



Decision and Reasons for Decision

Citation:	<i>FutureBus Pty Ltd and Energy Queensland Limited; Ergon Energy Corporation Limited (Ergon Energy Network) and Ergon Energy Queensland Pty Ltd (Ergon Retail) [2023] QICmr 17 (31 March 2023)</i>
Application Numbers:	316654, 316726, 316727
Applicant:	FutureBus Pty Ltd ACN 638 354 873
First Respondent:	Energy Queensland Limited ACN 612 535 583
Second Respondent:	Ergon Energy Corporation Limited (Ergon Energy Network) ACN 087 646 062
Third Respondent:	Ergon Energy Queensland Pty Ltd (Ergon Retail) ACN 121 177 802
Decision Date:	31 March 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - NONEXISTENT DOCUMENTS - application for financial and technical information relating to the Torres Strait Islands and Cape York electricity network - whether there are reasonable grounds to be satisfied the requested documents do not exist - section 47(3)(e) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant sought access to a range of financial and technical documents relating to the electricity network in the Torres Strait Islands and Cape York from Energy Queensland Limited, Ergon Energy Corporation Limited (Ergon Energy Network) and Ergon Energy Queensland Pty Ltd (Ergon Retail) (**Respondent**)¹ under the *Right to Information Act 2009* (Qld) (**RTI Act**).
2. The Respondent located and granted full access to its fixed asset register for the Torres Strait and Cape York. In relation to the remaining parts of the access application, the Respondent did not locate any documents because they were not created. The Respondent therefore refused access to this information under section 47(3)(e) of the RTI Act on the basis that the documents were nonexistent.

¹ I have referred to Energy Queensland Limited, Ergon Energy Corporation Limited (Ergon Energy Network) and Ergon Energy Queensland Pty Ltd (Ergon Retail) collectively as the Respondent in this decision for ease of reference. The relevant background and jurisdictional issues are addressed under the heading 'Application of the RTI Act to the Respondent' below.

3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the decision.
4. For the reasons set out below, I affirm the decision under review. I am satisfied that access to the requested information can be refused under section 47(3)(e) of the RTI Act as the documents are nonexistent.

Reviewable decision

5. The reviewable decision is the Respondent's decision dated 30 March 2022.

Evidence considered

6. Significant procedural steps taken in these reviews are set out in the appendix. The evidence, submissions, legislation, and other material I have considered in reaching this decision are referred to in these reasons (including footnotes and the appendix).²

Issue for determination

7. The applicant requested:

*Historical information on capital expenditure, past expenditure, past revenue, current expenditure, current revenue, forecasts for future demand, forecasts for future expenditure, forecasts for future capital expenditure, forecasts for future revenue, **for the Torres Strait Islands and Cape York's electricity network and retail.***

Type of documents - cashflow forecasts, forecast budgets, historical income and expense statements, asset registers, depreciation schedules, reports on forecast demand, forecasts of future expenditure, balance sheets.

Time period: 2010-2030

[bold font is my emphasis]

8. The Respondent located and granted full access to the fixed asset register for Torres Strait and Cape York. This document comprises approximately 33 pages. In relation to the remaining parts of the access application, the Respondent did not locate any documents and explained that extensive searches and enquiries with the relevant individuals were made, but it does not have the documents because they are not created.
9. On external review, the Respondent provided submissions to OIC explaining the nature and extent of the searches and enquiries it had undertaken to locate the requested information and a detailed explanation as to why it did not create this information. In essence, the Respondent's position is that the documents do not exist because they are not created—and they are not created because the Respondent does not report or

² Including the *Human Rights Act 2019 (Qld) (HR Act)* to the extent necessary to do so. The participants in this review are not 'individuals', and only individuals have human rights under section 11 of the HR Act. To the extent then that it is necessary to observe relevant rights under section 58(1) of the HR Act, I am satisfied that I have done so. However, Kingham J in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 at [90] indicated that where section 58(1) of the HR Act applies, there need be no mover to raise human rights issues because that section requires the relevant public entity to properly consider engaged human rights and to not act or make a decision that is not compatible with human rights. This is because in observing and applying the law prescribed in the RTI Act, as I have done in this case, an RTI decision-maker will be '*respecting and acting compatibly with*' applicable human rights as stated in the HR Act (*XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].) In this regard, I note Bell J's observations at [573] of XYZ on the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*'

record data for the specific Torres Strait and Cape York sites, rather it records this information for the Isolated Network as a whole.³

