



## Decision and Reasons for Decision

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**Citation:** *Q70 and Queensland Human Rights Commission* [2020] QICmr 76 (21 December 2020)

**Application Number:** 315439

**Applicant:** Q70

**Respondent:** Queensland Human Rights Commission

**Decision Date:** 21 December 2020

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - communications between agency officers and legal advisers - whether information would be privileged from production in a legal proceeding - improper purpose exception - whether access may be refused to exempt information - section 67(1) of the *Information Privacy Act 2009* (Qld) and 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 - CONTRARY TO PUBLIC INTEREST INFORMATION - personal information of other individuals - whether disclosure would, on balance, be contrary to the public interest - whether access may be refused under section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - SCOPE - IRRELEVANT INFORMATION - request for information about the applicant - whether information may be excluded on the basis it is irrelevant to the scope of the application - section 88 of the *Information Privacy Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - whether agency has taken all reasonable steps to locate documents requested by the applicant - whether access to further documents may be refused on the basis that they do not exist or cannot be located - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(e) and 52(1) of the *Right to Information Act 2009* (Qld)

## REASONS FOR DECISION

### Summary

1. The applicant applied to the Queensland Human Rights Commission (**QHRC**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) to access information about her in documents created, sent or received by the QHRC Chief Executive Officer (**CEO**).<sup>1</sup>
2. QHRC located 135 documents<sup>2</sup> mainly comprising emails and electronic records held by QHRC in relation to complaints, applications and administration files. QHRC granted access to most of the documents subject to the deletion of parts it considered were irrelevant to the scope of the application, or contrary to the public interest to disclose. QHRC also refused access to legally privileged communications on the basis they were exempt.
3. The applicant applied to QHRC for internal review of the decision to refuse access to information and raised concerns that QHRC had not located all relevant documents.<sup>3</sup> On internal review, QHRC affirmed its original decision and provided the applicant with information about the searches conducted and its recordkeeping systems.<sup>4</sup>
4. The applicant then applied to the Office of the Information Commissioner (**OIC**) for external review of QHRC's internal review decision, continuing to raise concerns about the refused information and existence of further documents.<sup>5</sup> In her application, the applicant submitted that '*QHRC operate in secrecy, with a culture of discrimination, vindictiveness and corruption*' and made allegations of '*falsified records*'.
5. For the reasons set out below, I affirm QHRC's decision and find that:
  - access may be refused to information on the ground that it is exempt information or because its disclosure would, on balance, be contrary to the public interest<sup>6</sup>
  - certain information may be deleted under section 88 of the IP Act on the basis it is irrelevant to the scope of the application; and
  - access to any further documents may be refused on the basis they do not exist.<sup>7</sup>

### Background

6. The decision under review is QHRC's internal review decision dated 2 June 2020.
7. The Appendix sets out significant procedural steps relevant to the review. In reaching this decision, I have taken into account evidence, submissions, legislation and other material as referred to in these reasons (including footnotes and the Appendix).
8. Generally, it is necessary for decision makers to have regard to the *Human Rights Act 2019* (Qld) (**HR Act**). However, section 11(1) of the HR Act provides that '[a]ll individuals *in Queensland* have human rights' (my emphasis). Given the applicant

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<sup>1</sup> Application dated 27 February 2020 and compliant on 18 March 2020. The date range applicable to the application is 1 January 2017 to 18 March 2020.

<sup>2</sup> Comprising 1094 pages.

<sup>3</sup> On 6 May 2020.

<sup>4</sup> Decision dated 2 June 2020.

<sup>5</sup> External review application dated 2 June 2020.

<sup>6</sup> Under section 67(1) of the IP Act and sections 47(3)(a) and (b) of the *Right to Information Act 2009* (Qld) (**RTI Act**). Section 67(1) of the IP Act sets out that an agency may refuse access to information in the same way and to the same extent that the agency could refuse access to the document under section 47 of the RTI Act were the document the subject of an access application under the RTI Act.

