

Decision and Reasons for Decision

Citation:	<i>W89 and Department of Transport and Main Roads [2025] QICmr 51 (11 August 2025)</i>
Application Number:	318537
Applicant:	W89
Respondent:	Department of Transport and Main Roads
Decision Date:	11 August 2025
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - request for complaint handling documents - applicant submits further information should exist - whether agency has conducted reasonable searches and inquiries - 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)(a) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Background

1. The applicant applied to the Department of Transport and Main Roads (**Department**) under the *Information Privacy Act 2009* (Qld) (**IP Act**)¹ for access to various documents concerning a complaint he had made about his insurer, and a vehicle previously registered to him.²
2. The Department located 5 pages and decided³ to release them to the applicant in full. The applicant sought internal review on the basis that he considered the Department should have located documents comprising internal communications and communications with the insurer.⁴ The Department located and decided⁵ to release a transcript of a telephone call between a departmental officer and an employee of the insurer (**Transcript**), refusing access to small portions of information on the basis it comprised irrelevant or contrary to public interest information.⁶

¹ On 1 July 2025 key parts of the *Information Privacy and Other Legislation Amendment Act 2023* (Qld) (**IPOLA Act**) came into force, effecting significant changes to the IP Act and *Right to Information Act 2009* (Qld) (**RTI Act**). References in this decision to the IP and RTI Acts, however, are to those Acts as in force prior to 1 July 2025. This is in accordance with Chapter 8 Part 3 of the IP Act and Chapter 7 Part 9 of the RTI Act, comprising transitional provisions requiring that access applications on foot before 1 July 2025 are to be dealt with as if the IPOLA Act had not been enacted.

² Access application dated 23 January 2025.

³ Decision notice dated 3 March 2025.

⁴ Internal review application dated 3 March 2025.

⁵ Internal review decision notice dated 28 March 2025. The Department also decided to affirm the original decision.

⁶ The Department also located and released in full copies of three documents provided to the Department by the applicant, comprising correspondence from the insurer to the applicant dated 11 March 2024, 10 May 2024 and 10 September 2024.

3. The applicant applied⁷ to the Office of the Information Commissioner (**OIC**) for external review of the Department's internal review decision and raised further concerns about missing documents. During the review, the applicant accepted OIC's preliminary view⁸ that the Department had correctly refused access to the small portions of information within the Transcript. However, the applicant maintained his view that further documents referred to in the Transcript should exist.⁹

Issue for determination

4. The applicant's outstanding concerns on external review are limited to the issue of missing information, specifically documents which he says should have been provided by the insurer to the Department, or created by the Department, as referred to in the Transcript. In considering the applicant's submissions, I have examined the reasonableness of the Department's searches and made a finding on whether access to further documents may be refused on the basis they are nonexistent.¹⁰
5. In making this decision, I have taken into account evidence, submissions, legislation and other material set out in these reasons (including footnotes). I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information and in doing so, have acted in accordance with section 58(1) of the HR Act.¹¹
6. For the reasons set out below, I vary the Department's internal review decision¹² and find that access to further documents may be refused on the basis they are nonexistent.¹³

Relevant law

7. Under the IP Act, an individual has a right to be given access to documents in the possession or under the control of an agency to the extent they contain their personal information.¹⁴ While the legislation is to be administered with a pro-disclosure bias,¹⁵ the right of access is subject to certain limitations, including grounds for refusing access, as set out in the IP Act and RTI Act.¹⁶
8. Relevantly, access to a document may be refused if it is nonexistent or unlocatable.¹⁷ A document will be nonexistent if there are reasonable grounds to be satisfied it does not exist.¹⁸ 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 the document, but it cannot be found.¹⁹
9. To be satisfied that a document does not exist, the Information Commissioner has previously identified a number of key factors to consider, including the agency's structure, its recordkeeping practices and procedures and the nature and age of

⁷ External review application dated 31 March 2025.

⁸ Conveyed by letter dated 22 May 2025.

⁹ Submission to OIC dated 22 May 2025.

¹⁰ Under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act.

¹¹ OIC's approach to the HR Act set out in this paragraph has been considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23].

