Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	***Duhs and Queensland Police Service* [2019] QICmr 26 (18 July 2019)**
Application Number:	**313993**
Applicant:	**Duhs**
Respondent:	**Queensland Police Service**
Decision Date:	**18 July 2019**
Catchwords:	**ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL TO DEAL WITH ACCESS APPLICATION - EFFECT ON AGENCY'S FUNCTIONS - whether work involved in dealing with application would, if carried out, substantially and unreasonably divert resources of agency from their use by the agency in performing its functions - sections 41 and 42 of the *Right to Information Act 2009* (Qld)**

REASONS FOR DECISION

Summary

1. The applicant applied to Queensland Police Service (**QPS**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents concerning QPS' investigation into the 1952 death of Ms Betty Shanks.

2. QPS decided to refuse to deal with the application under section 40 of the RTI Act, on the grounds it appeared to QPS that all requested documents were comprised of exempt information.

3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QPS' decision. During the external review, QPS withdrew its reliance on section 40 of the RTI Act. QPS instead submitted that it may refuse to deal with the application under section 41(1)(a) of the RTI Act, on the basis the work involved in dealing with the application would, if carried out, substantially and unreasonably divert the resources of QPS from their use by QPS in performance of its functions.

4. For reasons explained below, I accept the alternative ground for refusing to deal relied on by QPS. I therefore vary QPS' decision, and find that QPS may refuse to deal with the applicant's access application under section 41(1)(a) of the RTI Act.

Background

5. The applicant's access application dated 14 May 2018 – the '**Original Application**' – requested:

> *The police investigation file (or each police investigation file, if more than one) regarding the death in Brisbane in 1952 of Betty Shanks. Each report and/or memo recommending the prosecution of any person or persons for or in connection with the death of Betty Shanks.*
>
> *Each report and/or memo recommending against the prosecution of any person or persons for or in connection with the death of Betty Shanks.*

Each report and/or memo concerning the possibility of the prosecution of any person or persons for or in connection with the death of Betty Shanks.

Each report and/or memo concerning the circumstances and/or cause of the death of Betty Shanks.

Each submission (of the Queensland Police Service or anyone else) to any coroner's investigation and/or to any coronial inquest and/or to any commission of inquiry concerning the death of Betty Shanks.

Each report or memo concerning any coroner's investigation and/or any coronial inquest and/or any commission of inquiry concerning the death of Betty Shanks.

All other documents concerning the death of Betty Shanks.

6. QPS, as noted, decided to refuse to deal with the Original Application under section 40 of the RTI Act. Section 40 permits an agency to refuse to deal with an application where the application is, in short, expressed to relate to all documents, or all documents of a stated class that relate to a stated subject matter, and it appears all documents are comprised of exempt information.[1]

7. I wrote to QPS early in the review,[2] expressing the preliminary view that I did not consider that it was open for QPS to refuse to deal with the application under section 40 of the RTI Act.

8. QPS accepted this preliminary view.[3] In the alternative, however, QPS argued that it may refuse to deal with the Original Application on the ground set out in section 41(1)(a) of the RTI Act – that dealing with the application would entail approximately 4,201 total hours of work, and therefore substantially and unreasonably divert QPS resources.

9. By letter dated 25 October 2018, I advised the applicant of my preliminary view that dealing with the Original Application would substantially and unreasonably divert QPS' resources from their use in performance of its functions, and that QPS may therefore refuse to deal with the Application under section 41(1)(a) of the RTI Act.

10. The exercise of the power in section 41(1)(a) of the RTI Act is governed by section 42 of the RTI Act, which sets out prerequisites that must be satisfied before a decision to refuse to deal under section 41(1)(a) can be made. The two provisions are set out in full in Appendix B to these reasons, and are discussed in further detail below.

11. For present purposes, it is sufficient to note that, in recognition of the fact that the ground for refusing to deal with an application under section 41(1)(a) of the RTI Act can only be relied on if an applicant has first been given an opportunity to narrow the scope of the application so as to re-frame it into a form that can be processed by an agency,[4] my 25 October 2018 letter invited the applicant to advise me if he wished to narrow the scope of the Original Application.

12. The applicant did not accept my 25 October 2018 preliminary view. In submissions dated 15 November 2018, the applicant:

    - questioned OIC's capacity to consider the application of section 41 of the RTI Act on external review, where the provision had not been relied on by an agency; and, in any event,

[1] 'Exempt information' being information to which an agency such as QPS may refuse access: sections 47(3)(a) and 48, and schedule 3, of the RTI Act.
[2] Letter dated 24 July 2018.
[3] Letter dated 31 August 2018.
[4] Section 42(2) of the RTI Act.

- queried the work estimates relied on by QPS (noted in paragraph 8 above), and disputed any view that processing the Original Application would substantially and unreasonably divert QPS resources.

13. The applicant's 15 November 2018 submissions also listed various documents, provision of which by QPS would cause him to withdraw his application ('**Re-Stated Request**').

14. By letter to the applicant dated 30 November 2018,[5] I explained my view that it was within my power to consider section 41 of the RTI Act on external review. This view is also set out in these reason for decision, at paragraphs 36-41.

15. I also, relevantly, confirmed that the Re-Stated Request was ***not*** a narrowed application offered by the applicant for QPS' consideration (of the kind envisaged by section 42(2) of the RTI Act), but a bare request that he be given access to nominated documents.[6] After noting that the Re-Stated Request pre-empted key elements of the RTI processing process,[7] I advised the applicant that I was proceeding on the basis he confirmed the scope of the Original Application.

