



Decision and Reasons for Decision

Citation:	<i>McCrystal and Queensland Building and Construction Commission (No. 2)</i> [2017] QICmr 50 (6 October 2017)
Application Number:	312996
Applicant:	McCrystal
Respondent:	Queensland Building and Construction Commission
Decision Date:	6 October 2017
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - application for information about a review of an investigation of the applicant's complaint concerning an alleged regulatory breach - whether agency has taken all reasonable steps to locate documents but the documents cannot be found or do not exist - 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 Queensland Building and Construction Commission (QBCC) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to:

*All documents, correspondence, materials and advice considered that comprised the "review of decision" performed by "manager" described under point 2 of "Investigations" of correspondence by [a specified QBCC officer - Officer X] to [the applicant] (28 July 2016). Also request the review itself.*²
2. QBCC located 37 pages. It decided³ three pages were outside the scope of the access application. Of the remaining 34 pages, it decided to release 22 pages and parts of 12 pages. It deleted or refused the rest of the 12 pages on the basis that this information was irrelevant to the application, or its disclosure would be contrary to the public interest. For unspecified reasons, it also redacted lines of symbols appearing on seven pages.
3. The applicant applied⁴ to the Office of the Information Commissioner (**OIC**) for an external review, seeking access to all information not disclosed by QBCC. The applicant also raised general concerns that QBCC had not located all relevant documents.

¹ On 4 August 2016.

² The applicant identified the types of documents he sought as '[r]eview itself, and supporting/ considered documentation, internal & external correspondence, decision, correspondence & notices subsequent to review'. The application covered the period from July 2014 to 4 August 2016 (being the date the application was received by QBCC).

³ On 30 September 2016.

⁴ The applicant initially applied for external review on 7 October 2016 and, on 10 October 2017, provided an amended application to replace the earlier document.

4. For the reasons set out below, I vary QBCC's decision and find that access to the additional documents raised by the applicant may be refused on the ground they are nonexistent or unlocatable.

Background

5. QBCC regulates the building industry throughout Queensland. A range of legislation falls within QBCC's regulatory responsibilities.⁵ As part of these responsibilities, QBCC provides services⁶ which include encouraging and enforcing compliance with the laws the QBCC is responsible for administering.⁷ QBCC has a range of administrative, civil and criminal enforcement remedies available to it under the legislation that it administers.⁸
6. The applicant has made a number of complaints to QBCC relating to residential building work at two adjoining properties—Property 1 and Property 2. Of relevance to this review:
 - On 10 July 2014, the applicant made a complaint to QBCC about unlicensed contracting by LJ Technical Control Construction Pty Ltd (**LJ Technical**) at Property 1 (**Initial Complaint**).
 - QBCC investigated the Initial Complaint and, on 24 July 2014, issued a stop work order and an infringement notice.
 - Further information was submitted for QBCC's consideration.⁹
 - On 25 July 2014, after considering the further information, QBCC decided that LJ Technical was appropriately licensed for the building work at Property 1 and construction was permitted to continue (**Initial Decision**).
 - By letter dated 8 August 2014, QBCC notified LJ Technical that the infringement notice was withdrawn.
7. On about 19 February 2015, the applicant, via his legal representative, lodged a further complaint concerning building work at Property 1, which maintained the Initial Complaint and requested an immediate investigation by QBCC.¹⁰
8. Then, on about 8 February 2016, the applicant, via his legal representative, lodged another complaint concerning building work at Property 1 and requested a review of the Initial Decision. QBCC's response, dated 15 March 2016, confirmed that QBCC considered the investigation of the Initial Complaint was finalised and relevantly stated:

Your correspondence makes reference to the notification of offence lodged by your client in 2014 and seeks a review and comment about whether any further steps would be taken against LJ Technical Control Construction Pty Ltd (the respondent). When taking into

⁵ Refer to <<http://www.qbcc.qld.gov.au/about-us/overview>> and <<http://www.qbcc.qld.gov.au/about-us/legislation>>.

⁶ QBCC's website refers to the four main services QBCC provides for Queensland home owners and contractors as 'Licensing services', 'Dispute prevention and resolution services', 'Home warranty insurance' and 'Information and education'.

⁷ Refer to QBCC's Compliance and Enforcement Policy 2014 at <<http://www.qbcc.qld.gov.au/about-us/our-policies>>.

⁸ QBCC Compliance and Enforcement Policy 2014 relevantly states: 'Where breaches are blatant, repeated and/or cause significant detriment, the QBCC will target those licensees or unlicensed individuals for prosecution. The QBCC has a range of other tools available, which may be used as an alternative to prosecution.'

