



Decision and Reasons for Decision

Citation:	<i>F60XCX and Department of the Premier and Cabinet</i> [2016] QICmr 41 (13 October 2016)
Application Number:	312166
Applicant:	F60XCX
Respondent:	Department of the Premier and Cabinet
Decision Date:	13 October 2016
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION ACT - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - whether information would be privileged from production in a legal proceeding on the ground of legal professional privilege - whether exempt - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(a) and 48 and schedule 3, section 7 of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION ACT - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - applicant contends additional documents exist - whether the agency has taken all reasonable steps to locate the documents - whether access may be refused on the basis that the documents do not exist or are unlocatable - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL TO DEAL WITH ACCESS APPLICATION - EFFECT ON AGENCY'S FUNCTIONS - whether the work involved in dealing with application would, if carried out, substantially and unreasonably divert resources of agency from their use by agency in performing its functions - sections 60 and 61 of the <i>Information Privacy Act 2009</i> (Qld)</p>

REASONS FOR DECISION

Summary

1. The applicant made two separate access applications under the *Information Privacy Act 2009* (Qld) (**IP Act**) to the Department of the Premier and Cabinet (**Department**) and the

Office of the Queensland Parliamentary Counsel (**OQPC**)¹ for access to a wide range of information about the applicant's employment at OQPC and the ending of that employment.²

2. The Department had a delegation from OQPC to process the application to OQPC. The Department processed both access applications, was the contact agency for both external reviews, and made one decision in respect of both access applications. The decision considered 5943 pages in total, 4491 pages of which were located by Departmental officers. In relation to these 4491 pages, the Department decided:
 - to grant access to 2992 pages and parts of 847 pages; and
 - refuse access to 652 pages and the remainder of the 847 part pages.³
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the decision to refuse access to information, and also contended that all relevant documents had not been located.
4. Given the scope of the two applications, the OQPC's delegation to the Department regarding the OQPC application and the Department's processing of both applications, OIC determined that it was most efficient and convenient for both participants and OIC to address issues arising in the two external reviews concurrently.⁴ However, given that two access applications to two entities that comprise separate agencies for the purpose of the IP Act have been considered on external review, two decisions are required. This decision relates to the Department's decision insofar as it involves the application to the Department.
5. For the reasons set out below, I set aside the Department's decision regarding the applicant's application to the Department, and find that the Department may refuse:
 - access to the remaining information in issue that was refused in the Department's decision and some information located on external review on the ground that the information is exempt information
 - access to certain documents the applicant contends the Department failed to locate on the ground that they are nonexistent or unlocatable; and
 - to process, or further process, the remaining documents located on external review on the basis that the work involved in dealing with these documents would substantially and unreasonably divert the Department's resources from their use in the performance of the Department's functions.

¹ OQPC is a statutory authority established by section 5 of the *Legislative Standards Act 1992* (Qld) (**LS Act**), and therefore a public authority comprising an agency for the purpose of access applications under the IP Act—section 17 of the IP Act and sections 14 and 16 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

² The applicant initially set out a scope for the Department application in correspondence dated 18 May 2014 (received by the Department on 21 May 2014). The Department and applicant agreed on an amended scope for the Department application in emails on 30 May 2014. Also, the Department and applicant agreed to exclude certain information from the scope of both applications in emails on 7 July 2014.

³ Note—of this information, 78 pages and 11 part pages were considered outside the scope of the information or irrelevant to it, while the remainder were considered exempt information.

⁴ The manner in which an external review is conducted is, subject to the IP Act, at the Information Commissioner's discretion, and the overriding obligation on the Information Commissioner is to ensure that the procedures adopted in an external review are fair to all participants—sections 108(1) and 110(2)(a) of the IP Act.

Background

6. Significant procedural steps relating to the applications and external reviews are set out in the Appendix.

Reviewable decision

7. The decision under review is the Department's decision dated 20 August 2014 insofar as that decision relates to the applicant's application to the Department.

Evidence considered

8. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and Appendix).

Information in issue

9. On external review, OIC advised the applicant⁵ that it would not consider seven categories of information⁶ any further in the two reviews, unless the applicant advised OIC otherwise. As the applicant did not address any of the seven categories of information in subsequent correspondence⁷ or telephone discussions,⁸ OIC confirmed to the applicant that they no longer formed part of the information in issue in these reviews.⁹ Further, in a telephone conversation with an OIC staff member,¹⁰ the applicant advised that he did not seek an eighth category of information.¹¹
10. The rest of the information refused in the Department's decision remains in issue,¹² as do approximately 11,113 pages located on external review. In the following reasons, I have referred to this information as Category A Information (comprising 276 pages and 54 part pages) or have addressed it in terms of the substantial and unreasonable diversion of resources issue.

⁵ In OIC's preliminary view dated 13 August 2015.

⁶ That is, categories of information which the applicant had stated (to the Department and/or OIC) that he did not seek, or which OIC considered he was unlikely to seek, in light of these statements. The seven categories were:

- i) information which is irrelevant to or outside the scope of the access application
- ii) personal information of other individuals, comprising details such as names, details of work performance, pay level and leave
- iii) work mobile telephone numbers
- iv) the name of draft legislation, details about draft legislation and copies of draft legislation
- v) a credit card number, username and password
- vi) information relating to consultation with an OQPC officer by another agency from which the applicant had requested documents; and
- vii) a letter from Crown Law confirming its retainer, including its schedule of fees.

The pages and part pages corresponding to these seven categories were identified in the appendix to OIC's preliminary view to the applicant dated 13 August 2015.

⁷ Including the applicant's submissions dated 20 August 2015 and 29 August 2015.

⁸ On 21 August 2015, 27 August 2015, 28 August 2015 and 3 September 2015.

⁹ Letter to the applicant dated 4 September 2015.

¹⁰ On 27 August 2015.

¹¹ That is, viii) documents relating to the applicant's workers compensation matters.

¹² Apart from pages and part pages of that information that the Department released to the applicant during the external reviews.

Issues for determination

11. The issues remaining for determination in these reviews are whether:

- access to the **Category A Information** may be refused on the ground that it is exempt information, namely information that would be privileged from production in a legal proceeding on the ground of legal professional privilege
- access to certain documents that the applicant contends should have been located may be refused on the ground that they are nonexistent or unlocatable; and
- the Department may refuse to process, or further process, approximately 11,113 pages located on external review, on the basis that the work involved in dealing with these documents would substantially and unreasonably divert the Department's resources from their use in the performance of its functions.

Category A Information

12. The Category A Information comprises 276 pages and 54 part pages.¹³

Relevant law

13. The IP Act confers on an individual a right to access documents of an agency, to the extent they contain the individual's personal information.¹⁴ This right of access is subject to limitations, including grounds for refusal of access.¹⁵ One ground for refusal of access is if the information sought comprises exempt information.¹⁶
14. Relevantly, information is exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege (**LPP**).¹⁷ This exemption reflects the requirements for establishing LPP at common law.¹⁸ Therefore, the exemption requires an examination of how the common law principles of LPP apply.
15. At common law, LPP attaches to confidential communications between a client and their lawyer, made for the dominant purpose of giving or obtaining legal advice or the provision of legal services.¹⁹ When these requirements are met, LPP is established. Qualifications and exceptions to LPP²⁰ may, in particular circumstances, affect the question of whether information attracts or remains subject to it.

¹³ That is, 243 pages and 44 part pages considered in the Department's decision, and 33 pages and 10 part pages located during the external review (all of which were set out in the appendix to OIC's preliminary view to the applicant dated 13 August 2015 and letter to the Department of the same date).

¹⁴ Section 40(1)(a) of the IP Act. Section 12 of the IP Act defines personal information 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*'.

¹⁵ Grounds for refusal of access are set out in section 47 of the RTI Act. Section 67(1) of the IP Act provides that access to information may be refused under the IP Act on the same grounds as in section 47 of the RTI Act.

¹⁶ Sections 47(3)(a) and 48 of the RTI Act.

¹⁷ Schedule 3, section 7 of the RTI Act.

¹⁸ The Electoral and Administrative Review Commission, *Report on Freedom of Information*, Report No 90/R6 (1990) at [7.152] states that '[t]he exemption incorporates the common law concept of legal professional privilege'. This statement was confirmed in the context of the RTI Act in *Ozcare and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 May 2011) at [12].

¹⁹ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [9].

²⁰ Such as waiver or improper purpose.

Department's position

16. The Department considers that the Category A information is subject to legal professional privilege.²¹

Applicant's submissions

17. In relation to LPP, the applicant submits²² that:

I find it hard to believe that all the documents identified in Table 8^[23] attract legal professional privilege. It is difficult for me to make specific submissions about the documents without even knowing the general nature of each document. I would like these documents to be more closely scrutinised.