16. Further exchanges of correspondence then occurred, by which, relevantly, the applicant continued to agitate procedural issues initially raised in his 15 November 2018 submissions,[8] and I reiterated my preliminary view that I had the power to make a decision refusing to deal with the Original Application under section 41(1)(a) of the RTI Act, was satisfied that grounds existed to do so, and, in the absence of any final submissions on the point, intended to proceed to such a decision.[9]

17. On 12 March 2019, the applicant made further submissions, by way of two separate letters. One of these indicated that he maintained his position as outlined in paragraph 12.

18. The other,[10] however, set out the terms of a narrowed application (**Narrowed Application**), as follows:

> *(a) all reports of Detective Inspector Peter Barron prepared in 1999 about his interview of, or discussion with,* …[Individual A] *in or about April 1999 at* …[a location]*, including in respect of any items taken away by Detective Barron such as (1)* …[Individual A's] *drawing of brown brogues…* [Individual A] *believes …* [Individual B] *…wore on Friday 19 September 1952, (2) a sample of hair that* …[Individual A] *cut from…* [Individual B's] *head when …* [Individual B] *was dying in 1997 for the purposes of obtaining …* [Individual B's] *DNA, and (3) a letter the police sent to …* [Individual A] *in 1991 after …* [Individual A] *informed the police (for the second time) that …* [Individual A] *believed …* [Individual B] *…had killed Betty Shanks (**Ms Shanks**);*
>
> *(b) all reports prepared on or after 1 January 2000 by Ron Grice (alone or with others) and/or Barry Blair (alone or with others) and/or Dennis Burns (alone or with others) concerning their analysis of the clothing of Ms Shanks. Results of the testing of the clothing of Ms Shanks by the scientists mentioned above may have been forwarded, at some point since 1 January 2000, to the Queensland Police Service by Leo Freney who was head of the Molecular Biology section at the John Tonge Centre at the time; and*

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[5] On the same day (ie, 30 November 2018), I wrote to QPS, inviting its reply to the applicant's 15 November 2018 submissions.
[6] Which position the applicant had conveyed via his 15 November 2018 submissions, and his representative's 20 November 2018 advice to OIC.
[7] Particularly the assessment and levying of charges, which Parliament has provided must be paid, where applicable (section 60 of the RTI Act) and can only be waived in limited circumstances: sections 63-67 of the RTI Act.
[8] See letters dated 4 December 2018 and 19 February 2019.
[9] My letters dated 5 and 26 February 2019.
[10] Expressed to be 'without prejudice' and referring to matters of costs and the decision in *Calderbank* v *Calderbank* [1975] 3 All ER 333; as I advised the applicant by letter dated 17 April 2019, OIC is not the applicant's opponent in adversarial legal proceedings, but an independent body charged with conducting an impartial merits review of agency decisions under RTI Act. Discharging this function requires us to impartially assess, and ultimately, determine questions of law and fact: an exercise which, as in any court or tribunal process, may result in OIC as adjudicator reaching conclusions diverging from those preferred by a given participant, such as the applicant. I also note that, when required to finalise a review by way of decision, I am obliged to give reasons for my decision, these reasons to set out findings on material questions of fact and evidence or other material on which those findings are based: section 110(3) of the RTI Act, and section 27B of the *Acts Interpretation Act 1954* (Qld) – such material, in the present context, including submissions relied on by the applicant through the review.

> *(c) any document created or amended on or after 1 April 1999 referring to …*[Individual B]… *in connection with Ms Shanks and/or Ms Shanks' death, including analysis of the hair sample referred to … above.*

19. In an effort to promote settlement of this review, and to ensure that the applicant had the benefit of the consultation and narrowing process envisaged by section 42 of the RTI Act, I referred this Narrowed Application to QPS for consideration as to whether it could process same.[11]

20. By letter dated 10 April 2019, QPS advised that, as with the Original Application, it considered processing the Narrowed Application would substantially and unreasonably divert agency resources, setting out submissions in support of its position.

21. By letter dated 17 April 2019, I forwarded to the applicant a copy of QPS' 10 April 2019 submissions, and advised the applicant of my preliminary view that, as with the Original Application, QPS was entitled to refuse to deal with the Narrowed Application under section 41(1)(a) of the RTI Act.[12]

22. The applicant made final submissions in support of his case, by way of correspondence dated 8 May 2019.

23. Significant procedural steps taken during the external review are otherwise as set out in the Appendix to this decision.

Reviewable decision

24. The decision under review is QPS' decision dated 28 May 2018, refusing to deal with the applicant's RTI access application, under section 40 of the RTI Act.

Evidence considered

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

Relevant law

26. Parliament intends that an agency receiving an access application will deal with that application unless dealing with the application would, on balance, be contrary to the public interest.[13] The circumstances in which dealing with an access application would, on balance, be contrary to the public interest are set out in sections 40, 41 and 43 of the RTI Act.

27. As canvassed above, section 41(1)(a) of the RTI Act permits an agency to refuse to deal with an access application if the agency considers the work involved in dealing with the application would, if carried out, substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions.

28. I have set out section 41 in full in Appendix B to these reasons; for present purposes it is sufficient to note that sections 41(2) and (3) of the RTI Act state the considerations an agency must have regard to in determining whether dealing with an application would substantially and unreasonably divert the agency's resources from its functions, and those which must be disregarded. Relevantly, an agency:

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[11] Letter dated 14 March 2019.

