



Decision and Reasons for Decision

Citation:	<i>I50 and Queensland Police Service [2021] QICmr 47 (16 September 2021)</i>
Application Number:	315955
Applicant:	I50
Respondent:	Queensland Police Service
Decision Date:	16 September 2021
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - INFORMATION PRIVACY - compliance with relevant application requirements - whether agency was entitled to decide an access application did not comply with all relevant application requirements - requirement to provide sufficient information about documents sought - sections 43(2)(b) and 53 of the <i>Information Privacy Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. In December 2019, the applicant applied¹ to the Queensland Police Service (**QPS**) to access information about herself.
2. QPS notified the applicant² that QPS intended to refuse to deal with the application, on the basis that it did not comply with the requirements of section 43 of the *Information Privacy Act 2009* (Qld) (**IP Act**) because the application:
 - did not give sufficient information about the documents the applicant was seeking, to enable QPS to identify them; and
 - was not accompanied by a certified copy of the applicant's identification.
3. The applicant then provided a certified copy of her identification to QPS.³
4. QPS again notified the applicant⁴ that the application did not give sufficient information about the documents the applicant was seeking and, for that reason, QPS intended to refuse to deal with the application.

¹ Application dated 19 December 2019. The application identified the types of documents sought as '*[a]ll statements, emails, internal memos, file notes and phone calls, text messages etc*' within the period November 2019 to 19 December 2019.

² Letter dated 29 January 2020 (**First non-compliance notice**).

³ Which was received by QPS on 3 February 2020.

⁴ Letter dated 10 March 2020 (**Second non-compliance notice**).

5. By letter dated 18 March 2021, QPS notified the applicant that it had decided to refuse to deal with the application under section 53(6) of the IP Act, on the basis that it did not comply with all relevant application requirements.
6. The applicant then applied⁵ to the Office of the Information Commissioner (**OIC**) for external review. The applicant's primary concern was QPS' delay in dealing with the application. During the external review, the applicant submitted that, prior to 18 March 2021, she had not been contacted by QPS about the application⁶ and she had not received written notices that QPS was required to issue before refusing to deal with her application under section 42 of the *Right to Information Act 2009* (**RTI Act**).
7. For the reasons set out below, I set aside the decision QPS is deemed to have made and find that QPS may refuse to deal with the application under section 53 of the IP Act, as it does not comply with the requirements of section 43(2)(b) of the IP Act.

Background and preliminary issues

8. On external review, the applicant argued that she made the application under the RTI Act, not the IP Act.⁷
9. In the online application form completed by the applicant, she selected the option '*The applicant is seeking access to documents that contain personal information only either in relation to themselves or on behalf of another person*'. On its face, the access application appears to only seek access to documents containing the applicant's personal information. I also note that the First and Second non-compliance notices referred to QPS' receipt of an application *under the [IP Act]*. While it appears that the applicant provided a certified copy of her identification to QPS in response to the First non-compliance notice, she did not take issue with the reference to her application being made under the IP Act. Further, the applicant did not seek to pay the applicable RTI Act application fee or address this issue when contacted by QPS. In these circumstances, I am satisfied that it is appropriate for this review to proceed under the IP Act.
10. During the review, the applicant also asserted that she has not been afforded due process.⁸
11. The procedure to be followed on external review is, subject to the IP Act, within the discretion of the Information Commissioner⁹ and the Information Commissioner has an obligation to promote settlement of external review applications.¹⁰ In order to ensure procedural fairness (as required by both the IP Act¹¹ and common law), it is the practice of OIC to convey a preliminary view, based on an assessment of the material before the Information Commissioner or her delegate, to an adversely affected participant. This is to explain the issues under consideration to the participant and affords them the opportunity to put forward any information they consider relevant to those issues.¹²

⁵ External review application dated 31 March 2021.

