



Decision and Reasons for Decision

Citation:	<i>K27 and Queensland Ombudsman</i> [2021] QICmr 58 (11 November 2021)
Application Number:	315732
Applicant:	K27
Respondent:	Queensland Ombudsman
Decision Date:	11 November 2021
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST - personal information - whether disclosure would on balance be contrary to the public interest - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - SUFFICIENCY OF AGENCY SEARCH EFFORTS - whether agency has taken reasonable steps to identify and locate documents requested by applicant - section 130 and sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld)</p>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Queensland Ombudsman (**QO**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to various documents concerning the employment of a named QO officer (**Nominated Officer**).
2. As an apparent consequence of email transmission issues, QO did not issue a decision to the applicant within the time prescribed in the RTI Act,² and was therefore taken to have made a decision refusing access to requested information.³ QO did, however, issue the applicant with a notice of decision shortly after expiry of the processing period,⁴ and released a number of documents to the applicant⁵. Access to others was refused.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QO's deemed decision.⁶ The applicant contested the refusal by QO to release information, and contended QO had not taken reasonable steps to locate all documents relevant to his application.

¹ Access application dated 2 September 2020.

² As set out in the Office of the Information Commissioner's letter to QO dated 11 December 2020.

³ Under section 46 of the RTI Act.

⁴ 'Processing period' as defined in section 18 of the RTI Act.

⁵ Dated 23 October 2020.

⁶ External review application dated 16 November 2020.

4. Following negotiations with OIC, QO agreed to release further information to the applicant. The applicant, meanwhile, withdrew his application as it related to other information, leaving only parts of a single page in issue (to which parts the applicant continues to seek access). Additionally, the applicant continued to press his case that QO had not taken reasonable steps to locate all relevant information.
5. For the reasons explained below, I am satisfied that disclosure of the parts of the single page remaining in issue would, on balance, be contrary to the public interest. QO may therefore refuse access to this information, under section 47(3)(b) of the RTI Act.
6. I am also satisfied that QO has taken reasonable steps to locate information relevant to the application, and has therefore discharged its search obligations in relation to the access application.

Background

7. Significant procedural steps are set out in the Appendix to this decision.

Reviewable decision

8. The decision under review is the decision taken to have been made by QO under section 46 of the RTI Act, refusing access to requested information.

Evidence considered

9. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).
10. In making this decision I have had regard to the *Human Rights Act 2019* (Qld),⁷ particularly the right to seek and receive information.⁸ 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,⁹ 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.*'¹⁰

Information in issue

11. The information in issue consists of parts of a single page – 'page 56'¹¹ – containing two emails.¹²

Issues for determination

12. The issues for determination are:

⁷ HR Act.

⁸ As embodied in section 21 of the HR Act.

⁹ *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].

¹⁰ *XYZ*, [573].

¹¹ As numbered by QO in processing the access application.

¹² A copy of this page, with information in issue clearly marked, will accompany the copy of these reasons that is sent to QO.

1. whether QO may refuse access to the information in issue under section 47(3)(b) of the RTI Act; and
2. whether QO has taken reasonable steps to locate information relevant to the access application (such that access to further documents may be refused, on the ground that any documents are nonexistent or unlocatable).¹³

Procedural complaints/allegations of bias

13. Prior to considering substantive issues, I should note that the applicant raised in this review various allegations of a piece with those recently canvassed and addressed by me in *Z32 and Queensland Building and Construction Commission; J26 (Third Party)*¹⁴ at paragraphs 13-20. What I said there adequately addresses those allegations and complaints, to the extent they were raised in this review.
14. The applicant has, in short, been treated fairly through the course of this review, and there is no reasonable basis on which it might be said that I am actually or apparently prejudiced or biased against him.¹⁵ Further, as the reasons below disclose, he has been given adequate notice of OIC's preliminary views on issues (to the extent they may be adverse to him) and the material on which those views were based, and ample opportunity to put his case.
15. I will now address the substantive issues requiring my determination, beginning with the question as to whether access may be refused to the information in issue.

Access to information

Relevant law

16. In deciding whether disclosure of information would, on balance, be contrary to the public interest,¹⁶ the RTI Act requires a decision-maker to:¹⁷
 - 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.
17. 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. I have followed the steps listed above, and, in doing so, considered these lists, together with all other relevant information, in reaching my decision.

¹³ Sections 47(3)(e) and 52 of the RTI Act.

¹⁴ [2021] QICmr 52 (14 October 2021), (*Z32*).

¹⁵ And thus there is no basis for a finding of bias, actual or apprehended, in accordance with the test stated in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337: ie, even allowing for the fact that I have now had one dealing with the applicant (my decision in *Z32*, which was partly in his favour), it could not be said that I do not bring an impartial mind to the determination of the issues in this review, in the eyes of a fair-minded lay bystander.

