



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>H36 and Office of the Director of Public Prosecutions [2023] QICmr 25 (6 June 2023)</i></b>
<b>Application Number:</b>	<b>316880</b>
<b>Applicant:</b>	<b>H36</b>
<b>Respondent:</b>	<b>Office of the Director of Public Prosecutions</b>
<b>Decision Date:</b>	<b>6 June 2023</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION – request for applicant’s brief of evidence - personal information and privacy - whether disclosure would, on balance, be contrary to the public interest - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)</b> <b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE – request for applicant’s brief of evidence - 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 <i>Information Privacy Act 2009</i> (Qld) - sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009</i> (Qld)</b>

## REASONS FOR DECISION

### Summary

1. The applicant applied<sup>1</sup> to the Office of the Director of Public Prosecutions (**ODPP**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to the full brief of evidence in relation to an offence that he was convicted of in 2017.
2. The ODPP located 144 pages of information responsive to the access application and decided<sup>2</sup> to grant full access to 69 pages and refuse access to parts of 66 pages<sup>3</sup> and

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<sup>1</sup> Access application dated 8 July 2022. The access application was made to the Department of Justice and Attorney-General (**DJAG**) and was then transferred to the ODPP. DJAG has delegated power to deal with applications made under the IP Act for access to documents in the ODPP’s possession or control.

<sup>2</sup> Decision dated 1 August 2022.

<sup>3</sup> Pursuant to section 67(1) of the IP Act and schedule 4, part 3 of the *Right to Information Act 2009* (Qld) (**RTI Act**). Section 67(1) of the IP Act provides an agency may refuse access to a document in the same way and to the same extent the agency could refuse access to the document under section 47 of the RTI Act were the document to be subject to an access application under that Act.

eight full pages.<sup>4</sup> One page was excluded from consideration as ODPP decided it contained information irrelevant to the application.

3. The applicant then applied<sup>5</sup> to the Office of the Information Commissioner (**OIC**) for review of the ODPP's decision. The applicant seeks access to the refused information and contends that further documents in the ODPP's possession that are relevant to the access application should exist.
4. For the reasons set out below:
  - I affirm ODPP's decision to refuse access to the information in issue on the ground that disclosure would be contrary to the public interest;<sup>6</sup> and
  - I am satisfied that ODPP has undertaken all reasonable searches to locate documents responsive to the access application. Accordingly, access may be refused to any further information on the ground that it is nonexistent or unlocatable.<sup>7</sup>

## Background

5. The applicant was convicted of an offence and sentenced in 2017. The applicant states that he is seeking a full copy of the brief of evidence provided to the Court, as he is considering appealing his conviction.

## Reviewable decision

6. The decision under review is ODPP's decision dated 1 August 2022.

## Evidence considered

7. Significant procedural steps relating to the external review are set out in the Appendix to this decision.
8. The evidence, submissions, legislation, and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and the Appendix).
9. In making this decision I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), in particular the right of the applicant to seek and receive information.<sup>8</sup> I consider that a decision-maker will, when observing and applying the IP Act and RTI Acts, be '*respecting and acting compatibly with*' these rights and others prescribed in the HR Act.<sup>9</sup> I further consider that, having done so when reaching my decision, I have acted compatibly with and given proper consideration to relevant human rights, as required under section 58(1) of the HR Act.<sup>10</sup>
10. The applicant submits that refusal of access to the refused information prejudices his human right to have his conviction and sentence reviewed by a higher court in

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<sup>4</sup> Four pages pursuant to schedule 4, part 3, section 3 of the RTI Act and four pages pursuant to section 53(a) of the RTI Act.

<sup>5</sup> External review application dated 29 August 2022.

<sup>6</sup> Section 47(3)(b) of the RTI Act.

<sup>7</sup> Section 47(3)(e) of the RTI Act.

<sup>8</sup> Section 21 of the HR Act.

