



Decision and Reasons for Decision

Citation:	<i>Stiller and Queensland Health</i> [2019] QICmr 41 (27 September 2019)
Application Number:	314359
Applicant:	Stiller
Respondent:	Queensland Health
Decision Date:	27 September 2019
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - applicant submits agency failed to locate documents - whether agency has taken all reasonable steps to locate documents relevant to the access application - whether documents were created - whether access to further documents may be refused on the basis that they are nonexistent or unlocatable - sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant requested information from Queensland Health, under the *Right to Information Act 2009* (Qld) (**RTI Act**).¹ In his application, he posed a question about the existence of a signed Ministerial document relating to hand hygiene procedures and requested all information relating to that question. The applicant had previously made inquiries with Queensland Health and other government bodies about the same subject matter.
2. Queensland Health decided² to refuse access to the requested information on the basis it was nonexistent or unlocatable.
3. The applicant applied³ to the Information Commissioner (**OIC**) for external review of Queensland Health's decision, submitting that Queensland Health had interpreted his application too narrowly and raising concerns about the sufficiency of searches.
4. For the reasons set out below, I affirm Queensland Health's decision and refuse access to any further information on the basis that it is nonexistent or unlocatable.

¹ Access application dated 6 October 2018.

² Decision dated 29 November 2018.

³ External review application dated 20 December 2018.

Background

5. The decision under review is Queensland Health's decision dated 29 November 2018.
6. Significant procedural steps taken by OIC in conducting the external review are set out in the appendix to these reasons.
7. Evidence, submissions, legislation, and other material considered in reaching this decision are referred to in these reasons (including footnotes and appendix).

Issue for determination

8. During the external review, Queensland Health accepted that the access application was framed sufficiently broadly to capture documents *relating to* whether a Minister had issued instructions about hygiene procedures and was not limited to a copy of those instructions. Queensland Health located 29 pages of emails and internal documents dealing with questions from the public, including communications with the applicant. These documents were released to the applicant, subject to the redaction of third party information.
9. The applicant did not contest the redactions in these documents. However, he contends that additional documents must exist (**Requested Information**). Accordingly, the issue for determination is whether the Requested Information may be refused on the basis that it is nonexistent or unlocatable.⁴
10. On external review, the applicant posed questions about the way in which his prior inquiries in relation to the same subject matter were responded to by Queensland Health and the Minister's Office. The RTI Act does not afford citizens a legally enforceable right to obtain answers to questions.⁵ I am therefore unable to answer the applicant's questions in this regard. In my findings, I have addressed the applicant's submissions to the extent they are relevant to the issue under consideration, which is, whether Queensland Health may refuse access to the Requested Information on the basis that it is nonexistent or unlocatable.⁶

Relevant law

11. The RTI Act provides citizens a right to be given access to documents of an agency,⁷ subject to certain limitations including grounds for refusal.⁸ One such ground of refusal is where the document is nonexistent or unlocatable.⁹
12. A document is *nonexistent* if there are reasonable grounds to be satisfied it does not exist.¹⁰ To be satisfied that a document does not exist, the Information Commissioner has previously had regard to various key factors including the agency's record keeping practices and procedures (including, but not limited to, its information management

⁴ By email dated 15 May 2019 the applicant also raised concerns about Queensland Health's processing of his application and OIC's external review processes. OIC responded to these concerns during external review. In reaching my findings about whether access to further information may be refused, I have not made any determinations in relation to these concerns.

⁵ *Hearl and Mulgrave Shire Council* (1994) 1 QAR 557 (**Hearl**) at [30]. *Hearl* concerned the application of section 21 of the now repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**). Section 23 of the RTI Act is drafted in substantially the same terms as section 21 of the FOI Act and, therefore, the Information Commissioner's findings in *Hearl* are relevant in this matter.

⁶ I also note that my findings in this decision relate to the access application made to Queensland Health. The Minister for Health's Office is a separate entity for the purposes of the RTI Act.

⁷ Section 23 of the RTI Act.

⁸ Set out at section 47 of the RTI Act.

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

¹⁰ Section 52(1)(a) of the RTI Act.

approaches).¹¹ By considering the relevant factors, the decision maker may conclude that a particular document was not created because, for example, the agency's processes do not involve creating that specific document. In such instances, it is not necessary for the agency to search for the document. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.

