



Decision and Reasons for Decision

Citation:	<i>P82 and Department of Housing and Public Works [2024] QICmr 70 (3 December 2024)</i>
Application Number:	317573
Applicant:	P82
Respondent:	Department of Housing and Public Works
Decision Date:	3 December 2024
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE – request for a call centre audio recording - whether there are reasonable grounds to be satisfied the requested documents do not exist - sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld) and section 67(1) of the <i>Information Privacy Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of Housing, Planning and Public Works (**Department**)² under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to records held by the Department that related or mentioned the applicant between 11 May 2019 and 7 June 2019.
2. In response to the application, the Department conducted searches for relevant documents, however the searches did not to locate any documents that fell within the scope of the application. Accordingly, the Department decided³ to refuse access to the documents requested on the basis that they are nonexistent and/or unlocatable.⁴ The applicant then applied to the Office of the Information Commissioner (**OIC**) for review of the Department's decision.⁵ During the external review, the Department located and released one audio recording to the applicant.⁶ The applicant contended that a further call centre audio recording with specific date and time exists and should have been located.
3. For the reasons explained below, I affirm the Department's decision and find that access to the remaining document sought by the applicant may be refused on the ground it is nonexistent and/or unlocatable.⁷

¹ On 13 July 2023.

² Following a machinery of government change, the agency currently responsible for this matter is the Department of Housing and Public Works.

³ Decision dated 15 September 2023.

⁴ Under section 67(1) of the IP Act and sections 47(3)(e) and 52 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

⁵ Received on 25 September 2023.

⁶ On 26 September 2024.

⁷ Under section 52 of the RTI Act.

Background

4. Significant procedural steps in this external review are set out in the Appendix.
5. During the external review, the applicant raised numerous matters extraneous to the issue for determination in this external review under the IP Act. For example, a large proportion of the applicant's submissions⁸ focused on other proceedings before the Queensland Civil and Administrative Tribunal in which the applicant was involved and the applicant's submissions seeking amendment of a Work order document in that matter. In these reasons for decision, I have only considered submissions made by the applicant to the extent they raise issues *relevant* to the issue for determination in this review, as set out below.

Preliminary issues

6. Before considering the issue for determination, it is necessary to deal with certain preliminary matters arising from concerns expressed in the applicant's submissions.⁹ The applicant has made various allegations, particularly that OIC:
 - has misled the Queensland Civil and Administrative Tribunal (**QCAT**); and
 - has not been impartial when conducting this external review.
7. Having carefully considered all of the applicant's allegations, I am satisfied that this Office has discharged its obligations under the IP Act fairly and honestly. To support his allegations about misleading QCAT, the applicant attached to his submissions a previous OIC decision,¹⁰ however that decision was *not* subject to appeal proceedings before QCAT. While a different OIC decision¹¹ was subject to proceedings before QCAT, OIC filed no written submissions in that appeal, OIC representatives were excused from the hearing, and at no time either before or during that Directions Hearing did OIC make any declaration about the existence, or nonexistence, of any document. Therefore I find the applicant's allegation¹² that OIC, or its representative at the Directions Hearing, misled QCAT is entirely unfounded and without substance.
8. The applicant's submissions confirm his strong disagreement with OIC's views, however I do not accept that OIC's views are fraudulent as the applicant has alleged. In processing this external review, OIC has:
 - requested that further searches be conducted
 - assessed the issues on the basis of the information before OIC; and
 - communicated a view to the applicant explaining the reasoning and giving the applicant an opportunity to respond.
9. While the applicant may disagree with OIC's preliminary view, I do not accept that forming a view and communicating them to the applicant involves any element of dishonesty as the applicant alleged, and therefore I find this allegation also without substance.

⁸ Submissions dated 16 May 2024, 19 June 2024, 19 July 2024 and 26 August 2024.

⁹ Correspondence dated 19 June 2024, 21 June 2024 and 1 July 2024.

¹⁰ *Q96 and Department of Housing and Public Works* [2020] QICmr 44 (31 July 2020) (**Q96**).

¹¹ *B47 and Department of Housing, Local Government Planning and Public Works* [2024] QICmr 9 (22 February 2024), which was the subject of APL069-24.

