



## Decision and Reasons for Decision

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<b>Citation:</b>	<i>F60XCX and Queensland Ombudsman</i> [2014] QICmr 28 (13 June 2014)
<b>Application Number:</b>	311860
<b>Applicant:</b>	F60XCX
<b>Respondent:</b>	Queensland Ombudsman
<b>Decision Date:</b>	13 June 2014
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - information relating to the handling of the applicant's complaint by the Queensland Ombudsman including unsubstantiated allegations about other individuals and information provided by a witness - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld) and section 67(1) of the <i>Information Privacy Act 2009</i> (Qld)</b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied to the Queensland Ombudsman (**Ombudsman**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for all documents containing his personal information including information on a number of the Ombudsman's files.
2. The Ombudsman located the relevant documents and refused access to information relating to a witness and unsubstantiated allegations on the basis that its disclosure would, on balance, be contrary to the public interest under sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld) (**RTI Act**).
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the decision to refuse access to the relevant information.
4. For the reasons set out below, the decision under review is affirmed and access to the relevant information can be refused as its disclosure would, on balance, be contrary to the public interest.

## Background

5. The applicant made a complaint to the Ombudsman about issues arising from his employment with another agency and the actions of a particular officer. The Ombudsman:
  - notified the applicant that it had decided to not further investigate the complaint under section 23(1)(f) of the *Ombudsman Act 2001* (Qld) as further investigation was unnecessary or unjustifiable
  - provided the applicant with reasons for its decision<sup>1</sup>
  - did not notify the agency or the subject officer that the complaint had been received and did not put the allegations to the subject officer or the agency for response; and
  - did not make any finding about whether the allegations made by the applicant were substantiated or unsubstantiated.
6. The applicant considers that the Ombudsman did not formally commence an investigation but merely collected information and documents relevant to his complaint.<sup>2</sup> The applicant intends to apply for internal review of the Ombudsman's decision to not further investigate his complaint and believes that the Information in Issue is relevant to his internal review application.<sup>3</sup>
7. Significant procedural steps relating to the external review are set out in the appendix to these reasons.

## Reviewable decision

8. The decision under review is the Ombudsman's internal review decision dated 2 December 2013.

## Evidence considered

9. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).

## Issue for determination

10. The Ombudsman located 315 pages relevant to the access application and decided to:
  - grant full access to 180 pages
  - refuse access to 81 pages and 16 part pages on the basis that disclosure would, on balance, be contrary to the public interest; and
  - exclude 11 pages and 27 part pages from consideration on the basis that the information was outside the scope of, or irrelevant to, the access application.
11. A number of issues were informally resolved on external review.<sup>4</sup> The remaining issue for determination is whether access to information can be refused under section 67(1)

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<sup>1</sup> By letter dated 3 June 2013.

<sup>2</sup> Applicant's submissions dated 29 December 2013. The applicant made submissions to the Ombudsman and OIC on various occasions as identified in the appendix to this decision. I have carefully considered these submissions and note that some issues raised by the applicant are repeated throughout his submissions. The footnotes to this decision do not reference each instance where an issue was raised.

<sup>3</sup> Applicant's submissions dated 24 April 2014.

<sup>4</sup> The applicant accepted OIC's preliminary view that certain information could be excluded from consideration under section 88 of the IP Act as it was irrelevant to the access application. The Ombudsman accepted OIC's preliminary view that there was no basis to refuse access to a small amount of information on page 54 and released this information to the applicant.

of the IP Act on the basis that its disclosure would, on balance, be contrary to the public interest under the RTI Act.

### Information in issue

12. The information in issue (**Information in Issue**) comprises 81 full pages and 16 part pages relating to a complaint the applicant made to the Ombudsman and can be described as:
- internal case management documents, file notes and emails which record details of internal discussions and preliminary analysis of the complaint
  - draft letters to the officer who was the subject of the complaint and the relevant agency; and
  - file notes containing information provided by a witness in relation to the complaint.

### Relevant law

13. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent the documents contain the individual's personal information. However, this right is subject to limitations, including grounds for refusal of access.<sup>5</sup>
14. An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.<sup>6</sup> The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.
15. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest<sup>7</sup> and explains the steps that a decision-maker must take<sup>8</sup> in deciding the public interest as follows:
- identify any irrelevant factors and disregard them
  - identify relevant public interest factors favouring disclosure and nondisclosure
  - balance the relevant factors favouring disclosure and nondisclosure; and
  - decide whether disclosing the information in issue would, on balance, be contrary to the public interest.