10. The Respondent offered to assist the applicant before the commencement of this external review by identifying the terms of a fresh application under the RTI Act which may yield relevant information and/or arranging a meeting with its General Manager to discuss the applicant's questions, concerns or request for information. The applicant did not pursue these options with the Respondent.
11. After conveying the Respondent's submissions to the applicant on external review together with the preliminary view that the requested information was nonexistent, OIC encouraged the applicant to consider pursuing these options with OIC's assistance. The applicant did not wish to engage with these possible avenues of informal resolution on external review.
12. Accordingly, the issue for determination is whether the Respondent was entitled to refuse access to the requested information under section 47(3)(e) of the RTI Act on the basis that it is nonexistent.

Application of the RTI Act to the Respondent

13. The applicant made one access application which sought access to documents covering the three entities identified as *'Energy Queensland Limited and its subsidiaries Ergon Energy Corporation Limited trading as Ergon Energy Network and Ergon Energy Queensland Pty Ltd trading as Ergon Retail'*. The decision-maker issued one decision covering all three entities.
14. Energy Queensland Limited (**EQL**) is the parent company of a number of operating companies whose main business is the provision of regulated electricity distribution, retail services to customers and other unregulated business activities. These companies include Ergon Energy Corporation Limited (**Ergon Energy Network**) and Ergon Energy Queensland Pty Ltd (**Ergon Retail**). As the parent entity, EQL has the legal right to control documents in the physical possession of these entities.⁴
15. EQL is a government owned corporation (**GOC**) and Ergon Energy Network is its subsidiary. I am satisfied that these entities meet the definition of 'agency' as defined in section 14(1) of the RTI Act and are subject to the application of the RTI Act.
16. In terms of Ergon Retail:
 - The RTI Act does not apply to the entities mentioned in schedule 2, part 2 in relation to the function mentioned in that part.⁵ Schedule 2, part 2, item 14 of the RTI Act provides that the RTI Act does not apply to Ergon Energy Queensland Pty Ltd ACN 121 177 802 (i.e. Ergon Retail) in relation to its functions, except so far as they relate to community service obligations.
 - Section 112(1)(a) of the *Government Owned Corporations Act 1993* (Qld) (**GOC Act**) provides that the community service obligations of a GOC are obligations to perform activities that the GOC's board establishes to the satisfaction of the shareholding Ministers are not in the commercial interests of the GOC to perform.

³ Refer to the definition of Isolated Network in paragraph 23 below.

⁴ Respondent's submissions to OIC on 1 July 2022.

⁵ Section 17(b) of the RTI Act.

This section applies to a statutory duty to perform activities that arise under an Act applying specifically to a GOC.⁶

- On this issue, the Respondent relevantly explained that:⁷
 - The Queensland Government Budget Strategy and Outlook 2020-21 indicates that the government considers its community service obligations to include the provision of electricity in regional Queensland.⁸
 - The Uniform Tariff Policy (**UTP**) provides for parity of pricing for all non-market electricity consumers, regardless of their geographic location in Queensland. For customers outside of the southeast corner, the cost of supplying electricity typically exceeds the price allowed for in regulated retail tariffs. The Queensland Government pays EQL to provide electricity in regional Queensland at prices based on the costs to supply in southeast Queensland, in accordance with the Government's UTP.
 - The access application concerns those community service obligations.

17. I accept the Respondent's submissions on this issue and am satisfied that Ergon Retail is covered by the RTI Act in this review as the access application relates to its community service obligations under the GOC Act.

Whether there are reasonable grounds to be satisfied that the requested documents do not exist

18. The information requested by the access applicant is set out at paragraph 7 above.

Relevant law

19. Access to a document may be refused if it is nonexistent or unlocatable.⁹ A document is nonexistent if there are reasonable grounds to be satisfied it does not exist.¹⁰ 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.¹¹

20. To be satisfied that a document does not exist, the Information Commissioner has previously recognised that an agency must rely on its particular knowledge and experience, having regard to various key factors including:¹²

- the administrative arrangements of government
- the agency's structure
- the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and other legal obligations that fall to it)

⁶ Section 112(2)(h) of the GOC Act.

⁷ Respondent's submissions to OIC on 1 July 2022.

⁸ https://s3.treasury.qld.gov.au/files/2020_21_Budget_Strategy_and_Outlook_2-2.pdf at page 140.

