



Decision and Reasons for Decision

Citation:	<i>Turner and Queensland Corrective Services [2023] QICmr 38 (22 August 2023)</i>
Application Number:	316940
Applicant:	Turner
Respondent:	Queensland Corrective Services
Decision Date:	22 August 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - applicant submits agency did not locate all relevant documents - whether agency has conducted all reasonable searches - whether access to further documents may be refused on the basis they are nonexistent or unlocatable - sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Queensland Corrective Services (**QCS**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to all information created or received in relation to a meeting between the Minister for Police and Minister for Corrective Services, and a representative of a community-based support group, on 21 August 2017.
2. QCS decided that the application did not comply with the requirements of section 24(2)(b) of the RTI Act because its scope was too broad and it failed to give sufficient information concerning the requested documents to enable QCS to identify them. After consulting with the applicant, as required under section 33(3) of the RTI Act, QCS issued a prescribed written notice under section 33(6) of the RTI Act that the access application was not compliant with all relevant application requirements.²
3. The applicant applied³ to the Office of the Information Commissioner (**OIC**) for external review of QCS's decision.
4. For the reasons explained below, I set aside the decision under review. In substitution for it, I find that access to information may be refused because it is nonexistent or unlocatable under sections 47(3)(e) and 52(1) of the RTI Act.

¹ On 23 September 2022.

² Decision dated 11 October 2022.

³ On 11 October 2022.

Background

5. The applicant made an access application in similar terms to the Office of the Minister for Police and Minister for Corrective Services (**Minister's Office**).⁴ To the extent that the searches and inquiries conducted by the Minister's Office for responsive documents, and the documents located and released to the applicant as a result, are relevant to the issues for consideration in this review, I will discuss them below.

Reviewable decision

6. The decision under review is the decision of QCS dated 11 October 2022 that the access application does not comply with all relevant application requirements.

Evidence considered

7. Evidence, submissions,⁵ legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and appendix).
8. In making this decision I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁶ I consider that in observing and applying the law prescribed in the RTI Act, an RTI decision-maker will be 'respecting and acting compatibly with' this right and others prescribed in the HR Act,⁷ and that I have done so in making this decision, as required under section 58(1) of the HR Act. In this regard, I note Bell J's observations 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.'*⁸

External review process

9. During the course of the review, in an attempt to reach an informal resolution of the issues, OIC addressed QCS's concerns that the scope of the access application did not enable identification of the likely location/s of requested documents. OIC identified two matters that it considered would assist QCS with identification. These matters were based, to an extent, on searches and inquiries that had been conducted in the related application made to the Minister's Office, and the documents located by the Minister's Office.⁹ Given that the applicant had requested access to any briefs provided to the Minister in advance of the meeting, OIC also asked QCS to explain the usual process for such briefings and where briefing documents would usually be stored.¹⁰
10. Following receipt of QCS's response on the relevant issues,¹¹ OIC wrote to QCS¹² to express the preliminary view that the access application was compliant and that the applicant had provided sufficient information to enable QCS to conduct searches and make inquiries in an effort to locate responsive documents. In light of that view, OIC requested a submission from QCS addressing a number of sufficiency of search issues.

⁴ The applicant also sought external review in relation to that application.

⁵ Including the submissions made by the applicant in his external review application, and in his correspondence dated 5 June 2023.

⁶ As embodied in section 21 of the HR Act.

⁷ *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].

⁸ *XYZ*, [573].

⁹ Six pages were located and released to the applicant, except for references to mobile telephone numbers.

¹⁰ Letter dated 11 November 2022.

¹¹ On 25 November 2022.

¹² Letter dated 23 March 2023.

11. QCS responded by providing advice received from the Chief of Staff of the Office of the Commissioner regarding the preparation and location of briefing material, as well as providing further information about the searches performed.¹³
12. Based on the information provided by QCS in both this review and in the related review involving the Minister's Office, OIC then expressed a preliminary view to the applicant that it was reasonable to find that the requested documents did not exist as they were not created.¹⁴ The applicant did not accept this preliminary view and lodged a submission in support of his position.¹⁵

Issue for determination

13. Given that QCS did not seek to challenge OIC's preliminary view that the access application complied with all relevant application requirements, the only issue for determination is whether access to the requested information may be refused on the grounds that it is nonexistent or unlocatable under sections 47(3)(e) and 52(1) of the RTI Act.