¹² Dated 26 August 2024 and 2 September 2024

Reviewable decision

10. The decision under review is the Department's decision dated 15 September 2023.

Evidence considered

11. Evidence, submissions, legislation, and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix).
12. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹³ 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 RTI Act.¹⁴ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observation of Bell J on the interaction between equivalent pieces of Victorian legislation:¹⁵ '*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*'.¹⁶

Issues for determination

13. During the course of the external review, the applicant narrowed the scope of the application to '*the legal and binding time stamped call centre recording that was captured for this work order [xxxxxx86] whilst it was being raised by the operator on the morning of 11/05/2019 at 8.00:24 AM*'.¹⁷ OIC requested the Department to conduct further searches to locate the particular recording.¹⁸ However, these further searches failed to locate such recording and OIC conveyed this outcome to the applicant.¹⁹ In response, the applicant made submissions.²⁰ The material provided by the applicant did not provide evidence that such audio recording existed. On the contrary, the applicant's submissions seemed to claim that such recording did not exist, and the material provided by the applicant was consistent with this claim.
14. Given the applicant's assertion that such recording did not exist was consistent with the Department's initial decision to refuse access to records on the ground that they do not exist, OIC wrote to the applicant²¹ advising that in circumstances like this, the Information Commissioner may refuse to deal with the application for external review on the ground of lacking substance as it would appear there was no issue for determination in the review.
15. At this point,²² the applicant referred to Q96, an OIC decision regarding a previous external review in which he was the applicant.²³ The applicant submitted that, in Q96, OIC referred to what, in his view, was the audio recording identified in his narrowed

¹³ Section 21(2) of the HR Act.

¹⁴ *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]. I further note that OIC's approach to the HR Act set out in this paragraph was considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (where Judicial Member McGill saw '*no reason to differ*' from our position).

¹⁵ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁶ *XYZ* at [573].

¹⁷ Correspondence dated 16 May 2024. See also correspondence and 24 May 2024.

¹⁸ Correspondence dated 23 May 2024.

¹⁹ Correspondence dated 14 June 2024.

²⁰ Correspondence dated 19 July 2024.

²¹ Correspondence dated 20 August 2024.

²² Correspondence of 2 September 2024.

²³ See footnote 9 above.

scope, and stated that OIC had obtained a copy of this recording.²⁴ He confirmed he was seeking access to that recording.

16. The Department conducted further searches and located a copy of what it considered to be the audio recording referred to in Q96, and released this to the applicant.²⁵ However, the applicant maintained his contention that OIC's decision was referring to *another* call centre recording. He maintained this exists and is yet to be located.²⁶
17. Accordingly, the issue for determination in this review is whether the Department has undertaken all reasonable steps to locate the specific audio recording dated 11 May 2019 at around 8:00:24am raised by the applicant, and whether access to this recording may be refused on the grounds that it is nonexistent and/or unlocatable under sections 47(3)(e) and 52 of the RTI Act.

Relevant law

18. Under 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. However, this right is subject to limitations, including grounds for refusal of access.²⁷
19. 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. However, access may be refused where a document is nonexistent or unlocatable.²⁸
20. To be satisfied that a document does not exist, the Information Commissioner has previously recognised that an agency must rely on its particular knowledge and experience, having regard to various key factors including:²⁹
 - the administrative arrangements of government
 - the agency's structure
 - the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and other legal obligations that fall to it)
 - the agency's practices and procedures (including, but not limited to, its information management approaches); and
 - other factors reasonably inferred from information supplied by the applicant, including the nature and age of the requested documents, and the nature of the government activity to which the request relates.

²⁴ The OIC decision raised by the applicant was Q96, wherein the reference to the audio recording appears at [17].

²⁵ On 26 September 2024.

²⁶ Correspondence of 26 September 2024, 16 October 2024 and 31 October 2024.

²⁷ Section 67(1) of the IP Act sets out that an agency may refuse access to a document 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 to be the subject of an access application under the RTI Act.

²⁸ Under sections 47(3)(e) and 52 of the RTI Act. The functions of the OIC include reviewing whether agencies have taken reasonable steps to locate documents (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.

²⁹ *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) (**PDE**) at [37]- [38] (The decision in *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld), which was in substantially the same terms as section 52 of the RTI Act). Refer also to *Van Veendendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017) and *Y20 and Department of Education* [2021] QICmr 20 (11 May 2020) at [45].

