



Decision and Reasons for Decision

Citation:	<i>G43 and Office of the Director of Public Prosecutions [2023] QICmr 50 (12 September 2023)</i>
Application Number:	316974
Applicant:	G43
Respondent:	Office of the Director of Public Prosecutions
Decision Date:	12 September 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT - 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 - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Office of the Director of Public Prosecutions (**ODPP**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to documents relating to an incident on 28 April 2021.²
2. ODPP did not make a decision within the statutory timeframe and therefore was deemed to have made a decision refusing access to the requested documents.³
3. The applicant then applied to the Office of the Information Commissioner (**OIC**) for review of ODPP's decision.⁴ During the external review, ODPP located and released 40 pages to the applicant. The applicant contended that certain further documents (specifically, notes taken by two named QPS Officers and a 'complete' version of a statement made by a named QPS Officer) exist and should have been located.
4. For the reasons explained below, I vary the deemed decision under review and find that access to the remaining documents may be refused on the ground they are nonexistent.⁵

¹ Access application which became compliant on 29 August 2022. Note – the Department of Justice and Attorney-General has delegated power to deal with applications made under the IP Act for access to documents in ODPP's possession or control and acted as delegate in this matter.

² The applicant identified file number QP[...].

³ Deemed decision notice dated 7 October 2022.

⁴ External review application dated 24 October 2022 (received 28 October 2022).

⁵ Under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the *Right to Information Act 2009* (Qld) (**RTI Act**).

Background

5. Significant procedural steps in this external review are set out in the Appendix.
6. The applicant raised submissions which are outside the Information Commissioner's external review jurisdiction.⁶ In making my decision in this external review, I have considered the applicant's submissions to the extent they are relevant to the issues for determination in the context of this external review.

Reviewable decision

7. The decision under review is the decision deemed to have been made by ODPP to refuse access to all information requested in the access application.⁷

Evidence considered

8. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).⁸
9. In making this decision I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), in particular the right of the applicant to seek and receive information.⁹ I consider that a decision maker will, when observing and applying the IP Act and RTI Act, be '*respecting, and acting compatibly with*' these rights and others prescribed in the HR Act.¹⁰ I further consider that, having done so when reaching my decision, I have acted compatibly with and given proper consideration to relevant human rights, as required under section 58(1) of the HR Act.¹¹

Issues for determination

10. In its deemed decision notice, ODPP explained that, had a decision been made within the statutory timeframe, access to all documents would have been refused, as their disclosure could reasonably be expected to prejudice a person's fair trial or the impartial adjudication of a case.¹² On external review, ODPP accepted OIC's view that, to the extent that the documents sought by the applicant formed part of a brief of evidence in the applicant's trial, they would ordinarily be disclosed as part of the pre-trial process, and therefore this ground for refusing access would not apply to such documents.¹³ ODPP conducted searches for relevant documents and located 40 pages responsive to the scope of the access application,¹⁴ which were released to the applicant.¹⁵

⁶ External review application dated 24 October 2022 (received 28 October 2022).

⁷ Under section 66(1) of the IP Act. The date of the deemed decision notice was 7 October 2022, however ODPP was deemed to have refused access to the information requested in the access application on 5 October 2022.

⁸ Including the submissions made by the applicant in the external review application, and in correspondence dated 9 November 2022 (received 17 November 2022), 27 December 2022 (received 3 January 2023), 22 February 2023 (received 27 February 2023), 2 March 2023 (received 7 March 2023), 20 March 2023 (received 29 March 2023), 30 March 2023 (received 5 April 2023), 16 April 2023 (received 21 April 2023) and 11 June 2023 (received 15 June 2023).

⁹ Section 21(2) of the HR Act.

¹⁰ See *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; and *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

¹¹ I note the observations by Bell J on the interaction between equivalent pieces of Victorian legislation in *XYZ*, [573]: '*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.*' I also note that OIC's approach to the HR Act set out in this paragraph was considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (noting that Judicial Member McGill saw '*no reason to differ*' from our position).

¹² Under section 67(1) of the IP Act and sections 47(3)(a), 48 and schedule 3, section 10(1)(e) of the RTI Act.

¹³ Letter dated 16 November 2022.

¹⁴ Letter 9 December 2022.

¹⁵ Letter dated 23 May 2023.