[12] If an agency assesses a narrowed application as requiring work that would involve a substantial and unreasonable diversion of resources, the agency may proceed directly to a decision to this effect: section 42(3) of the RTI Act. In such a situation, however, an affected applicant would have rights of review. That is obviously not the case on external review – I therefore gave the applicant the benefit of this further preliminary view as to the status of the Narrowed Application.

[13] Section 39 of the RTI Act.

(a) must not have regard to any reasons the applicant gives for applying for access, or the agency's belief about the applicant's reasons for applying for access,[14]

(b) must have regard to the resources that would be used for:

- identifying, locating or collating the documents
- making copies, or edited copies of any documents
- deciding whether to give, refuse or defer access to any documents, including resources that would have to be used in examining any documents or conducting third party consultations; or
- notifying any final decision on the application.[15]

29. Before making a decision to refuse to deal with an application under section 41(1)(a), an agency must fulfil procedural steps stated in section 42(1)[16] of the RTI Act, that is:

(a) give the applicant written notice:

- stating an intention to refuse to deal with the application
- advising that for the prescribed consultation period,17 the applicant may consult with the agency with a view to making an application in a form that would remove the ground for refusal; and
- stating the effect of subsections section 42(2) to (6) of the RTI Act.

(b) give the applicant a reasonable opportunity to consult; and

(c) as far as reasonably practicable, give the applicant any information that would help the making of an application in a form that would remove the ground for refusal.

Issues for determination

30. As discussed in above, the decision under review was a decision to refuse to deal with the application under section 40 of the RTI Act. Having withdrawn reliance on section 40, QPS instead relied on the ground stated in section 41(1)(a) of the RTI Act.

31. The applicant does not, as canvassed above, consider that it is open to an agency in QPS' position to advance an alternative ground for refusing to deal with an access application on external review, and does not accept that OIC can consider the application of section 41 of the RTI Act on external review in these circumstances. The applicant thus contests OIC's capacity to make a decision that an agency may refuse to deal with an application under section 41(1)(a) of the RTI Act, when the agency has not itself relied on this provision.

32. In a related vein, the applicant stresses the procedural requirements stated in section 42 of the RTI Act, which must be discharged prior to a decision refusing to deal under section 41(1)(a). The applicant does not accept that the above have been met, and that consequently and irrespective of any other considerations, it is not open to me to make a decision under section 41 of the RTI Act.[18]

33. Finally, regardless of the foregoing, the applicant rejects the proposition that dealing with either the Original Application, or the Narrowed Application, would substantially and unreasonably divert QPS resources.

34. In view of the above, the issues to be determined are whether:

[14] Section 41(3) of the RTI Act. I have not had any regard to any such matters in reaching my decision in this review.
[15] Section 41(2) of the RTI Act. This list is not exhaustive.
[16] Also set out in full in Appendix B.
[17] Under section 42(6) of the RTI Act, the '*prescribed consultation period*' for a written notice under section 42(1)(a) is 10 business days after the date of the notice, or the longer period agreed by the agency and the applicant.
[18] The applicant submitting that any such decision would be '*infected with jurisdictional error*': 4 December 2018 submissions.

- QPS may refuse to deal with either variation of the access application – i.e. the Original Application, or the Narrowed Application – under section 41(1)(a) of the RTI Act, despite not having relied on section 41 in the decision under review
- the requirements in section 42 of the RTI Act have been met; and
- dealing with either application would substantially and unreasonably divert QPS resources.

35. I have addressed these matters below, beginning with the Information Commissioner's power to consider the application of section 41 where it is only relied on by an agency for the first time on external review.

Power to consider section 41 on external review and section 42 requirements

36. Section 105(1) of the RTI Act gives the Information Commissioner power to decide any matter in relation to an access application that could, under the RTI Act, have been decided by an agency.

37. I am satisfied both that an agency in QPS' position may advance an alternative ground for refusing to deal with an access application on external review,[19] and that, consistently with a number of prior OIC decisions,[20] section 105(1) gives the Information Commissioner the power to consider the application of section 41 on external review.

38. I am also of the view that in such circumstances, the procedural prerequisites stated in section 42 of the RTI Act – intended to afford an applicant the opportunity to consult with a view to redrawing a potentially substantial and unreasonable application into a manageable form – can be met through the external review process itself.[21]

39. I am further satisfied that the above requirements have been met through the course of this external review. My letter to the applicant dated 25 October 2018 signalled the possibility that the applicant's application as originally framed may substantially and unreasonably divert QPS resources,[22] and offered him the opportunity to narrow that application.[23] It further explained that QPS was unable to supply much by way of information that may assist the applicant to narrow the Original Application.[24]

40. Additionally, following receipt of the applicant's 15 November 2018 submissions replying to my 25 October 2018 letter, I engaged in further preliminary consultative correspondence with the applicant – namely, my 30 November 2018 and 5 February 2019 letters – in which I took care to address not only relevant procedural matters, but the manner in which I was approaching the Re-Stated Request, and the substantive question as to whether dealing

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[19] In the same way as an agency may, on external review, advance alternative grounds for refusing access to documents, agencies not being bound to adhere to positions adopted in decisions under review: *Caloundra City News and Caloundra City Council* (Unreported, Queensland Information Commissioner, 8 February 2007), at [74], citing *'NKS' and Queensland Corrective Services Commission* (1995) 2 QAR 662.

