



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>A51 and Office of the Health Ombudsman [2020] QICmr 17 (24 March 2020)</i></b>
<b>Application Number:</b>	<b>314687</b>
<b>Applicant:</b>	<b>A51</b>
<b>Respondent:</b>	<b>Office of the Health Ombudsman</b>
<b>Decision Date:</b>	<b>24 March 2020</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 - whether agency has conducted reasonable searches - whether access to further documents may be refused on the basis they are nonexistent or unlocatable - sections 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> and sections 47(3)(e) and 52 of the <i>Right to Information Act 2009 (Qld)</i></b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied, under the *Information Privacy Act 2009 (Qld)* (**IP Act**), to the Office of the Health Ombudsman (**OHO**), for ‘*information about me and my matters*’, including ‘*text messages and calendar entries*’ for named OHO officers.<sup>1</sup>
2. OHO located 37 pages of emails and internal OHO documents, and released these to the applicant, subject to the redaction of information on two pages.<sup>2</sup>
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review ‘*on the basis of insufficient searches*’.<sup>3</sup>
4. On external review, OHO released an additional five pages to the applicant. However, the applicant maintained that further documents should have been located.
5. I vary OHO’s decision and find that access to further documents may be refused on the basis that they do not exist or are unlocatable.<sup>4</sup>

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<sup>1</sup> Access application dated 7 June 2019. The date range applicable to the application was from 2 May 2019 to 7 June 2019.

<sup>2</sup> Decision dated 26 June 2019.

<sup>3</sup> Application for external review dated 26 June 2019.

<sup>4</sup> Section 67(1) of the IP Act and section 47(3)(e) of the *Right to Information Act 2009 (Qld)* (**RTI Act**).

## Background

6. The decision under review is OHO's decision dated 26 June 2019.
7. Significant procedural steps taken by OIC in conducting the external review are set out in the appendix to these reasons.
8. Evidence, submissions, legislation, and other material considered in reaching this decision are referred to in these reasons (including footnotes and appendix).

## Issues for determination

9. The applicant believes that OHO should have located more documents in response to her application. The issues to be determined are therefore: (1) whether OHO has taken reasonable steps to locate all relevant documents, and (2) whether access to further documents may be refused on the basis that they are nonexistent or unlocatable.<sup>5</sup>
10. The applicant also raised concerns about deficiencies in OHO's conduct in dealing with her complaints and processing her access application, and also queried the content of released documents. To the extent the applicant's submissions are relevant to the issue for determination, I have addressed them below.<sup>6</sup> However, some aspects of the applicant's submissions fall outside the Information Commissioner's external review jurisdiction and therefore, I have not considered, nor referred to those parts of her submissions, in these reasons.

## Relevant law

11. The IP Act provides citizens with a right to be given access to documents of an agency, to the extent they contain the individual's personal information.<sup>7</sup> This right is subject to certain limitations including grounds for refusal of access.<sup>8</sup> One such ground is where the requested information is nonexistent or unlocatable.<sup>9</sup>
12. A document will be nonexistent if there are reasonable grounds to be satisfied it does not exist.<sup>10</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>11</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.

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<sup>5</sup> Section 47(3)(e) and 52(1) of the RTI Act. On review, the applicant did not seek to contest OHO's decision to refuse access to parts of two pages. Therefore, that redacted information is not considered in these reasons.

<sup>6</sup> However, OIC does not have jurisdiction to examine broader compliance/complaint issues, nor to comment on the way an agency chooses to record information in its records. Therefore, such issues are not considered in these reasons.

<sup>7</sup> Section 40 of the IP Act.

<sup>8</sup> Section 67(1) of the IP Act states that an agency may refuse access to a document of an 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, were the document to be the subject of an access application under the RTI Act.

<sup>9</sup> Sections 47(3)(e) and 52(1) of the RTI Act.

<sup>10</sup> Section 52(1)(a) of the RTI Act. For example, a document has never been created.

<sup>11</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 FOI Act. 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.

