Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	***P60 and Department of Education*** **[2021] QICmr 35 (1 July 2021)**
Application Number:	**315774**
Applicant:	**P60**
Respondent:	**Department of Education**
Decision Date:	**1 July 2021**
Catchwords:	**ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL TO DEAL WITH APPLICATION - SUBSTANTIAL AND UNREASONABLE DIVERSION OF RESOURCES - request for information relating to a workplace investigation into the applicant's conduct - whether dealing with the access application would substantially and unreasonably divert the agency resources from their use in performing its functions - whether section 60 of the *Information Privacy Act 2009* (Qld) applies**

REASONS FOR DECISION

Summary

1. The applicant applied[1] to the Office of Industrial Relations (**OIR**)[2] under the *Information Privacy Act 2009* (Qld) (**IP Act**) for *'all information relating to the workplace investigation commenced in August 2019 into my conduct'* between 8 August 2019 to 30 June 2020.

2. OIR decided to refuse to deal[3] with the application on the ground that all of the documents would fall into an exempt class, because disclosure could reasonably be expected to prejudice the effectiveness of a lawful method or procedure.[4]

3. The applicant applied[5] to the Office of the Information Commissioner (**OIC**) for external review of OIR's decision. Early in the review process, OIR accepted OIC's view that section 59 of the IP Act did not apply, and in the alternative, submitted that section 60 of the IP Act applied on the basis that processing the application would substantially and unreasonably divert OIR's resources.

[1] On 9 November 2020.
[2] OIR joined the Department of Education in December 2017 (refer to <https://www.oir.qld.gov.au/about-us>). While the Department of Education is the respondent agency to this review, I refer to OIR throughout as that is the organisational unit which handled the application and review.
[3] On 10 December 2020.
[4] Section 59 of the IP Act and schedule 3, section 10(1)(f) of the *Right to Information Act 2009* (Qld) (**RTI Act**).
[5] External review application dated 10 December 2020.

4. OIR provided extensive submissions to OIC to support its position that processing the application would substantially and unreasonably divert its resources.[6] In summary, OIR relied on the complexity of the workplace investigation, the number of parties involved and the geographical distribution of them across Queensland, challenges associated with searching for *'all information'* across multiple OIR databases, the high workload of OIR, the particular nature and tenure of the applicant's employment at OIR, shortcomings of its recordkeeping practices and procedures, and the limited resources available to its RTI Unit.

5. For the reasons set out below, I set aside OIR's decision. I find that OIR is not entitled to refuse to deal with the application under section 60 of the IP Act.

Background and evidence considered

6. Significant procedural steps relating to the external review are set out in the Appendix.

7. The decision under review is OIR's decision dated 10 December 2020.

8. The submissions, legislation and other material I have considered in reaching this decision are set out in these reasons (including footnotes and Appendices).

9. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.[7] I consider a decision maker will be *'respecting'* and *'acting compatibly with'* that right and others prescribed in the HR Act, when applying the law prescribed in the IP Act.[8] I have acted in this way in making this decision.[9] I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:[10] *'it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the* Freedom of Information Act'.[11]

Issue for determination

10. The issue for determination is whether OIR is entitled to refuse to deal with the application under the IP Act on the basis that dealing with it would substantially and unreasonably divert OIR's resources from the performance of its functions.[12]

Relevant law

11. An individual has a right to be given access to documents of an agency, to the extent they contain the individual's personal information.[13] An agency is required to deal with an access application unless doing so would, on balance, be contrary to the public interest.[14]

12. Section 60(1) of the IP 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

---

[6] 5 February 2021, 23 March 2021 and 7 May 2021.
[7] Section 21 of the HR Act.
[8] *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) ***(XYZ)*** at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].
[9] In accordance with section 58(1) of the HR Act.
[10] *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[11] *XYZ* at [573].
[12] OIR bears the onus of establishing this in the affirmative, under section 100 of the IP Act.
[13] Section 40 of the IP Act.
[14] Section 58 of the IP Act.

out, substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions.

