



## Decision and Reasons for Decision

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**Application Number:** 310651

**Applicant:** Ogawa

**Respondent:** Queensland Police Service

**Decision Date:** 17 April 2012

**Catchwords:** **INFORMATION PRIVACY ACT – APPLICATION FOR ACCESS TO INFORMATION – REFUSAL OF ACCESS - NON-EXISTENT DOCUMENTS - applicant contended responsive documents should be in the agency’s possession - whether there are reasonable grounds for agency to be satisfied that further documents do not exist - – whether access to documents can be refused under section 67(1) of *the Information Privacy Act 2009* (Qld) and section 47(3)(e) of the *Right to Information Act 2009* (Qld) on the ground set out in section 52(1)(a) of the *Right to Information Act 2009* (Qld)**

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## REASONS FOR DECISION

### Summary

1. On 20 March 2011, the applicant applied to the Queensland Police Service (**QPS**) for access to *“any information about what I was doing when in QPS’s custody in April 2006 in relation to charges of misuse of telecommunication under the Commonwealth Criminal Code.”*
2. QPS conducted searches but did not locate any responsive documents. QPS decided on 24 May 2011 that there were reasonable grounds to believe that responsive documents did not exist. Accordingly, QPS decided to refuse access pursuant to sections 67(1) of the *Information Privacy Act 2009* (Qld) (**IP Act**) and 47(3)(e) and 52 of the *Right to Information Act 2009* (Qld) (**RTI Act**).
3. During the external review, QPS conducted further searches. It located and agreed to informally release two documents, Custody Index entries and a QPRIME report, to the applicant.<sup>1</sup> The applicant has received those documents.
4. In a related and ongoing external review involving the same applicant<sup>2</sup>, further documents relative to the broader scope of that review<sup>3</sup> were located by QPS. Those documents have been released to the applicant under that separate external review.<sup>4</sup>
5. The applicant does not accept the sufficiency of QPS’s further searches performed at the request of the Office of the Information Commissioner (**OIC**) in relation to this external review<sup>5</sup> and considers that further documents exist. QPS also provided comprehensive submissions<sup>6</sup> explaining its searches.
6. I am satisfied that additional documents sought by the applicant do not exist and QPS may therefore refuse access to them under section 67(1) of the IP Act and section 47(3)(e) of the RTI Act.<sup>7</sup>
7. Significant procedural steps relating to the application and external review are set out in the Appendix.

### Reviewable decision

8. The decision under review is QPS’s decision dated 24 May 2011.

### Evidence considered

9. The evidence, submissions, legislation and other material I have considered in reaching my decision is disclosed in these reasons (including footnotes and Appendix).

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<sup>1</sup> Search submissions of QPS dated 19 July 2011, received by OIC on 22 July 2011.

<sup>2</sup> External Review Number 310759.

<sup>3</sup> The scope of the application under review in External Review Number 310759 is for 1. all entries concerning OGAWA Megumi in the Electronic Log of the City Criminal Investigation Branch of the QPS; 2.all entries concerning OGAWA Megumi in QPRIME; and 3. All records concerning OGAWA Megumi in the archives available at the Police Information Centre of the QPS.

<sup>4</sup> 3 pages of an Occurrence Log for 14 April 2006, with the personal information of third parties deleted was released to the applicant by QPS under cover of its letter to her dated 28 October 2011.

<sup>5</sup> Instigated by the applicant on 31 May 2011.

<sup>6</sup> Dated 19 July 2011.

<sup>7</sup> On the ground set out in section 52(1)(a) of the RTI Act.

