



Decision and Reasons for Decision

Citation:	<i>T12 and Queensland Police Service [2024] QICmr 8 (20 February 2024)</i>
Application Number:	317519
Applicant:	T12
Respondent:	Queensland Police Service
Decision Date:	20 February 2024
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether agency has conducted reasonable searches - whether access to documents may be refused on the basis they are nonexistent - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52(1)(a) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Queensland Police Service (**QPS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to documents concerning certain aspects of her employment by QPS, including diary notes and emails sent or received by named officers that concerned the applicant, and minutes of a particular Absence Management Committee (**AMC**) meeting wherein the applicant was discussed.
2. By decision dated 9 August 2023, QPS refused access to the requested documents 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**) on the grounds that the documents were nonexistent.
3. The applicant applied² to the Office of the Information Commissioner (**OIC**) for external review of QPS's decision.
4. For the reasons set out below, I affirm the decision under review.

Background

¹ Application received 7 June 2023.

² On 21 August 2023.

5. The applicant has made a number of previous applications to QPS seeking access to documents concerning her employment. Those applications have resulted in the release of documents to the applicant. The current application seeks access to information referred to in some of the released documents.

Reviewable decision

6. The decision under review is QPS's decision dated 9 August 2023.

Evidence considered

7. Significant procedural steps relating to the external review are set out in the Appendix.
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). I have taken account of the applicant's submissions to the extent that they are relevant to the issues for determination in this review.³
9. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁴ 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.⁵ 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:⁶ '*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.*'⁷

Issue for determination

10. The issue for determination is whether QPS is entitled to refuse access to the requested documents on the ground that they are nonexistent.

Relevant law

11. Access to a document may be refused if the document is nonexistent or unlocatable.⁸
12. 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, including:⁹
 - the administrative arrangements of government
 - the agency's structure
 - the agency's functions and responsibilities

³ Including the external review application and emails/submissions received on 27 November 2023 and 9 February 2024.

⁴ Section 21 of the HR Act.

⁵ *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].

⁶ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁷ *XYZ* at [573].

⁸ Section 67(1) of the IP Act and sections 47(3)(e) and 52 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. 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.

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

- 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.
13. 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 inquiry process an agency will be required to undertake will depend on the particular circumstances.
14. To determine whether a document exists, but is unlocatable, the RTI Act requires consideration of whether there are reasonable grounds for the agency 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. In answering these questions, regard should again be had to the circumstances of the case and the key factors listed in paragraph 12 above.¹⁰
15. 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.¹¹ 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.¹² 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. Suspicion and mere assertion will not satisfy this onus.

Discussion

16. In its decision, QPS stated that searches for responsive documents had been conducted by the officers named in the access application, and no responsive documents had been located. In respect of the applicant's request for minutes of the relevant AMC meeting, QPS stated that inquiries had been made of QPS's Health, Safety and Wellbeing Division, which advised that minutes are not taken of AMC meetings.
17. In her application for external review, the applicant argued that relevant provisions of QPS's Management Support Manual, as well as the *Police Service Administration Act 1990* (Qld), required records of the kind she had requested to be created and maintained by QPS. The applicant also relied upon information contained in documents to which she had obtained access in response to previous access applications to argue that there was evidence that certain conversations between named officers had taken place, including an entry on one page that related to the applicant and that stated, relevantly, '*... Inspector will discuss with [QPS officer] and will chat on Monday*'. The applicant sought access to documents relating to the '*chat on Monday*'. In addition, the applicant contended that, in relation to a request she had made for a change in her workplace supervisor, it was reasonable to expect that the two officers named in her application would have discussed this issue and made a record of that discussion.

¹⁰ Pryor at [21].

¹¹ Section 137(2) of the IP Act. The Information Commissioner also has power under section 115 to require additional searches to be conducted during an external review.

¹² Section 87(1) of the RTI Act.

18. At the commencement of the external review, OIC wrote to QPS to request a copy of any records of the searches conducted by QPS.¹³
19. After considering the search information provided by QPS in response,¹⁴ OIC wrote to the applicant to explain that information and to express the preliminary view that, on the information presently available, access to the requested documents could be refused on the grounds that they do not exist.¹⁵ OIC advised the applicant that the material provided by QPS indicated that:
 - Formal search requests had been sent to the two officers named in the access application, as well as to QPS's Health, Safety and Wellbeing Division.
 - Each of these persons/entities conducted searches (as relevant) of Outlook accounts, diaries and electronic case file/s and each provided a search declaration to the effect that nil responsive documents had been located that responded to the terms of the access application.
 - As regards the search certification provided by the Health, Safety and Wellbeing Division, the following explanation was provided as to why no responsive documents had been found:

There were no emails in relation to the [applicant's] request re 'the chat'. The 'chat' was in reference to verbal conversations. I do not recall any email correspondence nor could I locate any email correspondence on the case file relevant to 'the chat' the applicant refers too [sic].
20. In relation to the final bullet point above, the applicant indicated that she had made a further access application to QPS seeking access to the file note, and that she therefore did not wish to pursue that issue any further in this review. However, she did not accept OIC's preliminary view in respect of the other matters, and provided a further submission in support of her position.¹⁶
21. In her submission, the applicant argued that, given the time that had passed since the relevant events occurred, as well as the volume of emails that the relevant officers would have sent and received during that period, it was unreasonable to expect that officers would hold all emails solely in their Outlook account, particularly as this would also permit them to delete emails without consequence. The applicant contended that it was therefore reasonable for QPS to conduct searches of its archived/backup email system in an effort to locate any responsive emails.
22. The applicant also argued that, as *'the chat'* did not involve any persons from the Health, Safety and Wellbeing Division, the explanation provided by that Division as to why responsive documents did not exist was irrelevant as no person from that Division could state with certainty that emails were not sent between the two officers who were to be involved in the conversation.