¹² Which is the reviewable decision for the purpose of this review.

¹³ Under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act.

¹⁴ Section 40 of the IP Act.

¹⁵ Section 64 of the IP Act.

¹⁶ Section 67(1) of the IP Act and section 47 of the RTI Act. Those grounds are however, to be interpreted narrowly: see section 67(2) of the IP Act.

¹⁷ Sections 47(3)(e) and 52 of the RTI Act.

¹⁸ Section 52(1)(a) of the RTI Act.

¹⁹ Section 52(1)(b) of the RTI Act.

requested documents.²⁰ By considering relevant key factors, a decision-maker may conclude that a particular document was not created because, for example the agency's processes do not require creation of that specific document. In such instances, it is not necessary for the agency to search for the document, but sufficient that the circumstances to account for the nonexistence are adequately explained.

10. Where 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, depending on which of the key factors are most relevant in the circumstances. 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.²¹
11. On an external review, the agency or Minister who 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.²² However, where the issue of missing documents is raised, the applicant bears a practical onus of demonstrating that the agency has not discharged its obligation to locate all relevant documents.²³ Suspicion and mere assertion will not satisfy this onus.²⁴

Searches, evidence and submissions

12. The Department's decision explained that searches had been conducted by the Customer Services, Safety and Regulation Division, resulting in the location of the released 5 pages.²⁵ While the internal review decision does not indicate what additional searches were conducted, the Department stated that a *'recording of a telephone conversation between [a departmental officer] and [the insurer] has been identified and a transcript obtained.'*²⁶
13. In his external review application,²⁷ the applicant pointed to comments in the Transcript which he considers *'indicates an anticipated update or corrected letter from [the insurer] to rectify the misrepresentation'* and that *'[n]o such document has been disclosed, despite falling within the scope'*. The applicant also pointed to other comments which he contended signalled *'subsequent communications or internal memoranda'* between the Department and the insurer or within the Department and that *'email trail or correspondence between'* the Department and the insurer had not been provided, nor had internal Department *'records reflecting the escalation'* by the departmental officer. The applicant further contended that *'the transcript constitutes direct evidence of missing records critical to'* his complaint.

²⁰ These factors are identified in *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) at [37]-[38]. These factors were more recently considered in *B50 and Department of Justice and Attorney-General* [2024] QICmr 33 (7 August 2024) at [15], *T12 and Queensland Police Service* [2024] QICmr 8 (20 February 2024) at [12], and *G43 and Office of the Director of Public Prosecutions* [2023] QICmr 50 (12 September 2023) at [19].

²¹ Section 130(2) of the RTI Act. The Information Commissioner also has power under section 115 of the RTI 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.

²² Section 87(1) of the RTI Act.

²³ See *Mewburn and Department of Local Government, Community Recovery and Resilience* [2014] QICmr 43 (31 October 2014) at [13].

²⁴ See *Parnell and Queensland Police Service* [2017] QICmr 8 (7 March 2017) at [23]; *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36]; *Y44 and T99 and Office of the Public Guardian* [2019] QICmr 62 (20 December 2019) at [38].

²⁵ Department's original decision at page 1.

²⁶ Internal review decision at page 4.

²⁷ Dated 31 March 2025.

14. In response to a request from OIC²⁸ to respond to the applicant's concerns, the Department submitted:²⁹

Advice has been provided by the Vehicle Identification Unit (VIUnit) that, to the best of their recollection, an email was not sent to [the insurer] ... as [the insurer's] representative had advised [the Department] that [the applicant's] vehicle had been repaired, meaning that the requirements under the Transport Operations (Road Use Management—Vehicle Registration) Regulation 2021 did not apply. Furthermore, [the insurer] had advised [the Department] that [the applicant's] customer complaint was still in progress at an escalated level. Unfortunately, the relevant officer within the VIUnit cannot recall why she stated that she would get back to [the insurer] and is unable to locate any further evidence of contact regarding this case.

