



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>Q27 and Office of the Director of Public Prosecutions [2024] QICmr 29 (2 July 2024)</i></b>
<b>Application Number:</b>	<b>317429</b>
<b>Applicant:</b>	<b>Q27</b>
<b>Respondent:</b>	<b>Office of the Director of Public Prosecutions</b>
<b>Decision Date:</b>	<b>2 July 2024</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - request for documents about applicant - whether agency has conducted reasonable searches - whether access to documents may be refused on the basis documents are nonexistent or unlocatable - section 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> and sections 47(3)(e) and 52 of the <i>Right to Information Act 2009 (Qld)</i></b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied for access<sup>1</sup> to all documents held by the Office of the Director of Public Prosecutions (**ODPP**) about him since 1 January 2006.
2. The Department refused access to the documents under sections 67(1) of the *Information Privacy Act 2009 (Qld)* (**IP Act**) and sections 47(3)(e) and 52(1)(a) of the *Right to Information Act 2009 (Qld)* (**RTI Act**) on the ground that they were nonexistent.<sup>2</sup>
3. The applicant applied for internal review of the Department's decision<sup>3</sup> and the Department affirmed its original decision on internal review.<sup>4</sup>
4. The applicant then applied<sup>5</sup> to the Office of the Information Commissioner (**OIC**) for external review of the Department's internal review decision.
5. I affirm the decision under review by finding that access to the documents requested by the applicant may be refused under sections 67(1) of the IP Act and sections 47(3)(2) and 52(1)(a) of the RTI Act.

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<sup>1</sup> The Department of Justice and Attorney-General (**Department**) 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.

<sup>2</sup> Decision dated 19 May 2023.

<sup>3</sup> On 16 June 2023.

<sup>4</sup> Internal review decision dated 23 June 2023.

<sup>5</sup> On 13 July 2023.

## Reviewable decision

6. The decision under review is the Department's internal review decision dated 23 June 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). I have taken into account the applicant's submissions<sup>6</sup> to the extent they are relevant to the issue for determination in this review.
9. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>7</sup> 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 RTI Act.<sup>8</sup> 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:<sup>9</sup> '*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*'.<sup>10</sup>

## Issue for determination

10. The only issue for determination is whether the Department was entitled to refuse access to the requested documents on the basis that they are nonexistent or unlocatable.
11. Before addressing this issue, it is necessary that I address a preliminary matter—namely, the applicant's allegation that his access application was modified by the Department.

## Preliminary matter

12. The applicant submitted two access applications. It appears that the earlier application (sent by post) and dated 11 April 2023 (**Earlier Application**) may not have been received. Following a telephone conversation with an officer from the Department, the applicant lodged a new application dated 10 May 2023 (**Later Application**). The Earlier Application was then located by the Department and processed with the Later Application.
13. The applicant submitted that the terms of his access applications were modified.<sup>11</sup> More specifically, he stated:

*...the original terms of access are for any documents relating to myself; not just those titled or named [name 1] or [name 2]... I think this is important to understand, as it is extremely unlikely any documents meeting the original terms of access would be titled according to my name. While a person's name is arguably the most relevant identifier when handing information*

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<sup>6</sup> Contained in the application for external review and in emails of 9 November 2023 (dated 9 October 2023) and 7 February 2024.

<sup>7</sup> Section 21(2) of the HR Act.

<sup>8</sup> *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].

<sup>9</sup> *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>10</sup> XYZ at [573].

<sup>11</sup> Submission received 7 February 2024.

*privacy applications, the same cannot be said when it comes to locating documents. I believe only looking for documents titled according to my names would significantly alter the scope of the request. The original application asks for 'any documents relating to myself', and then explains that I have two names which may be relevant for the purposes of the application...*

14. The terms of the two applications were:

Earlier Application

*Any and all documents that may be held by the ODPP...  
January 2016 – Present*

Later Application

*Seeking access to any documents relating to myself  
I would like you to conduct a search on the names [name 1] and [name 2]...  
January 2006 – 13/05/2023*

15. The scope of the application, as recorded in the Department's initial and internal review decisions,<sup>12</sup> is:

*Any documents under names [name 1], [name 2] for the date range 1 January 2006 to 13 May 2023*

16. I understand the applicant's concern is that not all documents about him would be located if searches were limited to documents 'titled' or 'named' [name 1] or [name 2]. I accept that the scope in the Department's decisions is worded differently to that in the Earlier and Later Applications, however, I do not consider that the wording of the application as recorded by the Department in the decision under review would *only* capture documents 'titled' or 'named' [name 1] or [name 2]. In any event, as explained at paragraphs 23 to 32, I am satisfied that this wording would have had no practical effect on the outcome of the searches undertaken by ODPP for relevant documents.

