



Decision and Reasons for Decision

Citation: *F60XCX and Department of Natural Resources and Mines*
[2015] QICmr 17 (27 July 2015)

Application Number: 312123

Applicant: F60XCX

Respondent: Department of Natural Resources and Mines

Decision Date: 27 July 2015

Catchwords: ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - EXEMPT INFORMATION - CABINET INFORMATION - information relating to drafting of legislation - documents comprised exclusively of exempt information - information that would reveal or prejudice Cabinet considerations - whether exempt - sections 47(3)(a) and 48 and schedule 3, section 2(1) of the *Right to Information Act 2009* (Qld) and 67(1) of the *Information Privacy Act 2009* (Qld)

ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - information relating to drafting of legislation - section 9A of the *Legislative Standards Act 1992* (Qld) - whether exempt - waiver - sections 47(3)(a) and 48 and schedule 3, section 7 of the *Right to Information Act 2009* (Qld) and 67(1) of the *Information Privacy Act 2009* (Qld)

ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - information relating to feedback about applicant's work performance - applicant contends further documents exist - agency record keeping practices - extensive searches - whether the agency has taken all reasonable steps to locate the documents but the documents cannot be found or do not exist - sections 47(3)(e) and 52 of the *Right to Information Act 2009* (Qld) and 67(1) of the *Information Privacy Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Natural Resources and Mines (**Department**) under the *Information Privacy Act 2009 (Qld)* (**IP Act**) for information which generally relates to work carried out by the applicant.
2. The Department located 174 pages and decided to refuse access to 161 pages under section 67 of the IP Act and section 47(3)(a) of the *Right to Information Act 2009 (Qld)* (**RTI Act**), on the basis that the information comprises exempt information under section 48 of the RTI Act.¹
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision to refuse access to the 161 pages (**Information in Issue**). The applicant also contended that the Department had not conducted all reasonable searches to locate documents responsive to the access application.
4. For the reasons set out below, I find that access to:
 - the Information in Issue is refused on the basis that it is exempt information,² namely information that would prejudice the confidentiality of Cabinet considerations³ or information subject to legal professional privilege;⁴ and
 - further documents that the applicant considers should have been located by the Department is refused on the basis that such documents are nonexistent or unlocatable.⁵

Background

5. The applicant is seeking access to information about interactions involving particular officers of the Department (**Officer X** and **Officer Y**) that occurred while the applicant was engaged to perform work in relation to the drafting of legislation, and any feedback, comments and/or complaints made by Officers X and Y about the applicant.
6. Significant procedural steps relating to the external review are set out in the appendix to these reasons.

Reviewable decision

7. The decision under review is the Department's decision dated 18 July 2014.

Evidence considered

8. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).

¹ The Department also refused access to parts of three pages under section 67 of the IP Act and section 47(3)(b) of the RTI Act, on the basis that disclosure would, on balance, be contrary to the public interest under section 49 of the RTI Act. The applicant did not apply for external review of this part of the Department's decision.

² Section 67 of the IP Act and sections 47(3)(a) and 48 of the RTI Act.

³ Schedule 3, section 2(1) of the RTI Act.

⁴ Schedule 3, section 7 of the RTI Act.

⁵ Section 67 of the IP Act and sections 47(3)(e) and 52(1)(a) and (b) of the RTI Act.

Issues for determination

9. The issues requiring determination in this review are:
- whether the Information in Issue is exempt information; and
 - whether the Department has conducted all reasonable searches to locate documents responsive to the access application.
10. I will address these issues in Part 1 and Part 2 of this decision respectively.

Part 1 Exempt information

11. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent the documents contain the individual's personal information. However, this right is subject to limitations, including grounds for refusal of access.⁶ One such ground is that the information comprises exempt information.⁷
12. Relevantly for this review, two types of exempt information are:
- A. information brought into existence for the consideration of Cabinet, or information the disclosure of which would reveal any consideration of Cabinet or would otherwise prejudice the confidentiality of Cabinet considerations or operations (**Cabinet information**);⁸ and
 - B. information that would be privileged from production in a legal proceeding on the ground of legal professional privilege (**LPP information**).⁹
13. I will now consider whether the Information in Issue is comprised of these types of exempt information.

A. Cabinet information

Information in Issue considered

14. In this decision, I have considered whether six pages of the Information in Issue – namely, a two page email¹⁰ (**Email**) and a four page document¹¹ (**Document**) attached to the Email – comprise Cabinet information.¹²

Relevant law

15. Certain types of Cabinet documents, including Cabinet submissions and briefing notes, are taken to be comprised exclusively of exempt information without any further consideration of their contents.¹³
16. Other information will also be exempt from disclosure if disclosure of it would reveal any consideration of Cabinet, or would otherwise prejudice the confidentiality of Cabinet considerations or operations.¹⁴ The term “consideration” is defined as

⁶ Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent it 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.

⁷ Sections 47(3)(a) and 48 of the RTI Act.

⁸ Schedule 3, sections 2(1)(a) and (b) of the RTI Act.

⁹ Schedule 3, section 7 of the RTI Act.

¹⁰ Pages 156 to 157.

¹¹ Pages 158 to 161.

¹² The applicant's name appears in both documents.

¹³ Schedule 3, section 2(3) of the RTI Act.

