



Decision and Reasons for Decision

Citation:	<i>Heath and Office of the Health Ombudsman [2016] QICmr 5 (4 February 2016)</i>
Application Number:	312530
Applicant:	Heath
Respondent:	Office of the Health Ombudsman
Decision Date:	4 February 2016
Catchwords:	ADMINISTRATIVE LAW – INFORMATION PRIVACY – REFUSAL OF ACCESS – NONEXISTENT DOCUMENTS – applicant seeks access to an agreement between the former Health Quality and Complaints Commission and a dentist – whether there are reasonable grounds to be satisfied the agreement does not exist – section 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> – sections 47(3)(e) and 52(1)(a) of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied to the Office of Health Ombudsman (**OHO**) under the *Information Privacy Act 2009 (Qld)* (**IP Act**) for access to an agreement he believes was made between the former Health Quality and Complaints Commission (**HQCC**) and a dentist relating to the applicant's dental work (**Agreement**).
2. OHO searched for the Agreement but was unable to locate it. OHO refused access to the Agreement under sections 67(1) of the IP Act and sections 47(3)(e) and 52 of the *Right to Information Act 2009 (Qld)* (**RTI Act**) on the basis that it was nonexistent or unlocatable.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of OHO's decision.
4. For the reasons addressed below, I affirm OHO's decision and find that access to the Agreement can be refused under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act as it is nonexistent.

Background

5. Significant procedural steps are set out in the appendix to these reasons.

Reviewable decision

6. The decision under review is OHO's decision dated 17 July 2015.

Evidence considered

7. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).

Issue for determination

8. The issue for determination on external review is whether OHO was entitled to refuse access to the Agreement on the basis that it is nonexistent or unlocatable.

Relevant law

9. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent the documents contain the individual's personal information. However, this right is subject to limitations, including grounds for refusal of access.¹ Access to a document may be refused if the document is nonexistent.²
10. A document is nonexistent if there are reasonable grounds for the decision-maker to be satisfied that the document does not exist.³ 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.⁴
11. 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.

Findings

12. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate the requested documents.⁵ Generally, the agency that made the decision under review must establish that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.⁶ However, where an external review involves the issue of missing documents, the applicant bears responsibility for providing reasonable grounds on which to support a belief that the agency has not discharged its obligation to locate all relevant documents.⁷

¹ 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.

² Sections 47(3)(e) and 52(1)(a) of the RTI Act.

³ Section 52(1)(a) of the RTI Act.

⁴ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at paragraph 19 which adopted the Information Commissioner's comments in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009). The key factors include: 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.

⁵ Section 137(2) of the IP Act.

⁶ Section 100(1) of the IP Act.

⁷ *Mewburn and Department of Local Government, Community Recovery and Resilience* [2014] QICmr 43 (31 October 2014) at paragraph 13.

13. The applicant submits that the dentist made an agreement with HQCC sometime after 25 May 2012 and that both the dentist and HQCC have confirmed the existence of an agreement to him.⁸ The applicant's remaining submissions explain his reasons for seeking access to the Agreement, the history of his dental treatment, interactions with the relevant dentist and his personal circumstances and are irrelevant to the issue for determination. Having carefully considered all of the information the applicant has provided to OIC, I am not satisfied that the applicant's submissions provide any evidence which points to the existence of the Agreement or supports a reasonable belief that the Agreement exists.
14. In processing the applicant's request, OHO undertook searches of the electronic and hardcopy files which were transferred from HQCC.⁹ These searches did not locate the Agreement.
15. On external review, OHO advised OIC that:¹⁰
 - it had seven files relating to the applicant's contact with OHO or HQCC
 - three of these files related to the applicant's dental work
 - its Records Officer searched the contents of each of the seven files and there was no record of any agreement between HQCC and the dentist in any of these files
 - an agreement would only exist as a result of a conciliation process; and
 - there was no conciliation process in relation to the applicant's dental work as the applicant did not wish to lodge a formal complaint.
16. OHO provided OIC with a copy of the three files relating to the applicant's dental work and I carefully considered the contents of each of these files. Only one file relates to the particular dentist identified in the access application. This file contains four pages.¹¹ This information confirms OHO's submission that the applicant contacted HQCC about the dentist but did not wish to make a formal complaint. There is no reference in this file, or the other two files relating to the applicant's dental work, to the Agreement.
17. As the applicant did not make a formal complaint about the dentist, I consider there would not have been an investigation or conciliation process which would have resulted in the creation of an agreement. In the circumstances, I consider that OHO has taken all reasonable steps to locate the Agreement and, if the Agreement did exist, the searches performed would have located it. Furthermore, and as noted above, I am not satisfied that the applicant's submissions provide any evidence which points to the existence of the Agreement or supports a reasonable belief that the Agreement exists.
18. For these reasons, I consider there are reasonable grounds to be satisfied that the Agreement does not exist and that OHO has taken all reasonable steps to locate the Agreement.

