



## Decision and Reasons for Decision

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Citation:	<b><i>O35 and Queensland Police Service [2024] QICmr 48 (4 October 2024)</i></b>
Application Number:	<b>318032</b>
Applicant:	<b>O35</b>
Respondent:	<b>Queensland Police Service</b>
Decision Date:	<b>4 October 2024</b>
Catchwords:	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - application to access certain filed police reports - 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</i> (Qld) and sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009</i> (Qld)</b>

## REASONS FOR DECISION

### Summary

1. The applicant applied<sup>1</sup> to the Queensland Police Service (**QPS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) to access a report against a named individual, which the applicant filed at a particular police station on or around 1 September 2018, and any report which the named individual filed against the applicant.
2. QPS located a one page document as relevant to the access application and decided to disclose that document to the applicant, subject to the deletion of another individuals' personal information.<sup>2</sup>
3. The applicant sought internal review.<sup>3</sup> QPS did not make an internal review decision within the statutory timeframe and was therefore taken to have affirmed the original decision.<sup>4</sup>
4. The applicant then applied to the Office of the Information Commissioner (**OIC**) for review of QPS' decision.<sup>5</sup>

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<sup>1</sup> By email to QPS dated 11 March 2024 (**access application**). The access application nominated a 'police link' reference for the requested documents. The access application attached an access application form (dated '03/12/24'), the applicant's 1 September 2018 correspondence addressed to a private entity (to which 'Policelink' was a copied recipient) and a March 2024 email chain between the applicant and the Department of Justice and Attorney-General, concerning a separate access request.

<sup>2</sup> Decision dated 15 April 2024.

<sup>3</sup> By email dated 15 April 2024 (**Internal Review Application**).

<sup>4</sup> Pursuant to section 97(2) of the IP ACT. This was confirmed in QPS' 22 May 2024 letter to the applicant.

<sup>5</sup> By email dated 22 May 2024 (**External Review Application**).

5. During the review, QPS disclosed further information to the applicant, however, the applicant remains dissatisfied with the level of information which has been disclosed.
6. For the reasons set out below, I vary QPS' decision and find that access may be refused to any further documents relevant to the access application on the ground that they are nonexistent.<sup>6</sup>

### Reviewable decision

7. The decision under review is the decision QPS was deemed to have made on internal review, affirming its original 15 April 2024 decision.

### Evidence considered

8. 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). The significant procedural steps taken during this review are set out in the Appendix.
9. Generally, it is necessary that decision makers have regard to the *Human Rights Act 2019* (Qld) (**HR Act**), as section 11(1) of the HR Act provides that all individuals **in Queensland** have human rights. The applicant does not reside in Queensland. However, at times relevant to the information requested in the access application he did reside in Queensland. On the basis of this nexus to Queensland, I have also had regard to the HR Act, particularly the right to seek and receive information.<sup>7</sup> I consider a decision-maker will be '*respecting and acting compatibly with*' these rights and others prescribed in the HR Act, when applying the law prescribed in the IP Act and the RTI Act.<sup>8</sup> I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.<sup>9</sup>

### Issue for determination

10. The IP Act also empowers the Information Commissioner to make any decision in respect of an access application that could have been made by the agency.<sup>10</sup> As such, in making a decision on external review, the Information Commissioner<sup>11</sup> may rely on provisions in the IP Act and RTI Act which are different to those relied upon by the agency in the decision under review.

<sup>6</sup> 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**). Section 67(1) of the IP Act sets out that an agency may refuse access to information in the same way and to the same extent that the agency could refuse access to the document under section 47 of the RTI Act were the document the subject of an access application under the RTI Act.

<sup>7</sup> Section 21(2) of the HR Act.

<sup>8</sup> *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 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 OIC's position).

<sup>9</sup> I also note the following observations made by Bell J in *XYZ* at [573], on the interaction between equivalent pieces of Victorian legislation (namely, the *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)): '*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*'.