18. The applicant has not made any further submissions about LPP, except to confirm that he does not accept OIC's preliminary views in this regard.²⁴

Findings

19. In relation to the applicant's statement that it '*is difficult for [him] to make specific submissions about the documents without even knowing the general nature of each document*', I note that:

- there are limitations on the amount of detail OIC can use to describe the Category A Information, in view of the prohibitions in the IP Act on OIC disclosing information which is claimed to be exempt information;²⁵ and
- also, in view of the relatively large volume of the Category A Information, OIC has employed a degree of generalisation in its identification and discussion of this information—rather than identifying the general nature of each document.²⁶

20. I have carefully considered the nature and purpose of the communications contained in the Category A Information, and the context in which they occurred. I am satisfied that:

- Crown Law was engaged by the Department and OQPC to provide legal services regarding issues relating to the applicant's employment
- the information in the Category A Information comprises confidential communications; and
- the communications:
 - are between the Department and/or OQPC as client and Crown Law as legal advisor; and
 - were for the dominant purpose of seeking and/or providing legal advice regarding issues relating to the applicant's employment.

²¹ Decision dated 20 August 2014 (at page 17); and letter to OIC dated 3 August 2015.

²² Submission dated 29 August 2015.

²³ Of OIC's letter to the applicant dated 13 August 2015.

²⁴ See the applicant's submissions dated 12 June 2016, 3 July 2016 and 12 July 2016, and the telephone discussion between an OIC officer and the applicant on 1 July 2016.

²⁵ See sections 120 and 121 of the IP Act.

²⁶ This is in keeping with the approach to voluminous applications endorsed by Woodward J of the Federal Court of Australia in *News Corporation Ltd & Ors v National Companies and Securities Commission* (1986) 57 ALR 550, 562, in which Woodward J observed that '*... if the Freedom of Information legislation is to remain workable, it must be open to a respondent, and to the AAT [as the independent review tribunal], to deal with large numbers of documents with a degree of generalization appropriate to the case.*'

21. In view of the above, I am satisfied that each of the requirements of LPP is satisfied in respect of the Category A Information, and therefore this information is subject to LPP.
22. Further, I am satisfied that no exception or qualification to LPP applies. In this regard, I note that the applicant did not raise any exception or qualification to LPP in his submissions, and that there is no other evidence before me to suggest that any such qualification or exception may be relevant.
23. In these circumstances, I find that access to the Category A Information can be refused on the ground that it is subject to the LPP exemption, and is therefore exempt information.²⁷

Unlocated documents

24. On consideration of the applicant's submissions, it is OIC's understanding that the applicant contends that the following types of documents should have been located, but were not:
 - (i) Handwritten file notes of Officer B regarding meetings in 2010 and 2011, including on or about 18 and 19 August 2011²⁸
 - (ii) Handwritten file notes of Officer C regarding meetings in 2010 and 2011, including on or about 18 August 2011²⁹
 - (iii) File notes of Officer A regarding meetings on 19 August 2011³⁰
 - (iv) Other file notes of Officer A³¹
 - (v) The applicant's leave history from 20 November 2008 to 19 November 2011³²
 - (vi) Documents relating to the applicant's performance review on 21 July 2011³³
 - (vii) Other performance planning and review documents³⁴
 - (viii) Documents related to the discussion of the applicant's performance at the OQPC's Executive Management Group (**EMG**) meeting on 31 October 2011³⁵
 - (ix) Documents authored or received by Officer D in 2010 and 2011³⁶
 - (x) Documents on the applicant's 'employee record' or 'staff file'³⁷
 - (xi) Additional electronic records and hard copy files;³⁸ and
 - (xii) '[A]ll the minutes of the OQPC executive management group meetings from 2009 onwards and ... those parts of these minutes which contain [the applicant's] personal information'.³⁹

Relevant law

25. Under the IP Act, one of the grounds for refusal of access to a document is that the document sought is nonexistent or unlocatable.⁴⁰ A document is nonexistent if there are

²⁷ Section 67(1) of the IP Act and section 47(3)(a) and schedule 3, section 7 of the RTI Act.

²⁸ Submission dated 14 October 2014.

²⁹ Submissions dated 14 October 2014 and 29 August 2015.

³⁰ Submissions dated 14 October 2014, 6 May 2015, and 29 August 2015.

³¹ Submission dated 29 August 2015.

³² Submissions dated 14 October 2014 and 29 August 2015.

³³ Submissions dated 14 October 2014 and 29 August 2015.

³⁴ Submissions dated 14 October 2014, 6 May 2015 and 29 August 2015.

³⁵ Submission dated 29 August 2015.

³⁶ Submissions dated 19 July 2015 and 29 August 2015.

³⁷ Submissions dated 14 October 2014, 6 May 2015, and 29 August 2015.

³⁸ External review application dated 3 September 2014, and submissions dated 14 October 2014, 6 May 2015, 19 July 2015, and 29 August 2015.

³⁹ Submission dated 12 June 2016.

⁴⁰ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

reasonable grounds to be satisfied it does not exist.⁴¹ 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 it, but it cannot be found.⁴²

26. To be satisfied that a document does not exist, an agency must rely on its particular knowledge and experience, having regard to various key factors including:
 - the administrative arrangements of government
 - the agency's structure
 - the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
 - the agency's practices and procedures (including, but not limited to, its information management approaches); and
 - other factors reasonably inferred from information supplied by the applicant, including the nature and age of the requested documents, and the nature of the government activity to which the request relates.⁴³
27. By considering the above factors, an agency may ascertain that a particular document was not created because, for example, its processes do not involve creating the specific document. In such instances, it is not necessary for the agency to search for the document. It is sufficient that the relevant circumstances to account for the nonexistent document are explained.
28. An agency may also rely on searches to satisfy itself that documents do not exist. If an agency relies on searches to justify a decision that documents do not exist, all reasonable steps must be taken to locate the documents.⁴⁴ Such steps may include enquiries and searches of all relevant locations identified after consideration of the key factors listed above.
29. In assessing whether a document exists, but is unlocatable, it is necessary to consider:
 - 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.⁴⁵
30. In answering these questions, regard should be had to the circumstances of the case and to the key factors set out above.⁴⁶

⁴¹ Section 52(1)(a) of the RTI Act.

⁴² Section 52(1)(b) of the RTI Act.

⁴³ *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]-[38]. The decision in *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld). Section 52 of the RTI Act is drafted in substantially the same terms as the provision considered in *PDE* and, therefore, the Acting Information Commissioner's findings in *PDE* are relevant here.

⁴⁴ As set out in *PDE* at [49]. See also section 137(2) of the IP Act.

⁴⁵ Section 52(1)(b) of the RTI Act.

⁴⁶ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [21].

Findings

Documents responsive to item (i)

31. As set out at item (i) above, the applicant submits that handwritten file notes of Officer B regarding meetings in 2010 and 2011, including on or about 18 and 19 August 2011, should have been located, but were not.
32. The applicant submits that he witnessed Officer B make a handwritten file note during a meeting with the applicant and Officer C on or about **18 August 2011**, and searches of Officer B's hard drive and emails would not have located the handwritten file note.⁴⁷
33. In response to OIC's initial enquiries regarding the steps taken to locate such a file note, the Department provided OIC with a record of searches and certification completed by Officer B,⁴⁸ in which she stated '[a]s previously advised, no meeting notes can be located'.
34. Subsequently, in response to OIC's further enquiries about the meeting on or about 18 August 2011, the Department provided OIC with a statutory declaration signed by Officer B⁴⁹ which relevantly states as follows (with **emphasis added**):

*... I recollect attending a meeting requested by [the applicant] on or about **18 August 2011**. [Officer C] was also in attendance. I recollect during this meeting [the applicant] sought advice regarding an email he had received from his supervisor.*

I recall that [the applicant] requested the matters discussed were to remain in confidence and he did not require either myself or [Officer C] to take any action in terms of these matters.

I recollect taking some handwritten notes during the course of this meeting. These notes were ephemeral and were disposed of shortly after the meeting as no action was required as per [the applicant's] request.

35. The applicant also submits that he witnessed Officer B make handwritten notes during a meeting with the applicant and Officer A in the morning of **19 August 2011**.⁵⁰
36. In response to OIC's initial enquiries regarding the steps taken to locate a file note taken by Officer B regarding this meeting, the record of searches and certification completed by Officer B⁵¹ states '[n]o meeting notes can be located'.
37. In response to OIC's further enquiries in relation to Officer B's attendance at the 19 August 2011 meeting and any other meetings involving the applicant in 2010 and 2011, the Department provided OIC with a statutory declaration signed by Officer B⁵² which relevantly states as follows (with **emphasis added**):

*... I recollect attending a meeting between [the applicant], [Officer A] and myself on or about the **morning of 19 August 2011**. [Officer A] invited me to attend this meeting as an independent observer. During this meeting it is possible I took some hand written notes.*

⁴⁷ Submission dated 29 August 2015.

⁴⁸ Completed on 14 May 2015, and provided to OIC on 20 May 2015.

⁴⁹ Dated 9 October 2015.

⁵⁰ Submission dated 18 October 2015.

