



## Office of the Information Commissioner Queensland

### Decision and Reasons for Decision

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<b>Application Number:</b>	<b>310223</b>
<b>Applicant:</b>	<b>McKinnon</b>
<b>Respondent:</b>	<b>Department of Communities</b>
<b>Decision Date:</b>	<b>7 June 2011</b>
<b>Catchwords:</b>	<b>RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION – REFUSAL OF ACCESS – Grounds on which access may be refused – section 47(3)(b) of the <i>Right to Information Act 2009</i> (Qld) – to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest under section 49 of the <i>Right to Information Act 2009</i> (Qld)</b>

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## REASONS FOR DECISION

### Summary

1. The applicant is a former employee of the Department of Communities (**Department**) who seeks access to a broad range of information under the *Right to Information Act 2009* (Qld) (**RTI Act**) including:
  - information concerning a complaint made by the applicant about a co-worker
  - information concerning complaints made by others about the same co-worker and others
  - the applicant's personnel file
  - emails, notes and memos between the investigator of the applicant's complaint and others
  - all emails between various co-workers of the applicant between certain dates
  - a copy of a particular expression of interest; and
  - "[a] copy of the HR records ... received and the number of applications HR received ..." in response to the particular expression of interest.
2. As set out in its decision dated 14 May 2010, the Department located 18 relevant files<sup>1</sup> and decided to:
  - grant full access to 343 pages and partial access to 85 pages
  - refuse access to 400 pages in full; and
  - omit 136 pages which are copies of relevant documents, omit 17 pages in their entirety and 4 partial pages which it found irrelevant to the application and omit 214 pages which fall outside scope of the access application.
3. The applicant applied for external review of the Department's decision:
  - refusing access to certain information on the basis that its release would, on balance, be contrary to public interest; and
  - omitting pages on the basis that they are copies, contain irrelevant information or fall outside the scope of the access application.
4. During the course of this review, the applicant confirmed that he does not seek access to:
  - the full personnel file of the subject of his complaint
  - addresses or phone numbers of other individuals; or
  - information of an administrative nature in relation to the secondment of a third party.
5. As a result of informal negotiations conducted by this Office during the course of this review, the Department agreed to release additional information including information the disclosure of which it previously found would, on balance, be contrary to the public interest including:
  - the findings of the Department's investigation into the complaint lodged by the applicant about a co-worker
  - information in the Department's investigation report which was already known to the applicant (as he was the relevant complainant)

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<sup>1</sup> The information provided to this Office consists of 19 files.

- letters which the Department had previously provided to the applicant prior to the RTI application
- some routine personal work information; and
- information regarding the successful candidate in a selection process in which the applicant was involved.<sup>2</sup>

6. After carefully reviewing all of the relevant information before me and for the reasons set out below, I am satisfied that:

- the information identified by the Department as copies of relevant documents and information falling outside or irrelevant to the scope of the application is properly characterised; and
- access to the remaining information to which the Department refused access, can be refused under sections 47(3)(b) and 49 of the RTI Act as its disclosure would, on balance, be contrary to public interest.

### **Reviewable decision**

7. The decision under review is the Department's decision dated 14 May 2010.

### **Background**

8. Significant procedural steps are set out in the appendix to this decision.

### **Copies and information falling outside scope of access application**

9. I have carefully reviewed the documents which the Department identified as copy documents and am satisfied that:

- these documents are properly characterised; and
- one copy of each document has been considered for release by the Department and forms part of the information in issue in this review.

10. I have also carefully considered the information identified by the Department as outside or irrelevant to the scope of the access application including:

- file covers and page dividers
- an unpopulated file sheet
- an internal mail envelope
- attendance sheets for an unrelated third party
- post application documents<sup>3</sup> (created after the applicant lodged his access application on 23 February 2010); and
- information relating to the human resource management of unrelated third parties which is not sought by the applicant.<sup>4</sup>

11. On the information before me, I am satisfied that the information identified as outside or irrelevant to the scope of the access application is properly characterised and does not form part of the information in issue in this review.

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<sup>2</sup> The Department also agreed to release the terms and conditions of a lease held by the applicant which it originally found was irrelevant.