<sup>10</sup> Section 118(1)(b) of the IP Act. This provision reflects the merits review process that is conducted on external review.

<sup>11</sup> Or delegate.

11. During the review, I conveyed a preliminary view to the applicant about the information to which QPS had decided to refuse access and invited the applicant to provide a submission if he continued to seek access to that information.<sup>12</sup> In the absence of a response from the applicant, that refused information was excluded from further consideration and it is not addressed in this decision.
12. Although QPS disclosed additional information to the applicant during the review, the applicant maintained that further documents relevant to his application exist and have not been disclosed by QPS.
13. Accordingly, the issue for determination in this review is whether QPS has taken all reasonable steps to locate documents relevant to the access application and whether QPS may therefore refuse access to further relevant documents on the basis they do not exist or cannot be located.

### Relevant law

14. An individual has a right under the IP Act to be given access to documents of an agency, to the extent they contain the individual's personal information.<sup>13</sup> Section 43(2)(b) of the IP Act requires an applicant to give sufficient information concerning the document(s) sought to enable a responsive officer of the agency to locate relevant documents.
15. The IP Act access right is subject to limitations, including the grounds for refusal of access.<sup>14</sup> One refusal ground is where a document is nonexistent or unlocatable.<sup>15</sup>
16. To be satisfied that a document does not exist, the Information Commissioner has previously identified key factors to consider, which include:<sup>16</sup>
  - the administrative arrangements of government
  - the agency's structure
  - the agency's functions and responsibilities<sup>17</sup>
  - 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.

<sup>12</sup> As set out in the Appendix. It is the practice of OIC to convey a preliminary view, based on an assessment of the material before the Information Commissioner or her delegate at that time, to an adversely affected participant. This is to explain the issues under consideration to the participant and affords them the opportunity to put forward any further information they consider relevant to those issues. It also forms part of the Information Commissioner's processes for early resolution of external reviews.

<sup>13</sup> Section 40 of the IP Act. 'Personal information' is defined in section 12 of the IP Act as 'information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'.

<sup>14</sup> The grounds on which access can be refused are set out in section 47 of the RTI Act. As noted above, section 67(1) of the IP Act provides that access may be refused to information in the same way and to the same extent as information may be refused under the RTI Act.

<sup>15</sup> Sections 47(3)(e) and 52(1) 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. 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.

<sup>16</sup> These factors are identified in *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) at [37]-[38] (*PDE*). These factors were more recently considered in *Van Veenendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017) (*Van Veenendaal*) at [23]-[25] and *P17 and Queensland Corrective Services* [2020] QICmr 68 (17 November 2020) at [17]-[19].

<sup>17</sup> Particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it.

17. It may not be necessary for searches to be conducted when proper consideration is given to relevant factors. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.<sup>18</sup> However, searches may be relied on to satisfy the decision-maker that a document does 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.<sup>19</sup> What constitutes reasonable steps will vary from case to case.<sup>20</sup>
18. To determine whether a document exists, but is unlocatable, 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 it.<sup>21</sup> In answering these questions, regard should again be had to the circumstances of the case and the key factors set out above.<sup>22</sup>
19. 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.<sup>23</sup> 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 documents, as opposed to all possible steps.<sup>24</sup>
20. 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.<sup>25</sup> However, where an external review involves the issue of missing documents, as is the case here, the applicant has a practical onus to establish reasonable grounds to believe that the agency has not discharged its obligation to locate all relevant documents. Suspicion and mere assertion will not satisfy this onus.<sup>26</sup>

## Findings

21. As noted in paragraphs 1, 2 and 11 above:

- the applicant applied to QPS to access two specific reports filed with police—that is, a report which he filed against a named individual on or about 1 September 2018 at a particular police station and a report which that named individual had filed with any police station about the applicant; and
- QPS located one document which it considered to be relevant to the access application and decided to disclose that document to the applicant, subject to the

<sup>18</sup> For example, where a particular document was not created because 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.

