



Decision and Reasons for Decision

Citation: *N54 and Queensland Building and Construction Commission [2023] QICmr 26 (8 June 2023)*

Application Number: 317067

Applicant: N54

Respondent: Queensland Building and Construction Commission

Decision Date: 8 June 2023

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - documents containing legal advice - whether exempt information - sections 47(3)(a) and 48 and schedule 3, section 7 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - DISCLOSURE PROHIBITED BY ACT - workplace investigation reports resulting from a public interest disclosure - whether exempt information - sections 47(3)(a) and 48 and schedule 3, section 12 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - workplace investigation report - personal information and privacy - management function of an agency - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - applicant submits agency did not locate all relevant documents - whether agency has conducted all reasonable searches - whether access to further documents may be refused on the basis they are nonexistent or unlocatable - sections 47(3)(e) and 52(1) of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Queensland Building and Construction Commission (QBCC) under the *Right to Information Act 2009* (Qld) (RTI Act) for access to certain documents relating to a successful job application that had been submitted to QBCC by an internal candidate (hereinafter referred to as 'AB').
2. After conducting preliminary inquiries in order to estimate the number of responsive documents, QBCC decided² to refuse to deal with the application under section 41 of the RTI Act on the grounds that the work involved in dealing with the application would substantially and unreasonably divert QBCC's resources.³
3. The applicant applied for internal review of QBCC's decision.⁴ On internal review, QBCC affirmed its decision to refuse to deal with the application under section 41.⁵
4. The applicant then applied⁶ to the Office of the Information Commissioner (OIC) for external review of QBCC's decision.⁷ As a result of negotiations conducted by OIC during the course of that external review, the applicant agreed to narrow the terms of the access application in certain respects, and QBCC agreed to withdraw its 'refusal to deal' decision and to resume processing the application on the basis of those narrowed terms.⁸ On 8 July 2022, the application, in the terms set out below, was therefore returned to QBCC to resume processing:⁹

With reference to [AB's] "SASC [Statement Addressing Selection Criteria] ..." (attached): any and all information informing or relating to actions/investigations/outcomes by [AB] described in specific statements:

a) identifying inconsistencies between QBCC's defects policy and SS 71J and 72 of the QBCC act, particularly in light of the amendment to S71J(4) in November 2017, leading the commissioner to request a new commissioner's directive be drafted to resolve the inconsistencies.

b) identifying problems and risks in QBCCs ad hoc practice of changing direction to rectify decisions outside the formal review process set in QBCC Act, leading the commissioner to request a new commissioner's directive be drafted to resolve inconsistencies.

c) identifying serious procedural fairness issues in IRUs decision-making processes, addressed through my [i.e., AB's] participation in the IRU working group and resulting policy and process changes.

d) identifying lack of rigorous processes for procurement of technical services in some regional offices, and taking appropriate steps to formally record and control this risk collaboratively with the senior risk advisor and the then acting Director Regional Services.

¹ Application dated 23 September 2021.

² Decision dated 2 December 2021.

³ In making this decision, QBCC took account of the fact that it was dealing with a second large access application made by the applicant. It also refused to deal with that application under section 41 of the RTI Act (section 41 permits an agency to consider the work involved in processing all applications made by an applicant).

⁴ On 23 December 2023.

⁵ Decision dated 25 January 2022.

⁶ On 22 February 2022.

⁷ External review 316585.

⁸ External review 316585 was finalised and closed.

⁹ The information in bold and highlighted with an asterisk indicates where the applicant narrowed the scope of his request.

e) *identifying problems in QBCC's policy and practice around 'early dispute resolution' EDR including inconsistency with the QBCC Act, and addressing these through collaborating with BAS in the drafting of new EDR procedural guidelines.*

****Limited to communications between [AB] and other persons concerning EDR policy and procedure only (and not any underlying files)***

f) *the three high quality staff misconduct investigation reports produced by my [i.e., AB's] team between August and December 2018.*

****Limited to the 'three ... misconduct investigation reports' referred to in this part only.***

g) *the significant number of advices I [i.e. AB] have provided since joining QBCC, to human resource staff and line managers concerning the assessment and management of staff performance issues, ensuring that these are managed appropriately and proportionately to their seriousness (eg without unnecessary escalation of performance issues into misconduct concerns)*

h) *the advice and support I [i.e. AB] have provided to the Director of Licensing and Assistant Commissioner concerning the conflict of interest issues within the Complex Licensing Panel.*

Type of documents: Including but not limited to policies/procedures/guidelines/directives, audits, reports, internal/external correspondence, letters, emails, interviews, recordings, meetings, minutes, memorandums, case notes, HR files, complaints/investigations, metadata

Time period/date range: 14 May 2018 - Present + contemporary (does not exclude documents dealt with by [AB] that pre-date 14 May 2018)

