



Decision and Reasons for Decision

Citation:	<i>Sheehan and Queensland Police Service</i> [2017] QICmr 12 (4 April 2017)
Application Number:	312993
Applicant:	Sheehan
Respondent:	Queensland Police Service
Decision Date:	4 April 2017
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - NONEXISTENT DOCUMENTS - information about a firearms licence and traffic infringement notice - applicant contends additional documents exist - whether agency has taken all reasonable steps to locate documents but the documents cannot be found or do not exist - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld) ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL TO DEAL WITH APPLICATION - LACKING SUBSTANCE - information about an incident - applicant contends incident did not occur - whether the Information Commissioner should decide not to further deal with part of external review application under section 107(1)(a) of the <i>Information Privacy Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Queensland Police Service (**QPS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to a range of information relating to a traffic infringement notice issued to him and his firearms licence.
2. QPS located 33 pages and 1 video recording in response to the access application. By its decision dated 16 August 2016, QPS decided to:
 - release 15 pages, parts of 18 pages and 1 video recording; and
 - refuse access to portions of information appearing on 18 pages, on the grounds that the information was exempt information or its disclosure would, on balance, be contrary to the public interest.
3. The applicant sought an internal review of QPS's decision dated 16 August 2016, on the basis that all relevant documents had not been located.

4. QPS did not make an internal review decision within the 20 business days¹ and was therefore taken to have made a decision on 21 September 2016, affirming the original decision dated 16 August 2016.²
5. The applicant applied to the Office of the Information Commissioner (**OIC**) for an external review, again on the basis that all relevant documents had not been located.³
6. For the reasons set out below, I vary the decision deemed to have been made by QPS and find that access to the additional documents the applicant contends should have been located are nonexistent.⁴ Also, I have decided not to further deal with the applicant's external review application insofar as it seeks information about an incident which, according to the applicant, did not occur.⁵

Reviewable decision

7. The decision under review is the internal review decision deemed to have been made by QPS on 21 September 2016, refusing access to portions of information appearing on 18 pages.

Issue for determination

8. The issue for determination is whether the additional information raised by the applicant should have been located by QPS.

Evidence considered

9. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes).
10. The applicant provided a number of submissions to OIC.⁶ I have summarised and addressed the applicant's submissions below, to the extent they are relevant to the issue for determination. In respect of the submissions that are not relevant to the issue for determination, these generally seek answers to a series of questions and relate to the applicant's concerns about the conduct of certain QPS officers. OIC's jurisdiction under the IP Act relates only to decisions about access to documents⁷ held by agencies and does not extend to any consideration of these questions and concerns.

Relevant law

11. An individual has a right to be given access, under the IP Act, to documents of an agency, to the extent the documents contain the individual's personal information.⁸ However, this right is subject to other provisions of the IP Act, including the grounds on which an agency may refuse access to documents.

¹ QPS purported to issue an internal review decision to the applicant, affirming the original decision, on 22 September 2016.

² Under section 97(2) of the IP Act.

³ The applicant did not seek review of the decision to refuse access to portions of information appearing on 18 pages, on the grounds that the information was exempt information or its disclosure would, on balance, be contrary to the public interest.

⁴ 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**).

⁵ Under section 107(1)(a) of the IP Act.

⁶ As set out in the Appendix.

⁷ And, where relevant, amendment of documents.

⁸ Section 40(1)(a) of the IP Act.

12. Access to a document may be refused if the document is nonexistent or unlocatable.⁹ 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.¹⁰ A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.¹¹
13. To be satisfied that documents are **nonexistent**, a decision-maker must rely on their particular knowledge and experience, having regard to various key factors including:
 - 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 limited to, its information management approaches); and
 - other factors reasonably inferred from information supplied by the applicant, including the nature and age of the requested documents, and the nature of the government activity to which the request relates.¹²
14. When proper consideration is given to the above factors, an agency may ascertain that a particular document was not created because, for example, the agency's processes do not involve creating the specific document. In such instances, it is not necessary for an agency to search for the document. It is sufficient that the relevant circumstances accounting for the nonexistent document are explained.
15. An agency may also rely on searches to satisfy itself that documents do not exist. If searches are relied on to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents.¹³ Such steps may include enquiries and searches of all relevant locations identified after consideration of the key factors listed above.
16. In assessing whether a document exists, but is **unlocatable**, it is necessary to consider whether:
 - there are reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession; and
 - the agency has taken all reasonable steps to find the document.¹⁴
17. When considering these matters, regard should again be had to the circumstances of the case and the key factors set out above.¹⁵
18. An individual's right to be given access, under the IP Act, to documents of an agency, is also subject to the grounds on which the Information Commissioner may refuse to deal,

⁹ Sections 47(3)(e) and 52 of the RTI Act.