<sup>7</sup> Sections 47(3)(e) and 52(1)(a) of the RTI Act.

resides in a State other than Queensland, I have not had direct regard to the HR Act. I have, however, observed and respected the law prescribed in the IP and RTI Acts in making this decision. Where the HR Act applies, doing so is construed as '*respecting and acting compatibly with*' the rights prescribed in the HR Act.<sup>8</sup> Accordingly, had it been necessary for me to have regard to the HR Act, the requirements of section 58(1) of that Act would be satisfied and the observations of Bell J in XYZ about the interaction between the Victorian analogues of Queensland's legislation would apply.<sup>9</sup>

### Information in issue

9. The information to which access has been refused appears mainly in QHRC internal and external email communications (including attachments) and internal QHRC memoranda. Some of the pages contain correspondence exchanged between QHRC and the applicant. While I am limited in the extent I can describe the refused information,<sup>10</sup> it can be summarised as follows:
- communications between QHRC and its internal legal advisers (**LPP information**)<sup>11</sup>
  - information about other individuals appearing in an internal QHRC memorandum to the CEO and a one-page email authored by the applicant (**Third Party Information**);<sup>12</sup> and
  - information appearing on 56 pages<sup>13</sup> of emails and attachments (**Irrelevant Information**).

### Issues for determination

10. The issues for determination fall into two categories. Firstly, I must consider refusal of access to the LPP Information on the basis it is exempt, and to the Third Party Information on the basis that disclosure would, on balance, be contrary to the public interest.<sup>14</sup>
11. Secondly, the applicant has concerns about the scope of the application, deletion of the Irrelevant Information and submits that QHRC has not located all relevant documents (**Scope and Further Documents**).<sup>15</sup>
12. The applicant has also raised concerns about the external review procedure followed by OIC. She contends that she is unable to participate in a written only process which has been used to cause '*disadvantage and deception*',<sup>16</sup> and submits that:<sup>17</sup>

*I cannot receive my rights by your restrictive method of contact with me.*

<sup>8</sup> 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].

<sup>9</sup> See XYZ at [573] where His Honour states '*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*'.

<sup>10</sup> Section 121 of the IP Act.

<sup>11</sup> 177 pages.

<sup>12</sup> Pages 1, 2, 4, 5, 6, 8 and 10 in the File titled 'Xs90 Unredacted' (the memorandum is duplicated in these pages).

<sup>13</sup> Being pages 7 and 10-12 in the File titled 'Admin-UNREDACTED'; pages 17, 20-21, 22 (which is a blank page) and 23-24 in File titled 'BNE3413121 - UNREDACTED'; pages 1, 22 and 23 in the File titled 'BN3414860- UNREDACTED'; pages 1, 4, 12, 15, 18, 21, 24, 27-28, 31, 34, 46-48, 51-58, 71 and 78-83 in the File titled 'IP 2 - unredacted'; pages 12 and 19-24 in the File titled 'IP 4 - unredacted'; and pages 6, 9-11, 20-21 and 25 in the File titled 'Second privacy - unredacted'.

<sup>14</sup> This category requires me to examine the grounds for refusal of access in section 47(3)(a) and (b) of the RTI Act.

<sup>15</sup> This category requires me to examine the scope of the application, section 88 of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

<sup>16</sup> The applicant raised this concern on 4 September 2020, when responding to OIC's email dated 3 September 2020, which provided a status update to the applicant concerning her then current external reviews.

<sup>17</sup> Applicant's email dated 24 August 2020.

*You withhold critical information including your processes and contact with other parties. You do not answer questions unless you have waited several months and then it is obscured as to what you are communicating about.*

13. The procedure to be followed on external review is, subject to the IP Act, within the discretion of the Information Commissioner.<sup>18</sup> To afford procedural fairness,<sup>19</sup> OIC will generally issue a written preliminary view to an adversely affected party, based on an assessment of the material before the Information Commissioner or delegate at that time. This approach ensures that the party is presented with the information constituting the case against them and affords them the opportunity to put forward information in reply, in support of their case.
14. During this review, I conveyed two written preliminary views to the applicant.<sup>20</sup> On each occasion, I invited the applicant to respond, and provided a number of options as to the form of her submissions.<sup>21</sup> The applicant elected to provide written submissions by email in response to the first preliminary view<sup>22</sup> but did not respond to the second. In these circumstances, I am satisfied that the applicant has been afforded adequate opportunities to put forward her views and has not been disadvantaged by OIC's processes. Therefore, I have not dealt with the procedural concerns any further in this review.