5. The applicant attached to his access application, a copy of a Statement Addressing Selection Criteria (**SASC**) to which he had obtained access in response to a previous RTI application he had made to QBCC. The SASC had been prepared and submitted to QBCC as part of AB's successful application for a position at QBCC. As the terms of the access application set out above indicate, the SASC contained statements by AB made in support of his job application and that described some of the work he had performed at QBCC. The applicant sought access to documents held by QBCC that related to the descriptions of AB's work contained in the SASC.
6. By decision dated 4 October 2022, QBCC decided to grant the applicant full access to 121 pages, partial access to 61 pages, and to refuse access to 120 pages. Access to information was refused either on the basis that it was exempt information, or because its disclosure would, on balance, be contrary to the public interest.
7. In an 18 page submission, the applicant applied for internal review of QBCC's decision on 4 November 2022. In addition to disputing QBCC's interpretation of the terms/timeframe of his access application, the applicant disputed QBCC's findings concerning exempt information and contrary to the public interest information. He also raised numerous sufficiency of search issues.
8. On internal review, QBCC conducted further searches and inquiries in response to the applicant's sufficiency of search concerns, and located some additional responsive

information. In its internal review decision,¹⁰ QBCC varied the initial decision and gave the applicant access to additional information.¹¹

9. On 3 January 2023, the applicant applied to OIC for external review of QBCC's decision.
10. For the reasons set out below, I decide to affirm QBCC's internal review decision.

Background

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

Reviewable decision

12. The decision under review is QBCC's internal review decision dated 2 December 2022.

Evidence considered

13. Evidence, submissions,¹² legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and appendix).
14. In making this decision I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹³ I consider that in observing and applying the law prescribed in the RTI Act, an RTI decision-maker will be '*respecting and acting compatibly with*' this right and others prescribed in the HR Act,¹⁴ and that I have done so in making this decision, as required under section 58(1) of the HR Act. In this regard, I note Bell J's observations on the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*'¹⁵

Information in issue

15. The information in issue is identified in Attachment B to QBCC's internal review decision dated 2 December 2022 (**Information in Issue**) except for any references to identifying/personal information for individuals, including mobile phone numbers and case numbers and other references that would identify particular matters/individuals. The applicant has indicated that he does not seek access to information of this type. During the review, he also indicated that he does not pursue access to information that QBCC had decided was irrelevant to the terms of the application.

Issues for determination

16. The issues for determination are:
 - whether access to information may be refused on the grounds that it is exempt information

¹⁰ Dated 2 December 2022.

¹¹ It gave full access to 242 pages, partial access to 61 pages, and refused access in full to 117 pages - as identified in Attachment B to the internal review decision. It also decided that any additional documents to which the applicant sought access were nonexistent or unlocatable under section 52 of the RTI Act.

¹² Including the submissions made by the applicant in his internal and external review applications, and in his letter dated 26 April 2023.

¹³ As embodied in section 21 of the HR Act.

¹⁴ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

¹⁵ *XYZ*, [573].

- whether access to information may be refused on the grounds that its disclosure would, on balance, be contrary to the public interest; and
- whether the searches and inquiries that QBCC has conducted in an effort to locate all responsive documents have been reasonable in all the circumstances.

Relevant law - exempt information

17. The RTI Act's primary object is to give a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access.¹⁶ The Act must be applied and interpreted to further this primary object,¹⁷ and is to be administered with a pro-disclosure bias.¹⁸
18. Section 23 of the RTI Act gives effect to the Act's primary object by conferring a right to be given access to documents. This right is subject to other provisions of the RTI Act,¹⁹ including grounds on which access may be refused.²⁰ These grounds are to be interpreted narrowly.²¹
19. One of these grounds permits an agency to refuse access to information to the extent that it is exempt information under sections 47(3)(a) and 48, and schedule 3, of the RTI Act.

Application of schedule 3, section 7 of the RTI Act - legal professional privilege

20. An agency may refuse access to information where it would be privileged from production in a legal proceeding on the ground of legal professional privilege (**LPP**).
21. Broadly, for information to be subject to LPP it must be a confidential communication made:
 - in the course of a lawyer/client relationship for the dominant purpose of seeking or providing legal advice (**advice privilege**); or
 - for the dominant purpose of use in existing or reasonably anticipated legal proceedings (**litigation privilege**).
22. If these elements are satisfied, the agency must still consider if:
 - the privilege has been waived; or
 - the circumstances give rise to the improper purpose exception.

Discussion

23. In a letter dated 21 March 2023, I communicated to the applicant a preliminary view that QBCC's claim of LPP over the relevant communications identified in its internal review decision was correct and should be affirmed on external review.
24. In his submission in response dated 26 April 2023, the applicant simply requested that OIC *'formalise the Preliminary View'*.

¹⁶ Section 3(1) of the RTI Act.

¹⁷ Section 3(2) of the RTI Act.

¹⁸ Section 44 of the RTI Act.

¹⁹ Section 23(1) of the RTI Act.

²⁰ Section 47 of the RTI Act.

²¹ Section 47(2)(a) of the RTI Act.

Finding

25. Having reviewed the relevant communications identified in Attachment B to QBCC's internal review decision, I am satisfied that they comprise confidential communications between QBCC, and staff employed as legal officers in QBCC's legal unit, made for the dominant purpose of seeking or providing legal advice. There is no evidence before me to suggest that privilege in these communications has been waived, or that any circumstances exist that would give rise to the improper purpose exception. I therefore find that access to the communications may be refused under section 48 and schedule 3, section 7 of the RTI Act.