⁹ Sections 47(3)(e) and 52(1) of the RTI Act.

¹⁰ Section 52(1)(a) of the RTI Act.

¹¹ Section 52(1)(b) of the RTI Act.

¹² *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [19], which adopted the Information Commissioner's comments in *PDE and The University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]- [38] (The decision in *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld), which was in substantially the same terms as section 52 of the RTI Act). Refer also to *Van Veendendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017) and *Y20 and Department of Education* [2021] QICmr 20 (11 May 2020) at [45].

- the agency's practices and procedures (including, but not limited to, its information management approaches); and
 - other factors reasonably inferred from information supplied by the applicant, including the nature and age of the requested documents, and the nature of the government activity to which the request relates.
21. By considering the above factors, an agency may ascertain 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.
22. An agency may also rely on searches to satisfy itself that a document does not exist. In those cases, all reasonable steps must be taken to locate the documents.¹³ Such steps may include inquiries and searches of all relevant locations identified after consideration of the key factors listed above.

Respondent's submissions

23. The Respondent advised that:
- Ergon Energy Network builds and maintains the electricity distribution network for regional Queensland. It owns and operates 33 isolated power stations with stand-alone electricity networks that supply communities too remote to connect to the national grid. These stand-alone micro-grids form Ergon Energy Isolated Network and they supply a diverse range of 39 communities which are located throughout the Gulf of Carpentaria, Palm and Mornington Islands and Western Queensland, as well as in the Torres Strait and parts of Cape York (**Isolated Network**). Notably, however, much of the Cape York network is connected to the National Electricity Market, and therefore not isolated.
 - Ergon Retail sells electricity and issues energy bills to approximately 700,000 retail customers throughout regional Queensland.
24. The Respondent's position is that the documents do not exist because its systems, practices and processes do not create the type of information the applicant has requested, *which relates specifically to the Torres Strait Islands and Cape York*.
25. In reaching this position, the Respondent considered its corporate structure, business functions and responsibilities and undertook enquires and searches across all three companies, including its Engineering Division, Finance Division and Retail Division. The Respondent's submissions in this regard are summarised below.¹⁴

Engineering Division

26. The Engineering Division is responsible for leading the group's engineering and asset management strategies. This includes site analysis for capital and operation works, demand and load analysis and forecast, and outworking the Isolated Network Strategy 2030 to transition to renewable energy in the isolated communities.

¹³ As set out in *PDE* at [49].

¹⁴ The summary of the Respondent's submissions is taken from its decision letter dated 30 March 2022 and submissions to OIC on 1 July 2022 (which included search certifications) and 15 December 2022.

27. Searches were conducted by the Manager of Isolated Networks from EQL's Renewables & Distributed Energy Business Unit.
28. The Isolated Network Team, which is part of EQL's Renewables & Distributed Energy Business Unit, is responsible for implementing the Isolated Network Strategy 2030 and asset management of the Isolated Network. The Isolated Network Team analyses load profile for key sites – but it does not create forecasts for future demand for the grouping of Torres Strait Islands and the grouping of sites that make up Cape York's electricity network.
29. The Manager of Isolated Networks searched specific folders in the share drives (as this is where raw load data and load data analysis for the Isolated Network is stored). There were no documents concerning forecasts for future demand for the grouping of sites that make up the Torres Strait Island and Cape York's electricity network. The Respondent advised that this is because EQL does not analyse the load profiles for Torres Strait Islands and Cape York.
30. Searches were also conducted by the Investment Portfolio Manager from EQL's Grid Investment Business Unit.
31. EQL's Grid Investment Business Unit is responsible for the development of the five-year rolling grid investment forecast and a more detailed twelve-month Grid Investment Plan. The Grid Investment Plan refers to the Isolated Network in totality (that is, all 33 stand-alone micro-grids that support a diverse range of communities in Torres Strait, Gulf of Carpentaria, Cape York, Palm Island and Western Queensland). It does not reference the groupings of sites that make up the Cape York and Torres Strait Island networks. On this basis, the Respondent advised that it does not create or record forecasts for future expenditure or forecasts for capital expenditure for the Torres Strait Islands and Cape York as it focuses on the Isolated Network in its entirety.
32. The Investment Portfolio Manager searched the relevant applications used for network investment planning and reporting (Copperleaf Asset Management Software and SAP S4 Business Objects Reporting) using the search term 'Future Year' and found no relevant documents. This is because the grid investment forecast and Grid Investment Plan focus on the Isolated Network in its entirety and not the Torres Strait Islands and Cape York electricity networks.