¹⁴ Schedule 3, section 2(1)(b) of the RTI Act.

including discussion, deliberation, noting (with or without discussion), making a decision, and consideration for any purpose (including for information and to make a decision).¹⁵

17. However, there are three exceptions to this exemption:

- if it is more than ten years after the information's relevant date¹⁶
- if the information was brought into existence before 1 July 2009;¹⁷ and
- if the information has been officially published by decision of Cabinet.¹⁸

Submissions

18. The Department's decision states¹⁹ that the Email and Document:

... consist of a draft cabinet submission and internal email communications relating to the drafting of new legislation and have been prepared specifically for the purpose of briefing Cabinet ...

... these documents were prepared for the purposes of Cabinet, and refer to matters subsequently submitted to Cabinet. By releasing the information held in these documents, Cabinet confidentiality would be prejudiced and the considerations or operations of Cabinet would no longer remain confidential.

19. During the external review, the Department conveyed advice from its Cabinet Legislation Liaison Office²⁰ that the Document is a briefing note prepared by the Office of the Queensland Parliamentary Counsel (**OQPC**) and provided to the former Department of Environment and Heritage Protection (**DERM**)²¹ for DERM's inclusion in a submission to Cabinet.
20. Other than seeking external review of the Department's decision to refuse access, the applicant has made no specific submissions in relation to this ground of refusal.

Findings

21. I am satisfied that none of the exceptions to the exemption apply, as both the Email and Document were created in May 2011, and there is no evidence before me to indicate that Cabinet has made any decision authorising their publication.²²
22. Given the nature of the Document and the Email, it is necessary to consider the application of schedule 3, section 2(1)(b) of the RTI Act. The relevant question is whether disclosure of the information in the two documents would reveal a consideration of Cabinet, or otherwise prejudice Cabinet confidentiality or operations. It must be shown that an individual viewing the documents would have revealed to them a consideration of Cabinet, or that disclosure would otherwise prejudice Cabinet confidentiality.

¹⁵ Schedule 3, section 2(5) of the RTI Act.

¹⁶ Schedule 3, section 2(1) of the RTI Act. For information considered by Cabinet, the "relevant date" is the date the information was most recently considered by Cabinet; otherwise, "relevant date" is the date the information was created – see definition of "relevant date" in schedule 3, section 2(5) of the RTI Act.

¹⁷ The date on which schedule 3, section 2 commenced – schedule 3, section 2(2)(a) of the RTI Act.

¹⁸ Schedule 3, section 2(2)(b) of the RTI Act.

¹⁹ At page 7.

²⁰ On 23 July 2015.

²¹ Machinery of government changes transferred responsibility for relevant documents from DERM to the Department.

²² Schedule 3, section 2(1) and (2) of the RTI Act.

23. I have carefully considered the Document. I note that it has the heading 'Cabinet Submission — Briefing Note'. Given OQPC's provision of the Document to DERM, and the name of the attachment to the Email by which it was provided,²³ I am satisfied that the Document is a final version, rather than a draft.²⁴ In light of the nature of the information in the Document and the Department's submissions (including the advice of its CLLO), and taking note of what was included (or not) in material that was subsequently put before Parliament,²⁵ I am satisfied that disclosure of the Document could reasonably be expected to reveal Cabinet's noting of particular information, and the focus of its discussions, deliberations and decision making processes.
24. I have carefully considered the Email as well. I am satisfied that the Email refers to the Document and, in doing so, conveys information about the Document.²⁶ In these circumstances, I am satisfied that the Email could also reasonably be expected to reveal Cabinet's considerations of the type noted above.
25. Accordingly, I am satisfied that the Document and the Email both contain information that, if disclosed to an individual, would indirectly reveal considerations of Cabinet to that individual. Further, I am satisfied that if either of these documents were disclosed, the recipient's awareness of their contents would reduce the confidentiality of Cabinet considerations regarding information in the Document. On these grounds, I am satisfied that disclosure of both the Document and the Email would prejudice the confidentiality of Cabinet considerations, and that they are therefore exempt information under schedule 3, section 2(1)(b) of the RTI Act.²⁷
26. In conclusion, I find that access to the Document and the Email may be refused under section 47(3)(a) of the RTI Act. Given this finding, the two documents are excluded from further consideration in this decision.

B. LPP information

Information in Issue considered

27. I will now turn to a consideration of the remaining Information in Issue (**Information Remaining in Issue**), comprised of 155 full pages,²⁸ which relate to communications between OQPC and DERM about the drafting of a particular Bill being prepared for introduction to and consideration by Parliament (**Bill**).²⁹

Relevant law

28. The OQPC is established by the *Legislative Standards Act 1992 (Qld)* (**LS Act**). The LS Act sets out the functions of OQPC.³⁰ These include the drafting of Government bills³¹ and the provision of certain types of advice to Ministers and government

²³ Which includes the word 'final'.

²⁴ Section 121(3) of the IP Act prevents me from including any more information about the Document in this decision.

²⁵ Section 121(3) of the IP Act prevents me from identifying relevant aspects of this material in this decision.

²⁶ Section 121(3) of the IP Act prevents me from including any more information about the Email in this decision.