Application of schedule 3, section 12(1) of the RTI Act - information the disclosure of which is prohibited by an Act

26. QBCC decided that two workplace investigation reports²² were exempt information under schedule 3, section 12(1) of the RTI Act because their disclosure is prohibited by section 65(1) of the *Public Interest Disclosure Act 2010* (Qld) (**PID Act**).
27. Section 65(1) of the PID Act provides that if a person gains confidential information because of the person's involvement in the administration of the PID Act, the persons must not make a record of the information, or intentionally or recklessly disclose the information to anyone, except in specified circumstances. Section 65(7) defines 'confidential information' as including information about the person who made the public interest disclosure (**PID**), or against whom the PID was made, as well as information disclosed by the PID.

Discussion

28. During the course of the review, I advised the applicant that it was clear on the face of the two reports that the complaints were recorded as PIDs. I expressed the preliminary view that QBCC's reasoning contained in its internal review decision was correct, and that the reports qualified for exemption under schedule 3, section 12(1) of the RTI Act.
29. In his submission dated 26 April 2023, the applicant complained that, during the negotiations about the scope of his application, QBCC did not disclose to him that two of three workplace reports to which he limited his request for access would attract the PID exemption. He submitted that QBCC had engaged in bad faith negotiations and that '*QBCC's conduct must be considered through the lens of the conduct of offences under the RTI Act, particularly ss42 and 177*'.
30. Under section 42 of the RTI Act, an agency is simply required to assist an applicant to make their application in a form that would remove the ground for refusal under section 41. It is not required to indicate to an applicant whether or not access to requested documents will be given in the event that the application is re-made in a form that removes the ground for refusal.
31. As regards section 177 of the RTI Act, there is no evidence before me to support an allegation that any person has given information to OIC that the person knows is false or misleading in a material particular.
32. The applicant further submitted that he disagreed with the PID exemption claim by QBCC unless QBCC was able to demonstrate the two investigations '*were in fact commenced because of a Public Interest Disclosure, were later complained about in or folded into a*

²² See item f) of the access application at paragraph 4.

subsequent *Public Interest Disclosure*, or were decided under the *Public Interest Disclosure Act 2010 with an actual underlying Public Interest Disclosure*'.

33. As the applicant was advised during the course of the review, the two investigation reports in question indicate that the complaints under investigation were treated as PIDs. As such, I am satisfied that the reports comprise confidential information for the purposes of section 65(7) of the PID Act, and their disclosure is therefore prohibited under section 65(1) of the PID Act.

Finding

34. Having reviewed the two reports in question, I am satisfied that they comprise exempt information under schedule 3, section 12(1) of the RTI Act on the grounds that their disclosure is prohibited by the operation of section 65(1) of the PID Act.

Relevant law - contrary to the public interest information

35. The RTI Act also permits an agency to refuse access to a document to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest.²³
36. The steps to be followed in determining whether disclosure of information would, on balance, be contrary to the public interest,²⁴ are prescribed in section 49 of the RTI Act. In summary, a decision-maker must:
- 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 disclosure of the information in issue would, on balance, be contrary to the public interest.
37. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of the public interest lies in a particular case.

Discussion

Investigation report

38. QBCC decided that disclosure of the third workplace investigation report, which did not arise from a PID, would, on balance, be contrary to the public interest.
39. In my letter to the applicant dated 21 March 2023, I expressed the preliminary view that QBCC's analysis of the application of the public interest balancing test to the report was correct:

While I acknowledge the public interest in the accountability and transparency²⁵ of QBCC regarding its employment decisions, I do not consider that disclosure of the report would enhance these public interest factors in any significant way concerning the decision to appoint [AB]. Given the nature of the information contained in the report, I consider that any public

²³ Sections 47(3)(b) and 49 of the RTI Act.

²⁴ The concept 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, although there are some recognised public interest considerations that may apply for the benefit of an individual: Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 *AIAL Forum* 12, 14.

²⁵ Schedule 4, part 2, item 1 of the RTI Act.

interest factors favouring disclosure are significantly outweighed by the public interest in protecting the personal information²⁶ and right to privacy²⁷ of the various persons referred to in the report; and in preventing prejudice to QBCC's management function concerning its staff.²⁸ The report deals with personal and highly sensitive issues affecting a number of officers. There is a strong public interest in protecting the personal information and privacy interests of the persons concerned, given that disclosure under the RTI Act is to be regarded as disclosure to the world at large.²⁹ Given the volume of identifying and highly sensitive information contained throughout the report, and the nature of the issues discussed, I am satisfied that it is not practicable to redact identifying information from the report.

40. In his submission in response,³⁰ the applicant argued as follows:

It is noted from the outset that the staff misconduct report in question relates to multiple QBCC Officers, rather than an isolated Officer or small group. The nature of the investigation and report suggests there exists a serious and systemic issue at the QBCC, and the Public Interest is significantly enhanced by the release of information relating to allegations of a large cohort of QBCC Officers engaging in misconduct.

The Preliminary View to refuse access to the staff misconduct report is also infected the misinterpretation that the scope of the Request relates to [AB]'s employment application (and appointment), rather than the particular workplace and industry issues [AB] had dealt with, or was dealing with (which is the actual nature of the Request).

Since the Preliminary View does acknowledge "the public interest in the accountability and transparency of QBCC regarding its employment decisions", which is but one of a number of reasons enhancing the public interest, removal of the misinterpretation of the scope of the Request tips the public interest balancing exercise in favour of release.

