



## Decision and Reasons for Decision

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**Citation:** *S72 and Department of Justice and Attorney-General [2019] QICmr 49 (11 November 2019)*

**Application Number:** 314276

**Applicant:** S72

**Respondent:** Department of Justice and Attorney-General

**Decision Date:** 11 November 2019

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - SCOPE OF ACCESS APPLICATION - documents relating to dissemination of statements made by the applicant regarding concerns arising from an employment matter about another individual - whether documents are within scope of the access application - section 24 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - IRRELEVANT INFORMATION - documents regarding an employment matter about another individual - whether deleted information was irrelevant to the terms of the access application - section 73 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - communications between an agency and Crown Law regarding an employment matter about another individual - whether exempt - waiver - 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 - documents relating to dissemination of statements made by the applicant regarding concerns arising from an employment matter about another individual - personal information and privacy - management of staff - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

## REASONS FOR DECISION

### Summary

1. The applicant applied<sup>1</sup> to the Department of Justice and Attorney-General (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to:
  1. *All documents showing the internal/external disclosure of all/part of "Statement made by [the applicant] in relation to [Employee X]'s employment with the [named statutory body<sup>2</sup>] dated 29 April 2018" [(Statement 1)] by or to [the Deputy Director-General].*
  2. *All documents including and/or referring to a statement dated 27 May 2018 provided to ... Human Resources about [Employee X]'s employment with the [named statutory body<sup>3</sup>] [(Statement 2)].*
2. The Department located 475 pages and decided<sup>4</sup> to give access to 95 pages<sup>5</sup> and parts of 199 pages, refusing access to the remaining information on the basis it is irrelevant to the scope of the access application or it comprised exempt information or information which is contrary to the public interest to disclose.
3. The applicant applied<sup>6</sup> for external review of the Department's decision refusing access and also raised concerns about the sufficiency of the Department's searches.
4. During the course of the external review, the:
  - Department:
    - agreed that the applicant was entitled to access some further information contained within 31 pages; and
    - located 16 additional pages (**Additional Documents**) and agreed to release parts of those pages to the applicant; and
  - applicant confirmed that they no longer sought access to some information and accepted that access to other information may be refused.
5. For the reasons set out below, I vary the Department's decision and find that:
  - there is no reasonable basis to require the Department to undertake further searches for documents sought in the access application;
  - certain documents fall outside of the scope of the terms of the access application and cannot be considered in this review; and
  - access to the remaining information in issue may be refused on the basis that it:
    - is irrelevant to the scope of the access application; or
    - comprises exempt information or contrary to the public interest information.

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<sup>1</sup> Dated 30 August 2018 and received on 4 September 2018.

<sup>2</sup> See paragraph 7.

<sup>3</sup> See paragraph 7.

<sup>4</sup> Dated 24 October 2018.

<sup>5</sup> Subject to the deletion of irrelevant information.

<sup>6</sup> Dated 14 November 2018 and received on 15 November 2018.

## Background

6. Significant procedural steps relating to the external review are set out in Appendix 1.
7. In order to prevent disclosure of Employee X's personal information or prejudice their right to privacy, I have de-identified the named statutory body (**Statutory Body**) that previously employed Employee X and the applicant.

## Reviewable decision

8. The decision under review is the Department's decision dated 24 October 2018.

## Evidence considered

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

## Information in issue

10. As noted at paragraph 4 above, some further information has been released to the applicant and the applicant has accepted that access to other information may be refused.
11. Accordingly, the **Information in Issue** is comprised of 292 pages and parts of 101 pages as set out in Appendix 2.

## Issues for determination

12. The issues for determination are:
  - whether the Department's searches are sufficient to be satisfied that all reasonable steps have been taken to locate documents responding to the access application
  - whether certain documents are outside the scope of the terms of the access application and therefore, not captured in this review
  - whether access to the Information in Issue may be refused on the grounds that:
    - it is irrelevant to the scope of the access application (**Category A information**)
    - it is exempt from disclosure on the basis that it is subject to legal professional privilege (**Category B information**);
    - it would, on balance, be contrary to the public interest to disclose:
      - third party personal information (**Category C information**); and
      - work mobile phone numbers and leave details (**Category D information**).

## Preliminary matter

### ***Searches for documents in the office of the Statutory Body***

13. The applicant has requested that searches for documents responsive to the application be undertaken within the office of the Statutory Body by an independent body that is external to the Department. In support of this, the applicant submitted:<sup>7</sup>

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<sup>7</sup> Page 2 of submission dated 3 June 2019, received on 3 July 2019 (**3 July 2019 submission**).