<sup>3</sup> See section 27(1) of the RTI Act which provides that an access application is taken only to apply to documents that are, or may be, in existence on the day the application is received.

<sup>4</sup> Which appears in documents which also refer to the applicant (for example, an email attaching relieving authorities for the applicant and an unrelated third party).

## Information in issue

12. I have categorised the information remaining in issue in this review (**Information in Issue**) in the following manner:

Category	Description
A	information relating to complaints
B	information contained on personnel files
C	information relating to a specific recruitment process
D	information relating to general human resource matters

## Summary of Department's decision

13. In summary, the Department decided that release of the Information in Issue would, on balance, be contrary to the public interest on the following basis:
- while people have a right to seek access to information held by the government, individuals have a right to privacy regarding their personal information
  - there are details contained in the Information in Issue which are clearly the personal information of other people and although individuals can share day to day experiences, the details of each individual is not necessarily shared with other work colleagues
  - the disclosure of particular aspects of an individual's personal information contained in the documents could also reasonably be expected to cause a public interest harm if disclosed or it may damage a person's reputation in their community; and
  - on balance, disclosure of this information is contrary to public interest.

## Summary of applicant's submissions

14. The applicant provided submissions in support of his case including:
- *If the comments, beliefs and personal opinions [contained within the Information in Issue] amount to bullying and harassment of other staff members, my submission is that the public interest test should be applied in an objective manner.*
  - *Comments, beliefs and personal opinions are tantamount in a workplace to ensure their compliance with other legislation i.e. Workplace Health and Safety Act 1995, Anti-Discrimination Act 1991, Criminal Code Act 1899 to name but a few. If it can be found that there [are] offences contained within the comments, beliefs and personal opinions, public interest warrants the disclosure as there is limited protection afforded under these [other] Acts.*
  - *I have a right to discredit any comments, beliefs or opinions about myself.*
  - *I fail to understand why the Department has previously released information concerning the personal details of another officer ... concerning comments and beliefs but has seen fit not to disclose other persons comments, I can infer from*

*this, that these documents contain information of which the Department is seeking to refuse access for reasons of litigation.*

- *The reasons for the omitting of information is insufficient. I understand that personal phone numbers addresses and the like can be omitted and do not require information of the sort. I understand emails and documents containing myself and the actions that I took to have the matter reported have been omitted without reason.*
- *A substantial amount of information of which I had requested has not been provided as the Department is deliberately withhold[ing] information ... which it knows will be the subject of further legal proceedings.*
- *I would appreciate an external review to be conducted of the documents and determine whether on balance the disclosure should be made.*

### **Issue for determination**

15. The issue for determination in this review is whether the Department was entitled to refuse access to the Information in Issue on the basis that its disclosure would, on balance, be contrary to public interest under section 49 of the RTI Act.

### **Evidence relied upon**

16. In making this decision, I have taken the following into account:
  - the applicant's access application to the Department and application for external review to the Office of the Information Commissioner (**OIC**)
  - the Department's decision
  - the applicant's submissions
  - information provided by the Department
  - file notes of telephone conversations between OIC staff and the applicant
  - file notes of telephone conversations between OIC staff and Department staff
  - the Information in Issue
  - relevant provisions of the RTI Act and the *Information Privacy Act 2009* (Qld) (**IP Act**); and
  - previous decisions of the Information Commissioner as identified below.

### **Findings**

17. Under section 23 of the RTI Act, a person has a right to be given access to documents of an agency. However, this right is subject to a number of exclusions and limitations, including grounds for refusal of access.
18. Relevantly, sections 47(3)(b) and 49 of the RTI Act provide a ground for refusal of access where disclosure of information would, on balance, be contrary to public interest.

