



Decision and Reasons for Decision

Citation:	<i>D68 and Department of Housing and Public Works [2019] QICmr 31 (26 August 2019)</i>
Application Number:	314279
Applicant:	D68
Respondent:	Department of Housing and Public Works
Decision Date:	26 August 2019
Catchwords:	ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – NONEXISTENT OR UNLOCATABLE DOCUMENTS – documents about the ‘crawl space’ in the ceiling of the applicant’s unit – applicant contends documents ought to exist – whether the agency has taken all reasonable steps to locate responsive documents – whether access may be refused on the basis that the documents do not exist or are unlocatable – section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of Housing and Public Works (**Department**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to information in the following terms:

Subject matter

Visual records etc. of the crawl-space between the ceiling and the roof here at [the applicant’s address] – please see the more detailed outline in the accompanying letter (of 10/9/18) in support of this application (not to mention the said statutory declaration of the last 4th of September then) – further note please that access to pertinent metadata is also sought herein (as outlined likewise in said letter in support)

Type of documents

Photos and internal memos etc including related metadata

Time period

Prior to 26/9/14 (and up to the time of a decision upon this very application).

¹ Application dated 26 September 2018 and received on 28 September 2018.

2. In his letter dated 10 September 2018, the applicant stated:

...for access to complete visual – i.e. any and all (presumably all inclusive) pictorial evidence (or – if you like – information then) – and additionally any related documentation (or information– i.e. including the very related metadata) – of the contents of the crawl-space between the ceiling and the very roof here [applicant’s address] which is currently held on record (or in the pertinent archives then), and that is to say, preferably then, the most recent entry thereof (i.e. such records), moreover, with reference, of course, to subsection (2) of section – No.47 of the Act, I would also be seeking, access to, such full and complete record, to be generated anew, before any decision is proposed to be made in respect of the matter of this very application, and that is to say, inclusive of a good – and well detailed – comprehensive visual record of the entirety of the said (or such current) contents – not to mention an additional specific record (likewise to be made then) of the very manhole – hatch door [and surrounds (i.e. to be made from outside the said crawl-space) at the junction (or above it this is) of the small kind of hallway adjacent to the (would be) master bedroom and the entrances to the bathroom (etc) and living room-area here ... to be given access – additionally – to all of the metadata (in point), and not the least of all, but not necessarily limited to then, the date and time at which the inspection (to make such records) were proposed to have been carried out, and, the full names (and employee – number) of each officer – and/or other employees – which purports to have carried out – or otherwise participated in - such inspections – or (for that matter) the recording of the records ultimately so made.

3. On 18 September 2018, the Department wrote to the applicant to inform him that it considered that it may be reasonable to expect that some documents to which he sought access would contain information other than his personal information as defined in section 12 of the IP Act.² It advised him that his request could not be dealt with under the IP Act in its current form because the IP Act only provided a right to access documents to the extent they concerned the applicant’s personal information. It therefore gave him three options to consider, pursuant to its obligation to consult with him under section 54(3) of the IP Act:

- amend his application to proceed under the IP Act by limiting its scope to documents containing his personal information; or
- request that the application be processed under the *Right to Information Act 2009* (Qld) (**RTI Act**) and pay the application fee; or
- withdraw his application.

4. The applicant responded by letter dated 26 September 2018, confirming that his application was made under the IP Act.

5. The Department gave its decision by letter dated 9 October 2018. It advised that a search of its records for responsive documents had located one page contained within a letter from the applicant to the Department dated 12 June 2017. In the letter, the applicant complained about the unit that had been allocated to him by the Department and alleged that a neighbour may have set up in the crawl space between the roof and ceiling of his apartment ‘*some kind of secreted high frequency sound emitting device - directed at [my] unit - and/or the surrounding grounds*’. The Department gave the applicant access to the full letter.

² Section 12 of the IP Act defines ‘personal information’ as ... *information or an opinion, including information or an opinion forming part of database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*

6. The applicant applied for a *'just and expeditious'* internal review of the Department's decision.³ He stated that the letter that the Department had released to him *'never was – and could not reasonably be seen as – the subject of this matter. Accordingly, the said proposed decision appears as nothing more than a frivolous vexatious abuse of the very powers and processes of the IP Act.'* He also complained that the Department had not properly consulted with him under section 54(3) of the IP Act.⁴

7. On internal review, the Department affirmed its initial decision.⁵ The Department stated:

Given that your application was made under the IP Act and the scope of your request for documents detailed by your application and letter dated 10 September 2018, I consider that you are seeking access to:

Documents and visual records (including metadata), of the crawl space between the ceiling and the roof at [the applicant's address] which contain your personal information.