²⁷ Schedule 3, section 2(1)(b) of the RTI Act can apply to information created before the relevant Cabinet consideration (as well as information created contemporaneously with or after the relevant Cabinet consideration). The question is whether, if a person viewed the information, a Cabinet consideration would be revealed to them, or the confidentiality of the Cabinet consideration would be prejudiced. See *Quandamooka Yoolooburrabee Aboriginal Corporation and Department of Natural Resources and Mines; Sibelco Australia Ltd (Third Party)* [2014] QICmr [47] (19 November 2014) at [58]-[59].

²⁸ Pages 1 to 155.

²⁹ The applicant's name appears in each communication. Section 121(3) of the IP Act prevents me from including any further information about the communications in this decision.

³⁰ See section 7 of the LS Act.

³¹ Section 7(a) of the LS Act.

entities³² when doing so.³³ Section 9A of the LS Act provides that confidential communications between OQPC and its clients³⁴ are subject to LPP,³⁵ if they are made for the purpose of or incidental to particular functions – including drafting Government bills and providing advice when doing so.³⁶

29. The RTI Act provides that information will be exempt from disclosure if it would be privileged from production in a legal proceeding on the ground of LPP.³⁷ This exemption reflects the requirements for establishing LPP at common law.³⁸ Therefore the exemption requires an examination of how the common law principles of LPP apply. Section 9A of the LS Act is, in my view, a reflection of the common law principles of LPP, and thus I must turn my mind to the application of the common law principles of LPP in any event.
30. At common law, LPP attaches to confidential communications between a client and their lawyer, made for the dominant purpose of giving or obtaining legal advice or the provision of legal services.³⁹

Submissions

31. The Department's decision states:⁴⁰

[a]ny email exchanges regarding the drafting of the ... Bill between OQPC and the former DERM constitute confidential communications between a client and the OQPC as outlined in section 9A of the [LS Act]. The documents which contain information regarding the drafting of legislation are not considered routine or mundane and are sensitive enough to warrant the protection of confidentiality.

32. The applicant's submissions focus on whether an exception to LPP applies in the circumstances of this matter. In summary, the applicant submits⁴¹ that:
- the Information Remaining in Issue should not attract the exemption in schedule 3, section 7 of the RTI Act, as it cannot be used in legal proceedings and is only of historical consequence
 - the applicant was involved in most of the communications in question
 - the Department cannot validly object to release of the Information Remaining in Issue, as the applicant only requires it for a limited purpose, which is to

³² The definition of "Government entity" in schedule 1 of the LS Act refers to the definition in section 24 of the *Public Service Act 2008* (Qld). This includes – at section 24(1)(a) – a department.

³³ Section 7(g) of the LS Act.

³⁴ Which section 7(a), (b), (g) and (i) of the LS Act indicate are Ministers, other members of parliament and government entities. This is supported by the examples provided at section 9A(2) of the LS Act.

³⁵ Section 9A(2) of the LS Act.

³⁶ Section 9A(1) of the LS Act, which refers to the functions set out in section 7(a) to (i) of the LS Act.

³⁷ Schedule 3, section 7 of the RTI Act.

³⁸ As noted in the Explanatory Notes to the *Right to Information Bill 2009* (Qld), schedule 3, section 7 of the RTI Act re-enacts section 43(1) of the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**). While the Explanatory Notes to section 43(1) of the *Freedom of Information Bill 1991* (Qld) simply restate the provision that became section 43(1) of the FOI Act, the Electoral and Administrative Review Commission's *Report on Freedom of Information*, December 1990 stated, at [7.152], in relation to its proposed exemption that was subsequently adopted in section 43(1) of the FOI Act that '[t]he exemption incorporates the common law concept of legal professional privilege'. Further, the Queensland Parliament's then Legal, Constitutional and Administrative Review Committee in *Freedom of Information in Queensland*, Report No. 32, December 2001 noted, at [11.12] that '[b]ecause this exemption relies on the common law regarding legal professional privilege, changes in the common law will change the scope of this exemption. The Committee does not believe that there should be any statutory interference with the common law'. OIC has previously observed that the exemption turns on the application of common law principles – see *Queensland Law Society Inc. and Legal Ombudsman; Hewitt (Third Party)* (1998) 4 QAR 328 (**Hewitt**) at [11] regarding section 43(1) of the FOI Act; and *Ozcare and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 May 2011) at [12] regarding schedule 3, section 7 of the RTI Act.

³⁹ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [9].

⁴⁰ At page 9.

⁴¹ In his external review application and a submission dated 19 April 2015.

demonstrate that the work conducted on the Bill was satisfactory, there were no concerns raised about the applicant's interactions with Officer X, and Officer X's feedback about the applicant's performance had no proper basis; and

- disclosure to the applicant would not constitute full waiver as it is only required for the limited and specific purpose of pursuing a complaint against Officer X, and the applicant is prepared to give an undertaking to only use the information for this purpose.

Findings

Does the Information Remaining in Issue attract LPP?