<sup>9</sup> See *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; and *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

<sup>10</sup> I note the observations by Bell J on the interaction between equivalent pieces of Victorian legislation in *XYZ*, [573]: '*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.*' I also note that OIC's approach to the HR Act set out in this paragraph has recently been considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (noting that Judicial Member McGill saw '*no reason to differ*' from our position).

accordance with the law.<sup>11</sup> Section 32(4) of the HR Act, provides that a person convicted of a criminal offence '*has the right to have the conviction and any sentence imposed in relation to it reviewed by a higher court in accordance with the law*'. The applicant is seeking access to the refused matter to obtain advice on the prospects of successfully appealing his conviction and submits that any advice will be significantly impeded without the information.<sup>12</sup> While the applicant's representative may be of the view that they are not able to fully advise the applicant on his prospects of success without all of the information, that does not prevent the applicant from commencing an appeal and obtaining a full copy of the information through the appeal process. Accordingly, I do not agree that refusal of access to the remaining information prejudices the applicant's human rights in the way suggested by the applicant.

### Information in issue

11. ODPP refused access to four pages on the ground that other access to the documents is available.<sup>13</sup> During the review, we conveyed our preliminary view to the applicant that ODPP was entitled to refuse access to those documents on that basis.<sup>14</sup> The applicant did not seek to contest our view and accordingly, those four pages are not considered as part of this decision.
12. The information remaining in issue comprises four full pages and parts of 66 pages (**Information in Issue**) which broadly contain:
  - the names (in some instances, only middle names), initials and other personal details (such as contact details, date of birth, age and signatures) of individuals other than the applicant (including the victim/complainant and witnesses); and
  - the statement made to Queensland Police Service (**QPS**) by the victim/complainant, which was recorded in a formal witness statement and a police diary.

### Issues for determination

13. The issues for determination in this review are:
  - whether ODPP was entitled to refuse access to the Information in Issue on the ground that disclosure would, on balance, be contrary to the public interest; and
  - whether ODPP has undertaken all reasonable searches to locate documents responsive to the access application.

### Contrary to the public interest information

#### **Relevant law**

14. Under the IP Act, an individual has a right to be given access to documents to the extent they contain the individual's personal information.<sup>15</sup> However, this right is subject to the provisions of the IP Act and the RTI Act.<sup>16</sup> Relevantly, an agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.<sup>17</sup>

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<sup>11</sup> Section 32(4) of the HR Act. Letter to OIC dated 8 September 2022.

<sup>12</sup> Letter to OIC dated 8 September 2022.

<sup>13</sup> In this case in the form of court transcripts.

<sup>14</sup> Pursuant to sections 47(3)(f) and 53 of the RTI Act.

<sup>15</sup> Section 40 of the IP Act.

<sup>16</sup> As noted above, section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent it could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under that Act.

<sup>17</sup> Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

15. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision-maker must:<sup>18</sup>
- identify and disregard any irrelevant factors
  - identify factors in favour of disclosure
  - identify factors in favour of nondisclosure; and
  - decide whether, on balance, disclosure of the information would be contrary to the public interest.
16. Schedule 4 of the RTI Act contains a non-exhaustive list of factors that may be relevant in determining where the balance of the public interest lies in a particular case. I have had regard to these factors,<sup>19</sup> and to the applicant's submissions, in reaching my decision. I have also applied the IP Act's pro-disclosure bias<sup>20</sup> and considered Parliament's intention that grounds for refusing access to information are to be interpreted narrowly.<sup>21</sup>

### **Findings**

17. In deciding whether disclosure of the Information in Issue would, on balance, be contrary to the public interest, I have taken no irrelevant factors into account in making my decision.

#### **Public interest factors favouring disclosure**

18. The RTI Act recognises that public interest factors favoring disclosure will arise where disclosing the information could reasonably be expected to:
- enhance the Government's accountability and transparency;<sup>22</sup> and
  - reveal the reason for a government decision and any background or contextual information that informed that decision.<sup>23</sup>
19. Disclosing the Information in Issue would give the applicant a more complete picture of the information in the possession of ODPP at the time he was prosecuted. However, ODPP has disclosed a significant amount of information to the applicant and this disclosure has substantially advanced ODPP's accountability and transparency. Taking into account the nature of the Information in Issue, which generally comprises third-party personal information, and the information which has been disclosed to the applicant, I am not satisfied that disclosure of the Information in Issue would, to any significant extent, further advance ODPP's accountability and transparency. In these circumstances, I attribute low to no weight to these factors.
20. There is a public interest in individuals being able to obtain access to their own personal information held by government. Having reviewed the Information in Issue, I am satisfied that to the extent that it relates to the applicant, it is the applicant's personal information. Accordingly, this disclosure factor applies to the applicant's personal information within the Information in Issue and I afford it significant weight. However, the information relating to the applicant is intertwined with the personal information of other individuals

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<sup>18</sup> Section 49(3) of the RTI Act.

