



Decision and Reasons for Decision

Citation:	<i>X99 and Queensland Police Service [2024] QICmr 10 (18 March 2024)</i>
Application Number:	317656
Applicant:	X99
Respondent:	Queensland Police Service
Decision Date:	18 March 2024
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether agency has conducted reasonable searches - whether access to 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)(a) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to Queensland Police Service (**QPS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to entries concerning her that were recorded in the 'Absence Management' section in QPS's Case Management Database (**CMD**) between 1 February 2021 and 11 August 2023.¹
2. QPS located five responsive pages. By decision dated 16 October 2023, QPS gave full access to four pages (except for the deletion, pursuant to section 88 of the IP Act, of some irrelevant information on one page), and partial access to one page. In respect of the latter, QPS decided that disclosure of some information would, on balance, be contrary to the public interest because it comprised the personal information of other persons.²
3. The applicant applied³ to the Office of the Information Commissioner (**OIC**) for external review of QPS's decision. In her application, the applicant sought review of QPS's decision to delete irrelevant information, and also raised an issue concerning the sufficiency of QPS's searches for responsive documents. During the course of the review, OIC advised the applicant that it was OIC's view that the deletion by QPS of irrelevant information on one page was justified as the information in question fell

¹ Application received by QPS on 11 August 2023.

² Pursuant to section 67(1) of the IP Act and section 47(3)(b) of the *Right to Information Act 2009* (Qld).

³ By email on 13 November 2023.

outside the date range specified in the access application. QPS was therefore entitled to delete the information under section 88 of the IP Act. The applicant decided not to pursue that issue any further on external review.⁴ However, she advised that she required OIC to proceed to a formal determination regarding the sufficiency of search issues that she had raised on external review.

4. For the reasons set out below, I find that the searches and inquiries that QPS conducted in order to locate documents responding to the terms of the access application were reasonable in all the circumstances, and that access to any further responsive documents may be refused 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**) on the grounds that such documents are nonexistent.

Background

5. The applicant has made a number of previous applications to QPS seeking access to documents concerning her employment by QPS. Those applications have resulted in the release of documents to the applicant. The current application seeks access to information referred to in some of the previously released documents.

Reviewable decision

6. The decision under review is QPS's decision dated 16 October 2023.

Evidence considered

7. Significant procedural steps relating to the external review are set out in the Appendix.
8. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix). I have taken account of the applicant's submissions to the extent that they are relevant to the issues for determination in this review.⁵
9. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁶ I consider a decision-maker will be '*respecting and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the IP Act and the RTI Act.⁷ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:⁸ '*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.*'⁹

Issue for determination

10. The issue for determination is whether QPS is entitled to refuse access to requested documents under the IP Act on the ground that they are nonexistent.

⁴ See OIC's email of 5 March 2024 to which no response was received.

⁵ Contained in the external review application dated 13 November 2023.

⁶ 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 *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁹ *XYZ* at [573].

Relevant law

11. Access to a document may be refused if the document is nonexistent or unlocatable.¹⁰
12. To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors, including:¹¹
 - the administrative arrangements of government
 - the agency's structure
 - the agency's functions and responsibilities
 - the agency's practices and procedures (including, but not exclusive to, its information management approach); and
 - other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates.
13. If searches are relied on to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents. 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 the particular circumstances.
14. To determine whether a document exists, but is unlocatable, the RTI Act requires consideration of 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 whether the agency has taken all reasonable steps to find the document. In answering these questions, regard should again be had to the circumstances of the case and the key factors listed in paragraph 12 above.¹²
15. 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.¹³ Generally, 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.¹⁴ However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable grounds to be satisfied that the agency has not discharged its obligation to locate all relevant documents. Suspicion and mere assertion will not satisfy this onus.

Findings

16. In her application for external review, the applicant referred to a policy document that had been released to her by QPS in response to an earlier access application, and that

¹⁰ Section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist - section 52(1)(a) of the RTI Act. A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document but it cannot be found - section 52(1)(b) of the RTI Act.

¹¹ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (*Pryor*) at [19] which adopted the Information Commissioner's comments in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009).

¹² *Pryor* at [21].

¹³ Section 137(2) of the IP Act. The Information Commissioner also has power under section 115 to require additional searches to be conducted during an external review.

¹⁴ Section 100(1) of the IP Act.

set out the rights and responsibilities of injured workers. In particular, the applicant relied upon the following section of the policy:

Without exception, all decision making processes, outcomes and action items from Absence Management Committee meetings, including any out-of-session discussions, will be recorded in the 'Absence Management' section within the Case Management Database.