33. I have carefully considered the nature and purpose of the communications contained in the Information in Issue, and the context in which they occurred. I am satisfied that:
- OQPC provides legal advice and legal drafting services when drafting Government bills
 - DERM engaged OQPC to advise on and draft the Bill
 - the Information in Issue is comprised of confidential communications
 - the communications:
 - are between OQPC as legal advisor and DERM as client; and
 - were for the dominant purpose of seeking and/or providing instructions and advice regarding the drafting of the Bill.
34. I note the applicant's submission that the LPP exemption should not apply to the Information Remaining in Issue, as it cannot be used in legal proceedings and is only of historical consequence. However, I note that the reference to 'a legal proceeding' in schedule 3, section 7 of the RTI Act is a reference to a hypothetical legal proceeding rather than a specific legal proceeding.⁴² Given this position, I am satisfied that the improbability of potential legal proceedings raised by the applicant does not prevent LPP from applying to the Information Remaining in Issue.
35. I also note the applicant's submission regarding the applicant's involvement in most of the communications in question. I take this to mean that the applicant believes that the communications are not confidential, or that they are confidential generally but as against the applicant. However, I do not consider the applicant's argument that the applicant was a party to or otherwise involved in communications that are captured by the Information Remaining in Issue alters the privilege.
36. In the circumstances of this matter, the applicant is seeking access to the Information Remaining in Issue in the applicant's private capacity. I am satisfied that the fact that the applicant gained some knowledge of the communications contained in the Information Remaining in Issue during the performance of the applicant's work duties relating to the Bill does not abrogate the confidentiality of those communications. The duty of confidentiality is owed by the legal advisor to the client – in this case, by OQPC to the Department. Therefore, LPP belongs to the Department and only the Department can waive LPP.⁴³ As set out below in my consideration of exceptions to LPP, I am satisfied that the Department has not waived LPP. Accordingly, although the applicant was privy to some information in the Information Remaining in Issue due to his work duties, I am satisfied the communications in the Information Remaining in Issue were confidential at the time that they were made, and remain confidential.

⁴² As discussed in *Hewitt* at [30]-[31], cited in *Ozcare* at [12].

⁴³ *Mann v Carnell* (1999) 201 CLR 1 (**Mann**) at [28].

37. Given the above, I find that each of the requirements of LPP at common law is satisfied and therefore the Information Remaining in Issue attracts LPP.⁴⁴

Does an exception to LPP apply?

38. There are two exceptions to LPP.

Waiver

39. The first exception is where a client waives LPP in relation to a privileged communication. In that circumstance, the communication is no longer subject to LPP, and consequently, is no longer exempt from disclosure.⁴⁵ LPP will be waived where there is conduct on the part of the client (in this case, the Department) which is inconsistent with the maintenance of LPP over a communication.^{46, 47}
40. In this case, I find no evidence of such conduct on the part of the Department.
41. There is no evidence before me to suggest that the Department has consented to waiver of LPP. On the contrary, during the course of the external review, the applicant wrote to the Department, seeking the Department's consent to waive LPP. By responding that the applicant should pursue the applicant's review rights through this external review, the Department declined to consent to waiver of LPP.⁴⁸
42. Further, I am satisfied that the Department has not engaged in conduct inconsistent with the maintenance of LPP. In this regard, I have carefully considered the applicant's submission regarding the applicant's involvement in most of the communications in question. Although the applicant's involvement with the Bill has ceased, I am satisfied that the applicant continues to owe a duty to maintain confidentiality in relation to matters that the applicant gained knowledge of during the performance of the applicant's work duties relating to the Bill. The fact that the applicant possesses this knowledge, and gained it during the course of performing work for the Department does not amount to waiver of LPP on the part of the Department.
43. The applicant submits that the Department cannot validly object to release of the Information Remaining in Issue when the applicant only requires it for a limited purpose.⁴⁹ I disagree that the applicant's intended use for information can have any impact on whether or not LPP applies to the Information Remaining in Issue. Neither the common law regarding LPP nor the requirements of the IP and RTI Acts oblige the Department to disclose information subject to LPP to the applicant because the applicant wants to utilise that information for a limited purpose.
44. Further to this point, the applicant submits that disclosure of the Information Remaining in Issue to the applicant would not amount to general waiver of LPP, as it would be for a specific, limited purpose. As the agency has not disclosed the Information Remaining in Issue to the applicant and there is no obligation on the agency to do so, it is unnecessary for me to address this submission.

⁴⁴ This conclusion is, I note, consistent with the LS Act's provision regarding LPP.

⁴⁵ *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 (**Osland**) at 287.

⁴⁶ *Mann* at [28], *Osland* at [45].

⁴⁷ Consistent with the common law principle of waiver, section 9A(3) of the LS Act provides that communications may be disclosed with the client's consent.

⁴⁸ As advised by the Department during a conversation on 8 April 2015 and the applicant's submission dated 19 April 2015.

⁴⁹ That is, to demonstrate that the work conducted on the Bill was satisfactory, there were no concerns raised about the applicant's interactions with Officer X, and Officer X's feedback about the applicant's performance had no proper basis.

Improper purpose

45. The second exception to LPP is where a communication is made in furtherance of an improper purpose, a crime, or fraud. In such circumstances, LPP cannot be maintained in respect of the communication.⁵⁰ The applicant submits that if the applicant were given access to the Information Remaining in Issue, the applicant would be able to show that Officer X engaged in criminal conduct by breaching section 92A of the *Criminal Code Act 1899 (Qld)*.⁵¹ There is no material before me which would suggest the Information Remaining in Issue, or any part thereof, was created in furtherance of an improper purpose, a crime, or fraud. Accordingly, I am satisfied that this exception to waiver does not arise in the circumstances of this matter.
46. On the basis of the above, I find that none of the exceptions to LPP apply to the Information Remaining in Issue in the circumstances of this matter.