Relevant law

14. The RTI Act permits an agency to refuse access to information where the requested information is nonexistent or unlocatable.¹⁶
15. A document will be *nonexistent* if there are reasonable grounds to be satisfied it does not exist.¹⁷ To be satisfied that a document does not exist, the Information Commissioner has previously had regard to various key factors including the agency's record-keeping practices and procedures (including, but not limited to, its information management approaches).¹⁸ 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.
16. The Information Commissioner may also take into account the searches and inquiries conducted by an agency in determining whether a document is nonexistent. The key question then is whether those searches and inquiries amount to '*all reasonable steps*'.¹⁹ What constitutes reasonable steps will vary from case to case, as the search and inquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances. Such steps may include inquiries and searches of all relevant locations identified after consideration of relevant key factors.²⁰
17. 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.²¹ In determining

¹³ Letter dated 6 April 2023.

¹⁴ Letter dated 17 May 2023.

¹⁵ Letter dated 5 June 2023.

¹⁶ Sections 47(3)(e) and 52(1) of the RTI Act.

¹⁷ Section 52(1)(a) of the RTI Act. For example, a document has never been created.

¹⁸ *Isles and Queensland Police Service* [2018] QICmr 27 (7 June 2018) at [15] which adopted the Information Commissioner's comments in *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]-[38]. *PDE* addresses the application of section 28A of the now repealed FOI Act. Section 52 of the RTI Act is drafted in substantially the same terms as the provision considered in *PDE* and, therefore, the Information Commissioner's findings in *PDE* are relevant.

¹⁹ As set out in *PDE* at [49].

²⁰ As set out in *PDE* at [38].

²¹ Section 52(1)(b) of the RTI Act. For example, a document has been lost or disposed of.

whether a document is unlocatable, it is necessary to consider the specific circumstances of each case,²² 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.²³

18. 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.²⁴ 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.²⁵ If the applicant maintains further documents exist, the applicant bears a practical onus of demonstrating that the agency has not discharged its obligation. Suspicion and mere assertion will not satisfy this onus.²⁶

Submissions of the parties

19. As noted above, the applicant was granted access to six pages of information as a result of his application to the Minister's Office. These pages comprised Outlook meeting makers for 21 August 2017 and are all substantially the same in content. They indicate:

- the meeting organiser was the Minister
- the subject matter, namely, the Minister to meet with a representative of the support group
- the required attendees; and
- one of the pages has the 'category' marked 'Cabinet'.

20. In its letter to the applicant dated 17 May 2023, OIC summarised the initial submissions made by the applicant²⁷ in relation to his application to the Minister's Office as follows:

- The applications concern a 30-minute meeting between the Minister and a representative of the support group occurring at a time when a particular controversial issue was receiving widespread attention
- That alone suggests it was more than a friendly catch-up, particularly since the Minister was then the subject of widespread public criticism regarding the issue
- It can reasonably be expected that any 30-minute business meeting with a key stakeholder group 'would have warranted a note or three in accordance with statutory record-keeping requirements'; and
- According to page 1 of the six documents released, this meeting may also have been significant because of the reference to 'Cabinet' on the Categories line.

21. OIC summarised QCS's submissions²⁸ in response as follows:

- The Minister's Office maintains a strong working relationship with a number of external stakeholders and conducts business with them regularly. It is not uncommon for these meetings to be less formally structured than other meetings,

²² *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].

²³ Section 52(1)(b) of the RTI Act.

²⁴ Section 87 of the RTI Act.

²⁵ Section 130(2) of the RTI Act.

²⁶ *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36].

²⁷ Email of 25 October 2022.

²⁸ Letter received 6 April 2023.

without agenda or briefs being provided. Indeed, these meetings are often arranged simply by phone and not with a formal invite being sent by email.