The Public Interest factors purportedly outweighing release are diluted, eroded, and otherwise should be rejected, in circumstances where the report relates to multiple QBCC Officers, rather than an isolated Officer or small group. The nature of the investigation and report suggests there exists a serious and systemic issue at the QBCC, and the Public Interest is significantly enhanced by the release of information relating to allegations of a large cohort of QBCC Officers engaging in misconduct.

41. The applicant's contention regarding the misinterpretation of the terms of his access application will be discussed further below, in the context of sufficiency of search issues he has raised.
42. The applicant's contention that the report concerns instances of misconduct by multiple QBCC officers and that this somehow suggests that there exists 'a serious and systemic issue' at QBCC is misconceived. The report relates to the conduct of one QBCC officer. Other officers are referred to in the report in the context of their involvement as the complainant, or as persons who were present at the time the actions complained about took place. I reject the applicant's submission that the report evidences systemic issues concerning widespread staff misconduct at QBCC and that this therefore gives rise to a stronger public interest in disclosure of the report beyond the general accountability of the QBCC for the conduct of investigations and management of its workforce.
43. As I noted in my preliminary view, the report contains highly sensitive information about a number of persons that was provided in the context of an investigation of a complaint

²⁶ Schedule 4, part 4, section 6 of the RTI Act.

²⁷ Schedule 4, part 3, item 3 of the RTI Act.

²⁸ Schedule 4, part 3, item 19 of the RTI Act.

²⁹ Noting that '... there is no provision of that Act which contemplates any restriction or limitation on the use which that person can make of that information, including by way of further dissemination' – see *FLK v Information Commissioner* [2021] QCATA 46 at [17] per McGill J.

³⁰ Dated 26 April 2023.

about the conduct of a QBCC officer. I afford significant weight to the public interest in protecting the personal information and right to privacy of all persons referred to in the report. I also afford significant weight to the public interest in protecting the ability of QBCC to manage its staff effectively. I am satisfied that QBCC's ability to investigate and deal with staff conduct issues efficiently and effectively would suffer significant prejudice if investigation reports of the kind in issue were to be released under the RTI Act where there are no restrictions on further disclosure.

44. I acknowledge that QBCC is accountable for the manner in which it manages its staff and investigates misconduct allegations. However, I am not satisfied that the public interest in QBCC's accountability and transparency in that regard is sufficient to outweigh the strong public interest factors favouring nondisclosure of a sensitive workplace investigation report that I have identified in the preceding paragraph.

Finding

45. For the reasons given above, I find that the public interest in the accountability and transparency of QBCC regarding the investigation report is outweighed, to a significant degree, by the public interest in protecting the personal information and right to privacy of the persons referred to in the investigation report, as well as the public interest in protecting the ability of QBCC to effectively manage its staff.
46. I therefore find that disclosure of the report would, on balance, be contrary to the public interest, and access under the RTI Act may be refused on that basis.

References to a business

47. QBCC refused access to brief references on two pages to the name of a business in connection with a matter under investigation relating to that business. QBCC decided the disclosure of the business name could reasonably be expected to cause damage to the reputation of the business.
48. In my preliminary view letter dated 21 March 2023, I expressed agreement with QBCC's decision, stating that I was unable to identify public interest factors favouring disclosure of the identity of the company that would be sufficient to outweigh prejudice caused to the company's business/commercial affairs through disclosure.
49. In response, the applicant submitted as follows:

The refusal to release documents concerning the business affairs of a company are only applicable if that same company, and the QBCC, have not engaged in any unlawful conduct. The Public Interest is enhanced by the release of information about a company if it has engaged in any unlawful activity, and likewise the QBCC if it has engaged in any unlawful activity in relation to or about the company. As I have no reference to the nature of the information contained in the documents, unfortunately I am unable to elaborate further on this point.

50. With the exception of the name of the business, all other information has been released to the applicant. The applicant is therefore aware of the matter that was being discussed in connection with that business. There is nothing in that information that establishes that either the business or QBCC engaged in unlawful activity.

Finding

51. I am satisfied that disclosure of the name of the business could reasonably be expected to prejudice its business or commercial affairs. I afford that nondisclosure factor moderate weight in the public interest balancing test. I am unable to identify any factors favouring disclosure that would be of sufficient weight to outweigh the public interest in nondisclosure, particularly given the surrounding information that has been released to the applicant. I therefore find that disclosure would, on balance, be contrary to the public interest, and access under the RTI Act may be refused on that basis.

Relevant law - sufficiency of search

52. The RTI Act also permits an agency to refuse access to information where the requested information is nonexistent or unlocatable.³¹
53. A document will be *nonexistent* if there are reasonable grounds to be satisfied it does not exist.³² To be satisfied that a document does not exist, the Information Commissioner has previously had regard to various key factors including the agency's record-keeping practices and procedures (including, but not limited to, its information management approaches).³³ By considering the relevant factors, the decision maker may conclude that a particular document was not created because, for example, the agency's processes do not involve creating that specific document. In such instances, it is not necessary for the agency to search for the document. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.
54. The Information Commissioner may also take into account the searches and inquiries conducted by an agency in determining whether a document is nonexistent. The key question then is whether those searches and inquiries amount to '*all reasonable steps*'.³⁴ What constitutes reasonable steps will vary from case to case, as the search and inquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances. Such steps may include inquiries and searches of all relevant locations identified after consideration of relevant key factors.³⁵
55. 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. In determining whether a document is unlocatable, it is necessary to consider the specific circumstances of each case,³⁶ and in particular whether:
- there are reasonable grounds for the agency to be satisfied that the requested documents have been or should be in the agency's possession; and
 - the agency has taken all reasonable steps to find the document.³⁷

³¹ Sections 47(3)(e) and 52(1) of the RTI Act.