⁶ The First and Second non-compliance notices were both sent to the applicant at the address she nominated for her contact details in the access application. I note that the applicant confirmed she did receive the 18 March 2021 letter from QPS, which was also sent to the same address. It is unclear why the applicant would have received some, but not all, of the correspondence QPS sent to her at the address she nominated for her contact details.

⁷ External review application and submissions dated 31 May 2021.

⁸ Applicant's emails dated 13 July 2021.

⁹ Section 108 of the IP Act.

¹⁰ Section 103(1)(b) of the IP Act.

¹¹ Section 110(2) of the IP Act.

¹² It also forms part of the Information Commissioner's processes for early resolution under section 103(1) of the IP Act.

12. After completing a preliminary assessment of the issues in this review, I wrote to the applicant¹³ to explain my preliminary view that QPS was entitled to refuse to deal with the application under section 53 of the IP Act. I invited the applicant to provide a submission in response. In the absence of any response from the applicant, and in accordance with the Information Commissioner's informal resolution processes, I closed the review on 13 May 2021. When the applicant notified me that she had not received my preliminary view letter,¹⁴ I re-opened the review, sent a further copy of the preliminary view letter to the applicant and invited the applicant to provide submissions.¹⁵ The applicant made a number of submissions contesting the preliminary view. In these circumstances, I am satisfied that the applicant has been afforded due process in this review. The applicant has been appraised of the issue under consideration and has been afforded a number of opportunities to put forward submissions in response.
13. Finally, the applicant alleged that an OIC staff member exhibited '*impermissible prejudgement*' as a decision-maker and '*an apprehension of bias*'.¹⁶ The applicant further contended that '*in the public interest, the decision for this external review should be allocated to a senior council [sic] at the Queensland Bar, or better still, one from an interstate bar*'.¹⁷
14. The High Court in *Ebner v Official Trustee in Bankruptcy*¹⁸ identified that the governing principle, where a question arises as to the independence or impartiality of a decision-maker, is whether '*a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide*'.¹⁹ The High Court has also noted that '*[t]he question of whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts...*'.²⁰
15. The only basis for the applicant's allegations of prejudgement and bias appears to be an email which was sent to her by an OIC staff member on 13 July 2021, correcting an error in an earlier email sent on the same day.²¹ The applicant contended that if that the OIC staff member was:²²

this "quick off the mark" to "correct" documents sent to me - as previously sent to you earlier today - it continues to demonstrate [staff member's] "impermissible pre-judgement" as a decision maker and further supports that [staff member] has NOT considered my submission in this external review process at ANY TIME.

16. It is not open to an external review applicant to request that a specific decision-maker deal, or not deal, with their review. I do, however, note that I was not the OIC staff member who sent the email which is the subject of the applicant's allegations. I have carefully reviewed the entirety of the correspondence sent to, or received from, the

¹³ On 20 April 2021.

¹⁴ I sent correspondence, including the preliminary view letter, to the applicant at the address she nominated for her contact details in the external review application (which is the same address nominated in the access application). I note that the applicant confirmed she did receive my letter closing the review on 13 May 2021, which was also sent to the same address. It is again unclear why the applicant would have received some, but not all, of the correspondence sent to her at the address she nominated as her contact details.

¹⁵ On 14 May 2021. As set out in the Appendix, I also agreed to the applicant's requests for further time to respond to my preliminary view.

¹⁶ Applicant's emails received at 12.23pm and 9.58pm on 13 July 2021 and at 1.38am on 14 July 2021.

¹⁷ Applicant's email received at 1.38am on 14 July 2021.

¹⁸ (2000) 205 CLR 337 (*Ebner*).

¹⁹ *Ebner* at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ. See also *Michael Wilson & Partners Limited v Nicholls* (2011) 244 CLR 427 at [31] per Gummow ACJ, Hayne, Crennan and Bell JJ.

²⁰ *Isbester v Knox City Council* (2015) 255 CLR 135 at [20] per Kiefel, Bell, Keane and Nettle JJ.