⁹ This further information was considered in a separate access application made by the applicant and much of it was released to him.

¹⁰ Page 86 in File 920989 Ministerial EDRMS, released to the applicant in respect of another of his access applications, contains the following statement by his legal representative: 'On 23 February 2015 the QBCC provided to us a response to our letter dated 17 February 2015 whereby they explained they had conducted a thorough investigation with respect to the development at the site and determined the Developer was appropriately licensed.'

consideration the age of the complaint and that statute of limitation associated with commencing any proceedings has expired (should the QBCC wish to revisit their decision), no further steps will be taken with relation to this matter.

I am satisfied that the respondent in this matter has been further educated and provided with relevant advice and information from the CIU Investigators. The matter has been resolved by educating the licensee in this instance, in accordance with the QBCC Compliance and Enforcement Policy.

9. The applicant made a number of other complaints to QBCC during the same period, including:

- certifier complaints concerning Property 1¹¹
- unlicensed contracting by LJ Technical at Property 2;¹² and
- fire protection work complaints.¹³

Given the number of complaints made by the applicant, QBCC's investigations of them were, at times, being conducted concurrently by different QBCC officers.

10. By letter dated 28 July 2016, QBCC provided information to the applicant concerning its investigations of six of his complaints.¹⁴ Under the heading 'Investigations' in that letter, point 2 makes the following statement regarding the Initial Decision (**Statement**):

Ongoing concerns about this decision led to a further review and a detailed investigation of the legislation which was undertaken by a manager. It was determined that the work subject of your complaint was in fact technically outside the scope of the builders licence. As the licensee had undertaken the same work at [Property 2], the QBCC ensured that the licensee was made aware of the breaches detected at both [Property 1 and Property 2] and took appropriate action.

11. The applicant's access application seeks information relating to QBCC's 'further review' of its investigation of the Initial Complaint that resulted in the Initial Decision, as referred to in this Statement (**'further review'**).

12. In its decision that is the subject of this external review (**RTI Decision**), QBCC provided the following explanation to the applicant about the 'further review':

After discussions with the Compliance Investigations Unit (CIU), including the author of the letter, I have established that the "further review and a detailed investigation of the legislation which was undertaken by a manager" refers to a meeting held between [Officers X, Y, and Z]. In this meeting, [Officer Y] went through his investigation, documents and the decision of the complaint regarding [Property 2]. [Officer Y] also raised the [Initial] [C]omplaint about [Property 1] and voiced his belief that the decision maker had erred in the decision to withdraw the fine for [Property 1] as he considered the scenarios in [Property 1] and [Property 2] to be similar. Both seniors agreed with [Officer Y's] findings on [Property 2] and noted his concerns about the decision of [Property 1].

There are no notes resulting from this meeting ... CIU

13. The significant procedural steps relating to the external review are set out in the Appendix.

¹¹ Complaints dated 30 March 2015 and 11 August 2015. QBCC investigated both complaints.

¹² Complaint dated 26 October 2015. QBCC investigated the complaint.

¹³ Complaint about fire protection works at Property 1 dated 18 April 2016 and complaint about fire protection and building works at Properties 1 and 2 dated 1 June 2016. QBCC investigated both complaints.

¹⁴ Identified as the Initial Complaint and complaints received by QBCC on 19 February 2015, 30 October 2015, 9 February 2016, 18 April 2016 and 11 July 2016.

Reviewable decision

14. The decision under review is the RTI Decision—that is, QBCC’s decision dated 30 September 2016.

Issue to be determined

15. During the external review:
- QBCC released small portions of information to the applicant
 - the applicant did not wish to pursue access to the lines of symbols;¹⁵ and
 - the applicant accepted OIC’s view that the remaining information¹⁶ may be refused or deleted on the basis that it was outside the scope of or irrelevant to the access application.
16. Accordingly, some issues have been resolved informally during the review process. The remaining issue to be determined is whether additional information raised by the applicant should have been located by QBCC.

Evidence considered

17. Evidence, submissions, legislation and other material that I have considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).
18. The applicant provided OIC with extensive submissions in his external review application, amended external review application and on two occasions during the external review. To the extent the applicant’s submissions are relevant to the issues for determination in this review, I have addressed them below.
19. OIC’s jurisdiction under the RTI Act relates to decisions about access to and, where relevant, amendment of, documents held by agencies. The applicant’s submissions raise a number of concerns that OIC is unable to consider or address on external review, and which are not relevant to the issues for determination in this review. Generally, these relate to the applicant’s:
- dissatisfaction with QBCC’s investigations of his various complaints, including the Initial Complaint, and certain investigation outcomes
 - concern that his representations to QBCC disputing the Initial Decision were ignored, refuted or dismissed
 - concern that the Initial Decision and the outcome of QBCC’s investigation of a similar complaint concerning Property 2 were not the same; and
 - belief that QBCC staff have made incorrect representations and decisions about various complaints.

