

Decision and Reasons for Decision

Citation: U68 and The Public Trustee of Queensland [2025] QICmr 18

(2 April 2025)

Application Number: 317669

Applicant: U68

Respondent: The Public Trustee of Queensland

Decision Date: 2 April 2025

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION -

REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - request made by an eligible family member for information about management and administration of financial affairs and estate of a late relative - applicant submits file notes and medical reports should exist - whether agency has taken all reasonable steps to locate requested documents - whether access to further documents may be refused on the basis the documents are nonexistent or unlocatable - sections 47(3)(e) and 52(1) of

the Right to Information Act 2009 (Qld)

REASONS FOR DECISION

Summary

- 1. The applicant applied¹ to the Public Trustee of Queensland (**Public Trustee**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents regarding the Public Trustee's involvement in managing the financial affairs, and estate of, her late uncle.
- 2. After agreement to narrow the scope², searches conducted by the Public Trustee located 842 pages and the Public Trustee³ decided⁴ to release those pages to the applicant in their entirety, subject to the deletion of small portions of information in five pages.⁵

¹ Access application dated 21 July 2023.

² See paragraph 19 of these reasons.

³ The Public Trustee delegated power under section 30 of the RTI Act to the Director-General of the then Department of Justice and Attorney-General (**Department**) to deal with applications made under the RTI Act for access to documents in the Public Trustee's possession or control. On 1 November 2024, the Department became the Department of Justice following machinery of government changes. In these reasons, I refer to the Public Trustee as the respondent agency, including when referencing the steps taken by the Department on behalf of the Public Trustee.

⁴ Decision dated 24 October 2023.

⁵ The Public Trustee also identified information in 2 pages as irrelevant to the terms of the access application.

- 3. The applicant applied⁶ to the Office of the Information Commissioner (**OIC**) for external review of the Public Trustee's decision as she was concerned that certain documents had not been located, including a copy of her late uncle's 1965 Will.⁷
- 4. During the review, the Public Trustee undertook further searches and released additional documents to the applicant, including a copy of the 1965 Will. However, the applicant maintained that the Public Trustee should have located more documents, specifically, 'file notes pertaining to the year 1996' and 'a contemporaneous medical report from 1996 ... as part of the [Public Trustee's] duty of care requirements to [her] uncle upon making a new Will'8 and provided further submissions to explain the basis for her belief that further scrutiny of the Public Trustee's searches and records was warranted.
- 5. For the reasons set out below, I find that the Public Trustee has taken all reasonable steps to identify and locate documents responding to the access application and access to further documents may be refused on the basis they do not exist.⁹

Background

- 6. The applicant had originally requested access to the complete client file for the her late uncle from 1980 to the date of the access application (a period of more than 40 years), including documents filed in the Supreme Court in 1980 to enable the Public Trustee to take control of his finances, documents used or created by the Public Trustee to assess whether he met the requirements of needing financial administration, correspondence with various health practitioners, copies of Wills and documents regarding how they were obtained or created, expenses charged by the Public Trustee to her late uncle and his estate, and correspondence with other agencies regarding her late uncle.
- 7. Following receipt of the application, and in accordance with the RTI Act, the Public Trustee notified¹⁰ the applicant that it considered dealing with the application would substantially and unreasonably divert its resources, and invited the applicant to consider narrowing the scope of her request. The applicant agreed¹¹ to significantly narrow the scope of her request.¹²
- 8. The applicant explained to OIC¹³ that the Public Trustee had been appointed to provide financial guardianship services to her late uncle from 1980 until his death in 2021. In 1996, the Public Trustee facilitated the drafting of a new Will for the applicant's uncle, superseding a previous Will made in 1965 before he became a 'protected person' under the Public Trustee Act 1978 (Qld). The 1996 Will named the Public Trustee as the executor of her late uncle's estate and the Public Trustee continues to administer the estate.¹⁴

Reviewable decision and evidence considered

- 9. The decision under review is the Public Trustee's decision dated 24 October 2023.
- 10. Significant procedural steps relevant to the external review process are set out in the Appendix.

⁶ External review application dated 20 November 2023.

⁷ The applicant did not seek review of the refused information in 5 pages nor the irrelevant information in 2 pages.

⁸ Submission dated 4 April 2024.

⁹ Sections 47(3)(e) and 52(1) of the Right to Information Act 2009 (Qld) (RTI Act).

¹⁰ Letter dated 3 August 2023.

¹¹ By email dated 7 August 2023.