13. The Information Commissioner may also rely on the agency's searches to satisfy themselves that a document does not exist. In those cases, all reasonable steps must be taken to locate the documents.¹² Such steps may include inquiries and searches of all relevant locations identified after consideration of relevant key factors.¹³
14. A document is *unlocatable* if it has been or should be in the agency's possession and all reasonable steps have been taken to find it, but it cannot be found. In determining whether a document is unlocatable, it is necessary to consider the specific circumstances of each case,¹⁴ and in particular whether:
 - there are reasonable grounds for the agency to be satisfied that the requested documents have been or should be in the agency's possession; and
 - the agency has taken all reasonable steps to find the document.¹⁵
15. The agency that made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.¹⁶ Where the issue of missing documents is raised on external review, the agency must demonstrate that reasonable steps have been taken to identify and locate relevant documents.¹⁷ If the applicant maintains further documents exist, the applicant bears a practical onus of demonstrating that the agency has not discharged its obligation. Suspicion and mere assertion is not sufficient to satisfy this onus.¹⁸

Submissions

16. The applicant submits that:
 - Queensland Health had been approached multiple times regarding the existence of the relevant documents and there had been inter-department communications about them;¹⁹
 - further searches were required as the information released to him during the review indicated that his original question regarding the existence of the Ministerial correspondence was not addressed or referred to the relevant Minister;
 - the '*lack of continuation in the internal communication*' released to him suggested that Queensland Health '*deliberately avoided providing all information at hand*'; and
 - he was aware of certain communications that had not been located.²⁰

¹¹ *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]-[38]. *PDE* addresses the application of section 28A of the now repealed FOI Act. Section 52 of the RTI Act is drafted in substantially the same terms as the provision considered in *PDE* and, therefore, the Information Commissioner's findings in *PDE* are relevant.

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

¹³ As set out in *PDE* at [38].

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

¹⁵ Section 52(1)(b) of the RTI Act.

¹⁶ Section 87(1) of the RTI Act.

¹⁷ Section 130(2) of the RTI Act.

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

¹⁹ Applicant submissions dated 20 December 2018.

²⁰ Applicant submissions dated 9 July 2019 and 5 August 2019.

17. In support of his contentions, the applicant provided his correspondence with the Leader of the Opposition (**OLO**) regarding the existence of the Requested Information, including an email to OLO in which the applicant explained that he had a conversation with a Queensland Health employee that indicated to him further relevant documents existed.²¹
18. Queensland Health provided me with search records and certifications to evidence the searches undertaken in the current electronic document and record management system as well as the previously used corporate record system²² as well as records of inquiries made with the Office of the Chief Health Officer and Nursing Director.²³
19. In short, Queensland Health submitted that any signed instructions from the Minister to Queensland Health regarding hand hygiene processes would have been sent to the Office of the Chief Health Officer for action and any relevant correspondence would have been recorded on the corporate record management system. Searches of these locations did not locate the Requested Information.²⁴
20. In support of these submissions, Queensland Health explained that:
 - the Department's corporate systems were searched, including the previously used Corporate Record System, RecFIND and the current electronic Document and Record Management System (eDRMS). *'These systems store all official correspondence including briefing notes, requests to/ from the Minister, letters, reports and references to documents held on hard copy department files'*²⁵
 - searches for electronic documents were also conducted within the Communicable Diseases Branch, Office of the Chief Health Officer, Prevention Division²⁶
 - the Nursing Director of the Communicable Diseases Branch advised hard copy file searches would not identify further documents;²⁷ and
 - there is no evidence to indicate that the Minister ever provided signed instructions of the subject matter identified in the access application.²⁸

Findings

21. There is no evidence before me to indicate that the signed Ministerial instructions identified by the applicant exist. The applicant himself concedes that he does not have any *facts or evidence* to support his enquiry.²⁹ Therefore, it is unsurprising that minimal related documentation would exist.
22. The search records provided by Queensland Health demonstrate that searches were conducted in the current and superseded electronic document databases and corporate records management systems. Queensland Health has also made specific inquiries with the Chief Health Officer. The Nursing Director of the Communicable Diseases Branch confirmed that searches of hard copy files would not produce any additional documents.

²¹ Applicant submissions dated 5 August 2019.

²² Queensland Health's submissions dated 7 February 2019 and 2 April 2019, search records dated 16 November 2018 and 27 November 2018, and email record dated 16 November 2018.