- The Governance Officer has been advised from the recollections of others that the meeting was requested by the support group and the meeting related to a number of contemporaneous issues. The discussion did not relate to a change in government policy or the making of a government decision. As the meeting was requested by the support group, rather than a portfolio department, this would explain the absence of agenda or other preparatory materials.
- Although the calendar entry indicates that the meeting was allocated a period of 30 minutes, this does not necessarily mean that the meeting itself ran for the entirety of the allocated time. This is especially likely given that the meeting was informal in nature, occurred during a parliamentary sitting week and occurred immediately prior to the Minister's travel and attendance at another location.
- The Governance Officer has been advised from the recollections of others that only the Minister, his Chief of Staff, his Acting Executive Assistant, and the representative of the support group, were present at the meeting. The records identified as part of the initial search reflect that other people were included in the calendar invitation (e.g. Morayfield Electoral Office, Police Security, etc). It is ordinary practice within the Minister's Office that these people are invited to calendar appointments so that they are aware of the Minister's itinerary and movements. It does not mean that these were present at the meeting.
- The classification of the meeting as a 'Cabinet' matter is unfortunately due to a more recent change in categorisation of Outlook items that has unintentionally had a retrospective application. The Minister's Office current Executive Assistant recently changed the categories within Outlook, including remaining existing categories. This would have retrospectively applied to all calendar appointments marked within that category. The Governance Officer notes that general, non-Cabinet related meetings in the Minister's calendar from a similar time period appear to also have been affected by this administrative change.

22. QCS also relied on searches to justify its position that the documents did not exist. The nature and extent of the search and inquiry process by QCS, in both this review and in the related review involving the application made to the Minister's Office, were summarised for the applicant as follows:

- The searches performed included the Minister's laptop, electronic systems, filing cabinets, storage areas and databases/spreadsheets. The search locations were chosen as they are the central record keeping systems used within the office.
- The G: Drive/File Explorer maintains the majority of ministerial office records. The Ministerial Office Outlook account contains records of the majority of incoming and outgoing correspondence for the office, particularly that which is received by the Office email 'police@ministerial.qld.gov.au'. The Sharepoint contains the records relating to correspondence and briefing registers. The search terms used were '*[surname of support group representative]*' and '*[name of support group]*'.
- There are minimal physical records stored within the Minister's Office, as the majority of these records are related to portfolio matters and stored by each respective portfolio department.
- The search of the Minister's laptop included the Minister's emails and File Explorer. This search was conducted by the Minister and was overseen by the Governance Officer. The search terms used for the search were '*[surname of support group representative]*' and '*[name of support group]*'.
- The staff member responsible for arranging the meeting at the time would have been the Minister's Acting Executive Assistant. The Minister's Office is unable to

conduct a search of this person's emails as she is no longer employed with the Minister's Office and the Minister's Office has no access to her email account.

- All of the relevant staff members who were employed within the Minister's Office during the relevant period are no longer employed with the Minister's Office, save for one. Given that those staff members are no longer employed within the Minister's Office, the Minister's Office does not have the ability to conduct searches of their emails or computers.
- The Minister's Office has been unable to locate any relevant physical records from these staff members in its custody. For completeness, since the initial searches were conducted, the Governance Officer has conducted a further search of physical and electronic records and certified that he was unable to locate any further relevant information.
- QCS advised that the searches made by the Minister's Office located no documentation (such as a brief) received from QCS regarding this meeting and, coupled with the fact that no QCS officer was present at this meeting, there is no evidence linking QCS to the Minister's meeting with the support group representative.
- Inquiries were also made with the Chief of Staff of the Office of the Commissioner of QCS who advised that:
 - QCS has a Senior Departmental Liaison Officer (**SDLO**) who is the primary contact for the Minister's Office and reports directly to the Chief of Staff in the Office of the Commissioner. The usual process is that, if the Minister's Office requires a brief from QCS on any topic, they will request this through the SDLO who will provide the request to QCS Executive Services to add to the MINCOR (ministerial correspondence) system.
 - The MINCOR system ensures that the relevant briefing material can be sought from the responsible Command within QCS (content experts) in a timely fashion, can be tracked through the chain of command for approval to be returned to the Minister's Office, and is stored for future reference.
 - The Chief of Staff has conducted a search of the Office of the Commissioner's documents and MINCOR and has advised that he cannot locate any briefing material or any other documentation in relation to the meeting. The Chief of Staff also consulted with both the current SDLO and the SDLO who would have been in the role at the time, but with nil documents located.