## Exempt information

### Relevant law

15. Under the IP Act, an individual has a right to be given access to documents of a Queensland government agency, to the extent they contain the individual's personal information.<sup>23</sup> The right of access is however subject to some limitations, including the grounds on which access to information may be refused.<sup>24</sup> One ground for refusing access is where information comprises exempt information.<sup>25</sup>
16. Information will qualify as exempt if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.<sup>26</sup> Legal professional privilege attaches to confidential communications between a lawyer and client made for the dominant purpose of seeking or giving legal advice or professional legal assistance, or preparing for, or for use in, or in relation to, existing or reasonably anticipated legal proceedings.<sup>27</sup> The privilege:
  - will extend to copies of unprivileged documents made for the dominant purpose of obtaining legal advice;<sup>28</sup> and

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<sup>18</sup> Section 108(1)(a) of the IP Act.

<sup>19</sup> As required by section 110(2) of the IP Act and common law.

<sup>20</sup> By emails dated 24 August 2020 and 22 September 2020.

<sup>21</sup> I invited the applicant to respond by audio file or in writing and noted that this could either be emailed to OIC or saved to a USB or CD and posted.

<sup>22</sup> By email dated 24 August 2020.

<sup>23</sup> Section 40 of the IP Act.

<sup>24</sup> The grounds are set out in section 47 of the RTI Act.

<sup>25</sup> Schedule 3 of the RTI Act identifies the types of exempt information.

<sup>26</sup> Schedule 3, section 7 of the RTI Act. In *Ozcare and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 May 2011) at [12], the Information Commissioner noted that this exemption reflects the requirements for establishing legal professional privilege at common law.

<sup>27</sup> *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552. These principles were recently confirmed by the High Court in *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 at [23]-[25].

<sup>28</sup> As confirmed by the High Court in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 (*Propend*).

- may protect communications between salaried employee legal advisers of a government department or statutory authority and his/her employer as the client (including communications through other employees of the same employer) provided there is a professional relationship of legal adviser and client, which secures to the advice an independent character, notwithstanding the employment.<sup>29</sup>
17. The dominant purpose has been described as '*the ruling, prevailing or most influential purpose*',<sup>30</sup> and it is to be determined objectively, having regard to the evidence, the nature of the documents and the parties' submissions.<sup>31</sup>
  18. Qualifications and exceptions to legal professional privilege<sup>32</sup> may, in particular circumstances, affect the question of whether information attracts or remains subject to it, and therefore whether it comprises exempt information under the RTI Act.

### Findings

19. Section 121 of the IP Act limits the detail I can give about the LPP Information. However, I can describe it as communications involving QHRC's internal legal advisors which comprise requests for legal advice on issues associated with the applicant's complaints and applications to QHRC and the legal advice provided (including attachments). On the information before me, there is no evidence that these communications were not confidential or that they have been disclosed outside of the lawyer-client relationship. I am also satisfied that, based on the content of the communications, they were created for the dominant purpose of QHRC seeking, or its legal advisors providing, legal advice.
20. Therefore, I find that the elements of legal professional privilege are established in relation to the LPP Information.
21. Legal professional privilege may be waived by the holder of the privilege.<sup>33</sup> There is no evidence available to me that QHRC, as the party entitled to the benefit of legal professional privilege, has waived that privilege. Therefore, I find that this exception to legal professional privilege does not apply.
22. Legal professional privilege will also not apply to legal communications made in the furtherance of a fraud or crime.<sup>34</sup> This exception operates to displace legal professional privilege where evidence exists that the relevant client has embarked on a deliberate course of action knowing that the proposed actions were contrary to law, and has made the relevant communications in furtherance of '*some illegal or improper purpose*'.<sup>35</sup> The High Court of Australia in *Propend*<sup>36</sup> determined that a person alleging legal professional privilege is lost for illegality must do more than make vague or generalised contentions of crimes or improper purpose.
23. The applicant submits that there is '*no legal privilege for furthering unlawful purpose*'.<sup>37</sup> However, the applicant has provided no further details, or evidence, supporting her

<sup>29</sup> *Waterford v Commonwealth* (1987) 163 CLR 54 at 95-96 per Mason and Wilson JJ and *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 at [8]-[11].

<sup>30</sup> *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at page 416.