13. The phrase *'substantially and unreasonably'* is not defined in either the IP Act, the RTI Act or the *Acts Interpretation Act 1954* (Qld). It is therefore appropriate to consider the ordinary meaning of these words.[15] The dictionary definitions[16] of those terms relevantly provide:

- *'substantial'* means *'of ample or considerable amount, quantity, size, etc.'*
- *'unreasonable'* means *'exceeding the bounds of reason; immoderate; exorbitant.'*

14. In deciding whether dealing with an application would substantially and unreasonably divert an agency's resources from the performance of its functions, the IP Act requires a decision-maker to have regard to the resources that would be used for:[17]

- 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 be used to examine any documents or conducting third party consultations; and
- notifying any final decision on the application.

15. The question of whether the impact on an agency's resources would be 'substantial' is a question of fact. In previous decisions, the Information Commissioner has held that relevant factors to consider include:[18]

- the agency's resources and size[19]
- the other functions of the agency;[20] and
- whether and to what extent processing the application will take longer than the legislated processing period of 25 business days.[21]

16. In determining whether the work involved in dealing with an application is unreasonable, it is not necessary to show that the extent of the unreasonableness is overwhelming.[22] Rather, it is necessary to weigh up the considerations for and against, and form a balanced judgement of reasonableness, based on objective evidence.[23] Factors that have been taken into account in considering this question include:[24]

- whether the terms of the request offer a sufficiently precise description to permit the agency, as a practical matter, to locate the documents sought
- the public interest in disclosure of documents
- whether the request is a reasonably manageable one, giving due but not conclusive, regard to the size of the agency and the extent of its resources usually available for dealing with access applications

---

[15] Section 14B of the *Acts Interpretation Act 1954* (Qld).
[16] Macquarie Dictionary Online www.macquariedictionary.com.au
[17] Section 60(2) of the IP Act.
[18] This is not an exhaustive list.
[19] *Middleton and Building Services Authority* (Unreported, Queensland Information Commissioner, 24 December 2010) at [34]-[37].
[20] *60CDYY and Department of Education and Training* [2017] QICmr 52A (7 November 2017) at [18].
[21] *ROM212 and Queensland Fire and Emergency Services* [2016] QICmr 35 (9 September 2016) at [40].
[22] *F60XCX and Department of the Premier and Cabinet* [2016] QICmr 41 (13 October 2016) at [90].
[23] *ROM212 and Queensland Fire and Emergency Services* [2016] QICmr 35 (9 September 2016) at [42], adopting *Smeaton v Victorian WorkCover Authority (General)* [2012] VCAT 1550 (***Smeaton***) at [30].
[24] *Smeaton* at [39].

- the agency's estimate of the number of documents affected by the request, and by extension the number of pages and the amount of officer time
- the reasonableness or otherwise of the agency's initial assessment and whether the applicant has taken a cooperative approach in rescoping the application
- the timelines binding on the agency
- the degree of certainty that can be attached to the estimate that is made as to the documents affected and hours to be consumed; and in that regard, importantly whether there is a real possibility that processing time may exceed to some degree the estimate first made; and
- whether the applicant is a repeat applicant to that agency, and the extent to which the present application may have been adequately met by previous applications.

17. Refusing to deal with an application under section 60 of the IP Act is subject to certain prerequisite procedural steps, set out in section 61 of the IP Act. Where section 60 of the IP Act is raised on external review, it remains appropriate for an agency to engage in consultation that would ordinarily have occurred under section 61 of the IP Act.

OIR's submissions

18. In its first submission to OIC raising the ground of substantial and unreasonable diversion of resources, OIR submitted as follows:

> *Preliminary enquiries have been undertaken from the business unit who advised that the investigation was complex, took well over a year and generated a large volume of administrative documents and handwritten notes ... Given the complexity and nature of this matter, a request for "all documents" would require HR staff to conduct searches for a years' worth of emails and handwritten notes, most of them of a merely administrative nature.*
>
> *HR has advised that there is a HR investigation file containing the evidentiary material and other relevant documentation.* [25]

