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## IPOLA GUIDELINE

### Applying the legislation – Right to Information Act 2009

#### Search issues and referral during external review

**This guide does not reflect the current law.**

**It highlights important changes to the *Right to Information Act 2009* in a general way.**

**This guide is not legal advice and additional factors may be relevant in specific circumstances. For detailed guidance, legal advice should be sought.**

The *Right to Information Act 2009* (Qld) (**RTI Act**) gives people the right to access agency<sup>1</sup> documents, subject to some exceptions and limitations. It also provides parties affected by the decision, usually the applicant or a consulted third party, with review rights.

Affected parties can only apply for review of a reviewable decision, as set out in schedule 4A of the RTI Act. Reviewable decisions under the RTI Act which raise search issues are:

- a decision that purports to, but may not, cover all documents in scope of the application (referred to as sufficiency of search); and
- a decision to refuse access because a document is nonexistent or unlocatable.

These reviewable decisions can be internally reviewed by the agency or externally reviewed by the Office of the Information Commissioner (**OIC**). Refer to ***Review rights under the RTI Act*** guideline for more information.

#### How are search issues handled during an external review?

The onus is generally on the agency to demonstrate that its searches were sufficient, and it located all documents within the scope of an application.<sup>2</sup> For a documents non-existent or unlocatable decision, the agency will need to demonstrate it met certain specific criteria.

Refer to ***Documents nonexistent or unlocatable*** guideline for more information.

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<sup>1</sup> In this guideline, references to an agency include a Minister unless otherwise specified.

<sup>2</sup> Section 87 of the RTI Act

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The OIC will advise the agency if search issues are being considered during the review.

### **Submissions**

As part of assessing the sufficiency of an agency's searches, the OIC may request agency submissions which set out:

- the locations which were searched
- the reasons those locations were chosen (including references to relevant record keeping policies and practices)
- the search terms used in searching any electronic databases; and
- any explanation of why the documents do not exist or cannot be located.

The OIC will also require a record of the agency's searches and signed search certification forms from officers involved in the searching and may ask the agency to undertake additional searches and enquiries to demonstrate all reasonable steps have been taken to locate relevant documents.

### **Informal resolution**

The OIC seeks to informally resolve issues under review. As part of informally resolving sufficiency of search issues, the OIC asks agencies to provide submissions in a format which can be disclosed to the applicant. If the agency is concerned about any part of its submissions being provided to the applicant, the agency should advise the OIC of its concerns.

The OIC may also request information directly from officers in the relevant business unit involved in the creation and/or recordkeeping of relevant documents, as these officers have detailed knowledge of these practices and procedures.

If a review cannot be resolved informally, the OIC will issue a formal decision.

### **Location of additional documents**

#### **Referral back to the agency**

If additional in scope documents are identified during the external review of an access application, section 105A of the RTI Act allows the OIC to refer those documents back to the agency to make a decision if:

- referral would be a more efficient and effective way for an access decision to be made on the documents; and
- it is reasonably likely that the agency would be able to make an access decision consistent with the primary object of the RTI Act.

The OIC will consult with the agency before any referral occurs. If the documents are referred, the external review will continue minus those documents.



If the OIC refers the additional documents back to the agency, the applicant is taken to have made a new, fully compliant access application to the agency for those additional documents. No access or processing charges are payable for the new application.

The valid application day for the application will be the day the documents were referred back to the agency. The applicant does not need to pay an application fee or provide evidence of identity or authority if the agent is unchanged from the initial application. If the applicant has a new agent acting for them, the valid application day will be the day the agency receives evidence of identity and authority for the new agent.

Refer to *Timeframes under the RTI Act* and *Managing noncompliant applications for more information*.

### **Additional documents not referred**

If additional documents are not referred back to the agency, they will be considered by the OIC during the review. The same informal resolution process that applies to other documents in issue may apply, so the OIC may seek:

- the agency's agreement to release some or all of the additional documents where, consistent with the objects of the Act, it would be appropriate to do so, and/or
- the applicant's agreement to remove additional documents from the external review where release would not be appropriate.

If access to the additional documents cannot be informally resolved, the OIC will issue a formal decision.

**For additional IPOLA assistance, please contact the IPOLA team by email [IPOLA.Project@oic.qld.gov.au](mailto:IPOLA.Project@oic.qld.gov.au)**

**For information and assistance on current legislation, please refer to the OIC's guidelines, or contact the Enquiries Service on 07 3234 7373 or by email [enquiries@oic.qld.gov.au](mailto:enquiries@oic.qld.gov.au)**

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