### **Factors favouring disclosure**

19. Taking into account all of the relevant information before me, I am satisfied that the factors favouring disclosure of the Information in Issue include the following, as disclosure could reasonably be expected to:

- promote open discussion of public affairs and enhance the accountability of government<sup>5</sup>
- advance the fair treatment of individuals in their dealings with agencies<sup>6</sup>
- reveal the reason for a government decision;<sup>7</sup> and
- contribute to the administration of justice (both for a person and generally) including procedural fairness.<sup>8</sup>

### **Factors favouring nondisclosure**

20. Taking into account all of the relevant information before me, I am satisfied that the factors favouring nondisclosure of the Information in Issue include:

- an individual's right to privacy should be protected<sup>9</sup>
- disclosure of an individual's personal information may cause a public interest harm;<sup>10</sup> and
- where information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct, disclosure of the information may prejudice the fair treatment of individuals whom the information is about.<sup>11</sup>

### **Application of factors to each category of Information in Issue**

#### **Category A – complaints**

21. The Category A information consists of information relating to complaints made by the applicant and third parties.

22. Specifically, the applicant seeks access to:

- *All emails sent between Larissa Denysiv, Yolonde Jaspersen, John Barron, Sue Elmes and Michael Bond concerning myself, investigations or complaints being conducted on [a particular officer] between 01/06/2009 – 14/02/2010*
- *All emails sent between Sue Elmes, Ken Ezzy, Neil Smith and Michael Bond concerning an investigation of which [a particular officer] is the subject officer including any emails naming myself*
- *Copy of the complaint referral of which I was the complainant and [a particular officer] the subject officer, including the CMC referral and subsequent response from the CMC*
- *The number and date of any complaints naming [a particular officer] as the subject officer and the alleged particulars of the complaint/s*
- *A copy of each complaint made naming [a particular officer] as the subject officer and the investigative file and findings reports including all documents on the RESOLVE database*
- *A copy of the bullying complaint made by Peter Grant including any emails, memos or handwritten notes provided by Peter Grant to Sue Elmes, Larissa Denysiv, Neil Smith or Lachlan Findlay*
- *The number of times and the dates John Barron has accessed timesheets of Matthew McKinnon through TADPOLE between 16/01/2009 and 14/02/2010*

<sup>5</sup> Schedule 4, Part 2, Factor 1 of the RTI Act.

<sup>6</sup> Schedule 4, Part 2, Factor 10 of the RTI Act.

<sup>7</sup> Schedule 4, Part 2, Factor 11 of the RTI Act.

<sup>8</sup> Schedule 4, Part 2, Factor 16 and 17 of the RTI Act.

<sup>9</sup> Schedule 4, Part 3, Factor 3 of the RTI Act.

<sup>10</sup> Schedule 4, Part 4, section 6(1) of the RTI Act.

<sup>11</sup> Schedule 4, Part 3, Factor 6 of the RTI Act.

- *All emails, notes and memos sent between the investigator of my complaint and the following persons – Manager of Ethical Standards, Larissa Denysiv, Michael Bond and Sue Elmes; and*
- *All emails sent between John Barron, Yolonde Jaspersen and Larissa Denysiv concerning Peter Grant and Ros Hart, Ros Harwood between 1 February 2009 and 14/02/2010.*

23. I will deal separately with information relating to the:

- complaint made by the applicant; and
- complaints made by others.

**Category A(i) – complaint made by applicant**

24. With respect to information relating to the complaint made by the applicant about a co-worker and the Department's subsequent investigation of that matter, I note that there is a strong public interest in:

- providing the applicant (who was the complainant) with sufficient information to be satisfied that the Department conducted a thorough investigation and reached a fair and realistic decision in response to the allegations;<sup>12</sup> and
- the Department being accountable to the applicant and providing an adequate explanation of the outcomes of the investigation and the basis for those outcomes.<sup>13</sup>

25. In this respect, I note that the Department has provided the applicant with relevant information about the investigation including:

- a partial copy of the relevant investigation report which sets out information including the investigation process, a list of agreed facts and the findings of the investigation
- a partial copy of the investigation plan and terms of reference for the investigation
- an internal email about the nature of the conduct alleged
- a partial copy of the applicant's transcript of interview; and
- a briefing note to the Deputy Director General about the commencement of the investigation.

26. The information which has not been released comprises the personal information of third parties.

27. Personal information is '*information or an opinion... whether true or not ... about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*'<sup>14</sup>

28. As the information to which the applicant seeks access arose in the context of his employment with the Department, it is necessary to consider whether the information

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<sup>12</sup> Schedule 4 part 2 item 16 of the RTI Act. See also *Villanueva and Queensland Nursing Council and Others* (2000) 5 QAR 363 at paragraphs 93, 137 and 141; *Daw and Queensland Rail* (Unreported, Queensland Information Commissioner, 24 November 2010) at paragraph 24 and *Jackson and Queensland Health* (Unreported, Queensland Information Commissioner, 10 February 2010) at paragraphs 42 and 47.

