

Decision and Reasons for Decision

Citation:	M56 and Queensland Ombudsman [2026] QICmr 130 (28 July 2026)
Application Number:	318879
Applicant:	M56
Respondent:	Queensland Ombudsman
Decision Date:	28 July 2026
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE - whether requested documents are documents of the respondent - whether access may be refused on the grounds that the requested documents are nonexistent - section 12, and sections 47(3)(e) and 52(1)(a) of the <i>Right to Information Act 2009</i> (Qld)

DECISION

1. I affirm¹ the reviewable decision² of the Queensland Ombudsman (**QO**) and am satisfied that access to the requested information may be refused under the *Right to Information Act 2009* (Qld) (**RTI Act**) because it is nonexistent.
2. This means that no further information is to be released to the applicant.
3. My reasons for the decision follow.



Joanne Kummrow
Information Commissioner
Date: 28 July 2026

¹ Under section 110(1)(a) of the *Right to Information Act 2009* (Qld). On 1 July 2025 key parts of the *Information Privacy and Other Legislation Amendment Act 2023* (Qld) (**IPOLA Act**) came into force, affecting changes to the RTI Act and *Information Privacy Act 2009* (Qld) (**IP Act**). As the applicant's application was made before this change, the RTI Act and IP Act **as in force prior to 1 July 2025** remain applicable to it (see section 206K of the IPOLA Act). This is in accordance with transitional provisions in chapter 7, part 9 of the RTI Act and chapter 8, part 3 of the IP Act, which require that applications on foot before 1 July 2025 are to be dealt with as if the IPOLA Act had not been enacted. Accordingly, references to the RTI Act and IP Act in this decision are to those Acts.

² See paragraph 9 below.

REASONS FOR DECISION

Summary

4. The applicant applied³ to QO under the RTI Act for access to documents between 2017 and 16 July 2025 contained within an email account established by the Queensland Building and Construction Commission (**QBCC**) for the purpose of allowing a (named) QO investigator to review QBCC documents in connection with a QO investigation. The applicant also applied for access to certain metadata associated with the email account.
5. QO refused access to the requested documents⁴ on the basis they did not exist.
6. The applicant applied⁵ to the Office of the Information Commissioner (**OIC**) for external review of QO's decision.

Background

7. The applicant made a privacy complaint against QBCC in 2022. As part of that complaint, the applicant alleged that, in 2020, QBCC sent an email about the applicant to the QO investigator named in the applicant's access application and that this amounted to a privacy breach.
8. In the decision on that privacy complaint⁶ made by OIC's then Principal Privacy Officer,⁷ there is a detailed discussion about the conflicting information provided by QBCC and QO regarding the means by which the QO investigator was sent the email, and the email address that was used. After assessing all available evidence, the Principal Privacy Officer stated in their decision that they accepted, '*at face value*', QBCC's assertion that it had set up a QBCC email account for the QO investigator in order to '*assist in an ongoing investigation that the Queensland Ombudsman was conducting in respect of certain matters within the QBCC*'. The Principal Privacy Officer also accepted, '*at face value*', information from QO that searches of its records, including email accounts, had failed to locate a copy of the relevant email contained in any QO email account.
9. The applicant based his access application on the information in the decision on his privacy complaint, and seeks access to all records in the email account set up in 2020 by QBCC for use by the QO investigator.

Reviewable decision

10. The decision under review is the decision of QO dated 11 August 2025.

³ Access application dated 25 June 2025. Application fee paid on 16 July 2025.

⁴ Decision dated 11 August 2025.

⁵ Application received on 1 September 2025.

⁶ A copy of the decision was provided by the applicant in conjunction with his access application.

⁷ In addition to its external review functions under the RTI Act, OIC is also responsible (via a separate division) for handling privacy complaints under the *Information Privacy Act 2009* (Qld).

Evidence considered

11. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes). I have taken account of the applicant's submissions⁸ to the extent they are relevant to the issues for determination in this review.
12. 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 IP Act and the RTI Act. 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: '*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*'.

Issue for determination

13. The central issue for determination is whether access to the requested documents may be refused under the RTI Act on the ground they do not exist. As part of that determination, it is also necessary to consider whether the requested documents are documents of QO.