19. Later in the review, OIR expanded on the above submission to provide details of the number of individuals relevant to, and business units involved in managing, the investigation. OIR explained that the complexity of the investigation was complicated further by the involved individuals and units being geographically spread across Queensland and the associated travel and business continuity arrangements. OIR particularly submitted that:

> *To meet the requirement of* 'all information relating to…' *document searches will need to be conducted with all individuals identified in the investigation report, authorising officers, investigation officers and officers who have been required to perform an administrative or management function as a result of the investigation.*
>
> *…*
>
> *Given the subject, complexity, volume … the work required to conduct searches to identify responsive documents, review them against the IP Act application scope is onerous and substantial in use of resources and time and effort required to achieve just his* [sic] *part of the process. I have identified a significant number of OIR staff and business units who will be required to conduct searches, as documents are kept in a wide variety of formats, locations and business units. The requirement to conduct broad searches would unreasonably divert OIR officers from their core business, which is ensuring the safety of Queensland workers.* [26]

[25] Email to OIC dated 5 February 2021.
[26] Submission to OIC dated 19 March 2021.

20. OIR also provided OIC with:

- details about its organisational structure, including that it has approximately 800 employees across Queensland, in numerous regional offices
- an overview of the functions of Workplace Health and Safety Queensland (**WHSQ**)
- information about the particular duties performed by the applicant in their role, and relevant responsibilities of the applicant's work unit; and
- details about its information management structure, particularly noting that it does not have a whole of organisation electronic document and records management system (**EDRMS**) but instead, uses multiple electronic platforms across the agency to store documents in addition to physical files.[27]

21. OIR submitted that due to the applicant's particular responsibilities and long tenure with OIR, any electronic searches would be *'likely to return an excessive volume of records and documents unrelated to the investigation. Once the searches are completed, OIR officers will need to spend many hours or several days manually reviewing the material to determine if any fall within the application scope'.* [28]

22. OIR broadly quantified the estimated searches as follows:

> *… search requests will need to be sent to* [numerous individuals] *to find all information relating to the investigation into the complaint about the applicant's conduct. Further, document searches will need to be sent to OIR's Data and Evaluation business unit and ICTS to search archived outlook files* [of former officers]. *Conducting the searches will require several hours, impacting on the daily business of the Data & Evaluation business unit and ICTS. Additionally, document searches will need to be reviewed by appropriately qualified officers for relevance. The work involved in conducting the searches represents an unreasonable and substantial diversion of OIR's resources.*[29]

23. OIR also made submissions[30] about the resourcing of its RTI and Privacy team, including that:

- it is currently operating under its existing staff establishment, with a very high workload
- key staff are shortly ending their employment with the RTI Unit and remaining staff will include one principal adviser, one senior adviser and one adviser responsible for making decisions on a running average total of between 75-87 access applications at any one time
- officers are also responsible for managing other information release requests
- existing resources are less than adequate to manage the current workload of the unit; and
- recruitment is constrained due to current budgetary limitations.

24. In a later submission[31] OIR provided further information regarding the amount of time involved to assess and process the application. OIR submitted that:

---

[27] Submission to OIC dated 19 March 2021. OIR acknowledged that the absence of an EDRMS was a shortcoming in its information management system and explained that while a project for the migration of records into an EDRMS had been completed, the project was placed on hold due to budgetary constraints imposed after the COVID-19 pandemic. Therefore, OIR continues to use *'a combination of paper records, multiple digital formats and shared drives to store records for the foreseeable future.'*

[28] Submission to OIC dated 19 March 2021.

[29] Submission to OIC dated 19 March 2021.

[30] Submission to OIC dated 19 March 2021.

[31] On 7 May 2021.