Preliminary issue

20. Before considering the issue for determination, it is necessary to deal with a preliminary issue arising from concerns expressed in the applicant’s submissions. The applicant submits that:

¹⁵ These symbols conveyed no discernible meaning. QBCC advised that they appeared as a by-product of its process of converting emails to .pdf format.

¹⁶ That is, the information that QBCC had deleted or refused on the basis that it was irrelevant to the access application or its disclosure would be contrary to the public interest.

- in processing the access application, QBCC's decision-maker has been '*influenced or directed, orally or in writing and either explicitly or by being disingenuous, to make a decision believed to not be the decision that should have been made under the RTI Act*';¹⁷ and
- he believes the QBCC officers who the QBCC decision-maker liaised with during the processing of the access application have acted disingenuously.¹⁸

21. I have carefully considered the applicant's submissions in this regard. There is no evidence before me which supports the applicant's assertions that QBCC's processing of the access application, or the conduct of its officers in that processing and on external review, was inappropriate or that QBCC's decision-maker has been influenced or directed as the applicant alleges.

Additional documents the applicant believes QBCC failed to locate

22. As noted above,¹⁹ the issue to be determined is whether additional information raised by the applicant should have been located by QBCC.
23. OIC sought²⁰ confirmation from the applicant about the categories of information which, in his view, exist and should have been located by QBCC. The applicant confirmed²¹ that his sufficiency of search concerns were limited to the following three categories of documents:

- Category (i)** documents relating to a review, conducted in 2014, of QBCC's investigation of the Initial Complaint
- Category (ii)** documents recording the meeting between three specified officers (**Officers X, Y and Z**), which is referenced in the explanation at page 2 of QBCC's RTI Decision; and
- Category (iii)** documents recording actions taken or notifications issued as a result of QBCC's changed assessment of the Initial Complaint.

Relevant law

24. Under the RTI Act, a person has a right to be given access to documents of an agency, unless access would, on balance, be contrary to the public interest.²² There are some limitations on this right of access, including grounds for refusal of access.²³
25. Relevantly, one such ground is that access to a document may be refused if the document is nonexistent or unlocatable.²⁴ A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.²⁵ A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document but it cannot be found.²⁶

¹⁷ External review application and submissions dated 19 July 2017.

¹⁸ Submissions dated 19 July 2017. The applicant submits that such officers were disingenuous in their recollection of the event that the Statement actually refers to. The applicant's view—that the meeting described in QBCC's RTI Decision does not constitute the '*further review*' referred to in the Statement—is set out in the reasons regarding the Category (i) documents below.

¹⁹ At paragraph 16.

²⁰ On 30 June 2017.

²¹ Dated 19 July 2017. OIC's subsequent letters to the applicant dated 17 August 2017 and 8 September 2017 noted that the applicant's sufficiency of concerns related only to these three categories.

²² Section 44 of the RTI Act. This is referred to as the 'pro-disclosure bias' and is the starting point in deciding access to information under the RTI Act.

²³ Set out in section 47(3) of the RTI Act.

²⁴ Sections 47(3)(e) and 52 of the RTI Act.

²⁵ Section 52(1)(a) of the RTI Act.

²⁶ Section 52(1)(b) of the RTI Act.

26. To be satisfied that a document is *nonexistent*, the Information Commissioner has previously recognised that a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors, including:²⁷
- the administrative arrangements of government
 - the agency structure
 - the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
 - the agency's practices and procedures (including but not exclusive to its information management approach); and
 - other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates.
27. When proper consideration is given to relevant factors, it may not be necessary for searches to be conducted. This is the case in circumstances where it is ascertained 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.
28. Searches may also be relied on to satisfy the decision-maker that a document does not exist. If searches are relied on to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents.²⁸ 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.
29. To determine whether a document exists, but is *unlocatable*, the RTI Act requires consideration of whether there are reasonable grounds to be satisfied that the requested document has been or should be in the agency's possession; and whether the agency has taken all reasonable steps to find the document.²⁹ In answering these questions, regard should again be had to the circumstances of the case and the key factors set out above.³⁰

Steps taken by QBCC to locate documents

30. OIC requested that QBCC conduct further searches for documents responsive to the access application, including the three categories of documents identified above.³¹ In response to OIC's requests for further searches and enquiries, QBCC confirmed that it had conducted further searches of its contractor management system, electronic

²⁷ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (**Pryor**) at [19], which adopted the Information Commissioner's comments in *PDE and the University of Queensland* [2009] QICmr 7 (9 February 2009) (**PDE**). The decision in *PDE* concerned 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 here.