*While the [Statutory Body office holder] is not an employee of [the Department] per se, the [Statutory Body] is a business unit within the Justice Services division of [the Department] and should therefore be considered an entity of [the Department] for the purposes of this external review.*

14. Under the RTI Act, an applicant has a general right to access documents of an agency.<sup>8</sup> Relevantly:
- a *document of an agency* means a document in the possession of or under the control of an agency, whether brought into existence or received in the agency<sup>9</sup>
  - an *agency* means a department or a public authority<sup>10</sup>
  - a *public authority* means an entity established for a public purpose by an Act or established by government under an Act for a public purpose, whether or not the public purpose is stated in the Act;<sup>11</sup> and
  - an entity includes a person.<sup>12</sup>
15. The Statutory Body office holder is an independent statutory position appointed by the Governor-in-Council under the Statutory Body's enacting legislation.<sup>13</sup>
16. On the Department's website,<sup>14</sup> the Statutory Body is listed as an independent justice body, which reports to the Minister, for which the Department provides administrative support, including records management, information technology and human resourcing support.
17. Despite the administrative arrangements with the Department, and in light of the Statutory Body's enabling legislation, I am satisfied that the Statutory Body is a separate agency for the purposes of section 14 of the RTI Act and that hard copy documents physically held by the Statutory Body<sup>15</sup> are not in the possession or control of the Department for the purposes of section 12 of the RTI Act. The access application the subject of this external review was made to the Department, not the Statutory Body. Accordingly, physical searches of the Statutory Body's offices by the Department are neither required nor appropriate. If the applicant continues to seek access to documents held by the Statutory Body, the applicant may submit a separate access application to the Statutory Body.

## Sufficiency of search

### Relevant law

18. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate

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<sup>8</sup> Section 23 the RTI Act.

<sup>9</sup> Section 12 of the RTI Act.

<sup>10</sup> Section 14(1)(a) and (c) of the RTI Act.

<sup>11</sup> Section 16(1)(a)(i) and (ii) of the RTI Act.

<sup>12</sup> Under schedule 1 of the *Acts Interpretation Act 1954* (Qld).

<sup>13</sup> As set out at paragraph 7 above, I have de-identified the Statutory Body to prevent disclosure of the personal information of Employee X and protect their right to privacy. This prevents me from naming the legislation which established the Statutory Body.

<sup>14</sup> At <<https://www.justice.qld.gov.au/about-us/services#working-for>>.

<sup>15</sup> For example, documents kept in filing cabinets on the premises of the Statutory Body.

documents applied for by applicants.<sup>16</sup> What is reasonable is viewed in light of a number of key factors, including:<sup>17</sup>

- 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.

19. What constitutes reasonable steps will vary from case to case as the search and enquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances.<sup>18</sup>

20. Generally, the agency that made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.<sup>19</sup> However, where an external review involves the issue of the sufficiency of an agency's searches, the applicant has a practical onus to establish reasonable grounds to believe that the agency has not discharged its obligation to locate all relevant documents.

### Findings

21. On external review, the applicant contended that more documents should exist. Specifically, the applicant made two contentions:<sup>20</sup>

- 1) Communications are missing from the Deputy Director-General of Justice Services; and
- 2) Emails appear to have been removed from email chains.

22. In support of each of these claims the applicant provided supporting examples as follows:

1) Communications are missing from the Deputy Director-General, Justice Services
Example 1A: <sup>21</sup> <i>...I was informed on 14 August 2018 by [Officer L] of the Ethical Standards Unit that my confidential statement about Employee X had been provided to the [Deputy Director-General] Justice Services. On the basis of this advice, it is reasonable to assume that the [Deputy Director-General] Justice Service was sent the statement in question, either electronically (email) or as hard copy, as part of a communication (either verbal or via email)</i>

<sup>16</sup> Section 130(2) of the RTI Act. The Information Commissioner also has power under section 102 of the RTI Act to require additional searches to be conducted during an external review.

<sup>17</sup> *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (**Pryor**) at [19] which adopted the Information Commissioner's comments in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009).

<sup>18</sup> *Pryor* at [21].

<sup>19</sup> Section 87(1) of the RTI Act.

<sup>20</sup> Application for external review dated 14 November 2018.

<sup>21</sup> Application for external review dated 14 November 2018, page 6.