³² Section 52(1)(a) of the RTI Act. For example, a document has never been created.

³³ *Isles and Queensland Police Service* [2018] QICmr 27 (7 June 2018) at [15] which adopted the Information Commissioner's comments in *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]-[38]. *PDE* addresses the application of section 28A of the now repealed FOI Act. Section 52 of the RTI Act is drafted in substantially the same terms as the provision considered in *PDE* and, therefore, the Information Commissioner's findings in *PDE* are relevant.

³⁴ As set out in *PDE* at [49].

³⁵ As set out in *PDE* at [38].

³⁶ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [21]. See also, *F60XCX and Office of the Queensland Parliamentary Counsel* [2016] QICmr 42 (13 October 2016) at [84] and [87], and *Underwood and Minister for Housing and Public Works* [2015] QICmr 27 (29 September 2015) at [33]-[34] and [49].

³⁷ Section 52(1)(b) of the RTI Act.

56. The agency that made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.³⁸ Where the issue of missing documents is raised on external review, the agency must demonstrate that reasonable steps have been taken to identify and locate relevant documents.³⁹ If the applicant maintains further documents exist, the applicant bears a practical onus of demonstrating that the agency has not discharged its obligation. Suspicion and mere assertion will not satisfy this onus.⁴⁰

Discussion

Scope of the access application

57. The applicant contends that the scope of his access application has been misinterpreted by QBCC and that if it were interpreted correctly, additional documents would fall within its terms. He argues that because the relevant timeframe covered by the access application was stated to be from *'May 2018 to present+contemporary...'*, his application should be interpreted as including documents post-dating AB's SASC.

58. In its initial decision, QBCC stated:

I note that your application lists the timeframe as being from May 2018 to present. However, given that the application refers to the Statement Addressing Selection Criteria for a position, which was submitted at a particular time, the documents must – by necessity – predate that submission. I note that the position was advertised on the 7th of January 2019, and closed on the 20th of January 2019.

59. On internal review, QBCC affirmed this position but stated in its decision that “...*due to your allegations that maybe the candidate in question was deliberately misleading the QBCC selection panel or a QBCC selection panel allowed itself to be misled, I have included some additional information that has been sourced to demonstrate for transparency and in the public interest that the QBCC holds information in relation to the advices or work products listed in the attributes in question.*’

60. In my preliminary view letter to the applicant dated 21 March 2023, I said as follows in respect of this issue:

You contend that your access application should be interpreted as including documents post-dating [AB's] Statement Addressing Selection Criteria (SASC) by virtue of the inclusion in your application of the relevant timeframe as May 2018 to present.

I do not agree. The introductory words of your access application are as follows:

With reference to "SASC OIC mark up QBCC August redacted S PDF" (attached): any and all information or relating to actions/investigations/outcomes by [AB] described in specific statements ... [listed below]:...

[my emphasis]

On a logical analysis of the wording you have used, the statements contained in [AB's] SASC could only have been describing work he had performed up until the time he completed the SASC and lodged his application for the relevant position. Accordingly, regardless of the timeframe you stated in the application, I am satisfied that your request for information

³⁸ Section 87 of the RTI Act.

³⁹ Section 130(2) of the RTI Act.

⁴⁰ *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36].

relating to the work described by [AB] in those statements is limited to the time period from May 2018 to 20 January 2019.⁴¹

61. The applicant continued to dispute this interpretation of his application in his submission dated 26 April 2023:

To the extent there arises any conflict under an access application concerning the search and release of any information that is not exempt or contrary to public interest, then the pro-disclosure bias applies and the scope of an application cannot be artificially limited in its interpretation to exclude information but rather, should be interpreted in such a way as to include information.

In any event, there can be no mistaking the scope of the present access application (the Request). And even to the extent there is any misinterpretation or conflict; then Parliament's intent, the Object of the RTI Act, and the pro-disclosure bias of the RTI Act, dictates that the giving of access to information must prevail.

...

The fatal error in interpretation in this instance is derived from a misguided belief that the Request sought access only to any and all information about [AB's] employment application process, rather than the workplace and industry issues [AB] had dealt with, or was dealing with.

It is particularly concerning that [OIC] specifically seeks to exclude the explicitly stated timeframe of the Request in furtherance of this misinterpretation:...

...

I do not dispute the Request stated "With reference to...". However, this is merely a universally generic expression to pre-empt and refer to some form of material evidence, in which to support a given contention. In this instance, the contention was that [AB] was engaged in particular workplace and industry issues, and had made particular work product statements disclosing their existence and his involvement. The purpose of the Request then was to contend that documents about those workplace and industry issues must exist, and they should be released under the RTI Act.

...

The scope of the Request is otherwise capable of ready and reasonable interpretation. The focus of the Request is clearly seeking access to "any and all information or relating to actions/investigations/outcomes by [AB] described in specific statements" and not [AB's] employment application. It cannot be emphasised enough that the timeframe section of the Request that followed sought access to information up to and including information that was "present" and "contemporary".

...

