



Decision and Reasons for Decision

Citation:	3EUS8A and Department of Communities, Child Safety and Disability Services [2014] QICmr 29 (18 June 2014)
Application Number:	311648
Applicant:	3EUS8A
Respondent:	Department of Communities, Child Safety and Disability Services
Decision Date:	18 June 2014
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - SCOPE OF ACCESS APPLICATION - PERSONAL INFORMATION - information relating to an agency investigation and Crime and Misconduct Commission (CMC) report into the administration of a departmental program - applicant was departmental officer involved in administration of the program - applicant raised concerns about the administration of the program - whether the information is the applicant's personal information - section 40 of the <i>Information Privacy Act 2009</i> (Qld) ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT DOCUMENTS - applicant contends further information exists - whether there are reasonable grounds to be satisfied that further documents responding to the scope of the access application do not exist - whether access may be refused under section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52(1)(a) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Communities, Child Safety and Disability Services (**Department**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to 'Documents relating to [the applicant's] work and actions relevant to the administration of the former Major Grants program and related information by the Crime and Misconduct Commission [(**CMC**)]', over the period March to September 2009 (**access application**). The access application specifically sought access to a report that the Department prepared '... in response to information provided by [the applicant] to the CMC, plus any notes or drafts or material that relates to the preparation of that report document.'

2. The Department located 43 pages, and released 35 full pages and 8 part pages to the applicant.¹
3. The applicant sought external review of the Department's decision on the basis that the applicant considered that the Department failed to locate all information that responded to the access application, especially the following:
 - the report prepared by the former Department of Communities'² Internal Audit Branch (**Internal Report**), which formed exhibit 31 to the CMC Report on an Investigation into the alleged Misuse of Public Monies, and a former Ministerial Advisor (**CMC Report**)
 - the CMC Report; and
 - any information relating to the preparation of the Internal Report or the CMC Report (collectively, **Report Information**).
4. For the reasons set out below, I am satisfied that:
 - access to the Report Information cannot be sought under the IP Act, as this information is not the applicant's personal information; and
 - the Department has taken reasonable steps to identify and locate documents that the applicant applied for, and no further information responding to the access application exists, and therefore access to further information may be refused under section 47(3)(e) and 52(1)(a) of the *Right to Information Act 2009* (Qld) (**RTI Act**).

Background

5. Significant procedural steps relating to the application are set out in the appendix to this decision.

Reviewable decision

6. The decision under review is the Department's decision dated 26 June 2013.

Evidence considered

7. The evidence, submissions, legislation and other material I have considered in reaching my decision are disclosed in these reasons (including footnotes and appendix).

Issues in the review

8. The issues for determination in this review are whether:³
 - the application for access to the Report Information is able to be made under the IP Act; and
 - the Department has taken reasonable steps to identify and locate the documents that the applicant applied for.

¹ The applicant did not take issue with the part refusals on external review.

² Departmental Arrangements Notice (No. 1) 2012 restructured the former Department of Communities, and renamed it the Department of Communities, Child Safety and Disability Services.

³ During the course of this external review, the Department located a further five pages of information that were created during the administration of the Major Facilities Program. This information contains the applicant's name in the context of the applicant being a public servant involved in the administration of the particular projects the information refers to. The applicant is not pursuing access to this information, and therefore it is not in issue in this review.

Is the application for access to the Report Information able to be made under the IP Act?

9. No, for the reasons that follow.

Relevant law

10. The IP Act forms one part of the information access scheme that facilitates access to information held by the Queensland Government. The IP Act allows an individual a right of access to documents of an agency, to the extent that the document contains the applicant's personal information,⁴ unless giving access would, on balance, be contrary to the public interest.⁵

11. The access scheme created by the IP Act is separate from, and complemented by, the access scheme established by the RTI Act. The RTI Act confers a right of access to documents of an agency⁶ containing non-personal information, or both personal and non-personal information, upon payment of a fee.⁷

12. An access application may only be made and dealt with under the IP Act if all of the documents sought in the access application contain the applicant's personal information. If an applicant is seeking access to documents that do not contain the applicant's personal information, the applicant must apply for access to this information under the RTI Act.⁸

13. 'Personal information' is defined as:⁹

...information or an opinion, including information or an opinion forming part of a 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.