<sup>31</sup> In *AWB Ltd v Cole & Anor (No 5)* (2006) 155 FCR 30, Justice Young observed that dominant purpose '*is a question of fact that must be determined objectively*'. I also note that the High Court confirmed in *Propend* that legal professional privilege will extend to copies of unprivileged documents made for the dominant purpose of obtaining legal advice.

<sup>32</sup> Such as waiver or improper purpose.

<sup>33</sup> *Mann v Carnell* (1999) 201 CLR 1 at [28]. Waiver may be express or implied.

<sup>34</sup> *Fletcher & Ors v Fortress Credit Corporation (Australia) II Pty Limited & Ors* [2014] QSC 303 at [51].

<sup>35</sup> *Propend* at 514. See also *Secher and James Cook University* (Unreported, Queensland Information Commissioner, 6 June 2012) at [20] and *Murphy and Treasury Department* (1998) 4 QAR 446 at [31]-[42].

<sup>36</sup> At page 591.

<sup>37</sup> Applicant's email dated 24 August 2020.

allegation that legal professional privilege in the LPP Information has been displaced due to the improper purpose exception.

24. Having considered the material before me (including the LPP Information and the applicant's submissions), there is nothing before me, other than the applicant's general assertion, to indicate that any communication within the LPP Information was made in furtherance of any illegal, improper or dishonest purpose. On this basis, I find that legal professional privilege has not been displaced by the improper purpose exception.
25. For the above reasons, I am satisfied that the LPP Information meets the requirements of legal professional privilege and that the exceptions do not apply. Accordingly, I find access to the LPP Information may be refused as it comprises exempt information.<sup>38</sup>

### **Third Party Information**

26. Access may be refused to information where disclosure would, on balance, be contrary to the public interest.<sup>39</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.<sup>40</sup>
27. In deciding where the balance of the public interest lies, the RTI Act requires a decision maker to identify factors for and against disclosure and decide, on balance, whether disclosure would be contrary to the public interest.<sup>41</sup> In balancing the public interest, a decision maker is prohibited from taking into account irrelevant factors.<sup>42</sup>
28. As set out in paragraph 9 above, the Third Party Information comprises the names and other personal information<sup>43</sup> of other individuals in the following documents:
  - an email which the applicant sent to two QHRC officers about one of her complaints (**Email**); and
  - an internal memorandum addressed to QHRC's CEO (**Memo**).<sup>44</sup>
29. In making this decision, I have not taken into account any irrelevant factors.

### **Factors favouring disclosure**

30. The applicant submits that she seeks information about QHRC's decision to '*ban all [her] rights to claim human rights protections*'.<sup>45</sup>
31. There is a public interest in QHRC being transparent and accountable in relation to its complaints handling procedures.<sup>46</sup> The Memo takes the form of a briefing note to the

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<sup>38</sup> Under section 67 of the IP Act and sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act.

<sup>39</sup> Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

<sup>40</sup> However, there are some recognised public interest considerations that may apply for the benefit of an individual. See Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 AIAL Forum 12, 14.

<sup>41</sup> Section 49(3) of the RTI Act.

<sup>42</sup> Including those at schedule 4, part 1 of the RTI Act.

<sup>43</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>44</sup> The Third Party Information appearing on pages 1, 2 and 4 is duplicated in the same document on pages 5, 6 and 8.

<sup>45</sup> External review application dated 2 June 2020.

<sup>46</sup> Schedule 4, part 2, items 1, 3 and 11 of the RTI Act.

CEO and sets out the background to the applicant's complaints to the QHRC with the purpose of the Memo<sup>47</sup> stated to be:

*To implement steps to protect the workplace health and safety of staff of the ADCQ and to ensure the complaint handling procedures of the Commission are sustainable.*<sup>48</sup>