- OIR's RTI and Privacy team annually receives and processes in excess of 580 access applications, 160 administrative access applications for WHSQ investigations and issues 300 disclosure decisions, in addition to dealing with privacy complaints and managing court based disclosure processes
- searching for the personal information of the applicant will involve *'a significant amount of work for each person identified as likely to hold documents'*
- search requests would need to be sent to multiple regional offices, consultancies, and individuals[32]
- IT remote searches of former employee email accounts would need to be conducted
- *'significant time'* would be required to review responsive documents and convert to PDF, estimated at *'one minute per email that does not contain attachments'*; and
- email searches will not capture *'all documents'* as handwritten notes, text messages or documents in shared drives will not be captured.[33]

25. OIR estimated that the work involved in processing the application would take over 90 hours[34] and a further 2 hours per third party consultation, with additional (unquantified) time required for *'marking up and collation of documents'*.[35]

26. In its submissions, OIR referred to support it provided to the applicant during the workplace investigation process, the avenue of internal review available to the applicant through the Queensland Ombudsman and the need for balance in affording the applicant natural justice and confidentiality and privacy of other individuals involved.

27. OIR questioned the motives of the applicant for making the application.[36] This is an irrelevant consideration and I have had no regard to it in making this decision.[37]

Findings

28. Consistent with the requirement to consult under section 61 of the IP Act, OIR proposed that the applicant consider narrowing the scope of the application to a *'copy of the HR investigation file'*.[38] While the applicant did not agree to this proposal,[39] I find that OIR satisfied the consultation requirements, in the context of this review.

29. As noted at paragraph 1 above, the applicant is seeking access, under the IP Act, to information relating to the workplace investigation commenced in August 2019 into her conduct. The applicant requested all documents, including electronic transmissions, over an 11 month timeframe.

30. This is not the first time the applicant has applied to OIR for documents regarding her employment. The applicant has made at least two previous applications, in narrower terms, which have both been the subject of external review. In both reviews, the applicant accepted OIC's preliminary view that she was not entitled to access the requested information comprising source complaint documents and witness statements, on public

[32] In its submissions, OIR did specify the number of regional offices and individuals involved and I have taken those figures into account in reaching this decision. However, in view of OIR's submissions regarding sensitivities of the workplace investigation context, I have excluded the figures from these reasons. Given the decision is adverse to OIR and favourable to the applicant, the absence of these figures do not serve as a disadvantage the applicant. I would note however that it does somewhat limit the precedent value of these reasons in terms of agencies seeking in the future seeking guidance as to the application and interpretation of section 60 of the IP Act. I have also had regard to the limitation set out in section 121(3) of the IP Act.
[33] This point was outlined in OIR's submission dated 19 March 2021.
[34] Estimating between 2 to 3.5 hours per officer (including former employees).
[35] Page 3 of OIR's submission received on 7 May 2021.
[36] Page 6 and 7 of OIR's submissions dated 19 March 2021.
[37] Section 60(3) of the IP Act.
[38] Email to OIC dated 5 February 2021.
[39] During a telephone call with OIC on 12 February 2021.

interest grounds. In both matters, OIC explained to the applicant that she had, albeit unintentionally, applied to access information which would ordinarily be refused on public interest grounds. The applicant subsequently made an application with a broader scope to capture her personal information, ie. the application which is the subject of OIR's refusal to deal decision.

31. The scope of this application does not canvass a variety of subject matters nor seek documents over a period of multiple years[40] or from business units with divergent functions. Rather, it reflects the type of access application that is commonly processed by government agencies where individuals are seeking information about themselves, from their employer, in relation to a workplace investigation. In processing such applications, it is reasonable to expect that records of the officer's work unit, supervisors, and human resources would be relevant to search.

32. A key hurdle that OIR faces in establishing that processing the application would be substantial, is the absence of an estimate of the total number of responsive pages, despite confirming that it has located several workplace investigation files relating to the matter. I acknowledge that the Information Commissioner has previously found in favour of an agency without an estimate of total responsive pages[41], but also observe that case involved a scope spanning 30 years, which is not comparable to the 11 month period applicable here.

33. OIR has submitted that the records of multiple individuals[42] need to be searched. While the estimated number is more than one or two, it still equates to very small percentage of its total workforce (800 staff). Even if it did take each officer 2 hours each to search their records, that is a small percentage of an ordinary working day. Also, given the ease with which Outlook can be electronically searched for emails, and the general obligations on public service officers to retain their records in an organised and retrievable way,[43] I consider an estimate of 2 hours per officer is generous. In addition, it is not uncommon for an IT unit to be required to conduct searches of archived records of former officers. Officers in those units are generally highly proficient in efficiently locating information electronically.