### Findings

16. I have considered the irrelevant factors in schedule 4 of the RTI Act and am satisfied that none of them arise in the circumstances of this case. I will now consider the relevant factors favouring disclosure and nondisclosure.

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<sup>5</sup> 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 the RTI Act.

<sup>6</sup> Section 47(3)(b) and 49 of the RTI Act.

<sup>7</sup> Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.

<sup>8</sup> Section 49(3) of the RTI Act.

### ***Accountability, transparency, fair treatment and the administration of justice***

17. I have considered whether disclosing the Information in Issue could reasonably be expected to:<sup>9</sup>

- enhance the Ombudsman's accountability<sup>10</sup>
- reveal the reason for the Ombudsman's decision and any background or contextual information that informed the decision<sup>11</sup>
- advance the applicant's fair treatment in his dealings with the Ombudsman;<sup>12</sup> and
- contribute to the administration of justice for the applicant.<sup>13</sup>

18. In summary, the applicant submits that:<sup>14</sup>

- The Ombudsman (including its officers) must be accountable to the Government and complainants for how it deals with complaints in the performance of its official functions and, to that end, the Ombudsman must disclose all documents it created which relate to the applicant.
- The applicant intends to apply for internal review of the Ombudsman's decision to not further investigate his complaint as he is concerned about how his complaint was dealt with, the conduct of the Ombudsman's officers and the '*extraordinary amount of time*' the Ombudsman took to deal with the complaint.
- The applicant needs the Information in Issue to understand the background or contextual information leading up to the decision not to further investigate the complaint and to prepare his internal review application.
- The fact that the Ombudsman has given the applicant reasons for not investigating his complaint is irrelevant as the applicant disagrees with those reasons and intends to challenge the reasons on internal review.
- He has suffered a '*gross injustice*' as a result of a decision by the subject agency's relevant officer which has had significant consequences for him and his career and disclosing the Information in Issue will enable him to understand '*what transpired during the extraordinary period in which the [the Ombudsman] dealt with [his] complaint before deciding not to further investigate [his] complaint*' and assist him in making a '*cogent argument that the Ombudsman should investigate [his] complaint*'.
- A decision refusing access to the Information in Issue will '*limit the scope of [his] challenge*' of the Ombudsman's decision not to further investigate and '*indirectly facilitate the perpetuation of a gross injustice [he] suffered because of an administrative decision of [the subject agency]*'.

19. I consider that disclosing the Information in Issue would provide the applicant with a more comprehensive understanding of how the Ombudsman handled the complaint

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<sup>9</sup> The term '*could reasonably be expected to*' requires an expectation that is reasonably based, that is, neither absurd, irrational or ridiculous, nor merely a possibility. Whether the expected consequence is reasonable requires an objective examination of the relevant evidence. It is not necessary for a decision-maker to be satisfied upon the balance of probabilities that disclosing the document will produce the anticipated harm. The expectation must arise as a result of the disclosure, rather than from other circumstances. See *Murphy and Treasury Department* (1995) 2 QAR 744 and *Sheridan and South Burnett Regional Council (and Others)* (Unreported, Queensland Information Commissioner, 9 April 2009).

<sup>10</sup> Schedule 4, part 2, item 1 of the RTI Act.

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

<sup>12</sup> Schedule 4, part 2, item 10 of the RTI Act.

<sup>13</sup> Schedule 4, part 2, item 17 of the RTI Act.

<sup>14</sup> Applicant's submissions dated 24 April 2014.

and the reasoning behind its decision to not investigate the complaint further. I acknowledge that the applicant is dissatisfied with the Ombudsman's decision and would like as much information as possible to prepare his internal review application. I am satisfied that the factors identified at paragraph 17 are relevant. It is now necessary for me to determine the weight to be afforded to them in the circumstances of this external review.

