



Decision and Reasons for Decision

Citation:	<i>McCrystal and Queensland Building and Construction Commission</i> [2019] QICmr 50 (18 November 2019)
Application Number:	314730
Applicant:	Shaun McCrystal
Respondent:	Queensland Building and Construction Commission
Decision Date:	18 November 2019
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - applicant submits agency has failed to locate all responsive documents - whether agency has taken all reasonable steps to locate documents relevant to the access application - 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 made an access application¹ to the Queensland Building and Construction Commission (**QBCC**) under the *Right to Information Act 2009* (Qld) (**RTI Act**). He applied for access to documents from July 2014 concerning a 'briefing', 'comprehensive review', and 'review of the investigation' conducted by a QBCC officer on or around March 2015 into a complaint that the applicant had made to QBCC about a builder who was carrying out building work near his home.
2. QBCC undertook searches for responsive documents and decided that the documents that the applicant sought to access did not exist.²
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QBCC's decision.³
4. For the reasons set out below, I vary QBCC's decision by finding that access may be refused on the grounds that some documents to which the applicant seeks access are nonexistent under section 52(1)(a) of the RTI Act, and some documents are unlocatable under section 52(1)(b) of the RTI Act.

¹ Dated 26 September 2018.

² Decision dated 24 June 2019.

³ Application dated 19 July 2019.

Background

5. Significant procedural steps taken by OIC in conducting the external review are set out in the appendix to these reasons.
6. The applicant has made multiple access applications to QBCC under the RTI Act over an extended period seeking access to documents concerning a complaint he made to QBCC that building work taking place near his home involved unlicensed contracting. A number of those applications have been subject to external review by OIC and a number of OIC's decisions have been appealed by the applicant to the Queensland Civil and Administrative Tribunal (QCAT) and are currently on appeal.⁴
7. A document released to the applicant as the result of one of his previous RTI access applications was an email dated 24 March 2015 from a QBCC officer to the applicant's lawyer, responding to the applicant's dissatisfaction with QBCC's investigation into the applicant's complaint. In that email, the QBCC officer referred to having '*received a briefing*' about the matter and that they had '*comprehensively reviewed QBCC's investigation*'. Later in the email, the officer again said that they had '*undertaken a review of the investigation*'.
8. This email prompted the applicant's current access application in which he seeks access to all documents concerning the briefing and review that the QBCC officer referred to in the email dated 24 March 2015.

Reviewable decision

9. The decision under review is QBCC's decision 24 June 2019.

Evidence considered

10. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the appendix).
11. The applicant provided written submissions to OIC supporting his case.⁵ He also delivered to OIC nearly 1000 pages of documents relating to various legal proceedings, including those involving the builder about whom he had complained to QBCC. I have carefully reviewed the applicant's submissions and supporting documents. I do not consider that any of the court documents he provided about the builder and associated legal proceedings have any relevance to the issue before me for determination in this review. In respect of the issues the applicant raised in his written submissions, some are not matters which the Information Commissioner has jurisdiction to consider in conducting an external review under the RTI Act. Others are irrelevant to a consideration of the issue for determination. Accordingly, in reaching this decision, I have considered the applicant's submissions to the extent they are relevant to the issue for determination on external review. I will discuss the applicant's submissions below.

⁴ For a summary of the background to the applicant's complaint and his various applications to QBCC, see *McCrystal and Queensland Building and Construction Commission* [2017] QICmr 32 (10 August 2017), *McCrystal and QBCC (No.2)* [2017] QICmr 50 (6 October 2017), *McCrystal and Queensland Building and Construction Commission* [2018] QICmr 2 (30 January 2018), *McCrystal and Queensland Building and Construction Commission (No. 2)* [2018] QICmr 10 (7 March 2018), *McCrystal and Queensland Building and Construction Commission (No.3)* [2018] QICmr 22 (18 May 2018).

⁵ Submissions dated 19 July 2019 and 8 October 2019.

Issue for determination

12. The issue for determination is whether the information that the applicant seeks to access is nonexistent or unlocatable under section 47(3)(e) and section 52 of the RTI Act.

Relevant law

13. Access to a document may be refused if it is nonexistent or unlocatable.⁶ A document is nonexistent if there are reasonable grounds to be satisfied it does not exist.⁷ 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.⁸
14. To be satisfied that a document is nonexistent, the Information Commissioner has previously recognised that a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors, including:
 - the administrative arrangements of government
 - the agency structure
 - the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
 - 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.⁹
15. It may not be necessary for searches to be conducted when proper consideration is given to relevant factors. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.¹⁰
16. Searches may also be relied on to satisfy the decision-maker that a document does not exist. 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.¹¹ What constitutes reasonable steps will vary from case to case as the search and enquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances.
17. To determine whether a document exists, but is unlocatable, the RTI Act requires consideration of whether there are reasonable grounds to be satisfied that the requested document has been or should be in the agency's possession; and whether the agency

⁶ Sections 47(3)(e) and 52(1) of the RTI Act.

⁷ Section 52(1)(a) of the RTI Act.