⁵¹ Completed on 14 May 2015, and provided to OIC on 20 May 2015.

⁵² Dated 9 February 2016.

However, as no action was required by me in relation to this particular meeting, any notes taken would have since been disposed of as ephemeral documents; and

I have no recollection of attending any other meetings involving [the applicant] during the period 2010 to 2011, as I only commenced duty in the Department of the Premier and Cabinet on 7 March 2011.

38. The applicant disputes the accuracy of the statements given in Officer B's statutory declarations.⁵³ In doing so, he submits that the statements in Officer B's statutory declarations about ephemeral notes and disposal of them '*should raise serious doubts with OIC*'. It is my understanding that the applicant considers that these statements contradict the earlier statements made by Officer B and/or the Department which stated only that such file notes could not be located. I accept that the more recent statements are more detailed; however, I do not consider that they are inconsistent with the earlier statements.
39. I have carefully considered the applicant's submissions regarding the file notes in question and the information provided by the Department regarding its searches and enquiries, both on receipt of the applicant's application and in response to OIC's enquiries. I have done so with reference to the factors listed in *PDE*, and in particular the Department's structures, recordkeeping practices and document management systems. On careful consideration of this material, I am satisfied that:
- while Officer B did make handwritten notes in the 18 August 2011 meeting, and may have made notes during the 19 August 2011 meeting, Officer B subsequently disposed of such notes; and
 - given Officer B has no recollection of attending any other meetings involving the applicant, and in the absence of evidence from the applicant regarding any such meetings, it is reasonable to conclude that no notes about other meetings made by Officer B exist.
40. In these circumstances, I am satisfied that all reasonable searches for the item (i) documents have been conducted and access to them may be refused as they either never existed or have been disposed of, and are therefore nonexistent or unlocatable for the purpose of the IP Act.

Documents responsive to item (ii)

41. As set out at item (ii) above, the applicant submits that handwritten file notes of Officer C regarding meetings in 2010 and 2011, including on or about 18 August 2011 should have been located, but were not.
42. The applicant submits that he witnessed Officer C make handwritten file notes at each meeting the applicant had with him, including on or about 18 August 2011.⁵⁴
43. In response to OIC's initial enquiries regarding the steps taken to locate such file notes, the Department provided OIC with a record of searches and certification completed by Officer C,⁵⁵ in which he stated:

⁵³ Submission dated 12 June 2016.

⁵⁴ Submission dated 29 August 2015.

⁵⁵ Completed on 29 April 2015, and provided to OIC on 20 May 2015.

No recordings were taken by me in relation to any of the identified meetings ... and as I understood that the conversations in question were of a confidential nature I did not prepare any file notes from those meetings nor maintain any ephemeral documentation in relation to the discussions. This information has been communicated to [the applicant] on a number of occasions.

44. In response to the Department's further enquiries, the Department provided OIC with a statutory declaration signed by Officer C⁵⁶ which relevantly states as follows (with **emphasis added**):

... I acknowledge meeting with [the applicant], at his request, on several occasions including on or about 18 August 2011 and during these discussions do recall jotting down some brief dot points on the matters that we were discussing.

At the time of these meetings I understood that [the applicant] wanted to treat our conversations as confidential and as such I did not create any file notes from the discussions. I also recall meeting with [the applicant] and with [Officer B] at or around that time. At that meeting I recollect [the applicant] advising that he did not wish to pursue the matters that he had raised any further and as such I did not retain any handwritten notes from that or any previous meetings with him.

All handwritten notes taken at the time of my discussions with [the applicant] were treated as ephemeral documents and these no longer exist. [sic] *I have previously advised [the applicant] of this on a number of occasions and in response to his ongoing queries referred the matter to Crown Law who provided the attached letter to [the applicant] in December 2012.*

I have conducted a number of searches for the handwritten notes sought by [the applicant] over an extended period of time and repeated this process recently. In undertaking a detailed review of the paper documents in my possession I was unable to locate any new documentation or notes in relation to these discussions with [the applicant], other than what has already been supplied as part of his access application.

45. The Department also provided OIC with the Crown Law letter⁵⁷ referred to in the third paragraph of the statutory declaration quoted above, which relevantly states:

[Officer C] ... confirmed that he had searched his records and been unable to locate any records of his discussions with you in 2010 or 2011 (either typed or handwritten). [Officer C] has advised Crown Law that he also told you [Officer B] has conducted a similar review of her records and had been unable to locate any records of notes taken during the meeting she attended on 18 August 2011.

46. In response to OIC's preliminary view on these item (ii) documents, which summarised the above information, the applicant disputed the accuracy of the statements given in Officer C's statutory declaration.⁵⁸ In doing so, he expressed concerns of the same nature as those addressed at paragraph 38 above. Again, I cannot discern the inconsistency alleged by the applicant.

47. On careful consideration of the applicant's submissions regarding these file notes and the information provided by the Department regarding its searches and enquiries (both on receipt of the access application and on external review), and taking into consideration the factors listed in *PDE*, I am satisfied that, while Officer C did make handwritten notes at meetings on 18 August 2011 and other dates, Officer C subsequently disposed of such notes.

⁵⁶ Dated 9 October 2015.

⁵⁷ Dated 21 December 2012.

⁵⁸ Submission dated 12 June 2016.

48. On the basis of this information, I am satisfied that all reasonable searches for the item (ii) documents have been conducted and access to them may be refused as they have been disposed of, and are therefore nonexistent or unlocatable.

Documents responsive to items (iii) to (ix) and (xii)

49. As set out above, the applicant submits that the following **specific** types of documents should have been located, but were not:

- (iii) File notes of Officer A regarding meetings on 19 August 2011
- (iv) Other file notes of Officer A
- (v) The applicant's leave history from 20 November 2008 to 19 November 2011
- (vi) Documents relating to the applicant's performance review on 21 July 2011
- (vii) Other performance planning and review documents
- (viii) Documents related to the discussion of the applicant's performance at the OQPC's EMG meeting on 31 October 2011
- (ix) Documents authored or received by Officer D in 2010 and 2011; and
- (xii) '*[A]ll the minutes of the OQPC executive management group meetings from 2009 onwards and ... those parts of these minutes which contain [the applicant's] personal information*'.

50. I am satisfied that these types of documents would (if they exist) have been created by OQPC officers and therefore be in OQPC's possession. The sufficiency of the searches for such documents by OQPC officers is addressed in OIC's decision regarding the applicant's application to OQPC, which concludes that all responsive documents have been located, and any further responsive documents are nonexistent or unlocatable.⁵⁹

51. However, on the information before me, it appears reasonable to expect that documents responsive to items (iii) to (ix) and (xii) could, at some stage, have entered the Department's possession, given the Department's involvement (as evidenced in some of the information released to the applicant) in some of OQPC's human resources matters and industrial relations proceedings involving the applicant. On consideration of the factors listed in *PDE* with respect to both the Department and OQPC, I anticipate that most, if not all, of such documents would be duplicates of documents in OQPC's possession that have been considered in terms of the applicant's application to OQPC.

52. In any event, in the particular circumstances of this review—that is, where approximately 6768 additional pages of documents have been located by Departmental officers on external review,⁶⁰ but these pages have been assessed by neither the Department nor OIC—I am unable to reach a conclusion about the adequacy of the Department's searches for Departmental documents responsive to items (iii) to (ix) or (xii). While the location of approximately 6768 pages appears to indicate that extensive searches have occurred, I cannot, in the absence of any assessment of these pages, conclude that the Department has conducted all reasonable searches for Departmental documents responsive to items (iii) to (ix) and (xii), nor can I make a finding that such documents are nonexistent or unlocatable.

53. In these circumstances—where a large volume of pages has precluded me from making a finding regarding the sufficiency of searches for Departmental documents—I have

⁵⁹ See paragraphs 57-88 of the decision regarding the access application to OQPC.

⁶⁰ That is, the approximately 6768 pages identified at paragraph 69.

instead considered whether assessing these pages would be a substantial and unreasonable diversion of resources.⁶¹

Documents responsive to items (x) and (xi) and any other documents responsive to the application to the Department

54. The applicant also submits that the following **general** types of documents should have been located, but were not:

- (x) Documents on the applicant's '*employee record*' or '*staff file*'; and
- (xi) Additional electronic records and hard copy files.

55. Given that the scope of the applicant's application included the entirety of his 'employee record',⁶² it appears reasonable to expect that the approximately 6768 pages referred to above⁶³ could contain information falling within the scope of the applicant's application to the Department, including any general types of documents responsive to items (x) and/or (xi). Again, in the absence of any assessment of these pages by the Department or OIC, I am unable to conclude that all reasonable searches for further documents falling within the scope of the applicant's application to the Department, including any general types of documents responsive to items (x) and/or (xi), have been conducted, nor can I make a finding that such documents are nonexistent or unlocatable.

56. Accordingly, as noted above,⁶⁴ I have considered the approximately 6768 pages, in terms of whether assessing them would be a substantial and unreasonable diversion of resources.