21. By considering the above factors, an agency may ascertain that a particular document was not created because, for example, 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. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency. An agency may also rely on searches to satisfy itself that a document does not exist. In those cases, all reasonable steps must be taken to locate the documents.³⁰ Such steps may include inquiries and searches of all relevant locations identified after consideration of the key factors listed above.
22. 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.³¹ In determining whether a document is unlocatable, it is necessary to consider the specific circumstances of each case,³² and in particular, whether:
- there are reasonable grounds to be satisfied that the requested documents have been or should be in the agency's possession; and
 - the agency has taken all reasonable steps to find the document.³³
23. Where the issue of missing documents is raised on external review, the agency must demonstrate that reasonable steps have been taken to identify and locate relevant documents.³⁴ If the applicant maintains further documents exist, the applicant bears a practical onus of demonstrating that the agency has not discharged its obligation. Suspicion and mere assertion will not satisfy this onus.³⁵

Findings

24. The initial application sought access to:³⁶
1. *All personal details held at the DHPW BMCCH³⁷ BAS (My personal file?);*
 2. *Copy of all dispersed personal details from Queensland Fire and Emergency Services (QFES) and/or xxxx2U;*
 3. *Copy of email/audio files placed on the Housings email servers and/or at BMCCH and/or systems/accounts by QFES/HSG INTERF and/or xxxx2U containing personal details as previously illustrated.*

Timeframe: within the date range of 11 May 2019 to 7 June 2019

25. The Department has provided OIC with signed search certifications completed by the relevant officers involved in undertaking the Department's initial searches for documents responsive to the above scope, which I have carefully considered. These certifications detail the nature and extent of the search and enquiry process the Department undertook to locate the relevant documents. In summary, the Department made enquiries with the relevant staff and searched numerous mailboxes, property and management emails, electronic files, U and H Drives including archived emails, dashboards, the department's management system, SharePoint and registers. However, the searches did not to locate any documents that fell within the scope of the

³⁰ As set out in *PDE* at [49].

³¹ Section 52 of the RTI Act.

³² *Pryor* at [21]. See also, *F60XCX and Office of the Queensland Parliamentary Counsel* [2016] QICmr 42 (13 October 2016) at [84] and [87], and *Underwood and Minister for Housing and Public Works* [2015] QICmr 27 (29 September 2015) at [33]-[34] and [49].

³³ Section 52(1)(b) of the RTI Act.

³⁴ Section 130(2) of the RTI Act.

³⁵ *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36].

³⁶ Access application dated 13 July 2023.

³⁷ Department of Housing and Public Works (DHPW), Brisbane Metro Call Centre Housing (BMCCH).

application. Accordingly, the Department decided³⁸ to refuse access to the documents requested on the basis that they are nonexistent and/or unlocatable.³⁹

26. During the course of the external review, at the time of narrowing his scope to the one audio recording that is the subject of this decision, the applicant provided OIC with a copy of a database entry of work order xxxxxx86, which is recorded as being raised on 11 May 2019 at 8:00:24am. The applicant specifically requested the call centre audio recording of the call he considered would have occurred whilst the work order was being raised and prompting its creation, stating:⁴⁰

The request is now just for the legal and binding time stamped call centre recording that was captured for this work order xxxxxx86 whilst it was being raised by the operator on the morning of 11/05/2019 at 8.00:24 AM?

27. OIC requested that the Department⁴¹ conduct further searches to locate the particular recording. In response, the Department⁴² confirmed that the initial searches conducted as part of progressing the initial application would have located this record if it existed, given the terms of its searches. However, noting that the Public Works directorate became part of the Department in December 2023, additional searches were conducted with the Public Works directorate. The Department advised the following:

- *The QBuild Maintenance Response Centre (MRC) only take direct calls from Housing tenants within the Gold Coast and Maroochydore zones areas. All other Housing related calls, including the Redcliffe area, are via Smart Services Queensland (SSQ)*
- *The QBuild MRC business hours are 07:30 to 17:00, Monday to Friday. Out of hours phone calls are diverted to SSQ*
- *The phone call in relation to this request was outside of business hours (call made on Saturday 11 May 2019), and therefore via SSQ*
- *QBuild's MRC phone system does not have phone call recording capabilities.*

As a result of MoG changes on 18 December 2023, SSQ is now part of the Department of Transport and Main Roads (DTMR). Any further searches would need to be undertaken by SSQ DTMR, and not this Department.

28. Having considered the extent of the searches and inquiries conducted by the Department, including the explanation provided to account for the nonexistence of such recording, OIC conveyed a preliminary view⁴³ that the Department had taken all reasonable steps to locate the specific recording sought by the applicant and it had not been located. In response, the applicant referred to Q96 and asserted⁴⁴ that the audio recording referenced in paragraph 17 of this decision comprised the specific audio he was seeking to access.