<sup>19</sup> I have considered each of the public interest factors outlined in schedule 4 of the RTI Act, and any relevant factors are discussed below.

<sup>20</sup> Section 64 of the IP Act.

<sup>21</sup> Section 67(2) of the IP Act and section 47(2) of the RTI Act.

<sup>22</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>23</sup> Schedule 4, part 2, item 11 of the RTI Act.

to such an extent that it cannot be disclosed without also disclosing the personal information of those other individuals (giving rise to the nondisclosure factors discussed below).

21. The applicant submits that:<sup>24</sup>
  - he is currently incarcerated and is considering a possible appeal of his conviction
  - he requires the Information in Issue for this purpose, as he does not hold any of the documents from when he was tried and sentenced; and
  - the redacted documents present access to justice issues for him. In this respect the applicant's submissions include that the witness statements that have been disclosed suggest the presence of another individual at the incident location and that this information could be material to an appeal against conviction.
22. Given the applicant's submissions, I have considered whether disclosure of the Information in Issue could reasonably be expected to:
  - advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies<sup>25</sup>
  - contribute to the administration of justice generally, including procedural fairness;<sup>26</sup> and
  - contribute to the administration of justice for a person.<sup>27</sup>
23. During the external review, I conveyed a preliminary view to the applicant,<sup>28</sup> that in view of the information that has been disclosed to the applicant by ODPP in response to his access application and the information that would have been made available to the applicant during the court process, I considered the fair treatment and administration of justice factors are not deserving of any significant weight.<sup>29</sup>
24. The applicant objects to the weight that I consider applies to the factors favouring disclosure of the Information in Issue. In particular the applicant submits that:<sup>30</sup>
  - refusing access to witness names (including the identity of other persons at the location where the incident occurred) is preventing the applicant from receiving advice about his prospects of successfully appealing his conviction; and
  - while the applicant's lawyer would have had access to the Information in Issue during the court process, the applicant does not have any of those documents in his possession.
25. The fundamental requirements of procedural fairness<sup>31</sup> - that is, an unbiased decision-maker and a fair hearing - should be afforded to a person who is the subject of an investigation or decision.<sup>32</sup> There is no information before me to suggest that the applicant was not afforded an opportunity to respond to the charges against him during the criminal proceedings which are now finalised. To that extent, I understand that the applicant pleaded guilty to the charge against him. However, as noted above, the

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<sup>24</sup> Letter to OIC dated 8 September 2022 and email to OIC dated 31 January 2023.

<sup>25</sup> Schedule 4, part 2, item 10 of the RTI Act.

<sup>26</sup> Schedule 4, part 2, item 16 of the RTI Act.

<sup>27</sup> Schedule 4, part 2, item 17 of the RTI Act.

<sup>28</sup> Email to the applicant dated 17 January 2023 and letter to the applicant dated 24 February 2023.

<sup>29</sup> Email to the applicant dated 17 January 2023 and letter dated 24 February 2023.

<sup>30</sup> Email to OIC dated 31 January 2023.

<sup>31</sup> Schedule 4, part 2, item 16 of the RTI Act

<sup>32</sup> The fair hearing aspect of procedural fairness requires that, before a decision that will deprive a person of some right, interest or legitimate expectation is made, the person is entitled to know the case against them and to be given the opportunity of replying to it (*Kioa v West* (1985) 159 CLR 550 at [584] per Mason J).

applicant submits that the information in the witness statements that have already been disclosed to him, suggests the presence of another individual at the incident location and that information could be material to an appeal against conviction. I understand the applicant's submission to be, in essence, that if there was another individual at the location at the time of the incident, that person may have been a potential witness and as a result of that person not providing evidence during the criminal proceedings, that a miscarriage of justice has occurred. I acknowledge the applicant's submission in this respect, however even if it is the case that disclosure of the Information in Issue would reveal that there was another individual present at the incident location, that in itself, does not equate to a finding that a miscarriage of justice has occurred. On this basis, while these factors may apply,<sup>33</sup> I afford them only moderate weight.