¹³ Letter dated 19 September 2023.

¹⁴ QPS letter dated 9 October 2023.

¹⁵ Letter dated 9 November 2023.

¹⁶ Email of 27 November 2023.

23. OIC again wrote to QPS¹⁷ to advise it of the issues raised by the applicant and to request that it:
- consider exercising its discretion to conduct a search of its backup system in an effort to locate any responsive emails;¹⁸ and
 - raise directly with the two officers who were to be involved in *'the chat'*, whether they had any recollection regarding the conversation, and whether they generated any documents in respect of it.
24. QPS responded on 18 January 2023, advising that:
- inquiries had been made directly with the relevant officers regarding *'the chat'* and neither could specifically recall such a conversation occurring
 - both advised that, as part of their roles, they had a number of conversations on differing occasions covering a range of issues, and that the applicant may have been discussed in their conversations
 - both had already conducted searches for responsive documents and none of the located documents related to this conversation or indicated that a conversation had, in fact, occurred
 - as neither officer recalled having the conversation, it is possible that the conversation did not eventuate – the reference to *'the chat'* in the relevant document indicated only that a possible future conversation might occur
 - if the conversation did occur, its topic was a live/developing issue with minimal details and there was nothing about its nature to indicate that there would have been a reason to record details within an email or contemporaneous record; and
 - QPS declined to exercise its discretion to conduct a search of its backup system because the responses provided by the relevant officers, as well as the results of searches conducted to date, did not provide any indication that the conversation had, in fact, occurred, and a record of it created that would be kept in, and retrievable from, the backup system.
25. Following consideration of this information, OIC again expressed a preliminary view to the applicant that the searches and inquiries conducted by QPS were reasonable in the circumstances and that access to the requested documents could be refused on the basis they did not exist.¹⁹ Again, however, the applicant did not accept this view, arguing that the topic of *'the chat'* was important and therefore it was *'reasonable to believe a record of same would have [been] created.'* The applicant also submitted that, given the time that had elapsed, it was *'impractical'* for QPS to place reliance upon the fact that neither officer could recall a conversation.²⁰

Findings

26. The applicant argues that it is reasonable to expect that responsive documents ought to exist in QPS's possession or under its control because QPS's policies, procedures and relevant legislation required records to be created. However, OIC has no jurisdiction under the IP Act to investigate QPS's record-keeping obligations or procedures and whether or not they have been complied with, or to make findings about whether records ought to have been created. As noted above, where a

¹⁷ Letter dated 28 November 2023.

¹⁸ Searches of backup systems are only mandatory under section 52(2) of the RTI Act. In all other cases, they are not required unless the agency considers the search appropriate (see section 29 of the RTI Act).

¹⁹ Letter dated 23 January 2024.

²⁰ Letter dated 9 February 2024.

sufficiency of search issue is raised on external review, the issues for OIC to determine are:

- whether there are reasonable grounds for believing that responsive documents exist in the agency's power or possession; and, if so,
- whether the searches and inquiries conducted by the agency in an effort to locate responsive documents have been reasonable in all the circumstances.

27. Having considered the submissions and evidence provided by QPS that describe the various searches and inquiries that QPS has conducted in an effort to locate responsive documents, and the results of those searches and inquiries, I am satisfied that they have been reasonable in all the circumstances. I am unable, on the information before me, to identify any other searches or inquiries that I consider it would be reasonable to ask QPS to conduct in an effort to locate copies of responsive documents. Nor am I satisfied that the applicant has discharged the practical onus upon her to establish reasonable grounds to be satisfied that QPS has not discharged its search and inquiry obligations under the IP Act. The applicant has not identified any other avenues of search or inquiry that she contends it would be reasonable to ask QPS to undertake.
28. I am also satisfied that QPS is not required to conduct a search of its backup system under section 52(2) of the RTI Act.
29. I therefore find that access to the requested documents may be refused on the basis that they are nonexistent under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act.

DECISION

30. For the reasons set out above, I affirm the decision under review by finding that access to the requested information may be refused under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act.
31. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

R Moss
Principal Review Officer

Date: 20 February 2024

APPENDIX**Significant procedural steps**

Date	Event
21 August 2023	OIC received the application for external review
6 September 2023	OIC received the preliminary documents from QPS
19 September 2023	OIC advised the parties that the application for external review had been accepted and requested search records from QPS
9 October 2023	OIC received search records from QPS
9 November 2023	OIC expressed a preliminary view to the applicant
27 November 2023	OIC received a submission from the applicant
28 November 2023	OIC requested that QPS conduct further searches and inquiries
18 January 2024	OIC received a response from QPS
23 January 2024	OIC expressed a further preliminary view to the applicant
9 February 2024	OIC received a submission from the applicant