Substantial and unreasonable diversion of resources

57. The following pages located on external review have not been considered by the Department or OIC:

- approximately 6768 pages located by Departmental officers;⁶⁵ and
- approximately 2050 pages located by OQPC officers.⁶⁶

58. Further, 2477 pages located on external review by OQPC officers were assessed by OIC, but only in terms of the specific types of documents at items (iv), (v), (vi), (vii), (viii), (ix) and (xii).⁶⁷ In this regard, 182 pages were considered (and 175 of these were released, except for excluded information); however, the remaining 2295 pages have not been considered in terms of any further documents falling within the scope of the applicant's application to the Department, including any documents responsive to items (x) and/or (xi).

⁶¹ Under the heading '*Substantial and unreasonable diversion of resources*' below.

⁶² As defined in section 10(1) of the *Public Service Regulation 2008* (Qld) (**PS Regulation**).

⁶³ In paragraph 52.

⁶⁴ Regarding the specific types of documents responsive to items (iii) to (ix) and (xii).

⁶⁵ Which are identified at paragraph 69.

⁶⁶ Which are identified at paragraph 69.

⁶⁷ The items referred to in this paragraph are set out at paragraph 24 above.

59. As set out above,⁶⁸ due to the large volume of pages yet to be assessed, or further assessed, I have been unable to make a finding regarding the sufficiency of searches for particular types of Departmental documents that the applicant contends should have been located. Given this position, and noting that the scope of the application to the Department included the entirety of his 'employee record',⁶⁹ it appears reasonable to expect that the above pages located by Departmental officers could contain some information responsive to that application.
60. Also, on the information before me, it appears reasonable to expect that responsive information created by Departmental officers could, at some stage, have entered OQPC's possession (for example, in series of emails and attachments thereto) and consequently be among the documents located by OQPC officers, given the Department's involvement (as evidenced in some of the information released to the applicant) in some of OQPC's human resources matters and industrial relations proceedings involving the applicant. Further, it appears reasonable to expect that at least some of such documents remain in the Department's control, and therefore remain Departmental documents⁷⁰ falling within the scope of the applicant's application to the Department.
61. Given these considerations, I consider that the entirety of the pages noted above—totalling approximately 11,113 pages (**Remaining Documents**)⁷¹—may contain information responsive to the applicant's application to the Department. However, given the large volume of these Remaining Documents, the issue of substantial and unreasonable diversion of resources arises for consideration.

Relevant law

62. Parliament intends that an agency receiving an access application will deal with that application unless dealing with the application would not be in the public interest.⁷² The only circumstances in which dealing with an access application will not be in the public interest are set out in sections 59, 60 and 62 of the IP Act.
63. Relevantly, section 60 of the IP Act permits an agency to refuse to deal with an access application if the agency considers the work involved in dealing with the application would, if carried out, substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions.⁷³
64. Before making a decision to refuse to deal with an application on this basis, the agency must fulfil certain procedural prerequisites, namely:⁷⁴
- give the applicant a written notice:
 - stating an intention to refuse to deal with the application
 - advising that, for the prescribed consultation period, the applicant may consult with the agency with a view to making the application in a form that would remove the ground for refusal; and

⁶⁸ See paragraph 52 regarding Departmental documents responsive to items (iii) to (ix) and (xii); and paragraph 55 regarding other Departmental documents falling within the scope of the applicant's application to OQPC, including any general types of documents responsive to items (x) and/or (xi).

⁶⁹ As defined in section 10(1) of the PS Regulation.

⁷⁰ Given the definition of document of an agency in section 13 of the IP Act and section 12 of the RTI Act.

⁷¹ That is, the sum of the approximately 6768, 2050 and 2295 pages referred to at paragraphs 57-58 above.

⁷² Section 58 of the IP Act.

⁷³ Section 60(1)(a) of the IP Act.

⁷⁴ Section 61(1) of the IP Act.

- stating the effect of section 61(2)-(6) of the IP Act
 - give the applicant a reasonable opportunity to consult with the agency; and
 - as far as is reasonably practicable, give the applicant any information that would help the making of an application in a form that would remove the ground for refusal.
65. In deciding to refuse to deal with an application on this basis, an agency:
- must not have regard to any reasons the applicant gives for applying for access or the agency's belief about what are the applicant's reasons for applying for access;⁷⁵ and
 - must have regard to the resources that would be used for:⁷⁶
 - identifying, locating or collating the documents
 - making copies, or edited copies of any documents
 - deciding whether to give, refuse or defer access to any documents, including resources that would have to be used in examining any documents or conducting third party consultations; or
 - notifying any final decision on the application.
66. On external review, OIC may decide any matter in relation to an access application that could, under the IP Act, have been decided by an agency.⁷⁷ Accordingly, OIC may determine that requiring an agency to process an access application would be a substantial and unreasonable diversion of the agency's resources, and decide to refuse to deal with an application under section 60 of the IP Act.
67. The IP Act does not expressly address the procedural requirements to be met by OIC before making a decision to refuse to deal with an application on this basis. However, generally, the IP Act provides that the procedure to be taken on external review is, subject to the IP Act, at the discretion of the Information Commissioner.⁷⁸

Summary of steps taken by OIC

68. In this case, the issue of substantial and unreasonable diversion of resources arose on external review, following the location of additional documents as a result of OIC's enquiries. In these circumstances, I am not required to make any determination regarding the Department's satisfaction of the procedural prerequisites in section 61 of the IP Act.
69. However, it is relevant to note that, in the course of the two reviews, OIC has taken the following steps, similar to those outlined in section 61 of the IP Act, to afford procedural fairness to the applicant:
- The applicant was given the opportunity to respond to the following OIC correspondence regarding the issue of substantial and unreasonable diversion of resources:
 - OIC's initial correspondence⁷⁹—which noted that the work envisaged to consider the Remaining Documents would constitute a substantial and unreasonable diversion of the Department's resources; asked the applicant

⁷⁵ Section 60(3) of the IP Act.

⁷⁶ Section 60(2) of the IP Act.

⁷⁷ Section 118(1)(b) of the IP Act.

⁷⁸ Section 108(1)(a) of the IP Act.

⁷⁹ On 8 July 2015.

to advise if he was able to limit the extent of these documents; and indicated an intention that OIC was considering whether to refuse to deal with the application on the basis that to do so would cause a substantial and unreasonable diversion of resources

- OIC's first preliminary view⁸⁰—which considered the applicant's first proposal to limit the Remaining Documents, and advised that OIC considered that the ground of substantial and unreasonable diversion of resources could be relied on, despite the applicant's proposal to limit these documents; and
- OIC's response⁸¹ to the applicant's request⁸² for general descriptors of the various categories of information in issue—which explained and clarified OIC's first preliminary view as follows:

... the work involved in identifying the types of information nominated by you for elimination from consideration would be extensive, and require examination [of] the entirety of the Remaining Documents in some detail. ... [E]xamining the Remaining Documents to the degree necessary to categorise them and provide descriptors would require [an] extensive amount of work.

- OIC described the Remaining Documents to the applicant as follows:
 - the approximately 6768 pages located by Departmental officers—
emails located by [Officer G] of the Department (about 1,370 pages)
emails located by [Officer B] of the Department (about 4,400 pages); and
documents located on the Department's N: Drive (Human Resources) (about 1,000 pages).
 - the approximately 2050 pages located by OQPC officers—
PSC Complaint File (40 pages approx.)
Legislation worked on by applicant (600 pages approx.)
Legislation drafting Fair Trading (350 pages approx.)
...
QComp Legal File (whole file LPP) (350 pages approx.)
Workcover claim file (450 pages approx.)
Workcover file ... (100 pages approx.)
QIRC Appeal file (160 pages approx.)
 - the 2295 pages as being the pages out of the 2477 pages⁸³ which were assessed on external review as **not** containing information responding to the applicant's specific sufficiency of search concerns identified at items (i), (ii), (iv), (v), (vi), (vii), (viii), (ix) and (x).
- OIC provided the applicant with the following information, in an effort to help the applicant reduce the volume of Remaining Documents to an extent that would remove the ground for refusal:

In considering these options and whether you are able to narrow the scope of the terms of your application or reduce the number of documents to be reviewed, you may like to consider whether there are documents of a particular type, created within a particular time period, authored by particular individuals, or emailed to or by certain individuals to which you particularly seek access. You may also consider whether you wish to pursue access to documents if they are duplicates of documents to which you have already been given access.^[84]

⁸⁰ Dated 13 August 2015.

⁸¹ On 21 August 2015.

⁸² On 20 August 2015.

⁸³ That is, the 2477 pages provided to OIC in response to OIC's request for copies of the following approximately 1702 pages: *Personal Performance Review Documents (57 pages approx.) ... [Officer K] envelope (200 pages approx.) ... Executive Group Management Papers (150 pages approx.) ... [Officer D] legal file (290 pages approx.) ... [Officer D] file (250 pages approx.) ... OQPC staff file (305 pages approx.) ... Legislation Water and other Bill (450 pages approx.)*.