²¹ OIC emailed applicant on 13 July 2021 at 10:36am; applicant responded by email on 13 July 2020 at 11:25am; OIC emailed applicant noting error in previous correspondence and providing correction on 13 July 2021 at 1:25pm.

²² Applicant's email received at 9.58pm on 13 July 2021.

applicant and considered the applicant's submissions to the extent they are relevant to the issue for determination. I have also considered the access application and the legislative framework for applying to access government held information. I do not consider that the applicant has raised any basis to suspect that I cannot decide this matter in any way other than on its legal and factual merits. I also cannot identify any conflict of interest in my dealing with her application for review of QPS' decision, and the applicant's prejudgement and bias allegations have not altered my conduct of the review or my consideration of the issues before me in any way.

17. The significant procedural steps taken during the external review are set out in the Appendix to this decision.

Reviewable decision

18. Under section 99 of the IP Act, a person affected by a reviewable decision²³ may apply to have the decision reviewed by the Information Commissioner.²⁴
19. Where an agency has not given an applicant written notice of its decision by the end of the processing period, it is taken to have made, on the last day of the processing period, a decision refusing access to the document.²⁵ Here, QPS received the applicant's application in December 2019 and did not issue a written decision in respect of the application until March 2021.²⁶
20. QPS' written decision is purportedly made under section 53(6) of IP Act, which requires an agency, within 10 business days *'after making the decision'*, to give the applicant prescribed written notice of the decision. No timeframe is specified in section 53(6) of the IP Act for the agency to *decide* whether a purported application does not comply with all relevant application requirements (that is, after giving an applicant the opportunity to consult under section 53(3) of the IP Act, and considering any responses). There is also no information before me to suggest that QPS made the decision regarding continued non-compliance any sooner than March 2021. However, having regard to the primary objects of the IP Act,²⁷ I consider that section 53(6) was intended to afford an agency a reasonable period only, after consultation, in which to make its decision whether to deal with a non-complaint application.²⁸
21. In these circumstances, I am satisfied that QPS did not make a decision within the required statutory timeframe.²⁹ The decision under review is the decision QPS is deemed to have made to refuse access under section 66 of the IP Act.³⁰

²³ As defined in schedule 5 of the IP Act.

²⁴ An application for external review is required to be made within 20 business days from the date of the written notice of decision or any longer period allowed by the Information Commissioner (section 101 of the IP Act).

²⁵ Section 66 of the IP Act. *'Processing period'* is defined in section 22 of the IP Act as 25 business dates *'from the day the application is received by the agency'*.

²⁶ Being approximately 12 months after the Second non-compliance notice.

²⁷ Section 3 of the IP Act.

²⁸ Reflecting section 38(4) of the *Acts Interpretation Act 1954* (Qld), which provides that if no time is provided or allowed for taking an action, the action must be done *'as soon as possible, and as often as the relevant occasion happens'*.

²⁹ By letter dated 20 April 2021, I notified QPS that the applicant was seeking external review of a deemed decision (given the significant delay in QPS issuing its written decision). QPS has not explained why it did not make its decision under section 53(6) of the IP Act prior to March 2021 and did not seek to contest that the reviewable decision was a deemed decision.

³⁰ As QPS did not issue a written decision in respect of the application for over 12 months and the applicant then immediately applied for external review, I have exercised the discretion in section 101(d) of the IP Act to accept the applicant's external review application outside the statutory timeframe.