13. 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 here is whether those searches and inquiries amount to ‘*all reasonable steps*’.<sup>12</sup> 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. Such steps may include inquiries and searches of all relevant locations identified after consideration of relevant key factors.<sup>13</sup>
14. 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 it, but it cannot be found. In determining whether a document is unlocatable, it is necessary to consider the specific circumstances of each case,<sup>14</sup> and in particular whether:
  - there are reasonable grounds for the agency to be satisfied that the requested documents have been or should be in the agency’s possession; and
  - the agency has taken all reasonable steps to find the document.<sup>15</sup>
15. 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>16</sup> 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>17</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>18</sup>

## Submissions

16. The applicant was not convinced that the 35 pages released to her by OHO represented all relevant documents responding to the terms of her application. The applicant specifically raised concerns that SMS messages from the mobile phones of particular OHO staff should have been located.<sup>19</sup>
17. OHO provided evidence<sup>20</sup> to OIC that the following locations had been searched:
  - Resolve, HP Records Manager (**HPRM**) and S:\Drive
  - all Outlook mailboxes and calendar entries of the following OHO staff:
    - the Health Ombudsman
    - the Principal Officer of the Assessment and Resolution Division
    - the Director of Triage of Assessment
    - the Executive Director of Assessment and Resolution Division
    - the Director of Complaints Intake and Referrals
    - the Director of Resolution and Conciliation
  - all Outlook mailboxes of the Principal Review Officer and Internal Review team; and

<sup>12</sup> As set out in *PDE* at [49]. See also section 137(2) of the IP Act.

<sup>13</sup> As set out in *PDE* at [38].

<sup>14</sup> *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [21]. See also, *F60XCX and Office of the Queensland Parliamentary Counsel* [2016] QICmr 42 (13 October 2016) at [84] and [87], and *Underwood and Minister for Housing and Public Works* [2015] QICmr 27 (29 September 2015) at [33]-[34] and [49].

<sup>15</sup> Section 52(1)(b) of the RTI Act.

<sup>16</sup> Section 100(1) of the IP Act.

<sup>17</sup> Section 137(2) of the IP Act.

<sup>18</sup> *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36].

<sup>19</sup> Application for external review dated 26 June 2019.

<sup>20</sup> Search records and certifications dated 4, 8, 9, 10, 14, 15 and 16 October 2019 and 11 and 12 February 2020.

- mobile telephones of two named officers for relevant SMS messages.
18. OHO submitted that its usual record keeping practice is to save all case related correspondence in Resolve and HPRM, and all non-case specific correspondence is saved on S:/Drive.<sup>21</sup> OHO submitted that it had required officers that were not named in the application to search for records as they had previously been involved in the applicant's matters.<sup>22</sup>
19. OHO's searches of the mobile phone records of two officers did not reveal any relevant documents. However, one staff member named in the application had recently ceased employment with OHO and, in accordance with standard OHO Information and Communications Technology practice, the work mobile telephone of that staff member was factory reset and its contents erased.<sup>23</sup>
20. In summary, the applicant's ongoing concerns<sup>24</sup> regarding missing documents include:
- records demonstrating why the Chief Executive Officer managed her complaints had not been located
  - the applicant's original complaint, any processing documents or records of discussions with involved parties or external agencies and an outcome report had not been located
  - the calendar entries, emails and text messages of the Health Ombudsman were not searched; and
  - correspondence between OHO and the Information Commissioner in relation to the applicant's complaints were not located.

## Findings

21. The applicant considers that the 35 pages released to her was insufficient. While I accept that this is a relatively small number of pages, the fact that the access application<sup>25</sup> covered a short timeframe of approximately five weeks, and sought only information about the applicant and her personal interactions with OHO, is likely to have contributed to the location of only 35 pages.
22. Having considered OHO's submissions regarding its recordkeeping practices, I am satisfied that it was reasonable for OHO to conduct searches in the locations described above in paragraph 17, including the Outlook mailboxes and calendar entries of the officers named in the access application. I also consider that OHO's searches of the Outlook accounts of other OHO officers (not named in the application but who had previously been involved in dealings with the applicant) have served to further enhance its search efforts.
23. I acknowledge that OHO was unable to conduct searches of the records on a work mobile telephone, due to that officer having left OHO's employment. However, given OHO's submission regarding its recordkeeping practices in relation to mobile phone records of past employees, I am satisfied that any relevant documents that may have been stored on that device have been destroyed and are therefore, nonexistent.

