



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>G92 and Department of Education [2024] QICmr 5 (15 February 2024)</i></b>
<b>Application Number:</b>	<b>317393</b>
<b>Applicant:</b>	<b>G92</b>
<b>Respondent:</b>	<b>Department of Education</b>
<b>Decision Date:</b>	<b>15 February 2024</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - applicant submits agency did not locate all relevant documents relating to the assessment and performance of ASPIRE program at Brisbane State High School - whether agency has taken all reasonable steps to locate documents relevant to access application - whether access to further documents may be refused under sections 47(3)(e) and 52(1)(a) of the <i>Right to Information Act 2009</i> (Qld)</b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied<sup>1</sup> to the Department of Education (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to information on the performance indicators, outcomes, assessment and performance of the Years 7-8 ASPIRE Program at Brisbane State High School (**ASPIRE Program**).
2. The Department located three pages and decided to release these to the applicant in full.<sup>2</sup> The applicant then applied to the Office of the Information Commissioner (**OIC**) for review of the Department's decision.<sup>3</sup> During external review, the Department located and released 480 pages to the applicant. The applicant contended that certain further documents existed and should have been located.
3. For the reasons explained below, I vary the Department's decision, as further documents were located by the Department since its decision under review and find that access to any remaining documents may now be refused on the grounds they are nonexistent.<sup>4</sup>

#### Background

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<sup>1</sup> On 16 February 2023.

<sup>2</sup> Decision dated 31 May 2023.

<sup>3</sup> On 22 June 2023. The applicant had previously lodged an internal review on 15 June 2023. However, the Department advised the applicant that internal review was not available for the grounds of sufficiency of searches.

<sup>4</sup> Under section 52 of the RTI Act.

4. Significant procedural steps in this external review are set out in the Appendix.
5. The applicant raised submissions which are outside the Information Commissioner's external review jurisdiction.<sup>5</sup> In making my decision in this external review, I have considered the applicant's submissions to the extent they are relevant to the issues for determination in the context of this external review.

### Reviewable decision

6. The decision under review is the Department's decision dated 31 May 2023.

### Evidence considered

7. Evidence, submissions, legislation, and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix).<sup>6</sup>
8. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>7</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 RTI Act.<sup>8</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 observation of Bell J on the interaction between equivalent pieces of Victorian legislation:<sup>9</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>10</sup>

### Issues for determination

9. During the course of the external review, the Department confirmed that the scope of the application was not initially interpreted as it was intended it to be. OIC confirmed the scope of the access application with the Department and requested further searches be conducted.<sup>11</sup> The Department located 480 additional pages<sup>12</sup> which were released to the applicant.<sup>13</sup>
10. The applicant contended that specific further documents exist and should have been located.<sup>14</sup> Accordingly, the issue for determination in this review is whether the Department has undertaken all reasonable steps to locate the further documents, and whether access may be refused on the grounds that they are nonexistent under sections 47(3)(e) and 52(1) of the RTI Act.

### Sufficiency of the Department's searches

#### Relevant law

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<sup>5</sup> External review application dated 22 June 2023 and submissions dated 5 October 2023, 15 November 2023 and 21 November 2023.

<sup>6</sup> Including the submissions made by the applicant in the external review application, and in correspondence dated 5 October 2023, 15 November 2023 and 21 November 2023.

<sup>7</sup> Section 21(2) of the HR Act.

<sup>8</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]. I further note that OIC's approach to the HR Act set out in this paragraph was considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (where Judicial Member McGill saw '*no reason to differ*' from our position).

<sup>9</sup> *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>10</sup> *XYZ* at [573].

<sup>11</sup> Letter dated 7 August 2023.

<sup>12</sup> Correspondence dated 6 September 2023.

<sup>13</sup> Documents were released to the applicant on 4 October 2023 by the Department.

<sup>14</sup> Correspondence dated 5 October 2023, 15 November 2023 and 21 November 2023.