Conclusion

47. In conclusion, I am satisfied that the Information Remaining in Issue is exempt information, as LPP applies to it.⁵² Accordingly, I find that access to the Information Remaining in Issue is refused on the ground that it comprises exempt information under section 47(3)(a) of the RTI Act.

Part 2 Sufficiency of search

Relevant law

48. An agency may refuse access to documents which:
- do not exist;⁵³ or
 - have been (or should be) in an agency's possession, but cannot be located.⁵⁴
49. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.⁵⁵ 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.⁵⁶
50. To be satisfied that a document does not exist, an agency must rely on its particular knowledge and experience, having regard to various 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 limited to information management); and

⁵⁰ *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

⁵¹ Section 92A of the *Criminal Code Act 1899 (Qld)* relates to misconduct by a public officer.

⁵² Section 48 and schedule 3, section 7 of the RTI Act.

⁵³ Section 52(1)(a) of the RTI Act.

⁵⁴ Section 52(1)(b) of the RTI Act.

⁵⁵ Section 52(1)(a) of the RTI Act.

⁵⁶ Section 52(1)(b) of the RTI Act.

- 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.⁵⁷
51. By considering the factors above, an agency may ascertain that a particular document was not created because, for example, its processes do not involve creating the specific document. In such instances, it is not necessary for the agency to search for the document. It is sufficient that the relevant circumstances to account for the nonexistent document are explained.
52. In assessing whether documents are nonexistent, an agency may also conduct searches. Where searches are conducted, an agency must demonstrate that it has taken all reasonable steps to locate responsive documents, prior to deciding that the documents are nonexistent.⁵⁸ In determining whether all reasonable steps have been taken, regard should be had to the factors listed above.⁵⁹
53. In assessing whether a document exists, but is unlocatable, it is necessary to consider 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
 - the agency has taken all reasonable steps to find the document.⁶⁰
54. In answering these questions, regard should be had to the circumstances of the case and the factors set out at paragraph 50 above.⁶¹

Submissions

Applicant's submissions

55. In his application for external review, the applicant submits that the Department did not locate all documents relevant to the access application. More specifically, the applicant submits that the following documents should have been located:
- 1) email from Officer Y to the applicant dated 1 April 2011 which reveals that there were internal conflicts between the Department's relevant policy unit and legislation unit
 - 2) any file notes, email exchanges or other internal communications within the Department about the issues giving rise to internal conflicts between the Department's relevant policy unit and legislation unit
 - 3) Officer Y's file note of a telephone discussion with the applicant on 16 August 2011 to discuss Officer X's feedback
 - 4) Officer Y's file note of a follow-up telephone discussion with the applicant on 18 August 2011
 - 5) file notes created by Officer Y of any discussions with Officer X about Officer X's feedback which occurred after the applicant's phone conversations with Officer Y on 16 August 2011 and 18 August 2011
 - 6) email exchanges or other internal communications between Officers Y and X about Officer X's feedback; and

⁵⁷ *PDE and The University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (**PDE**) at [37].

⁵⁸ As set out in *PDE* at [44]. See also section 130(2) of the RTI Act.

⁵⁹ *PDE* at [49].

⁶⁰ Section 52(1)(b) of the RTI Act.

⁶¹ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [21].

- 7) emails involving Officer X and the applicant while the applicant was working on the Bill.
56. However, the applicant submits that OIC should assess the sufficiency of the Department's searches with reference to the scope of the access application, rather than just types of documents specified by the applicant at items 1) to 7) above.⁶²
57. The applicant further submits that:⁶³
- OIC should have directed the Department to locate the documents sought rather than asking the Department to conduct further searches; and
 - the Department should be directed to conduct full and proper searches to locate documents responding to item 1) and 3) to 6), and this direction should extend to all electronic databases and document management systems of the Department.
58. The applicant also submits that, given the applicant's purpose for seeking access to the documents,⁶⁴ individuals other than Officers X and Y should have conducted the searches, as it is not in Officers X or Y's interest to locate the documents sought. In this regard, the applicant expresses concern that the two officers are withholding documents to avoid scrutiny of their actions. In the alternative, the applicant expresses concern that records of the Department have been destroyed in breach of the *Public Records Act 2002* (Qld) (**PR Act**).⁶⁵

Department's submissions

59. The Department advised OIC that, during the processing of the access application, it made enquiries with Officers X and Y. As a result, the Department's records in relevant business units were searched and 174 pages relevant to the access application were located.⁶⁶
60. During the course of the external review, OIC asked⁶⁷ the Department to:
- provide a submission identifying the types of records searched (e.g. email accounts, network drives) and how those records were searched (e.g. by using the applicant's name as a keyword)
 - undertake further enquiries with Officers X and Y to determine if the documents at items 1) and 3) to 6) exist
 - if the Department considered that further documents exist, undertake any necessary searches and enquiries and provide a submission addressing the nature and extent of that process
 - have any relevant officers undertaking the searches sign and complete a search certification to be provided to OIC; and
 - if the Department considered that further documents do not exist or cannot be located, provide a submission setting out the Department's reasons for forming that view.

