



Decision and Reasons for Decision

Citation:	<i>Z74 and Department of Education [2022] QICmr 35 (30 June 2022)</i>
Application Number:	315494
Applicant:	Z74
Respondent:	Department of Education
Decision Date:	30 June 2022
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether agency has conducted reasonable searches - whether access to further documents may be refused on the basis they are nonexistent or unlocatable - section 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> - sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant¹ applied to the Department of Education (**Department**)² under the *Information Privacy Act 2009 (Qld)* (**IP Act**) for access to:

All documents held in relation to the suspension of [the applicant] in [month and year]. Including, but not limited to any reviews into and/or complaints made about the suspension and emails between school staff.

Date Range: [date] to [date]

Excluding any OneSchool behaviour records, emails between the school staff and [names of parents] and correspondence between the [name of school] and the [Area] Region between [date] and [date].

2. The Department located 581 pages and decided to³ grant full access to 511 pages. Access was refused to parts of 63 pages, on the ground that disclosure would, on balance, be contrary to the public interest⁴ and to parts of seven pages on the ground that the information comprises exempt information – specifically, information the

¹ The access application was made on behalf of a child by a parent of the child. In this decision, references to the applicant include references to the child's parent when acting on behalf of the child in relation to the access application.

² On 22 January 2020.

³ On 19 June 2020.

⁴ Section 47(3)(b) of the *Right to Information Act 2009 (Qld)* (**RTI Act**).

disclosure of which could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law in a particular case.⁵

3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review,⁶ contending that the Department had not taken all reasonable steps to locate documents relevant to his access application.
4. For the reasons set out below, I am satisfied that the Department has taken reasonable steps to locate information relevant to the application and accordingly, I vary the Department's decision and find that access may be refused to any further documents under sections 47(3)(e) and 52(1) of the RTI Act on the ground they are nonexistent or unlocatable.

Background

5. The applicant was suspended from school and subsequently made a complaint about the actions taken by various staff at the school and the information placed on the applicant's OneSchool record in relation to the suspension.
6. During the external review the Department agreed to release to the applicant the information that it considered to be exempt information. It also located and agreed to release documents that it located as a result of further searches.⁷ Accordingly, these matters, having been resolved during the external review, will not be addressed in this decision except to the extent they are relevant to the issues considered below.
7. The applicant has identified certain documents that he believes have not been located by the Department.
8. Significant procedural steps relating to the external review are set out in the Appendix.

Reviewable decision

9. The decision under review is the Department's decision dated 19 June 2020.

Evidence considered

10. 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 they are relevant to the issues for determination in this review.
11. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁸ 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.⁹ 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:¹⁰ '*it is perfectly compatible with the scope of that positive right in the Charter for it to be*

⁵ Section 48 and schedule 3, section 10(1)(a) of the RTI Act.

⁶ On 13 July 2020.

⁷ Subject to the redaction of information that would, on balance, be contrary to the public interest to disclose pursuant to section 47(3)(b) of the RTI Act.

⁸ Section 21(2) of the HR Act.

⁹ *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].

¹⁰ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

observed by reference to the scheme of, and principles in, the Freedom of Information Act.¹¹

Issue for determination

12. The sole issue remaining to be determined in this decision is whether all reasonable steps have been taken by the Department to locate documents responsive to the applicant's access application (such that access to further documents may be refused on the ground they are nonexistent or unlocatable).¹²

Relevant law

13. Under the IP Act, an individual has a right to access their personal information subject to some limitations.¹³ Relevantly, access to a document may be refused if the document is nonexistent or unlocatable.¹⁴
14. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.¹⁵ 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.¹⁶
15. To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors:¹⁷
 - the administrative arrangements of government
 - the respondent agency's structure
 - the respondent agency's functions and responsibilities
 - the respondent 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.
16. When proper consideration is given to relevant factors, it may not be necessary for searches to be conducted. However, 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. What constitutes reasonable steps will vary from case to case as the search and enquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances.
17. To determine whether a document exists, but is unlocatable, the RTI Act requires consideration of whether there are reasonable grounds to be satisfied that the requested document has been or should be in the agency's possession; and whether the agency has taken all reasonable steps to find the document.¹⁸

¹¹ XYZ at [573].

