



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>McDonald and Queensland Building and Construction Commission (No 2) [2022] QICmr 18 (1 April 2022)</i></b>
<b>Application Number:</b>	<b>316297</b>
<b>Applicant:</b>	<b>McDonald</b>
<b>Respondent:</b>	<b>Queensland Building and Construction Commission</b>
<b>Decision Date:</b>	<b>1 April 2022</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether agency has conducted reasonable searches - whether access to further documents may be refused on the basis they are nonexistent or unlocatable - sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009</i> (Qld)</b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied<sup>1</sup> to the Queensland Building and Construction Commission (QBCC) under the *Right to Information Act 2009* (Qld) (RTI Act) for access to an 'audio recording, internal emails and notes'<sup>2</sup> regarding a meeting he attended with then QBCC Commissioner Bassett on 19 May 2021 (**the Meeting**).
2. QBCC located an audio recording of the Meeting and 207 pages of information. QBCC decided<sup>3</sup> to release the audio recording in full and to refuse access to some information on the basis it was subject to legal professional privilege and was therefore exempt information,<sup>4</sup> and to refuse access to other information on the grounds that its disclosure would, on balance, be contrary to the public interest.<sup>5</sup> QBCC also deleted some irrelevant information from the documents.<sup>6</sup>
3. The applicant applied for internal review of QBCC's decision.<sup>7</sup> As part of his internal review application the applicant noted the responsive documents had not disclosed 'internal notes taken by participants, copies of internal emails after the meeting on 19 May 2021, and attachments listed in all emails.'<sup>8</sup> The applicant also contested the

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<sup>1</sup> On 21 May 2021.

<sup>2</sup> The access application timeframe was from 1 May 2021 to 21 May 2021 (the date the applicant lodged his access application).

<sup>3</sup> On 14 July 2021 (the applicant granted QBCC further time to process his application).

<sup>4</sup> Sections 47(3)(a), 48, and schedule 3, section 7 of the RTI Act.

<sup>5</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>6</sup> Section 73 of the RTI Act.

<sup>7</sup> On 25 July 2021.

<sup>8</sup> On 27 July 2021.

refusal of certain information on the grounds it was exempt information or contrary to public interest information.<sup>9</sup>

4. QBCC did not issue an internal review decision within the prescribed timeframe and were taken to have issued a deemed decision affirming its original decision issued on 14 July 2021.<sup>10</sup>
5. The applicant then applied to the Office of the Information Commissioner (**OIC**) for external review.<sup>11</sup> The applicant applied on the same basis as the internal review outlined at [3].
6. For the reasons set out below, I vary QBCC's internal review decision. I find that QBCC has taken all reasonable steps to identify and locate responsive documents, and that access to further documents may be refused pursuant to sections 47(3)(e) and 52(1) of the RTI Act.

## Background

7. During the external review, QBCC agreed to disclose additional information to the applicant.<sup>12</sup> The applicant accepted OIC's view that the information refused by QBCC on the grounds it comprised exempt information or information that would, on balance, be contrary to the public interest to disclose could be refused on these grounds.<sup>13</sup> Further, the applicant did not contest OIC's view that the information deleted from the documents by QBCC as irrelevant, was in fact irrelevant to the applicant's access application.<sup>14</sup> Also, in the course of the external review the applicant accepted OIC's view that certain documents<sup>15</sup> were nonexistent or unlocatable.<sup>16</sup> Accordingly, these matters, having been resolved during the external review, will not be addressed in this decision.
8. Throughout the external review, the applicant has maintained that he witnessed Commissioner Bassett make notes during the Meeting, and therefore such notes exist and should be located.<sup>17</sup>

## Reviewable decision

9. The decision under review is QBCC's internal review decision on 24 August 2021.

## Evidence considered

10. Significant procedural steps relating to the external review are set out in the Appendix.
11. 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.

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<sup>9</sup> Internal review correspondence on 25 and 27 July 2021.

<sup>10</sup> On 24 August 2021.

<sup>11</sup> On 2 September 2021.

<sup>12</sup> Disclosed on 25 October 2021.

<sup>13</sup> On 22 October 2021.

<sup>14</sup> Preliminary view issued on 20 October 2021.

<sup>15</sup> Documents the applicant considered should have existed between 19 May 2021 and 21 May 2021; email attachments to documents; and the notes taken by all participants but one in the Meeting.