11. The applicant contended that specific further documents exist and should have been located. Accordingly, the issue for determination is whether ODPP has undertaken all reasonable searches to locate these documents, and whether access to them may be refused on the grounds that they are nonexistent under section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

Sufficiency of the ODPP's searches

Relevant law

12. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent they contain the individual's personal information.¹⁶ However, this right is subject to limitations, including grounds for refusal of access.¹⁷
13. 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.¹⁸ However, access may be refused where a document is nonexistent or unlocatable.¹⁹
14. A document will be *nonexistent* if there are reasonable grounds to be satisfied it does not exist.²⁰ 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).²¹ 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.
15. 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*'.²² 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.²³

¹⁶ Section 40(1)(a) of the IP Act. '*Personal information*' is defined in section 12 of the IP Act as '*information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion*'.

¹⁷ Section 67(1) of the IP Act sets out that an agency may refuse access to a document in the same way and to the same extent that the agency could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under the RTI Act.

¹⁸ Section 137(2) of the IP Act. The Information Commissioner also has power under section 115 of the IP Act to require additional searches to be conducted during an external review. 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.

¹⁹ Sections 47(3)(e) and 52(1) of the RTI Act.

²⁰ Section 52(1)(a) of the RTI Act. For example, a document has never been created.

²¹ *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 *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.

²² As set out in *PDE* at [49].

²³ As set out in *PDE* at [38].

16. A document will be *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.²⁴ In determining whether a document is unlocatable, it is necessary to consider the specific circumstances of each case,²⁵ and in particular whether:
- there are reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession; and
 - the agency has taken all reasonable steps to find the document.²⁶
17. 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.²⁷ 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.²⁸

Findings

18. It is the applicant's position that the following documents exist and should have been located:²⁹
- **Notes** - notes taken by two named QPS Officers (**Officers A and B**) in relation to QP[...]; and
 - a **'complete' statement** - a version of a statement made by a named QPS Officer (**Officer C**) containing 25 paragraphs in total, including paragraphs numbered 10, 11, 13, 14, 15, 18, 20, 21, 22 and 23 which are 'missing' from the version of the Officer C's statement already available to the applicant.
19. 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:³⁰
- 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)
 - 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.
20. In terms of the Notes, ODPP submitted:³¹
- Officer A did not take notes. There is therefore nothing that can be disclosed.

²⁴ Section 52(1)(b) of the RTI Act. For example, a document has been lost or disposed of.

²⁵ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (**Pryor**) 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].

²⁶ Section 52(1)(b) of the RTI Act.

²⁷ Section 130(2) of the RTI Act.

²⁸ *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36].

²⁹ Letter dated 22 February 2023 (received 27 February 2023).

³⁰ *Pryor* at [19], which adopted the Information Commissioner's comments in *PDE* at [37]- [38]. Refer also to *Van Veenendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017) at [23] and *Y20 and Department of Education* [2021] QICmr 20 (11 May 2021) at [45].

³¹ Letters dated 28 November 2022, 9 December 2022 and email dated 7 March 2023.

- Further, Officer B did not take notes. So, again there is therefore nothing that can be disclosed.
 - The arresting officer advised ODPP no notes were taken by those officers in relation to the matter. In turn, on 30 May 2022, ODPP advised the applicant's legal representatives that there were no notes taken by Officers A or B.
21. In terms of a 'complete' statement containing the 'missing' paragraphs numbered 10, 11, 13, 14, 15, 18, 20, 21, 22 and 23, ODPP submitted:³²
- Inquiries by the prosecution indicate that the non-sequential numbering of the paragraphs in the statement are the result of a formatting mistake and there is no further version or missing material.
 - On 29 August 2022, after confirming this advice from the arresting officer, ODPP wrote to the applicant's legal representatives and advised that there is no information missing from the statement.³³
22. The applicant's access application was made on 29 August 2022 – the same day of ODPP's abovementioned correspondence to the applicant's legal representatives. During the review, the applicant has provided submissions which continue to raise the Notes and a 'complete' statement.³⁴ He has indicated that these documents were not among the 40 pages released to him during the external review following OIC's queries about the brief of evidence in his trial (noted at paragraph 10 above), and have not been provided to him as part of pre-trial proceedings regarding disclosure listed for hearing earlier this year. He maintains that these documents exist and should be provided to him. I wrote to the applicant³⁵ to confirm my understanding of his reasoning in this regard was as follows:
- ODPP's statement that '*information responsive to your application was located*' in its deemed decision notice³⁶ means that the Notes and a 'complete' statement must exist; and
 - computer software and practices such as '*documents are perused by a brief-checker or other person*' would have removed any formatting errors in Officer C's statement and therefore the explanation provided by ODPP is not plausible.³⁷
23. In my letter to the applicant, I expressed the preliminary view that access to these documents may be refused on the ground that they do not exist. The applicant did not accept this and lodged final submissions in support of his case.³⁸
24. I consider the explanations provided by ODPP – about Officers A and B not taking notes and the formatting error in Officer C's statement – are plausible and reasonable. In reaching this conclusion, I have considered the explanations themselves, the situations they relate to, the cohesive nature of the version of the statement already available to the applicant (which does not suggest the omission or deletion of any 'missing' paragraphs), and the lack of other any material to suggest the existence of the Notes or a 'complete' statement. I am satisfied that ODPP's explanation adequately addresses why the documents do not exist.