¹² Sections 47(3)(e) and 52(1) of the RTI Act.

¹³ Section 67 of the IP Act provides that an agency may refuse access to a document of an agency in the same way and to the same extent the agency 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.

¹⁴ Sections 47(3)(e) and 52 of the RTI Act.

¹⁵ Section 52(1)(a) of the RTI Act.

¹⁶ Section 52(1)(b) of the RTI Act.

¹⁷ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (*Pryor*) at [19] which adopted the Information Commissioner's comments in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009).

¹⁸ *Pryor* at [20]-[21].

18. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate documents applied for by applicants.¹⁹ Generally, 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.²⁰ However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable grounds to be satisfied that the agency has not discharged its obligation to locate all relevant documents.²¹ Suspicion and mere assertion will not satisfy this onus.²²

Findings

19. During the external review, OIC required the Department to conduct further searches for documents responsive to the access application and as noted at paragraph 6 above, further documents were located and released to the applicant. The documents located included emails from employees at the school attended by the applicant.
20. After these documents were released to the applicant, the applicant submitted that the Department had not conducted all reasonable searches and accordingly should undertake further searches to locate documents responsive to the access application.²³ The applicant submitted that further searches should be undertaken:
- by the school's Deputy Principal
 - by the Department's legal branch; and
 - of the Principal's records.

The Deputy Principal's email account

21. The applicant raised the issue of:²⁴

... emails turning up in one of the staff's released documents and those emails missing in the corresponding staff members documents.

22. In particular, the applicant refers to an email (**Email**) sent by the Deputy Principal to a teacher at the applicant's school, in which the Deputy Principal requests that the teacher add a record to the applicant's OneSchool record. While the Email was located following a search undertaken of the teacher's email account, the Email was not located in the searches of the Deputy Principal's email account.
23. In this respect, the applicant submitted:²⁵

*It is obvious that the email from [the Deputy Principal] to instruct [the teacher] to change the record is an email that the department had but is now allegedly unlocatable. It is fair to assume that considering that the email was deleted from [the Deputy Principal's] account, any record as to why that email was sent was also 'unlocatable'. Under the circumstances, I believe the onus is on the department to conduct further searches to locate this record [**Record**], or at*

¹⁹ Section 137(2) of the IP Act. The Information Commissioner also has power under section 115 of the IP Act to require additional searches to be conducted during an external review.

²⁰ Section 100(1) of the IP Act.

²¹ *Mewburn and Department of Local Government, Community Recovery and Resilience* [2014] QICmr 43 (31 October 2014) at [13].

²² *Parnell and Queensland Police Service* [2017] QICmr 8 (7 March 2017) at [23] (**Parnell**); *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36] (**Dubois**); *Y44 and T99 and Office of the Public Guardian* [2019] QICmr 62 (20 December 2019) at [38] (**Y44 and T99**).

²³ Applicant's email to OIC dated 16 June 2022.

²⁴ Applicant's email to OIC dated 16 June 2022.

²⁵ Applicant's email to OIC dated 16 June 2022.

least why it came into existence. A further search may also provide information around [the teacher] changing the other record in relation to 20/21 [month and year]. The released documents show she was instructed to add the incident from 23 [month and year], she was not instructed to add the record of 20/21 [month and year]. Unfortunately, because of poor record keeping, another email instructing [the teacher] to change the 20/21 [month and year] record cannot be dismissed.