¹⁶ 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, 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.

¹⁷ Section 49 of the RTI Act.

18. Additionally, I have kept in mind the RTI Act's pro-disclosure bias¹⁸ and Parliament's requirement that grounds for refusing access to information be interpreted narrowly,¹⁹ and have not considered any irrelevant factors.

Findings

19. As noted, the only information in issue is that which is redacted from the copy of page 56 otherwise released to the applicant. I am proscribed from detailing that information;²⁰ it is sufficient to say that it is in the nature of a social conversation between colleagues relating to matters in their private sphere.
20. The only public interest consideration that appears to favour disclosure of this limited amount of information is the general public interest in promoting access to government-held information.²¹ Disclosure would not advance any of the public interest factors favouring disclosure itemised in schedule 4, part 2 of the RTI Act in any way that I can identify, and no other broader public interest considerations stand to be advanced by its release. Certainly, this information is, contrary to the applicant's assertions,²² in no way suggestive of misconduct, negligence or other deficient behavior by either of the correspondents or their employing agencies, so as to give rise to public interest factors such as those stated in schedule 4, part 2, items 5 and 6 of the RTI Act.
21. Telling against disclosure of the information in issue is the fact that it comprises personal information²³ of persons other than the applicant,²⁴ disclosure of which the RTI Act prescribes would give rise to a public interest harm.²⁵ Additionally, disclosure of this information could reasonably be expected to²⁶ prejudice protection of relevant individuals' right to privacy.²⁷
22. There is a strong public interest in safeguarding the personal information and privacy of members of the community, including public servants. I afford relevant nondisclosure factors heavy weight in balancing the public interest.
23. As for public interest considerations favouring disclosure, I have acknowledged above the general public interest in promoting access to government held information – a consideration warranting concomitantly 'general' or modest weight, which weight is

¹⁸ Section 44 of the RTI Act.

¹⁹ Section 47(2)(a) of the RTI Act.

²⁰ Section 108 of the RTI Act.

²¹ Implicit in, for example, the objects of the RTI Act.

²² Generally in his submissions dated 24 May 2021, more pointedly in his 30 July 2021 submissions (paragraph 13).

²³ Personal information is defined in section 12 of the *Information Privacy Act 2009* (Qld) 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.' This definition applies for the purposes of the RTI Act: schedule 5.

²⁴ Being information about persons, who are directly identified in page 56 and whose identities are thus 'apparent...from the information'.

²⁵ Schedule 4, part 4, section 6 of the RTI Act. It is worth noting that while OIC has historically tended to the view that disclosure 'routine personal work information' would not, ordinarily, on balance be contrary to the public interest, this is not information of that kind.

²⁶ This test requires a decision-maker to distinguish 'between what is merely possible ... and expectations that are reasonably based' and for which 'real and substantial grounds exist': *B and Brisbane North Regional Health Authority* [1994] QICmr 1, a decision of the Information Commissioner analysing the equivalent exemption in the repealed *Freedom of Information Act 1992* (Qld), at [154]-[160]. Other jurisdictions have similarly interpreted the phrase 'as distinct from something that is irrational, absurd or ridiculous': See *Smolenski v Commissioner of Police, NSW Police* [2015] NSWCATAD 21 at [34], citing *Commissioner of Police, NSW Police Force v Camilleri* (GD) [2012] NSWADTAP 19 at [28], *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [61] and *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at [190].

²⁷ A factor favouring nondisclosure: schedule 4, part 3, item 3 of the RTI Act. The concept of 'privacy' is not defined in the RTI Act. OIC has adopted the Australian Law Reform Commission's definition of the concept: the right of an individual to preserve their personal sphere free from interference from others ("For your information: Australian Privacy Law and Practice" Australian Law Reform Commission Report No. 108 released 11 August 2008, at paragraph 1.56). I am satisfied private communications of the kind redacted from page 56 fall within the 'personal sphere' of the communicating individuals.

manifestly insufficient to displace the substantial public interest considerations favouring nondisclosure in this case.

24. Disclosure of the information in issue would, on balance, be contrary to the public interest. Access to that information may therefore be refused, under section 47(3)(b) of the RTI Act.

'Missing' documents and sufficiency of search

25. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate documents applied for by an applicant.²⁸
26. For the following reasons, I consider that QO has taken reasonable steps in this case. I have addressed each of the three parts of the access application below, in numerical order.