## Relevant law

17. Under section 40 of 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.<sup>13</sup> This right is subject to limitations, including grounds for refusal of access.<sup>14</sup>
18. The Information Commissioner's external review functions include investigating whether agencies have taken reasonable steps to identify and locate documents applied for by applicants.<sup>15</sup> However, access may be refused in circumstances where a document is nonexistent or unlocatable.<sup>16</sup>

<sup>12</sup> Dated 19 May 2023 and 23 June 2023 respectively.

<sup>13</sup> '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'.

<sup>14</sup> Section 67(1) of the IP Act sets out that an agency may refuse access to information 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 the subject of an access application under the RTI Act.

<sup>15</sup> 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.

<sup>16</sup> Sections 47(3)(e) and 52(1) 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.

19. To be satisfied that a document is nonexistent, an agency must rely on their particular knowledge and experience and have regard to a number of key factors which include:<sup>17</sup>
  - the administrative arrangements of government
  - the agency's structure
  - the agency's functions and responsibilities<sup>18</sup>
  - 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.
20. When proper consideration is given to the relevant factors, it may not be necessary for searches to be conducted. However, 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 enquiry process an agency will be required to undertake will depend on which of the key factors are *most* relevant in the particular circumstances.
21. To determine whether a document 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 locate the document. In answering these questions, regard should again be had to the particular circumstances of the case and the relevant key factors.<sup>19</sup>
22. 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.<sup>20</sup> However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable grounds to believe that the agency has not discharged its obligation to locate all relevant documents. Suspicion and mere assertion will not satisfy this onus.<sup>21</sup>

## Discussion

23. During the course of the external review, the Department provided submissions<sup>22</sup> to OIC in relation to ODPP's searches and provided a copy of a search certification completed by ODPP. The search records provided by the Department confirm that the following locations were searched by ODPP:<sup>23</sup>
  - Records Management
  - VisualFiles
  - E-docs
  - Suitability Checking, Recording and Monitoring (**SCRAM**); and
  - Queensland Wide Inter-linked Courts (**QWIC**) database.

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<sup>17</sup> These factors are identified in *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) at [37]-[38].

<sup>18</sup> Particularly the legislation for which it has administrative responsibility and the other legal obligations that fall to it.

<sup>19</sup> *Pryor* at [21].

<sup>20</sup> Section 100(1) of the IP Act.

<sup>21</sup> *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].

<sup>22</sup> During a telephone call on 14 November 2023 and in an email dated 19 January 2024.

<sup>23</sup> Search certification dated 18 May 2023.

24. Those records also confirm that the following search process was used by ODPP:<sup>24</sup>
- both names in the access application were used in all search locations
  - VisualFiles was searched under 'defendant' and 'participant' (victim); and
  - E-docs files was searched generally for documents under both names.
25. No documents were located by ODPP. However, in the search certification, the officer who performed the searches stated '*ODPP does not have carriage of any matters related to named person. PPC will have documents*'. 'PPC' is the Police Prosecution Corps, a division of the Queensland Police Service (**QPS**).
26. The search certification was approved by the Practice Manager at ODPP.
27. On external review, further enquiries were made with both the Department and ODPP<sup>25</sup> to understand the searches performed and ODPP's record keeping practices.
28. From these enquiries, I understand that:<sup>26</sup>
- Records Management holds pre 2009 ODPP files
  - VisualFiles is ODPP's central document management system and contains post 2009 ODPP files
  - E-docs is the 'backend' of VisualFiles. Searches are done in E-docs to ensure that no documents are missed following searches in VisualFiles for matters after 2009
  - SCRAM is a QPS system that ODPP can access to order criminal history information
  - QWIC is a Queensland Courts system—ODPP has search access to this system
  - QWIC includes information about whether a matter is prosecuted by the Police Prosecution Corps, ODPP or the Commonwealth Director of Public Prosecutions
  - QWIC also records file location information—that is, information about which agency holds a particular file or if a file is in transit; and
  - ODPP's searches in QWIC revealed that QPS (not ODPP) prosecuted the only proceedings recorded against [name 1] or [name 2], as referred to in the access application (the applicant's name and a name he was formerly known by). No files were recorded against ODPP under these names.
29. I also understand that the search function in ODPP's databases is limited to a person's name—that is, ODPP can only perform searches for documents under a person's name. A file is created in ODPP's databases for each incoming matter under the name of the person who was charged. If the person was not a defendant or victim, unless the name of the defendant or victim is known, ODPP is unable to conduct searches. Accordingly, in this matter, the key words used in the Department's searches were [name 1] and [name 2].
30. The Department also provided OIC with a copy of the information recorded in QWIC. There were four entries in QWIC during the relevant time period and the 'lodging authority' was noted as QPS. The applicant was provided with a copy of this information to assist him if he decided to make a fresh access application to QPS.