20. The fact that these public interest considerations are relevant does not oblige the Ombudsman to provide the applicant with access to its entire file nor reveal all of its internal discussions about how to deal with the complaint. Rather, these public interest considerations are satisfied by the Ombudsman issuing a decision to the applicant that identifies all considerations taken into account in reaching the decision. The Ombudsman has provided the applicant with detailed reasons for its decision to not investigate the complaint further. The applicant also spoke with officers within the Ombudsman's office at various stages throughout the handling of the complaint.<sup>15</sup>
21. That the applicant disagrees with the reasons provided by the Ombudsman is not relevant to my findings on this issue and I note that the applicant is entitled to, and intends to, apply for internal review of the decision. The applicant submits that it is *'inappropriate for [OIC] to consider whether the information I am seeking could be of any assistance to me in preparing my application for internal review of [the Ombudsman's] decision not to further investigate my complaint'*.<sup>16</sup> My findings in this review do not go to this issue. Similarly my findings do not express a view on the appropriateness of the Ombudsman's decision to not further investigate the applicant's complaint.
22. As previously noted at paragraph 10, the Ombudsman located 315 pages relevant to the access application and granted the applicant full access to 180 pages and part access to 43 pages. This information comprises:
  - file notes of numerous conversations between staff of the Ombudsman and the applicant
  - correspondence from the Ombudsman to other agencies
  - internal emails between officers of the Ombudsman
  - case management documents; and
  - extracts of legislation and policies.
23. I consider that the release of this information to the applicant furthers the applicant's understanding of how the Ombudsman handled the complaint and advances these public interest factors.
24. I am satisfied that these factors have been advanced significantly by the information already released to the applicant under the IP Act and the detailed reasons provided in the Ombudsman's decision issued to the applicant. I have examined the remaining Information in Issue carefully and it is limited in nature. Accordingly, I find that its disclosure would only marginally advance these factors. For these reasons, I afford each of these four factors favouring disclosure low weight.

### ***Personal information of the applicant***

25. The Information in Issue was created as a result of the applicant's complaint to the Ombudsman and is generally about the applicant. I am satisfied that much of the

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<sup>15</sup> Internal review decision dated 2 December 2013.

<sup>16</sup> Applicant's submissions dated 24 April 2014.

Information in Issue therefore comprises his personal information.<sup>17</sup> This gives rise to a factor favouring disclosure.<sup>18</sup>

26. The applicant will be generally aware of some of the Information in Issue where it reflects information he provided to the Ombudsman in support of his complaint or information that has been conveyed to him by the Ombudsman in the reasons for its decision. I note that the applicant disputes this and submits that *'there is a significant amount of information in issue that is not known to me'*.<sup>19</sup>
27. I find that, as the applicant is generally aware of some of the Information in Issue, this reduces the weight of this factor to a degree and I afford this factor moderate weight.

### **Personal information and privacy of other individuals**

28. The Information in Issue is also the personal information of other individuals, that is, the subject officer and the witness. Given the nature of this information, and the way in which it is presented within the Information in Issue, it is not possible to separate the applicant's personal information from the personal information of others. As a result, I have considered whether disclosing the Information in Issue could reasonably be expected to:
- prejudice the protection of an individual's right to privacy;<sup>20</sup> and
  - cause a public interest harm as it would disclose personal information of a person.<sup>21</sup>
29. The applicant submits that the subject officer's right to privacy would not be affected by release of the Information in Issue because he knows the name of the subject officer and, in any event, the name could be deleted from the documents to alleviate any concern about further dissemination of the information.<sup>22</sup> I do not accept this submission. The identity of the subject officer, while known to the applicant, could reasonably be ascertained by other readers from the information released by the Ombudsman and the remaining Information in Issue.
30. Similarly, it is not possible to merely delete the name of the witness. Given the nature of the information provided by the witness, it would be possible for the applicant, and other readers, to identify them.
31. Generally, information relating to the day-to-day work duties and responsibilities of a public service officer may be disclosed under the IP Act, despite it falling within the definition of personal information. However, agency documents can also contain personal information of public servants which is not *routine* work information.<sup>23</sup> Although the personal information appears in a workplace context, it comprises serious unsubstantiated allegations<sup>24</sup> about the conduct of the subject officer. I consider such information is not related wholly to the routine day-to-day work activities of a public service officer and is not routine personal work information. It is then relevant to

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<sup>17</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>18</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>19</sup> Applicant's submissions dated 24 April 2014.

<sup>20</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>21</sup> Schedule 4, part 4, section 6(1) of the RTI Act.

<sup>22</sup> Applicant's submissions dated 24 April 2014.

<sup>23</sup> *Underwood and Department of Housing and Public Works* (Unreported, Queensland Information Commissioner, 18 May 2012) at paragraph 60.

<sup>24</sup> The applicant does not accept this and has provided submissions on this issue which I will address below. I do not consider these submissions reduce the weight of these factors.

consider the extent of the harm that could result from disclosing the personal information of other individuals under the IP Act.

32. The Information in Issue is sensitive and personal in nature. I consider its disclosure under the IP Act would be a significant intrusion into the privacy of the subject officer and witness. Further, I find that the extent of the public interest harm that could be anticipated from disclosure is significant.
33. I have taken into account the fact that the applicant made the complaint and therefore, some of the Information in Issue will be generally known to him. In view of this, and given the nature of the information and the context in which it appears, I afford moderate weight to these two factors favouring nondisclosure.

