



Decision and Reasons for Decision

Citation: *N37 and Queensland Police Service [2022] QICmr 33 (29 June 2022)*

Application Number: 315594

Applicant: N37

Respondent: Queensland Police Service

Decision Date: 29 June 2022

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - IRRELEVANT INFORMATION - information outside of the subject matter of the access application - whether deleted information is irrelevant to the terms of the access application - section 88 of the *Information Privacy Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - personal information of other individual - personal information and privacy - whether disclosure of information would, on balance, be contrary to the public interest - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether agency has conducted reasonable searches - whether access to further documents may be refused on the basis they are nonexistent or unlocatable - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(e) and 52(1) of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Queensland Police Service (**QPS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for ‘all QPS email communication and file notes associated with my matter’ between December 2016 and 12 June 2020.

¹ On 12 June 2020.

2. Following communication with the applicant, QPS decided to refuse to deal with the access application² on the basis it did not comply with the requirements for a valid application.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QPS's decision.³
4. During the external review the applicant narrowed and specified the terms of his application to enable QPS to identify and locate responsive documents. QPS released documents to the applicant during the review.
5. For the reasons outlined below, I set aside QPS's decision refusing to deal with the access application. In substitution I find that information irrelevant to the application may be deleted.⁴ I find that access may be refused to certain information as disclosure would, on balance, be contrary to the public interest.⁵ I also find that QPS has taken reasonable steps to identify and locate responsive documents, and access to any further documents may be refused as the documents are nonexistent or unlocatable.⁶

Background

6. The applicant was formerly employed by QPS as an officer.
7. The scope agreed by the applicant and QPS during the external review was '*all emails relating to [the applicant] from the email accounts of [30 individuals]*' between 1 December 2016 to 30 July 2017.⁷
8. During the external review, QPS disclosed documents to the applicant⁸ and I relayed my view to the applicant on the information deleted or refused by QPS.⁹ The applicant did not contest parts of this view, and that information is no longer in issue.¹⁰

Reviewable decision

9. The decision under review is the refusal to deal decision by QPS on 25 August 2020.

Evidence considered

10. Significant procedural steps relating to the external review are set out in the Appendix.
11. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix).
12. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**) particularly the right to seek and receive information.¹¹ I consider a decision-maker will be '*respecting and*

² On 25 August 2020.

³ On 26 August 2020.

⁴ Section 88 of the IP Act.

⁵ Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

⁶ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

⁷ The applicant named 31 individuals but named one individual twice. OIC and the applicant exchanged correspondence in October and November 2020 to arrive at a new scope that included sufficient information to enable QPS to identify and locate documents.

⁸ On 13 July 2021.

⁹ On 21 January 2022.

¹⁰ The applicant made submissions on 27 February 2022 contesting my view regarding the sufficiency of QPS's searches, the deletion of irrelevant information, and the refusal of information on page 336 of the documents, on the ground disclosure would, on balance, be contrary to the public interest. The applicant did not contest my view regarding exempt information or contrary to the public interest information (apart from page 336).

¹¹ Section 21 of the HR Act.

acting compatibly with that right and others prescribed in the HR Act, when applying the law prescribed in the IP Act and the RTI Act.¹² I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:¹³ *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.*¹⁴

Information in issue

13. The information in issue in this review comprises:

- **Disciplinary Information** - a description of the disciplinary matters of other named QPS officers which appears on three pages;¹⁵ and
- **Informant Information** - the first name and surname of the QPS employee who first reported an allegation of misconduct by the applicant to the local Superintendent which appears on one page.¹⁶

Issues for determination

14. The issues for determination are:

- whether the Disciplinary Information is not relevant to the access application and may be deleted pursuant to section 88 of the IP Act
- whether the Informant Information may be refused on the basis disclosure would, on balance, be contrary to the public interest; and
- whether access may be refused to any further documents on the basis they are nonexistent or unlocatable.

Irrelevant information

Relevant law

15. Section 88 of the IP Act provides that an agency may give access to a document subject to the deletion of information it considers is not relevant to an application. This is not a ground for refusal of access, but a mechanism to allow irrelevant information to be deleted from documents which are identified for release to an applicant.
16. Deciding whether information is irrelevant is a question of fact. In determining this question it is necessary to consider whether the information has any bearing upon, or is pertinent to, the terms of the application.¹⁷
17. As noted at paragraph [7] the terms of the applicant's application were clarified on external review to be, "*all emails relating to [the applicant] from the email accounts of [30 individuals]*" between 1 December 2016 to 30 July 2017.

Applicant's submissions

¹² *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].

¹³ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁴ *XYZ* at [573].

¹⁵ Pages 18, 65 and 66.

¹⁶ Page 336.

¹⁷ *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) at [52].