26. The applicant's submission that refusal of witness names is preventing the applicant from receiving advice about his prospects of successfully appealing his conviction, also raises the administration of justice for a person factor favouring disclosure.<sup>34</sup> For this to apply, it must be established that the applicant has suffered some kind of wrong in respect of which a remedy is, or may be available under the law, that there is a reasonable basis for seeking to pursue any such remedy and that disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available or worth pursuing.<sup>35</sup>
27. Following the decision of *Bruce Dulley Family Lawyers and WorkCover Queensland*,<sup>36</sup> I am not satisfied that the applicant's consideration of appealing his conviction is the type of wrong contemplated by this factor favouring disclosure and accordingly I afford this factor no weight.
28. In addition, in support of disclosure of the Information in Issue, the applicant submits that there are strict rules of disclosure that apply to criminal proceedings and, on that basis public interest factors weigh in favour of him receiving a further copy of the material.<sup>37</sup> The rules of disclosure referred to by the applicant are in relation to the procedure to be followed in bringing an accused person to trial. Given that the applicant has been tried, convicted and is serving a prison sentence, I do not consider that the rules of disclosure referred to by the applicant are relevant to my consideration of the disclosure of the Information in Issue under the IP Act. Further, there is no information before me to suggest that the strict rules of disclosure were not followed during the proceedings and the applicant's sentencing.
29. I also consider the Information Commissioner's comments in *Phyland and Department of Police* are particularly relevant to the applicant's submissions:<sup>38</sup>

*The RTI Act was not ... designed to serve as an adjunct to court processes, but to comprise a stand-alone mechanism for enabling public access to government-held information. Obviously, the applicant is entitled to elect to pursue access under the right of access conferred by the RTI Act. In doing so, however, she must accept the qualifications upon and limitations to that right imposed by the Act itself: including refusal of access where ... disclosure would disclose personal information or infringe upon an individual's right to privacy.*

<sup>33</sup> Schedule 4, part 2, items 10 and 16 of the RTI Act.

<sup>34</sup> Schedule 4, part 2, item 17 of the RTI Act.

<sup>35</sup> *Willsford and Brisbane City Council* (1996) 3 QAR 368 at [17]; confirmed in *10S3KF and Department of Community Safety* (Unreported, Queensland Information Commissioner, 16 December 2011) at [16]].

<sup>36</sup> (Unreported, Queensland Information Commissioner, 26 July 2012) at [31]. While I acknowledge that the findings in that matter related to a civil matter, I consider that the findings apply equally to a criminal matter.

<sup>37</sup> Letter to OIC dated 6 April 2023. The applicant's references include sections 590AH and 590AJ of the Criminal Code Act 1899 (Qld), section 29 of the Director of Public Prosecutions Guidelines, rule 29.5 of the Australian Solicitor's Conduct Rules and section 23(2)(a) of the HR Act.

<sup>38</sup> (Unreported, Queensland Information Commissioner, 31 August 2011) at [24], cited in *Sedlar and Logan City Council* [2017] QICmr 52 (7 November 2017) at [59]. While I acknowledge that this case was in relation to an access application made under the RTI Act, I consider that the comment applies equally to an access application made under the IP Act.

30. I have carefully considered all factors listed in schedule 4, part 2 of the RTI Act and the applicant's submissions. Having done so, I can identify no other public interest considerations favouring disclosure of the Information in Issue.