### ***Prejudice the fair treatment of individuals***

34. A factor favouring nondisclosure will arise where disclosing information could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct.<sup>25</sup>
35. Firstly, I am satisfied the Information in Issue is about allegations of misconduct or unlawful, negligent or improper conduct. The Information in Issue contains allegations about the subject officer which were made by the applicant in his complaint to the Ombudsman. It also includes allegations made by a witness which were relevant to the applicant's complaint. Given the nature of the allegations (which I cannot identify in any more details in these reasons),<sup>26</sup> I am satisfied they relate to misconduct or unlawful, negligent or improper conduct.
36. The applicant submits that *'the subject allegations are not my allegations. Rather, they are allegations made by [the Ombudsman's] officers in the course of dealing with my complaint. My rights should not be prejudiced simply because [the Ombudsman's] officers chose to make 'allegations' about the [subject officer]'*.<sup>27</sup> The applicant's submission on this issue is misconceived. As noted above, the allegations were made by the applicant and a witness. The fact that the allegations may be contained in documents created by officers of the Ombudsman based on information supplied by the applicant and witness does not alter this.
37. Secondly, I must consider whether the allegations are unsubstantiated. The applicant submits that:<sup>28</sup>
  - for this factor to apply, the allegations must have been *'fully and impartially investigated by a competent body and a formal finding reached by the body that the allegation is unsubstantiated'*
  - the Ombudsman has made no such finding in this case; and
  - the applicant's interpretation of this factor is supported by OIC's decision in *Troiani and Queensland Police Service (Troiani)*.<sup>29</sup>
38. In *Troiani*, the relevant allegations were investigated by the agency and findings were made that they could not be substantiated. In applying this factor in *Troiani*, the Assistant Information Commissioner said:<sup>30</sup>

<sup>25</sup> Schedule 4, part 3, item 6 of the RTI Act.

<sup>26</sup> Section 121(3) of the IP Act provides that OIC must not include information that is claimed to be exempt or contrary to the public interest in the reasons for decision on external review.

<sup>27</sup> Applicant's submissions dated 24 April 2014.

<sup>28</sup> Applicant's submissions dated 24 April 2014.

<sup>29</sup> (Unreported, Queensland Information Commissioner, 21 August 2012).

<sup>30</sup> At paragraphs 27-29.

27. *The Information in Issue includes references to individuals who were the subject of the allegations made by the applicant's late husband in relation to unlawful activity. As set out in paragraph 17 of these reasons, QPS found that the allegations could not be substantiated as no evidence of fraud or other criminal activity was discovered in the investigation.*
28. *The RTI Act provides if disclosure could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of unlawful conduct, this will give rise to a public interest factor favouring nondisclosure.*
29. *Given the nature of the Information in Issue and QPS' findings in relation to the allegations, I consider this factor applies in this case. I am satisfied that the public interest weighs strongly against disclosure as the Information in Issue relates to unsubstantiated allegations and has the potential to adversely affect the reputations of the relevant individuals.*
39. I do not accept that these comments in *Troiani* support the applicant's contention. The decision in *Troiani* was based on the particular facts and circumstances of that case. The Assistant Commissioner's findings do not limit the application of this factor to circumstances where an allegation has been unsubstantiated as a result of a formal finding.
40. In this case, the Ombudsman's investigation did not proceed to a point where any findings were made on the substance of the allegations. The Ombudsman decided to not further investigate the complaint as it was unnecessary or unjustifiable. That is, no formal finding was made that the allegations were either substantiated or unsubstantiated. As a result, and in the absence of any positive finding by the Ombudsman that the allegations are substantiated, I am satisfied that the allegations in this case are unsubstantiated.
41. The applicant submits that, as he made the allegations, there is no reason for the Information in Issue to not be released to him subject to the deletion of the subject officer's name.<sup>31</sup> I accept that the applicant is aware of the substance of the allegations he made and the identity of the subject officer and I consider this reduces the weight of this factor to some degree in relation to that information. I have previously addressed why the name of the subject officer cannot be deleted from the Information in Issue at paragraph 29. There is no evidence before me that the applicant is aware of the information provided by the witness.
42. The applicant submits that he seeks access to the Information in Issue for the purpose of preparing his application for internal review of the Ombudsman's decision and has no intention of disseminating or republishing the Information in Issue.<sup>32</sup> I note that it is not possible to place restrictions on the use, dissemination or republication of information released under the IP Act. In *OKP and Department of Communities*<sup>33</sup> the Information Commissioner explained that a decision-maker should not assume that disclosure of information to an applicant is disclosure to the 'world at large' but should not exclude from consideration evidence about the intended or likely extent of dissemination of information by the applicant. I have taken into account the applicant's submission on his intended use of the information. However, I have not excluded the possibility that the Information in Issue could be disseminated further as permitted under the IP Act.