23. Having considered the submissions of both parties, OIC expressed the preliminary view to the applicant²⁹ that QCS had comprehensively addressed:

- the context for understanding its practices and procedures for the creation of documents relating to meetings
- the explanations provided by the relevant individuals about why the requested information does not exist in this case; and
- the nature and extent of the search and enquiry process undertaken by QCS and the Minister's Office to locate the requested information.

24. OIC also considered that the searches that QCS had conducted to satisfy itself that the requested documents did not exist had been reasonable in all the circumstances.

25. As noted, the applicant did not accept OIC's preliminary view and lodged final submissions in support of his case.³⁰ Those submissions that are relevant to the issue for determination may be summarised as follows:

²⁹ Letter dated 17 May 2023.

³⁰ Letter dated 5 June 2023.

- The searches and inquiries conducted by QCS are limited and *'do not go close to excluding the possibility of other information responsive to my application'*: consequently, QCS has not discharged its statutory obligations.
 - *'QCS is wrongly trying to quarantine searches and inquiries to one location - the Commissioner's office; one position - the SDLO; and one particular class of information - briefing material and the like which might have been entered in MINCOR'*.
 - Contrary to QCS contentions on *'usual processes'*, there are many interactions between Ministerial offices and public servants that *'go nowhere near'* the SDLO and MINCOR – multiple examples are to be found within the hundreds of documents already released.³¹
 - It is entirely possible that Ministerial staffers *'fired off'* an email or two - before and/or after the meeting - to request prior information, order subsequent action, and the like. The fact no such emails or related materials were captured in the related application to the Minister's Office is largely explained by the QCS contentions submitted in response to that matter.
 - It is also possible, although somewhat less likely, that Ministerial staffers made a phone call or two for much the same purposes, and that those calls generated responsive documents within QCS.
26. The applicant also contended that the searches and inquiries conducted by QCS did not reflect the scope of his access application. He emphasised that the scope of his application covered *'all units'* of QCS and argued that QCS's submissions were largely silent in relation to searches conducted for *'emails, texts, voicemails and any other potentially responsive information ... for example, emails, attachments, file notes, and the like'* beyond the Office of the Commissioner and SDLOs - *'Why was no such email circulated to "all units" on this occasion, or at least to all units that might conceivably hold or have knowledge of potentially responsive documents?'* The applicant also identified six QCS officers whom he believed would likely have been included in any relevant *'email traffic'* with the Minister's Office, *'either directly, or by way of courtesy copy'*.

Findings

27. As noted, the issues for OIC to consider when an applicant raises a sufficiency of search contention are:
- whether there are reasonable grounds for expecting that the requested documents exist: and, if so
 - whether the searches and inquiries conducted by the agency in an effort to locate such documents have been reasonable in all the circumstances.
28. 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:³²
- the administrative arrangements of government
 - the agency's structure

³¹ The applicant also relied upon his personal experience of working within government and in Ministerial offices in making this submission.

³² *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 functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and other legal obligations that fall to it)
- 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.

29. Taking account of:

- the type of documents that the applicant requested
- the results of the various searches and inquiries already conducted by the Minister's Office in the context of the related access application for similar documents; and
- the information provided by QCS regarding the practices and procedures relating to communications between QCS and the Minister's Office,

I consider it was reasonable for QCS to focus its searches and inquiries on the Office of the Commissioner, the SDLO, and MINCOR. I am satisfied that such searches and inquiries in that regard were reasonably targeted based upon the terms of the access application and could reasonably have been expected to locate information falling within the terms of the access application. For the reasons explained in QCS's submissions, as set out above, these searches and inquiries were unsuccessful.