DECISION

19. For these reasons, I affirm OHO's decision and am satisfied that OHO was entitled to refuse access to the Agreement under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act on the basis that it is nonexistent.

⁸ Emails to OIC on 19 September 2015 and 22 September 2015.

⁹ OHO's decision dated 17 July 2015.

¹⁰ In telephone conversation with OIC staff on 13 August 2015.

¹¹ OHO provided the applicant with a copy of these four pages to assist in the progress of the external review. However, these pages are not relevant to the scope of the access application.

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

Tara Mainwaring
A/Assistant Information Commissioner

Date: 4 February 2016

APPENDIX

Significant procedural steps

Date	Event
2 July 2015	OHO received the access application.
17 July 2015	OHO issued its decision to the applicant.
21 July 2015	OIC received the external review application from the applicant.
23 July 2015	OIC notified OHO and the applicant that the external review application had been received. OIC asked OHO to provide relevant procedural documents by 28 July 2015. OIC received the requested documents from OHO. OIC received submissions from the applicant by email and phone.
24 July 2015	OIC received submissions from the applicant by email.
29 July 2015	OIC asked OHO to provide a copy of the file relating to the dentist by 5 August 2015.
7 August 2015	OIC received the requested documents from OHO.
13 August 2015	OIC requested further information from OHO about its search process. OIC received submissions from OHO by phone.
14 August 2015	OIC received submissions from the applicant by phone. OIC wrote to the applicant requesting he provide further information supporting his case by 21 August 2015. The applicant requested an extension of time to provide the requested information.
17 August 2015	OIC notified the applicant and OHO that the external review application had been accepted. OIC granted the applicant an extension of time to provide his submissions until 18 September 2015.
16 September 2015	OIC received submissions from the applicant by phone.
18 September 2015	OIC received submissions from the applicant by email.
19 September 2015	OIC received submissions from the applicant by email.
21 September 2015	OIC received submissions from the applicant by phone.
22 September 2015	OIC received submissions from the applicant by email.
20 October 2015	OIC requested that OHO provide further information by 28 October 2015.
27 October 2015	OIC received the requested information from OHO. OHO agreed to release four pages to the applicant to assist in the progress of the review although these pages were not relevant to the scope of the access application.
5 November 2015	OIC conveyed its preliminary view to the applicant and invited him to provide submissions supporting his case by 20 November 2015 if he did not accept the preliminary view. OIC asked OHO to provide the applicant with the four pages it had agreed to release by 12 November 2015.
7 November 2015	OIC received submissions from the applicant by email.
11 November 2015	OHO notified OIC that it had released the four pages to the applicant.
16 November 2015	OIC wrote to the applicant confirming the preliminary view and inviting him to provide any further and final submissions supporting his case by 24 November 2015.
20 November 2015	OIC received submissions from the applicant by email.
15 December 2015	OIC received submissions from the applicant by email.