18. The applicant submitted:¹⁸

The emails that you have considered do hold actual legal weight in building the complete picture of how this matter has run its course. To not disclose this information would fail the grounds of evidence that I am compiling under the evidence Act [the applicant pasted sections 5, 44 and 46B of the Evidence Act 1977 (Qld)]

It is my view that even the tone or reference of character attached in these emails will be deemed as significant evidence in legal remedy.

.....

The fact that due to my original application for information I was able to obtain over 30 personnel emails located in fact held relevant information to this matter, given the statement information is irrelevant and under s5, 44 and 46B of the evidence ACT 1977,

It is a determination that all information is in fact relevant and has been proven by my application that had located over 369 pages of information that did not exist at the time of my original application.

[sic]

Findings

19. I understand from the applicant's submissions about the Disciplinary Information that the applicant:

- is raising public interest grounds, particularly relating to a legal remedy, favouring disclosure of the Disciplinary Information
- considers all information within the 369 pages located by QPS is relevant, simply by virtue of QPS locating those pages; and
- has raised certain sections of the *Evidence Act 1977 (Qld)* (**Evidence Act**) as he considers that those sections of the Evidence Act are 'a *determination that all information is in fact relevant.*'

20. In respect of his first submission, the public interest is not a component to be considered when assessing whether information is relevant to an access application for the purpose of the application of section 88 of the IP Act. Rather, I must determine whether the deleted information has any bearing on, or is pertinent to, the terms of the application, or relates to the applicant and in this case I am satisfied it does not. The information is clearly about the disciplinary matters of other QPS personnel.

21. In relation to his second submission, the fact that QPS located documents responsive to the terms of the application does not equate to all of the information within the documents being relevant to his matter. The IP Act and RTI Act acknowledge that not all information in each located document will be relevant to the access application and provides a mechanism to allow the deletion of irrelevant information.

22. As to the applicant's final submission appearing to suggest that sections 5, 44 and 46B of the Evidence Act amount to a determination that all information is relevant in this matter, I do not accept this submission. Section 5 of the Evidence Act defines documents said to be of a certain character. Section 44 of the Evidence Act provides that where a Queensland law allows certain documents considered to be admissible in evidence for any purpose, a document purporting to be a certain document is also admissible to the same extent and for the same purpose as long as it is authenticated in the manner required by that Queensland law. Section 46B of the Evidence Act allows a court or Tribunal to inform itself about an Act or statutory instrument in any way it considers appropriate.

¹⁸ By emails on 27 February 2022 and 21 April 2022.

23. Sections 5, 44 and 46B of the Evidence Act do not make any claims that irrelevant information deleted from a document under the RTI Act or IP Act is in fact relevant. Nor is there anything in these sections of the Evidence Act that has any relevance to, or provides any guidance on, determining the issue of whether information in the documents concerning disciplinary matters of other QPS officers is relevant to the access application. It follows that I reject the applicant's submission.
24. As a question of fact, having carefully reviewed the Disciplinary Information deleted by QPS, I am satisfied that it comprises information about the disciplinary processes of QPS officers other than the applicant, and does not relate to the applicant, or his access application outlined at paragraph 7 above. Accordingly, I am satisfied that the Disciplinary Information may be deleted from the documents, in accordance with section 88 of the IP Act. I note in passing that it is open to the applicant to apply for access to the Disciplinary Information in a new access application.

Contrary to the public interest information

Relevant law

25. An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.¹⁹ An external review by the Information Commissioner, or her delegate, is a merits review²⁰ and as such the Information Commissioner has power to make any decision the agency decision maker could have made under the IP Act.²¹
26. The term public interest refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.
27. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:²²
 - identify factors irrelevant to the public interest and disregard them
 - identify factors in favour of disclosure of information
 - identify factors in favour of nondisclosure of information; and
 - decide whether, on balance, disclosure of the information would be contrary to the public interest.
28. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of public interest lies in a particular case. I have considered these lists, together with all other relevant information, in reaching my decision. I have applied the IP Act's pro-disclosure bias²³ and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.²⁴

¹⁹ Sections 47(3)(b) and 49 of the RTI Act.

²⁰ This means that OIC stands in the shoes of the agency and can make any decision that was open to the agency to make. OIC's role is to conduct a fresh review of the relevant facts and law and make a fresh decision. See *V45 and Queensland Police Service* [2021] QICmr 30 (16 June 2021) at [17].

²¹ Section 118 of the IP Act particularly notes the Information Commissioner has, in an addition to any other power, the power to review any decision that has been made by the agency or Minister in relation to the access application and the power to decide any matter in relation to the access application that could, under the RTI Act, have been decided by an agency or Minister.

²² Section 49(3) of the RTI Act.

²³ Section 64 of the IP Act.

²⁴ Section 47(2) of the RTI Act.