8. The Department confirmed that, after a search of its records, the only document that it was able to locate that referred to the crawl space in the applicant's unit was the applicant's letter to the Department dated 12 June 2017. It then gave reasons for its decision to release that letter to the applicant.

9. The applicant applied to this Office (**OIC**) for external review of the Department's decision.⁶ He complained that the Department had interpreted the scope of his application too narrowly by limiting it to only those documents which contained his personal information as well as information about the crawl space. He considered that the Department ought to have in its possession other documents that responded to the terms of his application.

10. For the reasons set out below, I affirm the Department's decision that the scope of the applicant's application under the IP Act is correctly interpreted as a request for *'documents and visual records (including metadata) of the crawl space between the ceiling and the roof at [the applicant's address] which contain the applicant's personal information'*. I further find that there are no reasonable grounds for expecting that the Department holds in its possession or under its control responsive documents additional to the letter that the applicant sent to the Department on 12 June 2017.

Reviewable decision

11. The decision under review is the Department's internal review decision dated 9 November 2018.

Evidence considered

12. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and the appendix).

13. I have had regard to the applicant's letters dated 9 April 2019 (received 17 April 2019), 20 May 2019, and his undated letter received by OIC on 14 June 2019. I have also had

³ Letter dated 12 October 2019 and received by the Department on 19 October 2019.

⁴ In a letter dated 15 October 2018, the applicant called for the Department to *'withdraw [its] said purportedly made decision, and only return then, to engage in the very consultation process (under the IP Act) in terms of the very discussions I have been at pains to entertain ... in my correspondence in this matter...'*

⁵ Decision dated 9 November 2018.

⁶ Letter dated 15 November 2018.

regard to his correspondence with the Department during the processing of the application.⁷

Issue for determination

14. The issue for determination is whether the Department was entitled to refuse access to documents on the basis that those documents are nonexistent or unlocatable under section 67(1) of the IP Act and sections 47(3)(e) and section 52 of the RTI Act.

Relevant law

15. Section 67 of the IP Act provides that an agency may refuse access to a document of the agency in the same way and to the same extent the agency could refuse access to the document under section 47 of the RTI Act. Under section 47(3)(e) of the RTI Act, an agency may refuse access to a document because the document is non-existent or unlocatable as mentioned in section 52. Section 52(1) provides that, for section 47(3)(e), a document is non-existent or unlocatable if:
- (a) the agency dealing with the application for access is satisfied that the document does not exist; or
 - (b) the agency dealing with the application for access is satisfied –
 - (i) the document has been or should be in the agency's possession; and
 - (ii) all reasonable steps have been taken to find the documents, but the documents cannot be found.

The applicant's submissions

16. The central submission that the applicant made in his application for external review was that the Department had only looked at *'one particular pile - or file, in order to only find documents that might actually mention (i.e. on the very face of same) both my name and the said crawl-space ...'* and that *'personal information (in the very terms of the legislation), of an individual, is not necessarily only that which contains such particulars, etc.'* The applicant argued that any information about the crawl-space in his ceiling would, under section 12 of the IP Act, be his personal information.
17. In a letter dated 3 April 2019, the Assistant Information Commissioner (**AIC**) discussed the meaning of 'personal information' and the way in which it is determined whether information is the personal information of an individual for the purposes of the IP Act. The AIC expressed the view that if plans, drawings, photographs etc., about the crawl space or manhole at the applicant's property were to exist, they would not comprise the applicant's personal information. The AIC advised that, while she agreed that information did not necessarily have to contain the applicant's name to be considered his personal information,⁸ such information was not, in her preliminary view, *about* the applicant.
18. The AIC went on to advise the applicant that, regardless of whether any information held by the Department about the crawl space was or was not his personal information, the Department had advised that it had undertaken searches for *any* documents about the crawl space at the applicant's property, irrespective of whether or not they also contained his personal information. This included searches of the tenancy file, property file, and the building and asset file. The only information located about the crawl space was the applicant's letter to the Department dated 12 June 2017.