Issue for determination

22. External review by the Information Commissioner is a merits review and the Information Commissioner has the power to decide any matter in relation to an application that could have been decided by the agency, under the IP Act.³¹
23. On external review, QPS maintained that the application did not comply with the requirement in section 43(2)(b) of the IP Act. Accordingly, the issue for determination is whether QPS may refuse to deal with the application on the basis it does not comply with all relevant application requirements.
24. During external review, I also wrote to the applicant conveying a view that part of the application seeks documents of an entity to which the IP Act does not apply.³² However, I have not addressed that issue in this decision, and I have reached this decision in relation to the application of sections 43 and 53 of the IP Act only.
25. The applicant's submissions on external review raise the refusal to deal provision in section 41 of the RTI Act. That provision is not being considered in this review. The applicant also seeks to raise concerns beyond the jurisdiction of the Information Commissioner and which fall outside the scope of this review.³³ I have considered the applicant's submissions and have summarised them throughout this decision to the extent they are relevant to the issues in this review.

Evidence considered

26. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix).
27. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.³⁴ I consider a decision-maker will be '*respecting, and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the IP Act.³⁵ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.³⁶

Relevant law

28. The IP Act affords an individual a right to be given access to documents of an agency, to the extent they contain the applicant's personal information.³⁷
29. The requirements for making a valid application to access such documents are set out in section 43 of the IP Act. Relevantly, section 43(2)(b) of the IP Act requires an access application to give sufficient information concerning the document to which access is

³¹ Section 118(1) of the IP Act.

³² By virtue of section 17 of the IP Act and section 14(2) and schedule 2, part 2, item 7 of the RTI Act and consistent with the observations of Hoeben J in *Carmody v Information Commissioner & Ors* (No.5) [2018] QCATA 18 at [35]-[54].

³³ For example, about the time taken by QPS to respond to the application and perceived inadequacies in QPS' processing of the application. I note that the applicant has indicated she is pursuing other complaint processes in respect of these concerns.

³⁴ Section 21 of the HR Act.

³⁵ *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].

³⁶ I also note the following observations made by Bell J in *XYZ* at [573], on the interaction between equivalent pieces of Victorian legislation (namely, the *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)): '*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].*'

³⁷ Section 40 of the IP Act. *Personal information* is defined in section 12 of the IP Act.

requested 'to enable a responsible officer of the agency or Minister to identify the document'.³⁸

30. The scope of the access application is critical for the agency to progress searches in a targeted way, to discharge its obligation to locate all relevant documents. Accordingly, an access applicant must describe the requested documents with enough detail to allow the decision-maker to:
 - identify the documents being applied for; and
 - conduct searches for those documents.³⁹
31. An agency may not refuse to deal with an application because it does not comply with all relevant application requirements without first giving the applicant a reasonable opportunity to consult, with a view to making an application in a form meeting all relevant application requirements.⁴⁰ Following that consultation opportunity, and consideration of any response, where the agency decides the application does not comply with all relevant application requirements, it must give the applicant written notice of the decision within 10 business days.⁴¹

Findings

Does the application give sufficient information concerning the documents sought?

32. The application seeks access to '*[a]ll statements that may have been made to police that contain [the applicant's] personal details or refer to [the applicant] within the last four weeks and any statements that may refer to a current external review with the OIC*'.⁴²
33. On external review, QPS submitted⁴³ that the application did not sufficiently identify the documents being applied for and that, to identify and request searches of the relevant police district or station, they required some detail as to what the requested statements would have been in regard to and where they would likely have been made. On the other hand, the applicant submitted that she was '*very clear on the documents/the timeframes/and the context in which the documents may have been held and where they may be held (OIC)*'.⁴⁴
34. While the applicant's request is confined to statements made within a one-month period, it is not linked to any specific incident, event or external review. Nor is the request confined to statements made to any specific officer or to a particular police station. On an objective reading, the application could encompass the following types of documents:
 - a contemporaneous record of a statement made by the applicant to any Queensland police station, unit or officer (past or present)

³⁸ Given the applicant's contentions in this matter, it is also relevant to note that section 43(2)(c) of the IP Act requires the applicant to also '*state an address to which notices under this Act may be sent to the applicant*'.

³⁹ *127 and Queensland Police Service* [2019] QICmr 29 (12 August 2019) at [12] with reliance on *Londsdale and James Cook University* [2015] QICmr 34 (15 December 2015) at [9].