<sup>13</sup> See *Jackson and Department of Health* (Unreported, Queensland Information Commissioner, 10 February 2010) at paragraph 42.

<sup>14</sup> See section 12 of the IP Act.

which has not been released comprises the routine personal work information of public servants.

29. Routine personal work information is information that is solely and wholly related to the routine day to day work duties and responsibilities of a public service officer and includes:
  - work email addresses
  - work phone numbers
  - work classifications; and
  - incidental appearances of a person's name in work documents.
30. Information which is not wholly related to the routine day to day work activities of a public service officer is not routine personal work information, and includes:
  - complaints made by or about a public service officer
  - reasons why an officer is accessing leave entitlements of any kind or when they have taken, or intend to take, leave
  - opinions expressed at work that are not about work
  - opinions about another public service officer
  - details of the way in which an officer utilises relevant flexible working hours arrangements; and
  - opinions or reports about how well an officer performs their duties.
31. I note that the applicant does not seek access to the personal addresses or personal phone numbers of third parties.
32. The remaining information in this category comprises the following personal information of persons:
  - names
  - personal opinions, comments and beliefs; and
  - non routine work-related information about other public service officers.
33. I note the Department's view that although individuals may share day to day experiences, details are not necessarily shared with other work colleagues and that if the personal information of third parties was disclosed, it may damage their reputation.<sup>15</sup>
34. Taking into account all of the information available to me, I am satisfied that the information which has been disclosed to the applicant satisfies the public interest in:
  - affording the applicant (who was the complainant) procedural fairness
  - the Department being accountable to the applicant in relation to the handling of the investigation; and
  - the applicant being provided with an adequate explanation of the outcome of the investigation and the basis for the outcome.
35. As the remaining category A(i) information concerns persons other than the applicant and the interests of persons other than the applicant, I am satisfied that its disclosure:

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<sup>15</sup> See the Department's Decision dated 14 May 2010 at page 4.



- would disclose personal information of third parties (which is not routine personal work information) and could reasonably be expected to cause a public interest harm
- could reasonably be expected to prejudice the protection of those third parties' rights to privacy; and
- is, on balance, contrary to public interest.

**Category A(ii) – complaints made by others**

36. Specifically with respect to the information relating to complaints made by third parties, I note that:
- the applicant is neither the complainant nor the person about whom the complaints are made
  - the applicant is not entitled to an adequate explanation of the outcome of investigations relating to these complaints (made by third parties about persons other than the applicant); and
  - the complaint information may contain allegations, innuendo and rumour, which may not have been substantiated and disclosure of this type of information may lead to a number of interpretations and result in unfairness to persons referred to directly or indirectly within the information.
37. The remaining information in this category comprises the personal information of third parties, including:
- names
  - personal opinions, comments and beliefs; and
  - information about public service officers, other than the applicant, which is not work related.
38. I have carefully considered the applicant's submissions that comments, beliefs and personal opinions contained within third parties' personal information may amount to bullying and harassment of other staff members and that he has a right to be able to discredit any comments, beliefs or opinions about himself made by others.
39. However, I am also conscious that the jurisdiction of this Office does not extend to the conduct of investigations to determine whether information before it may offend the *Anti-Discrimination Act 1991* (Qld), *Workplace Health and Safety Act 1995* (Qld) or *Criminal Code Act 1899* (Qld).
40. Rather, the extent of this Office's jurisdiction on external review is limited to the assessment of relevant information to determine whether it qualifies for exemption from disclosure under the RTI Act.
41. As the remaining category A(ii) information concerns complaints made by third parties about persons other than the applicant and does not comprise routine work information, I am satisfied that its disclosure:
- would disclose personal information of third parties (which is not routine personal work information) and could reasonably be expected to cause a public interest harm
  - could reasonably be expected to prejudice the protection of those third parties' rights to privacy; and
  - is, on balance, contrary to the public interest.