Applicant's submissions

29. The applicant provided lengthy submissions in support of his claim that disclosure of the Informant Information was in the public interest.²⁵ I have considered these submissions to the extent they are relevant to determining this issue, and set out the relevant parts below:

The information I seek in fact involve grounds for criminal chargers of the public officials that are involved as there is factual evidence for legal remedy including;

Collusion – *working together in secret for a dishonest purpose.*

Corrupt conduct can involve collusion between public officials and external parties.

There is facts that a level of nepotism from officers involved and senior management of the QPS

Extorsion/Blackmail – *making demands for my resignation with threats of criminal prosecution making a gain or causing a loss by threatening to cause detriment.*

Perverting the course of justice – *QPS obstructed justice by fabricating or disposing of evidence, intimidating or threatening a witness this can be proven by the QPS withholding over 389 pages of information from the Queensland Civil and Administrative Tribunal when I challenged the matter in the tribunal, disregarding my request for my information, delaying due process -*

Abuse of function- *where a public official intentionally acts or fails to act in his discharge of his or her function s for the purpose of detriment/benefit to others.*

Corruption in the public sector *in fact weakens public confidence in Government and is defined as the dishonest or biased exercise of public official duties.*

....

The basis of the false accusation of the matters involving the [redacted] matter can be proven by the attached one of the affidavits of a serving QPS officer (I have over 5 statements that all corroborate) that in fact I had disclosed and avoided conflict of interest in my legal purchase [redacted] and in fact disclosed to my direct supervisor ..that my intent to purchase [redacted] to ensure that no conflict of interest would occur and I had taken all reasonable steps to avoid any conflicts of Interest.

...

These actions can in fact be put forth as evidence that not only was I subject to a level of reprisal and bullying and harassment but also due process was in fact not afforded to me as previously stated below;

....

- *Disclosure of the information is reasonably expected to evidence or likely to identify that the QPS and ESC and its staff have, engaged in illegal, unlawful, inappropriate, unfair or the alike conduct, and have maliciously or in bad faith.*
- *Disclosure of the information could reasonably be expected to contribute to the enforcement of criminal law.*
- *Disclosure of the information could be expected to contribute to the administration of justice generally, including procedural fairness.*

The content of this fabricated story emailed to [senior QPS officer] does carry the required elements and ground on the following criminal offences under law. And there for any factors of nondisclosure cannot be applied in this instance.

...

The function of the Office of Information Commission is not to determine legal outcomes but to ensure all relevant information is released by the agency for the purpose of the correction of law.

...

Evidence is not only determined by the content it is the fact the ability no matter how minor the information it is essential for transparency in the matter on foot and further shows that QPS

²⁵ By emails on 27 February 2022 and 21 April 2022.

proceeded to act beyond the function and I assert once again the High Court emphasises the importance of the purpose and objects of an Act in assessing the public interest under that Act.

...

The irrelevant factors considered include:

- *Disclosure of the information could reasonably be expected to cause embarrassment to the Government (QPS and ESC) or loss of confidence, these factors are in fact irrelevant in the decision makers consideration of the public interest test due to the conduct by the QPS and ESC in which is relying on for its assertion of the exemption.*

...

I will be seeking this matter to be addressed with in the Commission of Fair work as the conduct and deceptive approach, lack of accountability from the QPS will be scrutinised during this process, but in further action I will be making submissions to the Queensland Integrity Commissioner and a Ministerial request for a Public Information Discloser for the matter to be presented Attorney Generals office for review to consider.

[sic]

30. The applicant also submitted that multiple QPS employees and officers related to these matters were liable for prosecution and were in 'breach of conduct' under sections 131 and 92A of the *Criminal Code Act 1899* (Qld) (**CC Act**).

Findings

31. Regarding the applicant's submissions, I note that section 3(2) of the IP Act provides that it '*... must be applied and interpreted to further the primary object*'.²⁶ Section 3(1)(b) of the IP Act provides that its primary object includes to provide for '*a right of access to, and amendment of, personal information in the government's possession or under the government's control...*'. However, this right is not absolute. Section 3(1)(b) itself specifies that the right of access to personal information applies '*...unless, on balance, it is contrary to the public interest to give the access or allow the information to be amended*'. Section 40 of the IP Act further provides that '**[s]ubject to this Act, an individual has a right to be given access under this Act to documents of an agency [or Minister] to the extent they contain the individual's personal information.**' The rights of access and amendment enumerated in the IP Act are subject to the Act itself. The provisions of section 67(1) of the IP Act and 47 of the RTI Act uphold the right of access to personal information provided for in sections 3(1)(b) and 40 of the IP Act, whilst simultaneously ensuring that the right of access to personal information is limited and balanced by the public interest.
32. Consequently, I am satisfied that in applying sections 64 and 67(1) of the IP Act and sections 47(3)(b), 49 and schedule 4 of the RTI Act to my assessment of whether disclosure of the Informant Information would, on balance, be contrary to the public interest, I am acting consistently with the object of the IP Act.