⁴⁰ Section 53(3) of the IP Act. The agency is also required, under section 53(2) of the IP Act, to make '*reasonable efforts*' to contact an applicant within 15 business days of receiving such an application to inform the applicant how the application does not comply with a relevant application requirement.

⁴¹ Section 53(6) of the IP Act.

⁴² The application identifies the types of documents sought as: '*All statements, emails, internal memos, file notes and phone calls, text messages etc*'.

⁴³ On 14 April 2021.

⁴⁴ External review application. The applicant further submitted that she was '*very specific in the types of documents requested – emails/internal memos/file notes/recorded phone calls/text messages and so on within the dates of November 2019 – to current – December 2019*' [emphasis added].

- a contemporaneous record of a statement about, or referencing, the applicant (in any capacity) made by another individual to any Queensland police station, unit or officer (past or present)
 - any statement about an incident or event at the applicant's address (whether or not the applicant was involved)
 - a document created or received by QPS in an external review involving the applicant; and
 - a document created or received by QPS in an external review which does not involve the applicant, but which refers to the applicant's personal details (for example, by referencing a previously published decision involving the applicant).
35. The specific recordkeeping and document management systems of an agency are relevant when determining whether an application sufficiently describes the documents sought.⁴⁵ Where an agency is large and decentralised, as is the case with QPS, applicants may need to include additional information in their application to enable the agency to identify the documents and undertake searches. Section 43(2)(b) of the IP Act places the onus on the applicant, not the decision-maker, to identify the documents she wants to access. QPS does not have one central database and it records the information it receives in different ways, depending on the nature of that information and the context in which that information is provided. Accordingly, an officer could not identify '*all statements made to police*' that contain the applicant's personal information without further information to direct those searches, such as identifying the matters to which the statements relate or identifying involved officers.
36. Taking into account the terms of the application and the nature of QPS' record keeping systems, I am satisfied that that the application does not comply with the requirements specified in section 43(2)(b) of the IP Act, as it does not provide sufficient detail of the requested documents to enable QPS to identify and conduct targeted searches for those documents. On this basis, I find that the application did not comply with all relevant application requirements specified in section 43 of the IP Act.

Was the applicant given a reasonable opportunity to consult?

37. The applicant submitted:⁴⁶

At no time have I received any contact by any officer in relation to this RTI application over the 16 months. I have phoned several times requested a response – to no avail.

...

I was not afforded the opportunity to correct the request and make it valid as per the legislation.

...

Therefore – it is in the public interest that this decision be overturned and that I be given permission to access the documents I seek – in the interest of a fair, equitable, open and transparent government; in the interest of a fair judicial process and in the interest of justice.

38. In the First non-compliance notice,⁴⁷ QPS identified that the application did not provide the following information about the documents the applicant was seeking to access:⁴⁸

⁴⁵ *Mewburn and Queensland Police Service* [2014] QICmr 49 (2 December 2014) at [41]-[42].

⁴⁶ External review application.

⁴⁷ While the First non-compliance notice was given 25 business days after QPS received the application, I note that section 53(2) of the IP Act required that QPS make only '*reasonable efforts*' to contact an applicant within 15 business days of receiving an application and there is no prescribed action or decision which would arise if the 15 business day timeframe is not met. Taking into account the application was made shortly before the commencement of the Christmas holiday period, I consider it reasonable to conclude that QPS did make the reasonable effort required by section 53(2) of the IP Act.

⁴⁸ This notice also identified that the application was not accompanied by a certified copy of the applicant's identification.