⁶² Submission dated 19 April 2015.

⁶³ Submission dated 19 April 2015.

⁶⁴ To obtain evidence to support the applicant's complaint to the Department about Officer X.

⁶⁵ Statements to this effect are contained within the applicant's submissions dated 28 July 2014, 28 September 2014 and 19 April 2015.

⁶⁶ Department's decision dated 18 July 2014 at pages 1 and 2.

⁶⁷ By letter dated 30 September 2014.

61. In response, the Department provided⁶⁸ OIC with search certifications and records of searches completed by Officers X and Y and made submissions that:

- a physical file about the Bill was not created
- only electronic records about the Bill exist; and
- these electronic records have been searched – however:
 - the Department has been unable to locate the email of Officer Y at item 1) or emails between Officers X and Y at item 6); and
 - the Department has been unable to locate file notes (either handwritten or electronic) of Officer Y as listed at items 3), 4) and 5).

62. The records of searches conducted by Officers X and Y reveal that:

- Officer X searched all records relating to the Bill, which were kept electronically, including emails and relevant drives on departmental servers. The search terms employed by Officer X were the names of eight individuals involved in the drafting of the Bill and related policy considerations. Officer X confirmed that no hard copy file for the Bill was created. Officer X did not locate an electronic copy of the email from Officer Y at item 1), and noted that Officer Y was also undertaking searches for this email. Officer X confirmed that no emails at item 6) would exist, as Officer X did not exchange emails with Officer Y about Officer X's feedback regarding the applicant – rather, they had a discussion.
- Officer Y searched Officer Y's personal email archive, Departmental Enterprise Vault and the electronic file directory used by the relevant work policy unit. The search terms used by Officer Y were the applicant's first and surname. Officer Y also made enquiries with Officer X (who, following work on the Bill, became Director of the relevant business unit) to confirm that the business unit did not have a hard copy file regarding the Bill. Officer Y did not locate any documents at items 1) and 3) to 6), and concluded that, as electronic searches had not located the file notes and there was no hard copy that could be searched, no file notes exist.

63. On consideration of Officer X and Y's searches, OIC made further enquiries with the Department to clarify why no hard copy file for the Bill existed and, if it had at some point, the details of its disposal. In response, the Department submits:

As previously advised ..., a physical file for the ... Bill was never created and therefore does not exist.

I have made further enquiries with [Officer X] who managed the ... Bill amendments in 2011. [Officer X] has confirmed that: all records relating to the Bill were kept electronically, all records were supplied as part of the original Right to Information request, and further searches were undertaken as requested by [OIC], with no additional documents being located.

I note that the Public Records Act 2002 does not specify that records must be in a particular form, rather that records must be retained and made accessible. The business unit determined to retain documents relating to the ... Bill in an electronic format, which is not contrary to the requirements of the Public Records Act 2002.

⁶⁸ Email to OIC dated 22 October 2014 enclosing the search certifications and records of searches completed.

Findings

64. The applicant's submissions raise the following issues:
- firstly, whether the documents set out at 1) to 7) above are within scope of the access application; and
 - then, if so, whether those documents and other documents responsive to the access application are nonexistent or unlocatable.
65. The applicant's submissions also contend that OIC should have directed the Department to locate the documents sought rather than asking the Department to conduct further searches; and should consider the scope of the access application, rather than just types of documents specified by the applicant, when assessing the sufficiency of the Department's searches. Further, the applicant's submissions raise issues regarding alleged withholding of documents or, in the alternative, destruction of records other than in accordance with PR Act requirements.
66. I shall address each issue separately.

Are the documents at items 1) to 7) within scope of the access application?

67. In relation to the documents at item 7), I note that the Department has located and refused access to these types of documents on the basis that they attract LPP. These documents are dealt with at Part 1.B. above, and are therefore not considered further here.
68. In relation to the documents at item 2), the applicant is seeking access to documents about issues giving rise to internal conflicts between two specified business units within the Department.
69. As set out at paragraph 11 above, under the IP Act, an individual has a right to be given access to documents of an agency to the extent the documents contain the individual's personal information. Personal information is defined 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'*.⁶⁹
70. During the course of the review, the applicant was informed of OIC's preliminary view that, should documents at item 2) exist, they would not fall within the scope of an access application made under the IP Act.⁷⁰ The applicant responded⁷¹ by submitting that the documents at item 2) *'relate to [the applicant], [the applicant's] work in drafting the Bill and [the applicant's] interactions with [Officer X]'* and will demonstrate that *[Officer X] was criticised by the Department's [business unit] and maliciously deflected that criticism on to me'*.
71. I have carefully considered the applicant's submissions and find that, while they reiterate the scope of the access application, they do not identify or explain any connection between the documents at item 2) and that scope. I am satisfied that, if the documents at item 2) exist, they do not appear to relate to the applicant, the applicant's work in relation to the Bill or to the applicant's interactions with Officers X and Y. Rather, they appear to relate to internal conflicts between two business units within the

⁶⁹ Schedule 6 of the RTI Act and section 12 of the IP Act.