Irrelevant Factors

33. The applicant submits that considering whether disclosure of the Informant Information could reasonably be expected to cause embarrassment to, or loss of confidence in, the Government would be to take into account an irrelevant factor in the application of the public interest balancing test.²⁷
34. I have considered the applicant's submission. I cannot identify how disclosure of the Informant Information would cause embarrassment to QPS, or cause a loss of

²⁶ Also, section 14A(1) of the *Acts Interpretation Act 1954* (Qld) provides that '[i]n the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation'.

²⁷ Schedule 4, part 1, item 1 of the RTI Act.

confidence in QPS given that it would demonstrate that QPS and its employee complied with their obligations under the *Police Service Administration Act 1990* (Qld) (**PSA Act**) (discussed further below). Nonetheless, I agree that this factor, if it applied, would be irrelevant to considering the public interest in making this decision and I have not considered this factor nor any other factor in schedule 4, part 1 of the RTI Act.

Factors favouring disclosure

35. I am satisfied that disclosing the Informant Information would enhance QPS's accountability and transparency, and reveal background or contextual information that informed QPS's decision to investigate the applicant.²⁸ In determining the weight that applies to these factors, I have considered the information already disclosed by QPS, including the full substance of the email in which the Informant Information appears²⁹ and the subsequent email trail, including recipients; the significant number of pages located and disclosed in this matter; and information disclosed in the applicant's previous related review (OIC reference: 314889). On the material before me, I consider QPS has significantly discharged the public interest obligations of accountability and transparency, as well as disclosing almost all of the information that informed QPS's decision to investigate the applicant, and therefore low weight applies to these factors favouring disclosure.
36. I have considered the applicant's submissions regarding misconduct or negligent, unlawful or improper conduct (**Misconduct Factor**), or possible deficiencies in conduct by an officer or agency (**Deficient Conduct Factor**).³⁰ By way of supporting evidence, the applicant provided a copy of an affidavit from a QPS Officer (**Constable X**)³¹ and stated that:
- The basis of the false accusation of the matters involving the [redacted] can be proven by the attached one of the affidavits of a serving QPS officer (I have over 5 statements that all corroborate) that in fact I had disclosed and avoided conflict of interest in [redacted] and in fact disclosed to my direct supervisor .. that my intent [redacted] to ensure that no conflict of interest would occur and I had taken all reasonable steps to avoid any conflicts of Interest.*
- [sic]
37. Relevantly, the wording of the Misconduct Factor and Deficient Conduct Factor require the Informant Information *itself* to contribute to the public interest factor. Accordingly, in terms of the Misconduct Factor, it is necessary to consider if the Informant Information *itself* could reasonably be expected to reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct. Given the Informant Information is limited to the first and last name of the individual who reported the allegations to the Acting Inspector, I am satisfied the Misconduct Factor is not enlivened by the Informant Information.
38. I have reviewed the affidavit of Constable X provided by the applicant, and the applicant's submissions about the affidavit. However, the affidavit does not provide evidence 'proving...false accusations' by QPS, nor does it enliven the Deficient Conduct Factor, which, as noted above, requires the Informant Information *itself* to allow or assist inquiry into possible deficiencies of conduct.
39. In assessing whether the Deficient Conduct Factor applies to favour disclosure of the Informant Information, I have also considered section 6A.1 of the PSA Act, which

²⁸ Schedule 4, part 2, items 1 and 11 of the RTI Act.

²⁹ Page 336.

³⁰ Schedule 4, part 2, items 6 and 5 respectively of the RTI Act.

³¹ A pseudonym.

imposes a positive duty on all officers and staff members to report any misconduct or conduct subject to disciplinary action, if they know or reasonably suspect the conduct has occurred. An officer or employee complying with this legal duty and reporting the alleged conduct or misconduct, is not conduct that amounts to a possible deficiency in conduct by an officer.