⁸ Section 52(1)(b) of the RTI Act.

⁹ *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* [2009] QICmr 7 (9 February 2009) (*PDE*) at [37]. The decision in *PDE* concerned 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 here. See also *Lester and Department of Justice and Attorney-General* [2017] QICmr 17 (16 May 2017) at [11] and *F60XCX and Department of Natural Resources and Mines* [2015] QICmr 17 (27 July 2015) at [50].

¹⁰ For example, where a particular document was not created because 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.

¹¹ As set out in *PDE* at [49]. See also section 130(2) of the RTI Act.

has taken all reasonable steps to find it.¹² In answering these questions, regard should again be had to the circumstances of the case and the key factors set out above.¹³

QBCC's decision

18. In its decision, QBCC stated that in respect of the *'briefing'* referred to in the 24 March 2015 email, the two officers involved in the briefing had advised that the briefing was oral and no documents were created by either of them in connection with it.
19. QBCC's decision also stated that, in respect of the *'review'* or *'comprehensive review'*, the QBCC officer who wrote the 24 March 2015 email advised that they could not now recall, due to the period of time that had elapsed, what particular documents contained on QBCC's file at the relevant time the officer may have reviewed prior to telephoning the applicant's lawyer. A recording of that telephone call made by QBCC indicated that the officer advised the applicant's lawyer that the officer had *'just been briefed and ... spent the day perusing the correspondence we've received from you ... what I've done is reviewed our involvement with the matter ... I've had a look at what we've done so far and I'm satisfied that my team's executed their duties appropriately and applied the legislation appropriately'*.¹⁴
20. QBCC stated that, before being satisfied that the documents that the applicant sought to access did not exist, it searched QBCC's records management system (QBCC Enterprise Content Management (ECM) System) for any responsive documents created between 19 February 2015 (when the applicant's lawyer first contacted QBCC to express his client's dissatisfaction with QBCC's investigation) and 24 March 2015 (when QBCC emailed the applicant's lawyer). No responsive documents were located.
21. In its decision, QBCC also listed all documents created for the relevant case file between 16 September 2014 and 24 March 2015 and contained on the ECM system, and identified each previous access application made by the applicant that had requested access to each document.¹⁵
22. Based on the above, QBCC's decided that the documents that the applicant sought to access did not exist.

Discussion of applicant's submissions

23. In his submission dated 19 July 2019, the applicant raised a number of issues that fall outside the jurisdiction of the Information Commissioner under the RTI Act. The applicant requested that OIC investigate:
 - his allegations about the way in which QBCC had dealt with and investigated his complaint about the builder and the building work that the builder undertook near the applicant's home
 - his complaints about the way in which QBCC had discharged its functions under the *Queensland Building and Construction Commission Act 1991* (Qld) or the *Building Act 1975* (Qld); and
 - his allegation that QBCC had breached the *Public Records Act 2002* (Qld) by not keeping appropriate records.

¹² Section 52(1)(b) of the RTI Act.

¹³ *Pryor* at [21].

¹⁴ In the email of 24 March 2015, the QBCC officer also advised that they had read a letter that the applicant had sent to his local councillor.

¹⁵ QBCC identified three audio recordings of telephone conversations between a QBCC officer and the applicant's lawyer that had not previously been released to the applicant.

24. The applicant submitted that officers of QBCC be investigated or 'examined' to determine whether they had committed offences against the *Criminal Code Act 1899* (Qld) or the *Crime and Corruption Act 2001* (Qld).
25. I advised the applicant that OIC had no jurisdiction under the RTI Act to conduct investigations or examinations in respect of any of these matters. OIC's jurisdiction was limited to reviewing QBCC's decision and deciding whether to affirm, vary or set aside that decision.¹⁶
26. The applicant also raised a concern that he had discovered that QBCC's decision-maker, and the author of the 24 March 2015 email, were 'friends' on Facebook. He alleged that this friendship gave rise to a conflict of interest, and that the information that the decision-maker had gathered from the other officer and relied upon to make the decision was somehow influenced by the relationship. I advised the applicant that I did not accept his allegation.¹⁷ The information that the author of the email had provided about their recollection of relevant events and the existence of responsive document had been provided to OIC previously.¹⁸ There was no evidence before me that the decision-maker did not act in a fair and impartial manner in giving the decision and no basis to invoke the Information Commissioner's jurisdiction under section 113 of the RTI Act (disciplinary action).
27. In response to the searches and inquiries that QBCC stated that it had undertaken in effort to locate responsive documents, the applicant complained that no searches had been undertaken of the email accounts of the two QBCC officers who had been involved in the briefing referred to in the 24 March 2015 email. QBCC was asked to confirm on external review whether such searches had taken place. By email dated 22 October 2019, QBCC provided written confirmation from both officers that they had searched their Outlook and Mimecast accounts for the relevant period and did not locate any documents that related to the briefing.
28. The bulk of the submissions that the applicant provided in his second submission dated 8 October 2019 were irrelevant to the issue for determination. He discussed the history of his interactions with QBCC, the previous RTI applications he had made to QBCC, his QCAT appeals, and court proceedings involving the builder. He continued to raise issues about:
- the manner in which QBCC had handled his complaint
 - alleged unlawful activity by the builder
 - the failure of QBCC to take appropriate action against the builder
 - QBCC allegedly acting in furtherance of the alleged unlawful activity by the builder
 - QBCC's history of failing to locate and disclose relevant documents in response to the applicant's RTI access applications
 - alleged unlawful activity by certain QBCC officers
 - the failure of the Queensland Ombudsman and the QBCC Commissioner to refer QBCC officers to the Crime and Corruption Commission; and

¹⁶ Section 110 of the RTI Act.