32. QHRC's accountability and transparency has been substantially enhanced by the information released to the applicant in the Memo, and the other located documents. I am satisfied that disclosure of the Third Party Information would not further advance the accountability and transparency of QHRC to any significant degree, as it is limited to the personal information of third parties and because the Email was authored by the applicant. On this basis, I afford minimal weight to these factors favouring disclosure.
33. A factor favouring disclosure will also arise where disclosing information could reasonably be expected to reveal that the information is incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.<sup>49</sup> The applicant asserts that QHRC's documents are '*falsified records*',<sup>50</sup> however, she provided no further details about, or evidence in support of, this allegation. Taking into account the limited nature of the Third Party Information, I do not consider its disclosure would reveal it to be incorrect or misleading. Accordingly, I afford this factor no weight.
34. The RTI Act also favours disclosure of an applicant's personal information.<sup>51</sup> I am satisfied that the Email, which was authored by the applicant and includes her opinions, comprises the applicant's personal information. Given the limited nature of the Third Party Information within the Email, I afford this factor low weight in favour of disclosure. Also, the applicant's personal information is inextricably intertwined with the personal information of other individuals referred to in the Email, and therefore, its disclosure would also disclose the personal information of others, which raises a factor favouring nondisclosure discussed below.
35. I have taken into account the pro-disclosure bias and considered whether any other public interest factors favouring disclosure apply, including those listed in schedule 4, part 2 of the RTI Act.<sup>52</sup> I cannot identify any other public interest consideration favouring disclosure of the Third Party Information.<sup>53</sup>

### **Factors favouring nondisclosure**

36. The RTI Act recognises that there is a public interest harm<sup>54</sup> in disclosing the personal information of other individuals and that disclosing information that could reasonably be expected to prejudice the protection of an individual's right to privacy gives rise to a public interest factor favouring nondisclosure.<sup>55</sup>

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<sup>47</sup> Released to the applicant.

<sup>48</sup> ADCQ refers to the Anti-Discrimination Commission Queensland, which was renamed QHRC on 1 July 2019.

<sup>49</sup> Schedule 4, part 2, item 12 of the RTI Act.

<sup>50</sup> External review application dated 2 June 2020.

<sup>51</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>52</sup> Taking into account the limited personal nature of the Third Party Information, I am unable to identify how disclosure could, for example, reveal or substantiate, or allow or assist inquiry into, possible agency conduct deficiencies (schedule 4, part 2, items 5 and 6 of the RTI Act); advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies (schedule 4, part 2, item 10 of the RTI Act); or contribute to the administration of justice generally, including procedural fairness, or for a person (schedule 4, part 2, items 16 and 17 of the RTI Act).

<sup>53</sup> In the event that further relevant factors apply in favour of disclosure, I am satisfied that there is no evidence to indicate that any would carry sufficient weight to outweigh the significant weight that I have afforded to the public interest factors that favour nondisclosure, as discussed below.

<sup>54</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>55</sup> Schedule 4, part 3, item 3 of the RTI Act.

37. The concept of 'privacy' is not defined in either the IP Act or RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their 'personal sphere' free from interference from others.<sup>56</sup>
38. The Memo concerns steps taken to protect the workplace health and safety of QHRC's staff and refers to some of the applicant's communications, including the Email. The Third Party Information within both the Memo and the Email includes some highly sensitive personal information about individuals other than the applicant.
39. The Third Party Information appears in a highly sensitive context. I consider that its disclosure would be a significant intrusion into the privacy of the other individuals. I also consider that the extent of the harm arising from disclosing other individuals' names and some highly sensitive personal information about them, under the IP Act, would be significant. Accordingly, I afford significant weight to these factors favouring nondisclosure.
40. I acknowledge that the applicant will be aware of the content of the Email that she authored, and would likely be aware of some of the Third Party Information in the Memo given her interactions with QHRC staff. However, I do not consider that reduces the weight of the nondisclosure factors to any significant degree, particularly as there can be no restriction on the use, dissemination or republication of information disclosed under the IP Act.

### ***Balancing the public interest***

41. I acknowledge the pro-disclosure bias in deciding access to documents under the IP Act.<sup>57</sup> In addition, and for the reasons addressed above, I have identified some factors favouring disclosure of the Third Party Information (including those relating to the applicant's personal information and QHRC's transparency and accountability).<sup>58</sup> However, taking into account the limited nature of the Third Party Information, I afford these factors low weight.
42. On the other hand, I have identified that the public interest favours nondisclosure of the Third Party Information due to the significant weight afforded to protecting the personal information and right to privacy of other individuals, in a highly sensitive context.<sup>59</sup>
43. On balance, I am satisfied that the public interest factors favouring nondisclosure outweigh the factors favouring disclosure. Accordingly, I find that disclosure of the Third Party Information would, on balance, be contrary to the public interest and access may be refused on this basis.<sup>60</sup>

### **Scope and Further Documents**

#### ***Relevant law***

44. Section 88 of the IP Act permits information that is not relevant to an access application to be deleted from a document before giving access to a copy of the document. In

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<sup>56</sup> Paraphrasing the Australian Law Reform Commission's definition of the concept in 'For your information: Australian Privacy Law and Practice' Australian Law Reform Commission Report No. 108 released 12 August 2008, at paragraph 1.56.