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<sup>21</sup> OHO submissions dated 1 July 2019, 24 September 2019 and 16 October 2019 and submissions received by telephone on 13 August 2019.

<sup>22</sup> OHO submission received by telephone on 13 August 2019.

<sup>23</sup> OHO submission dated 12 February 2020.

<sup>24</sup> As set out in her correspondence to OIC dated 26, 27 and 28 August 2019, 9, 11, 19 and 26 September 2019, 19 and 21 November 2019, 11 December 2019, 17 February 2020 and 5, 11 and 12 March 2020.

<sup>25</sup> 2 May 2019 to 7 June 2019.

24. The applicant submits that the Health Ombudsman's calendar entries, emails and SMS messages were not searched. OHO provided evidence<sup>26</sup> that the Health Ombudsman's calendar entries and emails were searched, however, records of SMS messages were not searched. The access application sought SMS messages from three named officers, and on review, the applicant confirmed that part of her request related to those three officers. Therefore, I am satisfied that it was reasonable for OHO to conduct searches of SMS records in relation to those three named officers only.
25. Overall, I am satisfied that the searches and inquiries undertaken by OHO in response to the application, and during the external review, have been targeted, informed by OHO's working knowledge of its internal recordkeeping practices and processes, and involved officers who have interacted/dealt with the applicant. In view of this, and taking into account the terms of the access application, limited date range, and the absence of any objective evidence to support the existence of further documents, I am unable to identify any further searches OHO could reasonably be asked to undertake.
26. For these reasons, I find that OHO has taken reasonable steps to locate all documents relating to the access application and access to any further documents may be refused on the basis they are non-existent or unlocatable.<sup>27</sup>

## DECISION

27. I vary OHO's decision and find that access to further documents may be refused under section 67(1) of the IP Act and 47(3)(e) of the RTI Act on the basis they are nonexistent or unlocatable under section 52(1) of the RTI Act.
28. I have made this decision under section 123 of the IP Act, as a delegate of the Information Commissioner under section 139 of the IP Act.



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**K Shepherd**  
**Assistant Information Commissioner**

**Date: 24 March 2020**

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<sup>26</sup> Search certification dated 4 October 2019.

<sup>27</sup> Section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act.

## APPENDIX

### Significant procedural steps

Date	Event
26 June 2019	OIC received the application for external review.
1 July 2019	OIC requested, and received, procedural documents and submissions from OHO.
13 August 2019	OIC received submissions from OHO.
26, 27, and 28 August 2019	OIC received submissions from the applicant.
29 August 2019	OIC wrote to the applicant to request additional information in support of her application for external review and received submissions.
9, 11 and 19 September 2019	OIC received submissions from the applicant.
24 September 2019	OIC requested, and received, additional information from OHO.
26 September 2019	OIC received submissions from the applicant.
27 September 2019	OIC requested submissions and search certifications from OHO.
16 October 2019	OIC received submissions and search certifications from OHO.
18 November 2019	OIC wrote to the applicant and requested additional information in support of her application for external review.
19 November 2019	OIC received submissions from the applicant.
21 November 2019	OIC received submissions from the applicant.
11 December 2019	OIC identified information located by OHO that had not been released to the applicant. OHO agreed to release the information to the applicant. OIC notified the applicant that the application for external review had been accepted and received submissions.
11 February 2020	OIC requested OHO undertake additional searches and provide search certifications.
12 February 2020	OIC received submissions and search certifications from OHO.
13 February 2020	OIC conveyed a preliminary view to the applicant and OHO.
17 February 2020 and 5, 11 and 12 March 2020	OIC received submissions from the applicant.