⁷⁰ Conveyed to the applicant by letter dated 24 March 2015.

⁷¹ Submission dated 19 April 2015.

Department. On the information currently before me, there is no indication that the applicant was at any stage an employee of either of these units. Further, I am unable to identify any evidence which supports a finding that, if the documents at item 2) exist, they could reasonably be expected to contain mention of the applicant, either in the form of malicious deflection of criticism as suggested by the applicant or otherwise.

72. In these circumstances, I find that, if the documents at item 2) exist, they would not contain the applicant's personal information, and therefore cannot fall within the scope of the applicant's access application under the IP Act. Accordingly, I do not have jurisdiction to consider such documents further.
73. In relation to the remaining documents at items 1) and 3) to 6), I am satisfied that each of these types of documents would, if they exist, fall within the scope of the access application.
74. Accordingly, I will now consider whether the documents at items 1) and 3) to 6) are nonexistent or unlocatable.

Are the documents sought, including those at items 1) and 3) to 6), nonexistent or unlocatable?

75. As the Department conducted searches to locate relevant documents, I must consider whether all reasonable steps have been taken to locate them.
76. On the information before me, including search certifications and records of search of Officers X and Y, I am satisfied that officers of the Department conducted searches of all electronic records relating to the Bill, and relevant electronic databases, records management systems, and personal email archives. I also accept the Department's submissions, made on several occasions, that a hard copy file for the Bill was never created and therefore does not exist.
77. I have carefully considered the searches conducted by the Department,⁷² and the explanations in its submissions to OIC about there being no hard copy file for the Bill, in light of the factors listed in *PDE* as set out above. Taking into account the information provided by the applicant and having regard to the Department's structure and relevant business units' record keeping practices, I am satisfied that the Department has ensured that relevant staff have undertaken comprehensive, appropriately targeted searches of possible locations for documents responsive to the access application. In these circumstances, I consider it reasonable to conclude that the Department has taken all reasonable steps to locate the documents responsive to the access application, including the documents at items 1) and 3) to 6).
78. I must also consider whether there are reasonable grounds to be satisfied that document have been or should be in the agency's possession, in order to determine whether they are non-existent or unlocatable. On the information before me:
 - In relation to the email at item 1), I note the specificity and detail of the applicant's description and accept that he recalls receiving this email. In these circumstances, I am satisfied that there are reasonable grounds to be satisfied that this email exists, but, in light of the searches detailed previously, cannot be located. I find that the email is unlocatable.

⁷² Both prior to the Department's decision and on external review.

- In terms of Officer Y's file notes at items 3), 4) and 5), I note the applicant's view that Officer Y would have taken file notes of two telephone conversations between Officer Y and the applicant, and discussions between Officer Y and Officer X in relation to those telephone conversations. I also note Officer Y's view that the file notes do not exist, as electronic searches did not locate them and there is no hard copy file to search. In these circumstances, there is insufficient information for me to reach a finding regarding whether or not there are reasonable grounds to be satisfied that the file notes at items 3), 4) or 5) have been, or should be, in the agency's possession. In any event, given that I am satisfied that the Department has taken all reasonable steps to locate these file notes, I conclude that they either do not exist, or cannot be located.
- I accept that a conversation between Officers X and Y, rather than an exchange of emails as listed at item 6), took place. I consider that this provides a reasonable explanation as to why such emails have not been located. Accordingly, I find that the emails at item 6) do not exist.

Other issues

79. The applicant submits that OIC should have directed the Department to locate the documents sought, rather than asking the Department to conduct further searches for them. This submission is predicated on the assumption that the further documents exist, which appears clear in relation to one document only.⁷³ In any event, the process followed by OIC was in accordance with the RTI Act. That is, OIC asked that the Department conduct further searches as part of OIC's attempts to resolve issues informally.⁷⁴ The Department cooperated with OIC's requests – therefore rendering it unnecessary for OIC to resort to requiring the agency to conduct further searches.⁷⁵
80. The applicant also submits that OIC should have directed the Department to conduct full and proper searches of all electronic databases and document management systems of the Department for the documents at items 1) and 3) to 6). However, as set out above, on consideration of the *PDE* factors, including the Department's structure and record keeping practices, I am satisfied that the Department searched all locations where the documents could possibly be found. I am satisfied that requiring a search of all of the Department's electronic databases and document management systems would unreasonably consume departmental resources without any real prospect of success.
81. Further, the applicant submits that OIC should assess the sufficiency of the Department's searches with reference to the scope of his access application, not just the specific types of documents raised by him at 1) to 7) above.⁷⁶ This submission comprises a general assertion by the applicant that the Department has failed to discharge its obligation under the RTI Act to locate all documents responsive to the access application. The applicant had opportunity to provide further detail – for example, the further documents he considers should have been located, their authors, the date they were created, and their recipients (if relevant) – but did not do so. I acknowledge that it is incumbent on the Department to demonstrate that it has conducted all reasonable searches, and in this sense the onus falls to the Department. However, in the absence of further details from the applicant, the information currently before me indicates – as set out at paragraph 77 above - that the Department has conducted all reasonable searches for the documents. I am unable to identify any

⁷³ That is, the email listed at 1).

⁷⁴ Under section 94(1) of the RTI Act.