Part 1

27. I understand the applicant obtained access to certain QO documents pursuant to an earlier RTI access application²⁹ unrelated to the application the subject of this review. Some of these documents informed this latter application. These earlier documents included a single-page letter in the former Ombudsman's name,³⁰ dated 13 March 2019, which referred to the former Ombudsman having requested searches for and collation of certain records relating to the Nominated Officer. Part 1 of the applicant's RTI access application thus requested:

[1] Copies of the records ordered by Phil Clarke in the letter dated 13 March 2019 which are:

- (1) a complete copy of material stored on ...[the Nominated Officer's] computer (including emails sent and received),*
- (2) a complete copy of ...[the Nominated Officer's] computer log and*
- (3) [the Nominated Officer's] office telephone records.*

28. OIC raised the adequacy of searches for Part 1 documents in our letter to QO dated 19 February 2021:³¹

The applicant submits that QO's decision does not address this aspect of his access application.

The letter from Mr Clarke to the CCC dated 18 March 2019 expressly states that the Office Director, Corporate Services, was asked to obtain the documentation listed at 1(a)-(c) above. On the information currently before me, it would appear reasonable to expect that that request was complied with, and the requested documentation was collated and should be in the QO's possession or under its control.

Would you please either explain the absence of this documentation, or conduct further searches and advise me as to their outcome (including providing me with copies of any documents located).

²⁸ Section 130 of the RTI Act. For a recent discussion of principles to sufficiency of search and nonexistent document cases, see *V45 and Queensland Police Service* [2021] QICmr 30 (16 June 2021).

²⁹ Apparently dated March 2020 – see QO's letter to OIC dated 10 March 2021, extracted below (paragraph 29).

³⁰ Mr Phil Clarke.

³¹ Footnotes omitted. The reference to the '*letter from Mr Clarke to the CCC dated 18 March 2019*' was a typographical error; OIC was referring to the letter dated 13 March 2019 noted in paragraph 27. 'CCC' stands for 'Crime and Corruption Commission'.

29. QO replied by letter dated 10 March 2021, explaining the contextual matters canvassed above and the manner in which it approached Part 1:³²

...in response to the RTI application made by [the applicant] in March 2020, this Office released a number of documents to [the applicant]. Some of these documents have been referenced in [the applicant's] RTI application dated 3 September 2020, including a letter from [the former Ombudsman] Mr Clarke to the CCC dated 13 March 2019.

[The applicant's] RTI application dated 3 September 2020 seeks the records ordered by Mr Clarke outlined in the letter dated 13 March 2019 to the CCC. Mr Clarke's letter was unsigned and appears to be a draft letter.

This Office is in possession of a letter dated 18 March 2019 from Mr Clarke to the CCC. This letter was also released to [the applicant] in relation to his March 2020 RTI application. The 18 March 2019 letter is signed by Mr Clarke and is almost identical to the 13 March 2019 version, except there is no reference to the fact Mr Clarke will undertake a search for records. It appears the 13 March 2019 letter was never sent to the CCC and the 18 March 2019 letter was the final version that was sent to the CCC.

In response to [the applicant's] RTI application dated 3 September 2020, the decision maker conducted searches to locate documents within the scope of the application. An email was located, dated 13 March 2019, from Mr Clarke to ... the Director, Corporate Services of this Office, stating:

'Would you please arrange for a search of [Nominated Officer's] email account archives (inbox, sent, draft, any folders and calendar) from 1 February to 14 May 2018 for the following:

- 1. Any email between [Nominated Officer] and any QBCC staff member*
- 2. Any email between [Nominated Officer] and [another officer] which mentions the QBCC (both in relation to complaints against QBCC and [Nominated Officer's] potential release to QBCC)*
- 3. Any appointment in [Nominated Officer's] calendar which mentions QBCC (both in relation to complaints against QBCC and [Nominated Officer's] potential release to QBCC).*

The records show [the Director, Corporate Services] forwarded this request to the Information Technology manager for action. This request was undertaken and the relevant records were located by Information Technology. No other requests for searches by Mr Clarke were located in the records.

The scope of the search request sent to [the Director, Corporate Services] by Mr Clarke by email on 13 March 2019 is narrower than the description in the letter addressed to the CCC on the same date. The records of this Office show no search was ever requested, nor undertaken, as described in Mr Clarke's 13 March 2019 letter to the CCC.

All records located by this Office as a result of the search conducted by [the Director, Corporate Services] on or around 13 March 2019 have been produced by the decision maker in relation to [the applicant's] RTI application dated 3 September 2020.

30. The above advice was relayed to the applicant by OIC in our letter dated 10 May 2021, in which we went on to note that that advice appeared to adequately explain the number and nature of documents located by QO in processing Part 1 of the access application.
31. The applicant replied by letter dated 24 May 2021, submitting that QO's explanation as extracted in paragraph 29 – ie, that Part 1 documents were not collated by QO, because they were never technically the subject of an 'order' from Mr Clarke to that effect – did not adequately address this aspect of his access application.

³² 'QBCC' – 'Queensland Building and Construction Commission'.