14. The Right to Information Commissioner has previously determined that information will be a particular individual's personal information for the purposes of the IP Act if:

- the individual can be identified from the information sought; and
- the information sought is about that individual.¹⁰

15. In some instances, an individual's identity is clear from the face of the document, for example, an individual's name or a detailed description of a particular individual. Where a document does not contain information that obviously identifies an individual, the Right to Information Commissioner has previously considered that in some instances, an individual may be reasonably identifiable through additional information. The Right to Information Commissioner has previously considered that the below factors will influence whether an individual's identity can be reasonably ascertained:¹¹

- how available the additional information is

⁴ Section 40 of the IP Act.

⁵ Section 64(1) of the IP Act.

⁶ Section 3 of the RTI Act.

⁷ Section 24(2) of the RTI Act.

⁸ *Mahoney and Ipswich City Council* (Unreported, Queensland Information Commissioner, 17 June 2011) (*Mahoney*), at [14] to [17].

⁹ In section 12 of the IP Act.

¹⁰ *Mahoney* at [19].

¹¹ *Mahoney* at [21].

- how difficult it is to obtain
 - how many steps are required to identify the individual
 - how certain the identification will be
 - whether it will identify one specific individual or a group of people; and
 - whether the individual receiving the information can use it to identify the individual.
16. Whether information is 'about' an individual is a contextual question, independent from considering whether the information identifies an individual. The word 'about' is not defined in the IP Act. Accordingly, it is necessary to consider the word's ordinary meaning. The dictionary definition of 'about' includes '*of; concerning; in regard to ... connected with*'.¹² Accordingly, in considering whether information is 'about' an individual, it is necessary to consider whether the information reveals anything about the individual.¹³
17. Previous decisions of the Information Commissioner have determined that reports of investigations conducted as a result of an applicant's complaint are not about the applicant, but about the persons who were the subject of the allegations and investigation.¹⁴
18. Thus, in order to determine whether the Report Information is the applicant's personal information, and able to be sought under the IP Act, I must consider:
- firstly, whether the applicant can be identified from the Report Information; and
 - if so, secondly, whether the Report Information is about the applicant.
19. If the first element listed above is not satisfied, it is not necessary to consider the second element as the elements are cumulative.

Is the Report Information the applicant's personal information?

20. No.
21. I have carefully considered the CMC Report and the Internal Report. Neither Report contains details that would identify the applicant, such as the applicant's name, a photograph, or a detailed description of the applicant.
22. The applicant has submitted¹⁵ that the applicant's identity could be reasonably ascertained from the Report Information. The thrust of the applicant's submission in this regard is that evidence in the information that the Department released to the applicant suggests that both the Department and the CMC suspected that the applicant was responsible for disclosing departmental information to the media, and making a public interest disclosure.
23. Further, the applicant submits¹⁶ that the Internal Report was produced as a consequence of allegations that the applicant made to the CMC. In this regard, the

¹² Macquarie Dictionary Online.

¹³ *Mahoney* at [23] to [27].

¹⁴ See, for example, *McKay and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 25 May 2010) at [80] to [81]; *Cameron and Queensland Police Service* (Unreported, Queensland Information Commissioner, 7 August 2012) at [31] to [32]; *G8KPL2 and Department of Health* (Unreported, Queensland Information Commissioner, 31 January 2011) (**G8KPL2**) at [32]. *G8KPL2* was appealed to the Queensland Civil and Administrative Tribunal. On appeal, the Queensland Civil and Administrative Tribunal did not disagree with the Information Commissioner's interpretation of the term 'about': *Minogue v Office of the Information Commissioner and Anor* [2012] QCATA 191.

¹⁵ In an email to OIC dated 8 November 2013.