24. The applicant has submitted that the Department's location of the Email as received in the teacher's account provides reasonable grounds for concluding that the Email, as sent by the Deputy Principal's account, should be in the Department's possession.
25. While there is evidence as to the existence of the Email originating from the Deputy Principal's account, it has not been located following searches of the Deputy Principal's account and therefore, I must consider the question of whether the agency has taken all reasonable steps to find this version of the Email. In this regard, the Department has provided OIC with written certifications in relation to the searches conducted of the email accounts of the Deputy Principal. I acknowledge the applicant has concerns about the Department's record-keeping practices, however I am satisfied that the searches that were undertaken have been appropriate and targeted. Based on the search information provided by the Department, I am satisfied that all reasonable steps have been taken to locate the Email, as sent from the Deputy Principal's email account, and therefore there are reasonable grounds to conclude that this document is unlocatable.
26. As well as raising the version of the Email as sent from the Deputy Principal's email account, the applicant's submission also raised a query about the existence of some other type of Record indicating why the Email was sent, and a further email from the Deputy Principal to the teacher in relation to amendments to the OneSchool records.
27. While I acknowledge that the applicant considers that a Record *should* exist that would explain why the Deputy Principal instructed the teacher to amend the OneSchool record, the submission is based on the applicant's subjective view that a document would have been created to evidence this. Aside from the applicant's assertion that a Record should exist, there is no evidence before me that such a Record was created or exists. The request may simply have been made verbally, with no Record being created.
28. In terms of the applicant's submission about a further email from the Deputy Principal to the teacher, this submission is based on the applicant's speculative view that further documents may exist. Again, aside from the applicant's assertion that further searches may locate such an email, there is no evidence before me that further documents exist.
29. As noted, at paragraph 18, the applicant bears the practical onus of establishing reasonable grounds to be satisfied that the Department has not discharged its obligation to locate all relevant documents. I am not satisfied that the applicant has satisfied the onus, such that the Department should be required to conduct further searches.
30. Even if I am wrong in this conclusion and there are reasonable grounds for believing that a Record or further email exists, I must also consider the question of whether the agency has taken all reasonable steps to find these documents. As noted above, the Department has provided OIC with written certifications in relation to the searches conducted of the email accounts of the Deputy Principal. It has done the same with respect to the teacher. On the material before me, while I acknowledge the applicant's concerns about the Department's record-keeping practices, I am satisfied that the searches that were undertaken have been appropriate and targeted. In particular, I note that the Department spent over fourteen hours conducting searches of the email accounts of the Principal, Deputy Principal and the teacher.

31. Having carefully considered the search information provided by the Department, I am satisfied that all reasonable steps have been taken to locate these documents, and there are reasonable grounds to be satisfied that no further documents relevant to the applicant's request exist

The Department's legal branch

32. The applicant submitted that he considers searches should be undertaken by the Department's legal branch, as he believes that the Principal of the school was corresponding with the legal branch in relation to the complaints that he had made about the school. The applicant's belief results from an email sent by the Secondary Principal, in which the Secondary Principal requests the recipients of the email send information in relation to the school's bully screener program to the Principal '*with some urgency – as she needs it [sic] for Legal Branch*'.²⁶

33. Further the applicant submitted that:²⁷

... no documents involving the Legal Branch were found because the search was deficient. It is clear from the released documents that [the Principal] was corresponding with the Legal Branch. It is possible documents were shared via Sharepoint or OneDrive or emails which did not include one of the search terms.

34. I have carefully considered all of the documents located by the Department and I do not agree with the applicant's assertion that it is clear that the Principal was corresponding with the legal branch, in fact the applicant admits himself '*there is no indication as to why Legal Branch were involved*'.²⁸

35. In my review of the documents the only reference to the Department's legal branch I have located is comprised in the Secondary Principal's email as referred to above.²⁹ Having reviewed all of the documents located by the Department, in my opinion the Secondary Principal's reference to the Department's legal branch was likely an error and the information was being collated at the request of the [Area] Region (**Region**), that was handling the complaints the applicant had made about the school.