29. Paragraph 17 of Q96 set out the notation proposed by the Department in relation to an amendment application made by the applicant regarding a sentence in work order xxxxxx86 as follows:⁴⁵

17. *DHPW proposes the sentence in question be amended by adding the following notation:*

The statement relating to the telephone call made by [the applicant] is inaccurate and misleading. [The applicant] contacted the After Hours Call Centre on 11 May 2019 to

³⁸ Decision dated 15 September 2023.

³⁹ Sections 47(3)(e) and 52 of the RTI Act.

⁴⁰ Correspondence dated 16 May 2024 and 24 May 2024.

⁴¹ Correspondence dated 23 May 2024.

⁴² Correspondence dated 14 June 2024.

⁴³ Correspondence dated 20 August 2024.

⁴⁴ Correspondence 26 September 2024.

⁴⁵ Footnote in Q96 omitted.

advise that the fire alarms and strobe lights were going off. [The applicant] did not report the fire panel sounding at the property. This information was verified after listening to an audio recording of [the applicant's] telephone call which was provided to the department by Queensland Shared Services (CRM 6658)

30. In an effort to informally resolve this matter, OIC requested that the Department conduct searches for the audio recording referenced in paragraph 17 of Q96. The Department located a recording and agreed to release it to the applicant.⁴⁶ The file name of the provided audio recording was *'20019A (315060) Attachment 1 – voice recording'* – a file name containing both the Department's and OIC's reference numbers for the application and external review addressed in Q96. This recording records a call occurring some hours prior to the raising of work order xxxxxx86, at around 5:15am on 11 May 2024.
31. During the review, the applicant had himself provided⁴⁷ another copy of this same recording with a different file name (*'19113R Voice recording 1'*) to OIC. I understand this was disclosed to him in response to another, earlier access application with the departmental reference of 19113R, which resulted in another external review, 314835.
32. On receipt of *'20019A (315060) Attachment 1 – voice recording'*, the applicant remained dissatisfied and maintained his position that paragraph 17 of Q96 provided evidence of the existence of a different call, recorded around 08:00:24am, and in the possession of not only the Department, but also OIC. After carefully considering the applicant's submissions, I find the applicant's understanding of paragraph 17 of Q96 misconceived in two ways:
 - Paragraph 17 does not state that OIC obtained a copy of a call mentioned in that paragraph and listened to it. Rather, paragraph 17 quotes the Department's proposed notation, in which the Department says that the Department listened to a call.
 - The applicant assumes that the call referred to in paragraph 17 must have occurred at or around 08:00:24am whilst work order xxxxxx86 was being raised.
33. Having assessed all the information available, the only evidence which might support the existence of a call around 08:00:24 is the database entry regarding work order xxxxxx86, as provided by the applicant with his submission, which shows that this work order was raised on 11 May 2019 at 8:00:24am. In acknowledgment of the fact that the raising of a work order at the time a call is taken is a reasonably plausible scenario, OIC considered that there was a reasonable basis upon which it could require the Department to conduct additional searches. Accordingly, OIC requested the Department to conduct such further searches as referred in paragraph 277 above. I am satisfied that the resulting searches undertaken by the Department would have located a copy of a call recording at or around 8:00:24am, if it existed and was held by the Department.
34. On the other hand, in terms of circumstances pointing to the call which resulted in work order xxxxxx86 being the call made at around 5:15am and recorded in *'20019A (315060) Attachment 1 – voice recording'*, I consider that the Department is well placed to know which call it referenced in its own proposed notation, as quoted in paragraph 17 of Q96. I also note that the recording's file name, which contains both the Department's and OIC's reference numbers for the application and external review

⁴⁶ Released on 26 September 2024.

⁴⁷ On 24 September 2023, 29 September 2023, 6 December 2023, 19 June 2024, 21 June 2024, 1 July 2024, 19 July 2024 and 26 September 2024.

addressed in Q96, is consistent with it being the recording referred to in the Department's proposed notation.