## Relevant law

10. Under the IP Act, a person has a right to access documents of an agency<sup>8</sup> subject to other provisions of the IP Act and RTI Act including grounds on which an agency may refuse access to documents. Section 67(1) of the IP Act provides that access to a document may be refused on the same basis upon which access to a document could be refused under section 47 of the RTI Act. Under sections 47(3)(e) and 52 of the RTI Act, access to a document may be refused if the document is nonexistent or unlocatable. A document is nonexistent if there are reasonable grounds for the agency or Minister dealing with the access application to be satisfied that the document does not exist.<sup>9</sup>
11. The RTI Act is silent on how an agency or Minister can be satisfied that a document does not exist. However, principles that apply when refusing access to nonexistent or unlocatable documents were detailed in *PDE and the University of Queensland (PDE)*.<sup>10</sup>
12. The Information Commissioner explained in that decision<sup>11</sup> that, to be satisfied that a document does not exist or is unlocatable, an agency must rely on its particular knowledge and experience, having regard to various key factors including:
  - the administrative arrangements of government
  - the agency's 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 the request relates to.
13. Alternatively, an agency may rely on searches - as QPS did in this case - to satisfy itself that a document does not exist. The Information Commissioner indicated in *PDE* that if an agency does rely on searches to justify a decision that a document does not exist, all reasonable steps must be taken to locate the documents. Enquiries and searches of all relevant locations, having regard to the key factors listed above in paragraph 12 should take place.<sup>12</sup>

## Has QPS taken all reasonable steps to locate the documents?

14. QPS's decision sets out the nature of the searches that it conducted to locate documents responsive to the terms of the applicant's access application prior to issuing the decision:

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<sup>8</sup> Section 40 of the IP Act.

<sup>9</sup> Section 52(1)(a) of the RTI Act.

<sup>10</sup> Unreported, Queensland Information Commissioner, 9 February 2009. Note - Although *PDE* concerned section 28A of the now repealed *Freedom of Information Act 1992* (Qld), the requirements of that section are replicated in section 52 of the RTI Act and therefore the reasoning in *PDE* can be applied in the context of the RTI Act.

<sup>11</sup> *PDE* at paragraph 37.

<sup>12</sup> *PDE* at paragraph 49.

- searches undertaken by the Brisbane City, Criminal Investigation Branch (**CIB**) at which the applicant was detained
  - previous searches undertaken by the investigating/reporting officer in relation to two previous requests; and
  - checks undertaken of the QPS Information Management System.
15. During the course of this review, it became apparent that in making its decision QPS had searched for documents and recordings about a phone call made by the applicant while in police custody in April 2006<sup>13</sup>. Discussions between the applicant and this Office confirmed that she sought any information about her actions while in custody.<sup>14</sup> It was agreed between this Office and QPS<sup>15</sup>, that a wider view of the scope of the access application would encompass more general information about the applicant's time in police custody in April 2006. Accordingly, at the request of this Office, QPS caused further searches to be undertaken:
- it was confirmed by the Brisbane City CIB that no notebook entries or CCTV footage existed in relation to the applicant's arrest in April 2006 after enquiries were conducted with the Detective Senior Constable who was present at the time of the applicant's arrest in April 2006
  - it was confirmed that at the time of the applicant's arrest in April 2006, the QPRIME system was undergoing implementation and that 2006 arrest records may be held in archives; and
  - the archives available at the Police Information Centre (**PIC**) were searched.
16. The searches undertaken by the PIC of the archived Custody Index within the Legacy Data Archive found, through a search using the applicant's name, one record for the applicant's entry into custody in April 2006 (8 pages). Also located was a QPRIME report (6 pages) linked to the offence for which the applicant was arrested in April 2006. The Custody Index entries were released to the applicant informally and in full. The QPRIME report was similarly released but with the name and personal phone number of a federal police officer removed.
17. In a separate and ongoing external review<sup>16</sup>, the applicant sought similar but broader ranging information from QPS.<sup>17</sup> Further searches undertaken by QPS in that review were also carried out within the PIC and QPRIME system and additional documents were released to the applicant.<sup>18</sup> Thus I am satisfied that the further searches undertaken in that related review do not suggest possible locations for further searches in this review.
18. The applicant submits that OIC should investigate QPS's procedure in relation to the creation and retention of records of persons arrested. It is submitted that because this Office has not undertaken an investigation of the records, databases, archives and other like-information storing devices operated by QPS, the OIC cannot make an informed decision on review.<sup>19</sup>

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<sup>13</sup> This view appears to have come about from previous applications made by the applicant in which this information was sought.