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<sup>31</sup> Applicant's submissions dated 24 April 2014.

<sup>32</sup> Applicant's submissions dated 24 April 2014.

<sup>33</sup> (Unreported, Queensland Information Commissioner, 9 July 2009) at paragraphs 119-131 referring to the Victorian Court of Appeal decision in *Victoria Police v Marke* [2008] VSCA 218.



43. The applicant submits that release of the information would have no effect on the reputation of the subject officer and would not prejudice their fair treatment because:<sup>34</sup>
- what OIC describes as '*allegations*' are not '*allegations in the true sense of that expression*' and are '*merely issues identified by [the Ombudsman's] officers*' and '*contained in documents created by [the Ombudsman's] officers*'
  - the allegations have not been investigated by any relevant body nor has the body made any findings; and
  - the documents have no '*legal standing*' and simply contain issues that the Ombudsman was proposing to raise with the subject agency.
44. The basis for the applicant's contention that the '*allegations*' are not '*allegations in the true sense of that expression*' is unclear and I do not accept this submission. As I have explained previously, I am satisfied that the Information in Issue contains unsubstantiated allegations.
45. I do not accept the applicant's submission that no prejudice would result because the allegations have not been investigated and have no legal standing. The Information in Issue contains views about issues relevant to the Ombudsman's complaint handling process that was then at a preliminary, or at least incomplete, stage. Those views were not the views ultimately arrived at by the Ombudsman; the Ombudsman decided to not further investigate the complaint. The subject officer and agency were not notified by the Ombudsman that a complaint had been made. Accordingly, the comments in the Information in Issue were not tempered by a consideration of any information that could have been provided by the subject officer or agency.
46. I have carefully considered the Information in Issue and the serious nature of the allegations which have not been substantiated. I am of the view that its disclosure could reasonably be expected to adversely affect the reputation of the subject officer which in turn would prejudice their fair treatment. For these reasons, I afford moderate weight to this factor.

***Reveal or substantiate that an agency or official has engaged in official misconduct or negligent, improper or unlawful conduct***

47. A factor favouring disclosure will arise where disclosing information could reasonably be expected to reveal or substantiate that an agency or official has engaged in official misconduct or negligent, improper or unlawful conduct.<sup>35</sup>
48. I have addressed some of the applicant's submissions on this issue previously. The applicant also submits that:<sup>36</sup>
- he is concerned about the conduct of the Ombudsman and its officers in dealing with the complaint
  - this factor should be applied on the basis that the agency or official in question is the Ombudsman or an officer of the Ombudsman
  - the Information in Issue could form the basis for him to make a complaint on the ground that the Ombudsman or its officers have engaged in misconduct or negligent, improper or unlawful conduct; and
  - it is not OIC's role to determine or express an opinion about whether an agency or agency official has engaged in official misconduct or negligent, improper or unlawful conduct.

<sup>34</sup> Applicant's submissions dated 24 April 2014.

<sup>35</sup> Schedule 4, part 2, item 6 of the RTI Act.

<sup>36</sup> Applicant's submissions dated 24 April 2014.

49. It is open for a decision-maker to consider the application of this factor when undertaking a public interest balancing test under the RTI Act. A decision-maker will consider whether there is a reasonably based expectation that disclosing information could reveal or substantiate that an agency or official has engaged in official misconduct or negligent, improper or unlawful conduct. Given the applicant's submissions and the nature of the Information in Issue, I have considered this factor but I am satisfied that it does not apply to the Information in Issue for the following reasons.
50. As previously explained, no finding by the Ombudsman has been made about the allegations and they have not been substantiated. Therefore, disclosing the Information in Issue will not reveal or substantiate that the subject agency or the subject officer has engaged in the type of conduct identified. As a result, I do not consider this factor applies in relation to the subject officer or the subject agency.
51. I note the applicant's concerns about the conduct of the Ombudsman and its officers in dealing with his complaint. Accordingly, I have also considered whether this factor applies in relation to the Ombudsman or its officers. Based on my review of the available information, and despite the applicant's concerns, there is no evidence before me to suggest that this factor applies in relation to the Ombudsman or its officers.