⁸⁴ OIC's 8 July 2015 letter.

Also, you may wish to consider setting out a further proposal to assist in making the effect of dealing with the Remaining Documents less detrimental to both the Department and OIC's performance of their functions. Your proposal could, as noted under the heading 'Your advice' above, identify that you only require certain types of documents that can easily be searched for among the Remaining Documents.^[85]

... your proposal could identify that you only require certain types of documents that can easily be searched for among the Remaining Documents – for example, documents of a particular type, created within a particular time period, authored by particular individuals, or emailed to or by certain individuals.^[86]

- The applicant was provided with a further preliminary view,⁸⁷ which considered the applicant's second proposal to limit the Remaining Documents, and advised that OIC considered that the ground of substantial and unreasonable diversion of resources could be relied on, despite the applicant's proposals.

Summary of the applicant's responses

Applicant's initial proposal

70. Initially, the applicant advised OIC⁸⁸ that he did not seek access to the following types of information within the Remaining Documents:

- duplicates of documents to which he had already been given access, except for those duplicate documents that have additional notations or comments
- work mobile phone numbers and personal information of other individuals
- Cabinet documents; and
- legislation drafted by the applicant.

71. I acknowledge that the applicant's agreement to exclude Cabinet documents and legislation drafted by the applicant would likely reduce the Remaining Documents to some extent.

72. However, I consider that the applicant's agreement regarding duplicates would not reduce the amount of work required to examine the Remaining Documents, given the work involved in identifying duplicates.⁸⁹ In reaching this view, I have noted that:

- Given the extent of documents already released—4557 full and 1194 part pages⁹⁰—it would be a significant imposition for the Department or OIC to identify duplicates of released documents. For example, if a document within the Remaining Documents comprises a particular email sent from one individual at a certain time and date, to identify whether there is a released duplicate of that email, the Department or OIC would be required to examine the 5751 fully or partly

⁸⁵ OIC's 13 August 2015 letter.

⁸⁶ OIC's 21 August 2015 letter.

⁸⁷ Dated 26 April 2016.

⁸⁸ Submission dated 19 July 2015.

⁸⁹ In reaching this conclusion, I acknowledge that the applicant's proposal was partly based on what OIC had said the applicant may wish to consider in our 8 July 2015 letter.

⁹⁰ Comprising:

- Departmental documents—2992 full pages and 847 part pages pursuant to the Department's decision, and 410 full pages and 57 part pages in August 2015; and
- OQPC documents—723 full pages and 235 part pages pursuant to the Department's decision, 251 full pages and 55 part pages in August 2015, and 181 pages in late April 2016.

released pages in order to ascertain whether there is a duplicate of that specific email.

- Further, given the conditions the applicant said he would agree to in excluding duplicates, the Department or OIC would then also need to spend further time in considering:
 - whether the document is one to which the applicant had already been given access; and
 - whether it contains any additional notations or comments.

73. Similarly, in terms of the applicant's agreement to exclude the work mobile phone numbers and personal information of other individuals, I consider that this would not reduce the amount of work required to examine the Remaining Documents. In order to identify work mobile phone numbers and personal information of other individuals, it would be necessary to examine each page of the Remaining Documents. Even if only a small amount of time per page were required to identify such information, this would add up to an extensive amount of time, given the large number of pages requiring consideration.

Applicant's second proposal

74. The applicant made a further proposal⁹¹ to limit the Remaining Documents to the following categories of documents:

- (1) *Documents relating to my work performance or work conduct at OQPC created from 2009 onwards (including emails and file notes).*
- (2) *Documents expressing an opinion, appraisal, feedback or observation about me or my work, authored by [Officer A], [Officer D] or [Officer E] and created from 2009 onwards (including emails and file notes).*
- (3) *Documents dealing with the possible, proposed or actual termination of my employment at OQPC created from 2009 onwards (including emails and file notes).*
- (4) *File notes or other recordings of meetings I had with [Officer C], [Officer B] and/or [Officer G] of the Department in 2010 and 2011.*
- (5) *File notes or other recordings of the meeting I had with [Officer A] in her office in the morning of 19 August 2011, at which [Officer B] was present.*

75. I note that, for categories (4) and (5) of these five categories, these categories overlap with items (i) to (iii) raised by the applicant in terms of the sufficiency of the searches for responsive documents.⁹² My findings at paragraphs 31 to 48 above and paragraphs 53 to 60 of OIC's decision regarding the applicant's application to OQPC address most of the documents within these two categories. Relevantly, the findings conclude that documents regarding the meetings in question created by Officer C and Officer B, and further documents created by Officer A (other than the 3 pages released to the applicant), are nonexistent or unlocatable. Further, in terms of category (4), insofar as it relates to documents created by Officer G, I note that the Department provided OIC with a statutory declaration signed by Officer G which relevantly states as follows:

... I remember meeting with [the applicant] early in 2010, [and] any relevant records that I may have created in relation to these meetings would have been placed on his rehabilitation files.

⁹¹ On 29 August 2015.

⁹² These items are set out at paragraph 24 above.

I understand that these rehabilitation files have already been addressed as part of [the applicant's] original Information Privacy access application.

76. In relation to categories (1), (2) and (3), I note that these categories overlap with items (vi) to (ix) raised by the applicant in terms of the sufficiency of the searches for responsive documents.⁹³ I also note that a substantial number of documents responsive to these categories have already been released to the applicant. For example, based on a brief assessment of a small portion of the located information—namely, the 1452 pages of OQPC documents considered in the Department's decision—123 pages responsive to categories (1), (2) and (3) were identified as having being released to the applicant.⁹⁴
77. In these circumstances, I consider that my reasoning regarding duplicate documents (at paragraph 72 above) is apposite to the information covered by categories (1), (2), (3) and (4) insofar as category (4) relates to Officer G. I also note that, if the issue of duplicates was avoided (that is, if all responsive documents were simply identified and considered, regardless of whether or not they were duplicates that had previously been considered), the broadness of categories (1), (2) and (3) appears likely to capture a significant number of documents. Given these considerations, I consider that the applicant's proposal to limit the Remaining Documents to the above five categories would not reduce the amount of work required to deal with the Remaining Documents to such an extent as to remove the ground for the refusal to deal.

Other matters raised by the applicant

78. The applicant submits that OIC should afford him a further opportunity to narrow the scope of the Remaining Documents.⁹⁵ The applicant was afforded three opportunities⁹⁶ to limit the amount of the Remaining Documents, and made two proposals in this regard.⁹⁷ In these circumstances, OIC determined that a further opportunity to narrow the scope of the Remaining Documents was not required. The IP Act provides that the procedure to be taken on external review is at the discretion of the Information Commissioner,⁹⁸ subject to the requirement to adopt procedures that are fair.⁹⁹ In the present case, I am satisfied that the approach taken has been procedurally fair. Indeed, I note that, in giving three opportunities and considering two responses, OIC has exceeded the prerequisites in section 61 that apply to agencies.

⁹³ These items are set out at paragraph 24 above.

⁹⁴ The following table identifies a number of pages released to the applicant corresponding to each category:

Category of information	Example of released information (including part released documents)
<i>(1) Documents relating to my work performance or work conduct at OQPC created from 2009 onwards (including emails and file notes).</i>	OQPC – Pack 2, pp 1-14 OQPC – Pack 5, pp 186-187, 219-233
<i>(2) Documents expressing an opinion, appraisal, feedback or observation about me or my work, authored by [Officer A], [Officer D] or [Officer E] and created from 2009 onwards (including emails and file notes).</i>	OQPC – Pack 1, pp 1-2, 107-118, 121-125, 129-131, 140-168 OQPC – Pack 2, 15-19, 103-106 OQPC – Pack 4, pp 1-18 OQPC – Pack 5, pp 1-4, 154-155, 201-202, 208-211, 242-243
<i>(3) Documents dealing with the possible, proposed or actual termination of my employment at OQPC created from 2009 onwards (including emails and file notes).</i>	OQPC – Pack 2, pp 27-31 OQPC – Pack 3, pp 104-129 OQPC – Pack 5, pp 212-218

⁹⁵ In a submission dated 12 June 2016, in a telephone conversation with an OIC staff member on 1 July 2016 and by letter dated 3 July 2016.

⁹⁶ On 8 July 2015, 13 August 2015 and 21 August 2015.

⁹⁷ On 19 July 2015 and 29 August 2015.

⁹⁸ Section 108(1)(a) of the IP Act.

⁹⁹ Section 110(2)(a) of the IP Act.