<sup>16</sup> On 22 October 2021 and 23 November 2021.

<sup>17</sup> By email to OIC on 22 October 2021, 23 November 2021, 16 January 2022 and 21 February 2022.

12. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>18</sup> 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 *Information Privacy Act 2009* (Qld) (**IP Act**) and the RTI Act.<sup>19</sup> 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:<sup>20</sup> ‘*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.*’<sup>21</sup>

### Issue for determination

13. The sole issue remaining to be determined in this decision is whether all reasonable steps have been taken by QBCC to identify and locate the notes of Commissioner Bassett from the Meeting (**Notes**); and whether access to the Notes may be refused on the ground they are nonexistent or unlocatable.<sup>22</sup>

### Matters outside OIC’s jurisdiction

14. The applicant has expressed concerns about QBCC conduct, corruption within Queensland government, decisions by QBCC, OIC and other government agencies, and possible offences against the *Public Records Act 2002* (Qld) (**PR Act**). These complaints and concerns fall outside OIC’s jurisdiction on external review, which is limited to reviewing access and amendment decisions of an agency or Minister under either the RTI Act or the IP Act. I appreciate these concerns are genuinely held, and they inform the applicant’s submissions and reasons for seeking external review.
15. Given the sole issue for determination in this decision noted at [13], my role under the RTI Act is to consider whether QBCC has taken reasonable steps to locate documents responsive to the access application, namely, the Notes. To the extent that the applicant has made submissions relevant to this issue, I have taken these into account in making my decision.

### Relevant law

16. Under the RTI Act a person has a right to be given access to documents of an agency.<sup>23</sup> However, this right is subject to provisions of the RTI Act including the grounds on which an agency may refuse access to documents.<sup>24</sup> Relevantly, access to a document may be refused if the document is nonexistent or unlocatable.<sup>25</sup>
17. 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:<sup>26</sup>
- the administrative arrangements of government

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<sup>18</sup> Section 21(2) of the HR Act.

<sup>19</sup> *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].

<sup>20</sup> *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>21</sup> *XYZ* at [573].

<sup>22</sup> Sections 47(3)(e) and 52(1) of the RTI Act.

<sup>23</sup> Section 23 of the RTI Act.

<sup>24</sup> Including section 47(3) of the RTI Act.

<sup>25</sup> Sections 47(3)(e) and 52(1) 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.

<sup>26</sup> *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).

- the agency’s structure
  - the agency’s functions and responsibilities
  - 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.
18. 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.
19. To determine whether a document exists, but is unlocatable, the RTI Act 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 the document.<sup>27</sup>
20. 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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

## Findings

21. During the external review QBCC submitted that it had, in response to the concerns about the sufficiency of QBCC’s searches, expressed by the applicant in his internal review application:<sup>31</sup>
- ... completed further search requests due to Mr McDonald’s mention of search issues, however there were no additional documents located in scope of the original application.*
22. The applicant submitted:<sup>32</sup>
- Brett took notes at the meeting on 19 May 2021.*
23. I wrote to QBCC to advise of the applicant’s submission and seek further information about its searches.<sup>33</sup>

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<sup>27</sup> Pryor at [20]-[21].

<sup>28</sup> Section 130(2) of the RTI Act. The Information Commissioner also has power under section 102 of the RTI Act to require additional searches to be conducted during an external review.

<sup>29</sup> Section 87(1) of the RTI Act.

<sup>30</sup> *Parnell and Queensland Police Service* [2017] QICmr 8 (7 March 2017) at [23]; *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36]; *Y44 and T99 and Office of the Public Guardian* [2019] QICmr 62 (20 December 2019) at [38].

<sup>31</sup> On 6 September 2021.

<sup>32</sup> On 22 October 2021.

<sup>33</sup> On 27 October 2021.

24. QBCC provided documents, including email threads and signed search declarations, demonstrating the searches undertaken during the original processing and on internal review.<sup>34</sup> In respect of its initial searches, which located the audio recording and 207 pages, QBCC sent search requests to three QBCC employees. The areas searched included:

- email searches of its Ministerial, Commissioner and employee mailboxes
- ECM (database)
- OneNote; and
- Desktop searches for any relevant documents.