32. Contrary to the applicant's somewhat cynical opinion of OIC's handling of this matter, we did give the above submission serious contemplation, referring it to QO by letter dated 31 May 2021:

... the applicant's position is that he simply applied for documents of the kind listed at 1(a)-(c), ie that his access application was for documents of the type referred to (rather than any documents actually 'ordered' to have been collated) by Mr Clarke in his ...[13]³³ March 2019 draft letter.

Bearing in mind access applications are not to be read technically (and noting that QO did not in either its dealings with the applicant, or its decision, explain how it had approached part 1 of the application), it does seem arguable that relevant documents come within the scope of the access application.

33. We invited QO to make submissions in reply to the applicant's preferred construction of Part 1. Additionally, we noted that if that construction was accepted, then it would appear to comprise a particularly broad request, contemplation of the processing of which might enliven the grounds for refusal to deal with an application stated in section 41 of the RTI Act – substantial and unreasonable diversion of resources. OIC's 31 May 2021 letter thus also invited QO's submission on this issue.
34. QO replied by letter dated 16 June 2021, resisting the applicant's expansive construction of Part 1 and detailing the work that would be required to deal with such a request. Relevant aspects of that reply were set out in OIC's letter to the applicant dated 8 July 2021, in which we explained that we were minded to accept QO's construction submissions (footnotes omitted, emphasis as per original):

*Contrary to your 24 May 2021 submission, this part of your application did not request access 'to records **referenced** in the letter dated 13 March 2019...', but to records 'ordered' in that letter.*

As previously explained, the 13 March 2019 document was a draft, which on QO's advice was never finalised nor issued. Accordingly, no such records were ever 'ordered' to have been identified and collated. On this basis, QO did not, as previously explained, take further steps to identify and locate documents relevant to Part 1.

Having given all relevant circumstances careful consideration, I now consider QO's position to be justified.

The interpretation of an access application is not to be approached with the same strictness as, say, legal pleadings or the construction of legislation. With both this, and the fact QO does not appear to have explained its approach to this part during processing, in mind, I asked QO to consider dealing with Part 1 documents. Alternatively, I invited QO to provide me with a submission addressing the requirements of sections 41 and 42 of the RTI Act.

QO has now provided me with its reply. QO maintains its position that reasonable steps did not require it to locate and identify 'a complete copy of material stored on [Nominated Officer's] computer...' etc – that its approach to Part 1 was instead to consider:

'copies of the records ordered', in contrast to 'a complete copy of material stored on [Nominated Officer's] computer, a complete copy of [Nominated Officer's] computer log and [Nominated Officer's] office telephone records'.

This interpretation is consistent with the type of documents requested at Part 2 and Part 3 of the application, where records 'considered' by this Office were sought.

³³ The original text read '19', rather than '13' March: again, a typographical error. This 13 March 2019 email was among the documents released to the applicant – it spans pages 'RTI-001'-'RTI-002' of those documents.

It has also provided me with a submission establishing that the processing of such an application would entail a substantial amount – 145 hours – of work, involving:

- *seven hours to identify, locate and collate documents*
- *132 hours to examine documents, and a further four hours to undertake third party consultation (which latter figure, in my experience, is likely to be quite conservative); and*
- *two hours notifying a final decision on access.*

*This equates to one officer committing themselves wholly to **one part of your application**, for a period of four weeks, to the exclusion of all other duties (including dealing with information access applications received from other members of the community).*

*QO submits that it would have been entitled to refuse to deal with your application, had it been required to deal with Part 1. I accept this submission – dealing with **just** this part of your application would have consumed the bulk of the standard processing period afforded QO to deal with your complete application.*

That, alone, would have substantially diverted QO's resources. Further, given the high likelihood that a considerable proportion of the types of communications and documents requested would have no bearing on any matters going to the public interest, such work would also have unreasonably diverted QO's resources from their use in its performance of its functions.

Additional to this is the work QO was required to, and did, undertake in dealing with the balance of your application – which would only have exacerbated the impact of your application on QO's resourcing, taking that application further beyond the threshold imposed by section 41 of the RTI Act. (In this regard, I should point out that had QO been required to address Part 1, and then availed itself of the mechanisms afforded by sections 41 and 42 of the RTI Act, it may have been entitled to refuse to deal with the entirety of your access application, thereby depriving you of access to the various documents you have obtained pursuant to that application.)

In short, QO received an application that, relevantly, requested documents 'ordered' to have been produced. In accordance with the ordinary meaning of that word, it did not take steps to locate documents listed in this Part, as no such documents had ever been 'ordered'. This approach is, in my view, understandable and reasonable – any broader reading of this part of your application would have required QO to contemplate a substantial and unreasonable quantity of work.