²⁸ As set out in *PDE* at [49]. See also section 130(2) of the RTI Act.

²⁹ Section 52(1)(b) of the RTI Act.

³⁰ *Pryor* at [21].

³¹ Paragraph 23.

document and records management system and email records. QBCC provided OIC with a copy of its search records and enquiries in this regard.³²

31. Further, in light of the applicant's submissions concerning a lack of evidence that the meeting between Officers X, Y and Z described in the RTI Decision had occurred, QBCC also provided OIC with a memorandum, signed by Officers X and Y,³³ which outlines their recollection of the nature of the meeting and what was discussed at the meeting, and confirms that no document recording the meeting was created.
32. The only documents located as a result of QBCC's further searches were documents that had already been located and considered in response to two previous access applications made by the applicant—specifically:
 - (a) **First Prior Application Documents**—231 pages which were previously fully or partially released to the applicant in response to the applicant's first access application to QBCC, which was not the subject of an external review.³⁴ These 231 pages relate to QBCC's investigation of the Initial Complaint concerning unlicensed licensing at Property 1 that resulted in the Initial Decision and withdrawal of the infringement notice.
 - (b) **Second Prior Application Documents**—two pages³⁵ and one audio recording, which were assessed and partially or fully refused in response to the applicant's access application that was considered by OIC in external review 312924.³⁶ These documents record actions taken and notifications issued concerning the outcome of QBCC's investigation of the applicant's separate complaint concerning unlicensed contracting at Property 2.³⁷
33. As these documents had already been addressed in the two previous access applications, OIC advised the applicant that it assumed that he did not wish them to be considered again in this external review. The applicant did not object to this approach.
34. QBCC has relied on further searches by its officers on external review to demonstrate that all relevant documents have been located. The question I must therefore consider is whether QBCC has taken *all reasonable steps* to locate documents relevant to the access application, including the three categories of documents raised by the applicant. While this does not require OIC to deal separately with each of the applicant's sufficiency of search submissions or to make separate findings about QBCC's search efforts in relation to each of the types of documents the applicant believes exist,³⁸ the circumstances of this review are amenable to consideration of each of the three categories the applicant contends should be located in turn.

³² Three certifications regarding these searches and enquiries, two dated 29 August 2017 and one dated 31 August 2017, were completed by senior QBCC officers. Those certificates indicate QBCC searches used search terms including '1238341', '12638341_1', '1263834_6', '[Property 1]' and the street name of Property 1.

³³ Due to Officer Z's absence, the memorandum was not reviewed or signed by Officer Z.

³⁴ QBCC's file reference: RTI_053_14_15.

³⁵ Being page 10 in File 1263834_Case Notes and page 387 in File 1263834 Compliance EDRMS.

³⁶ QBCC's file reference: RTI_248_15_16. The external review was finalised by decision - refer to *McCrystal and Queensland Building and Construction Commission* [2017] QICmr 32 (10 August 2017).

³⁷ QBCC explained in its RTI Decision that the statement '*the licensee was made aware of breaches detected at both* [Property 1 and Property 2] *and took appropriate action*' in the 28 July 2016 letter was a reference to communications within these documents.

³⁸ Refer to *Goodman and Department of Justice and Attorney-General* [2014] QICmr 4 (6 February 2014) at [23].

Findings

Category (i) documents

35. As noted above,³⁹ the applicant submits that QBCC should have located:

Category (i) documents relating to a review, conducted in 2014, of QBCC's investigation of the Initial Complaint.

36. QBCC conducted searches of its contractor management system, electronic document and records management system and email records. Apart from the First Prior Application Documents, no additional documents relating to a review of QBCC's investigation of the Initial Complaint were located.

37. The applicant considers that QBCC's explanation in its RTI Decision about the meeting that constituted the *'further review'* is incorrect, and OIC cannot reasonably be satisfied that the described meeting is in fact this *'further review'* referred to in the Statement.⁴⁰ His submission that QBCC should have located further Category (i) documents is predicated on his view that circumstances other than the meeting outlined in the RTI Decision constitute the *'further review'*. Based on this position, he contends that documents about this other *'further review'* exist and should be located by QBCC.