40. While the Deficient Conduct Factor has a lower threshold than the Misconduct Factor, I am satisfied that disclosure of the Informant Information does not allow or assist inquiry into possible deficiencies of conduct or administration by QPS or a QPS employee. The applicant has submitted he requires the information for a public interest disclosure (**PID**) to the Attorney-General and a submission to the Queensland Integrity Commissioner (**QIC**). The applicant has received hundreds of pages of information from QPS, including the content of many emails and the content of the original notification email, in this review and a previous review. The disclosed information is sufficient for the applicant to assess whether he has grounds to make a PID or submission to the QIC. Most importantly, the Attorney-General, the QIC, and most other regulatory bodies, can access the Informant Information if needed in order to evaluate a complaint by the applicant – the applicant does not require the Informant Information to allow or assist inquiry into possible deficiencies of conduct by a QPS employee. I am satisfied that disclosure of the Informant Information would not advance the Deficient Conduct Factor.
41. The applicant also submitted that disclosure of the Informant Information would advance the administration of justice, both generally and for him personally (collectively the **Administration of Justice Factors**).³² In addition to the PID and QIC submission he proposes to make, the applicant submitted he requires the Informant Information to provide to the Fair Work Commission. Accordingly, I have considered whether the Administration of Justice Factors are enlivened by the Informant Information and, if so, the weight to be afforded.
42. The matter of *Willsford and Brisbane City Council* sets out the three factors that must apply in order for the public interest factor relating to the administration of justice for a person to apply.³³ In order for this factor favouring disclosure to apply to information, three criteria must all be satisfied:³⁴
 - 1) loss or damage or some kind of wrong had been suffered in respect of which a remedy was, or might be, available under the law
 - 2) the applicant had a reasonable basis for seeking to pursue the remedy; **and**
 - 3) disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy was available, or worth pursuing.
43. While there is no requirement on applicants to provide reasons for seeking access to information, in matters where the public interest balancing test is required, it may benefit the applicant to provide information and submissions to establish their argument in favour of disclosure of the information.³⁵ The applicant appears to submit he seeks to pursue an unfair dismissal application, a PID and a submission to the QIC.
44. While I accept the applicant considers a legal wrong, loss or damage has been suffered with respect to his separation of employment from QPS, it is doubtful whether the actions

³² Schedule 4, part 2, items 16 and 17 of the RTI Act.

³³ (1996) 3 QAR 368 (*Willsford*) decided under the now repealed FOI Act.

³⁴ *Willsford* at [17].

³⁵ I issued my preliminary view to the applicant on 21 January 2022 and on 8 April 2022. The applicant made submissions in response on 27 February 2022 and 21 April 2022.

proposed by the applicant at [41] are still available to him³⁶ or whether some of these actions could even be properly considered a remedy. It is also arguable whether there is a reasonable basis for seeking to pursue said remedy. As the *Willsford* criteria must all be met in order to apply to favour disclosure of the Informant Information, I have considered the third *Willsford* criteria below.

45. If, as the applicant submits, he requires the Informant Information to pursue or evaluate whether he may pursue remedies, the Informant Information must comprise information that would assist him to pursue the remedy, or evaluate whether a remedy is available or worth pursuing. The applicant has not provided evidence or submissions demonstrating how the Informant Information could assist the applicant in pursuing the suggested remedies, (especially the unfair dismissal application) or assist the applicant in evaluating whether the remedies are available or worth pursuing. In my opinion, if the applicant wishes to pursue an unfair dismissal application, or a PID or QIC submission, he already possesses sufficient information to do so, especially noting the hundreds of pages of investigation documents released to the applicant in this review and his previous review.³⁷
46. I consider that the third *Willsford* criteria is not made out. Subsequently I am satisfied the administration of justice for a person factor is not enlivened and therefore does not apply to favour disclosure of the Informant Information.
47. In respect of the applicant's submission that disclosure of the Informant Information would advance the administration of justice generally, including procedural fairness, in the context of a workplace investigation where the applicant is the subject officer, this generally requires the person to be:
 - adequately informed of the allegations made against them
 - given an opportunity to respond to the allegations; and
 - informed of the outcome of the investigation.³⁸
48. The documents demonstrate the applicant was advised of the allegations regarding the various matters;³⁹ the applicant responded to those allegations;⁴⁰ and was advised of the outcome of the investigation.⁴¹ I have given consideration to the applicant's submissions regarding the investigation and his resignation from QPS, but in respect of the specific Informant Information I am not persuaded that QPS has failed to provide the applicant with procedural fairness, such that the Informant Information is required to be disclosed. I am satisfied this factor does not apply to favour disclosure of the Informant Information.
49. The applicant also submitted that disclosure of the Informant Information could reasonably be expected to contribute to the enforcement of the criminal law.⁴² In the context of his submissions, I understand the applicant considers certain QPS officers have committed specific crimes under the CC Act. Even if this is correct (and I make no finding on this submission by the applicant) I am not persuaded that disclosing the

³⁶ Noting that unfair dismissal proceedings in Queensland must be lodged within 21 days of the dismissal taking effect, or if the commission allows a further period, pursuant to section 310(1) and (2) of the *Industrial Relations Act 2016* (Qld).

³⁷ It is arguable whether making a PID or lodging an application with the QIC properly constitute remedies for the purposes of the *Willsford* criteria, but I have not made a finding on this issue as it is sufficient that the applicant has identified one remedy of making an unfair dismissal application.

