Tribunal confirmed in *Webb v Information Commissioner*[24] that this '*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.

22. The Information Commissioner also has power under section 115 of the IP Act to require additional searches to be conducted by an agency during an external review. In assessing an agency's searches, the Information Commissioner has recently confirmed the relevant question is whether the agency has taken all reasonable steps to identify and locate responsive documents, as opposed to all possible steps.[25]

23. Having considered the information provided by the University that describes the various searches and inquiries that the University has conducted in an effort to locate responsive documents, and the results of those searches and inquiries, I am satisfied that they were reasonable in all the circumstances. I maintain the view that, if any responsive documents were to exist in the University's possession, it is reasonable to expect that these searches and inquiries would have located such documents, or, at the very least, located information that may have identified other relevant avenues of search or inquiry. In particular, given the serious nature of the documents that the applicant seeks, I am satisfied that it is reasonable to expect that the applicant's student record would contain relevant entries if incidents and allegations of the nature described in the access application had occurred.

24. I am also satisfied that using the applicant's name as the search tool in interrogating the relevant databases was reasonable having regard to the terms of the application, and ought reasonably be expected to have located any responsive documents or pointed to other avenues of search or inquiry.

25. I note the additional searches that the applicant submits are reasonably required. However, in circumstances where:

    - the University has conducted targeted searches for documents based on its knowledge of its structure, functions, practices and procedures (including its record-keeping and information management systems)
    - those searches have yielded no results and provided no information about other possible search locations or inquiries; and
    - the applicant has provided no cogent evidence to support a reasonable belief that the University ought to hold responsive documents,

    I am not satisfied that it is reasonable to require the University to spend further time and resources in casting a wider search net, based merely on the applicant's assertions about the application of historical policies, and speculation about other University officers who may have been involved in dealing with or documenting the type of issues identified in the access application (if any were to have arisen).

[24] [2021] QCATA 116 at [6].
[25] *S55 and Queensland Police Service* [2023] QICmr 3 (30 January 2023) at [23], cited with approval in *W55 and Brisbane City Council* [2024] QICmr 13 (17 April 2024) at [19].

26. In terms of the applicant's specific contention that the University should be required to conduct searches of *'the business systems maintained by Student Life that record and manage information associated with sexual assault, sexual harassment, harassment, bullying and discrimination'*, the University advised that Student Integrity forms part of Student Life.[26] As noted at paragraph 15 above, the University stated that the Manager of Student Integrity had conducted searches of the applicant's student file, as well as of student misconduct files generally, and was unable to locate any responsive documents. As such, I am satisfied that the 'business systems' that could reasonably be expected to hold documents of the nature sought by the applicant have been searched.

27. As to the applicant's contention that it is reasonable for searches of QSA records to be conducted because there is a possibility that responsive records may have been transferred to QSA, I would firstly note that there is nothing before OIC to indicate that the University located anything in its records to suggest that responsive documents ever existed. It follows that there can be no reasonable basis for expecting that responsive records were transferred to QSA. This is mere speculation by the applicant and does not discharge the practical onus upon him. In any event, QSA (which currently forms part of the Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and the Arts) is itself subject to the IP Act. The applicant is entitled to make an access application to QSA if he so wishes.

28. In summary, I am satisfied that the University has discharged the onus upon it to demonstrate that all reasonable steps have been taken to identify and locate responsive documents. I am not satisfied that the applicant has discharged the practical onus upon him to demonstrate that the University has not taken all such reasonable steps.

29. I therefore find that access to the requested documents may be refused on the basis that they are nonexistent under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act.

DECISION

30. For the reasons set out above, I affirm the decision under review by finding that access to the requested information may be refused under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act.

31. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

R Moss
Principal Review Officer

Date: 2 October 2024

[26] Previously known as Academic Administration.

APPENDIX

Significant procedural steps

Date	Event
12 April 2024	OIC received the application for external review.
22 April 2024	OIC received preliminary documents from the University.
16 May 2024	OIC advised the parties that the application for review had been accepted.
18 July 2024	OIC expressed a preliminary view to the applicant.
1 August 2024	OIC received a telephone call from the applicant to discuss OIC's preliminary view.
6 August 2024	OIC received a written submission from the applicant.