11. Under section 23 of the RTI Act, a person has a right to access documents of an agency subject to other provisions of the RTI Act including grounds on which an agency may refuse access to documents. Under sections 47(3)(e) and 52(1)(a) of the RTI Act, access to a document may be refused if the document is nonexistent.
12. The functions of the Information Commissioner on external review include investigating and reviewing whether an agency has taken reasonable steps to identify and locate documents applied for by applicants.<sup>15</sup>
13. A document will be *nonexistent* if there are reasonable grounds to be satisfied it does not exist.<sup>16</sup> To be satisfied that a document does not exist, the Information Commissioner has previously had regard to various key factors including the agency's record-keeping practices and procedures (including, but not limited to, its information management approaches).<sup>17</sup> By considering the relevant factors, the decision maker may conclude that a particular document was not created because, for example, 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. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.
14. The Information Commissioner may also take into account the searches and inquiries conducted by an agency in determining whether a document is nonexistent. The key question then is whether those searches and inquiries amount to '*all reasonable steps*'.<sup>18</sup> 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 which of the key factors are most relevant in the particular circumstances. Such steps may include inquiries and searches of all relevant locations identified after consideration of relevant key factors.<sup>19</sup>
15. Where the issue of missing documents is raised on external review, the agency must demonstrate that reasonable steps have been taken to identify and locate relevant documents.<sup>20</sup> If the applicant maintains further documents exist, the applicant bears a practical onus of demonstrating that the agency has not discharged its obligation. Suspicion and mere assertion will not satisfy this onus.<sup>21</sup>

## Findings

16. The applicant submitted<sup>22</sup> that the Department did not search for the "*primary documents*" which had been requested. The applicant explained:

<sup>15</sup> Section 130(2) of the RTI Act. The Queensland Civil and Administrative Tribunal confirmed in *Webb v Information Commissioner*

[2021] QCATA 116 at [6] that the RTI Act '*Departments do 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.

<sup>16</sup> Section 52(1)(a) of the RTI Act. For example, a document has never been created.

<sup>17</sup> *Isles and Queensland Police Service* [2018] QICmr 27 (7 June 2018) at [15] which adopted the Information Commissioner's comments in *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]-[38]. *PDE* addresses the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld). Section 52 of the RTI Act is drafted in substantially the same terms as the provision considered in *PDE* and, therefore, the Information Commissioner's findings in *PDE* are relevant.

<sup>18</sup> As set out in *PDE* at [49].

<sup>19</sup> As set out in *PDE* at [38].

<sup>20</sup> Sections 87(1) and 130(2) of the RTI Act.

<sup>21</sup> *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36].

<sup>22</sup> With the external review application on 22 June 2023.

*Included in those primary documents are emails and internal documents to the school board and other bodies about the initiation, design, need for, and overall performance of the ASPIRE programme.*

*What I wanted to know what 'how Departments Brisbane State High School know that its ASPIRE program is achieving its initial aims' and how is the program reviewed?*

17. OIC requested the Department to conduct further searches.<sup>23</sup> In response, the Department provided OIC with a signed search certification and advised that 480 additional pages had been located<sup>24</sup> all of which were released in full to the applicant.<sup>25</sup> The search certification detailed the nature and extent of the search and enquiry process undertaken to locate the relevant documents. The Department advised:

*The result of the searches only located documents that related to the course design and assessment. No documents were located relating to reports to school boards or committees or emails on the course design and assessment.*

18. The search records provided verified that relevant officers of Brisbane State High School (the **school**) conducted searches of network storage locations and electronic files. Searches for school council's records were conducted and did not locate records therein pertaining to the ASPIRE program. The search records certify over 10 hours was spent searching for relevant documents.

19. OIC conveyed a preliminary view to the applicant that all reasonable steps had been taken to locate additional documents.<sup>26</sup> The applicant did not accept this preliminary view and lodged a submission in support of her position.<sup>27</sup> The applicant stated:

*The 480 extra pages the school has located is the ASPIRE course content. This is not what was requested. What I requested was any justification for bringing in a streamed and selective program in Years 7 & 8 that would have ongoing academic consequences to a child's academic and other opportunities.*

*In the school records there must be documents as to why The ASPIRE was brought in, what it hopes to achieve (higher results for the selected group of students presumably), if it does achieve what it set out to achieve, and what impacts it's having on students - both in the program and those excluded. If there has been no review of the program, or there are no plans to review the program, then that's a problem.*

20. OIC requested the Department<sup>28</sup> consider the applicant's submissions and to conduct further enquiries. The Department confirmed<sup>29</sup> that no further records exist. The Department further confirmed that there are no documents outside the individual student results which assess or evaluate the performance of the ASPIRE program.<sup>30</sup> The Department also explained:

*Brisbane State High School have advised that the results of students within the ASPIRE program are monitored, and the results are strong, therefore is no need to conduct an evaluation of the program as it is meeting intended outcomes.*

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<sup>23</sup> Letter dated 7 August 2023.

<sup>24</sup> Correspondence dated 6 September 2023.

<sup>25</sup> Documents were released on 4 October 2023.

<sup>26</sup> Letter dated 28 September 2023.

<sup>27</sup> Correspondence dated 5 October 2023.

<sup>28</sup> Correspondence dated 12 October 2023 and telephone call on 2 November 2023.

<sup>29</sup> Correspondence dated 25 October 2023 and 3 November 2023.