³⁸ *Gapsa and Department of Transport and Main Roads* (Unreported, Queensland Information Commissioner, 6 September 2013); and *ODWOPH and Queensland Bulk Water Supply Authority trading as Seqwater* [2017] QICmr 3 (13 February 2017) at [28].

³⁹ A suspension notice and show cause notice dated 9 March 2017 at pages 360-361 in this review.

⁴⁰ The applicant's written response (signed but undated) formed part of the documents located in external review 314889 (file 2, pages 146-165).

⁴¹ I note the related matter before the Queensland Civil and Administrative Tribunal (**QCAT**) and comments and declarations published in that matter but have not included these in this decision to protect the personal information of the applicant.

⁴² Schedule 4, part 2, item 18 of the RTI Act.

Informant Information would contribute to enforcement of the criminal law. QPS is the primary law enforcement agency in Queensland. The applicant has not provided evidence substantiating his assertions about alleged criminal conduct by QPS officers, nor provided any evidence he has reported the matter to QPS or the Crime and Corruption Commission (**CCC**) for investigation.

50. Even if the applicant decided to report his concerns to QPS and/or the CCC, both agencies have access to, or currently possess, the Informant Information, as it forms part of the CCC monitored Ethical Standards Command (**ESC**) investigation into the applicant's acquisition of an item while a QPS officer. The decision by QPS to refuse the applicant access to the Informant Information is no obstacle to the enforcement of the criminal law in this matter, and disclosure of the Informant Information to the applicant would not contribute to the enforcement of the criminal law. I am satisfied this factor does not apply to the Informant Information.
51. I have carefully considered the Informant Information and submissions from the applicant and have not identified any other public interest factors in favour of disclosure.

Factors favouring nondisclosure

52. As the Informant Information is the personal information⁴³ of another individual two public interest factors favouring nondisclosure are enlivened, namely, where disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy (**Privacy Factor**), and reasonably be expected to cause a public interest harm by disclosing the personal information of an individual other than the applicant (**Personal Information Factor**).⁴⁴
53. In considering the weight that should be afforded to the Privacy Factor, I acknowledge that the name of a public sector employee on routine work documents would usually be considered routine personal work information.⁴⁵ In this matter, while the Informant Information is the first and last name of a QPS employee, the Informant Information appears in the context of the person 'informing' on the applicant, in a document forming part of a workplace investigation into the applicant, which is not an ordinary or routine part of the work of police officers (despite the obligation imposed by section 6A.1 of the PSA Act). Therefore, I am satisfied the Informant Information is not *routine* personal work information in this context and can be regarded as personal information for the purpose of the Privacy Factor and Personal Information Factor.
54. The concept of privacy is not defined in the IP Act, however, it can be viewed as the right of an individual to preserve their personal sphere from the interference of others.⁴⁶ I am satisfied that a person's involvement or implication in a workplace misconduct investigation is a matter falling within their private sphere.⁴⁷ For these reasons, I find that disclosure of the Informant Information would prejudice the right to privacy of the individual and I afford the Privacy Factor significant weight in favour of nondisclosure.
55. Similarly, I am satisfied that disclosing the Informant Information to the applicant, in the context of the workplace investigation and informant email in which it appears, would reasonably be expected to cause a public interest harm by disclosing personal information of an individual other than the applicant. There is a significant public interest

⁴³ Section 12 of the IP Act.

⁴⁴ Schedule 4, part 3, item 3 and schedule 4, part 4, section 6 of the RTI Act.

⁴⁵ *Kiepe and the University of Queensland* (Unreported, Queensland Information Commissioner, 1 August 2012) at [19].

⁴⁶ Paraphrasing the Australian Law Reform Commission's definition of the concept, in *For your information: Australian privacy law and practice Australian*, Law Reform Commission Report No. 108 released 11 August 2008 at [1.56].

⁴⁷ *A88 and Queensland Police Service* [2020] QICmr 2 (30 January 2020) at [36]-[38].

in safeguarding the personal information and right to privacy of individuals, and I afford the Personal Information Factor significant weight.