**Public interest factors favouring nondisclosure**

31. The Information in Issue broadly comprises information which identifies or is about individuals other than the applicant and information that was provided to QPS by other individuals, including the victim/complainant. I am satisfied that it comprises the personal information of these other individuals. Most of the Information in Issue is of a highly sensitive and highly personal nature,<sup>39</sup> and as noted above, some of it is intertwined with the applicant's personal information.
32. The RTI Act recognises that there is a public interest harm<sup>40</sup> in disclosing the personal information of a person, whether living or dead, and that disclosing information which could reasonably be expected to prejudice the protection of an individual's right to privacy gives rise to a public interest factor favouring nondisclosure.<sup>41</sup>
33. The applicant submits that:<sup>42</sup>
- the documents sought by the applicant would have been made available in their entirety and without redactions to the applicant for the purposes of his criminal proceedings. In the ordinary course, he would have been shown and taken through each document at the relevant time
  - the refusal of access to the victim/complainant's name is illogical in circumstances where the applicant was charged, prosecuted and pleaded guilty to the offence. Any suggestion of prejudice to the protection of her identity could not sensibly be maintained
  - witness names have been redacted, despite their witness statements (which identified them) having been provided voluntarily and in the knowledge that they would be given to the applicant. There can be no suggestion of prejudice to the witnesses by disclosure of the information; and
  - the ODPD decision acknowledges that some of the refused information may already be known to the applicant, but reliance is placed on the concern that '*... once the information is disclosed in this way, its dissemination cannot be controlled*'. The concern about control and dissemination of information is unjustified.
34. I do not accept the applicant's submission that because the documents he seeks access to would have been made available in their entirety and without redactions to the applicant for the purposes of his criminal proceedings, that provides the applicant with an unfettered and automatic right of access under the IP Act. The right of access under the IP Act is subject to the other provisions of the IP Act, including grounds upon which access may be refused.<sup>43</sup>
35. The applicant is submitting that because he has been charged, prosecuted and convicted of the offence, any right to the protection of privacy for the victim/complainant and witnesses has been waived in relation to any information that was provided to QPS or disclosed as part of the criminal proceedings. Further, the applicant submits that the

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<sup>39</sup> Such as the information (including observations and opinions) other individuals provided to QPS.

<sup>40</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>41</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>42</sup> Letter to OIC dated 8 September 2022.

<sup>43</sup> As provided in the RTI Act.

right to confidentiality is waived by individuals who make criminal complaints.<sup>44</sup> I do not accept the applicant's submissions.

36. In *Marshall and Department of Police*,<sup>45</sup> the RTI Commissioner recognised that in appropriate cases, information supplied to QPS will need to be further disseminated or published (so as, for example, to enable further investigation, or for prosecutorial purposes, often in open court) which may reduce the privacy interest attaching to relevant information.<sup>46</sup> I accept that this may be the case in relation to the Information in Issue in this review and that this reduces the weight of the privacy interest to some degree in this case. However, in that decision the RTI Commissioner also considered that members of the community assisting police with inquiries have a legitimate expectation that in doing so, their privacy will be maintained and respected as far as is possible.<sup>47</sup>
37. Further the applicant submits that as he has been prosecuted and convicted, this means that the Information in Issue is already in the 'public domain'.<sup>48</sup> In the decision of *Queensland Newspapers Pty Ltd and Department of Justice and Attorney-General*,<sup>49</sup> the Right to Information Commissioner recognised that while the right to privacy may be diminished in respect of information that is in the public domain, it is not destroyed and a residual right to privacy remains. The trial in that matter received intense public interest and wide media coverage. The Right to Information Commissioner took account of the sensitivity of the information and the fact that the matter had been finalised and was out of the public eye and determined that:<sup>50</sup>

*... the public interest in protecting the right to privacy of the persons involved, and referred to, in the recordings, even in respect of the information that was disclosed at trial, remains significant.*

38. While I acknowledge that some of the information may be known to the applicant as it comprises evidence that was provided to the applicant's lawyers at the time of the proceedings or presented to the court, given the nature of the Information in Issue and the very sensitive context in which it appears, I consider that the third-party individuals retain a right to the protection of their privacy. Accordingly, I consider that disclosure of the Information in Issue would be a significant intrusion into the privacy of those individuals. I accept that the weight of the privacy factor is reduced to some degree, however given the sensitivity of the information, I still consider that this factor warrants significant weight.
39. In my view, the extent of the harm in disclosing the personal information comprised in the Information in Issue is substantial due to the nature of the information and the impact this would have on those individuals' privacy.<sup>51</sup> For these reasons, I afford the public interest harm factor significant weight.
40. The applicant submits that no legal limits are placed on the use or dissemination of material provided in the course of criminal proceedings and that no information beyond

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<sup>44</sup> Letter to OIC dated 6 April 2023.