¹⁰ Section 52(1)(b) of the RTI Act.

¹¹ Section 52(1)(a) of the RTI Act.

¹² *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]-[38]. The decision in *PDE* concerned 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 Acting Information Commissioner's findings in *PDE* are relevant here. Refer also to *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (*Pryor*) at [19], which adopted the Information Commissioner's comments in *PDE*.

¹³ As set out in *PDE* at [49]. See also section 137(2) of the IP Act.

¹⁴ Section 52(1)(b) of the RTI Act.

¹⁵ *Pryor* at [21].

or further deal, with all or part of an external review application.¹⁶ Such grounds include being satisfied that the external review application, or part thereof, is lacking substance.

Analysis

QPS searches generally

19. The applicant's submissions raise general concerns about the adequacy of the searches for responsive documents undertaken by QPS.
20. On external review, OIC made enquiries with QPS about the processing of the access application and the searches conducted for documents responsive to the access application.
21. In responding to those enquiries, QPS identified that, due to an administrative error, the decision-makers did not, when making their decisions, consider a video recording and an audio recording that had been located as responsive to the access application (**Two Recordings**). QPS released the Two Recordings to the applicant in January 2017.
22. One of the Two Recordings is an audio recording of the applicant's attendance at the police station on 20 August 2015. The content of that audio recording does not lend itself to an expectation that there would be any further *written documentation*, such as notes or reports, created about the applicant's interaction with staff at the police station on that day.
23. In terms of *CCTV recordings* of the applicant's attendance at the police station on 20 August 2015, QPS submitted to OIC that:
 - CCTV recordings are only made of the front counter area of the station; and
 - in accordance with general retention and disposal procedures, any recordings from the day the applicant attended the station will have been taped over as they are outside the retention period.
24. QPS also provided OIC with records of searches and certifications, indicating that a senior officer at the relevant police station spent over an hour searching the station's records.
25. I have carefully considered the searches conducted by QPS, the explanation in its submissions to OIC about CCTV recordings and the content of the information in issue (in particular, the audio recording of the applicant at the police station on 20 August 2015¹⁷), in light of the key factors as set out above.¹⁸ I have also noted the applicant's allegation that the officer who conducted the searches had, in effect, a vested interest to avoid finding responsive information.¹⁹
26. The officer who conducted the searches was, in my view, well placed to conduct them, given the small size and relatively remote location of the business unit (a rural police station) where responsive information would, if it existed, be held. There is nothing in the material before me to suggest that the officer in question withheld, or attempted to withhold, any relevant documents.

¹⁶ Section 107(1) of the IP Act.

¹⁷ Referred to at paragraph 22.

¹⁸ At paragraph 13.

¹⁹ The applicant submitted: '*May I suggest that the fox has been put in charge of the hen house?*' (submission received 21 February 2017).

27. Taking into account the material provided by the applicant, and having regard to QPS's submissions regarding its structure, record keeping practices and searches, I consider that QPS ensured that an appropriate officer undertook comprehensive, suitably targeted searches of possible locations for documents responsive to the access application.
28. In these circumstances, I am satisfied that:
- QPS has taken all reasonable steps to locate documents responsive to the application; and
 - there are reasonable grounds to be satisfied that any further documents responsive to the applicant's access application are nonexistent, and may be refused on this basis.²⁰

QPS searches for documents about an incident the applicant contends did not occur