79. The applicant also expresses concern that the volume of the Remaining Documents is unnecessarily large, because the Department's searches on external review were too broad. It is my understanding that he considers that the issue of substantial and unreasonable diversion of resources would not require consideration, had the Department conducted better searches.¹⁰⁰
80. At the time the applicant initially raised concerns about the broadness of the Department's searches, the Department had already considered 5943 pages in its decision. The applicant has continued to express such concerns following receipt of OIC's more recent advice¹⁰¹ that:
- a very high number of pages—7429¹⁰²— have now been considered for release both initially and on external review, with the large majority of these pages—4557 full¹⁰³ and 1194 part¹⁰⁴ pages—released to the applicant
 - as noted above,¹⁰⁵ based on a brief assessment of the 1452 pages of OQPC documents considered in the Department's decision (that is, **not** a comprehensive assessment of all considered information)—123 pages responsive to categories (1), (2) and (3) were identified as having being released to the applicant; and
 - relevant individuals conducted all reasonable searches for relevant documents.¹⁰⁶
81. At the same time as expressing these concerns, the applicant also continues to raise sufficiency of search concerns.¹⁰⁷ Given that the applicant's sufficiency of search concerns remain despite the consideration of 7429 pages, and full or partial release of 5751 of these pages, I consider it reasonable for the Department's searches to be broad in nature, in an effort to locate any documents which may not have been located in earlier searches.

Findings

Would the work substantially divert the Department's resources?

82. The Department has not made a specific estimate of the resources that would be used in performing the tasks set out at section 60(2) of the RTI Act. When advising OIC of the location of 6768 pages of the Remaining Documents, the Department calculated that it would take 20 weeks to review that portion.¹⁰⁸ However, this calculation did not estimate the time that the work involved in reviewing the 6768 pages would consume—rather, it estimated the time that the RTI and Privacy Unit would need to review those pages, while also progressing other, unrelated applications and fulfilling other functions.
83. I consider that a very conservative estimate for the amount of time to be spent on assessing which of the Remaining Documents fall within the applicant's proposed limited scope would be 15 seconds per page. As the Remaining Documents comprise 11,113

¹⁰⁰ The applicant raised such concerns in submissions dated 19 July 2015, 20 August 2015, 29 August 2015 and 12 June 2016.

¹⁰¹ On 26 April 2016.

¹⁰² Comprising the 5943 pages initially considered in the decisions, 1298 further pages considered in August 2015, and 6 and 182 pages considered in OIC's letter dated 26 April 2016.

¹⁰³ Comprising 2992 and 723 pages initially, 661 pages in late August 2015, and 6 and 175 as a result of OIC's letter dated 26 April 2016.

¹⁰⁴ Comprising 847 and 235 pages initially, and 112 pages in late August 2015.

¹⁰⁵ At paragraph 76.

¹⁰⁶ As summarised at paragraphs 31-53, and set out in further detail at pages 7 to 12 of the preliminary view dated 26 April 2016.

¹⁰⁷ See the submissions referred to in footnote 100.

¹⁰⁸ Submission dated 18 June 2015.

pages, this would total 2778.25 minutes—or, in other words, approximately 46 hours, 20 minutes.

84. Assuming, on a very conservative basis, that only a small proportion—20%—of the Remaining Documents fall within the applicant's proposed limited scope of five categories, this would nonetheless result in the identification of approximately 2000 pages requiring further consideration.
85. Again, I consider that a very conservative estimate for the amount of time to be spent on:
- scanning these pages
 - determining if the pages are exact duplicates of documents to which the applicant has already been given access
 - if not—
 - determining whether to give, refuse or defer access to any information within the pages
 - marking-up the pages to redact any refused information or information which the applicant has agreed to exclude; and
 - conducting third party consultations; and
 - providing submissions to OIC regarding the Department's assessment of the Remaining Documents

would equate to approximately 1 minute per page. This would total approximately 2000 minutes—or, in other words, 33 hours, 20 minutes.

86. The combined total of these estimates is approximately 79 hours and 40 minutes. This equates to approximately 11 working days for one full time decision-maker working exclusively on the Remaining Documents—that is, a little less than half the usual processing period allowed for processing an application.¹⁰⁹
87. Whether the work involved in dealing with an application would, if carried out, substantially and unreasonably divert the resources of an agency is a question of fact in each individual case.¹¹⁰ The volume of documents is not the only consideration. In each case, it is necessary to assess the work required to deal with the application in the context of the agency's other functions.
88. In the present circumstances, I consider that the work already performed is relevant to the question of whether the further work involved in dealing with the Remaining Documents amounts to a substantial diversion of resources. In this regard, I consider it relevant to note the 130 hours (that is, approximately 18 working days) that the Department estimates have already been spent on dealing with these applications initially and on external review,¹¹¹ as well as the above estimate of 79 hours and 40 minutes.

¹⁰⁹ Under section 22 of the IP Act, the processing period for an access application is 25 business days. Whilst this period can effectively be extended in certain circumstances as certain periods do not count as part of the processing period, it is relevant to have regard to this timeframe when considering whether the time involved in processing a single access application will have a substantial impact on an agency's resources.

¹¹⁰ *Davies and Department of the Prime Minister and Cabinet* [2013] AICmr 10 (22 February 2013) at [28].

¹¹¹ Submission dated 16 October 2015.

89. I have carefully considered the total of the above estimates which, as stated above, I consider to be very conservative. I have also noted that this amount applies across two applications to entities that are separate agencies under the IP Act. Further, I have considered the present size of the Department's RTI and Privacy Unit, as well as the size of the Department and OQPC themselves, and noted the relatively limited capacity of the Department and OQPC to devote existing RTI and Privacy Unit resources, or other Departmental and OQPC resources, to continuing to deal with the applicant's applications relative to processing other applications under the RTI and IP Acts and performing other Departmental and OQPC functions. Taking into account these matters, I am satisfied that the work involved in processing,¹¹² or further processing,¹¹³ the Remaining Documents would, if carried out, **substantially** divert the resources of the Department from their use in the performance of the Department's and OQPC's functions.

Would the work unreasonably divert the Department's resources?

90. In determining whether the work involved in dealing with an application is unreasonable, it is not necessary to show that the extent of the unreasonableness is overwhelming. Rather, it is necessary to weigh up the considerations for and against, and form a balanced judgement of reasonableness, based on objective evidence.¹¹⁴

91. Factors that have been taken into account in considering this question include:¹¹⁵

- whether the terms of the request offer a sufficiently precise description to permit the agency, as a practical matter, to locate the documents sought within a reasonable time and with the exercise of reasonable effort
- the public interest in disclosure of documents relating to the subject matter of the request
- whether the request is a reasonably manageable one, giving due but not conclusive, regard to the size of the agency and the extent of its resources usually available for dealing with access applications
- the agency's estimate of the number of documents affected by the request, and by extension the number of pages and the amount of officer time
- the reasonableness or otherwise of the agency's initial assessment and whether the applicant has taken a cooperative approach in redrawing the boundaries of the application
- the timelines binding on the agency
- the degree of certainty that can be attached to the estimate that is made as to the documents affected and hours to be consumed; and in that regard, importantly whether there is a real possibility that processing time may exceed to some degree the estimate first made; and
- whether the applicant is a repeat applicant to that agency, and the extent to which the present application may have been adequately met by previous applications to the agency.

92. As the issue of substantial and unreasonable diversion of resources only arose on external review, some of these factors are not relevant in this case.

¹¹² The approximately 8818 pages referred to at paragraph 57 above.

¹¹³ The 2295 pages referred to at paragraph 58 above.

¹¹⁴ *Smeaton v Victorian WorkCover Authority (General)* [2012] VCAT 1550 (**Smeaton**) at [30], citing *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

¹¹⁵ *Smeaton* at [39].

Repeat applicant

93. There is no information before me to suggest that the applicant is a repeat applicant to the Department or OQPC in their capacity as agencies, nor that his applications may have been adequately met by previous applications to them.

Applicant's cooperation

94. I note that the applicant endeavoured to take a cooperative approach by proposing to reduce the categories of information to be considered within the Remaining Documents. However, for the reasons at paragraphs 70 to 77 above, I am satisfied that the applicant's proposals would not reduce the documents to be considered to such an extent as to remove the ground for the refusal to deal.

Sufficiently precise terms

95. I consider that categories (1), (2) and (3), as proposed by the applicant, are still broad and insufficiently precise to enable the Department to locate such documents within a reasonable time and with the exercise of reasonable effort. In this regard, I have noted that, for:
- category (1)¹¹⁶—it could reasonably be expected that there would be numerous documents which relate to the applicant's work performance or work conduct at OQPC over a period of years
 - category (2)¹¹⁷—there are likely to be many emails authored by these individuals expressing an observation about the applicant or the applicant's work over a period of years; and
 - category (3)¹¹⁸—this category would extend to nearly all documents created during proceedings after the time the applicant's employment ended, and it is also likely that there would be a substantial number of documents created about this prior to the ending of the applicant's employment.