#### ***Deficiencies in the conduct or administration of an agency or official***

52. Given the nature of the applicant's concerns about the subject agency and officer and the Ombudsman's handling of his complaint, I have also considered whether disclosing the Information in Issue could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official.<sup>37</sup>
53. The applicant submits:<sup>38</sup>
- it is not for OIC to decide whether there were possible deficiencies in the conduct or administration of the Ombudsman or its officers in dealing with his complaint
  - he should have access to the Information in Issue so that he can personally consider whether there were deficiencies in the conduct or administration of the Ombudsman or its officers in dealing with his complaint; and
  - any reasonable person would question what the Ombudsman has to hide.
54. It is open for a decision-maker to consider the application of this factor when undertaking a public interest balancing test under the RTI Act. A decision-maker will consider whether there is a reasonably based expectation that disclosing information could allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official. Given the applicant's submissions and the nature of the Information in Issue, I have considered this factor. Based on my review of the available information, and despite the applicant's concerns, there is no evidence before me to suggest that this factor applies in relation to the Information in Issue.

#### ***Deliberative process information***

55. The RTI Act recognises that a public interest factor favouring nondisclosure will arise where disclosing information could reasonably be expected to prejudice a deliberative process of government (**Nondisclosure Factor**).<sup>39</sup>

<sup>37</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>38</sup> Applicant's submissions dated 24 April 2014.

<sup>39</sup> Schedule 4, part 3, item 20 of the RTI Act.

56. The RTI Act also provides that disclosing information could reasonably be expected to cause a public interest harm through disclosure of an opinion, advice or recommendation that has been obtained, prepared or recorded or a consultation or deliberation that has taken place in the course of, or for, the deliberative processes involved in the functions of government (**Harm Factor**).<sup>40</sup>
57. Once it is established that the Information in Issue is deliberative process information, the Harm Factor will apply. It is then relevant to consider the nature and extent of the public interest harm that may result through disclosure.<sup>41</sup> For the Nondisclosure Factor to apply, a reasonable expectation of prejudice to the relevant deliberative process must be established.
58. The Information Commissioner has previously referred with approval to the following comments in considering the meaning of 'deliberative processes' involved in the functions of an agency:<sup>42</sup>

*The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action...*

*It by no means follows, therefore, that every document on a departmental file will fall into this category. ... Furthermore, however imprecise the dividing line may first appear to be in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of an agency...*

59. The applicant submits that information is not deliberative process information merely because it would reveal the discussions and deliberations of the Ombudsman's officers in deciding how to deal with the complaint or because the information has been created by a public servant.<sup>43</sup> The applicant also submits that the fact that a document is a deliberative process document carries no presumption that its disclosure would be contrary to the public interest.<sup>44</sup> I have addressed the operation of these two factors at paragraphs 55 to 58 above and the public interest balancing test at paragraphs 14 and 15 above.
60. The Ombudsman did not rely on these factors in the initial decision or internal review decision. However, the following reasons from the Ombudsman's internal review decision are relevant to these factors:

*The draft letters are a series of working drafts of the same letter that were prepared for internal discussion purposes by an officer and which contain, among other things, proposed opinions and recommendations.*

*The statements, upon which the proposed opinions and recommendations were based, were not tested. The officers the subject of your complaint were not interviewed and the allegations were not put to them for a response.*

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

<sup>41</sup> In *Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206 at paragraph 34 the Information Commissioner considered, in the context of the exemption relating to deliberative process information in the repealed *Freedom of Information Act 1992* (Qld), that 'specific and tangible harm to an identifiable public interest (or interests) would result from disclosure'. I consider that this is a relevant consideration when applying the Harm Factor under the RTI Act.

<sup>42</sup> *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at paragraphs 28-30 citing with approval the definition given in *Re Waterford and Department of Treasury (No.2)* (1984) 5 ALD 588 at page 606. The Information Commissioner's decision involved the repealed *Freedom of Information Act 1992* (Qld) but the comments are relevant to the application of these factors under the RTI Act.

<sup>43</sup> Applicant's submissions dated 24 April 2014.

<sup>44</sup> Applicant's submissions dated 24 April 2014.