38. Given the applicant's submissions in this regard, OIC made further enquiries with QBCC about its investigations regarding the Initial Complaint and QBCC provided the following information:

- on 24 July 2014, QBCC's investigation concluded that the building work at Property 1 fell outside the scope of LJ Technical's licence and an infringement notice was issued to LJ Technical
- on 25 July 2014, as a result of further information received by QBCC, that conclusion was changed and, on 8 August 2014, the infringement notice was withdrawn
- the difference between the outcome of the Initial Complaint about unlicensed contracting at Property 1 and the outcome of a separate investigation of the applicant's complaint about unlicensed contracting at Property 2 was discussed by certain complaint investigation staff in the meeting identified as the *'further review'* in QBCC's RTI Decision; and
- no documents or case comments have been added to QBCC's investigation file concerning the Initial Complaint since withdrawal of the infringement notice.

39. I note that:

- the Statement in QBCC's letter dated 28 July 2016 refers to the *'further review'* as a *'further review and a detailed investigation of the legislation which was undertaken by a manager'*; whereas
- QBCC's RTI Decision explains that this *'further review'* occurred during a meeting between Officers X, Y and Z, in which:
 - Officer Y went through his findings regarding the complaint about unlicensed contracting at Property 2, and Officers X and Z agreed with them; and

³⁹ At paragraph 23.

⁴⁰ Submissions dated 22 September 2017.

- Officer Y observed that this scenario was similar to that raised in the Initial Complaint and expressed concerns about the Initial Decision, and Officers X and Z noted these concerns.
40. The applicant considers that either the Statement's reference to a *'further review'* is a reference to circumstances other than the meeting outlined in the RTI Decision, or the Statement *'grossly exaggerates the process undertaken by the QBCC'*.⁴¹ I acknowledge that the Statement gave the applicant the impression that the *'further review'* entailed more than the described meeting. However, I also note the Statement's advice that [a]s *the licensee had undertaken the same work at [Property 2], the QBCC ensured that the licensee was made aware of the breaches detected at both [Property 1 and Property 2] and took appropriate action'*. In my view, this advice may reasonably be construed as being consistent with the RTI Decision's outline of the matters discussed in the meeting, in that it appears to confirm that, when QBCC conveyed its findings regarding the complaint about Property 2 to LJ Technical (as discussed in the meeting), QBCC also observed that there had been similar issues regarding Property 1.
41. The applicant submits that there is evidence to the contrary—that is, evidence which indicates that the meeting described in QBCC's RTI Decision does not constitute the *'further review'* referred to in the Statement.⁴² In this regard, the applicant submits that:
- based on the contents of the released drafts of QBCC's letter dated 28 July 2016, additional documents which demonstrate another *'further review'* must exist;⁴³ and
 - *'[t]his event may not be restricted to the year 2014, and may have even occurred before 8 August 2014'*.⁴⁴
42. It is my understanding that the applicant considers that changes to the wording of the Statement in four released drafts of the 28 July 2016 letter indicate that documents recording a review of the investigation, in 2014 or at some other date, exist and should have been located by QBCC.
43. I note that:
- The phrase *'a further review and a detailed investigation of the legislation was undertaken by a manager'* does not appear in the first⁴⁵ and second drafts⁴⁶ of QBCC's letter dated 28 July 2016. Rather, these drafts instead state *'[t]his matter was reviewed shortly thereafter, and nuances of the legislation examined'*.
 - The phrase *'a further review and a detailed investigation of the legislation was undertaken by a manager'* appeared in the third draft of QBCC's letter dated 28 July 2016,⁴⁷ remained in the fourth and final draft,⁴⁸ and therefore appears in final version sent to the applicant.⁴⁹
44. The applicant submits:⁵⁰

⁴¹ External review application.

⁴² Submissions dated 22 September 2017. The applicant's submissions in this regard are elaborated on at paragraphs 44-47 below.

⁴³ Submissions dated 19 July 2017.

⁴⁴ Submissions dated 19 July 2017.

⁴⁵ Attached to an email sent at 9:24am on 28 July 2016 and appearing at pages 16-17 of the documents released to the applicant.

⁴⁶ Attached to an email sent at 9:42am on 28 July 2016 and appearing at pages 21-22 of the documents released to the applicant.

⁴⁷ Attached to an email sent at 11:46am on 28 July 2016 and appearing at pages 29-31 of the documents released to the applicant.

⁴⁸ Attached to an email sent at 8:45am on 29 July 2016 and appearing at pages 33-34 of the documents released to the applicant.