<sup>19</sup> As set out in *PDE* at [49].

<sup>20</sup> 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.

<sup>21</sup> Section 52(1)(b) of the RTI Act.

<sup>22</sup> *Pryor* at [21].

<sup>23</sup> Section 137(2) of the IP Act. The Queensland Civil and Administrative Tribunal confirmed in *Webb v Information Commissioner* [2021] QCATA 116 at [6] that the equivalent provision in the RTI Act '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. The Information Commissioner also has power under section 115 of the IP Act to require additional searches to be conducted during an external review.

<sup>24</sup> *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].

<sup>25</sup> Section 100(1) of the IP Act.

<sup>26</sup> *Parnell and Queensland Police Service* [2017] QICmr 8 (7 March 2017) at [23]; *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36]; *Y44 and T99 and Office of the Public Guardian* [2019] QICmr 62 (20 December 2019) at [38].

deletion of certain information (which, as noted above, the applicant no longer seeks to access on external review).

22. The terms of an access application set the parameters for an agency's search efforts and therefore are of primary importance where an applicant contends, as is the case in this review, that the agency has not located all relevant documents.<sup>27</sup> An applicant also cannot unilaterally expand the scope of an access application on external review.<sup>28</sup>
23. When seeking internal review of QPS' original decision, the applicant submitted that other reports existed.<sup>29</sup> As the applicant submitted on external review that '*a better search should have occurred*',<sup>30</sup> I asked the applicant to provide further information supporting his position that other reports relevant to his access application exist. In response, the applicant submitted:<sup>31</sup>

*The reports were made in person at a police station and the officer that day took notes and drafted a report. I observed him do this. I recall sending subsequent emails to the police thereafter.*

24. After receiving this submission from the applicant, I asked QPS to conduct further searches for information responsive to the access application.<sup>32</sup> As a result of those further searches:
  - QPS located the one additional document recording the applicant's 1 September 2018 attendance at the police station nominated in the access application—although it was unclear on the face of this additional document whether it recorded a report of the nature requested in the access application, QPS agreed to disclose that document to the applicant; and
  - QPS also agreed to provide administrative access to four additional documents, which did not comprise the two reports requested in the access application.<sup>33</sup>
25. QPS provided details of the searches and inquiries it had conducted.<sup>34</sup> In summary, the received information confirms that:
  - in processing the access application, a search for responsive documents was conducted of QPRIME, which is the database used to capture and maintain information obtained by QPS in its law enforcement functions, using the applicant's name as the search term<sup>35</sup>—these searches located only one document relevant to the access application; and

<sup>27</sup> *Usher and Department of Natural Resources and Mines* [2014] QICmr 51 at [15]. See also *Lonsdale and James Cook University* [2015] QICmr 34 (**Lonsdale**) at [9] and *Van Veenendaal* at [15]. In this regard, I also note the observations of the Information Commissioner in *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 (**Cannon**) at [8], when addressing similar considerations under the predecessor to the RTI Act, the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**), which were cited with approval in *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) at [33] and *Ciric and Queensland Police Service* [2018] QICmr 30 (29 June 2018) at [20].

<sup>28</sup> *8RS6ZB and Metro North Hospital and Health Service* [2015] QICmr 3 (13 February 2015) at [14], citing *Robbins and Brisbane North Regional Health Authority* (1994) 2 QAR 30 at [17]. See also *Lonsdale* at [9].

<sup>29</sup> More specifically, in his Internal Review Application, the applicant submitted: *Also, other reports exist, namely, that were made by me against [named individual]. Where is the report I have made about him?*

<sup>30</sup> External Review Application.

<sup>31</sup> Applicant's email submission dated 12 July 2024.

<sup>32</sup> When doing this, I noted the contents of the applicant's 1 September 2018 email attached to the access application, which had been sent to private entities and was only copied to 'Policelink'.