Balancing the public interest

56. I have applied the pro-disclosure bias to the Informant Information.⁴⁸ In weighing the factors favouring disclosure, I note the low weight applied to the factors advancing QPS accountability and transparency.⁴⁹ In weighing the factors favouring nondisclosure, I note the significant weights of the Privacy Factor and the Personal Information Factor.⁵⁰
57. The nondisclosure factors outweigh the disclosure factors and are determinative. Accordingly, I find that QPS is entitled to refuse access to the Informant Information on the grounds that disclosure would, on balance, be contrary to the public interest.⁵¹

Nonexistent or unlocatable documents

Relevant law

58. Under the IP Act a person has a right to be given access to their personal information held by government.⁵² However, this right is subject to provisions of the IP Act and RTI Act, including the grounds on which an agency may refuse access to documents.⁵³ Relevantly, access to a document may be refused if the document is nonexistent or unlocatable.⁵⁴
59. To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors:⁵⁵
- the administrative arrangements of government
 - the agency's structure
 - the agency's functions and responsibilities
 - the agency's practices and procedures (including but not exclusive to its information management approach); and
 - other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates.
60. When proper consideration is given to relevant factors, it may not be necessary for searches to be conducted. However, if searches are relied on to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case as the search and enquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances.
61. To determine whether a document exists, but is unlocatable, the RTI Act requires consideration of whether there are reasonable grounds to be satisfied that the requested

⁴⁸ Section 64 of the IP Act.

⁴⁹ Schedule 4, part 2, items 1 and 11 of the RTI Act.

⁵⁰ Schedule 4, part 3, item 3 and schedule 4, part 4, section 6 of the RTI Act.

⁵¹ Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

⁵² Section 40 of the IP Act.

⁵³ Including section 47(3) of the RTI Act.

⁵⁴ Sections 47(3)(e) and 52(1) of the RTI Act.

⁵⁵ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (*Pryor*) at [19] which adopted the Information Commissioner's comments in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009).

document has been or should be in the agency's possession; and whether the agency has taken all reasonable steps to find the document.⁵⁶

62. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate documents applied for by applicants.⁵⁷ Generally, the agency that made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.⁵⁸ However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable grounds to be satisfied that the agency has not discharged its obligation to locate all relevant documents. Suspicion and mere assertion will not satisfy this onus.⁵⁹

Applicant's submissions

63. The applicant made the following submissions in support of his position that QPS's searches for responsive documents have not been thorough, targeted and reasonable:⁶⁰

The only reason these searches have been conducted is solely based on QPS failing to disclose all relevant information upon my first application for information.

The reluctance and total; disregard for due process has been constantly flaunt by the QPS to follow due process in this matter.

The statement that all reasonable steps is in fact offensive give the lengthily time frame afforded by myself to the QPS and the OIC in this matter, further this time frame fails any confidence that the public would expect.

I am not seeking information in regards to other officers only the information that pertains to me and to ensure misconduct and failing of public duty is corrected.

The facts of this matter is no longer under investigation there for the information I seek legally can be released.

[sic]

64. The applicant made submissions throughout the review process generally concerning QPS's conduct in investigating him, the circumstances of his employment separation from QPS, and QPS's subsequent conduct in its management of his access applications and external reviews.⁶¹ I have considered the applicant's submissions to the extent they are relevant to determining the issue of the existence, or otherwise, of further documents.

Findings

65. QPS stated it undertook searches of two email systems to locate responsive documents at the behest of this Office. QPS submitted this was because the application timeframe traversed a changeover in QPS's email system. QPS located 362 pages of emails as a result of these searches.

⁵⁶ Pryor at [20]-[21].

⁵⁷ Section 137(2) of the IP Act. The Information Commissioner also has power under section 115 of the IP Act to require additional searches to be conducted during an external review.

⁵⁸ Section 100(1) of the IP Act.

⁵⁹ Parnell and Queensland Police Service [2017] QICmr 8 (7 March 2017) at [23]; Dubois and Rockhampton Regional Council [2017] QICmr 49 (6 October 2017) at [36]; Y44 and T99 and Office of the Public Guardian [2019] QICmr 62 (20 December 2019) at [38].

⁶⁰ By email on 21 April 2022.

⁶¹ By email on 31 August 2021, 10 September 2021, 14 and 21 December 2021, 27 February 2022 and 21 April 2022.

66. The applicant identified possible missing emails after reviewing the released documents,⁶² and this was relayed to QPS.⁶³ QPS undertook further searches, located a further 7 pages of emails and submitted the following:⁶⁴

The Queensland Police service conducted further searches (tracer requests) with the Queensland Police Systems Audit & Investigation Unit (SAIU) for the potential of locating any further information regarding [applicant's] request.

....

SAIU has provided the advice that as outlook 365 online migrated from late 2017, prior to this the QPS did not archive emails, so QPS are satisfied we have exhausted all searching resources and any further emails are unlocatable and exempt under sections 47(3)(e) and 52 of the RTIA.