⁴⁹ Attached to an email sent at 8:51am on 29 July 2016 and appearing at pages 36-37 of the documents released to the applicant.

⁵⁰ Submissions dated 22 September 2017.

- the officers who prepared the first and third drafts of the 28 July 2016 letter would have reviewed *'the materials available on QBCC systems'*
- *'[i]t appears likely that the documents available under [the access application considered in external review] 312924 demonstrating the activity of [Officers X, Y and Z], as accepted by the OIC, were accessed by [those officers]'*
- as a result, those officers would have *'discovered'* that staff involved in other investigations had already determined, in 2015, that the work the subject of the Initial Complaint was outside the scope of LJ Technical's licence; and
- it is the activity of Officers X, Y, and Z, as accessed by the officers who prepared the first and third drafts of the 28 July 2016 letter, that is *'what is actually referred to in [the drafts of the Statement as the 'further review']'*.

45. In his statement, the applicant contemplates the possibility that the only documents available to the officers who prepared the first and third drafts were the First and Second Prior Application Documents:

In accordance with the analysis above, documents satisfying the further review and detailed investigation of the legislation indeed may only be [the First and Second Prior Application Documents] – and it is possible that these are the documents referred to by [the officers who prepared the first and third drafts of the 28 July 2016 letter]. Although [the three specified officers] may have further relevant documents in their possession, it is possibly true that documents may be nonexistent or unlocatable. However, this is not necessarily relevant in the circumstances.⁵¹

46. However, based on his assessment of specific statements in emails relating to investigations of his other complaints, he also submits that:

- three QBCC officers made a decision in November 2015 that the work the subject of the Initial Complaint was outside the LJ Technical's licence; and
- material about this decision—being among the materials available on QBCC systems available to the officers who prepared the first and third drafts—provided those officers with *'a more reasonably believable description of the event(s)'*.

47. As I understand it, the specific statements were:⁵²

- a statement in a QBCC email to the applicant's legal representative dated 24 March 2015—
I have undertaken a review of the investigation and I am satisfied that the CIU officers have acted appropriately and applied the legislation in the correct manner
- a statement in an internal QBCC email dated 25 November 2015—
If further evidence has come to light which now suggests the 'alternate solution' has changed and is of a different class and type and it is considered by [a specified officer] to now be outside the scope of the licence we can issue another fine. We would need to know when the new evidence came to light ...
- a statement in a QBCC email to a certifier dated 26 November 2015—
We now discover during the course of the recent investigation against [the certifier] that the building is a Type A in the basement and Type C above. I have been informed by our Licensing Manager that even though it is only Type A in the basement, it is outside [the builder's] license scope.

⁵¹ Submissions dated 22 September 2017.

⁵² I note that the documents containing these statements were released to the applicant under other applications made by him.

48. I have carefully considered the applicant's submissions about the material that, in his view, indicates that the meeting described in QBCC's RTI Decision does not constitute the '*further review*' referred to in the Statement. I have also carefully considered the four released drafts of the 28 July 2016 letter. I note the changes to the various drafts, and that these were circulated for comment over a 24 hour period. I am satisfied that there is no evidence before me which supports the applicant's assertion that the relevant QBCC staff accessed and reviewed documents when preparing the drafts of the 26 July 2016 letter. It follows that I am satisfied that there is no evidence that those QBCC staff accessed any materials recording a '*further review*'.
49. Further, even if it were the case that the emails containing the statements raised by the applicant (set out in the preceding paragraph) were accessed and reviewed by the relevant QBCC staff, I am, in any event, satisfied that the statements in question do not lend themselves to an expectation that any additional documents recording a '*further review*', as posited by the applicant, were created.
50. In these circumstances, and taking into consideration the search certifications and the memorandum referred to in paragraphs 30 and 31 above, I am satisfied that there is no evidence before me, apart from the applicant's assertions, which indicates that the explanation provided in QBCC's RTI Decision about what constitutes the '*further review*' referred to in the Statement is incorrect. Accordingly, I am satisfied that there is no evidence before me which indicates that documents about a different '*further review*' review, involving circumstances other than the meeting described in the RTI Decision, exist. (Documents about the meeting referred to in the RTI Decision are addressed under the heading 'Category (ii) documents' below).
51. In terms of the applicant's assertion or belief that QBCC *should* have created records of such a '*further review*', this too is insufficient to support a reasonable expectation that such records were, in fact, created. In any event, I am satisfied that any further documents which exist and are relevant to the access application would be located within the QBCC records that have been searched by QBCC.
52. In conclusion, the material before me does not support a reasonable expectation that further documents (in addition to the First Prior Application Documents) would have been created about the '*further review*' of QBCC's investigation of the Initial Complaint that resulted in the Initial Decision, as referred to in the Statement. Taking into consideration the steps taken by QBCC to locate responsive documents during the external review and the contents of the memorandum referred to in paragraph 31 above, I am satisfied that relevant QBCC staff have undertaken appropriately targeted searches of all relevant locations where it was reasonable to expect that the types of information requested in the access application, including those raised at (i) of the applicant's sufficiency of search submissions, would be found.
53. In these circumstances, I am satisfied that:
- QBCC has taken all reasonable steps to locate documents responsive to Category (i) of the applicant's sufficiency of search concerns; and
 - there are reasonable grounds to be satisfied that, apart from the First Prior Application Documents, any further documents falling within Category (i) are nonexistent or unlocatable and may be refused on this ground.⁵³