Finance Division

33. The Finance Division is responsible for preparing a budget, maintaining a balance sheet, preparing financial statements which include a consolidated statement of profit or loss and cash flows. EQL's Budgeting and Commercial Operations Services Business Unit within the Finance Division manages past capital expenditure, past expenditure and revenue, current expenditure and revenue and forecasts for future expenditure and forecast budgets.
34. Generally, the Respondent submitted that the Finance Division does not have the requested information because its financial systems, practice and processes do not create these documents for Cape York and the Torres Strait Islands.
35. Searches were conducted by the Commercial Manager from EQL's Budgeting and Commercial Operations Services Business Unit.
36. EQL's Budgeting and Commercial Business Unit collates the forecasts for future revenue, forecasts for future expenditure, forecasts budgets based on the past capital

expenditure, past expenditure and past revenue. The Commercial Manager searched the network drives and annual Isolated Reporting folder in Microsoft Explorer and confirmed that no documents exist. The relevant accounting system does not record or capture the capital, income or expenditure by power station, or by Torres Strait Islands and Cape York. The information is only available at an aggregate level.

37. Further, searches were conducted by the Manager of External Reporting Policy and Taxation from EQL's Financial Control Business Unit.
38. The Financial Control Business Unit manages the depreciation schedules. The Manager of External Reporting Policy and Taxation searched the database where the financial information for the Isolated Network's fixed assets is held (Ellipse Fixed Asset Module) using 'Torres Strait Islands' and 'Cape York' as search terms and did not locate the requested information. The Respondent submitted that information does not exist because the business does not track this information by Torres Strait Island and Cape York; the depreciation report does not contain asset location information; and the business would need to reconfigure the reporting solution as well as system configuration to be able to report at the requested level. Its financial reporting obligations are on a consolidated basis and do not require the Respondent to report on depreciation expense by asset location.

Retail Division

39. The Retail Division calculates the revenue from electricity sales to retail customers throughout regional Queensland which includes the isolated communities in the remote parts of regional Queensland.
40. The Respondent submitted that Retail Division's functions and responsibilities do not require the creation of the requested documents. The Retail Division does not maintain the electricity network, so does not manage the capital expenditure for the Isolated Network. It captures and reports the expenses and revenue as a total for the Isolated Network. It prepares forecasts for future revenue but does not prepare this information for Torres Strait Island and Cape York.
41. The Manager of Retail Commercial Services searched in the budget and forecast folders, online billed sales and other folders, searching by the locations requested. No relevant documents were located because they are not created.
42. Likewise, the Manager of Retail Billing searched the reporting database (ROCK) and billing system (Customer Care and Billing) searching by the locations requested. No relevant documents were located because they are not created.
43. The retail billing area deals with customers on an individual basis and not based on the Torres Strait and Cape York regions. Also, many sites across these areas are pre-paid meters and are not within the billing function.

Applicant's submissions

44. The applicant's submissions to OIC can be summarised as follows:¹⁵
 - It is simply unbelievable that the Respondent does not generate forecasts for future demand, expenditure, capital expenditure or revenue for the Torres Strait

¹⁵ The summary of the applicant's submissions is taken from his external review application on 7 April 2022 and submission dated 3 August 2022.

Islands and Cape York regions and Queensland electricity consumers should be frightened if that is the case.

- The applicant refers to a document by the Respondent published on the Queensland Government Tender Portal seeking expressions of interest from the market to identify suitably qualified suppliers able to deliver low carbon / renewable generation services in isolated networks including Thursday Island and Bamaga.¹⁶ The applicant says that *‘the first questions respondents asked [in relation to this document] was, “how much energy to generate, in which Towns/Islands?”*.