25. Additionally, QBCC submitted that it had contacted two employees, including Commissioner Bassett, to enquire if they took notes during the Meeting that were not yet in the documents. The first employee confirmed she had provided the notes she took during the Meeting along with other documents located in the original searches. Commissioner Bassett responded:<sup>35</sup>

*... Not to my recollection. Generally, I don't take notes as other staff there do so that I can focus on the conversation.*

26. I wrote to the applicant to provide this further information about the searches conducted by QBCC.<sup>36</sup> In response, the applicant stated *'the statement by Mr Bassett is simply not true. I personally saw Mr Bassett taking notes myself - as did all other representatives of the QBCC and the Minister's Office.'*<sup>37</sup>

27. I wrote to QBCC advising of the applicant's submission, and asked QBCC to search Mr Bassett's diaries, notebooks, emails, personal drive and any other database or place where records may have been created or stored by Mr Bassett for the time period in question.<sup>38</sup>

28. QBCC undertook further searches and provided a signed search declaration by the QBCC employee who conducted the searches.<sup>39</sup> These searches included:

- searching Outlook Mimecast, for any scanned notes
- a physical search of the Commissioner's office, including notebooks and papers; and
- a search of OneDrive.

29. QBCC confirmed no further documents had been located and submitted that searches had been undertaken in responding to the original access application, the internal review application and the external review application and no additional documents responsive to the terms of the access application had been located.<sup>40</sup>

30. QBCC also offered the following explanations for the notetaking the applicant stated that he witnessed:<sup>41</sup>

*Generally, the former Commissioner is not a paper-based person and does not attend meetings with hard copies of papers. I have checked the former Commissioner's office, and there are no*

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<sup>34</sup> On 28 October 2021.

<sup>35</sup> On 9 August 2021.

<sup>36</sup> On 23 November 2021.

<sup>37</sup> By email on 23 November 2021.

<sup>38</sup> On 24 November 2021.

<sup>39</sup> On 8 December 2021.

<sup>40</sup> By email on 8 December 2021.

<sup>41</sup> On 8 December 2021.

*notebooks nor papers that are in there. I have also checked his emails for any scanned copies of any notes that may have been taken, and there is no record of these.*

*I listened to the recording yesterday and today and I note that about 43 minutes into the meeting Brett Bassett asked [QBCC Employee 1] to ask [QBCC Employee 2] to cancel a meeting he had planned. The McDonald meeting went on for over 2 hour 45 minutes, so it is very likely that Brett may have answered important unrelated emails on his phone or laptop in that time period.*

31. I wrote to the applicant again<sup>42</sup> and outlined the further searches undertaken by QBCC on the basis of his submission, and the explanations provided by QBCC.

32. The applicant did not accept QBCC's explanation and submitted:<sup>43</sup>

*To reiterate, Mr Bassett was making hand written notes on what appears to be the Commissioner's Briefing - see copy obtained under RTI.*

*I observed Mr Bassett referencing details of the briefing so RTI'd the document. Any and all claims that Mr Bassett was not taking notes is dishonest and supports the integrity crisis that is occurring within the Commission at present.*

*The fact that these records are not readily locatable, is very concerning.*

33. The applicant's submission at [32] above was the first time he specified the Commissioner made handwritten notes. The applicant further submitted:<sup>44</sup>

*I note that Commissioner Bassett may not generally take notes and his recollection is not definitive. He states:*

*"[...] Not to my recollection. Generally, I don't take notes as other staff there do so that I can focus on the conversation."*

*I witnessed Mr Bassett taking notes during our meeting. It happened in front of me and I am 100% clear on that.*

*There is certainly no doubt that the former Queensland State Archivist has raised very serious concerns about the recording keeping of people within positions of power, such as Mr Bassett.*

*Given my great certainty that Mr Bassett made notes, it is my view again that if the QBCC claim to have undertaken all reasonable steps to locate this document, and that it remains unlocatable then this is likely to offend the Public Records Act 2002.*

34. Some, but not all, documents of agencies are public records, as defined in the PR Act.<sup>45</sup> The question of whether a document constitutes a public record under the PR Act, and whether there has been a breach of that Act, are not matters that fall within the jurisdiction of the Information Commissioner under the RTI Act or the IP Act.

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

- whether there are reasonable grounds for believing that additional responsive documents exist in the agency's power or possession; and, if so

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<sup>42</sup> On 12 January 2022.

<sup>43</sup> On 16 January 2022.