<sup>57</sup> Section 64 of the IP Act.

<sup>58</sup> Schedule 4, part 2, items 1, 3, 7 and 11 of the RTI Act.

<sup>59</sup> Schedule 4, part 4, section 6 and schedule 4, part 3, item 3 of the RTI Act.

<sup>60</sup> Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.



deciding whether information is irrelevant, it is necessary to consider whether the information has any bearing upon, or is pertinent to, the terms of the application.<sup>61</sup>

45. The functions of the Information Commissioner include investigating and reviewing whether an agency has taken reasonable steps to identify and locate documents applied for by applicants.<sup>62</sup> However, access may be refused to a document if it is nonexistent.<sup>63</sup>
46. To be satisfied that documents are *nonexistent*, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors.<sup>64</sup> If searches are relied on to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case, depending on which of the key factors are most relevant in the circumstances.
47. It is also well settled that the terms of an access application set the parameters for an agency's search efforts.<sup>65</sup>

### Findings

48. On external review, the applicant submits that she is seeking '*all information held about my [sic] by QHRC*'<sup>66</sup> and submits that QHRC has not located all relevant documents.<sup>67</sup>
49. The access application requested communications, records, emails, minutes, texts, deleted or archived items, paper and electronic records about the applicant '*created by, sent to or from or including or heard by*' the CEO of QHRC. The application did not identify any other QHRC officer by name, nor did it indicate that the applicant was seeking correspondence involving any other staff member except for the CEO.
50. It is not open for an access applicant to unilaterally expand the scope of an access application on external review.<sup>68</sup> I consider the terms of the access application are clear; they were expressly stated to include correspondence involving the CEO and no other officer. I am satisfied that the Irrelevant Information is, on its face, correspondence between other individuals, not involving the QHRC CEO. Therefore, I find that the Irrelevant Information was validly excluded.<sup>69</sup>
51. The applicant articulated her concerns about missing documents as follows:<sup>70</sup>

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<sup>61</sup> *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) at [52].

<sup>62</sup> Section 137(2) of the IP Act.

<sup>63</sup> Section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

<sup>64</sup> These factors are identified in *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [19] as including the administrative arrangements of government; the agency structure; the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it); the agency's practices and procedures (including but not exclusive to its information management approach); and other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates. These factors were more recently considered in *Van Veenendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017).

<sup>65</sup> *Fennelly and Redland City Council* (Unreported, Queensland Information Commissioner, 21 August 2012) at [15], citing *Robbins and Brisbane North Regional Health Authority* (1994) 2 QAR 30 and *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491. See also *3EUS8A and Department of Communities, Child Safety and Disability Services* [2014] QICmr 29 (18 June 2014) at [33] and *Usher and Department of Natural Resources and Mines* [2014] QICmr 51 (19 December 2014) at [15].

<sup>66</sup> Applicant's email dated 24 August 2020.

<sup>67</sup> External review application dated 2 June 2020.

<sup>68</sup> *Robbins and Brisbane North Regional Health Authority* (1994) 2 QAR 30 at [17]. See also *8RS6ZB and Metro North Hospital and Health Service* [2015] QICmr 3 (13 February 2015) at [14].

<sup>69</sup> Under section 88 of the IP Act.

<sup>70</sup> External review application dated 2 June 2020.