Public interest

96. The applicant has indicated to OIC on a number of occasions that he is seeking the information for specific purposes. I acknowledge this, but cannot take this aspect of the applicant's submissions into account.¹¹⁹ However, in accordance with the factors noted above, I am able to consider the public interest in disclosure of the categories of documents nominated by the applicant among the Remaining Documents. In this regard, my views are necessarily qualified, given that they are based on my understanding of the nature of such documents (as gleaned from consideration of other located documents and the parties' submissions), rather than a thorough awareness of their contents. Noting this qualification, I consider that there is some public interest in the applicant having access to his own personal information, and accept that the documents may relate to matters which could potentially enhance the accountability and

¹¹⁶ Documents relating to [the applicant's] work performance or work conduct at OQPC created from 2009 onwards (including emails and file notes).

¹¹⁷ Documents expressing an opinion, appraisal, feedback or observation about [the applicant or his] work, authored by [Officer A], [Officer D] or [Officer E] and created from 2009 onwards (including emails and file notes).

¹¹⁸ Documents dealing with the possible, proposed or actual termination of [the applicant's] employment at OQPC created from 2009 onwards (including emails and file notes).

¹¹⁹ Given section 60(3) of the IP Act, which provides that an agency must not have regard to any reasons the applicant gives for applying for access; or the agency's belief about what the applicant's reasons are for applying for access.

transparency of OQPC and the Department. However, it also appears that these public interest factors may apply mainly in terms of the applicant, and may be of limited interest to all or a substantial segment of the community.

97. Also in terms of the public interest, I note that, on external review, OIC prioritised consideration of the applicant's concerns regarding specific types of documents (that is, items (iv), (vi), (vii), (viii), (ix) and (xii)), and focused on files that could reasonably be expected to contain them (that is, the OQPC files comprising 2477 pages rather than those comprising approximately 2050 pages). I also note the Department's expectation that the majority of the Remaining Documents will either be duplicates, or outside the scope of the applications (but captured due to the broad nature of the searches undertaken by the Department on external review in an effort to locate any missed documents).¹²⁰ In these circumstances, I do not consider it likely that dealing with the Remaining Documents would further the public interest to any significant degree.

Reasonableness of agency's approach

98. I acknowledge the applicant's concerns about the broadness of the Department's searches that resulted in location of the Remaining Documents. However, for the reasons listed at paragraphs 79 to 81, I consider that it was reasonable for the Department to have undertaken broad searches in an effort to locate any documents which may not have been located in earlier searches.

Accuracy and certainty of estimate

99. As set out at paragraphs 83 to 89 above, for the purposes of this decision, I estimated that dealing with the Remaining Documents would take the Department approximately 79 hours and 40 minutes. In calculating this estimate, I formed my own conclusions, separate from the Department's own calculation.¹²¹ I consider that my estimate is very conservative. For example, depending on the nature of particular documents, the time required to undertake the following steps noted at paragraph 85 above regarding each page could well exceed the estimated 1 minute per page.
100. In terms of the time that the Department estimates has already been spent on dealing with the applications initially and on external review, I note the Department's estimate of 130 hours, and consider this to be reasonable in light of the number of documents considered by the Department, the amount of searches conducted, the lengthy nature of the decision, and the Department's communications on external review. Noting the time spent by OIC on similar activities, I consider that this estimate is conservative.

Reasonably manageable request

101. In determining whether dealing with the Remaining Documents is reasonably manageable for the Department and OQPC, I am required to give due, but not conclusive, regard to the size of the agency and the extent of its resources usually available for dealing with access applications. I do not regard the estimate of 79 hours and 40 minutes noted above to be reasonably manageable in the current reviews, in light of the time already spent dealing with the applications, and given the need for the Department and OQPC to process other applications and attend to other Departmental and OQPC functions.

¹²⁰ Submissions dated 19 May 2015, 16 June 2015 and 16 October 2015.

¹²¹ See paragraph 82.

102. Taking into account the above factors, I am satisfied that the work involved in processing,¹²² or further processing,¹²³ the Remaining Documents would, if carried out, **unreasonably** divert the resources of the Department from their use in the performance of the Department's functions.

Conclusion

103. I consider that the Department is entitled to refuse to deal with the Remaining Documents under section 60 of the IP Act on the basis that the work involved in processing, or further processing, them would both substantially and unreasonably divert the Department's resources from their use in the performance of the Department's functions.

DECISION

104. For the reasons set out above, I set aside the Department's decision, and find that:

- access to the Category A Information may be refused on the ground that it comprises exempt information¹²⁴
- certain documents the applicant contends the Department failed to locate may be refused on the ground that they are nonexistent or unlocatable;¹²⁵ and
- the Department may to refuse to deal with the Remaining Documents on the basis that the work involved in processing, or further processing, them would substantially and unreasonably divert the Department's resources from their use in the performance of its functions.¹²⁶

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

A Rickard
Assistant Information Commissioner

Date: 13 October 2016

¹²² The approximately 8818 pages referred to at paragraph 57 above.

¹²³ The 2295 pages referred to at paragraph 58 above.

¹²⁴ Section 67 of the IP Act and sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act.

¹²⁵ Section 67 of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

¹²⁶ Section 60(1)(a) of the IP Act.

APPENDIX

Significant procedural steps¹²⁷

Date	Event
21 May 2014	The Department received the access application for the Department.
30 May 2014	The Department proposed an amended scope for the access application for the Department. The applicant accepted this amended scope.
4 June 2014	OQPC received the access application for OQPC.
18 June 2014	The Department received the access application for OQPC.
7 July 2014	The Department proposed the exclusion of certain information from the scope of both applications, which the applicant accepted.
20 August 2014	The Department issued its decision in respect of both access applications.
3 September 2014	OIC received the application for external review of the decision in respect of both access applications.
5 September 2014	OIC notified the Department of the external review application and requested procedural documents in relation to both access applications.
12 September 2014	The Department provided OIC with the requested procedural documents.
24 September 2014	OIC notified the applicant and the Department that OIC had accepted the external review application. OIC asked the Department to provide a record of searches and its records regarding third party consultation by 9 October 2014.
1 October 2014	The Department provided records of its searches and its records regarding third party consultation.
14 October 2014	The applicant wrote to OIC, raising sufficiency of search concerns.
15 October 2014	An OIC staff member spoke with the applicant about the review, including about sufficiency of search concerns.
17 October 2014	OIC wrote to the applicant about the issues for consideration, including a request for specific sufficiency of search submissions.
18 October 2014	The applicant responded to OIC's 17 October 2014 correspondence.
21 October 2014	OIC wrote to the applicant about the issues for consideration.
22 October 2014	The applicant responded to OIC's 21 October 2014 correspondence.
24 October 2014	OIC wrote to the applicant.
20 November 2014	The applicant requested an update.

¹²⁷ As noted at paragraph 4 above, throughout the two external reviews, OIC has adopted the procedure of addressing issues arising in them concurrently. Consequently, the significant procedural steps summarised in this table identify the steps taken in both external reviews.

Date	Event
24 November 2014	OIC provided an update to the applicant.
12 December 2014	OIC asked the Department to provide a marked-up copy of the 5943 pages considered in its decision (being 4491 pages located by Departmental officers and 1452 pages located by OQPC officers).
15 December 2014	The Department provided a marked-up copy of the 5943 pages.
16 January 2015	OIC provided an update to the applicant.
24 February 2015	OIC provided an update to the applicant.
9 April 2015	OIC provided an update to the applicant.
28 April 2015	OIC wrote to the Department, asking for a sufficiency of search submission by 12 May 2015 and, if necessary, for further searches to be conducted. OIC provided an update to the applicant.
6 May 2015	The applicant wrote to OIC, raising sufficiency of search concerns.
8 May 2015	The Department requested an extension until 19 May 2015, which OIC granted. OIC wrote to the applicant, outlining the issues to be taken into account in addressing his sufficiency of search concerns.
19 May 2015	The Department confirmed to OIC that relevant Departmental officers' search records would shortly be provided to OIC, and that ' <i>several thousand documents potentially relevant to the scope of the application [had] also [been] provided [to the Department contact] by the relevant Officers</i> '. As a result, the Department requested an extension until 16 June 2015, in order to examine these documents.
20 May 2015	OIC granted the requested extension to the Department. The Department provided records of its further searches.
3 June 2015	OIC provided an update to the applicant.
16 June 2015	The Department noted its progress to date (including that approximately 1300 pages of the documents located on external review had been reviewed and approximately 7000 pages were yet to be reviewed), and asked for either an extension or OIC's advice as to how to progress the matter further.
17 June 2015	The Department provided a marked-up copy of 1298 pages of documents located on external review, and advised that approximately 6768 further pages ¹²⁸ had yet to be scanned and reviewed. The Department noted that at least some of these pages were duplicates of pages addressed in the Department's original decision.
18 June 2015	The Department summarised its progress to date in dealing with the documents located on external review, and the work yet to be done.

¹²⁸ Comprising 1368 pages of emails from Officer G, approximately 4400 pages of emails from Officer B, and approximately 1000 pages of the Department's N:Drive documents.