Relevant law

Document of an agency

14. The right of access established by section 23(1)(a) of the RTI Act exists only in respect of documents of an agency.
15. '*Document of an agency*' is defined in section 12 of the RTI Act as follows:

12 Meaning of document of an agency

In this Act, document, of an agency, means a document, other than a document to which this Act does not apply, in the possession, or under the control, of the agency whether brought into existence or received in the agency, and includes—

- (a) *a document to which the agency is entitled to access; and*
- (b) *a document in the possession, or under the control, of an officer of the agency in the officer's official capacity.*

16. If a requested document is not a document of an agency under section 12, the application does not fall within the scope of the RTI Act and there is no jurisdiction to deal with it under the RTI Act.

⁸ In the external review application and in emails on 30 September 2025 and 6 March 2026.

17. The meaning of ‘document of an agency’ was considered by the Queensland Civil and Administrative Tribunal in the *Carmody* series of decisions.⁹ Justice Hoeben decided as follows:
- a) *“possession” is not defined in the RTI Act or the Acts Interpretation Act 1954 (Qld). Its meaning depends upon the context in which it is used. Previous Information Commissioners have found that the word “possession” in the context of freedom of information legislation requires that the relevant documents be in the physical possession of an agency. The concept of possession is extended by the words “or under the control ... of”, words which have been considered by previous Information Commissioners to “convey the concept of a present legal entitlement to control the use or physical possession of a document”.*
 - b) *“possession” must, however, be read in context and subject to the limitation that whatever possessory interest DJAG has, allows DJAG to legally provide an access applicant with those documents (see ss 23, 47(3)(e) and 68(1) RTI Act). Unlike the analogous context of disclosure (where disclosure is required even of documents not capable of being produced), the RTI Act confers a right to access documents where DJAG is able to provide a copy (or produce one). The expression “possession”, where used to describe the documents of an agency, must be construed in a way consistent with that, so as not to capture documents where DJAG is not able to in fact produce them (or where to do so would interfere with judicial independence). The High Court has held in the context of subpoenas, that the concept of “possession” assumes that a person to whom it is directed “has the ability or capacity to produce them”.*

Nonexistent or unlocatable documents

18. The RTI Act permits an agency to refuse access to information where the requested information is non-existent or unlocatable.¹⁰ A document will be nonexistent if there are reasonable grounds to be satisfied it does not exist.¹¹ A document will be 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.¹²
19. To be satisfied that a document does not exist, there are a number of key factors to consider, including the agency’s structure, its recordkeeping practices and procedures and the nature and age of requested documents.¹³
20. After considering relevant factors, a decision maker may conclude that a particular document was not created because, for example, the agency’s processes do not require creation of that specific document. In such instances, it is not necessary for the agency to search for the document, and sufficient that the circumstances to account for the nonexistence are adequately explained by the agency. If searches

⁹ See, for example, *Carmody v Information Commissioner & Ors* (No 4) [2018] QCATA 17 at [66].

¹⁰ Sections 47(3)(e) and 52(1) of the RTI Act.

¹¹ Section 52(1)(a) of the RTI Act.

¹² Section 52(1)(b) of the RTI Act.

¹³ These factors are identified in *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (*Pryor*) at [19], which adopted the (then) 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 *B50 and Department of Justice and Attorney-General* [2024] QICmr 33 (7 August 2024) at [15], *T12 and Queensland Police Service* [2024] QICmr 8 (20 February 2024) [12], and *G43 and Office of the Director of Public Prosecutions* [2023] QICmr 50 (12 September 2023) [19].

are relied on to support a decision that documents do not exist, all *reasonable* steps must be taken by the agency to locate the documents.¹⁴ What constitutes reasonable steps will vary from case to case, depending on which of the key factors are most relevant in the circumstances.