¹² The narrowed scope is set out below at paragraph 19 of these reasons.

¹³ Submissions to OIC dated 20 November 2023, 4 April 2024, and 17 June 2024.

¹⁴ This chronology of events has been established from OIC's analysis of the released documents and the applicant's submissions.

11. Evidence, submissions, legislation and other material I have considered in reaching this decision are included in these reasons (including the Appendix). I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information. 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 RTI Act and in doing so, I have acted in accordance with section 58(1) of the HR Act.

Issue for determination

- 12. The applicant originally requested access to a broad scope of information, 18 however, for the purpose of this decision, the missing documents which remain the subject of her concerns are:
 - a. File notes created by the Public Trustee in 1996 pertaining to the creation of a new Will by the Public Trustee for her late uncle; and
 - b. Medical reports obtained by the Public Trustee in 1996 proximate to creation of her late uncle's new Will.
- 13. The issue for determination is whether the Public Trustee has taken all reasonable steps to locate the documents requested by the applicant, specifically those described in the preceding paragraph and whether accordingly, access may be refused on the basis they are nonexistent or unlocatable.¹⁹

Relevant law

- 14. The RTI Act provides an individual with a general right to access documents held by a Queensland government agency, subject to certain limitations, including grounds for refusing access.²⁰
- 15. Relevantly, access to a document may be refused if the document is nonexistent or unlocatable—a document will be *nonexistent* if there are reasonable grounds to be satisfied it does not exist²¹ and 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.²²
- 16. To be satisfied that a document does not exist, the Information Commissioner has previously identified key factors to consider, which include:²³
 - · the administrative arrangements of government
 - the agency's structure

¹⁶ 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].

¹⁵ Section 21 of the HR Act.

¹⁷ XYZ at [573]. OIC's approach to the HR Act set out in this paragraph has recently been considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (noting that Judicial Member McGill saw *'no reason to differ'* from our position).

¹⁸ As set out in paragraph 19 below.

¹⁹ Section 47(3)(e) and 52(1)(a) and (b) of the RTI Act.

²⁰ Section 23 of the RTI Act. Section 47 sets out the grounds on which access to information may be refused.

²¹ Section 52(1)(a) of the RTI Act.

²² Section 52(1)(b) of the RTI Act. 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.

²³ 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].

- the agency's functions and responsibilities²⁴
- 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.
- 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. 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. The documents are relied on to justify a decision that the documents are relied on to justify a decision that the documents do not exist, all reasonable steps will vary from case to case.
- 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.²⁸ 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.²⁹

Findings

Scope of application

- 19. It is well accepted that the scope of an application sets the parameters for an agency's searches.³⁰ In assessing the reasonableness of searches, it is relevant to set out the narrowed scope that was processed by the Public Trustee:
 - 1. All documentation within [my uncle's] client file for the years 1980 and 1996, including:
 - a. Correspondence received
 - b. Correspondence sent out
 - c. File notes
 - 2. Documentation received, used and created by the Public Trustee in 1980 to assess [my uncle] as fulfilling the requirements of needing financial administration.
 - 3. A copy of the 'RBH Report' listed and attached to the Treating Doctor's Report (TDR) submitted to Centrelink in the year 2000 by the Public Trustee. This Treating Doctor's Report was signed by [my uncle] on [a specified date]. In Part C (Certification) of the TDR, it refers to the 'RBH Report'. I am seeking a copy of this 'RBH Report'.
- 20. In response to the above narrowed scope the Public Trustee located the following types of documents:³¹

²⁴ Particularly with respect to the legislation for which it has administrative responsibility and other legal obligations that fall to it.

²⁵ 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.

²⁶ As set out in *PDE* at [49].

²⁷ 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.

²⁸ 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.

²⁹ S55 and Queensland Police Service [2023] QICmr 3 (30 January 2023) at [23], cited with approval in W55 and Brisbane City Council [202] QICmr 13 (17 April 2024) at [19].

³⁰ Van Veenendaal at [15].

³¹ 842 pages.

- a. statements and correspondence with financial institutions regarding bank accounts and debentures
- b. statements, dividends and file notes regarding management of shares
- c. correspondence regarding an application for a partial disability pension
- d. invoices and correspondence regarding costs associated with care arrangements
- e. income tax statements and assessment notices
- f. correspondence regarding obtaining a copy of the 1965 Will; and
- g. various medical opinions and file notes relating to contact with health practitioners.