<sup>33</sup> As those four additional documents—comprising an Activity Log for a particular police station and recordings of general enquiry telephone calls the applicant had made to QPS officers on 30 August 2018 and 1 September 2018—were not responsive to the terms of the access application, they are not addressed in this decision and the Information Commissioner has no jurisdiction to address any concern the applicant may have about the information within any of these documents which has not been disclosed by QPS.

<sup>34</sup> On 11 July 2024 and 12 August 2024.

<sup>35</sup> A QPS decision-maker provided a certification of this completed search.

- on external review, further searches were conducted of QRIME and two other QPS record keeping systems (namely, Evidence.com and ITAS<sup>36</sup>), which located the documents referenced in paragraph 24 above.
26. Having reviewed the applicant's submissions, the search information provided by QPS and the documents located by QPS' searches, I conveyed a preliminary view to the applicant<sup>37</sup> that QPS had conducted appropriately targeted searches of the locations where it was reasonable to expect that the two reports requested in the access application would be stored and, on that basis, access may be refused to any further relevant documents.
27. The applicant did not directly contest my preliminary view—instead, he submitted:<sup>38</sup>
- I wish to proceed further ahead with this matter and adopt and reply [sic] upon all of my initial submissions made initially in this matter.*
28. Having reviewed the terms of the access application and the submissions received from the applicant and QPS, I consider that QPS has conducted appropriately targeted searches of locations where it would be reasonable to expect the reports requested in the access application would be stored within QPS' record keeping systems.
29. Accordingly, I am satisfied that:
- QPS has taken all reasonable steps to locate documents relevant to the access application; and
  - access to any further documents relevant to the access application may be refused on the basis they do not exist.<sup>39</sup>

## DECISION

30. For the reasons set out above, I vary QPS' decision and find that access may be refused to any further documents relevant to the access application on the ground that they are nonexistent.<sup>40</sup>
31. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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**T Lake**  
**Principal Review Officer**

**Date: 4 October 2024**

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<sup>36</sup> Which is a computer application, developed by QPS, integrating resourcing, rostering, tasking and reporting of enforcement activities, including traffic enforcement.

<sup>37</sup> On 19 September 2024.

<sup>38</sup> Applicant's email submission dated 28 September 2024.

<sup>39</sup> Under section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act.

<sup>40</sup> Under section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act.

## APPENDIX

### Significant procedural steps

Date	Event
22 May 2024	OIC received the external review application and the applicant's email submission.
12 June 2024	OIC notified the applicant and QPS that the application for external review had been accepted and requested information from QPS.
11 July 2024	OIC received the requested information from QPS.
12 July 2024	<p>OIC asked the applicant to provide further details supporting his submission that further responsive documents were missing and received the applicant's response.</p> <p>OIC conveyed a preliminary view to the applicant about the information to which QPS refused access and invited the applicant to provide a submission if he wished to contest that view.</p> <p>OIC asked QPS to conduct further searches for information responsive to the access application.</p>
12 August 2024	OIC received QPS' submission concerning its further searches and the additional documents which were located.
20 August 2024	OIC sought clarification from QPS about its disclosure position for the additional documents which had been located.
11 September 2024	OIC received clarification from QPS about its disclosure position.
19 September 2024	OIC conveyed a preliminary view to the applicant about QPS' searches and invited the applicant to provide a submission if he wished to contest that view.
26 September 2024	OIC received QPS' confirmation that the additional document referred to in the first dot point of paragraph 24 had been disclosed to the applicant.
28 September 2024	OIC received the applicant's response that he wished to continue with the review and relied upon his prior submissions.
30 September 2024	OIC wrote to the applicant to confirm that a decision would be issued to finalise the external review.
1 October 2024	OIC received QPS' confirmation that the documents to which QPS had agreed to provide administrative access (as referred to in the second dot point of paragraph 24) had been sent to the applicant.