### **Category B – personnel files**

42. The Category B information consists of information contained on personnel files.
43. Prior to the Department making its decision, the applicant agreed to amend his application to the extent that he no longer seeks the personnel file of a third party.<sup>16</sup>
44. The applicant continues to seek access to a copy of his own personnel file and the Department has provided the applicant with access to the majority of this information.
45. The information within this category which has not been released to the applicant comprises information about third parties who participated in an AO5 Compliance Support Officer recruitment process in which the applicant was the successful candidate.
46. With respect to recruitment process information, I note that:
  - an unsuccessful candidate will ordinarily be entitled to:
    - unedited access to information about themselves
    - short listing and interview scores, notes made by members of a selection panel and the panel's final report subject to the deletion of any information which would identify unsuccessful candidates
    - the identity of successful candidates (which will be publicly known)
  - the following personal information will ordinarily qualify for exemption from disclosure:
    - information of a private nature, such as home addresses and phone numbers, family details, educational achievements, hobbies
    - information that would disclose the identity of an unsuccessful candidate; and
  - release of referee reports will depend on whether or not the referee provided the report on the basis of an express or implied understanding that it would be treated in confidence.
47. I also note that the Department has released the following information to the applicant:
  - the Selection Committee Report (attaching the documents listed below) subject to the deletion of the name of a candidate who withdrew from the process
  - the Compliance Support Officer advertised position description
  - the Shortlisting Moderation Form (specifically, the applicant was given access to information relating to the assessment of his application, the ratings of the other candidates including their scores against each of the selection criteria which reveals that three candidates were shortlisted)
  - the Applicant Key Response Areas which lists the key skills, abilities, knowledge or experience that would need to be demonstrated for each selection criteria
  - the Individual Assessment in relation to the applicant (the applicant has not been provided with a copy of the Individual Assessment for the two other candidates who were short listed); and
  - the Comparative Assessment which includes the overall assessment and overall merit ranking of the applicant and the two other shortlisted candidates and comments in relation to the applicant (the applicant has not been provided with the names of, or comments about, the other candidates).

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<sup>16</sup> The applicant continues to seek information in relation to complaints made about this third party during the 18 month period preceding the RTI application (information which falls within Category A of this decision).

48. After carefully considering all of the information before me, I am satisfied that the information which has already been disclosed to the applicant satisfies the public interest in:
- the Department being accountable for adherence to merit and equity principles in selection processes
  - the Department being accountable to the applicant in relation to the handling of the recruitment process; and
  - the applicant being provided with an adequate explanation of the outcome of the recruitment process and the basis for the outcome.
49. I am also satisfied that as the applicant was the successful candidate in the recruitment process, he is not entitled to information which may identify the unsuccessful candidates.
50. On the basis of the matters set out above, I am satisfied that disclosure of the remaining category B information:
- would disclose personal information of third parties (which is not routine personal work information) and could reasonably be expected to cause a public interest harm
  - could reasonably be expected to prejudice the protection of those third parties' rights to privacy; and
  - is, on balance, contrary to public interest.

#### **Category C – specific recruitment process**

51. The Category C information consists of information relating to a specific recruitment process:
- *A copy of the Criminal History Screening Officer's AO6 position expression of interest advertised between February 2009 and August 2009 naming Brooke Kruger as the contact officer, and*
  - *A copy of the HR records including the number of applications Brooke Kruger received and the number of applications HR received for Criminal Screening Officers position.*
52. I have carefully considered the Category C information and note that, in relation to this recruitment process, the Department has released the following information to the applicant:<sup>17</sup>
- the document seeking Expressions of Interest in the relevant AO6 position within the Criminal History Screening Unit
  - parts of the Shortlist Assessment Form including all information relating to the assessment of the applicant's Expression of Interest, the ratings of the other candidates, which reveals their scores against each of the selection criteria and that only one candidate was shortlisted
  - the name of, and comments about, the successful candidate
  - parts of a file note recording discussion about the applicant's demonstrated suitability and relevant comments about the successful candidate (from a meeting between the Chair of the recruitment process and the Director and

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<sup>17</sup> Including information released during the external review process.