[20] *Middleton and Department of Health* (Unreported, Queensland Right to Information Commissioner, 20 June 2011); *F60XCX and Department of the Premier and Cabinet* [2016] QICmr 41 (13 October 2016) (***F60XCX***); *ROM212 and Queensland Fire and Emergency Services* [2016] QICmr 35 (9 September 2016) – the latter two decisions concerning identical provisions in *Information Privacy Act 2009* (Qld).

[21] *F60XCX*, at [66]-[69].

[22] Satisfying the requirement in section 42(1)(a)(i) of the RTI Act, that an applicant first be given notice of any intended refusal to deal.

[23] Section 42(1)(b) of the RTI Act, ultimately allowing him to 15 November 2018 to do so, a period exceeding the 'prescribed consultation period' defined in section 42(6) of the RTI Act (OIC email dated 7 November 2018).

[24] See paragraph (c) above, paraphrasing section 42(1)(c) of the RTI Act. It is important to note that the obligation on an agency to give an applicant information as imposed by this subsection does not confer an '*entitlement*' (paraphrasing the applicant's 19 February 2019 submissions), but merely sets a requirement to assist as far as is reasonably practicable. What will be 'reasonably practicable' will vary from case to case, and will depend on all relevant circumstances. In exceptional cases, it may not be reasonably practicable for an agency to offer much if anything by way of 'helping' information, due to factors such as the complexity of the subject matter of a particular application, and/or limitations in agency knowledge of that subject matter. I am satisfied that this is a case of that kind. Additionally, a particular applicant's knowledge of or familiarity with documents the subject of a given request is also in my view relevant for the purposes of assessing what is 'reasonably practicable' in a specific case: as I noted in my letter to the applicant dated 30 November 2018, his detailed Re-Stated Request for documents set out in his 15 November 2018 letter indicated he was sufficiently informed so as to identify documents of interest that might be the subject of a narrowed application.

with the applicant's access application would substantially and unreasonably divert QPS resources.

41. In these circumstances, I consider that the substance and spirit of the prerequisites in section 42 of the RTI Act have been met through the review process, and that I am empowered to make a decision that QPS is entitled to refuse to deal with that application under section 41(1)(a).

Would dealing with either of the Original or Narrowed Applications substantially and unreasonably divert QPS resources?

42. Yes, for the reasons that follow.

Work involved in processing the Applications

43. QPS estimated that undertaking this work in relation to the Original Application would take 4,201 hours, and at least two years (or, on my reckoning, 3,625 hours) [25] as regards the Narrowed Application.

44. It was not particularly clear from QPS' submissions concerning the Original Application as to the basis on which much of its initial 4,201-hour estimate was founded. These initial submissions were both vigorously contested by the Applicant,[26] and the subject of considered analysis by me in reply.[27]

45. I do not, however, think that it is necessary to detail and re-state the argument and counter-argument surrounding QPS' initial estimate. This is because in its later submissions dated 10 April 2019, made in reply to the Narrowed Application, QPS effectively disclosed the heart or crux of its position in relation to ***both*** the Original and Narrowed Applications: basically, its apprehension that disclosure of *any* documents requested in *either* variation of the Application could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law – ie, the death of Ms Shanks – which is a ground for refusing access to information.[28]

46. QPS is not, however, in a position to properly evaluate and decide this issue, without first organising documents relevant to that investigation, in order that it might not only locate and retrieve documents requested by the applicant, but:

- obtain an overview of the investigation as it currently stands, particularly as regards forensic matters; and then
- assess whether disclosure of specific documents such as those requested could reasonably be expected to prejudice that investigation.

47. QPS estimated that undertaking that work would take, as noted, at least[29] two years, involving:

- approximately six months' dedicated administrative work to digitise documents, so as to render them usable by commissioned investigators for the purposes of assessing any potential investigatory prejudice

[25] Based on 500 7 hour, 15 minute working days.
[26] Submissions dated 15 November 2018, putting a 'counter-estimate' of 133 days to process the Original Application.
[27] Letter dated 5 February 2019, in which I noted that even if I were to accept the applicant's 133 day position in entirety, this would still require some 25.6 staffing weeks – or in excess of 900 hours of work which, for reasons explained in that letter, I was satisfied would amount to a substantial and unreasonable diversion of QPS resources. I also proffered a hypothetical scenario even more favourable to the applicant, of 336 hours - and explained my conclusion that this lower figure would still substantially and unreasonably divert QPS resources.
[28] Schedule 3, section 10(1)(a) of the RTI Act. QPS confirmed that this reflected its position in advice to OIC dated 15 April 2019.
[29] Noting that, despite the applicant's 15 November 2018 submissions to the contrary, processing an application for documents of the kind requested in either the Original or Narrowed application is also likely to entail, for example, third party consultation, which is work required to be taken into account under section 41(2)(b)(ii) of the RTI Act. (In any event, the estimates stated in this paragraph do not, as I understand, incorporate third party consultation, such that even in the unlikely event no such consultation would be required, this would not reduce these estimates.)

- six months' work by relevant officers to identify and review forensic documentation related to this investigation
- approximately 12 additional months for two Detectives (a Detective Sergeant and Detective Senior Constable) to review the investigation material and provide advice to the Right to Information and Privacy Unit, so that a considered decision could be made on the documents sought; and
- additional unspecified time managing 'chain of command' issues.