Findings

45. The Respondent has provided submissions to OIC which comprehensively address:
- its functions and responsibilities which provide relevant context for understanding its practices and procedures for the creation of documents
 - the explanations provided by the relevant individuals about why the requested information does not exist; and
 - the nature and extent of the search and enquiry process the decision-maker and other relevant individuals undertook within the various areas to locate the requested information.
46. I accept the Respondent’s *explanation* that the relevant divisions (engineering, finance and retail) do not create the requested information for the grouping of sites that make up the Torres Strait Islands and Cape York, but rather deal with the Isolated Network in its entirety. This is a reasonable explanation as to why there are no documents specifically relating to the Torres Strait Island and Cape York network.
47. I acknowledge the applicant’s concern with this explanation, but I also note that the applicant does not provide any evidence to demonstrate that this information is incorrect. The document on the Queensland Government Tender Portal (seeking expressions of interest from the market to identify suitably qualified suppliers able to deliver low carbon/renewable generation services in the Isolated Networks including Thursday Island and Bamaga) does not contain any information which contradicts the Respondent’s submissions.
48. I also acknowledge that the various types of technical and financial documents sought by the applicant, but relating to the Isolated Network as a whole rather than the Torres Strait and Cape York micro-grids in particular, would draw – in part – on entries, line items and other information regarding the Torres Strait and Cape York micro-grids. However, I accept that such information is collated and aggregated along with similar information from other micro-grids, and consequently the conclusions and predictions reached in these technical and financial documents would only relate to the Isolated Network in its entirety, and could not be ‘unscrambled’ by the reader to reveal similar conclusions and predictions specific to the micro-grids of interest to the applicant.
49. In the circumstances, I consider the applicant would have benefitted from make a fresh application framed with the assistance of the Respondent to target specific information which *is created* as part of the Respondent’s functions.
50. As well as providing OIC with explanations regarding why the relevant units do not create the requested information, the Respondent also relied on *searches* to satisfy

¹⁶ OIC obtained a copy of this document from the Respondent and considered it as part of this external review.

itself that the documents did not exist. In summary, those searches were performed by a number of individuals within the relevant areas and included network drives, folders and applications used for network investment planning and reporting, accounting, annual reporting, financial information and billing. OIC has a copy of the signed search certifications provided by those individuals where the specific searches that were performed and the results of those searches are detailed.

51. Having carefully considered the Respondent's submissions, I am satisfied that the Respondent has made appropriate searches to locate the requested information, including making enquiries of the relevant staff regarding the possible existence and location of the requested information; and ensuring that relevant staff have conducted comprehensive, appropriately targeted searches of the relevant document management systems. I consider that if the requested information did exist, it would have been located as a result of these searches and that the Respondent has taken all reasonable steps to locate the requested information.¹⁷
52. In these circumstances, I find there are reasonable grounds to be satisfied that the requested documents do not exist as they are not created by the Respondent. Access to the requested information can be refused under sections 47(3)(e) and 52(1)(a) of the RTI Act as the documents are nonexistent.

DECISION

53. For the reasons set out above, I affirm the decision under review.
54. 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: 31 March 2023

¹⁷ While the Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate documents applied for by applicants (section 130(2) of the RTI Act), the Queensland Civil and Administrative Tribunal confirmed in *Webb v Information Commissioner* [2021] QCATA 116 at [6] that the RTI Act 'does not contemplate that [the Information Commissioner] will in some way check an agency's records for relevant documents' and that, ultimately, the Information Commissioner is dependent on the agency's officers to do the actual searching for relevant documents.

APPENDIX

Significant procedural steps

Date	Event
7 April 2022	OIC received the application for external review. OIC requested preliminary documents from the Respondent.
14 April 2022	OIC received preliminary documents from the Respondent.
27 May 2022	OIC advised the applicant and the Respondent that the application for external review had been accepted. OIC confirmed with the applicant and the Respondent that for OIC's purposes, three decisions had been made and were under review. OIC requested submissions and search records from the Respondent.
6 June 2022	OIC requested further information from the Respondent and granted the Respondent further time to provide the requested information and submissions.
22 June 2022	The Respondent requested an extension of time to provide the requested information.
23 June 2022	OIC granted the Respondent an extension of time.
1 July 2022	The Respondent provided submissions and requested documents.
15 July 2022	OIC asked the Respondent if they were agreeable to providing their submissions dated 1 July 2022 to the applicant.
21 July 2022	The Respondent supplied OIC with a copy of their submissions with proposed redactions to provide to the applicant.
27 July 2022	OIC conveyed a preliminary view to the applicant and provided the applicant with the Respondent's redacted submissions.
12 August 2022	The applicant provided submissions contesting OIC's preliminary view.
25 November 2022	OIC requested further submissions from the Respondent. OIC provided the applicant with an update.
8 December 2022	The respondent requested an extension of time to provide OIC with further submissions, which OIC subsequently granted.
15 December 2022	The Respondent provided further submissions.
20 January 2023	OIC conveyed a final preliminary view to the applicant.
24 January 2023	The applicant requested a formal decision.