21. OIC's external review functions include investigating and reviewing whether an agency has taken reasonable steps to identify and locate documents requested under the RTI Act by an applicant.¹⁵
22. On an external review, the agency or Minister who 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. However, where the issue of missing documents is raised, the applicant bears a practical onus of demonstrating that the agency has not discharged its reasonable search obligations.¹⁶ Suspicion and mere assertion about the possible existence of additional documents will not satisfy this onus.¹⁷

Submissions

23. In the decision under review, QO advised that it had conducted the following searches in an effort to locate any documents responding to the terms of the applicant's access application:
 - (a) electronic general administrative document management system that contains QO's general office documents
 - (b) electronic complaints management system
 - (c) the email inbox of the QO investigator named in the access application; and
 - (d) information technology systems and records.
24. QO advised that no responsive documents were located and stated in its decision:

I am advised that it has been the practice of this Office, in circumstances where it is necessary to view a large amount of material, to visit an agency and be set up with IT access to view relevant files. This practice does not include the establishment of an email account for ongoing communication. In this situation the QO Officer would not be aware of how another agency sets up such access.

I note that this Office has previously undertaken searches relating to your access request

¹⁴ In *Webb v Information Commissioner* [2021] QCATA 116 (**Webb**) at [6], McGill J observed that this does not extend to all 'possible' steps.

¹⁵ Section 137(2) of the IP Act. The Information Commissioner also has power under section 115 of the IP Act to require additional searches to be conducted during an external review. The Queensland Civil and Administrative Tribunal confirmed in *Webb* at [6] that this '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.

¹⁶ See *Mewburn and Department Local Government, Community Recovery Resilience* [2014] QICmr 43 (31 October 2014) [13].

¹⁷ *Parnell and Queensland Police Service* [2017] QICmr 8 (7 March 2017) [23]; *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) [36]; *Y44 and T99 and Office of the Public Guardian* [2019] QICmr 62 (20 December 2019) [38].

and have [sic] previously advised that these searches have failed to locate evidence that [named QO investigator] has had an email account set up for him by the QBCC. I have undertaken fresh searches for this application.

25. In his 30 September 2025 submission, the applicant submitted:

- (a) the existence of the QBCC email account was established through the response to his privacy complaint and must now be searched
- (b) section 12 of the RTI Act ‘*instantly*’ applies to any documents contained in the QBCC IT system/email account established for the QO investigator because such documents are documents of QO; and
- (c) QO had failed to search ‘*the one and only location*’ that it knew contained responsive documents: that is, the QO investigator’s QBCC email account.

26. OIC considered the applicant’s submission and expressed the following preliminary view:¹⁸

I acknowledge there is evidence that [named QO investigator] was provided with IT access to QBCC systems in 2018 for the limited purpose of performing QO functions in connection with an investigation at the time. However, based on the information available to me, those arrangements appear to have unilaterally been put in place by QBCC, a separate and independent agency; they do not, in my view, represent actions of the QO that could be argued as entitling QO to access any records of QBCC created as a result of those IT access arrangements. For completeness, it is my view that any documents held by QBCC in relation to those IT access arrangements are not documents of QO for the purpose of section 12 of the RTI Act.

Based on the information available to me in this review, I consider that it was reasonable for QO to undertake searches only of its internal recordkeeping systems, and it is also my view that those searches revealed no responsive documents. While I have considered the searches undertaken by QO, I also accept QO’s explanation that any IT access arrangements were put in place by QBCC and that this did ‘not include the establishment of an email account for ongoing communication’.

In the circumstances of this case, I do not consider that it would be reasonable for QO to undertake independent searches of the recordkeeping systems of QBCC, an entirely separate agency, in response to your RTI Act application. If you are seeking access to documents held by QBCC, you may wish to lodge a fresh application directly to that agency.

27. The applicant did not accept this preliminary view and provided a further submission on 6 March 2026 in which he made the following submission:

- (a) OIC had adopted an unduly narrow interpretation of what constitutes a ‘document of an agency’ under section 12 of the RTI Act and what amounts to ‘reasonable steps’ to locate responsive documents
- (b) an interpretation of ‘control’ in section 12 that allows QO to avoid searches and disclosure by relying on ‘*inter-agency hosting arrangements*’ undermines that the pro-disclosure and transparency objects of the RTI Act

¹⁸ Letter dated 22 January 2026.