¹⁶ Applicant's submissions to OIC dated 20 March 2014, at pages 11 to 12.

applicant asserts that the allegations that appear in the Internal Report are allegations that the applicant made to the CMC, and the Internal Report '*...proceeds to address specifically [the applicant's] exact 13 allegations – one by one*'.¹⁷

24. The applicant maintains that the Internal Report was addressing the accuracy of the applicant's statements, which '*...makes this a report as much about comment on [the applicant's] credibility as it does about investigating the issues [that the applicant] raised*'.¹⁸ The applicant asserts that '*...the fact that the Department not only knew exactly who was the source of the allegations, had displayed an intention to bring criminal charges against [the applicant] prior to commencing the report, and had a reputation to protect, delivered a report that focuses mainly on [the applicant's] statements, not context or implications and clearly identifies this document as certainly being a document about [the applicant's] reliability (me)*'.¹⁹
25. I do not accept this submission. I have carefully considered the information that the Department located in response to the access application, the Internal Report and the CMC Report. I find that there is a distinction between:
- an investigation into whether the applicant made disclosures of departmental information; and
 - the Internal Report and the CMC Report.
26. I am satisfied that an investigation into whether the applicant disclosed departmental information is about the applicant, and comprises the applicant's personal information.²⁰ The Department released information about this investigation to the applicant in response to the access application.
27. However, the fact that the Department held suspicions that the applicant disclosed information to the media and made a public interest disclosure and conducted an investigation into the former, is not evidence of the applicant's identity being reasonably ascertainable from either the Internal Report or the CMC Report. Those Reports are separate from, and independent to, any investigation into whether the applicant was the source of disclosures of departmental information. The CMC Report and the Internal Report concern whether any misconduct occurred in the administration of the Major Facilities Program, by persons other than the applicant.²¹ Neither the CMC Report, nor the Internal Report, refer to, or otherwise identify, the applicant in any way. I am therefore not satisfied that either the Internal Report or the CMC Report reveals a fact or opinion about the applicant.
28. Additionally, as to the applicant's submission that the applicant is identifiable from the Internal Report because the applicant was the source of the 13 allegations that appear in it, I do not consider this argument succeeds. The only information before me that identifies the applicant as the source of the 13 allegations is the applicant's own assertion that the applicant is the source of the allegations. This information is not ascertainable from the Internal Report, the CMC Report, or any surrounding

¹⁷ Applicant's submissions to OIC dated 20 March 2014, at page 12.

¹⁸ Applicant's submissions to OIC dated 20 March 2014, at page 12.

¹⁹ Applicant's submissions to OIC dated 20 March 2014, at pages 12-13.

²⁰ Within the meaning of section 12 of the IP Act.

²¹ The summary at page vii of the CMC Report describes the CMC Report as reporting on '*...the CMC's investigation into a grant of \$4.2 million to the Queensland Rugby Union in 2008 and the role that Mr Simon Tutt, ministerial advisor to the then Minister for Police, Corrective Services and Sport, the Honourable Judy Spence MP, played in the awarding of that grant. During the course of that investigation, the CMC also considered more general concerns about the manner in which the then Department of Local Government, Sport and Recreation administered and awarded grants under its Major Facilities Program.*'

information. In fact, if the applicant was, as the applicant asserts, a whistle blower, the CMC would not have identified the applicant in its dealings with the Department.²²

29. As to the information relating to the preparation of the Internal Report and the CMC Report it is useful to note that the Internal Report was triggered by the CMC requiring the Department to provide a response to certain allegations. This is useful to note because the applicant would not have been identified (if the applicant were the source of the allegations) by the CMC to the Department. I consider that it is reasonable to extrapolate from the fact that neither the Internal Report nor CMC Report identify the applicant, that the applicant is likewise not identified in any of the information relating to the preparation of those reports, particularly given the applicant's assertion of his status as a whistle blower.
30. Therefore, I am not satisfied that the applicant can be identified from the Report Information. I find that the Report Information is not the applicant's personal information²³ and accordingly, it is not necessary to consider whether the information is about the applicant.
31. Therefore, access to the Report Information cannot be sought under the IP Act as it does not contain the applicant's personal information.²⁴

Is there any further information in the Department's possession that responds to the access application?