<sup>45</sup> (Unreported, Queensland Information Commissioner, 25 February 2011) (*Marshall*).

<sup>46</sup> At [28].

<sup>47</sup> At [28].

<sup>48</sup> Letter to OIC dated 6 April 2023. The applicant refers to the case of *Director of Public Prosecutions v Smith* [1991] 1 VR 63 at 69.

<sup>49</sup> [2018] QICmr 52 (18 December 2018).

<sup>50</sup> At [31].

<sup>51</sup> Schedule 4, part 4, section 6 of the RTI Act. The concept of 'privacy' is not defined in either the IP Act or RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their 'personal sphere' free from interference from others (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 12 August 2008, at paragraph 1.56).



what was disclosed in the criminal proceedings is being sought. Accordingly, it is unjustified for ODPP or OIC<sup>52</sup> to place any reliance on the fact that once the information is disclosed under the IP Act '*its dissemination cannot be controlled*', as this ignores and is at odds with the principles underpinning disclosure in the criminal justice system.<sup>53</sup> In this respect, the applicant is attempting to correlate the disclosure of information during criminal proceedings, with the disclosure of information under the IP Act. These are very different processes. As noted in *Z59 and Queensland Police Service*<sup>54</sup> the access schemes established under the RTI Act and IP Act, require a decision-maker '*to balance competing public interest factors and ... take into account the effect of disclosure on the protection of a person's right to privacy*'.<sup>55</sup> As noted above, disclosing the Information in Issue under the IP Act, including to the applicant, would in my view be a significant intrusion into the third parties' privacy and could reasonably be expected to cause a public interest harm.

41. During the external review, I also conveyed a view to the applicant that release of the Information in Issue could reasonably be expected to prejudice the future flow of information from the community to QPS.<sup>56</sup> The applicant does not accept my view in this respect and has made similar submissions to those in relation to the factors favouring nondisclosure of third-party information, namely:<sup>57</sup>
- by making a criminal complaint, the complainant voluntarily revealed her identity and waived any right to privacy or confidentiality
  - the complainant agreed to give evidence on behalf of the prosecution and had the matter proceeded to trial, her evidence may have been heard in open court; and
  - all information concerning the complaint, the complainant, and the witnesses, was previously shared with and released to the relevant law enforcement agencies and to the applicant (through his legal representatives).
42. I do not accept the applicant's submissions in this respect and reiterate the view of the Right to Information Commissioner in *Marshall*.<sup>58</sup> I acknowledge that a person making a criminal complaint to QPS will have a reasonable expectation that the information they provide, may have to be disseminated for the purposes of further investigation or for criminal proceedings, however I do not consider that expectation extends to disclosure of the information under the RTI Act or IP Act, some years after any criminal proceedings have been finalised.
43. Further, while I acknowledge that QPS possesses certain coercive powers when investigating complaints, I nevertheless consider that efficient and effective use of QPS resources is facilitated by it being able to seek and obtain information from various members of the community, including complainants and bystanders with as much cooperation as possible. Routine disclosure of third-party personal information under the RTI Act or IP Act, could reasonably be expected to discourage the public from providing information to QPS. This in turn, could reasonably be expected to negatively impact on QPS's ability to obtain information required to perform its investigative functions. In the circumstances of this matter, I afford moderate weight to these factors favouring nondisclosure.

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<sup>52</sup> Letter to OIC dated 6 April 2023.

<sup>53</sup> Letters to OIC dated 8 September 2022 and 6 April 2023.

<sup>54</sup> [2023] QICmr 15 (28 March 2023).

<sup>55</sup> At [34].

<sup>56</sup> Schedule 4, part 3, items 13 and 16 and schedule 4, part 4, section 8 of the RTI Act.

<sup>57</sup> Letter to OIC dated 6 April 2023.

<sup>58</sup> As referred to at paragraph 36.