Taking all relevant circumstances into account – the fact that no documents were 'ordered' to have been produced, as expressly requested by you, and the unmanageable breadth of that element (and thus the application as a whole) if it were to have been read in the manner you now contend – my preliminary view is that reasonable steps did not require QO to identify and locate documents responsive to Part 1 of your access application.

You may, of course, elect to pursue a fresh application for 'a complete copy of material stored on [the Nominated Officer's] computer, a complete copy of [the Nominated Officer's] computer log and [the Nominated Officer's] office telephone records'; reasonable steps do not, however, in my preliminary view require QO to take any further action in respect of Part 1 of the access application the subject of this review.

35. The applicant maintains that reasonable steps require QO to deal with Part 1 of his application. His submissions dated 30 July 2021, insofar as they are relevant, largely reiterate those made earlier and canvassed above; essentially, that his request was simply for documents listed at points (1)-(3) of Part 1 of the access application,³⁴ rather

³⁴ Set out at paragraph 27.

than those that were actually 'ordered' to have been collated by Mr Clarke in his 13 March 2019 email to subordinate QO officers.³⁵

36. As explained at paragraph 32, OIC was not entirely hostile to the interpretation of Part 1 advanced by the applicant.
37. Having taken all relevant circumstances into account, however, I have ultimately concluded that, as a matter of fact, reasonable steps do not require QO to take any further action in respect of Part 1, for the reasons expressed in OIC's preliminary view letter to the applicant dated 8 July 2021 extracted at paragraph 34 above.
38. While QO might have explained its method to the applicant more clearly, its approach toward Part 1 is understandable – having ascertained that no documents had, as the applicant expressly requested, been '*ordered*' to have been collated by Mr Clarke as suggested in the latter's draft letter dated 13 March 2019, QO therefore proceeded no further with this part,³⁶ but rather directed its attentions to dealing with the documents Mr Clarke *had* ended up requesting – ie those described in the latter's 13 March 2019 email to the Director, Corporate Services (which, as discussed below, comprise the documents relevant to Part 2 of the access application).
39. I am fortified in this conclusion as to reasonableness by the fact that, as OIC pointed out to the applicant in the letter quoted in paragraph 34 above, it does not deprive him of the opportunity to pursue access to such documents, should they remain of interest to him. He would, however, need to lodge an appropriately framed fresh application.

Part 2

40. Part 2 of the access application requested '*copies of any and all inclusive records considered which were described broadly as 'email search' by Phil Clarke in the email dated 18 March 2019.*'
41. OIC fielded extensive submissions from the applicant concerning Part 2's correct construction, and QO's search efforts in response to same.³⁷
42. For reasons that will become apparent, it is unnecessary to descend into the particulars of this material. It is sufficient to note that the applicant contended that QO could not be

³⁵ These submissions, framed in unhelpfully antagonistic language, also refer to the distinction between the draft letter of 13 March 2019, and Mr Clarke's '*irrelevant*' email of the same date. I am not entirely clear what point the applicant is making here: as discussed elsewhere in these reasons, the draft letter is the material or foundational document on which the applicant grounded this part of his application – it was, however, only a draft, and the former Ombudsman did not request or order collation of such records. The records Mr Clarke ultimately requested were those described in his email of 13 March 2019 to the Director, Corporate Services (extracted in paragraphs 29 and 44), which records *were* collated, and which QO dealt with in processing the access application (a matter explored further below, in the context of Part 2 of the access application). Mr Clarke's email dated 13 March 2019 thus explains what documents or records he ultimately concluded ought to be, were requested to be, and were actually collated. The applicant also took issue with OIC inviting a submission from QO on the possible application of section 41 of the RTI Act, arguing that this denied him procedural fairness. I reject this: this is a merits review in which OIC delegates stand in the shoes of QO, and can make any decision in relation to the application it could have made (section 105(1) of the RTI Act). We are also entitled to inform ourselves as we consider appropriate (section 95(1)(c) of the RTI Act), and in the circumstances of this case, considered that resolving the Part 1 issue required some understanding of the work that such an ostensibly broad request may entail, for the purposes of assessing the reasonableness of QO's approach to same. This is not a matter that OIC kept from the applicant, advising him in our 31 May 2021 letter that we had invited QO to make a section 41 submission, the outcome of which invitation was communicated to him frankly and transparently in our 8 July 2021 letter (as evidenced by the extract of same in paragraph 34).

³⁶ Which, as canvassed in OIC's 8 July 2021 letter to the applicant, had it been required to do so would quite possibly have imperilled the entirety of the access application (although this is a matter on which I am not required to and make no ultimate finding) and which work, reason suggests, would unlikely to have been required had the collation of Part 1 records actually have been '*ordered*' as stated in the access application and thus already completed prior to the making by the applicant of that application.