⁷⁵ Under section 102 of the RTI Act.

⁷⁶ Submission dated 19 April 2015.

further documents falling within the scope of the application that should have been located by the Department.

82. In relation to the applicant's concern that Officers X and Y may have withheld documents and other departmental staff should have been asked to conduct the searches, I confirm that there is nothing in the material before me to suggest that any officers of the Department are deliberately attempting to withhold relevant documents from this external review process. As noted above, Officers X and Y completed search certifications as part of the external review process and were made aware that it is an offence under section 186 of the IP Act to provide false or misleading information to the Information Commissioner or staff of the OIC.⁷⁷
83. In relation to the applicant's concern that records of the Department have been destroyed in breach of the PR Act,⁷⁸ I note the applicant's concern. However, the Department's submissions about having an electronic file only raise no concerns about the destruction of public records. In any event, failure to accord with an agency's retention and disposal schedule (if this could be established) is not a matter that OIC has jurisdiction to address under the IP Act.⁷⁹ OIC's external review function is confined to conducting merits review of "reviewable decisions",⁸⁰ and investigating whether agencies have taken all reasonable steps to locate documents.⁸¹

Conclusion

84. I have carefully considered the information before me, including the information about the further documents sought by the applicant⁸² and the Department's search records and related submissions.
85. On careful consideration of all information before me, I find that the Department has taken all reasonable steps to locate the further documents sought by the applicant, but the documents either cannot be located or do not exist. Therefore, I am satisfied that the Department is entitled to refuse access to the further documents sought by the applicant⁸³ on the ground that they are nonexistent and/or unlocatable.⁸⁴

DECISION

86. I affirm the Department's decision by finding that access to the Information in Issue can be refused under section 67(1) of the IP Act in accordance with sections 47(3)(a) and 48 of the RTI Act.
87. I also find that access to the further documents that the applicant considers should have been located by the Department can be refused under section 67(1) of the IP Act in accordance with sections 47(3)(e) and 52(1)(a) and (b) of the RTI Act.

⁷⁷ The maximum penalty for this offence is 100 penalty units.

⁷⁸ Statements to this effect are contained within the applicant's submissions dated 28 July 2014, 28 September 2014 and 19 April 2015.

⁷⁹ OIC may, in a small number of instances, prosecute misconduct – however, only in relation to certain offences (that is, the offences in chapter 6, part 2 of the IP Act).

⁸⁰ See definition in schedule 5 of IP Act.

⁸¹ Section 137(2) of the IP Act.

⁸² To the Department in the applicant's access application, and to OIC in the applicant's external review application and correspondence during the external review.

⁸³ Under section 47(3)(e) of the RTI Act.

⁸⁴ Section 52(1)(a) and (b) of the RTI Act.

88. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Assistant Information Commissioner Corby

Date: 27 July 2015

APPENDIX
Significant procedural steps

Date	Event
28 April 2014	The Department received the access application under the IP Act.
18 July 2014	The Department issued a decision to the applicant.
28 July 2014	OIC received the applicant's external review application.
28 July 2014	OIC asked the Department to provide a number of procedural documents.
30 July 2014	OIC received the requested documents from the Department.
5 August 2014	OIC notified the applicant and the Department that it had accepted the external review application and requested the Department provide OIC with a copy of the documents in issue.
25 August 2014	OIC received a copy of the documents in issue from the Department.
26 September 2014	The applicant contacted OIC and provided a submission supporting the applicant's case.
28 September 2014	The applicant provided a submission supporting the applicant's case.
30 September 2014	OIC wrote to the applicant setting out the issues for consideration in the external review and provided an update on the progress of OIC's assessment of those issues.
30 September 2014	OIC asked the Department to provide OIC with information and a submission about its searches.
15 October 2014	The applicant contacted OIC and provided a submission supporting the applicant's case.
22 October 2014	OIC received the Department's response to OIC's request for information and a submission about the Department's searches.
24 March 2015	OIC conveyed its preliminary view to the applicant and invited the applicant to provide a submission supporting the applicant's case the applicant did not accept the preliminary view.
6 April 2015	The applicant notified OIC that the applicant did not accept OIC's preliminary view and sought an extension of time to provide a submission supporting the applicant's case.
7 April 2015	OIC granted the applicant the requested extension of time.
8 April 2015	The Department advised OIC that the applicant had written to the Department and requested that the Department waive LPP over 155 pages of the Information in Issue.
19 April 2015	The applicant provided a submission supporting the applicant's case and raised a procedural issue.
29 April 2015	The applicant contacted OIC about the procedural issue.
30 April 2015	OIC addressed the procedural issue with the applicant in writing.
26 May 2015	OIC asked the Department to provide a further submission about the Department's searches.
11 June 2015	The Department sought an extension of time to make a submission. OIC granted the Department the requested extension of time.
18 June 2015	The Department provided a further submission.

6 July 2015	OIC asked the Department to provide further information regarding its submission about the Department's searches. The Department provided the further information.
15 July 2015	OIC asked the Department to provide further information about the content of relevant Cabinet submissions.
16 July 2015	The Department provided further information about the content of relevant Cabinet submissions.
23 July 2015	The Department confirmed the further information provided by it about Cabinet submissions by email.