## Balancing the public interest

44. I have taken into account the pro-disclosure bias in deciding access to the Information in Issue under the IP Act.<sup>59</sup> I have afforded significant weight to the factor favouring disclosure of the applicant's personal information within the Information in Issue, however that personal information of the applicant is inextricably intertwined with the personal information of other individuals. In addition, and for the reasons outlined above, I have found that the factors relating to ODPP's transparency and accountability are deserving of low to no weight, taking into account the nature of the Information in Issue and the information which has been disclosed to the applicant and that the factors in relation to the fair treatment of individuals and administration of justice generally, are deserving of moderate weight.
45. On the other hand, I have found that the nondisclosure factors which relate to protecting the personal information and right to privacy of other individuals, in a highly sensitive context, are deserving of significant weight. In addition, the nondisclosure factors which relate to protecting the flow of information to QPS, are deserving of moderate weight.
46. On balance, I am satisfied that the public interest factors favouring nondisclosure of the Information in Issue outweigh the factors favouring disclosure. Accordingly, I find that disclosure of the Information in Issue would, on balance, be contrary to the public interest and access may be refused on that ground.<sup>60</sup>

## Sufficiency of the ODPP's searches

### Relevant law

47. As noted at paragraph 14, under section 40 of the IP Act, an individual has a right to be given access to documents of an agency to the extent they contain the individual's personal information.<sup>61</sup> However, this right is subject to limitations, including grounds for refusal of access.<sup>62</sup>
48. 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.<sup>63</sup> However, access may be refused where a document is nonexistent or unlocatable.<sup>64</sup>

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<sup>59</sup> Section 64 of the IP Act.

<sup>60</sup> Under section 47(3)(b) of the RTI Act.

<sup>61</sup> 'Personal information' is defined in section 12 of the IP Act as 'information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'.

<sup>62</sup> Section 67(1) of the IP Act sets out that an agency may refuse access to information in the same way and to the same extent that the agency could refuse access to the document under section 47 of the RTI Act were the document the subject of an access application under the RTI Act.

<sup>63</sup> 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. The Queensland Civil and Administrative Tribunal confirmed in *Webb v Information Commissioner* [2021] QCATA 116 (**Webb**) at [6] that the RTI Act 'does not contemplate that [the Information Commissioner] will in some way check an agency's records for relevant documents' and that, ultimately, the Information Commissioner is dependent on the agency's officers to do the actual searching for relevant documents.

<sup>64</sup> Sections 47(3)(e) and 52(1) of the RTI Act. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist—section 52(1)(a) of the RTI Act. A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document but it cannot be found—section 52(1)(b) of the RTI Act.

49. To be satisfied that a document is nonexistent, an agency must rely on their particular knowledge and experience and have regard to a number of key factors which include:<sup>65</sup>
- the administrative arrangements of government
  - the agency's structure
  - the agency's functions and responsibilities<sup>66</sup>
  - 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.
50. 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.
51. To determine whether a document exists, but is unlocatable, the RTI Act requires consideration of whether there are reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession; and whether the agency has taken all reasonable steps to find the document. In answering these questions, regard should again be had to the circumstances of the case and the relevant key factors.<sup>67</sup>
52. 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.<sup>68</sup> However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable grounds to believe that the agency has not discharged its obligation to locate all relevant documents. Suspicion and mere assertion will not satisfy this onus.<sup>69</sup>

### **Applicant's submissions**

53. The applicant submits that ODPP has failed to locate the following:<sup>70</sup>
- hospital and health service records
  - scene of crime photographs referred to in a witness statement
  - audio and visual recordings referred to in witness statements
  - an index to the brief of evidence; and
  - DNA evidence.

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<sup>65</sup> These factors are identified in *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) at [37]-[38]. These factors were more recently considered in *Van Veenendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017) and *P17 and Queensland Corrective Services* [2020] QICmr 68 (17 November 2020).

<sup>66</sup> Particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it.

<sup>67</sup> *Pryor* at [21].

<sup>68</sup> Section 100(1) of the IP Act.

<sup>69</sup> *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].

<sup>70</sup> Letter to OIC dated 8 September 2022.