36. The documents located by the Department provide the following chronology:

- the Region contacted the Principal requesting information about the school's bully screener program;³⁰
- on the same day the Secondary Principal sent the email requesting information about the bully screener program be sent to the Principal as '*she needs it [sic] for Legal Branch*';
- one of the email recipients provided a response to the Principal about the bully screener program;³¹
- on the following day, the Principal supplied the information about the bully screener program to the Region;³²

²⁶ Page 41 of the secondary principal's documents.

²⁷ Applicant's email to OIC dated 16 June 2022.

²⁸ Applicant's email to OIC dated 16 June 2022.

²⁹ With the exception of some correspondence between the legal branch and the Principal in relation to a previous external review which has been disclosed to the applicant.

³⁰ Pages 51-52 of Part 2 of the principal's emails.

³¹ Page 58 of Part 2 of the principal's emails.

³² Page 51 of Part 2 of the principal's emails.

- subsequently the Region provided the Principal with a response to forward to the applicant, which includes information about the bully screener program;³³ and
 - the Principal sent the response to the applicant by email.³⁴
37. Given the above chronology, it is reasonable to conclude that the Secondary Principal was requesting information about the school's bully screener program, as this was required by the Principal to respond to the Region's query and was not intended for the Department's legal branch. Accordingly, I am satisfied that there are no reasonable grounds for concluding that additional responsive documents exist in relation to communications with the legal branch.
38. However, if I am wrong in this respect, as noted at paragraph 30, I am satisfied that the searches that were undertaken of the Principal's email account have been appropriate and targeted. In respect of the applicant's submission, that emails to the legal branch may not have been located, because the search terms used by the Department would not have included these communications, the key words used by the Department when conducting its searches, included the applicant's first name and surname, the first name of the applicant's father and the name of the bully screener program. Accordingly, I am satisfied that the search terms used by the Department would have located any documents relevant in this regard.
39. Turning to the applicant's submission that any communications between the Principal and the legal branch may have been via SharePoint or OneDrive, rather than by email, the Department's search certificates indicate that the Department spent seven hours searching the H Drives, SharePoint and OneDrive accounts of the Principal and two other employees at the school.
40. Having carefully considered the search information provided by the Department, I am satisfied that all reasonable steps have been taken to locate the documents responsive to the terms of the applicant's application and there are reasonable grounds to be satisfied that no further documents relevant to the applicant's request exist.

The Principal's records

41. The applicant submitted that there is evidence that the Principal conducted a 'review'³⁵ of the suspension records comprised in the applicant's OneSchool account and that documents have not been located in this respect. To support this view, the applicant refers to an email from the Principal to a teacher at the school, in which the Principal states '*I need to check OneSchool records for [the applicant] for accuracy*'.
42. Further the applicant submitted that any review of the OneSchool record would be relevant to his access application. The applicant also speculates that a review of the OneSchool records may have been conducted by the legal branch.
43. As previously noted, I must consider whether there are reasonable grounds for believing that additional documents referred to by the applicant exist in the Department's power or possession.
44. I do not consider that the applicant has met the onus of establishing reasonable grounds to be satisfied that further documents exist or may be located. As referred to at paragraph 18, suspicion and mere assertion are not enough to satisfy this onus.³⁶

³³ Page 49 of Part 2 of the principal's emails.

³⁴ Page 41 of Part 2 of the principal's emails.

³⁵ Applicant's email to OIC dated 16 June 2022.

³⁶ *Parnell* at [23]; *Dubois* at [36]; *Y44 and T99* at [38].

Accordingly, I do not consider that there are reasonable grounds for requiring the Department to undertake further searches.³⁷

45. It is apparent from the applicant's submission that he considers that records would exist to support any review conducted into the accuracy of the applicant's OneSchool records by the Principal. However, again, this is based on the applicant's subjective view that documents would have been created in relation to any review conducted and aside from the applicant's assertion that documents would have been created, there is no evidence before me that such documents exist. While the Principal may have been checking the accuracy of the applicant's OneSchool records as a result of the complaints that the applicant had made, there is no evidence before me to suggest that this was done anymore formally, then by the Principal merely examining the actual records comprised in OneSchool itself, which would not result in the creation of a document. Additionally, as previously noted, the searches conducted by the Department have been appropriate and targeted. In these circumstances, I must again conclude that there are reasonable grounds to be satisfied that no further documents relevant to the applicant's request exist.