¹⁷ My letter to the applicant dated 16 September 2019.

¹⁸ QBCC had originally decided to refuse to deal with the applicant's access application under section 39 and section 43 of the RTI Act and the applicant had sought external review of that decision by OIC. That external review resolved informally because QBCC accepted OIC's view that it was not entitled to refuse to deal with the application. It therefore recommenced processing the application. During that external review process, QBCC provided information to OIC about the existence of responsive documents, including the information provided by the officer who had authored the 24 March 2015 email and which is set out at paragraph 19 above.

- the failure of OIC to include, in an appeal book which OIC prepared for a QCAT appeal involving the applicant and QBCC, documents about the builder and his alleged unlawful activity.
29. As noted above, in support of these submissions, the applicant delivered to OIC on 25 October 2019, nearly 1000 pages of court documents concerning various legal proceedings, including those involving the builder. None of the documents raises issues that I have jurisdiction to deal with under the RTI Act in conducting this external review.
30. The applicant again called for the Information Commissioner to exercise the power under section 104 of the RTI to examine QBCC officers in connection with his allegation that they *'cannot be considered reliable or credible in their representations to an RTI Decision Maker or the OIC'*.¹⁹
31. As the applicant has been advised on a number of occasions in this and in other external reviews involving him, I understand that he is dissatisfied with the way in which QBCC handled his complaint about the builder and the related building work. He is also clearly unhappy with aspects of the way in which OIC has dealt with previous of his external review applications. However, OIC's jurisdiction is confined to issues arising under the RTI Act. OIC has no power to examine the applicant's complaints against the builder, or the way in which QBCC handled his complaint. OIC has no jurisdiction to investigate or examine QBCC officers to determine if they have committed offences against the Criminal Code or the Crime and Corruption Act. As I have noted above, there is no evidence before me to suggest that QBCC officers did not provide accurate information to QBCC's decision-maker in this review such as to give grounds for invoking the Information Commissioner's disciplinary powers under section 113 of RTI Act.
32. I see no grounds for requiring QBCC officers to be examined under oath. I am satisfied with the written information that relevant officers have provided to QBCC and to OIC about their recollection of relevant events, and the searches and inquiries conducted by QBCC for responsive documents.

Findings

33. Based on the information provided by QBCC, I find, as a matter of fact, as follows:
- there are no reasonable grounds for believing that any documents were generated in connection with the briefing given by one QBCC officer to another, and so such documents may reasonably be regarded as non-existent; and
 - based on the statement by the QBCC officer that they cannot now recall which specific documents contained on QBCC's files as at 24 March 2015 that they may have reviewed prior to responding to the applicant's lawyer, such documents may reasonably be regarded as unlocatable.
34. My findings are based on the following information/evidence provided by QBCC:
- the statements by both QBCC officers involved in the briefing that the briefing was oral and no documents were created by either officer in connection with it
 - searches conducted of the officers' Outlook and Mimecast accounts
 - searches conducted of QBCC's ECM system; and
 - the statement by the QBCC officer who wrote the 24 March 2015 email that they could not now recall, due to the passage of time, which specific documents

¹⁹ Submission dated 8 October 2019.

contained on QBCC's files as at 24 March 2015 they had reviewed prior to contacting the applicant's lawyer.

35. On the basis of this information, I am satisfied that the various searches and inquiries that QBCC undertook in an effort to locate any documents that responded to the terms of the applicant's access application were reasonable in all the circumstances of this case, and I am unable to identify any further searches or inquiries which I consider it would be reasonable to ask QBCC to undertake.

DECISION

36. For the reasons set out below, I vary QBCC's decision by finding that access may be refused on the grounds that some documents to which the applicant seeks access are nonexistent under section 52(1)(a) of the RTI Act, and some documents are unlocatable under section 52(1)(b) of the RTI Act.
37. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Louisa Lynch
Right to Information Commissioner

Date: 18 November 2019

APPENDIX

Significant procedural steps

Date	Event
19 July 2019	The applicant applied to OIC for external review.
2 August 2019	QBCC provided procedural documents.
22 August 2019	OIC advised the applicant and QBCC that it had accepted the application for external review.
16 September 2019	OIC communicated a preliminary view to the applicant.
8 October 2019	The applicant provided written submissions.
22 October 2019	QBCC provided further information about the searches and inquiries it had conducted for responsive documents.
25 October 2019	The applicant delivered a bundle of documents to OIC.