⁷ Letters from the applicant dated 26 September 2018, 10 October 2018, 12 October 2018, and 15 October 2018.

⁸ Information can be personal information even if an individual's identity is not apparent, as long as their identity can reasonably be ascertained by reference to other information.

19. The applicant responded by letter dated 9 April 2019. He submitted that the letter that the Department had located in response to his application was not caught *'by the very content'* of his application. He continued to argue that, because he had been a tenant at the property throughout the period referred to in his access application, the *'only truly reasonable position open for your office to take, herein, would be that, indeed, there is a sufficient connection (or 'link' if you like), between (all of) the information sought (in my said initial application to the department), and myself, for such, to be effectively deemed, my 'personal information' – to which my access to same is practically guaranteed at law (under the IP Act – without charge that is).'* He rejected the suggestion that the Department had carried out comprehensive searches for information and submitted that it had only *'sifted through'* past correspondence with himself. He accused OIC of bias; of failing to take account of the pertinent information he had provided; and of taking into account irrelevant considerations.
20. The applicant wrote again on 20 May 2019 to advise that electricians had recently attended his unit, at the direction of the Department, to install new smoke alarms and that they had *'breach[ed] the kind of sanctity of the said crawl space'*. He alleged that the Department had deliberately arranged this to prejudice his inquiry and to retaliate against him, as well as to *'thwart'* the external review process. He also argued that the Department could easily have satisfied his inquiry about by conducting an inspection of the crawl space and generating a new or up-to-date visual record.
21. By letter dated 5 June 2019, I advised the applicant that I had reviewed the issues raised in his letter and considered them to be irrelevant to the only issue for determination in this review, which was whether there were reasonable grounds for expecting that, as at the date of his access application (26 September 2018),⁹ the Department had, in its possession or under its control, any additional documents that responded to the terms of his access application. I again reiterated to the applicant the searches that the Department had carried out and expressed the preliminary view that those searches appeared to me to be reasonable in all the circumstances, such that I was unable, on the information before me, to identify any other searches or inquiries that I considered it would be reasonable to ask the Department to undertake in an effort to locate any additional responsive documents.
22. The applicant responded with a 33 page handwritten undated submission (received on 14 June 2019). Much of that submission is irrelevant to the issue for determination in this review, in particular, the applicant's continued allegations about motives of the Department is arranging for the attendance of electricians at his property to install new smoke alarms. I do not accept the applicant's allegation that the Department deliberately arranged this attendance to somehow cause prejudice to the applicant or retaliate against him. I have no jurisdiction to investigate the attendance, as demanded by the applicant. As to the applicant's contention that the Department has the option of investigating the crawl space and gathering fresh information to answer his inquiry and then to give him access to a *'post-application document'*, whether or not an agency chooses to create a post-application document to respond to an applicant's application is a matter solely for the discretion of the agency.¹⁰ OIC has no power to compel an agency to create such a document. Similarly, the discretion that the applicant raises in his submissions that is contained in section 47(2) of the RTI Act – that an agency may give access to a document even if a ground on which access may be refused applies – is solely an agency's to exercise, and OIC has no jurisdiction to require an agency to

⁹ Section 47(1) of the IP Act provides that an access application is taken only to apply to documents that are, or may be, in existence on the day the application is received.

¹⁰ See section 27(2) of the RTI Act.

take any action in that regard. But in any case, the Department's position in this review is that it does not hold any additional responsive documents.

23. The applicant submitted that the terms of his access application were intended to be broad and to include any 'inventory' made of the condition and/or contents of the crawl space. He continued to argue that the Department had failed to conduct sufficient searches or particularise its searches, and that OIC had failed to provide him with a comprehensive statement of reasons for the preliminary view it had communicated. He objected to being asked to suggest any other searches or inquiries that he considered it would be reasonable to ask the Department to undertake in an effort to locate any further responsive documents. He also submitted that, because I had expressed a preliminary view that was adverse to him, I should not make the final decision in this matter because natural justice required me to pass the issues on to a more senior officer to decide.
24. First, I am satisfied that the Department has correctly interpreted the applicant's application as covering any documents, including visual records, and metadata. An inventory of the crawl space, were one to exist, would be captured within the Department's searches for any responsive 'documents'.¹¹ Secondly, the fact that I expressed a preliminary view that was adverse to the applicant does not amount to a denial of natural justice, or somehow indicate that I am biased against the applicant, such that I should not decide this matter. A 'preliminary view' is as the name suggests: a genuinely preliminary assessment of the issues for determination based upon the information available at the time. It is designed to inform the participants to a review of the relevant issues and to provide them with an opportunity to make a submission in support of their position. I am satisfied that the issues have been clearly explained to the applicant on a number of occasions. The applicant has availed himself of a number of opportunities to put forward submissions in support of his case. I have considered those submissions, but they have not persuaded me that the preliminary view I expressed to the applicant was incorrect. I am satisfied that the applicant has been afforded procedural fairness in this review.