67. In considering whether QPS has taken reasonable steps to locate responsive documents, I have had regard to QPS's systems, the scope of the access application being limited to emails, the located documents, the applicant's submissions and QPS's submission, especially in respect of QPS's changeover to Office365 in late 2017 and the fact that emails prior to this date were not archived. Given the application solely sought access to emails; QPS has searched its two email systems, twice; QPS has located 369 pages of emails in response; and QPS has provided an explanation of why further emails, if they existed, are unlocatable, I consider the steps taken by QPS to locate documents have been reasonable, and the explanation as to why any further emails predating late 2017 are unlocatable or nonexistent is credible.
68. The applicant's submissions suggest a misconception of the legislative provision – the wording '*reasonable steps*' is taken directly from the provision and refers solely to the steps taken by the agency to identify and locate responsive documents. It is also a finding, or view, at a point in time. I am required to make a finding in this decision on whether I am satisfied QPS has satisfied its obligations to take all reasonable steps to identify and locate responsive documents at this time. I acknowledge the applicant has significant concerns about QPS's conduct regarding his employment and its processing of his access applications and conduct as an external review participant, however, based on the facts as they stand at the time of writing this decision, I am satisfied that QPS has taken all reasonable steps to locate responsive documents.
69. In conclusion, I am satisfied that QPS has taken all reasonable steps to locate responsive documents; there is a reasonable basis to conclude further documents do not exist or cannot be located; and consequently, any further documents may be refused as nonexistent or unlocatable.⁶⁵

DECISION

70. I set aside QPS's decision refusing to deal with the access application. In substitution I find that:
- the Disciplinary Information is irrelevant to the application and may be deleted pursuant to section 88 of the IP Act
 - access to the Informant Information is refused as disclosure would, on balance, be contrary to the public interest, pursuant to section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act; and

⁶² By email on 31 August 2021.

⁶³ By email on 21 September 2021.

⁶⁴ By email on 2 December 2021.

⁶⁵ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

- QPS has taken reasonable steps to identify and locate documents responsive to the application, and access to any further documents may be refused as nonexistent or unlocatable pursuant to section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

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

Assistant Information Commissioner Corby

Date: 29 June 2022

APPENDIX**Significant procedural steps**

Date	Event
26 August 2020	OIC received the application for external review.
27 August 2020	OIC requested preliminary information from QPS.
23 October 2020	OIC accepted the application for external review.
13 and 20 November 2020	The applicant agreed to narrow the scope of his access application.
30 November 2020	OIC conveyed the new scope to QPS and requested searches to identify and locate responsive documents.
22 December 2020	OIC updated the applicant.
11 January, 1 and 8 February 2021	OIC contacted QPS about the overdue response.
1 February 2021	OIC updated the applicant.
9 February 2021	OIC issued a Notice to QPS under section 116 of the IP Act, with respect to the documents, submissions and search records requested on 30 November 2020.
3, 4 and 18 March 2021	OIC contacted QPS about the overdue response.
17 March 2021	OIC received submissions from the applicant.
18 March 2021	OIC received an update from QPS.
22 March 2021	OIC updated the applicant.
23 March 2021	OIC received the information in issue from QPS.
29 April 2021	OIC requested the overdue submissions from QPS.
10 May 2021	OIC updated the applicant.
20 May 2021	QPS requested an extension of time.
21 May 2021	OIC approved an extension of time for QPS.
15 June 2021	OIC contacted QPS about the overdue response.
6 July 2021	OIC received the requested submissions from QPS.
12 July 2021	OIC asked QPS to disclose information to the applicant. OIC updated the applicant and invited his submissions on particular information refused by QPS.
16 August 2021	OIC issued a letter to the applicant finalising the review informally, as no response was received by or after the due date. The applicant responded immediately to advise of the oversight and request further time to consider the documents disclosed by QPS. OIC granted an extension of time to the applicant and did not close the file.
31 August 2021	OIC received the applicant's submissions.
10 September 2021	OIC received a telephone call from the applicant.

Date	Event
21 September 2021	OIC requested further searches from QPS, and the outstanding search information requested on 30 November 2020. OIC updated the applicant.
5 October 2021	OIC received a telephone call from the applicant.
21 October 2021	OIC contacted QPS about the overdue search response.
8 November 2021	OIC issued a second Notice to QPS under section 116 of the IP Act, with respect to the searches requested on 21 September 2021, and original search information requested on 30 November 2020 and by Notice on 9 February 2021. OIC updated the applicant.
25 November 2021	QPS requested an extension of time, which OIC granted.
2 December 2021	OIC received the requested search information from QPS.
14 December 2021	OIC received correspondence from the applicant.
21 December 2021	OIC updated the applicant.
21 January 2022	OIC issued a preliminary view to the applicant. OIC requested QPS disclose additional documents to the applicant.
7 February 2022	QPS disclosed additional documents to the applicant.
27 February 2022	OIC received submissions from the applicant, including a request for a formal decision.
6 April 2022	OIC issued a further preliminary view to the applicant.
21 April 2022	OIC received further submissions from the applicant.
25 May 2022	OIC advised the applicant the review would be finalised by formal decision.