48. QPS' submissions went on to detail that:

> *…processing this request would significantly impact the core functions of the* [Homicide Cold Case Investigation] *team and direction would need to be sought from the Detective Inspector of the Homicide Investigation Unit as to which active homicide investigations would need to be suspended to allow the reallocation of resources to this task. And further, that potentially solvable investigations would go unattended to which would also impact surviving homicide victims who are a significant focus of the HCCIT.*

49. QPS submissions dated 10 April 2019 indicate that it has put some effort into formulating this estimate, and I consider it reflects a serious and sincere attempt at quantifying necessary work: work which, as canvassed above, would appear to be necessary in dealing with *either* the broader Original Application, or the Narrowed Application. I am prepared to accept QPS' 10 April 2019 estimate (which, to be clear, is the estimate I have relied on in assessing the resourcing impact of both the Original Applicant and Narrowed Application.)

50. Relevant work also comprises work to be done in deciding whether to give or refuse access to documents, within the meaning of section 41(2)(b) of the RTI Act, and therefore work that must be taken into account in the application of section 41(1).

51. The question then is whether the work outlined in paragraph 47 would 'substantially' and 'unreasonably' divert QPS resources from their use by QPS in performance of its functions.

Substantially and unreasonably

52. Assessing whether the work involved in processing a given application would, if carried out, substantially and unreasonably divert resources is a question of fact to be assessed in each individual case, taking into account a given agency's operations and resources.[30]

53. Neither of the terms 'substantially' or 'unreasonably' are defined in the RTI Act. They are therefore to be accorded their natural meanings.

Substantially

54. As for the first requirement, I am satisfied that requiring QPS to commit at least two years' work to processing either the Original or Narrowed Application would comprise a substantial – or 'considerable'[31] – diversion of QPS resources.

55. In this regard, I note the recent observations of Senior Member Puplick of the Administrative Appeals Tribunal, in considering the equivalent Commonwealth test:[32]

> *[82] …the number of hours involved is not, on its own, sufficient to establish that a practical refusal reason* [i.e. that a given application would substantially and unreasonably divert agency resources] *has been established.*

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[30] *Davies and Department of Prime Minister and Cabinet* [2013] AICmr 10 (22 February 2013) (***Davies***) at [23] and [28].
[31] '*Substantial*' is defined as meaning '*of…considerable amount, quantity, size, etc.:* a substantial sum of money' (Macquarie Dictionary Online, (accessed 17 July 2019)).
[32] *VMQD and Commissioner of Taxation (Freedom of information)* [2018] AATA 4619 (17 December 2018) (***VMQD***). The Commonwealth *Freedom of Information Act 1982* permits an agency to refuse to deal with an application where a 'practical refusal reason' exists. A 'practical refusal reason' exists where the work involved in processing the request would 'substantially and unreasonably divert the agency's resources from its other operations': section 24AA(1)(a) of that Act.

…

> *[101] … Nevertheless for any agency,* ***a burden in excess of 200 hours would almost certainly make the threshold of a rational and objective test****. …burdens as (relatively) small as 74 hours have been so characterised*.' (Emphasis added.)

56. I agree. I am satisfied that processing either the Original or Narrowed application would substantially divert QPS resources from their use by QPS in performance of its functions, such as those identified by QPS in the submissions quoted in paragraph 48.[33]

Unreasonably

57. Various factors have been identified as potentially relevant in assessing whether a given RTI access application would unreasonably divert agency resources.[34] These are not mandatory considerations – but matters that have been noted by tribunals as being of potential assistance in assessing the question of reasonableness.

58. For present purposes, beyond noting that assessing the issue of unreasonableness requires a weighing of all relevant considerations,[35] including having due – but not conclusive – regard to the size of the respondent agency and the resources usually available for dealing with information access applications,[36] I do not think it necessary to descend into a detailed assessment of such factors.[37]

59. This is because I am satisfied that requiring an agency – including one of QPS' size, resourcing and capacity[38] – to divert resources for either 4,201 or 3,625 hours would impose an 'exorbitant' and 'excessive'[39] impost on QPS, and therefore be unreasonable, in accordance with the ordinary meaning of that word and consistently with the authorities and principles noted above.[40]

60. Having said that, I wish to make clear that I have given the question of reasonableness very careful consideration, particularly as regards the Narrowed Application. That form of the application certainly reflects a cooperative attitude on the part of the applicant, it is stated with specificity, and appears to target a narrower range of documents than the Original Application.

61. It might also be argued that QPS' inability to properly assess whether the documents requested in the Narrowed Application (or, indeed, the Original Application) may comprise

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[33] As SM Puplick noted in the passage extracted above, work burdens as small as 74 hours have been found to comprise a substantial (and unreasonable) diversion or resources. In the particular case before the Senior Member, 375 hours was found to meet these tests, while OIC's decision in *Seal and Department of Police* (Unreported, Queensland Information Commissioner, 29 June 2007) 10 working weeks – or 362.5 hours – was found to satisfy both limbs of the test imposed by section 41(1) of the RTI Act.

[34] See *Marigliano and Tablelands Regional Council* [2018] QICmr 11 (15 March 2018), (***Marigliano***) at [30], for examples of these factors.

[35] *Re Langer and Telstra Corporation Ltd* [2002] AATA 341, cited in *VMQD*, at [88].

[36] *Cainfrano v Director General, Premier's Department* [2006] NSWADT 137 (***Cainfrano***), cited in *VMQD*, at [85].