34. As set out above, OIR has already located workplace investigation files. I accept these will need to be assessed to identify information that may be released to the applicant, and any to which grounds for refusing access apply. However, this is what is ordinarily involved in processing an application and is accordingly, why an agency is afforded 25 business days under the legislation to make its decision. While there are a number of officers that would need to do searches of their own records, it is unlikely that consultation with third party witnesses would be required as access to such information would ordinarily be refused on public interest grounds.[44]

35. I accept that the RTI Unit at OIR has experienced resourcing issues and staffing changes/shortages in recent months. However, processing applications under the IP Act forms part of the core business of the RTI Unit. The substantial and unreasonable refusal to deal provision is a mechanism to deal with applications that would divert the resources of the agency away from its other functions. While some applications may take longer to

[40] Notably, the date range of this application is less than 11 months.
[41] *Middleton and Department of Health* (Unreported, Queensland Information Commissioner, 10 June 2011) did not identify total estimated pages, but the scope of that access application under the RTI Act included documents spanning 30 years, which is significantly different to the 11 month timeframe of the access application under consideration in this review.
[42] OIR raised concerns about OIC including the figures in these reasons. See footnote 32 above.
[43] Section 7(1) of the *Public Records Act 2002* (Qld) requires public agencies to '*make and keep full and accurate records of its activities and have regard to any relevant policy, standards and guidelines made by the archivist about the making and keeping of public records*.' I also note the Records Governance Policy v1.0.2, with requirements 3 and 5 being particularly relevant.
[44] Noting that third party consultation is only required where an agency is considering disclosure of the relevant information.

process than others due to the complexity and sensitivity of issues involved, this will not enliven the refusal to deal provision. The legislation provides other, less punitive mechanisms, to deal with more complex or elongated applications, eg. requesting an extension of time to the processing period.[45]

36. While I acknowledge OIR's submission that it does not have a whole of organisation EDRMS in place, the RTI Unit does have access to the Outlook email system, which it can use to contact the relevant individuals in the various regional offices, to ask them to search their records for documents responding to the terms of the IP Act application. Presumably, this would lead to those officers searching their emails, hardcopy records and any other electronic storage systems available to them, collating the documents and returning them to the RTI Unit for independent assessment. Given the particular scope of the request, I do not consider this would substantially divert OIR's resources.

37. Taking into account the above, and particularly, the:

- scope of the application concerns one subject matter, ie. the workplace complaint investigation
- fact it has been made under the IP Act thereby limiting responsive documents to those containing the applicant's personal information
- request is limited to documents dated within an 11 month period; and
- absence of an estimate of the number of pages involved,

I am unable to find that processing the application would be a substantial diversion of agency resources.

38. Returning to the scope of the application, it does not, on its face, appear to me to be unreasonable. It reflects the type of application commonly made by applicants involved in public service workplace matters and is of a nature that is routinely processed by various agencies of all sizes, including small local councils and statutory bodies with far less resources than OIR. While I accept these applications can raise sensitive workplace issues and require discretion on the part of the RTI Unit, these factors do not amount to unreasonableness. Importantly, an individual is entitled to access their personal information held by government and there is a particularly strong public interest in granting an individual access to information about their public sector employment.[46]

39. While I acknowledge OIR's concerns about protecting the confidentiality and privacy of other persons involved in a workplace investigation, there are grounds on which to refuse access to such information in section 47 of the RTI Act, if required.[47] It is not unreasonable for an individual to seek access to information about their employment in a workplace complaint context. There is no evidence before me to suggest procedural fairness was not afforded to the applicant during the investigation, however, that does not mean the applicant cannot apply to access her personal information in documents relating to the investigation. Indeed, one of the objects of the IP Act is to afford people a right to access their personal information held by government and exercising that right is an entirely separate process to appealing the outcome of a workplace investigation.