32. No, for the reasons that follow.

Relevant law

33. It is well settled that the terms of an access application will set the parameters for an agency's search efforts.²⁵ Relevantly, an access application made under the IP Act will only capture documents containing the applicant's personal information.²⁶ In this regard, the Information Commissioner has previously held that:²⁷

It is not possible for an applicant to unilaterally extend the terms of an [access application] at the external review stage. The terms in which the [access application] was framed will already have set the parameters for an agency's response...and in particular set the direction of the agency's search efforts to locate all documents of the agency which fall within the terms of the [access application].

34. Accordingly, in the context of this external review, it is necessary to consider whether:
 - the documents to which access is being sought respond to the terms of the access application; or
 - further documents exist, which have not been located by the agency's search efforts.

²² Section 55 of the *Whistleblowers Protection Act 1994* (Qld) and section 65 of the *Public Interest Disclosure Act 2010* (Qld) prohibit the disclosure of the identity of a person who makes a public interest disclosure.

²³ Within the meaning of section 12 of the IP Act.

²⁴ Section 40 of the IP Act.

²⁵ *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at [8].

²⁶ Section 40 of the IP Act.

²⁷ *Robbins and Brisbane North Regional Health Authority* (1994) 2 QAR 30 at [17]. Although this decision concerned an application made under the now repealed *Freedom of Information Act 1992* (Qld), the introduction of the information access scheme contained in the IP Act and RTI Act has not altered this principle.

35. On external review, the Information Commissioner is empowered to investigate and review whether agencies have taken reasonable steps to identify and locate documents that respond to an access application.²⁸
36. However, an agency may refuse access to documents that are non-existent or unlocatable.²⁹ A document will be non-existent if, for example, it was never created. In considering whether a document is non-existent, it is necessary to enquire whether there are reasonable grounds for the agency to be satisfied that the requested document does not exist.³⁰

Analysis

37. The applicant has submitted that:³¹

... the Department has failed to competently address the subject of [the applicant's] application. The Department has ... failed to provide access to material relevant to the CMC inquiry into the Grant Program relevant to my involvement and therefore there is still a considerable amount of material relevant to my application still not disclosed.

38. It is clear that the applicant perceives the issue to be the sufficiency of the Department's searches.
39. The Department has provided OIC with copies of search certifications,³² and searches that its information management section performed.³³ I have carefully considered this information, and I am satisfied that the Department has used its best efforts to locate documents that respond to the scope of the access application.
40. On the basis of the evidence before me, I am satisfied that the issue at the crux of this external review is not the Department's search efforts, but the fact that the access application has been made under the IP Act, and is thus limited to accessing documents containing the applicant's personal information. As I have found earlier in this decision, the Report Information does not contain the applicant's personal information. Therefore, I am not satisfied that there is a reasonable basis to believe that further documents that respond to the access application exist.
41. The applicant further submits³⁴ that the applicant obtained information via '*...an RTI application with the CMC.*' The applicant submits that this information refers to a document related to the '*...desire of the [Department] to prosecute me.*' The applicant continues that:³⁵

The material provided by the CMC also strongly supported the construction of a premise that there must be significantly more information held by the Department that relates to the period when the department was seeking to take legal action against me...

Unless senior public servants involved in this aspect of my enquiry are hopelessly derelict in delivering their services or had been given deliberate instructions not to generate supporting documentation, department files should be replete with supporting material such as internal memos, minutes of meeting, notes to files, e-mails, and records of conversations, that would have underpinned the decision making process.

²⁸ Section 136 of the IP Act.

²⁹ Section 67 of the IP Act, and sections 47(3)(e) and 52 of the RTI Act.

³⁰ *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) at [34].

³¹ Application for external review.

³² Dated 21 May 2013.

³³ On 28 October 2013 and 5 December 2013.

³⁴ Applicant's submissions to OIC dated 20 March 2014, at page 15.

³⁵ Applicant's submissions to OIC dated 20 March 2014, at pages 15-16.