[37] Including the general public interest matters raised at paragraphs 7(d)-(g) of the applicant's 15 November 2018 letter. In any event, while I acknowledge that it could be said that there is some public interest in the subject matter of the documents requested in either the Original or Narrowed Application, this is offset by the strong public interest in allowing QPS to conduct investigation of serious crime free of impediment, and without having to re-direct resources to the processing of substantial information access applications, thereby diverting those resources from their use in not only dealing with applications lodged by other members of the public, but QPS' key law enforcement functions. Additionally, in the event regard is to be had to additional factors or considerations in assessing reasonableness, then it is legitimate too to take into account the timelines binding on QPS: *Marigliano*, at [30(f)]. QPS' two-year estimate plainly exceeds the 25 business day (plus 10 for third party consultation) period allowed for processing under section 18 of the RTI Act, reinforcing my view, explained below, that processing either variation of the application would be unreasonable.

[38] In this regard, I note SM Puplick's observations in *VMQD* that '*The ATO is of course, a large and well-resourced agency and cannot claim that it lacks capacity, nevertheless the Act is based upon it being able to deploy its resources efficiently in pursuit of its principal statutory objectives and obligations*.' [At 87.] These comments can be applied equally to QPS, and its management of applications received under the RTI Act.

[39] '*Unreasonable*' is relevantly defined as meaning '*exceeding the bounds of reason; immoderate; exorbitant'* (Macquarie Dictionary Online (accessed 17 July 2019)) and '*immoderate; excessive:* unreasonable demands' (Collins Online Dictionary, https://www.collinsdictionary.com/dictionary/english/unreasonable (accessed 11 July 2019)).

[40] Noting, too, that the test of unreasonableness does not require an agency to show that the *'extent of the unreasonableness is overwhelming': SRB and SRC and Department of Health, Housing, Local Government and Community Services* [1994] AATA 79, cited at [102] of *VMQD*.

exempt information arises from record-keeping inefficiency,[41] a matter that of itself would not ordinarily admit a finding of unreasonableness.[42]

62. On the other hand, the facts in this matter are exceptional: the Shanks investigation appears to be one of considerable complexity, spanning multiple decades and having obviously generated a mass of records, of multiple formats, and in varying states of preserve.

63. As I understand QPS' 10 April 2019 submissions, it is also the case that the manner in which documents were organised may well have been appropriate and intelligible at the time of their creation, but changes in document management practices and technologies over the course of time means that additional work, of the kind detailed in QPS' submissions, is required to render them usable today.

64. It is after careful contemplation of all relevant matters, then, that I have reached the conclusion stated at paragraph 59: that requiring QPS to commit to the Applications the time and personnel resources discussed above would amount to an unreasonable diversion of QPS resources.

Findings

65. The phrase 'substantial and unreasonable' '*admits of no ready or precise measure*',[43] and it *'is not possible to specify an indicative number of hours of processing time that would constitute*' a substantial and unreasonable diversion of resources.[44]

66. In all of the circumstances of this case, however, I am satisfied that requiring an agency to commit the time and resources discussed above to a single RTI access application meets the standard imposed by this test.

67. In reaching this position, I have borne in mind not just matters discussed above, but Parliament's expressed intention that agencies adopt a pro-disclosure bias in deciding to deal with applications.[45]

68. Equally, however, it is the case that Parliament has recognised that, in some circumstances, dealing with an access application may be contrary to the public interest, and that an agency will therefore be justified in refusing to deal with such an application. I consider that requiring QPS to deal with an application that would involve work of the kind outlined above, and necessitate the suspension of active homicide investigations, is a case of this kind.

69. I find that QPS may refuse to deal with both the Original and the Narrowed Application, under section 41(1)(a) of the RTI Act.

[41] Such as a failure to have those records adequately 'computerised', a matter raised in the applicant's 4 December 2018 submissions.
[42] *Davies*, at [30].
[43] *Cainfrano*, cited in *VMQD* at [98].
[44] *NX and Australian Trade and Investments Commission* [2018] AICmr 18, cited in *VMQD*, at [98].
[45] Note 13.

Applicant's submissions

70. I put the substance of the above reasoning to the applicant by letter dated 17 April 2019. In reply,[46] the applicant rejected any suggestion that there may exist an investigation that might be stand to be prejudiced by disclosure of requested information:

> *…there may be an open investigation at this point in the sense that the QPS file remains open because the murder of Betty Shanks remains unsolved, but we reiterate our view that the existence of an open file is not sufficient to amount to there being an investigation of the purposes … Schedule 3 item 10(1)(a) of the Act; and*
>
> *…further, in our view, QPS's letter to you dated 10 April 2019 appears to confirm there is not in fact any investigation at this point. How could it be that QPS is investigating a serious crime but yet no one at QPS has a thorough understanding of the investigation to date, and in fact there is no one with sufficient knowledge that he/she could be thoroughly across the investigation in less than two years? Is QPS genuinely contending it is investigating the Betty Shanks murder but no one involved in that investigation knows anything about what has happened in the investigation in the past? If so, it is a difficult contention to accept, for obvious reasons.*
>
> *If there is no investigation at this point in time (and hence no investigation which could be prejudiced), the QPS's position about substantial and unreasonable diversion of resources falls away.*

71. The decision under review records that the relevant investigation is an '*active investigation*'. While I acknowledge the applicant's submissions, I am prepared to accept QPS' statement. In any event, whether the investigation is categorised as 'active', as put by QPS, or merely 'open', as the applicant states, seems to me immaterial; the text of schedule 3, section 10(1)(a) of the RTI Act makes no such distinction, and operates simply by reference to 'the investigation'. The mere fact there exists an investigation is sufficient to render schedule 3, section 10(1)(a) potentially applicable in a particular case.