Assistant Director of the Department's Complaints, Compliance Investigations and Misconduct Prevention division)

- an email to the applicant attaching the Department's letter advising that he was unsuccessful in the recruitment process
- a reply email from the applicant requesting feedback in relation to the recruitment process and confirmation that this would be given; and
- a file note of a meeting between the Chair of the recruitment process and the applicant recording the feedback that the applicant was given.

53. The Category C information to which the applicant has been refused access comprises:

- names of the unsuccessful candidates
- written comments about each of the unsuccessful candidates; and
- personal information of the successful candidate.

54. On the basis of the matters set out above, I am satisfied that the information which has already been disclosed to the applicant satisfies the public interest in:

- the Department being accountable for adherence to merit and equity principles in selection processes
- the Department being accountable to the applicant in relation to the handling of the recruitment process; and
- the applicant being provided with an adequate explanation of the outcome of the recruitment process and the basis for the outcome.

55. I am also satisfied that disclosure of the remaining Category C information:

- would disclose personal information of third parties (which is not routine personal work information) and could reasonably be expected to cause a public interest harm
- could reasonably be expected to prejudice the protection of those third parties' rights to privacy; and
- is, on balance, contrary to the public interest.

#### **Category D – general human resource matters**

56. The Category D information consists of information relating to general human resource matters of the Department, specifically:

*All emails sent between John Barron, Yolonde Jaspersen and Larissa Denysiv concerning Peter Grant and Ros Hart, Ros Harwood between 1 February 2009 and 14/02/2010.*

57. The information falling within the scope of this part of the application includes correspondence about human resource matters including:

- the use of leave entitlements
- the use of flexible working hours arrangements; and
- staffing arrangements unrelated to the applicant.

58. Having carefully considered the Category D information, I am satisfied that it relates to individuals other than the applicant and consists of the personal information of those individuals which is not their routine personal work information.

59. On this basis, I am satisfied that disclosure of the remaining category D information:

- would disclose personal information of third parties (which is not routine personal work information) and could reasonably be expected to cause a public interest harm
- could reasonably be expected to prejudice the protection of those third parties' rights to privacy; and
- is, on balance, contrary to the public interest.

## **DECISION**

60. I vary the decision under review by finding that the Department is entitled to refuse access to the Information in Issue under sections 47(3)(b) and 49 of the RTI Act on the basis that disclosure would, on balance, be contrary to public interest.

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

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**Jenny Mead**  
**Right to Information Commissioner**

**Date: 7 June 2011**

**APPENDIX – Significant procedural steps**

<b>Date</b>	<b>Event</b>
23 February 2010	The applicant lodges his RTI application.
22 March 2010	The applicant agrees to re-scope his application.
14 May 2010	The Department issues its decision.
18 May 2010	The applicant applies to the OIC for external review of the decision.
27 May 2010	The Department provides OIC with copies of relevant documents.
9 June 2010	OIC informs the Department and the applicant that the external review application has been accepted.
23 June 2010	The Department provides OIC with copies of relevant documents.
29 October 2010	The Department agrees to release some additional information.
3 November 2010	OIC advises the applicant that the Department agrees to release some additional information and conveys a written preliminary view that disclosure of the remaining information would, on balance, be contrary to public interest. OIC invites the applicant to provide submissions in support of his case by 19 November 2010 if the view is contested.
19 November 2010	The applicant provides submissions in support of his case.
1 December 2010	The applicant provides a further submission in support of his case.
10 March 2011	OIC conveys a written preliminary view to the Department that further information contained within the Investigation Report should be released to the applicant and invites the Department to provide submissions in support of its case by 25 March 2011 if the view is contested.
21 March 2011	The Department advises OIC that it accepts that further information can be released to the applicant.
25 March 2011	OIC advises the applicant that the Department agrees to release further information contained in the Investigation Report and invites the applicant to provide any final submissions in support of his case by 8 April 2011.
6 April 2011	The applicant provides further submissions.
19 May 2011	OIC conveys a written preliminary view to the Department that further recruitment process information should be released to the applicant.
26 May 2011	The Department advises that it agrees to release the information in relation to a recruitment process.
31 May 2011	OIC advises Department that some additional routine work information should be released. The Department agrees.
6 June 2011	Applicant advises he does not seek access to administrative information related to secondment.