



Decision and Reasons for Decision

Citation:	<i>M44 and Office of the Health Ombudsman [2025] QICmr 3 (11 February 2025)</i>
Application Number:	317657
Applicant:	M44
Respondent:	Office of the Health Ombudsman
Decision Date:	11 February 2025
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether agency has taken all reasonable steps - whether access to document can be refused on the basis that it is unlocatable - section 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> and sections 47(3)(e) and 52(1)(b) of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied to the Office of the Health Ombudsman (**OHO**) under the *Information Privacy Act 2009 (Qld)* (**IP Act**)¹ for access to documents about himself in the context of a healthcare complaint he made to OHO.
2. OHO located 29 pages responsive to the terms of the application and released 26 full pages to the applicant and refused access to parts of the remaining three pages.²
3. The applicant applied³ to the Office of the Information Commissioner (**OIC**) for review of the OHO's decision on the basis that he considered that OHO had not taken all reasonable steps to locate a specific document in response to the access application.⁴
4. For the reasons set out below, I vary the decision under review and find that all reasonable steps have been taken to locate the document sought by the applicant, however, the document could not be located and, therefore, access to it may be refused pursuant to section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(b) of the *Right to Information Act 2009 (Qld)* (**RTI Act**).⁵

¹ By application dated 6 August 2023 (**access application**) which was emailed to OHO on 7 August 2023.

² Decision dated 4 October 2023.

³ External review application dated 13 November 2023 (**external review application**).

⁴ As a delegate of the Information Commissioner, I decided to allow the applicant a longer period of time to apply for review under section 101(1)(d) of the IP Act and the external review application was accepted.

⁵ Section 67(1) of the IP Act allows an agency or Minister to refuse access to a document in the same way and to the same extent the agency or Minister 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.

Background

5. The applicant contended⁶ that an OHO Officer read out a document which made references to the applicant, ciprofloxacin (a prescription medication) and blurred vision (**subject document**) in a telephone call. The applicant explained that he requested a copy of this document and submitted the OHO Officer advised him to make an access application for the document.
6. The applicant applied to OHO under the IP Act for access to documents.⁷
7. OHO undertook searches of its electronic and hard copy files and located three files responsive to the terms of the access application.⁸ OHO released 214 pages and two audio recordings in full and refused access to parts of eight pages.⁹
8. Following this decision the applicant and OHO corresponded regarding the applicant's sufficiency of search concern that OHO had not located the document he submitted was read to him by an OHO Officer during a telephone call. The applicant requested OHO conduct further searches for this document and was advised to make a new access application, which he did on 7 August 2023. It is OHO's decision on that access application which is the subject of this external review.¹⁰

Reviewable decision

9. The decision under review is OHO's decision dated 4 October 2023.

Evidence considered

10. Significant procedural steps taken during the external review are set out in the Appendix.
11. Evidence, submissions,¹¹ legislation and other material that I have considered in reaching this decision are set out in these reasons (including footnotes and the Appendix).
12. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**),¹² particularly the right to seek and receive information.¹³ I consider that, in observing and applying the law prescribed in the IP Act and RTI Act, a decision-maker will be '*respecting, and acting compatibly with*' that right and others prescribed in the HR Act.¹⁴ 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:¹⁵ '*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*'.¹⁶

⁶ As set out in an email to OHO on 28 July 2023, following receipt of a notice of decision dated 24 July 2023, and in the applicant's external review application. In the course of discussions with the applicant during the review and in his written submission, the applicant advised the telephone conversation occurred on or around 16 May 2023 later confirming it was 17 May 2023.

⁷ Access application dated 24 May 2023.

⁸ OHO references for these files are 202106064, 202300505 and 202300505-RA1.

⁹ Decision dated 24 July 2023.

¹⁰ Decision dated 4 October 2023.

¹¹ Including OHO's submissions dated 30 January 2024, 8 March 2024, 22 August 2024 and 12 September 2024, and the applicant's submissions contained in his external review application, as well as in emails dated 8 March 2024, 29 July 2024, 6 August 2024, 15 October 2024 and 15 December 2024.

¹² Relevant provisions of which commenced on 1 January 2020.