With regards to the advice provided to [the applicant] that "Once an outcome has been reached, this department will also be advised of the outcome in due course", I understand this was intended to mean that the VIUnit was expecting to receive an outcome from [the insurer]. To date [the Department] has not received an outcome and it is believed that the customer complaint with [the insurer] may be still ongoing.

When locating documents [in] response to [the applicant's] application, searches were undertaken within the generic VIUnit inbox ... as well as [the Department's] Document Management System (DMS). When saving documents, it is standard practice within the VIUnit to label all emails and DMS items using the Vehicle Identification Number (VIN) or registration number of the relevant vehicle to allow information to be easily identified. On this occasion, searches were undertaken in both locations using the VIN and registration number of [the applicant's] vehicle as well as his full name.

15. The Department's above submission was conveyed³⁰ to the applicant along with OIC's preliminary view that the Department had taken all reasonable steps to locate relevant documents. The applicant did not accept OIC's view and in response submitted that:³¹

... serious concerns remain regarding the adequacy and transparency of [the Department's] search processes. Your own preliminary view explicitly references recorded communications wherein [the Department] stated further documentation from [the insurer] would be forthcoming. The subsequent absence of these documents raises significant questions...

Specifically:

1. *[The Department] explicitly mentioned follow-up documentation from [the insurer] in recorded conversations; the failure to produce these documents strongly indicates that either [the Department] has not conducted sufficiently thorough searches or that documents may have been deliberately concealed or destroyed.*

...

I therefore respectfully request the OIC to require [the Department] to:

- *Provide a detailed explanation of why these explicitly referenced documents from [the insurer] have not been produced.*
- *Confirm explicitly whether these documents existed, and if they no longer exist, explain why they were not retained or produced...*

²⁸ Letter to the Department dated 7 May 2025.

²⁹ Submission dated 12 May 2025.

³⁰ Letter to the applicant dated 22 May 2025.

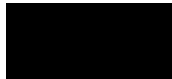
³¹ Submission dated 22 May 2025. The applicant also raised matters which fall outside the Information Commissioner's jurisdiction.

Findings

16. Having examined the information available to me, including the located documents, the applicant's and Department's submissions, and the outcome of inquiries with the relevant departmental officer, I am satisfied that the Department conducted targeted searches and inquiries to locate information relevant to the terms of the application. I accept that within the Transcript, there are references which, on their face, indicate that the Department had *anticipated* receiving and/or preparing additional documents in connection with the complaint. However, I am satisfied that the Department has provided an adequate explanation to account for the absence of further documents, as set out in paragraph 14, in that further documents were either not received from the insurer, nor created by the Department, beyond what has been located and released to the applicant.
17. I acknowledge that the documents located by the Department have not met the applicant's expectations and that he generally has outstanding concerns about his complaint to the Department and to the insurer. However, OIC does not have jurisdiction to make any determinations about the Department's complaint handling processes including how it obtains information from an insurer when dealing with a complaint of this nature. Similarly, it is outside the scope of this external review for OIC to make any findings on alleged/perceived deficiencies in those processes.
18. Notwithstanding the applicant's broader concerns, the issue for determination in this external review is whether access to further documents may be refused on the basis they do not exist. Based on the information set out in the preceding paragraphs, I am satisfied that the Department has conducted searches in locations where it would be reasonable to expect documents relevant to the application to be found. I also find that making inquiries with the relevant departmental officer was an appropriate avenue to pursue in the circumstances, as that officer had been directly involved in dealing with the applicant's complaint regarding the insurer and could reliably comment on whether further documents had been received or created. In the circumstances, I am unable to identify any further searches that would be reasonable for the Department to undertake.
19. For the reasons set out above, I find that the Department has taken all reasonable steps to locate documents relevant to the scope of the access application and access may therefore, be refused to any further documents on the basis they do not exist.³²

DECISION

20. I vary³³ the Department's internal review decision by finding that access to further documents may be refused under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act on the basis they do not exist.
21. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.



K Shepherd
Assistant Information Commissioner

Date: 11 August 2025

³² Section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act. In the circumstances of this case, I do not consider the Department was required to undertake a backup system search under section 52(2) of the RTI Act.

³³ Under section 123(1)(b) of the IP Act.