Applicant's submissions

- 21. In seeking an external review, the applicant originally raised concerns with OIC that the following documents had not been located:³²
 - a. the original or certified copy of her late uncle's 1965 Will
 - b. documents from 1980, such as the certificate of disability filed in the Supreme
 - c. documents showing how her late uncle came under the financial administration of the Public Trustee
 - d. medical opinions relating to her late uncle's capacity; and
 - e. documents from 1996, such as any information to explain how the Public Trustee came to be at her late uncle's nursing home in 1996 creating a Will for him.
- 22. The applicant explained³³ that while she did amend her original application³⁴ to make it less voluminous, she 'outlined that 1980 and 1996 were two significant years' and intended for 'all documentation pertaining to [her uncle] for those two specific years' to be searched.
- 23. After receiving further documents from the Public Trustee during the review³⁵ and information about the searches conducted, the applicant pointed to the 'absence of file notes pertaining to the year 1996' submitting as follows:

File notes are documents logging the interactions and decisions made by the [Public Trustee] relating to a customer. Examples of file notes, relating to different (earlier) years, can be found in file 2 ... This demonstrates that the keeping of file notes is indeed an administrative practice that the [Public Trustee] does. Moreover, the legal fiduciary nature of the [Public Trustee]'s relationship with "protected persons" like my uncle ... means they are expected to log and keep accurate records of such interactions and decisions.

...

It is standard practice for [Public Trustee] staff to keep accurate records of client interactions. This practice and administrative process has been going on since [my uncle] first came under financial guardianship in 1980, as evidenced by the many handwritten client file notes I received in my RTI documentation pertaining to earlier years ... It seems odd, especially since technology would improve record keeping, that I have received no handwritten or digital client file notes in relation to 1996, especially concerning the significant event of the [Public Trustee] creating a new Will for my uncle ... in early September 1996.

24. The applicant expressed concern that she had 'only been provided with a one page document relating to how a new Will came to be created in 1996 by the [Public Trustee] for [her uncle]. It is entitled "Request for outside Wills/EPOA service", which is also extremely sparse in information ...This seems grossly insufficient.'36

³² Application for external review dated 20 November 2023.

³³ Submission to OIC dated 24 January 2025.

³⁴ In August 2023.

³⁵ Including a copy of those listed at items (a) and (b) in paragraph 21.

³⁶ Submission to OIC dated 4 April 2024.

- 25. The applicant submitted that the Public Trustee 'has an equitable responsibility to ethically manage [her uncle's] finances, with accurate and transparent record keeping forming a core component of such trust responsibilities', and as such there should be file notes pertaining to matters such as decision making regarding management of her uncle's share portfolio, management of a perceived or actual conflict of interest when the Public Trustee also became her uncle's new executor in the 1996 Will, and the making of the 1996 Will in light of her uncle's capacity.³⁷
- 26. In addition to file notes from 1996, the applicant considered that it was reasonable to expect the Public Trustee would have in its possession medical report(s) assessing her late uncle's capacity at the time his new Will was made in 1996.³⁸
- 27. The applicant also pointed to different customer reference numbers which appeared throughout the released documents to support her submission that insufficient searches had been undertaken:³⁹

This suggests that different customer codes/ID/reference numbers were used for my uncle to identify him and to potentially link files. I would therefore like clarification as to whether all of these combinations have been used to search for the requested documents within my RTI application, especially as I see an overlap of identifiers relating to the year 1996.

28. The applicant generally raised concerns that the Public Trustee had not fulfilled its record keeping responsibilities, submitting that the community holds a 'reasonable expectation that a public office be held open to accountability for its actions by way of transparency, especially a public office that deals with vulnerable people. 40 Given this, the applicant has requested an explanation from the Public Trustee as to why it cannot locate the file notes and medical reports sought, including explicitly stating whether they are nonexistent or unlocatable.41

Public Trustee's searches and submissions

- 29. The Public Trustee provided OIC with copies of communications between officers of the Public Trustee and departmental officers involved in processing the RTI application, including search records describing the searches undertaken and certifications signed by the Public Trustee officers who undertook those searches. 42 Those communications reveal that the Public Trustee officers spent eight hours conducting searches and retrieving files from Queensland State Archives. The Public Trustee's search records showed that search terms used in searching electronic records included the name and customer ID of the applicant's uncle. As stated at paragraph 20 above, those searches by the Public Trustee located 842 pages regarding the management and administration of the applicant's late uncle's financial affairs and his estate.
- 30. Further targeted searches conducted by the Public Trustee during the external review resulted in location and release of the below additional documents:⁴⁴

 $^{\rm 40}$ Submissions dated 4 April 2024 and 17 June 2024.