Finding

62. I have considered the applicant's submissions, but I maintain the view explained at paragraph 60 above. Giving the words used in the application (as set out at paragraph 4 above) their plain meaning, I am satisfied that the phrases '*with reference to*' and '*information relating to actions/investigations/outcomes by AB described in specific statements*' were reasonably interpreted by QBCC as confining the documents to which access was sought to those which AB was describing in his SASC, and thus must pre-date the SASC. To the extent that this is in conflict with the timeframe stated in the application, I find that the words used by the applicant in setting out the terms of his access request prevail.
63. I acknowledge the RTI Act's pro-disclosure bias (as referred to by the applicant on numerous occasions in his submission), however, it is not relevant to a consideration of the interpretation to be given to the words used in an access application. Rather, it

⁴¹ Being the closing date for the relevant job application and therefore the last date on which AB could have finalised his SASC and lodged his application for the position.

serves to encourage agencies to adopt a pro-disclosure approach when considering the release of documents that fall within the scope of an access application.

64. I also acknowledge that an agency should not take an overly technical approach when interpreting the terms of an application. However, I do not consider that QBCC's interpretation can be regarded as such. QBCC was obliged to give the words used in the application their plain meaning and conduct its searches accordingly. I consider it did so. As the Information Commissioner has noted:⁴²

The terms in which an ... [RTI] access application is framed set the parameters for an agency's response under ... [the Right to Information Act 2009 (Qld) (RTI Act)], and in particular set the direction of the agency's search efforts to locate all documents of the agency which fall within the terms of the ... [RTI] access request. The search for relevant documents is frequently difficult, and has to be conducted under tight time constraints. Applicants should assist the process by describing with precision the document or documents to which they seek access.

65. Where, as here, there is a sophisticated applicant who has made many RTI access applications over many years, and who, in my view, has described in clear terms the documents to which they seek access, then they will be bound by the terms of their request.⁴³ I would also reiterate that QBCC's initial decision was to refuse to deal with the access application on the grounds that its scope was burdensome and that dealing with it would substantially and unreasonably divert QBCC's resources. In agreeing to re-commence processing the application on the basis of a narrowed scope, QBCC focused on responsive documents up to the date of the SASC (and the volume of work involved in dealing with them). Had the scope been interpreted as covering documents up to the date of the access application (September 2021), it is likely that QBCC would have maintained its reliance on section 41 of the RTI Act.
66. I therefore find, as a matter of fact, that the access application covers documents between May 2018 and 20 January 2019 (being the closing date for the relevant job application and therefore the last day on which AB could have finalised his SASC and lodged his application for the relevant position) that match the descriptions of documents contained in the SASC. To the extent that the applicant raises sufficiency of search issues concerning documents that post-date 20 January 2019, I find that they do not fall within the scope of the access application. But in any event, as I have noted at paragraph 59 above, QBCC's internal review decision-maker conducted searches for additional documents in an effort to satisfy the applicant's concerns, and included information in the internal review decision explaining the results of those searches and inquiries. If the applicant considers there are documents that post-date the SASC to which he wishes to pursue access, it is open to him to make a fresh access application.

Other sufficiency of search issues

67. The applicant made lengthy sufficiency of search submissions in his application for internal review. As a result, the internal review decision-maker conducted further searches and inquiries in an effort to locate additional responsive documents and provided detailed information that discussed those searches and inquiries, and their results. However, the applicant continued to raise sufficiency of search issues in his external review application.
68. On 21 March 2023, I provided the applicant with copies of QBCC's search certifications collated by both the initial and internal review decision-makers which described in detail

⁴² *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491, [8].

⁴³ *Robbins and Brisbane North Regional Health Authority* (1994) 2 QAR 30.

the various searches and inquiries that they had conducted. I expressed a preliminary view in the following terms:

Based on the information provided by QBCC in both its initial and internal review decisions, and in its search certifications, it is my preliminary view that the searches and inquiries conducted by QBCC in an effort to locate documents responding to the terms of your access application have been reasonable in all the circumstances. I acknowledge that you contend that specific documents responding to your application have not yet been located. However, I am unable, on the information presently before me, to identify any additional searches or inquiries that it would be reasonable to ask QBCC to undertake in an effort to locate such documents. I consider that QBCC has undertaken appropriately targeted searches of relevant locations where it is reasonable to expect that responsive documents would be found, and has made inquiries of relevant staff who it is reasonable to expect may have knowledge of the relevant issues.

69. The information contained in the search certification material is too detailed and voluminous to reproduce here. However, in summary, it identifies:

- all QBCC officers of whom inquiries were made (including AB) and the responses to those inquiries
- all QBCC officers who conducted searches for responsive documents (including AB) and the results of those searches
- all areas of QBCC that were searched, including databases (ECM, Sharepoint), registers, email accounts/Mimecast, and the search terms used; and
- the searches and inquiries that the initial and internal review decision-makers themselves conducted.

70. The complaints/issues raised by the applicant in response in his submission dated 26 April 2023 may be summarised as follows:

- a) responses provided by AB were *'vague, lacking recall or certainty'* and evidenced a failure to reasonably assist
- b) incomplete searches were performed on instruction by QBCC's initial decision-maker
- c) later searches failed to be sought from the same QBCC officers who had in fact already located responsive documents but did not release them, particularly in respect to item g) of the access application
- d) there are no search certifications from the *'original'* access application
- e) some search certifications are combined
- f) search certifications provided by the initial decision-maker are not dated and are made by the decision-maker and not the underlying staff: these must be rejected and searches must be conducted and certified by individual staff; and
- g) in an effort to locate documents responsive to item d) of the access application, inquiries should have been made with the Director of Regulatory Services.