<sup>44</sup> On 21 February 2022. I note this email was initially misplaced by OIC and not located until after OIC closed the file on 25 February 2022 on the basis we had not received any further submissions from the applicant by the due date. OIC wrote to the applicant on 28 February 2022 to advise of the error and confirm that we would proceed to a formal decision.

<sup>45</sup> See definitions of 'public record' in section 6(1) and 'record' in schedule 2 of the PR Act.

- whether the searches and inquiries conducted by the agency in an effort to locate the additional responsive documents have been reasonable in all the circumstances.
36. The applicant bears the practical onus of establishing reasonable grounds to be satisfied that the agency has not discharged its obligation to locate all relevant documents and that further searches and inquiries ought to reasonably be required.<sup>46</sup>
37. The applicant is certain that he saw Commissioner Bassett taking notes during the Meeting. The Commissioner on the other hand submits that note taking is not his usual practice and that he did not recall taking notes in the Meeting; a position given some support by QBCC's further submission that the former Commissioner was not a 'paper based person'.<sup>47</sup> There is, too, the further possibility that both versions may in a sense be correct – the applicant may well have seen the former Commissioner 'taking notes', or at least putting pen to paper. The product of that writing activity, however, may well have had no relevance whatsoever to the meeting itself, such that, indeed, no notes *relevant to the meeting, falling within the scope of the access application, or even comprising documents of an agency* were ever brought into existence.
38. The state of the evidence is such that it is simply not possible to resolve the above issue.
39. Nor is it necessary to do so.
40. That is because what *is* possible to definitively resolve is the fact that, despite extensive searches, no Notes can be located. The evidence before me demonstrates that QBCC undertook several sets of targeted and thorough searches that included direct enquiries with several staff, including the Commissioner; searches of electronic and email databases; and a physical search of the Commissioner's office, including hard copy records. Should the Notes exist, these searches were, in my view, reasonably likely to have located same.
41. In conclusion, I am, as a matter of fact, satisfied that QBCC has taken all reasonable steps to identify and locate documents requested by the applicant, namely the Notes. Access to those Notes may be refused on the ground stated in sections 47(3)(e) and 52(1) of the RTI Act.

## DECISION

42. For the reasons set out above I vary QBCC's decision and find that the searches and inquiries conducted by QBCC in an effort to locate any Notes taken by Commissioner Bassett during a meeting on 19 May 2021 have been reasonable in all the circumstances. Access to the Notes may be refused, under sections 47(3)(e) and 52(1) of the RTI Act.
43. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**Assistant Information Commissioner Corby**

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<sup>46</sup> *Mewburn and Department of Local Government, Community Recovery and Resilience* [2014] QICmr 43 (31 October 2014) at [13].

<sup>47</sup> See paragraph 30.

**Date: 1 April 2022**  
**APPENDIX**

**Significant procedural steps**

<b>Date</b>	<b>Event</b>
2 September 2021	OIC received the application for external review.
3 September 2021	OIC requested preliminary documents and information from QBCC.
6 September 2021	OIC received the preliminary documents and information from QBCC.
22 September 2021	OIC notified the applicant and QBCC that the external review had been accepted. OIC requested copies of the documents in issue from QBCC.
5 October 2021	OIC received the documents in issue from QBCC.
19 and 20 October 2021	OIC asked QBCC to disclose further documents to the applicant.
20 October 2021	OIC conveyed a preliminary view to the applicant.
22 October 2021	OIC received the applicant's submissions in response to OIC's preliminary view.
25 October 2021	QBCC disclosed further information to the applicant.
27 October 2021	OIC requested further information from QBCC regarding its searches.
28 October 2021	OIC updated the applicant. OIC received the requested information from QBCC.
23 November 2021	OIC conveyed a second preliminary view to the applicant. OIC received submissions from the applicant.
24 November 2021	OIC requested further searches by QBCC.
8 December 2021	OIC received information from QBCC regarding the further searches.
12 January 2022	OIC conveyed a third preliminary view to the applicant.
16 January 2022	OIC received submissions from the applicant.
3 February 2022	OIC contacted QBCC to seek its consent to an informal resolution proposal.
9 February 2022	QBCC agreed to the informal resolution proposal.
17 February 2022	OIC issued a further preliminary view to the applicant along with a copy of an email, proposing informal resolution of the review.
21 February 2022	OIC received submissions from the applicant.
25 February 2022	OIC closed the review in error.
28 February 2022	OIC reopened the review and notified the applicant and QBCC that the review would proceed to a formal decision.