72. It may be that, given the quantity of information held by QPS, and the lack of command of that information, limited progress is being made in the specific investigation the subject of the applicant's access application. Such dormancy, or a 'lull', so to speak, does not preclude the possibility of disclosure of information requested by the applicant prejudicing the investigation as it presently stands, or, importantly, its future conduct.

73. I further note the applicant's query as to how, given matters such as the age of the investigation, and the time that has passed since the incident giving rise to it, disclosure of requested information could reasonably be expected to prejudice that investigation, as reflected, for example, in the following submission:[47]

> *… even if there is an investigation at this point in time, QPS's assertion that assessing whether the exemption provided by … Schedule 3 item 10(1)(a) of the Act applies can be properly done only by someone who has a "comprehensive understanding of the investigation to date" cannot be accepted. In that regard, if there is an investigation and the people currently conducting it cannot readily enough articulate proper grounds for expecting disclosure of a document to prejudice the investigation, in our submission there cannot be any reasonable ground for expecting prejudice to the investigation.*

74. Care needs to be taken here, however, to note that the issue I am considering is ***not*** whether the exemption is made out – whether QPS would be justified in refusing access to requested documents, on the grounds their disclosure could reasonably be expected to prejudice an investigation. I am addressing an issue a level removed: whether the work that would be required to put QPS in a position to decide whether to refuse access to the

[46] Dated 8 May 2019. The applicant also referred, in his submissions through the review, to various decisions from this and other jurisdictions concerning the application of section 41 and similar provisions: see, for example, paragraph 3 of his 'open' letter of 12 March 2019. I have given these submissions careful consideration. Ultimately, however, what comprises 'substantial' and 'unreasonable' diversions of resources are questions of fact, to be resolved on a case by case basis.
[47] Dated 8 May 2019.

particular documents requested by the applicant under schedule 3, section 10(1)(a) of the RTI Act would substantially and unreasonably divert QPS resources. As noted above, this is work that, in accordance with section 41(2)(b) of the RTI Act, I am required to take into account.

75. This is, in my view, a much less exacting question, met by simple apprehension or concern – rather than expectation – that disclosure *may* cause the relevant prejudice. Experienced QPS investigatory personnel hold concern that this is so, opinion to which I am prepared to defer.

76. I also note that applicant's concern that QPS' position as reflected above would appear to effectively preclude the making of *any* successful application for documents concerning the Betty Shanks investigation.

77. I cannot prejudge the merits or otherwise of any future application for access to specific documents that might be made; I am charged only with determining the issues arising from the specific application made by the applicant at this particular point in time, as those issues are assessed against the criteria set out in section 41(2) of the RTI Act. Every application will give rise to different issues, and the potential impact of any given application will presumably vary from that claimed by QPS in this case, as investigatory work and documentary analysis progresses. I stress, however, that this is a unique case, involving relatively singular circumstances, and should not in any way be read as empowering QPS to '*reject any request for access to any document relating to any vaguely complex investigation…*'.[48]

Additional submissions

78. Before concluding, it is also appropriate that I address certain other general submissions raised by the applicant during the course of the review.[49]

79. Firstly, in his 15 November 2018 submissions, he queried why aspects of the processing work estimated by QPS could not be delegated elsewhere within that agency, and/or 'outsourced'. As I advised the applicant in my 5 February 2019 reply, I cannot see how these submissions particularly aid his case: adopting suggested actions would essentially involve diverting the burden of processing his application from one part of QPS to another, or require it to expend resources on the services of third party service providers.[50]

80. In the same 15 November 2018 submissions, the applicant argued that:

> *It could not be correct to interpret the Act in a way which enables an agency or minister to avoid the disclosure obligations in the Act simply by saying we didn't budget for having to comply with disclosure obligations and we would prefer to be using the money for a primary statutory functions. Compliance with right to information legislation is an ordinary incident of the activities of agencies and Ministers, and what is substantial and unreasonable diversion of resources must be considered in that light.*

81. No such interpretation is being adopted in this decision. Indeed, QPS has a relatively large information access processing unit, and deals with a considerable number of applications in any given year: a consideration that, as noted above, bears on an assessment of reasonableness. Undergirding the very existence of section 41 of the RTI Act is, however, a recognition that agencies such as QPS are not required to budget or allocate resources to deal with *every* information access application that may be received.

82. I fully agree with the applicant's point that compliance with the RTI Act is an '*ordinary incident*' of agency activity; at the same time, the legislature has, as discussed above, seen

[48] Applicant's submissions dated 8 May 2019.
[49] To the extent they are or remain relevant, noting again that QPS' clarification or consolidation of its position as mentioned in paragraph 45 means that it is not necessary to deal with all of the applicant's submissions though the review.
[50] And not diminish the overall resource impost estimated by QPS.

fit to permit agencies to refuse to deal with applications in certain special circumstances, such as where, as here, so dealing would substantially and unreasonably divert agency resources.

83. I also note the applicant's contention that the '…*QPS is a publicly funded organisation, so if it needs more money, it has the ability to ask parliament for it*'.

84. As I advised the applicant in my letter dated 5 February 2019, the above is premised on unrealistic expectations – it is not open to QPS to simply call for and obtain additional funding from the executive or legislature to deal with RTI access applications. Even if it were, the relevant question here is whether processing his application would substantially and unreasonably divert current agency resources – not those that might become available at some point in the future. As explained above, I am satisfied that it would.