¹³ Section 21(2) of the HR Act.

¹⁴ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; and *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

¹⁵ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁶ *XYZ* at [573].

Issue for determination

13. The issue for determination in this review is whether OHO has taken all reasonable steps to locate the subject document and if access to this document can be refused on the basis it does not exist or cannot be located.

Relevant law

14. Under the IP Act an individual is entitled to access their personal information held by government.¹⁷ This right of access is not absolute but subject to the provisions of the IP Act and RTI Act,¹⁸ including grounds for refusing access.¹⁹ Relevantly, an agency may refuse access if the requested documents are unlocatable.²⁰
15. To determine that a document is unlocatable, the legislation 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, if so, whether the agency has taken all reasonable steps to find the document.²¹ In answering these questions, regard should be had to the circumstances of the case and the relevant key factors²² including the administrative arrangements of government; the agency structure; the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it); the agency's practices and procedures (including but not exclusive to its information management approach); and other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates. What constitutes 'all reasonable steps' will vary from case to case and is dependent on the circumstances²³ and is a different test to all possible steps.²⁴
16. OIC's functions on external review include investigating and reviewing whether an agency has taken all reasonable steps to locate documents applied for by applicants.²⁵

OHO's searches

17. OHO provided evidence that it conducted searches of:
 - a. its electronic databases – Resolve, Content Manager and NAS drive
 - b. email accounts of various staff including all folders of the relevant OHO Officer's email account – including inbox, sent items, deleted items and archived items.
 - c. Teams messages; and
 - d. S: drive and desktop folders for any documents about the applicant not already uploaded to Content Manager.
18. The relevant OHO Officer also searched his records of telephone calls with the applicant.

¹⁷ Section 40 of the IP Act.

¹⁸ Section 40(1)(a) of the IP Act provides that '[s]ubject to this Act, an individual has a right to be given access under this Act to documents of an agency to the extent they contain the individual's personal information' (emphasis added).

¹⁹ Section 67(1) of the IP Act allows an agency or Minister to refuse access to a document in the same way and to the same extent the agency or Minister 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.

²⁰ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(b) of the RTI Act.

²¹ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [20]-[21] (**Pryor**) which adopted the Information Commissioner's findings in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (**PDE**).

²² *Pryor* at [19] and [21]. See also *P17 and Queensland Corrective Services* [2020] QICmr 68 (17 November 2020).

²³ *Webb v Information Commissioner* [2021] QCATA 116 at [5] per McGill J (**Webb**).

²⁴ *P52 and Fraser Coast Regional Council* [2024] QICmr 7 (19 February 2024) at [24]; *S55 and Queensland Police Service* [2023] QICmr 3 (30 January 2023) at [23].

²⁵ The external review functions are set out in section 137 of the IP Act.

19. OHO advised it is normal practice that inbound calls received at initial intake are recorded via the telephone platform, Genesys. The calls received through Genesys are then stored in the platform. Following the call, the call is retrieved and saved onto the relevant Resolve file – Resolve is OHO’s electronic document storage database.²⁶
20. OHO submitted that the majority of telephone calls received at intake also have a written record of the call saved in Resolve, which comprises the OHO Officer’s notes regarding the call. OHO also submitted that telephone calls which do not go through Genesys are not recorded although Officers should record the telephone call by way of a file note on the Resolve file.
21. The OHO Officer submitted that a call had been transferred to him from the applicant on 17 May 2023.²⁷ The OHO Officer explained in this telephone call that he would call the applicant later that day so they could speak further, which he did – this is the telephone conversation relevant to the subject document.
22. The OHO Officer confirmed there are no notes of this conversation in Resolve and submitted his usual practice would be to either document a conversation in his diary or when possible, place the call record straight in to Resolve. The OHO Officer went on to submit that as there were no records in Resolve of the telephone call he made to the applicant on 17 May 2023 he could only assume that the conversation was documented in his 2023 diary, however, he was unable to locate this.
23. Despite being unable to locate any record of the telephone call, the OHO Officer submitted that the document that he may have read to the applicant was a QAS report (and associated documents). The OHO Officer submitted that this document would have been the only document which he read out to the applicant.