40. Throughout the review, OIC has observed that OIR has not sought to apply or interpret the IP Act in accordance with its primary object, ie. to give an individual a right of access to their personal information in the possession of government.[48] There have also been

[45] Section 55 of the IP Act.
[46] Schedule 4, part 2, item 7 of the RTI Act. See *W7SV7G and Department of Education* [2018] QICmr 24 (22 May 2018) at [14].
[47] Section 67 of the IP Act provides that access to information may be refused under the IP Act on the same grounds as in section 47 of the RTI Act.
[48] Section 3 of the IP Act.

instances where OIR has not provided OIC with requested assistance. For example, OIC is yet to receive a copy of the investigation files identified by OIR; these would have been helpful to OIC in assessing whether processing the application would reach the 'substantial' threshold.[49] OIR has also chosen not to provide an estimate of the total number of responsive pages which ordinarily is a key factor relied on by the Information Commissioner in considering section 60 of the IP Act.[50] OIR sought multiple extensions of time and while OIC has been open to granting these given OIR's ongoing resourcing issues, they operated to cause further delay and disadvantage to the applicant in terms of preventing her from accessing any information to which she may be entitled under the IP Act. As at the date of this decision, the applicant has not been granted access to any of her personal information relating to the workplace complaint investigation through the IP Act process.[51]

41. On the basis of the above, I am satisfied that dealing with the access application would not substantially and unreasonably divert OIR's resources in the performance of its functions and therefore, section 60 of the IP Act does not apply.

DECISION

42. For the reasons set out above, I set aside OIR's decision. I find that OIR is not entitled to refuse to deal with the application under section 60 of the IP Act.

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

K Shepherd
Assistant Information Commissioner

Date: 1 July 2021

[49] Requested by OIC by email on 3 March 2021.
[50] See *Middleton and Department of Environment and Resource Management* (Unreported, Queensland Information Commissioner, 30 May 2011) at [27] – [28] (12,900 pages); *Mathews and The University of Queensland* (Unreported, Queensland Information Commissioner, 5 December 2011) at [34] (5,828 pages); *F60XCX and Office of the Queensland Parliamentary Counsel* [2016] QICmr 42 (13 October 2016) at [95] (11,113 pages).
[51] Although I understand certain information was provided to the applicant during the investigation process, eg. invitation to attend an interview and an outcome letter.

APPENDIX

Significant procedural steps

Date	Event
10 December 2020	OIC received the external review application.
18 December 2020	OIC advised OIR and the applicant that the application for external review was accepted.
22 January 2021	OIC issued a preliminary view to OIR that it could not refuse to deal with the application under section 59 of the IP Act.
5 February 2021	OIR accepted OIC's preliminary view and raised section 60 of the IP Act as an alternative ground to refuse to deal with the application. OIR proposed a narrowed scope for the applicant to consider.
12 February 2021	OIC relayed OIR's proposed narrowed scope and claim of substantial and unreasonable diversion of resources to the applicant. The applicant declined to narrow the scope of her access application.
16 February 2021	OIC relayed the applicant's response to OIR and issued a preliminary view that section 60 of the IP Act did not apply to the application.
26 February 2021	OIR made verbal submissions to OIC in support of its substantial and unreasonable diversion of resources claim.
2 March 2021	OIR requested an extension of time and advised OIC it had identified two investigation files containing relevant documents.
3 March 2021	OIC granted the extension of time and requested a copy of the two files which OIR had identified.
23 March 2021	OIC received submissions from OIR in support of its substantial and unreasonable diversion of resources claim.
14 April 2021	OIC issued a further preliminary view to OIR.
4 May 2021	OIC granted an extension of time to OIR.
7 May 2021	OIC received further submissions from OIR.
11 May 2021	OIC advised the applicant that the external review would be finalised by way of a formal decision.
29 June 2021	OIC contacted OIR regarding its submissions and advised the review would be finalised by a formal decision. OIR provided OIC with a copy of the invitation to attend an interview and outcome letter which were sent to the applicant in relation to the workplace investigation. OIR raised concerns about OIC referring to particular parts of its submissions due to the workplace investigation context.
1 July 2021	OIR provided OIC with further information.