None of this [sic] items have been discovered.

42. I invited the applicant to provide OIC with a copy of the information that the applicant considers suggests that the Department holds further information that responds to the access application, and a submission identifying what further information the applicant considers exists.³⁶ The applicant did not provide OIC with this information.
43. The information that the Department located in response to the access application does not refer to any contemplated legal action or prosecution against the applicant. The applicant has not provided any additional information that would assist the Department in conducting searches for the information that the applicant contends exists.
44. In circumstances such as those that prevail in this external review, where an applicant asserts that an agency has failed to identify a requested document, and has information that will enable the agency to identify the document so that it can conduct appropriate searches, there is a practical onus on an applicant to fully explain the basis for believing that the document exists, and disclose any relevant evidence which tends to support the existence of reasonable grounds for such a belief.³⁷ As the applicant did not provide OIC with this information, I must make this decision without its benefit.
45. I note that another factor that may contribute to the above information not being located is the time period which the applicant has specified in the access application. The applicant sought access to information relevant to the time period March to September 2009.
46. I have inspected the information that the Department released to the applicant and it is clear that the Department's Ethical Standards Unit referred allegations against the applicant to the CMC on or about 2 September 2009. On or about 17 September 2009, the CMC provided the Department with its assessment of the issue. The CMC considered that the allegation against the applicant would not be capable of productive investigation, and that no further action was warranted. There is no other information about any other legal action or prosecution that the Department may have contemplated against the applicant in that material. Whether further material exists that does not fall within the applicant's stipulated timeframe, I cannot know from the material before me.
47. I note that the Department underwent machinery-of-government changes in 2009³⁸ and 2012.³⁹ Following the 2012 machinery-of-government changes, the Department and DNPRSR entered into a memorandum of understanding (**MOU**). This MOU relates to '*...all records created by Sport and Recreations Services in its capacity under the former Department of Communities up until 01 July 2012*'.⁴⁰ Relevantly, Schedule B⁴¹ of the MOU provides for custodianship of records as follows:

³⁶ By letter to the applicant dated 18 April 2014.

³⁷ *Ainsworth and the Criminal Justice Commission and Others* (1999) 5 QAR 284 at [46].

³⁸ On 26 March 2009, Administrative Arrangements Order (No 1) 2009 abolished the Local Government, Sport and Recreation Department, and its sport and recreation functions were transferred to the Communities Department.

³⁹ On 3 April 2012, Departmental Arrangements Notice (No 1) 2012 restructured the former Department of Communities, and renamed it the Department of Communities, Child Safety and Disability Services. Departmental Arrangements Notice (No 1) 2012 also established the Department of National Parks, Recreation, Sport and Racing (**DNPRSR**). DNPRSR absorbed portfolios from the former Department of Communities, including sport and recreation.

⁴⁰ MOU between the Department and DNPRSR, dated 13 February 2013, at page 4.

⁴¹ At page nine of the MOU.

1. *Any records relating to the Sport and Recreation function that were transferred from previous agencies into the former Department of Communities will be transferred to DNPRSR custodianship as they become apparent.*
 2. *Any records distinctly relating to the Sport and Recreation function created up until 1st of July 2012 within the former department of Communities will be transferred to DNPRSR custodianship.*
48. This may be another explanation for why, if further information exists, it cannot be located. In this regard, I am aware the applicant made a previous access application to the Department, which the Department transferred to DNPRSR, as it considered DNPRSR held all documents relevant to the access application. However, in processing the access application, DNPRSR indicated that the Department held the majority of the documents. While this might on one hand provide some reason to consider that the Department holds further documents, it is apparent on the other hand that the Department has conducted appropriate searches, as evidenced by the search information and search certification the Department provided to OIC. I have carefully considered these searches and search certifications, and I am satisfied that the Department conducted appropriate searches in the circumstances.
49. I note the applicant did not provide OIC with any information that would assist the Department in its searches. Accordingly, on the basis of the terms of the applicant's application, the Department's search certifications, information about the Department's searches, the information that the Department located in response to the access application, the CMC Report and the Internal Report, I do not consider that it is reasonable to require the Department to conduct further searches for information as its searches were reasonable and appropriate in the circumstances.
50. I am satisfied that the Department has taken reasonable steps to identify and locate documents the applicant applied for, and no further documents responding to the access application exist.