⁵³ Under sections 47(3)(e) and 52(1) of the RTI Act.

Category (ii) documents

54. As noted above,⁵⁴ the applicant also contends that QBCC should have located:

Category (ii) documents recording the meeting between three specified officers (**Officers X, Y and Z**), which is referenced in the explanation at page 2 of QBCC's RTI Decision.

55. As set out above in relation to the Category (i) documents, the applicant does not consider that the meeting outlined in the RTI Decision constitutes the '*further review*' referred to in the Statement. Accordingly, the applicant does not accept that the changed assessment—that is, QBCC's position that '*the work the subject of your complaint was in fact technically outside the scope of the builders licence*', which the Statement indicates to be the conclusion of the '*further review*', and which differs from the Initial decision⁵⁵—arose in the context of this meeting.

56. However, the applicant submits that '*if the eventual [decision about the Initial Complaint] did indeed transpire from the alleged meeting described in the RTI [D]ecision*'.⁵⁶

- the phrase '*... a further review and a detailed investigation of the legislation which was undertaken by a manager*' in the Statement '*demonstrates that there should be some form of documentation of these findings*'⁵⁷
- it is not unreasonable to believe that a government decision would be documented, have some form of documented process, or even a documented reference to that process; however, the only documented evidence of the meeting is QBCC's RTI Decision;⁵⁸ and
- it is '*not reasonably believable*' that a government agency could conduct a further review or a detailed investigation of the legislation of '*a highly contentious issue*', arrive at a decision that would affect numerous parties, and also maintain its responsibilities under the *Public Records Act 2002* (Qld), without creating any document or contemporary reference to any meeting at which the issues could have possibly been discussed.⁵⁹

57. QBCC conducted searches of its contractor management system, electronic document and records management system and email records. No record of the referenced meeting between Officers X, Y and Z was located. QBCC also made enquiries of staff within its Compliance Investigation Unit and provided the memorandum referred to in paragraph 31 above in support of its submission that no record of the meeting was created.

58. Taking into consideration the steps taken by QBCC to locate responsive documents during the external review and the contents of the memorandum referred to in paragraph 31 above, I consider that QBCC has conducted searches and made enquiries reasonably likely to identify any record of the referenced meeting between Officers X, Y and Z; however, no such documents were located. I am satisfied that documents relating to such a meeting would, if they existed, be located within the QBCC records that have been searched by QBCC.

⁵⁴ At paragraph 23.

⁵⁵ Which, as noted at paragraph 6, determined that LJ Technical was appropriately licensed for the building work at Property 1, permitted construction to continue, and resulted in withdrawal of the infringement notice that had been issued to LJ Technical.

⁵⁶ Submissions dated 19 July 2017.

⁵⁷ Submissions dated 19 July 2017.

⁵⁸ Submissions dated 22 September 2017.

⁵⁹ Submissions dated 22 September 2017.

59. The applicant's assertion or belief that a record of the meeting *should* have been created does not mean that such a record was in fact created. OIC's jurisdiction does not extend to determining whether QBCC has failed to meet the requirements of the *Public Records Act 2002*. In this review, I am only required to determine if there are reasonable grounds to expect that the documents do not exist or cannot be located.
60. Based on all of the material before me, I consider that QBCC has ensured that relevant staff have undertaken appropriately targeted searches of all relevant locations where it was reasonable to expect that the types of information requested in the access application, including those raised at (ii) of the applicant's sufficiency of search submissions, would be found.
61. In these circumstances, I am satisfied that:
- QBCC has taken all reasonable steps to locate documents responsive to Category (ii) of the applicant's sufficiency of search concerns; and
 - there are reasonable grounds to be satisfied that any additional documents responsive to Category (ii) are nonexistent or unlocatable and may be refused on this ground.⁶⁰