³⁷ Applicant's submissions dated 24 May and 15 June 2021.

said to have undertaken reasonable search efforts in relation to this part unless it had searched both:

- a. the Nominated Officer's 'personal email account, and other digital platforms, such as SMS and WhatsApp',³⁸ and
- b. QO's backup systems.³⁹

43. OIC explained to the applicant why QO was not obliged to undertake searches of either of the above in correspondence through the review,⁴⁰ which explanations the applicant vigorously contested. As noted above, it is not now necessary to explore either those preliminary explanations nor the applicant's reply to same in any detail.
44. This is because, properly and correctly construed in light of all relevant circumstances, Part 2 is in fact rather confined in its scope, and gives rise to no missing documents issues whatsoever. OIC's 7 September 2021 letter to the applicant adequately explains this conclusion (footnotes included, bold as per original):

As advised in my letter dated 10 May 2021, the 'email search' referred to in Mr Clarke's 18 March 2019 email is, as QO explained to me and I related to you, that requested by Mr Clarke in his email dated 13 March 2019.⁴¹

Meeting RTI search obligations relevant to Part 2, then, only required QO to identify and deal with whatever documents were gathered by QO officers in March 2019, in actioning Mr Clarke's 13 March 2019 email search request. That was, as explained by QO in the correspondence from it to me extracted in my letter to you dated 10 May 2021, done in processing your access application. To repeat (my bold, and as far as is relevant):

An email was located, dated 13 March 2019, from Mr Clarke to ... the Director, Corporate Services of this Office, stating:

'Would you please arrange for a search of [the Nominated Officer's] email account archives (inbox, sent, draft, any folders and calendar) from 1 February to 14 May 2018 for the following:

1. *Any email between [the Nominated Officer] and any QBCC staff member*
2. *Any email between [the Nominated Officer] and ...[a named QO officer] which mentions the QBCC (both in relation to complaints against QBCC and [the Nominated Officer's] potential release to QBCC)*
3. *Any appointment in [the Nominated Officer's] calendar which mentions QBCC (both in relation to complaints against QBCC and [the Nominated Officer's] potential release to QBCC).*

The records show [the Director, Corporate Services] forwarded this request to the Information Technology manager for action. This request was undertaken and the relevant records were located by Information Technology. ...

...

All records located by this Office as a result of the search conducted by [the Director, Corporate Services] on or around 13 March 2019 have been produced by the decision maker in relation to [the applicant's] RTI application dated 3 September 2020.

I have no reason to question the above.

³⁸ See, for example, submissions dated 15 June 2021.

³⁹ As above.

⁴⁰ See letter from OIC to applicant dated 8 July 2021.

⁴¹ The text of which was set out in my 10 May 2021 letter and is, for convenience, repeated below.

Accordingly, I consider that the scope of this part of your application begins and ends with whatever was collated by QO officers in actioning Mr Clarke's 13 March 2019 request: ie, the bundle of 160-odd pages described and discussed in its letter to you dated 23 October 2020.

*There is, as previously explained, no reason to suspect that emails of interest to you exist, that may now be retrievable from QO's archives or backup systems.⁴² However, even if there was, they would not be responsive to this part of your application, **if they were not also retrieved by QO officers in actioning Mr Clarke's 13 March 2019 search request:** in which case they would appear in the bundle of documents collated by QO in processing your application.*

Reasonable steps in relation to Part 2 required QO to identify what QO staff collated in or around March 2019, in actioning Mr Clarke's 13 March 2019 request. I accept QO's advice that it has done just that. It has therefore discharged its search obligations in relation to Part 2.

45. The applicant has not contested the above reasoning. I am satisfied that it correctly states both the proper scope of Part 2 of the access application, and the extent of searches required of QO to address same. I adopt that reasoning for the purposes of this decision. QO has taken reasonable steps to identify and locate documents applied for in Part 2 of the access application.
46. Before turning to Part 3 of the access application, I will, for completeness, briefly note that as in Z32, the applicant in this review pressed OIC to make findings on matters entirely outside our power or authority under the RTI Act.
47. In this case, those matters centre on emails apparently obtained by the applicant pursuant to a separate RTI access application lodged with another agency. Those emails were sent from the Nominated Officer's QO email account⁴³ to that other agency. The emails were not located by QO in processing the access application, which the applicant submits suggests an absence of compliance by QO with its record-keeping obligations under the *Public Records Act 2002* (Qld) (**PR Act**). The applicant urges OIC to find to this effect.⁴⁴
48. The difficulties with the applicant's submissions in this regard are manifold.
49. Firstly, relevant emails were, for reasons explained above, never within the scope of the access application, and thus never required to have been located by QO: they simply did not form part of the bundle of documents collated by QO in response to the former Ombudsman's 18 March 2019 request, and thus are not relevant to Part 2 of the access application.
50. Secondly, even if those emails *were* somehow responsive to some part of the access application, they have, as is disclosed in documents released to the applicant by QO⁴⁵ and was explained to him during the review, been deleted from QO's systems.⁴⁶

⁴² Or, indeed, [the Nominated Officer's] *personal email or messaging services*. [Noting, too, that there is nothing to suggest that documents of an agency subject to the RTI Act and responsive to the access application might be held in any such personal systems or services: on this point, see OIC's letter to the applicant dated 8 July 2021.]