54. Further, the applicant's representative submits that in relation to a different IP Act application, it has been advised by QPS that the '*common practice is for the original brief to be retained by ODPP, as part of the Department of Justice and Attorney-General*'.<sup>71</sup>

### **Findings**

55. The Information Commissioner is dependent on the agency's officers to search for relevant documents.<sup>72</sup> In response to OIC's request that ODPP conduct further searches, ODPP submits that following finalisation of the applicant's criminal matter:<sup>73</sup>
- the police brief of evidence was returned to QPS on 23 November 2017. ODPP has provided OIC with a copy of its letter to QPS in this regard
  - further material was returned to QPS on 6 August 2019 (including, recordings of body worn camera footage, photographs and a recording of a DNA sample) ODPP has provided OIC with a copy of its letter to QPS in this regard
  - ODPP did not retain any index to the brief of evidence; and
  - a further search of ODPP's files did not locate any additional, relevant documents.
56. The question for me to consider is whether ODPP has taken 'reasonable steps' to locate the documents that the applicant considers to be missing. I have considered the submissions from the applicant, noting their contrary claims as to the return of documents to QPS, however mere assertion will not satisfy the onus. While I acknowledge the advice that QPS provided to the applicant's representative, I note that the advice appears to be of a general nature and is not in relation to the brief of evidence in this matter, whereas ODPP has provided OIC with copies of its letters to QPS returning the information.
57. Taking the above into consideration, I am satisfied that ODPP has conducted all reasonable searches of locations where it is reasonable to expect the documents to be and has also provided a reasonable explanation and evidence as to why it has not been able to locate further documents requested by the applicant. On that basis, I consider that access may be refused to any further documents on the ground they are unlocatable.

### **DECISION**

58. For the reasons set out below:
- I affirm ODPP's decision to refuse access to the Information in Issue on the ground that disclosure would be contrary to the public interest;<sup>74</sup> and
  - I am satisfied that ODPP has undertaken all reasonable searches to locate documents responsive to the access application. Accordingly, access may be refused to any further information on the ground that it is nonexistent or unlocatable.<sup>75</sup>

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<sup>71</sup> Email to OIC dated 24 January 2023.

<sup>72</sup> *Webb* at [6].

<sup>73</sup> Email to OIC dated 7 November 2022.

<sup>74</sup> Section 47(3)(b) of the RTI Act.

<sup>75</sup> Section 47(3)(e) of the RTI Act.

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

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**S Martin**  
**Assistant Information Commissioner**

**Date: 6 June 2023**

## APPENDIX

### Significant procedural steps

Date	Event
29 August 2022	OIC received the application for external review. OIC requested preliminary documents from ODPP.
30 August 2022	OIC received the preliminary documents from ODPP.
8 September 2022	OIC received submissions from the applicant.
20 September 2022	OIC advised the applicant and ODPP that the application for external review had been accepted. OIC conveyed a preliminary view to the applicant in relation to access to court transcripts and requested that ODPP undertake further searches for documents responsive to the applicant's access application.
4 October 2022	ODPP requested an extension of time to respond to OIC's letter dated 20 September 2022, which OIC granted.
11 October 2022	ODPP provided OIC with the Information in Issue.
21 October 2022	OIC followed up ODPP and requested submissions and search records.
7 November 2022	OIC received submissions and search records from ODPP in response to OIC's preliminary view.
16 December 2022	OIC conveyed a preliminary view to the applicant addressing sufficiency of search concerns.
13 January 2023	The applicant responded to OIC's preliminary view.
17 January 2023	OIC conveyed a further preliminary view to the applicant.
24 January 2023	The applicant responded to OIC's preliminary view.
31 January 2023	The applicant provided submissions contesting OIC's preliminary view.
24 February 2023	OIC conveyed a final preliminary view to the applicant.
28 February 2023	The applicant confirmed they did not accept OIC's preliminary view and requested a formal decision.
2 March 2023 and 3 March 2023	OIC contacted the applicant in response to the applicant's email of 28 February 2023.
31 March 2023	The applicant requested an extension of time to provide further submissions, which OIC granted.
6 April 2023	OIC received further submissions from the applicant.