71. The applicant submitted that the initial decision-maker's conduct and search certifications, and the *'defence'* of this conduct by the internal review decision-maker, *'must be considered through the lens of the conduct of offences under the RTI Act, particularly, sections 175 (instructing officers to perform limited searches) and 177 (providing false and misleading search certifications).*

72. In respect of the application of section 175 of the RTI Act, and the applicant's allegation that the initial decision-maker instructed officers to perform limited searches, this relates to items b), c) and d) in paragraph 70 above. The applicant's complaint appears to be that, when QBCC first received his application, it asked various officers to conduct

preliminary searches for responsive documents so that it could obtain an estimate of the expected volume in the context of deciding whether to refuse to deal with the application on the grounds of a substantial and unreasonable diversion of resources. The applicant complains that there are no search certifications in relation to these preliminary searches; that the searches conducted were limited; and, that when QBCC agreed to resume processing the application, the officers who had provided the preliminary information or estimates of responsive documents were not asked to perform searches for responsive documents.

73. I consider the applicant's complaints to be without merit. When an agency conducts preliminary searches for documents in the context of considering whether or not to issue a notice under section 42 of the RTI Act, it is not obliged to conduct detailed searches and inquiries for all responsive documents, or to retrieve responsive documents, or to complete search certifications. Rather, it is required to obtain a reasonable estimate of the number of responsive documents for the purpose of considering the work involved in processing the application. To require detailed searching, the retrieval of documents, and the completion of search certifications to be conducted or completed at this preliminary stage (when it is not yet clear whether a compliant application will in fact be received) would defeat the purpose of section 41, which is to allow an agency to refuse to deal with an application where the work involved in dealing with it (which includes the work involved in identifying, locating and collating responsive documents) would substantially and unreasonably divert the agency's resources.
74. In response to the applicant's complaint at item c) of paragraph 70 above – that once the application had been returned to QBCC to resume processing, the initial decision-maker failed to ask three officers who had provided preliminary information about possible responsive documents to now conduct full and complete searches – I consider that QBCC has adequately explained its position. It advised that one of the officers in question was on long leave at the relevant time. Inquiries were made of the second officer, but she had since changed positions and, given the elapse of time, was unable to recall the specifics of the preliminary information she had initially provided about documents that potentially responded to item g) of the access application.⁴⁴ However, I note that the internal review decision-maker conducted further searches for item g) documents, as did AB, who located and provided further documents, and who also provided further clarification concerning the existence of item g) documents.⁴⁵ The third officer (who had provided a preliminary response in respect of documents potentially responsive to item c) of the access application), had also left the relevant position in the intervening period. However, it appears that this officer had extracted, and provided to the RTI unit, copies of the documents she had located at preliminary stage in any event. AB subsequently located those same documents when he conducted searches, as well as locating additional relevant documents in his email inbox.⁴⁶
75. For these reasons, I do not consider the applicant's complaints at items b), c) and d) of paragraph 70 have merit. As regards his allegation that QBCC's decision-makers breached section 175(3) of the RTI Act, there is no evidence before me that establishes that either officer gave a direction to another officer to act contrary to the requirements of the RTI Act. I reject the allegation that the initial decision-maker improperly directed officers to conduct incomplete searches.
76. In response to the applicant's complaint at item a) of paragraph 70, I do not accept on the material before me that AB's responses evidence a failure to provide reasonable

⁴⁴ It is not clear whether the '35 cases' identified by this officer fell within the terms of the access application in any event, on the basis of the description contained in the search certification.

⁴⁵ See page 10 of the initial search certification and page 2 of the internal review search certification.

⁴⁶ See item c) on page 9 of the initial search certification.

assistance to QBCC's RTI unit to locate responsive documents. The initial search certification records or summarises, in a brief and high-level manner, the responses or comments that AB provided at the preliminary stage regarding the possible locations of responsive documents.⁴⁷ As I have explained above, I do not consider that detailed responses or searches were required at this stage, when QBCC was simply gathering preliminary information in relation to considering issuing a section 42 notice. Once the application was returned to QBCC to process and make a decision on access, both the initial and internal review search certifications indicate that AB searched his email inbox for responsive documents and provided more detailed background or explanatory information about the various requests contained in the access application.⁴⁸