35. Further, I note that the notation proposed by the Department in paragraph 17 (of Q96) does not specify that the call which prompted the creation of work order xxxxxx86 occurred at 08:00:24am, or any particular time. Similarly, work order xxxxxx86 itself, while referring to a call, does not indicate any particular time at which the call occurred. In this regard, I note the possibility that call centre staff may create notes, work orders etc in between calls, as well as during them, and this may account for the period of a few hours between the call at about 5:15am and the raising of work order xxxxxx86 at 08:00:24am. I also note that this alternative explanation for nonexistence, where the relevant call was made at an earlier time but not entered into the database until some hours later, possibly following undocumented steps, could reasonably explain the change in approach perceived by the applicant, or circumstances where the call taker has undertaken research, sought oral input from a supervisor, or undertook discussions with colleagues.
36. Finally, having listened carefully to '20019A (315060) Attachment 1 – voice recording', I note that there is consistency between the demeanour of the applicant and his reference to fire alarms and strobe lights 'going off currently' in this recording, and the notation proposed by the Department in paragraph 17 of Q96.
37. I acknowledge the applicant has raised concerns regarding the conduct of departmental officers. However, it is not my role to make any findings in this decision in relation to those concerns. The issue for determination in this matter is whether the Department has taken all reasonable steps to locate a *'call centre recording that was captured for this work order [xxxxxx86] whilst it was being raised by the operator on the morning of 11/05/2019 at 8.00:24 AM'* and may therefore conclude that it does not exist or is not held by the Department.
38. On the material before me, I consider that the Department has conducted targeted searches of the relevant location where it was reasonable to expect such a recording would be found. Further, in my view, the Department has provided a reasonable explanation as to why such a recording does not exist, or in any event, is not held by the Department.

DECISION

39. For the reasons set out above, I affirm the decision under review and find that:
 - the Department has taken all reasonable steps in searching for an audio recording dated 11 May 2019 at or around 8:00:24am; and
 - access to this document may be refused pursuant to section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act on the ground that it does not exist or is unlocatable.
40. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Katherine Zaidiza
A/Principal Review Officer

Date: 3 December 2024

Appendix

Significant procedural steps

Date	Event
25 September 2023	<p>OIC received the external review application (lodged on 24 September 2023).</p> <p>OIC requested relevant procedural documents from the Department.</p> <p>The Department advised that the applicant had submitted an internal and external review simultaneously, however the Department advised the applicant that it was unable to process the request for an internal review and the external review proceeded.</p>
26 September 2023	OIC received the procedural documents from the Department.
29 September 2023	OIC received correspondence from the applicant.
5 October 2023	OIC notified the Department that it had accepted the application for external review and requested the Department search records.
19 October 2023	OIC received search records from the Department.
5 December 2023	OIC notified the applicant that it had accepted the application for external review.
6 December 2023	OIC received a submission from the applicant.
13 February 2024	OIC requested additional information regarding the searches conducted by the Department. The Department sought numerous extensions of time to provide the additional information sought by OIC.
16 May 2024	OIC received correspondence from the applicant narrowing the scope of the documents sought in external review.
23 May 2024	<p>OIC received further correspondence from the applicant.</p> <p>OIC requested the Department to conduct further searches to locate the further documents sought by the applicant.</p>
24 May 2024	OIC received correspondence from the applicant in relation to the narrowed scope.
14 June 2024	OIC received a response from the Department in relation to the further searches conducted by it.
19 June 2024	OIC conveyed a preliminary view to the applicant.
19 June 2024	OIC received correspondence from the applicant with allegations regarding OIC representatives.
21 June 2024	OIC received correspondence from the applicant.
1 July 2024	OIC received correspondence from the applicant.
17 July 2024	OIC wrote to the applicant addressing the allegations raised by the applicant.
19 July 2024	OIC received submissions from the applicant.

Date	Event
20 August 2024	OIC conveyed a preliminary view to the applicant on the ground that, at that stage, the external review was lacking substance.
26 August 2024	OIC received submissions from the applicant.
2 September 2024	OIC sent correspondence to the applicant seeking clarification regarding his submissions. OIC received correspondence from the applicant.
5 September 2024	OIC requested that the Department undertake further searches for a recording referenced in a previous external review conducted by OIC.
25 September 2024	OIC received advice from the Department that further searches had been conducted and that these had located one recording. The Department confirmed that it agreed to the recording being released in full to the applicant.
26 September 2024	The Department provided a copy of the recording to the applicant. OIC received further submissions from the applicant.
16 October 2024	OIC reaffirmed its preliminary view and addressed the applicant's submissions. OIC received further correspondence from the applicant.
31 October 2024	OIC received final submissions from the applicant.