<sup>14</sup> Telephone conversation between applicant and OIC officer on 16 June 2011.

<sup>15</sup> Telephone conversation between QPS and OIC 29 June 2011 and OIC letter to QPS 30 June 2011.

<sup>16</sup> See Footnote 2.

<sup>17</sup> See Footnote 3.

<sup>18</sup> See Footnote 4.

<sup>19</sup> Applicant submissions dated 11 August 2011.

19. I reject the submissions made by the applicant. I have no jurisdiction under the RTI Act to undertake an investigation into the operational procedures of an agency and the types of records it makes in the course of those operations. Rather, I must consider the sufficiency of searches undertaken by an agency in the context of the factors identified in *PDE*<sup>20</sup> and satisfy myself from the agency's submissions that all reasonable steps to locate relevant information have been carried out.
20. On careful consideration of the searches that QPS has conducted, set out at paragraphs 14 to 17 above, and all evidence before me, I am satisfied that QPS has used its knowledge of factors such as organisational structure, the functions and responsibilities of its business groups, its internal practices and procedures and the nature and age of the documents sought<sup>21</sup> to appropriately identify all relevant business groups to search and persons with whom to make enquiries. In doing so, I am satisfied that:
- QPS has conducted comprehensive searches for the documents sought by the applicant; and
  - such searches comprise all reasonable steps to locate them.

### Findings

21. Taking into account all of the information set out above, I am satisfied that:
- there are reasonable grounds for QPS to be satisfied that no further documents responding to the applicant's access application exist; and
  - access may be refused on the basis that further documents do not exist.<sup>22</sup>

### DECISION

22. I affirm the decision under review and find that QPS is entitled to refuse access to the documents sought under section 67(1) of the IP Act and section 47(3)(e) of the RTI Act on the ground set out in section 52(1)(a) of the RTI Act.
23. I have made this decision as a delegate of the Information Commissioner, under section 139 of the *Information Privacy Act 2009* (Qld).

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**Acting Assistant Information Commissioner Lynch**

**Date: 17 April 2012**

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<sup>20</sup> See paragraph 12.

<sup>21</sup> As noted at paragraph 37 of *PDE*.

<sup>22</sup> Pursuant to section 47(3)(e) of the RTI Act on the ground set out in section 52(1)(a) of the RTI Act.

**APPENDIX****Significant procedural steps**

<b>Date<sup>23</sup></b>	<b>Event</b>
20 March 2011	QPS received the access application.
24 May 2011	QPS refused the applicant access to documents on the basis of section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act.
30 May 2011	The applicant applied to OIC for external review of the initial decision.
11 June 2011	Telephone conversation between OIC officer and applicant discussing the type of information sought.
16 June 2011	Applicant confirmed to OIC the type of information sought by her.
22 June 2011	OIC notified the applicant that the external review application had been accepted.
23 June 2011	OIC received relevant documents from QPS.
29 June 2011	OIC confirmed with QPS the type of information sought by the applicant.
30 June 2011	OIC notified QPS that the external review application had been accepted and asked QPS to perform further searches.
19 July 2011	OIC received submissions on additional searches undertaken.
22 July 2012	OIC received documents found by QPS as a result of further searches.
28 July 2011	OIC conveyed to the applicant a preliminary view on the sufficiency of search issue and confirmed that QPS had agreed to the release of additional documents to the applicant.
12 August 2011	The applicant advised the OIC that she did not accept the preliminary view and provided submissions.
27 January 2012	OIC conveyed a second preliminary view to the applicant reaffirming the earlier view and noting the information provided to the applicant in this review and related ongoing review number 310759.
27 January 2012	The applicant advised the OIC that she did not accept the second preliminary view and advised that her submissions of 11 August 2011 remained relevant to the second preliminary view.

<sup>23</sup> Of correspondence or relevant communications unless otherwise stated.