DECISION

85. I vary the decision under review under section 110(1)(b) of the RTI Act, and find that QPS may refuse to deal with the applicant's access application[51] under section 41(1)(a) of the RTI Act.

86. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Louisa Lynch
Right to Information Commissioner

Date: 18 July 2019

[51] Original or Narrowed.

APPENDIX A

Significant procedural steps

Date	Event
22 June 2018	OIC received the applicant's external review application. OIC notified QPS and the applicant that the review application had been received and requested procedural documents from QPS.
29 June 2018	OIC received the requested documents from QPS.
10 July 2018	OIC notified QPS and the applicant that the application for external review had been accepted.
24 July 2018	OIC conveyed an initial preliminary view to QPS that QPS was not justified in refusing to deal with the applicant's access application under section 40 of the RTI Act.
31 August 2018	QPS accepted OIC's preliminary view. QPS instead submitted that it may refuse to deal with the access application (ie, the Original Application) under section 41(1)(a) of the RTI Act.
18 September 2018	OIC requested further submissions from QPS.
9 October 2018	OIC received requested submissions from QPS.
25 October 2018	OIC wrote to the applicant, conveying a preliminary view that QPS may refuse to deal with the Original Application under section 41(1)(a) of the RTI Act, on the basis dealing with that application would substantially and unreasonably divert QPS resources. OIC invited submissions in reply.
15 November 2018	OIC received the applicant's response to OIC's 25 October 2018 preliminary view, advising that the applicant did not accept that preliminary view.
20 November 2018	The applicant's representative clarified aspects of the applicant's 15 November 2018 submissions with OIC.
30 November 2018	OIC relayed the applicant's submissions to QPS, and invited submissions in reply. OIC also wrote to the applicant, addressing certain issues raised in the applicant's 15 November 2018 correspondence.
4 December 2018	OIC received further submissions from the applicant.
17 December 2018	OIC received submissions from QPS.
5 February 2019	OIC reiterated its preliminary view to the applicant.
19 February 2019	OIC received further submissions from the applicant.
26 February 2019	OIC reiterated its preliminary view to the applicant, inviting final submissions by 12 March 2019.
12 March 2019	OIC received submissions from the applicant reaffirming his position, together with separate correspondence setting out terms of the Narrowed Application.
14 March 2019	OIC referred the Narrowed Application to QPS for consideration.
10 April 2019	OIC received QPS' submissions that dealing with the Narrowed Application would substantially and unreasonably divert QPS' resources.

Date	Event
17 April 2019	OIC forwarded QPS' submissions dated 10 April 2019 to the applicant, and conveyed the preliminary view that dealing with the Narrowed Application would substantially and unreasonably divert QPS resources.
8 May 2019	OIC received final submissions from the applicant.

APPENDIX B

Sections 41 and 42 of the *Right to Information Act 2009* (Qld)

41 Effect on agency's or Minister's functions

(1) An agency or Minister may refuse to deal with an access application or, if the agency or Minister is considering 2 or more access applications by the applicant, all the applications, if the agency or Minister considers the work involved in dealing with the application or all the applications would, if carried out—

(a) substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions; or

(b) interfere substantially and unreasonably with the performance by the Minister of the Minister's functions.

(2) Without limiting the matters to which the agency or Minister may have regard in making a decision under subsection (1), the agency or Minister must have regard to the resources that would have to be used—

(a) in identifying, locating or collating any documents in the filing system of the agency or the Minister's office; or

(b) in deciding whether to give, refuse or defer access to any documents, or to give access to edited copies of any documents, including resources that would have to be used—

(i) in examining any documents; or

(ii) in consulting in relation to the application with a relevant third party under section 37; or

(c) in making a copy, or edited copy, of any documents; or (d) in notifying any final decision on the application.

(3) In deciding whether to refuse, under subsection (1), to deal with an access application, an agency or Minister must not have regard to—

(a) any reasons the applicant gives for applying for access; or

(b) the agency's or Minister's belief about what are the applicant's reasons for applying for access.

42 Prerequisites before refusal because of effect on functions

(1) An agency or Minister may refuse to deal with an access application under section 41 only if—

(a) the agency or Minister has given the applicant a written notice—

(i) stating an intention to refuse to deal with the application; and

(ii) advising that, for the prescribed consultation period for the notice, the applicant may consult with the agency or Minister with a view to making an application in a form that would remove the ground for refusal; and

(iii) stating the effect of subsections (2) to (6); and

(b) the agency or Minister has given the applicant a reasonable opportunity to consult with the agency or Minister; and

(c) the agency or Minister has, as far as is reasonably practicable, given the applicant any information that would help the making of an application in a form that would remove the ground for refusal.

(2) Following any consultation, the applicant may give the agency or Minister written notice either confirming or narrowing the application.

(3) If the application is narrowed, section 41 applies in relation to the changed application but this section does not apply to it.

(4) If the applicant fails to consult after being given notice under subsection (1), the applicant is taken to have withdrawn the application at the end of the prescribed consultation period.

(5) Without limiting subsection (4), the applicant is taken to have failed to consult if, by the end of the prescribed consultation period, the applicant has not given the named officer or member written notice under subsection (2).

(6) In this section—

prescribed consultation period, for a written notice under subsection (1)(a), means—

(a) the period of 10 business days after the date of the notice; or

(b) the longer period agreed by the agency or Minister and the applicant whether before or after the end of the 10 business days mentioned in paragraph (a).