*I am unable to see deliberations or discussions and how they started for the QHRC act by [two individuals] to ban all my rights to claim human rights protections unless I pay tens of thousands for a lawyer. ...*

*There seems to be no records showing communication with respondents to my allegations despite them being given all correspondence from me and a privacy notice that what they say is shared with the other parties.*

*I cannot see a discussion about [individual] working for [another entity] but ordering my QHRC assessors which are her subordinates to reject all claims from me including claims they already said they would accept, or discussing her conflict of interest in [another entity] being one of the complaints she ordered by [sic] dismissed on arbitrary grounds that they refuse to explain.  
...*

*I cannot see my reviews of staff here, some of which were glowing reviews.*

52. QHRC confirmed that, in processing the application, it searched its electronic files relating to the applicant's complaints,<sup>71</sup> the CEO's email records<sup>72</sup> and QHRC's electronic archive (known as Recfind).<sup>73</sup> In its decision, QHRC also identified that the following electronic records were identified as containing information about the applicant:
- complaint files (24 folders)
  - information privacy access applications (6 folders); and
  - confidential administration files (2 folders).
53. The above folders were searched using the first and surname of the CEO as search terms and subsequently, each document was individually reviewed for relevance.
54. OIC requested information from QHRC about its recordkeeping practices and the searches it conducted for information requested in the application. QHRC provided search records and certifications to OIC which confirm that searches for information responsive to the application were conducted of records held in the following locations:
- QHRC's electronic files held in the applicant's name
  - records held in QHRC's information management, privacy and right to information applications folder
  - the email records of QHRC's CEO; and
  - QHRC's electronic drive which contains sensitive files that are accessible to the Executive Leadership Team.
55. QHRC also submits that enquiries were made of its CEO to confirm there were no other locations where relevant documents would be located.
56. Based on the information before me, including the located documents, access application, QHRC's search certifications and information in its decisions and submissions to OIC regarding its searches and recordkeeping practices, I am satisfied that QHRC has undertaken comprehensive searches of locations where it would be reasonable to expect that the types of information requested in the access application would be stored and has conducted appropriate enquiries about the existence of such information. I also find that it was reasonable for QHRC to limit its searches to locations that would be expected to contain communications involving the CEO and I am unable to identify any further steps or searches which would have been reasonable for QHRC

<sup>71</sup> Using search terms including the first and last names of QHRC's CEO.

<sup>72</sup> Using the applicant's last name as the search term.

<sup>73</sup> Internal review decision dated 2 June 2020.

to undertake given the scope of the application. With respect to the applicant's submissions, I do not consider they contain any evidence to give rise to a reasonable expectation that further documents<sup>74</sup> 'created by, sent to or from or including or heard by' QHRC's CEO, exist.

57. On the basis of the above, I am satisfied that QHRC has taken all reasonable steps to locate information relevant to the access application and access to any further information may be refused on the basis that it does not exist.<sup>75</sup>

## DECISION

58. For the reasons set out above, I find<sup>76</sup> that:

- access may be refused to the LPP Information as it is exempt information<sup>77</sup>
- access may be refused to the Third Party Information as disclosure would, on balance, be contrary to the public interest<sup>78</sup>
- the Irrelevant Information may be deleted under section 88 of the IP Act; and
- access to any further documents may be refused on the basis they do not exist.<sup>79</sup>

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

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**K Shepherd**  
**Assistant Information Commissioner**

**Date: 21 December 2020**

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<sup>74</sup> Including emailed reviews of staff, communications with respondents to her allegations, and deliberations or discussions between particular individuals. There is no evidence to suggest any of those documents (if they exist) were sent to, or involved, the CEO.

<sup>75</sup> Section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act.

<sup>76</sup> I affirm QHRC's decision under review.

<sup>77</sup> Under section 67(1) of the IP Act and sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act.

<sup>78</sup> Under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

<sup>79</sup> Sections 47(3)(e) and 52(1)(a) of the RTI Act.

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
2 June 2020	OIC received the external review application.
23 June 2020	OIC notified the applicant and QHRC that the external review application had been accepted and requested information from QHRC.
1 July 2020	OIC received the requested information from QHRC.
31 July 2020	OIC received further information from QHRC.
24 August 2020	OIC conveyed a preliminary view to the applicant and invited the applicant to provide submissions if she did not accept the preliminary view. OIC received the applicant's submissions contesting the preliminary view.
4 September 2020	OIC received an email from the applicant raising general concerns about OIC's external review processes.
22 September 2020	OIC conveyed a further preliminary view to the applicant and invited the applicant to provide submissions if she did not accept the preliminary view.