DECISION

51. I am satisfied that the Report Information does not comprise the applicant's personal information. I am therefore satisfied that the Report Information may not be sought under the IP Act.
52. On the basis of the scope of the access application, and the information available to OIC, I am satisfied that no further documents responding to the access application exist, and access to further information may be refused under sections 47(3)(e) and 52(1)(a) of the RTI Act.
53. Accordingly, I affirm the decision under review. I have made this decision as a delegate of the Information Commissioner, under section 139 of the *Information Privacy Act 2009* (Qld).

Assistant Information Commissioner Corby

Date: 18 June 2014

APPENDIX

Significant procedural steps

Date	Event
10 October 2012	The Department received the access application.
10 May 2013	The access application became compliant.
26 June 2013	The Department issued its decision on the access application.
5 July 2013	OIC received the applicant's application for external review.
23 July 2013	OIC advised the applicant and the Department that the application had been accepted for review.
9 August 2013	The Department provided OIC with a copy of the information which it had released to the applicant, a copy of the information which it refused access to, and consultation that the Department had undertaken with third parties.
23 August 2013	OIC asked the Department to provide further information about the Department's searches for documents that responded to the access application.
11 September 2013	The Department provided OIC with a submission about the searches it conducted in response to the access application, and a copy of the information it considered was outside the scope of the access application.
18 September 2013	OIC provided the applicant with an update on the status of the external review. OIC asked the Department to provide a further submission on the searches it conducted in response to the access application.
10 October 2013	OIC provided the applicant with an update on the status of the external review. The applicant asked if OIC had received the applicant's submission dated 19 September 2013.
11 October 2013	OIC informed the applicant that the applicant's submission dated 19 September 2013 had not been received, and asked the applicant to resend that submission.
28 October 2013	The Department informed OIC that it had located a file which may contain information relevant to this external review (Further File).
30 October 2013	OIC asked the Department to provide the Further File, so OIC may assess what (if any) documents fall into the scope of the Access Application.
7 November 2013	OIC provided the applicant with an update on the status of the external review.
8 November 2013	The Department provided OIC with the Further File. The applicant provided OIC with a submission in support of the applicant's case.
21 November 2013	The Department provided OIC with a submission on the searches it conducted in response to the access application.
5 December 2013	OIC provided the applicant with an update on the status of the external review.
11 December 2013	The Department provided OIC with details about the additional searches it for documents it conducted on external review, and changes to custody of records resulting from machinery-of-Government changes.
20 December 2013	OIC asked if the Department objected to the applicant being provided with access to five pages in the Further File (Category B Information).

3 January 2014	The Department provided OIC with a submission that the Category B Information is outside the scope of the access application.
16 January 2014	OIC asked the Department for a further submission about the Category B Information. OIC provided the applicant with an update on the status of the external review.
29 January 2014	The applicant provided OIC with a submission that further information responding to the access application exists.
31 January 2014	The Department provided OIC with a submission, reiterating that the Category B Information is outside the scope of the access application.
13 March 2014	OIC provided the applicant with an update on the status of the external review.
18 March 2014	OIC conveyed a written preliminary view to the applicant.
20 March 2014	The applicant advised OIC that the applicant contested the preliminary view and provided OIC with a submission in support of the applicant's case.
9 April 2014	OIC asked the applicant to provide OIC with the following information by 18 April 2014: <ul style="list-style-type: none"> • a copy of the applicant's submission dated 19 September 2013 • a copy of the applicant's submission dated 27 October 2013 • a copy of the information the applicant obtained from the CMC, which the applicant considers suggests that the Department holds further information that responds to their access application; and • a submission clearly identifying what further documents the applicant considers exists.
7 May 2014	The applicant informed OIC that the applicant did not wish to pursue access to the Category B Information.