- (c) the preliminary view equates *'documents of QO'* with *'documents stored on QO servers'*: that is not the test under section 12 of the RTI Act
- (d) QBCC established an email account for the QO investigator to assist QO to perform its statutory investigative functions – documents created within that email account in the course of QO exercising such functions are *'functionally documents of QO'* and QO has control over them, including a *'presently exercisable legal or practical right'* to obtain them
- (e) *'it is difficult to conceive QO cannot request documents establishing how that IT access was provisioned and how [the investigator's] account was used'*
- (f) the existence of a separate statutory identity for QBCC does not resolve the control question and nor is authorship determinative
- (g) *'reasonable steps'* required QO to *'at least'*:
 - make enquiries of QBCC as to whether IT access (including a temporary or limited account) was created;
 - request confirmation of whether any *'email capability was provisioned'*; and
 - request documents, audit logs and metadata relating to that email account.
- (h) *... the application also sought not only emails but associated metadata. Enterprise IT systems ordinarily generate account creation records, directory entries, login logs, mailbox provisioning records (even if unused), and deletion logs. Under the RTI Act, metadata constitutes a document. Even if no email correspondence occurred, the existence of [the] QBCC email account would generate system artefacts. It would be unusual for an IT access arrangement of this kind to leave no technical footprint.*
- (i) OIC's preliminary view does not address whether QBCC systems automatically provisioned a mailbox under the IT access, logs were retained, or archival systems were searched: absent evidence from QBCC, it is not open to conclude that no responsive documents exist; and
- (j) if QO relies on a claim that no email account and metadata was created, that assertion should be supported by reasonable steps including technical evidence, or a statement from QBCC's IT unit explaining configuration practices at the relevant time – without such evidence, the distinction *'is inferential rather than established'*.

Findings

28. On the material available to me, I accept that QBCC established an internal email account for the QO investigator in 2020 for the purpose of providing the QO investigator with electronic access to QBCC documents relevant to a QO investigation conducted under the *Ombudsman Act 2001* (Qld)¹⁹ into allegations involving QBCC. There is nothing before me to dispute QO's assertion that it is not the practice in such circumstances to establish an email account for the purpose of *'ongoing communication'*.²⁰ Rather, it is established for making agency documents available for QO to review during the course of a QO investigation.

¹⁹ QO is charged under the *Ombudsman Act 2001* (Qld) with investigating administrative actions taken by government agencies.

²⁰ QO decision dated 11 August 2025: see paragraph 24 above.

29. I do not accept the applicant's assertion that QBCC documents stored in the email account established by QBCC for the QO investigator are properly to be regarded as documents of QO for the purposes of section 12 of the RTI Act. Nor am I satisfied, on the evidence before me, that QO has a legal entitlement under the RTI Act to access the QBCC email account and to take possession or control of such documents, and to produce copies of those documents to the applicant for the purposes of responding to his access application.²¹
30. In my view, the documents are documents in the possession or under the control of QBCC for the purposes of section 12 of the RTI Act. The fact that a QO investigator may have had temporary electronic access to the documents (via internal IT access arrangements made by QBCC) for the purposes of the QO investigation that concluded some years ago, does not establish that QO has any present legal entitlement to access, produce or control the use of QBCC documents in the email account. Therefore, I am also not satisfied that QO has any present legal entitlement to access or control or take possession of any metadata held by QBCC in connection with the internal email account.
31. Based on the above findings, I am satisfied that, in discharging its reasonable search obligations under the RTI Act, QO was required to undertake searches of its own internal recordkeeping systems only.
32. Having regard to the searches conducted by QO (see paragraph 23 above), I am satisfied QO took all reasonable steps to locate any documents that responded to the terms of the applicant's access application. On the available information, I am unable to identify any other searches that QO could reasonably be required to undertake. Therefore, I am satisfied that access to the requested documents may be refused under sections 47(3)(e) and 52(1)(a) of the RTI Act on the basis they are nonexistent within QO's records.

Conclusion

33. The above are the reasons for my decision set out at paragraph 1.

--End--

²¹ Applying the findings of Justice Hoeben in the *Carmody* series of decisions: see paragraph 17 above.