29. The applicant also makes the following specific submissions about QPS's searches:
- he spoke with a QPS officer in an interview room when he attended a police station on 20 August 2015 to make a complaint
 - the documents that QPS has released to him contain information which, in his view, records that he was physically removed from the police station that day
 - however, contrary to this information, he was **not** physically removed from the police station
 - QPS has not located any CCTV, notes or reports which record his physical removal from the police station; and
 - he wishes to know if such documents were lost, destroyed or withheld.
30. It is my understanding that the applicant's submissions relate to documents that, in his view, do not exist, about an incident which, according to him, did not occur. The applicant considers that OIC should review whether such documents were lost, destroyed or withheld.
31. I consider that requiring an agency to conduct searches for documents known to be nonexistent would be unjustified and contrary to the objects of the IP Act. The information access scheme is not intended to be used to put an agency to a test to attempt to prove a negative or otherwise demonstrate error.
32. An application, or part thereof, may be considered to be lacking substance where *'the complainant has no arguable case which should be allowed to be resolved at a full hearing'*.²¹ OIC has previously considered²² a number of cases in various jurisdictions that have considered the meaning of 'lacking substance',²³ and noted that these cases held that a complainant must demonstrate more than a remote possibility of a well-founded claim, and that a complaint would be lacking substance if the complainant has no arguable case.²⁴

²⁰ Under section 67(1) of the IP Act and section 47(3)(e) and 52(1)(a) of the RTI Act.

²¹ *State Electricity Commission of Victoria v Rabel* [1998] 1 VR 102 at 110 per Ormison JA. Refer also to *Ebber and Another v Human Rights and Equal Opportunity Commission and Others* (1995) 129 ALR 455.

²² In *de Vere Lawyers and Whitsunday Regional Council* (Unreported, Queensland Information Commissioner, 19 March 2009) (**de Vere**)

²³ While the cases referred to in footnote 21 considered the term within the context of complaints made under anti-discrimination legislation, the tests formulated provide guidance in determining whether an application is 'lacking substance' under the IP Act, as both statutes are remedial in nature.

²⁴ *de Vere* considered section 77(1)(a) of the now repealed *Freedom of Information Act 1992* (Qld), which has been replicated in section 107(1)(a) of the IP Act. Refer also to *Gapsa and Public Service Commission* [2016] QICmr 6 (11 February 2016) at [5].

33. More recently, a Queensland Civil and Administrative Tribunal decision discussed section 47 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld),²⁵ which is expressed in terms similar to section 107 of the IP Act.²⁶ In deciding not to proceed with a matter, the decision noted relevantly that:²⁷

Section 47 has a valid role to play in ensuring that cases lacking substance do not place the tribunal in the position of having to devote time and resources to proceeding with a case that has no prospects of success.

34. To the extent that the external review application seeks to have QPS conduct further searches for documents the applicant considers do not exist, about an incident which he contends did not occur, I am unable to identify any well-founded claim and consider that the applicant has no arguable case nor prospects of success. Accordingly, I am satisfied that this aspect of the applicant's external review application is lacking substance and have decided not to further deal with it.²⁸

DECISION

35. I vary²⁹ the decision under review and find that access to the additional information the applicant contends should have been located may be refused on the ground that it does not exist.³⁰ I have also decided not to further deal with the external review application to the extent it relates to documents about an incident the applicant contends did not occur.³¹
36. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

J Mead
Acting Information Commissioner

Date: 4 April 2017

²⁵ *Saunders and Department of Communities* (QCAT, 25 October 2011).

²⁶ Allowing the Tribunal to discontinue a proceeding if it is frivolous, vexatious, misconceived, lacking substance or otherwise an abuse of process.

²⁷ At paragraph [14].

²⁸ Under section 107(1)(a) of the IP Act.

²⁹ The decision is varied because QPS was deemed to have affirmed the Original Decision under section 97(2) of the IP Act.

³⁰ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act.

³¹ Section 107(1)(a) of the IP Act.

APPENDIX**Significant procedural steps**

Date	Event
6 October 2016	OIC received the external review application.
21 October 2016	OIC notified the applicant and QPS that it had accepted the external review application and asked QPS to provide additional information.
24 October 2016	OIC received the applicant's further submissions.
27 October 2017	An OIC staff member spoke with the applicant about the review.
25 November 2016	OIC received the requested information from QPS.
8 December 2016	OIC wrote to the applicant about the release of the Two Recordings and conveyed an informal resolution proposal to the applicant.
10 January 2017	OIC received the applicant's further submissions concerning the adequacy of QPS's searches.
13 January 2017	QPS released the Two Recordings to the applicant.
2 February 2017	OIC conveyed a preliminary view to the applicant that QPS has taken all reasonable steps to locate documents relevant to the access application. OIC invited the applicant to provide submissions by 17 February 2017 if he did not accept the preliminary view.
21 February 2017	OIC received the applicant's further submissions.