³² Letters dated 28 November 2022, 9 December 2022 and email dated 7 March 2023.

³³ Letter dated 28 November 2022. This letter also repeated that there were no notes taken by Officers A or B.

³⁴ Letters dated 2 March 2023 (received 7 March 2023), 20 March 2023 (received 29 March 2023) and 30 March 2023 (received 5 April 2023).

³⁵ Letter dated 6 April 2023.

³⁶ Dated 7 October 2022.

³⁷ Letter dated 2 March 2023 (received 7 March 2023).

³⁸ Letters dated 16 April 2023 (received on 21 April 2023) and 11 June 2023 (received 15 June 2023).

25. I have considered the applicant's position that a statement in the deemed decision notice (that '*information responsive to your application was located*') should be construed as referring to the Notes and a 'complete' statement, and therefore reveals that they do exist. This statement could be construed, however, as relating to the documents which have since been disclosed to the applicant. I do not consider it reasonable to interpret this statement as confirming the existence of the Notes or a 'complete' statement.
26. Similarly, I have noted the applicant's contention that computer software and proof-reading checks would have removed any formatting errors in Officer C's statement, and therefore a 'complete' statement containing the 'missing' paragraphs must exist. While software functionality and quality assurance processes would, to some degree, reduce formatting errors when drafting and settling statements, I do not accept that these would render formatting errors so unlikely that it would be reasonable for me to conclude that a further, 'complete' statement exists.
27. I am satisfied that the searches and inquiries conducted by ODPP were reasonably targeted based upon the terms of the access application and could reasonably have been expected to locate the Notes and a 'complete' statement, if they existed. I accept that these searches and inquiries were unsuccessful for the reasons explained in ODPP's submissions, as set out above.
28. As I noted at paragraph 17 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. I acknowledge the applicant's submissions regarding his understanding of the deemed decision notice and processes related to taking statements with computer software. I regard such assertions as speculative in this case, rather than forming a reasonable basis for requiring additional searches or inquiries to be conducted.
29. For the above reasons, I find that there are reasonable grounds to be satisfied that the Notes and a 'complete' statement do not exist. Access to the requested information may therefore be refused on the ground these documents are nonexistent.

DECISION

30. I vary the decision under review. I find that access to the Notes and a 'complete' statement may be refused on the basis that they are nonexistent under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act.
31. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

A Rickard
Assistant Information Commissioner

Date: 12 September 2023

APPENDIX**Significant procedural steps**

Date	Event
28 October 2022	OIC received the application for external review. OIC requested preliminary documents from ODPP.
31 October 2022	OIC received the preliminary documents from ODPP.
16 November 2022	OIC advised the applicant and ODPP that the application for external review had been accepted. OIC requested the ODPP provide submissions and a copy of the documents located in response to the access application.
17 November 2022	OIC received correspondence from the applicant (dated 9 November 2023) referring to a court appearance on 8 November 2022.
28 November 2022	OIC received submissions from ODPP.
5 December 2022	OIC asked the applicant to advise if he wished to proceed with the external review.
9 December 2022	OIC received further submissions from ODPP.
3 January 2023	OIC received submissions from the applicant (dated 27 December 2022) confirming that he wished to proceed with the external review.
13 February 2023	OIC received further information from ODPP.
20 February 2023	OIC wrote to the applicant noting pre-trial proceedings regarding disclosure were listed for hearing and asked the applicant to advise if he wished to proceed with the external review.
27 February 2023	OIC received submissions from the applicant (dated 22 February 2023) confirming that he wished to proceed with the external review.
7 March 2023	OIC received further submissions from the applicant (dated 2 March 2023).
7 March 2023	OIC received submissions from ODPP.
29 March 2023	OIC received submissions from the applicant (dated 20 March 2023).
5 April 2023	OIC received further submissions from the applicant (dated 30 March 2023).
6 April 2023	OIC conveyed a preliminary view to the applicant.
21 April 2023	OIC received submissions from the applicant contesting OIC's preliminary view (dated 16 April 2023).
10 May 2023	OIC received further information from ODPP.
11 May 2023	OIC requested ODPP release the documents located to the applicant.
23 May 2023	ODPP released documents to the applicant.
15 June 2023	OIC received final submissions from the applicant (dated 1 June 2023).