⁴³ While the Nominated Officer was still an employee of QO.

⁴⁴ For example, submissions dated 15 June 2021.

⁴⁵ Internal QO email dated 14 March 2019, sent 11:06 AM, released to the applicant by QO as 'RTI-001'.

⁴⁶ And could not be retrieved from its archive systems – QO's backup systems only retaining documents for a period of 90 days and the relevant emails date to 2018 (which advice was conveyed by OIC to the applicant during the review: see letter dated 8 July 2021). Indeed, on the point of deletion, the applicant's own submissions dated 15 June 2021 expressly recognise as much, noting that these emails 'could not be located' by QO's then IT officer, and that it is thus 'provable' that such emails were 'deleted' from the Nominated Officer's email account.

51. Thirdly, I have, as noted, no power or authority under the PR Act, least of all to make adjudications of the kind sought by the applicant in an external review decision made under the RTI Act. I have no jurisdiction to declare whether a document, as asserted by the applicant, is in fact a public record in the first place, let alone to launch inquiries to establish the legitimacy or otherwise of any such document's disposal, so as to then form a view as to the propriety of that disposal.
52. And fourthly, even if none of the preceding matters were an issue – and mindful of the lack of jurisdiction noted in the preceding paragraph – it seems to me quite arguable that relevant emails of concern to the applicant do not fall within the definition of 'public record' set down in section 6 of the PR Act,⁴⁷ but comprise communications sent by the Nominated Officer for his own, rather than official QO 'statutory, administrative or other public responsibility,' purposes.⁴⁸
53. In any event, it does not, as I have noted, fall to me to determine this issue; if the applicant wishes to press such allegations, he will need to direct them to those properly invested with the authority to entertain same.⁴⁹

Part 3

54. Part 3 of the access application requested:

Copies of any records which were considered, and document or otherwise describe the discussions and outcomes of the meetings which were held on or around 12 March 2019 and 18 March 2019.

55. This part appears to be premised on a 'meeting maker' presumably disclosed to the applicant by QO pursuant to an earlier RTI access application made to that agency,⁵⁰ and an email from Mr Clarke to QO's former General Counsel dated 18 March 2019,⁵¹ each of which indicate that meetings involving several QO personnel were convened to discuss matters concerning the Nominated Officer.
56. Materials supplied by QO early in the review indicate that search queries were made of involved officers by QO during its processing of the access application.⁵² In any event, OIC referred the applicant's concerns as to adequacy of searches to QO in our letter dated 19 February 2021, commenting:

Assuming such meetings occurred, at face value it would appear reasonable to expect that there may exist file notes, minutes or emails recording the conduct and outcome of those meetings, and, potentially, documentation considered at those meetings.

Again, would you please either explain the absence of this documentation, or conduct further searches and advise me as to their outcome (including providing me with copies of any documents located).

57. In its letter dated 10 March 2021, QO, after explaining its approach to the processing of the access application (ie, targeting documents actually ordered to be collated by Mr Clarke, in his 13 March 2019 email), then relevantly advised as follows:

⁴⁷ So as to be subject to the retention obligations imposed by section 7 of the PR Act.

⁴⁸ Emails that while nevertheless personal, would seem to fall within the legitimate personal use exception afforded by most agencies to their employees, authorising officer use of agency systems for a degree of personal use.

⁴⁹ And noting, for completeness, that I have identified nothing in the material before me enlivening statutory reporting duties, such as that prescribed in section 113 of the RTI Act.

⁵⁰ A copy of which 'meeting maker' was annexed to the access application the subject of this decision.

⁵¹ Also annexed to the access application.

⁵² Internal QO email dated 21 September 2020.

No further relevant records have been located. I conducted a search of this Office's legal files and located file 2019-00131 (P1) which contains records that fall within the scope of the application. The contents of this file were provided to [the applicant] in response to his RTI application in March 2020. An additional search has been undertaken of the HR files and no documents were located ...