30. The applicant argues that, despite these searches and inquiries yielding no documents, nor identifying a potential avenue of further inquiry, it was reasonable (given the terms of his application referring to 'all units' and his contention that, in his experience, there are many instances of communications between Ministerial offices and agency staff that do not occur through the SLDO or MINCOR) for QCS to conduct searches across any unit of QCS that could potentially hold responsive information. He contends that Ministerial staffers may have sent emails to QCS officers before or after the meeting, or perhaps made telephone calls that may have generated responsive documents. He has identified six QCS officers whom he believes would likely have been involved in relevant email exchanges with the Minister's Office.
31. As I noted at paragraph 18 above, if an applicant maintains that further responsive documents exist, the applicant bears a practical onus of demonstrating that the agency has not discharged its obligation to show that reasonable steps have been taken to identify and locate relevant documents. Suspicion and mere assertion will not satisfy this onus.
32. I acknowledge the applicant's stated experience of working within government and his assertion that not all communications with Ministerial offices occur through the SDLO or official Ministerial correspondence channels. However, I nevertheless regard such an assertion as speculative in this case, rather than forming a reasonable basis for requiring additional searches or inquiries to be conducted.
33. Similarly, the applicant's contention that there may have been emails or telephone conversations between QCS officers and Ministerial staff concerning the meeting is speculative, rather than an expectation for which reasonable grounds exist. To the extent that it is reasonable to expect that such communications took place, I consider it is also reasonable to expect that they would have involved the SLDO and the Office of the Commissioner. I note the six officers that the applicant considers would likely have

been included in any relevant email traffic with the Minister's Office, and his request that their email accounts be searched. These include the Acting Commissioner, the Manager of the Office of the Commissioner, and Specialist Operations officers. Again, however, the applicant is merely speculating about the possible involvement of these individuals. There is nothing that has emerged from the searches and inquiries conducted by the Minister's Office or QCS that gives rise to reasonable grounds for expecting that these officers sent or received relevant emails, such as to reasonably require a search of their email accounts to be conducted. I also note that QCS advised that the Chief of Staff had conducted a search of the Office of the Commissioner's documents in any event, and advised that he could not locate any documentation in relation to the meeting.

34. When considering sufficiency of search issues, each case must be considered on its own facts and circumstances. However, I do not accept that, where an agency has conducted targeted searches for documents based on both a reasonable belief about where such documents would most likely be located within the agency, and the agency's usual practices, and where those searches yield no results and provide no information about other possible search inquiries or locations, it will necessarily be reasonable to require the agency to then cast a wider search net across the agency, based simply on an applicant's assertion that other work units or other officers may have been involved. What is reasonable depends on the facts and circumstances of each case. In this case, taking account of the narrow subject matter of the access application – a meeting involving the Minister on 21 August 2017 – I consider it was reasonable for QCS to conduct targeted searches of the locations within QCS where responsive documents would most likely be located, and then to determine whether any additional searches were reasonably required based on the results of those searches.
35. I note that the meeting in question was requested by the support group rather than the Minister, and there is nothing in the material before me to indicate that any officer of QCS attended the meeting, or prepared a brief for the Minister's use at the meeting. Taking account of this lack of evidence concerning the involvement of QCS, together with the searches and inquiries made by QCS and the Minister's Office in an effort to locate any responsive information, as well as QCS's submissions concerning the usual practices and procedures concerning communications between QCS and the Minister's Office, I find that there are reasonable grounds to be satisfied that the requested documents do not exist as they were not created. Access to the requested information may therefore be refused under sections 47(3)(e) and 52(1) of the RTI Act.

DECISION

36. I set aside the decision under review. In substitution for it, I find that access to the requested information may be refused on the basis that it is nonexistent or unlocatable under sections 47(3)(e) and 52(1) of the RTI Act.
37. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

S Martin
Assistant Information Commissioner

Date: 22 August 2023

APPENDIX

Significant procedural steps

Date	Event
11 October 2022	OIC received the application for external review
18 October 2022	OIC received preliminary documents from QCS
11 November 2022	OIC advised the parties that the application for review had been accepted and requested further information from QCS
25 November 2022	OIC received correspondence from QCS
23 March 2023	OIC requested a submission from QCS
6 April 2023	OIC received a submission from QCS
17 May 2023	OIC communicated a preliminary view to the applicant
5 June 2023	OIC received a submission from the applicant