77. The applicant's complaints at items e) and f) of paragraph 70 concern the form of the search certifications provided by QBCC. It should be noted at the outset that there are no formal requirements around the provision, or form, of search certifications by agencies. The RTI Act does not require agencies to complete search certifications. Section 52(1) of the RTI Act simply requires the agency to be satisfied that a document does not exist, or, if the document has been or should be in the agency's possession, that all reasonable steps have been taken to find the document but it cannot be found. In order to assist agencies to discharge their obligations under section 52, OIC has developed search certification forms which it encourages agencies to use when searching for documents. These forms reflect what OIC regards as best practice. However, the fact that an agency provides search certifications in a different form, or that do not comply with the recommended steps contained in OIC's suggested certification form, is not fatal. OIC's obligation is to review the information provided by the agency to determine whether OIC is satisfied that the searches and inquiries conducted by the agency have been reasonable in all the circumstances.
78. Having reviewed the search certifications provided by QBCC's initial decision-maker, I acknowledge that they do not reflect what OIC regards as best practice. The dates on which searches are conducted should be recorded and each person who conducts a search for documents should complete their own search certification, rather than a summary being provided by the decision-maker. Nevertheless, the initial decision-maker has signed a statement attesting to the fact that he contacted the listed officers about the application and he sets out in detail in the certification, and in the initial decision, the results of the searches and any comments provided or reasons given by those officers as to why documents were not located. While it may have been preferable for individual officers to complete their own search certifications, I can see no reason to question the veracity of the information provided by the initial decision-maker, who is QBCC's Principal RTI Officer and who, to my knowledge, has extensive experience in processing RTI applications and in managing searches for responsive documents. I also acknowledge the difficulties presented by the scope of the application.
79. For these reasons, I reject the applicant's allegation that the initial decision-maker breached section 177 of the RTI Act by providing provided false or misleading search certifications. There is no evidence before me to support this allegation.
80. In response to the applicant's complaint at item g) of paragraph 70, which relates to item d) of the access application, I note that AB's preliminary response as regards the existence or whereabouts of responsive documents was that the relevant issue was identified during a misconduct investigation and '*subsequent actions were primarily verbal*'.⁴⁹ AB stated that the relevant Risk Register may have been updated at the time,

⁴⁷ See pages 4-5 of the initial search certification.

⁴⁸ See pages 9-11 of the initial search certification and page 2 of the internal review search certification.

⁴⁹ See page 4 of the initial search certification.

and that the then Acting Director of Regional Services took the matter up and AB had no further involvement. Upon the application being returned to QBCC to continue processing, and as the officers holding the positions of Risk Officer, and Acting Director of Regional Services, no longer worked at QBCC,⁵⁰ the decision-maker made inquiries of three officers: the Director, Procurement; the Deputy Chief Financial officer; and the Acting Manager, Strategy Planning and Performance. These inquiries were focused on locating a relevant entry in a risk register, given AB's advice that any subsequent actions by him were primarily verbal. Inquiries made with these officers were unsuccessful in locating a relevant risk register entry.⁵¹ The initial decision-maker himself then conducted a keyword search of the Financial Services Risk Register and the Technical Services Risk Register, but was unable to locate any responsive information.⁵² On internal review, the decision-maker searched ECM and Sharepoint using search terms including '*procurement processes for technical services*', '*technical services*' and '*regional office*'. While no responsive information was found on ECM, the internal review decision-maker contacted the Board Secretariat who located Minutes of the Finance Audit and Risk Committee meeting of 12 November 2018 containing responsive information that was released to the applicant. The internal review decision-maker also reviewed the Technical Services Risk Register and referred it to AB, who advised that it did not record the issue he had identified.⁵³

81. Having reviewed the searches and inquiries conducted by QBCC in an effort to locate documents responding to item d) of the access application, I am satisfied that the searches and inquiries were reasonable in all the circumstances and were successful in locating responsive information which has been released to the applicant. QBCC explained that the officers who held relevant positions at the time that preliminary inquiries were made no longer worked at QBCC, and so search requests and inquiries were directed to other relevant officers.

Finding

82. Having reviewed the searches and inquiries conducted by QBCC, as set out in its initial and internal review search certifications, as well as the detailed information provided in both the initial and internal review decisions about the searches and inquiries that were conducted, I am satisfied that QBCC has taken all reasonable steps to locate all responsive information. In its experience of its relevant record-keeping processes, I consider QBCC has undertaken appropriately targeted searches of the relevant locations where it is reasonable to expect that responsive information would be found and undertaken all reasonable inquiries of relevant officers. I am unable, on the information before me, to identify any other searches and inquiries that it would be reasonable to ask QBCC to undertake.
83. There is nothing before me to suggest that these search efforts by QBCC were not made in good faith and in a genuine attempt to satisfy the terms of the access application. I reject the applicant's assertion that QBCC acted in bad faith in dealing with his application or at any stage attempted to mislead either the applicant or OIC. There is no material before me that supports those allegations.

⁵⁰ See page 3 of the internal review search certification.

⁵¹ See pages 13, 14 and 16-17 of the initial search certification.

⁵² See page 19 of the initial search certification.

⁵³ See page 2 of the internal review search certification.

DECISION

84. I affirm QBCC's internal review decision by finding that access to the Information in Issue may be refused on the grounds that:

- it is exempt information under section 48 and schedule 3, sections 7 or 12 of the RTI Act
- it is contrary to the public interest information under section 49 of the RTI Act; or
- it is information contained in a document that does not exist or is unlocatable under section 52 of the RTI Act.

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

Rachel Moss
Principal Review Officer

Date: 8 June 2023

APPENDIX

Significant procedural steps

Date	Event
3 January 2023	OIC received the application for external review
10 January 2023	OIC received preliminary documents from QBCC
3 February 2023	OIC advised the parties that the application for review had been accepted OIC requested copies of the information in issue and search certifications from QBCC
24 February 2023	QBCC provided the requested information
21 March 2023	OIC expressed a preliminary view to the applicant
14 April 2023	OIC received an extension of time request from the applicant
26 April 2023	OIC received a written submission from the applicant