58. The above advice was relayed to the applicant by OIC.⁵³ He continued to question the adequacy of QO searches.⁵⁴ In the interests of completeness, OIC wrote again to QO,⁵⁵ requesting further information as to its search efforts, and/or additional searches as may be necessary.
59. QO conducted further searches of the Nominated Officer's personnel file and relevant 'workforce management' holdings within its recordkeeping system. QO also made direct enquiries of those personnel still in its employ potentially involved in relevant meetings.⁵⁶ Those inquiries disclosed two fresh documents, each of which QO released to the applicant.⁵⁷
60. In view of the above, by letter dated 7 September 2021 OIC advised the applicant of our preliminary view that QO appeared to have taken reasonable steps to locate documents relevant to this part.
61. The applicant has not contested that view.
62. Given the totality of searches undertaken by QO both during processing of the access application and on external review,⁵⁸ and the practical onus borne by a person in the applicant's position regards adequacy or sufficiency of search issues,⁵⁹ I am comfortable adopting OIC's 7 September 2021 preliminary view as a final finding for the purposes of this decision: QO has taken reasonable steps to identify and locate Part 3 documents.

Sufficiency of search - conclusion

63. For the reasons explained at paragraphs 25-62 above, I am, as a matter of fact, satisfied that QO has taken all reasonable steps to identify and locate documents applied for by the applicant in all of Parts 1-3 of the access application. While I consider the preceding finding sufficient to dispose of this issue, if it is necessary to do so, I find that access to further documents may be refused, on the ground that such documents – to the extent they would fall within the scope of the access application, as properly construed – are nonexistent or unlocatable.⁶⁰

DECISION

64. I vary the decision under review,⁶¹ by finding that access may be refused to the information in issue on the basis that its disclosure would, on balance, be contrary to the

⁵³ Letter dated 10 May 2021, reiterated in our letter to the applicant dated 8 July 2021.

⁵⁴ Submissions dated 24 May 2021, 15 June 2021 and 30 July 2021.

⁵⁵ Letter dated 12 August 2021.

⁵⁶ On all of these points, see QO's letter dated 25 August 2021.

⁵⁷ Subject to the redaction of a small amount of direct contact information concerning one officer, and which redaction the applicant has not contested (and is therefore not in issue).

⁵⁸ Noting that those search efforts appear to have been entirely appropriately targeted at relevant document repositories (including legal files – one of the officers potentially involved in any meetings having been QO's former General Counsel) and of involved officers.

⁵⁹ *A51 and Office of the Health Ombudsman* [2020] QICmr 17 (24 March 2020) at [15], citing *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36].

⁶⁰ Sections 47(3)(e) and 52 of the RTI Act.

⁶¹ Ie, the decision taken to have been made under section 46 of the RTI Act, refusing access to all information requested in the access application.

public interest.⁶² I further record my satisfaction that QO has taken reasonable steps to identify and locate documents relevant to the applicant's RTI access application, in terms stated in the preceding paragraph.

65. I have made this decision under section 110 of the RTI Act, as a delegate of the Information Commissioner, under section 145 of the RTI Act.

K Shepherd
Acting Right to Information Commissioner

Date: 11 November 2021

⁶² Under section 47(3)(b) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
16 November 2020	OIC received the application for external review.
11 December 2020	OIC notified the applicant and the agency that it had accepted the external review application and asked QO to provide information.
15 December 2020	OIC received the information requested from QO.
20 January 2021	OIC provided an update to the applicant.
19 February 2021	OIC requested further information from QO. OIC provided an update to the applicant.
10 March 2021	OIC received requested information from QO.
19 March 2021	OIC conveyed a preliminary view to QO.
30 March 2021	OIC received submissions from QO in reply to OIC's 19 March 2021 preliminary view, including agreement to release some information.
10 May 2021	OIC conveyed a preliminary view to the applicant and requested QO release relevant information.
24 May 2021	OIC received submissions from the applicant, contesting OIC's 10 May 2021 preliminary view.
31 May 2021	OIC replied to the applicant's 24 May 2021 letter. OIC requested further information from QO.
9 June 2021	OIC received a request from QO for an extension of time to provide submissions.
10 June 2021	OIC granted QO the requested extension.
14 June 2021	OIC received a request for an extension of time from the applicant to reply to OIC's 31 May 2021 letter. OIC granted the applicant an extension.
15 June 2021	OIC received submissions from the applicant, in reply to OIC's 31 May 2021 letter.
16 June 2021	OIC received submissions from QO.
8 July 2021	OIC issued a response and further preliminary view to the applicant. OIC issued further preliminary view to QO.
21 July 2021	OIC received a request for an extension of time from the applicant to reply to OIC's 8 July 2021 letter.
22 July 2021	OIC granted the applicant an extension.
30 July 2021	OIC received submissions from the applicant.
11 August 2021	OIC replied to the applicant.
12 August 2021	OIC requested further information from QO.
25 August 2021	OIC received requested information from QO.
7 September 2021	OIC conveyed a further preliminary view to the applicant, requesting any submissions in reply by 21 September 2021.