²³ Queensland Health's submissions dated 7 February 2019 and file note of a telephone discussion with the Nursing Director of the Communicable Diseases Branch dated 26 November 2018.

²⁴ Queensland Health decision dated 29 November 2018.

²⁵ Queensland Health's submissions dated 29 May 2019.

²⁶ Queensland Health's submissions dated 29 May 2019.

²⁷ File note provided by Queensland Health dated 26 November 2018.

²⁸ Telephone conversation with OIC on 17 May 2019.

²⁹ Applicant email to OLO dated 23 February 2018 and provided to OIC in submissions dated 5 August 2019.

23. The applicant submits that the information released to him leads him to believe that further documents exist, but he has not identified specific missing documents or produced evidence to demonstrate that particular locations have not been searched.
24. I have carefully considered the information released to the applicant, which contains inquiries received by Queensland Health, internal documents regarding proposed response to those inquiries, and the agency's responses. I am unable to identify any indication within these documents that additional documents should exist, such as references to other documents, or any gaps in the continuity of the documents.
25. OLO's correspondence to the applicant states that OLO made inquiries with Queensland Health³⁰ and the Queensland Government had confirmed there is no policy addressing the subject matter of the access application.³¹ While I accept this indicates OLO made contact with a Government spokesperson about the matter, I am not satisfied that the evidence available to me indicates that these inquiries or confirmation resulted in the creation of documents that Queensland Health should hold, nor am I satisfied that this identifies any further searches that Queensland Health could reasonably undertake.
26. I acknowledge that the applicant remains concerned about the way his queries to the Minister's Office were addressed. However, his submissions do not identify or provide any objective evidence of further specific documents that have not been located, or searches that Queensland Health failed to conduct.
27. On the basis of the above, I am satisfied that Queensland Health's searches and inquiries have been appropriately targeted and informed by its particular knowledge regarding its own processes and record keeping practices and were reasonable in the circumstances of this matter. Given the specific background to this matter, and having considered the applicant's submissions, Queensland Health's submissions and the information released to the applicant during the review, I am unable to identify any further searches that could reasonably be conducted.
28. I am therefore satisfied that Queensland Health has taken all reasonable steps to identify documents responsive to the applicant's request, and any further documents do not exist or are unlocatable.³²

DECISION

29. I affirm Queensland Health's decision and find that the Requested Information is nonexistent or unlocatable under section 47(3)(e) and 52 of the RTI Act.
30. I have made this decision under section 110 of the RTI Act, as a delegate of the Information Commissioner under section 145 of the RTI Act.

S Martin
Assistant Information Commissioner

Date: 27 September 2019

³⁰ OLO's email to the applicant dated 26 March 2018.

³¹ OLO's email to the applicant dated 12 June 2019.

³² Section 47(3)(e) and 52 of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
20 December 2019	OIC received the application for external review.
24 December 2019	OIC notified Queensland Health that it had received the application for external review and requested procedural documents.
14 January 2019	OIC received the requested procedural documents from Queensland Health.
25 January 2019	OIC notified Queensland Health and the applicant that the application for external review had been accepted and requested further information from Queensland Health.
7 February 2019	OIC received the requested information from Queensland Health.
11 March 2019	OIC received telephone submissions from the applicant.
13 March 2019	OIC requested further information from Queensland Health.
18 March 2019	OIC received telephone submissions from Queensland Health.
2 April 2019	OIC received the requested information from Queensland Health.
3 May 2019	OIC requested further information from Queensland Health.
9 May 2019	OIC received the requested information from Queensland Health.
15 May 2019	OIC received submissions from the applicant.
16 May 2019	OIC conveyed a preliminary view to Queensland Health and requested submissions in response.
17 May 2019	OIC received telephone submissions from Queensland Health.
30 May 2019	OIC received submissions from Queensland Health dated 29 May 2019.
21 June 2019	OIC conveyed a preliminary view to the applicant.
9 July 2019	OIC received submissions from the applicant.
1 August 2019	OIC confirmed the submissions received from Queensland Health and OIC confirmed the preliminary view to the applicant.
5 August 2019	OIC received further submissions from the applicant.
7 August 2019	OIC confirmed the preliminary view to the applicant. The applicant advised OIC that he seeks a decision in finalisation of the external review.