<sup>30</sup> The applicant was provided with three pages relating to the breakdown of student results in the ASPIRE program from the Department in accordance with its access decision.

21. Based on the further information provided by the Department, OIC affirmed its preliminary view<sup>31</sup> to the applicant that all reasonable steps have been taken to locate documents relevant to the access application and that access to further documents may be refused on the basis that they do not exist.
22. The applicant contested this view and submitted<sup>32</sup> that there should be internal documents within the school pertaining to the design, implementation, assessment and outcomes of the ASPIRE program that are not being handed over by the school. The applicant's submissions included a series of specific questions about the ASPIRE program regarding the initial establishment of the program, the candidate selection process, reported performance of the program to the school's board, the name of the staff member leading the program and how it fits within the overall encouragement of students to perform at the school, matters which I note, are beyond the terms of the access application.
23. Whilst it is quite legitimate to ask these questions, the RTI Act does not give the applicant a right to obtain answers to questions about the ASPIRE program or to have the Department extract answers to questions from documents in their possession, unless there are documents in existence which clearly contain the answers to the applicant's questions.
24. In an effort to assist the applicant, throughout this external review, the Department and OIC have considered the questions the applicant has asked in the course of the review as a request for documents containing the answers to those questions, to the extent that those documents exist. However, the Department has confirmed the school has provided all documents responding to the access application which have been located in relation to the ASPIRE program.
25. I am satisfied that the searches and enquiry process conducted by the Department and the school have been comprehensive and sufficient to account for the nonexistence of additional documents. The Department's explanation adequately addresses why the documents do not exist.
26. I acknowledge the applicant's efforts in approaching the school to seek answers to the questions about the ASPIRE program and encourage the parties to engage in further communication to address the applicant's questions outside of the RTI framework. I reiterate it is not the purpose of the RTI Act to provide answers to questions. I also acknowledge the applicant's concerns with the school's record keeping practices in contravention of the *Public Records Act 2002* (Qld). However, this is not an issue which I have jurisdiction to consider under the RTI Act. OIC functions do not extend to investigating complaints about agency processes or conduct. OIC jurisdiction in this case is limited to determining whether all reasonable steps have been taken by the Department to locate any further documents in its possession that are relevant to the terms of the access application.
27. As I noted at paragraph 15 above, if an applicant maintains that further responsive documents exist, the applicant bears a practical onus of demonstrating that the agency has not discharged its obligation to show that reasonable steps have been taken to identify and locate relevant documents. Suspicion and mere assertion will not satisfy this onus. I acknowledge the applicant's assertions that the school does not want to disclose internal documents. I regard such assertions as speculative in this case,

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<sup>31</sup> Letter dated 14 November 2023.

<sup>32</sup> Correspondence dated 15 November 2023.

rather than forming a reasonable basis for requiring additional searches or inquiries to be conducted.

28. For the above reasons, I find that there are reasonable grounds to be satisfied that the specific further documents do not exist. Access to the requested information may therefore be refused on the ground these documents are nonexistent.

## **DECISION**

29. For the reasons set out above, I vary the decision under review and find that:
- the Department has taken all reasonable steps in searching for the further documents; and
  - access to any additional documents may be refused pursuant to sections 47(3)(e) and 52(1)(a) on the basis that they do not exist.
30. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

**S Martin**  

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**Acting Right to Information Commissioner**

**Date: 15 February 2024**

## APPENDIX

### Significant procedural steps

Date	Event
22 June 2023	OIC received the external review application. OIC requested relevant procedural documents from the Department.
29 June 2023	OIC received the procedural documents from the Department.
7 August 2023	OIC notified the applicant that it had accepted the application for external review. OIC notified the Department that it had accepted the application for external review, confirmed the scope of the application and requested further searches be conducted.
6 September 2023	The Department advised OIC that further searches had been conducted and additional pages were located. The Department provided search records and confirmed that it agreed to the documents being released in full to the applicant.
7 September 2023	OIC received the additional pages from the Department.
28 September 2023	OIC requested the Department provide a copy of the additional pages to the applicant. OIC conveyed a preliminary view to the applicant.
4 October 2023	The Department provided the additional 480 pages to the applicant.
5 October 2023	OIC received a submission from the applicant.
12 October 2023	OIC requested further information from the Department.
25 October 2023	OIC received a response from the Department.
2 November 2023	OIC requested further information from the Department.
3 November 2023	OIC received further information from the Department.
14 November 2023	OIC affirmed the preliminary view to the applicant.
15 November 2023	OIC received further submissions from the applicant.
16 November 2023	OIC advised the applicant of other avenues of enquiry the applicant may take to access information about the ASPIRE Program.
21 November 2023	OIC received a further submission from the applicant.