*... The draft statements and proposed opinions and recommendations represent one possible scenario. Ultimately, following further internal discussions and analysis of the contractual arrangements that existed between [the applicant] and the [subject] agency, a decision was made that the investigation should be concluded and reasons were given for that decision.*

61. I am satisfied that the draft letters together with the remaining Information in Issue comprise an opinion, advice or recommendation that has been obtained, prepared or recorded in the course of, or for, the deliberative processes involved in the functions of government. The Information in Issue goes directly to the thinking process of the relevant officers and reveals their opinions, advice and recommendations in deciding how to deal with the complaint. I am satisfied the Information in Issue does not deal with purely procedural or administrative processes.
62. Accordingly, the Harm Factor applies to the Information in Issue. It is now relevant for me to consider the nature and extent of the public interest harm that may result through disclosing the Information in Issue and whether a reasonable expectation of prejudice to the relevant deliberative process is established.
63. The applicant submits that:<sup>45</sup>
- disclosing the Information in Issue would not cause a public interest harm and could not reasonably be expected to prejudice the public interest
  - there is no basis for a claim that disclosing the Information in Issue would inhibit candour and frankness in future communications within the Ombudsman; and
  - even if such candour and frankness would be inhibited, the efficiency and quality of the deliberative process is unlikely to suffer to an extent which is contrary to the public interest.
64. I consider officers of the Ombudsman must be permitted to canvass all possibilities and make subjective evaluations on the information before them without concern that such comments, assessments and recommendations will be disclosed. The Information Commissioner has previously recognised that there is a public interest in government being able to make informed decisions in the course of carrying out its functions and in doing so, to have access to the widest possible range of information and advice without fear of interference.<sup>46</sup> However, I consider it is relevant that the Ombudsman's handling of the applicant's complaint is complete. I am satisfied that this reduces the extent of harm that disclosure could reasonably be expected to cause to the Ombudsman's deliberative processes.
65. I have also considered whether disclosing the Information in Issue would prejudice the substance or quality of future deliberations by the Ombudsman. I find it reasonable to expect that the Ombudsman would be required to consider matters, such as those set out in the Information in Issue, to ensure a complaint of this nature was dealt with thoroughly and appropriately. Therefore, I do not consider that the quality of the Ombudsman's deliberations in the future would be likely to suffer to such an extent that would be contrary to the public interest if the Information in Issue were disclosed.
66. For the reasons set out above, I find that:
- the Harm Factor applies but there is no specific or tangible harm to the relevant deliberative processes of the Ombudsman that could reasonably be expected to be caused by disclosure

<sup>45</sup> Applicant's submissions dated 24 April 2014.

<sup>46</sup> *Metcalf and Maroochy Shire Council* (Unreported, Queensland Information Commissioner, 19 December 2007) at paragraph 47.

- therefore, the Harm Factor carries low weight in favour of nondisclosure; and
- the Nondisclosure Factor does not apply as disclosure could not reasonably be expected to prejudice the Ombudsman's deliberative processes.

### ***Prejudice the flow of confidential information***

67. I have considered whether disclosing the information provided by a witness could reasonably be expected to:
- prejudice the Ombudsman's ability to obtain confidential information;<sup>47</sup> and
  - cause a public interest harm as it consists of information of a confidential nature that was communicated in confidence and its disclosure could reasonably be expected to prejudice the future supply of information of this type.<sup>48</sup>
68. The Ombudsman explained in its initial decision (which it affirmed on internal review) that this information:
- is about its dealings with a witness
  - is confidential; and
  - was communicated in confidence to the Ombudsman.
69. It is clear on its face that this information is highly sensitive and was communicated in confidence to the Ombudsman. There is a strong public interest in protecting the supply of confidential information from witnesses to agencies such as the Ombudsman and disclosing this type of witness information under the IP Act would discourage individuals from coming forward with such information in future. This in turn would significantly prejudice the Ombudsman's ability to obtain confidential information.
70. In my view, if the Ombudsman's investigation had continued, it is possible that this information would have been disclosed to the subject officer. However, this did not occur in this case and I am of the view that the information remains confidential.
71. For these reasons, I afford moderate weight to these factors which favour nondisclosure of the witness information.
72. The applicant submits that it is appropriate for OIC to obtain the witness' consent for the information to be released to him.<sup>49</sup> As OIC's position is that disclosing this information would, on balance, be contrary to the public interest, it is not appropriate for OIC to contact the third party as the applicant contends.<sup>50</sup>

### ***Balancing the relevant factors***

73. The IP Act is to be administered with a pro-disclosure bias meaning that access to information should be granted unless giving access would, on balance, be contrary to the public interest.<sup>51</sup>
74. I consider that disclosing the Information in Issue would provide the applicant with a more comprehensive understanding of the information considered by the Ombudsman which informed its decision to not investigate the complaint further. However, in my

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<sup>47</sup> Schedule 4, part 3, item 16 of the RTI Act.

<sup>48</sup> Schedule 4, part 4, item 8(1) of the RTI Act.

<sup>49</sup> Applicant's submissions dated 29 December 2013.