- Where in the [QPS], [the applicant] believe the requested documents will exist.
 - Who may have made the requested statements.
 - The matter at external review with the Office of the Information Commissioner.
 - Who may have authored such statement.
 - Which office/unit such a statement may have originated from.
 - Clarify the type of documents you seek – [the] application initially requests statements but later expands to all statements, emails, internal memos, file notes, phone call [sic], text messages etc. The onus is on the applicant to sufficiently describe the document/s sought.
 - Should [the applicant] wish to expand the scope to include all statements, emails, internal memos, file notes, phone call [sic], text messages etc.;
 - Provide the name of the person making the call/sending the text
 - Provide the telephone number, if known, from which the call was made from or the text was sent from.
 - Provide clarification as to the etcetera.
39. In the Second non-compliance notice, QPS requested that the applicant provide further information as to what incident/event and external review matter the requested documents might relate to.
40. QPS received no response from the applicant to these notices.
41. The applicant contends that she did not receive any correspondence from QPS until 18 March 2021. Evidence provided by QPS on external review indicates that it sent the First and Second non-compliance notices to the same address as the 18 March 2021 letter, being the address which the applicant nominated in the application. After QPS issued the First non-compliance notice, the applicant submitted a certified copy of her identity to QPS, which suggests that the correspondence had been received by her.
42. On the information before me, and taking into account the requirement in section 43(2)(c) of the IP Act, I am satisfied that the applicant was afforded *'reasonable opportunity to consult with a view to making an application in a form complying with all relevant application requirements'*, as contemplated by section 53(3) of the IP Act.

Conclusion

43. I find that the access application does not comply with all relevant application requirements and the applicant was afforded reasonable opportunity to consult with a view to making an application in a form complying with those requirements.

DECISION

44. For the above reasons, I set aside⁴⁹ the decision QPS is deemed to have made under section 66 of the IP Act and find that QPS is entitled to refuse to deal with the application under section 53(6) of the IP Act, on the basis that the application does not comply with all the relevant application requirements specified in section 43 of the IP Act.

S Martin
Assistant Information Commissioner
Date: 16 September 2021

⁴⁹ As a delegate of the Information Commissioner under section 139 of the IP Act.

APPENDIX**Significant procedural steps**

Date	Event
21 March 2021	OIC received the external review application.
14 April 2021	OIC received information from QPS.
20 April 2021	OIC notified QPS that the external review application was accepted. OIC notified the applicant that the external review application was accepted and conveyed a preliminary view that the application did not comply with the requirements of making a valid access application under the IP Act and, in part, seeks documents from an entity to which the IP Act does not apply. The applicant was invited to provide submission to OIC by 6 May 2021 if she wished to contest that view.
13 May 2021	In accordance with OIC's informal resolution processes, OIC closed the external review in the absence of any response from the applicant. OIC received the applicant's request to re-open the external review, on the basis she had not received OIC's 20 April 2021 letter, and asked OIC to investigate an alleged breach of privacy.
14 May 2021	OIC notified the applicant and QPS that the external review had been re-opened and invited the applicant to provide submissions to OIC by 29 May 2021 if she wished to contest OIC's preliminary view.
16 May 2021	OIC received an email from the applicant about her request for OIC to investigate an alleged breach of her privacy.
19 May 2021	OIC wrote to the applicant to confirm the correspondence OIC had sent to the applicant's nominated email address and request further details of the alleged breach of privacy.
26 May 2021	OIC received the applicant's request for an extension of time to respond to the preliminary view.
27 May 2021	OC granted an extension to 4 June 2021 for the applicant's response.
3 June 2021	OIC received the applicant's submissions dated 31 May 2021 and a request for a further extension of time.
7 June 2021	OIC granted an extension to 25 June 2021 for the applicant's further response.
21 June 2021	OIC received the applicant's request for further explanation of OIC's preliminary view.
23 June 2021	OIC conveyed a further preliminary view to the applicant.
6 July 2021	OIC received the applicant's further submissions.
13 July 2021	OIC corresponded with the applicant about the preliminary view and confirmed a formal decision would be issued to finalise the review. OIC received the applicant's further submissions.
14 July 2021	OIC received the applicant's further submission.