DECISION

46. For the reasons set out above, I am satisfied that the Department has taken reasonable steps to locate information relevant to the application and accordingly, I vary the Department's decision and find that access may be refused to any further documents under sections 47(3)(e) and 52(1) of the RTI Act on the basis they are nonexistent or unlocatable.
47. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Assistant Information Commissioner Corby

Date: 30 June 2022

³⁷ Under section 67(1) of the IP Act and section 52(1) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
13 July 2020	OIC received the application for external review.
16 July 2020	OIC requested preliminary documents and information from the Department.
7 August 2020	OIC received the preliminary documents and information from the Department.
19 August 2020	OIC notified the applicant and the Department that the external review had been accepted.
21 August 2020	OIC received documents located in response to the access application and records of searches conducted from the Department.
1 September 2020	OIC received an email from the applicant providing further information about his sufficiency of search concerns.
11 November 2020 – 25 January 2021	OIC provided various updates to the applicant and Department.
5 February 2021	OIC wrote to the Department requesting it to undertake further searches.
18 February 2021	OIC provided an update to the applicant.
15 March 2021 – 23 April 2021	OIC followed up the Department numerous times seeking a response to OIC's letter dated 5 February 2021.
7 May 2021	OIC served on the Department, a Notice to Produce Information and Documents pursuant to section 116 of the IP Act, requiring a response to OIC's letter dated 5 February 2021.
14 May 2021	OIC received a response from the Department.
19 May 2021	OIC wrote to the Department requesting it to conduct further searches.
17 June 2021	OIC received a request for and provided an extension of time to the Department to respond to OIC's email dated 19 May 2021.
7 July – 12 August 2021	OIC contacted the Department numerous times in relation to its overdue response.
9 September 2021	OIC received a request for an extension of time from the Department to respond to OIC's email dated 19 May 2021.
20 September 2021	OIC provided an extension of time to the Department.
27 September 2021	OIC received a partial response from the Department.
19 October 2021	OIC chased the Department for a response to the outstanding issues in OIC's email dated 19 May 2021 and conveyed a preliminary view in relation to further documents located by the Department.
11 November 2021	OIC contacted the Department in relation to its overdue responses.
13 November 2021	OIC received a response from the Department.

Date	Event
22 November 2021	OIC received confirmation from the Department that it had released further documents to the applicant.
23 November 2021	OIC wrote to the Department about its overdue response to outstanding issues and provided the applicant with an update.
29 November 2021	OIC received an email from the applicant raising further concerns about the sufficiency of the Department's searches.
3 December 2021	OIC wrote to the Department requesting it conduct further searches and respond to a query about some of the information disclosed to the applicant. OIC provided an update to the applicant and also received a call from the Department.
7 December 2021	OIC received an extension request from the Department.
14 December 2021	OIC provided an extension to the Department.
15 February 2022	OIC served on the Department, a Notice to Produce Information and Documents pursuant to section 116 of the IP Act, requiring a response to the outstanding issues in OIC's letter dated 19 May 2021.
1 March 2022	OIC received a response from the Department.
11 April 2022	OIC conveyed a preliminary view to the Department in relation to the further documents located by the Department.
26 April 2022	OIC received a request for and provided an extension of time to the Department to respond to OIC's letter dated 11 April 2022.
12 May 2022	OIC wrote to the Department about its overdue response.
23 May 2022	OIC received a response from the Department.
26 May 2022	OIC received confirmation from the Department that it had disclosed the further documents to the applicant.
2 June 2022	OIC wrote to the applicant addressing the concerns raised by the applicant in the external review. OIC received a call from the applicant.
16 June 2022	OIC received further submissions from the applicant in response to OIC's letter dated 2 June 2022.