Applicant’s submissions

24. The applicant submitted²⁸ that the subject document existed and should have been located by OHO in his original and subsequent access applications. He considered it reasonable to expect the document would have been uploaded to the servers and should have been identified and released to him in response to his access applications to OHO.²⁹
25. During the review, OIC conveyed to the applicant OHO’s submission that the subject document (that is, the document read out in the telephone call) was the QAS report. The applicant responded that he had reviewed the QAS report and this was not the subject document as it did not refer to ciprofloxacin and blurred vision, which he recalled were read out by the OHO Officer.³⁰

Findings

26. It is not in dispute that there was a telephone call on 17 May 2023. The issue in dispute is the whereabouts of the document that was read out to the applicant. OHO’s equivocal submission was that it *may* have been the QAS Report, however, the applicant was firmly of the belief that it was not this document. To further consider this issue, OIC requested OHO provide any records of the call, however, OHO advised that none were located.

²⁶ OHO submission dated 8 March 2024.

²⁷ As evidenced by a recording of this telephone call.

²⁸ External review application.

²⁹ External review application.

³⁰ Applicant’s submission dated 29 July 2024.

27. Having considered the applicant's submissions³¹ and OHO's submissions,³² I consider, on the balance of probabilities, that the subject document existed. I am equally satisfied that OHO has taken reasonable steps to locate the subject document, but it cannot be found. In reaching this conclusion, I have taken into account the locations that were searched, the enquiries undertaken by OHO and the information of the relevant OHO Officer who had the telephone call with the applicant.
28. Based on the information before me, it appears that enquiries were made with relevant officers and these officers were asked to search appropriate locations — that is, where relevant documents were expected to be located based on OHO's record keeping practices and those of the relevant officer. Having reviewed the search records, submissions from OHO and documents released to the applicant, I consider OHO has undertaken thorough and targeted searches of all appropriate locations where the subject document would reasonably be expected to be located and, therefore, all reasonable lines of enquiry have been exhausted.
29. In these circumstances, I consider OHO has taken all reasonable steps to locate the subject document but it could not be found and, therefore, access to it may be refused under sections 47(3)(e) and 52(1)(b) of the RTI Act.
30. Finally, I note that the applicant raised concerns about the conduct of OHO Officers in processing his access applications. In this regard, I find that, while there appears to have been a lapse in the OHO record keeping process in this instance, I am satisfied on the information before me that the information provided by OHO about the searches undertaken to locate the document, in the course of this review, is credible, and is not false or misleading for the purpose of section 186 of the IP Act.³³

DECISION

31. I vary the decision under review and find that all reasonable steps have been taken to locate the subject document, however, it could not be located and, therefore, access to the subject document may be refused pursuant to section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(b) of the RTI Act.
32. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

V Corby
Assistant Information Commissioner

Date: 11 February 2025

³¹ Contained in his external review application, as well as in emails dated 8 March 2024, 29 July 2024, 6 August 2024, 15 October 2024 and 15 December 2024.

³² Dated 30 January 2024, 8 March 2024, 22 August 2024 and 12 September 2024.

³³ Sections 184 and 186 of the IP Act.

APPENDIX**Significant procedural steps**

Date	Event
13 November 2023	OIC received the external review application.
14 November 2023	OIC requested procedural documents from OHO.
20 November 2023	OIC received the requested procedural documents from OHO.
30 January 2024	OIC notified the applicant and OHO that the application for external review had been accepted and requested information from OHO. OIC received some information from OHO.
23 February 2024	OIC requested further information from OHO about the searches undertaken.
8 March 2024	OIC received the requested information from OHO. OIC received submissions from the applicant.
12 July 2024	OIC conveyed a preliminary view to the applicant.
29 July 2024	OIC received the applicant's submission contesting the preliminary view.
6 August 2024	OIC received further submissions from the applicant.
22 August 2024	OIC requested further information from OHO. OHO clarified some search information provided to OIC.
12 September 2024	OIC received requested information from the OHO.
27 September 2024	OIC conveyed a second preliminary view to the applicant.
15 October 2024	OIC received the applicant's submission contesting the second preliminary view.
15 December 2024	OIC received further submissions from the applicant.