Category (iii) documents

62. Finally, as noted above,⁶¹ the applicant contends that QBCC should have located:
- Category (iii) documents recording actions taken or notifications issued as a result of QBCC's changed assessment of the Initial Complaint.
63. As noted above,⁶² the changed assessment is QBCC's position that *'the work the subject of your complaint was in fact technically outside the scope of the builders licence'*, which the Statement indicates to be the conclusion of the *'further review'*.
64. In response to OIC's enquiries about the actions taken or notifications issued throughout its investigations regarding the Initial Complaint, QBCC provided the following information:
- following the Initial Decision, the infringement notice issued to LJ Technical on 24 July 2014 was withdrawn on 8 August 2014; and
 - the difference between the Initial decision and the outcome of a separate investigation of the applicant's complaint about unlicensed contracting at Property 2 was notified to LJ Technical.

QBCC conducted searches of its contractor management system, electronic document and records management system and email records. Apart from the Second Prior Application Documents, no additional documents relating to actions taken or notifications issued as a result of QBCC's changed assessment of the Initial Complaint were located. Based on the material before me, I consider that relevant QBCC staff have undertaken appropriately targeted searches of all relevant locations where it was reasonable to expect that the types of information requested in the access application, including those raised at (iii) of the applicant's sufficiency of search submissions, would be found. I consider that further records relating to such actions or notifications would, if they existed, be located within the QBCC records that have been searched by QBCC.

⁶⁰ Under sections 47(3)(e) and 52(1) of the RTI Act.

⁶¹ At paragraph 23.

⁶² At paragraph 55.

65. Accordingly, I am satisfied that:

- QBCC has taken all reasonable steps to locate documents responsive to Category (iii) of the applicant's sufficiency of search concerns; and
- there are reasonable grounds to be satisfied that any additional documents responsive to Category (iii) are nonexistent or unlocatable and may be refused on this ground.⁶³

DECISION

66. I vary QBCC's decision and find that access to the additional documents raised by the applicant may be refused under section 47(3)(e) of the RTI Act on the ground that they are nonexistent or unlocatable under section 52(1) of the RTI Act.

67. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

A Rickard
Assistant Information Commissioner

Date: 6 October 2017

⁶³ Under sections 47(3)(e) and 52(1) of the RTI Act.

Appendix

Significant procedural steps

Date	Event
7 October 2016	OIC received the external review application.
10 October 2016	OIC received an amended copy of the external review application.
21 October 2016	OIC notified the applicant and QBCC that it had accepted the external review application and asked QBCC to provide information.
9 November 2016	OIC received requested information from QBCC.
November 2016 to June 2017	Initially OIC attempted to progress the applicant's various external reviews concurrently; however, this proved difficult given the volume of interconnected material across the reviews requiring consideration. OIC then progressed an earlier external review of the applicant, proceeding on the basis that OIC would deal each of the external reviews in turn.
30 June 2017	OIC requested that the applicant confirm his sufficiency of search concerns and advise whether he continued to seek access to certain types of information. OIC requested that QBCC conduct further searches to address the applicant's sufficiency of search submissions and consider releasing small portions of information to the applicant.
12 July 2017	OIC received QBCC's search response and advice that it agreed to release the small portions of information to the applicant.
19 July 2017	OIC received the applicant's submissions.
17 August 2017	OIC conveyed a preliminary view to the applicant that, apart from lines of symbols, the information that QBCC had decided not to release may be refused or deleted on the basis that it was outside the scope of or not relevant to the access application. OIC invited the applicant to indicate if he continued to seek access to the lines of symbols and to provide submissions if he did not accept the preliminary view. OIC requested that QBCC conduct further searches to address the applicant's sufficiency of search submissions.
29 August 2017	QBCC confirmed to OIC that it had released the small portions of information to the applicant.
1 September 2017	OIC received QBCC's further search response.
8 September 2017	OIC confirmed to the applicant that the absence of any response from him to OIC's preliminary view of 17 August 2017 was taken to mean that he accepted that preliminary view and did not seek access to the lines of symbols. OIC conveyed a further preliminary view to the applicant that the additional information the applicant considered QBCC should have located was nonexistent or unlocatable. OIC invited the applicant to provide submissions if he did not accept the preliminary view.
22 September 2017	OIC received the applicant's submissions regarding OIC's preliminary view of 8 September 2017.