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<sup>24</sup> Documented in the search certification dated 18 May 2023.

<sup>25</sup> Telephone call:

- 14 November 2023 between former Assistant Commissioner Martin, Assistant Commissioner Williams and the Director, Right to Information and Privacy at the Department.
- 28 May 2024 between ODPP's Practice Manager and a Senior Review Officer at OIC.

<sup>26</sup> Information provided during our telephone calls with the Department and ODPP was confirmed in an email from the Department dated 19 June 2024.

31. An explanation of ODPP's searches was provided to the applicant during the external review. In response, the applicant stated that he was not satisfied that ODPP's searches were adequate.<sup>27</sup> He also stated that:

*...ODPP is responsible for prosecuting criminal matters in the Magistrates (limited), District, Supreme and Mental Health courts, the Court of Appeal and the High Court of Australia. This involves legal preparation and court appearances. The reason I believe there are more documents in the ODPP's possession is perhaps best exemplified by my response in [other external review]; where it is all but certain additional conditions were imposed upon me other than what was prescribed by transport law. I do note, when I attended court for the matter, I was directed to a smaller courtroom that seemed to be closed to the public; this did not seem to be a usual undertaking of the court.*

*There are also other indications (both past and present) I have been subject to abnormal demands...None the less, it would seem some kind of irregular intervention has taken place in the courts, and the ODPP, in my opinion, is likely the source of that intervention.*

32. Other than his general assertion/belief that there are documents in ODPP's possession, there was no information in the applicant's submissions demonstrating that ODPP held relevant documents about him.

### **Finding**

33. On the information before me, I am satisfied that ODPP has undertaken comprehensive searches of all its systems where it could reasonably expect to locate information about the applicant. I note these searches were approved by ODPP's Practice Manager, whom I consider is well placed to understand ODPP's record keeping practices.
34. I am satisfied the searches were reasonable considering the very broad scope of the application and the limitations on how ODPP can conduct searches in its databases. In circumstances where only the applicant's names (that is, [name 1] or [name 2]) were provided to facilitate searches for documents, I consider that the key words used during the search process, in both the 'defendant' and 'participant' fields, were appropriate.
35. I also note that the information provided by the Department regarding the involvement of QPS' Police Prosecution Corps, rather than ODPP, in proceedings involving the applicant provides a reasonable explanation as to why documents the applicant may have expected be located by ODPP have not – because such documents are with QPS.
36. In these circumstances, I consider there are reasonable grounds for me to be satisfied that relevant documents are nonexistent or cannot be located within ODPP.

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<sup>27</sup> Submission received 9 November 2023. This position was reaffirmed in his submission (received 7 February 2024) in response to OIC's second preliminary view.

## **DECISION**

37. For the reasons set out above, I affirm the Department's internal review decision and find that documents are nonexistent or unlocatable within ODPP.<sup>28</sup>
38. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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**A Rickard**  
**Assistant Information Commissioner**

**Date: 2 July 2024**

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<sup>28</sup> Section 67(1) of the IP Act, and sections 47(3)(e) and 52 of the RTI Act.

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
13 July 2023	OIC received an application for external review from the applicant.
14 July 2023	OIC requested preliminary documents from the Department.
20 July 2023	OIC received the preliminary documents from the Department.
19 October 2023	OIC advised the applicant that the application for external review had been accepted and conveyed a preliminary view.  OIC advised the Department that the application for external review had been accepted.
9 November 2023	OIC received a submission from the Applicant.
13 November 2023	OIC contacted the Department to obtain further information about its searches.
27 November 2023	OIC received a response from the Department.
12 December 2023 15 January 2024	OIC contacted the Department to obtain further information about the search information provided.
19 January 2024	OIC received a response from the Department.
24 January 2024	OIC conveyed a second preliminary view to the applicant.
7 February 2024	OIC received a final submission from the Applicant.
28 May 2024	OIC contacted ODPP to obtain further information about the search information provided.
13 June 2024	OIC contacted the Department to confirm information provided about the search information provided by the Department and ODPP.
19 June 2024	OIC received a response from the Department.