17. This information prompted the applicant to seek access to all entries about her contained in the 'Absence Management' tab in QPS's CMD within a specified timeframe.
18. As noted above, QPS located five pages following a search of the Absence Management tab, and gave the applicant full or partial access to those pages. In her external review submission, the applicant referred to other information to which she had obtained access from QPS and that she argued indicated that other entries should have been contained under the Absence Management tab in compliance with QPS's policy. In particular, the applicant referred to the fact that the CMD recorded that an officer had provided updates about the applicant at meetings of the Absence Management Committee. However, the entries under the Absence Management tab contained no information about what had been conveyed by the officer in those updates, and no comments and/or decisions which may have been made by QPS as a result of the updates. The applicant sought access to this information which she contended was required to be recorded in compliance with QPS's policies.
19. The applicant also complained about a particular entry in the Absence Management tab which appeared to request that information about her not be recorded.
20. In my preliminary view letter to the applicant dated 21 February 2024, I advised the applicant of the information that QPS had provided to OIC concerning the searches it had conducted in an effort to locate responsive information:¹⁵

Searches were conducted of Injury Management's Case Management Database (CMD) - as requested by the applicant in her RTI application - for entries in the 'Absence Management' tab of her Injury Management case in the database. This tab of the CMD case captures IMA Meeting Updates, entered by the Injury Management Advisor prior to the meeting being held, and if the meeting is held, details of the decisions/comments from the meeting, as well as the attendees at the meeting, are also recorded in this tab of the CMD.

21. I advised the applicant that, given that QPS had conducted a search of the location specified in the access application – the Absence Management tab in the CMD – there did not appear to be any other avenues of search or inquiry that QPS could reasonably be asked to undertake in an effort to locate documents responding to the terms of the access request. I advised the applicant that an agency is obliged to give the words used in an access application their plain meaning and to conduct its searches accordingly. As the Information Commissioner has noted:¹⁶

The terms in which an ... [IP] access application is framed set the parameters for an agency's response under the [IP] Act, and in particular set the direction of the agency's search efforts to locate all documents of the agency which fall within the terms of the [IP] access request. The search for relevant documents is frequently difficult, and has to be conducted under tight time constraints. Applicants should assist the process by describing with precision the document or documents to which they seek access.

¹⁵ QPS's email to OIC of 23 January 2024.

¹⁶ *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 at [8].

22. In this case, the access application was precise in describing the documents sought, namely, those contained in the Absence Management section of the CMD. QPS conducted a search of the CMD accordingly.
23. I acknowledged the applicant's submission¹⁷ that the relevant QPS policy required certain information to be recorded in the Absence Management section of the CMD. However, to the extent that the applicant's submission was, in effect, that QPS had failed to comply with the policy, I referred the applicant to a previous decision which had recently been issued by OIC and that dealt with similar issues. In that decision, it was explained that OIC does not have jurisdiction under the IP Act to investigate QPS's record-keeping obligations or procedures and whether or not they have been complied with, or to make findings about whether or not records should have been created by QPS. Any complaint about failures in QPS's record-keeping practices must be directed to QPS. Similarly, I advised the applicant that OIC had no jurisdiction to deal with her complaint regarding the inappropriateness of a particular entry in the Absence Management tab that appeared to request that information about the applicant not be recorded.
24. In response to my preliminary view letter, the applicant advised that she did not accept that view and required the matter to proceed to a formal determination.¹⁸ She did not provide any further submissions in support of her position.

DECISION

25. Given that QPS conducted a targeted search in accordance with the terms contained in the access application (that is, a search of the Absence Management section of the CMD within the specified timeframe) I am satisfied that the searches and inquiries that QPS conducted in an effort to locate all responsive documents were reasonable in all the circumstances. I am further satisfied that no additional responsive documents exist in the specified location.
26. I therefore find that access may be refused on the ground that such documents are nonexistent under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act.
27. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Rachel Moss
Principal Review Officer

Date: 18 March 2024

¹⁷ Contained in the attachment to the application for external review.

¹⁸ Email from the applicant's lawyer on 25 February 2024.

APPENDIX**Significant procedural steps**

Date	Event
13 November 2023	OIC received the application for external review
23 November 2023	OIC received preliminary information from QPS
12 December 2023	OIC advised the parties that the application for review had been accepted
23 December 2023	OIC received a copy of the information in issue from QPS as well as search information
21 February 2024	OIC communicated a preliminary view to the applicant
25 February 2024	OIC received a response from the applicant