³⁷ Submissions to OIC dated 17 June 2024.

³⁸ Submission to OIC dated 4 April 2024.

³⁹ Ibid.

⁴¹ Submission to OIC dated 13 March 2025.

⁴² Provided to OIC on 11 January 2024.

⁴³ Hard copy files, local storage devices, computer drives, relevant databases (CIMS, Affinity, Content Manager), Microsoft Outlook and Teams, batched files (By email dated 19 November 2024, the Public Trustee explained that 'batched files' 'refer to a register of Protective Management files which have multiple batches.')

⁴⁴ Documents at i) to iii) released to the applicant on 18 March 2024, documents at iv) and v) released to the applicant on 13 December 2024 and documents at vi) released to the applicant on 28 February 2025

- i) a copy of the 1965 Will
- ii) a copy of the 'certificate of disability'
- iii) a form titled 'request for outside will/EPA service'
- iv) a form tilted 'particulars concerning an incapacitated person and his or her estate'
- v) a request to file in the Supreme Court the 'certificate of disability', including a copy of the 'certificate of disability'
- vi) the contents of the 'Will packet', comprising:
 - a copy of the Will packet
 - a copy of the 1996 Will
 - various forms titled: 'checklist for identification of will clients', 'request for outside will/EPA service', 'instructions for will', and 'Outside will annexure sheet to instructions for will'.
- 31. The Public Trustee submitted to OIC that:45
 - documents showing how the applicant's uncle came under the financial administration of the Public Trustee had been located and released to the applicant; and
 - the Public Trustee's file for 1980, the whole of which was considered in the Public Trustee's decision, does include some documents that respond to the applicant's request for medical opinions relating to the applicant's uncle's capacity.
- 32. In response to the applicant's specific concerns about file notes, medical reports and reference numbers, the Public Trustee submitted 'the items detailed have been reviewed and it has been confirmed that [the Public Trustee] does not hold the documents requested, particularly the year 1996'.46 Further, the Public Trustee submitted:
 - in relation to the 'RBH Report' referred to in the Treating Doctors Report, 47 'due to being filed together [it] would indicate that [pages 9-10 of File 3] are the report being referred to' and there is no other doctor report on the file; and
 - as to the different client reference numbers used throughout the documents located:

... the different reference numbers are due to the change in computer systems from [the Public Trustee's] old system DMS to the current system CIMS. This made no change to the search of the records as the record continues under the new number with all previous data and physical records ...

Analysis

- 33. The focus of the applicant's submissions during the external review have been the absence of files notes and medical reports pertaining to 1996, particularly in relation to the creation of her late uncle's 1996 Will.
- 34. As set out in paragraph 16, in assessing the reasonableness of searches, it is relevant to consider the age of the requested documents and records and the agency's recordkeeping practices. Accordingly, I have taken into account that the documents the applicant remains particularly interested in, if they were created/obtained by the Public Trustee, would be almost 30 years old. In my view, the passage of time, changes in recordkeeping practices and the implementation of an updated recordkeeping

⁴⁵ Submission from the Public Trustee dated 17 January 2024. The Public Trustee pointed to released documents in support of these submissions including a file note of a conversation with a Community Health Centre regarding concerns that the applicant's uncle could no longer manage his own affairs and that he had requested that the Public Trustee manage his affairs, subsequent correspondence with the Centre and a further file note about the applicant's uncle's circumstances (pages 752-755 of File 2). Also, the Public Trustee pointed to correspondence from a Social Worker to the Public Trustee enclosing a report by the Social Worker and a medical report from the applicant's uncle's treating Neurologist (pages 746-748 of File 2).

⁴⁶ Submission from the Public Trustee dated 30 May 2024.

 $^{^{\}rm 47}$ Located at pages 3-8 of File 3.

system/database by the Public Trustee during the intervening period, are factors which must be taken into account in determining whether the Public Trustee has taken all reasonable steps.