Findings

Personal information

25. While it is not strictly necessary for me to do so, given that the Department has confirmed that it conducted searches for **any** documents that refer to the crawl space in the applicant's unit, and did not confine its searches to documents that contain the applicant's personal information in connection with the crawl space, I confirm that the right of access under the IP Act is confined to documents to the extent that they contain the applicant's personal information.¹² Determining whether information is the personal information of an individual for the purposes of the IP Act requires consideration of whether the identity of the individual is apparent from the information or, alternatively, whether their identity is reasonably ascertainable, and if so, whether the information is **about** that individual.¹³

¹¹ Under schedule 1 to the *Acts Interpretation Act 1954* (Qld), 'document' is defined as including any paper or other material on which there is writing; or marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and any disc, tape or other article or any material from which sounds, images, writings or message are capable of being produced or reproduced.

¹² Section 40 of the IP Act.

¹³ *Mahoney and Ipswich City Council* (Unreported, Queensland Information Commissioner, 17 June 2011) at paragraph 19.

Sufficiency of search

26. The Department advised that in an effort to locate any documents that concerned the crawl space in the applicant's unit, it had requested the following business units – Townsville Housing Service Centre/Building Asset Services/Building and Property Asset Management – to conduct searches of all relevant files. Searches were conducted of:
- tenancy files;
 - property files; and
 - building plans.
27. With the exception of the applicant's letter to the Department dated 12 June 2017, no other documents that concerned the crawl space were located. Building Asset Services also advised that they had no records of any requests in relation to maintenance of the crawl space.
28. I am unable to identify any other searches or inquiries that I consider it would be reasonable to ask the Department to undertake in an effort to locate any other responsive documents. The applicant commenced his tenancy in September 2014 and, as far as I am aware, first raised his concerns about a possible sound-emitting device located in the crawl space in 2017. It is reasonable to assume that if any documents concerning the applicant and the crawl space were generated by the Department, they would have been generated between 2017 and the date of the applicant's access application and would be located on one or more of the files that the Department searched.
29. Accordingly, I am satisfied that it is reasonable to expect that the searches that the Department conducted (as described above) would have captured any responsive documents. I therefore find that there are reasonable grounds to be satisfied that additional responsive documents are nonexistent.

Decision

30. I affirm the Department's decision that it was entitled to refuse access to documents on the basis that those documents are nonexistent or unlocatable under section 67(1) of the IP Act and sections 47(3)(e) and section 52 of the RTI Act.
31. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Louisa Lynch
Right to Information Commissioner

Date: 26 August 2019

APPENDIX**Significant procedural steps**

Date	Event
19 November 2018	OIC received the application for external review.
20 November 2018	OIC notified the applicant and the Department that it had received the application for external review and requested procedural documents.
11 December 2018	OIC received the requested procedural documents from the Department.
18 January 2019	OIC provided the applicant with an update on the status of the review.
7 February 2019	OIC received the applicant's submissions dated 4 January 2019.
3 April 2019	OIC conveyed a preliminary view to the applicant and requested a submission in response.
17 April 2019	OIC received the applicant's submissions dated 9 April 2019.
7 May 2019	OIC provided the Department with an update on the status of the review and requested further information.
8 May 2019	The Department provided OIC with the requested information.
14 May 2019	The Department provided OIC with further information.
14 May 2019	OIC notified the applicant that the application for external review had been accepted.
27 May 2019	OIC received additional submissions from the applicant dated 20 May 2019.
5 June 2019	OIC conveyed a preliminary view to the applicant and requested submissions in response.
14 June 2019	OIC received the requested submissions from the applicant.