<sup>50</sup> OIC is required to take reasonable steps to notify a person of the likely release of information *if documents are likely to be released* and the release may reasonably be expected to be of concern to the person: section 110(4) of the IP Act. Furthermore, OIC does not have discretion to release information if it is established that its disclosure would be contrary to the public interest: section 118(2) of the IP Act.

<sup>51</sup> Section 64 of the IP Act.

view, these factors have been significantly advanced by the extent of information already made available to the applicant. The remaining Information in Issue is limited in nature and I afford low weight to the factors favouring disclosure.

75. Although some of the Information in Issue comprises the applicant's personal information, as he is the complainant it is mostly known to him. The personal information of other individuals within the Information in Issue is sensitive and its disclosure under the IP Act would be a significant intrusion into the privacy of these other individuals. I afford moderate weight to each of the factors relating to personal information and privacy.
76. I am satisfied that disclosing the Information in Issue could reasonably be expected to prejudice the fair treatment of individuals. I afford moderate weight to this factor as the allegations are serious and unsubstantiated and their unrestricted disclosure could adversely affect the reputation of the subject officer.
77. The Information in Issue comprises deliberative process information which gives rise to the relevant Harm Factor. However, as I am unable to identify specific or tangible harm to the relevant deliberative processes of the Ombudsman that could reasonably be expected to be caused by disclosure, the Harm Factor carries low weight.
78. I afford moderate weight to the two factors relating to the flow of confidential information provided by the witness and find that disclosing that part of the Information in Issue would significantly prejudice the Ombudsman's ability to obtain confidential information.
79. In this case and, for the reasons set out in this decision, I find that the factors favouring nondisclosure of the Information in Issue outweigh the factors favouring disclosure and that access to the Information in Issue can be refused.

## **DECISION**

80. For the reasons set out above, I affirm the decision under review and find that access to the Information in Issue can be refused under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act on the basis that its disclosure would, on balance, be contrary to the public interest.
81. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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**L Lynch**  
**Assistant Information Commissioner**

**Date: 13 June 2014**

## APPENDIX

### Significant procedural steps

Date	Event
20 October 2013	The Ombudsman received the access application under the IP Act.
21 October 2013	The Ombudsman issued a decision to the applicant.
5 November 2013	The applicant applied for internal review of the decision.
2 December 2013	The Ombudsman issued an internal review decision affirming the initial decision.
21 December 2013	OIC received the applicant's external review application.
23 December 2013	OIC asked the Ombudsman to provide a number of procedural documents by 7 January 2014. The Ombudsman requested an extension of time until 15 January 2014 to provide the requested documents.
24 December 2013	OIC granted the Ombudsman the requested extension of time.
29 December 2013	OIC received submissions from the applicant.
13 January 2014	OIC received the requested documents from the Ombudsman.
16 January 2014	OIC notified the applicant and the Ombudsman that it had accepted the external review application and requested the Ombudsman provide OIC with a copy of the documents in issue by 31 January 2014.
20 January 2014	OIC received a copy of the documents in issue from the Ombudsman.
20 March 2014	OIC conveyed its preliminary view to the Ombudsman in relation to a small amount of information on one page. The Ombudsman accepted the preliminary view and agreed to release the additional information to the applicant.
27 March 2014	OIC conveyed its preliminary view to the applicant in relation to the remaining information and invited him to provide submissions supporting his case by 11 April 2014 if he did not accept the preliminary view. OIC asked the Ombudsman to release the additional information to the applicant by 4 April 2014.
30 March 2014	The applicant notified OIC that he did not accept OIC's preliminary view and provided submissions supporting his case. The applicant also requested an extension of time until 28 April 2014 to provide further submissions supporting his case and raised a number of procedural issues.
31 March 2014	OIC granted the applicant the requested extension of time and addressed the relevant procedural issues.
3 April 2014	The applicant telephoned OIC and provided further submissions supporting his case and raised procedural issues in relation to the preliminary view.
4 April 2014	OIC addressed the procedural issues with the applicant in writing.
10 April 2014	The applicant telephoned OIC and raised procedural issues relating to the preliminary view.
11 April 2014	The Ombudsman notified OIC the additional information had been released to the applicant.
14 April 2014	The applicant wrote to OIC and raised a procedural issue relating to the preliminary view.
15 April 2014	OIC addressed the procedural issues with the applicant in writing.
24 April 2014	The applicant telephoned OIC and raised procedural issues relating to the preliminary view. OIC received written submissions from the applicant.

<b>Date</b>	<b>Event</b>
12 May 2014	The applicant wrote to OIC and raised a procedural issue relating to the preliminary view.
13 May 2014	OIC addressed the procedural issue with the applicant in writing.