- 35. The original searches conducted by the Public Trustee were, to my mind, targeted to the relevant recordkeeping locations and databases, having regard to the nature of the requested documents in the narrowed scope, and the functions of the Public Trustee relevant to the request. Those searches located over 800 pages of relevant documents. I acknowledge that further searches undertaken by the Public Trustee on external review resulted in the location of additional documents, including the Will packet documents but that these have not resolved all of the applicant's outstanding concerns about missing documents.
- 36. I have examined the specific documents referred to by the Public Trustee at paragraphs 31 and 32 and I consider they lend support to the submissions that medical reports and documents showing how the applicant's late uncle came under the care of the Public Trustee, had already been located. I also consider there is a reasonable basis to conclude, as submitted by the Public Trustee, that the 'RBH Report' referred to in the Treating Doctors Report, is the document that appears at pages 9-10 of File 3.
- 37. I acknowledge that the documents located by the Public Trustee have not met the applicant's expectations. I also recognise that the Public Trustee's involvement in the administration of her late uncle's finances and his estate is of great personal significance to the applicant. The Public Trustee, as a public authority, is required to comply with recordkeeping obligations under the *Public Records Act 2023* (Qld). However, it is not within the jurisdiction of the Information Commissioner to express judgment on whether a government agency *should have* generated *more* documentation on a particular subject matter. Further, OIC's jurisdiction does not extend to investigating the Public Trustee's actions nor any alleged deficiencies in the management of the applicant's late uncle's affairs. The issue I must determine in this review is whether the Public Trustee has taken *reasonable steps* to locate all documents relevant to the scope of the RTI Act application.
- 38. Based on the information available to me, including the scope of the application, the Public Trustee's search records, participants' submissions and the located documents, I am satisfied that, taking into account the historical nature of the documents and changes in recordkeeping practices and systems, the Public Trustee has conducted searches in locations where it would be reasonable to expect documents relevant to the application to be found. While I recognise that it took several rounds of searches by the Public Trustee to locate all relevant documents, and that the contents of the Will packet in particular were not identified until recently, in the circumstances of this case, I find there are no further reasonable searches that the Public Trustee could undertake.
- 39. For the reasons set out in paragraphs 33 to 38 above, I find that the Public Trustee has taken all reasonable steps to locate documents relevant to the scope of the access application and access may therefore, be refused to any further documents on the basis that they are do not exist.⁴⁸

⁴⁸ Section 47(3)(e) and 52(1)(a) of the RTI Act.

DECISION

- 40. I vary the decision under review and find that access to any further documents, including file notes and medical reports, may be refused under sections 47(3)(e) and 52(1)(a) of the RTI Act on the basis that they are nonexistent.
- 41. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Katie Shepherd
Assistant Information Commissioner

Date: 2 April 2025

APPENDIX

Significant procedural steps

Date	Event
20 November 2023	OIC received the external review application.
	OIC requested preliminary documents from the Public Trustee.
24 November 2023	OIC received preliminary documents from the Public Trustee.
14 December 2023	OIC notified the applicant and the Public Trustee that the application for external review had been accepted. OIC requested information from the Public Trustee.
11 January 2024	OIC received information from the Public Trustee.
17 January 2024	OIC received a submission and further located documents from the Public Trustee.
21 February 2024	OIC requested a further search be conducted by the Public Trustee.
5 March 2024	OIC received an additional document from the Public Trustee.
15 March 2024	OIC issued a preliminary view to the applicant. OIC asked the Public Trustee to release additional documents to the applicant.
18 March 2024	The Public Trustee released additional documents to the applicant.
4 April 2024	OIC received a submission from the applicant.
30 April 2024	OIC asked the Public Trustee to respond to the applicant's submissions about missing documents.
30 May 2024	OIC received a submission and records of further searches from the Public Trustee.
3 June 2024	OIC issued a further preliminary view to the applicant.
17 June 2024	OIC received a submission from the applicant.
15 November 2024	OIC contacted the Public Trustee to clarify information about its recordkeeping.
19 November 2024	OIC received a submission from the Public Trustee.
21 November 2024	OIC requested further information and search submissions from the Public Trustee.
4 December 2024	OIC received additional documents and a submission from the Public Trustee.
10 December 2024	OIC issued a further preliminary view to the applicant. OIC asked the Public Trustee to release additional documents to the applicant.
13 December 2024	The Public Trustee confirmed to OIC it had released the additional documents to the applicant.
24 January 2025	OIC received a submission from the applicant.
11 February 2025	OIC conveyed the applicant's submission to the Public Trustee and asked it to conduct further searches.

Date	Event
20 February 2025	OIC received additional pages, including the Will packet, and a further submission from the Public Trustee.
28 February 2025	OIC issued a further preliminary view to the applicant. OIC asked the Public Trustee to release the additional pages to the applicant; the Public Trustee confirmed those documents were released on this date.
13 March 2025	OIC received a further submission from the applicant.