Date	Event
8 July 2015	<p>OIC wrote to the applicant:</p> <ul style="list-style-type: none"> • informing him of the documents located on external review and reviewed by the Department • noting that the work involved in reviewing the Remaining Documents would constitute a substantial and unreasonable diversion of resources, and asking him to advise if he was able to limit the information to be considered; and • requesting a response by 22 July 2015.
13 July 2015	<p>An OIC staff member spoke with the applicant about OIC's 8 July 2015 correspondence.</p>
19 July 2015	<p>The applicant provided a response to OIC's 8 July 2015 correspondence, seeking an extension and further details about the documents in question, and advising that he did not wish to access the following types of information within them:</p> <ul style="list-style-type: none"> • duplicates of documents to which he had already been given access, except for those duplicate documents that have additional notations or comments • work mobile phone numbers and personal information of other individuals • Cabinet documents; and • legislation drafted by him.
21 July 2015	<p>An OIC staff member spoke with the applicant about OIC's 8 July 2015 correspondence.</p>
28 July 2015	<p>OIC wrote to the Department, summarising the applicant's proposal to limit the information to be considered in the documents located on external review yet to be reviewed by the Department, and asking if this would enable the Department to process these documents.</p> <p>The Department responded, noting that the applicant's proposal would not assist the Department in reducing the work involved in reviewing the documents in question.</p>
31 July 2015	<p>OIC wrote to the Department seeking clarification about the application of the LPP exemption in respect of certain information among the documents located on external review and reviewed by the Department.</p>
3 August 2015	<p>The Department provided a written response to OIC's 31 July 2015 letter.</p>

Date	Event
13 August 2015	<p>OIC wrote to the applicant:</p> <ul style="list-style-type: none"> • advising that the Department had agreed to release some of the documents located on external review and reviewed by the Department (namely, 410 pages and 57 part pages located by Departmental officers) • conveying a preliminary view on: <ul style="list-style-type: none"> ○ the LPP exemption ○ sufficiency of search issues; and ○ the substantial and unreasonable diversion of resources issue • asking the applicant to consider setting out a further proposal to limit the information to be considered in the documents located on external review yet to be reviewed by the Department; and • requesting a response by 26 August 2015. <p>OIC wrote to the Department, summarising the preliminary view to the applicant, and asking for information to be released to the applicant by 19 August 2015.</p>
20 August 2015	<p>The applicant wrote to OIC about the 13 August 2015 letter, requesting more details about the documents located on external review yet to be reviewed by the Department (including general descriptors of their various categories), and asking for an extension until 21 September 2015.</p>
21 August 2015	<p>An OIC staff member spoke with the applicant about OIC's 13 August 2015 letter.</p> <p>OIC wrote to the applicant in response to his 20 August 2015 letter:</p> <ul style="list-style-type: none"> • noting that: <ul style="list-style-type: none"> ○ the work involved in identifying the types of information nominated in his 19 July 2015 letter for elimination from consideration would be extensive, and require examination of the entirety of the documents located on external review yet to be reviewed by the Department; and ○ examining these documents to the degree necessary to categorise them and provide descriptors would require a similarly extensive amount of work; and • granting an extension until 2 September 2015 to respond to OIC's 13 August 2015 letter.
27 August 2015	<p>An OIC staff member spoke with the applicant about the 13 August 2015 and 21 August 2015 letters, his allegations of misconduct by agency officers and his query about action that could be taken regarding misconduct.</p>
28 August 2015	<p>An OIC staff member spoke with the applicant about the 13 August 2015 and 21 August 2015 letters, and his query about misconduct.</p>

Date	Event
29 August 2015	<p>The applicant provided a response to OIC's 13 August 2015 and 20 August 2015 letters:</p> <ul style="list-style-type: none"> • making submissions about OIC's preliminary view on the Category A Information and eleven sufficiency of search concerns • expressing concern that the large number of documents located on external review yet to be reviewed by the Department may be a result of the Department's searches having been too broad; and • including a further proposal to limit these documents.
3 September 2015	<p>An OIC staff member spoke with the applicant about the 13 August 2015 and 21 August 2015 letters, and his query about misconduct.</p>
4 September 2015	<p>OIC wrote to the applicant:</p> <ul style="list-style-type: none"> • confirming the remaining refusal and sufficiency of search issues • noting the applicant's further proposal to limit the information to be considered in the documents located on external review yet to be reviewed by the Department; and • providing a response to the applicant's query about misconduct. <p>An OIC staff member spoke with the applicant about the 13 August 2015 and 21 August 2015 letters, and his query about misconduct.</p>
16 September 2015	<p>OIC wrote to the Department, asking about sufficiency of search issues and the applicant's further proposal to limit the information to be considered in the documents located on external review yet to be reviewed by the Department, and requesting a response by 2 October 2015.</p>
22 September 2015	<p>An OIC staff member spoke with a Departmental officer about OIC's 16 September 2015 letter.</p>
30 September 2015	<p>An OIC staff member spoke with a Departmental officer about OIC's 16 September 2015 letter.</p>
1 October 2015	<p>OIC wrote to the Department about the sufficiency of search issues.</p>
2 October 2015	<p>The Department asked for an extension until 16 October 2015, which OIC granted. OIC provided an update to the applicant.</p>
13 October 2015	<p>An OIC staff member spoke with a Departmental officer about OIC's 16 September 2015 letter.</p>
16 October 2015	<p>The Department wrote to OIC, providing:</p> <ul style="list-style-type: none"> • search records and statutory declarations about documents • a response regarding the applicant's further proposal to limit the information to be considered in the documents located on external review yet to be reviewed by the Department • six further pages located on external review; and • details about categories of further documents located on external review by OQPC officers yet to be reviewed by it, which it approximated to total 3800 pages.

Date	Event
18 October 2015	The applicant wrote to OIC, explaining specific sufficiency of search concerns and expanding on his query about misconduct.
4 December 2015	An OIC staff member spoke with the applicant about the applicant's concerns about the sufficiency of search and substantial and unreasonable diversion of resources issues and his query about misconduct.
24 December 2015	An OIC staff member spoke with the applicant about the applicant's concerns about the sufficiency of search and substantial and unreasonable diversion of resources issues. OIC provided an update to the applicant.
29 January 2016	OIC wrote to the Department: <ul style="list-style-type: none"> • asking it to provide OIC with certain categories of documents among the approximately 3800 pages identified in its 16 October 2015 letter • seeking its position on disclosure of the six located pages provided with its 16 October 2015 letter • clarifying one aspect relating to one of the documents within the six located pages; and • requesting a search certification or statutory declaration relating to one sufficiency of search issue. OIC provided an update to the applicant.
12 February 2016	The Department wrote to OIC, responding to the issues raised in OIC's letter dated 29 January 2016, and providing OIC with 2477 pages of documents located on external review.
11 March 2016	OIC provided an update to the applicant.
1 April 2016	OIC wrote to the Department, seeking its position on disclosure of 182 of the 2477 pages provided with its 12 February 2016 letter, which contained information responding to eight of the eleven sufficiency of search concerns raised by the applicant in his submissions dated 29 August 2015.
5 April 2016	The Department confirmed its agreement to release a redacted version of the 182 pages.
26 April 2016	OIC wrote to the applicant: <ul style="list-style-type: none"> • conveying a preliminary view on: <ul style="list-style-type: none"> ○ the refused information remaining in issue, which OIC considered to be only the Category A Information ○ the sufficiency of search issues; and ○ the substantial and unreasonable diversion of resources issue regarding the documents located on external review yet to be reviewed by the Department; and • requesting a response by 13 May 2016. OIC asked the Department to release six pages and a redacted version of the 182 pages.
28 April 2016	An OIC staff member spoke with the applicant, and the applicant requested an extension of at least one month.

Date	Event
29 April 2016	OIC granted the applicant an extension until 16 June 2016. OIC suspended these reviews.
3 May 2016	The Department wrote to OIC, confirming release of the six pages and a redacted version of the 182 pages.
12 June 2016	The applicant provided a response to OIC's 26 April 2016 letter: <ul style="list-style-type: none"> • making submissions about sufficiency of search issues • expressing concerns about OIC's preliminary view on the substantial and unreasonable diversion of resources issue • raising a query about the offence provisions of the RTI Act; and • requesting certain documents.
13 June 2016	OIC ended the suspension of the two reviews.
1 July 2016	OIC provided an update to the applicant, confirming (among other things) that OIC's next step would be a written decision addressing the applicant's concerns insofar as they relate to the issues in these reviews. An OIC staff member spoke with the applicant about OIC's 26 April 2016 letter and the applicant's 12 June 2016 response.
3 July 2016	The applicant wrote to OIC, expanding on the issues raised in his 12 June 2016 response.
6 July 2016	OIC wrote to the applicant: <ul style="list-style-type: none"> • responding to a concern of the applicant regarding the substantial and unreasonable diversion of resources issue; and • confirming that OIC's next step would be a written decision.
12 July 2016	The applicant provided a response to OIC's 6 July 2016 letter.
4 August 2016	OIC responded to the applicant's 12 July 2016 letter.