*between the Ethical Standards Unit and herself. This communication has not been released or disclosed to me.*

Example 1B:<sup>22</sup> *... I sent emails to [Officer L] of the Ethical Standards Unit on 15 and 22 August 2018 to ask whether or not the [Deputy Director-General] Justice Services had provided the confidential statement regarding my concerns about the [named statutory office holder's] dealings with Employee X to the [statutory office holder]. I received responses on 16 August 2018 and 4 September 2018 that did not answer my question. Anxious to find out whether my confidential statement had been passed on the person I had made disclosures about, I lodged an RTI access application. On 4 October 2018, I received an email from [Officer L]. The email contained a direct quote from the [Deputy Director-General] Justice Services with respect to my question ... The email or document from the [Deputy Director-General] Justice Services that communicates this direct quote to the Ethical Standards Unit has not been released or disclosed to me.*

## 2) Emails appear to have been removed from email chains

Example 2A:<sup>23</sup> *Pages 1 and 2 of File 1 show that [Officer G] sent an email to [the Deputy Director-General] on 27 July 2018. At 3.59 p.m. on the same day, [Officer M] (whom I believe worked with the [Deputy Director-General] Justice Services at the time) responded to [Officer G's] email. It is unclear, however, how [Officer M] received the email as he was not one of the addressees in [Officer G's] email. It is therefore apparent that 1) [Officer G] sent the email under separate cover to [the Deputy Director-General] (which should have been identified and released as relevant to the scope of the RTI access application) or 2) [the Deputy Director-General], or one of the other addressees, forwarded the email to [Officer M]. In any case, there appears to be a missing email communication. There are, however, no official notations indicating that the 'missing' email has been officially redacted. The only conclusion I am able to draw from these facts is that an email from one of the addressees to [Officer M] has been deleted from the email string.*

Example 2B:<sup>24</sup> *There appears to be an email missing from [Officer P] to [Officer G] (see File 1 pages 43-44). I sent an email to [Officer P] on 27 July 2018. I did not send the email to [Officer G]. There is, however, no email from [Officer P] to [Officer G], yet [Officer G] later sent the same email string to [the Deputy Director-General], [Officer Z], and [Officer P] on the same day. There are no official notations indicating that the missing email has been officially redacted. As it is not possible to respond to an email without first having received it, it is reasonable to assume that the email to [Officer G] has been removed from the email string prior to identification and/or release of the document.*

## 23. Search records submitted by the Department<sup>25</sup> show:

- the signature of the officer who conducted the search
- that searches were conducted for documents responding to the terms of the access application
- that searches were undertaken within the Office of the Director-General, Office of the Deputy Director-General of Justice Services, Executive Services, Human Resources, Ethical Standards and Crown Law
- that searches were conducted in hard copy files, electronic files, the electronic file management system/IOMS/eDOCS/recfind and emails
- that the officer's spent over 5 hours searching for and collating documents relevant to the access application; and

<sup>22</sup> Application for external review dated 14 November 2018, page 6.

<sup>23</sup> Application for external review dated 14 November 2018, page 7.

<sup>24</sup> Application for external review dated 14 November 2018, page 7.

<sup>25</sup> Records of searches conducted provided by the Department on 17 December 2018.

- that all relevant documents within the searching officer's area were located and provided for consideration by the decision maker.
24. The searches resulted in the Department locating 475 pages in response to the access application.

### **Example 1A**

25. Included in the 475 pages responsive to the access application were;
- an email (at page 100 of File 3) from Officer H of ESU to the Deputy Director-General of Justice Services, dated 12 July 2018 which attaches a statement provided to ESU by the applicant; and
  - an email (at page 99 of File 3) in the same chain of emails, attaching Statement 1 and Statement 2.
26. In a letter to the applicant from the Office of the Information Commissioner dated 6 June 2019, Assistant Information Commissioner Rickard expressed the view that the above documents addressed the issue raised by the applicant in example 1A as they show the sending of the applicant's statements from ESU to the Deputy Director-General, Justice Services. In reply,<sup>26</sup> the applicant, while not providing a specific submission in response to the Assistant Information Commissioner's view on this point, nonetheless stated that the Assistant Information Commissioner's view generally was not accepted.
27. I have reviewed the emails noted at paragraph 25 above, and I am satisfied that they evidence the sending of the applicant's statements from ESU to the Deputy Director-General, Justice Services and therefore satisfy the applicant's contention outlined in example 1A. I consider that the Department has taken reasonable steps to identify and locate the documents applied for by the applicant. Accordingly, there is no reasonable basis to require the Department to undertake further searches.

### **Example 1B**

28. In relation to the applicants concerns outlined in example 1B, the Department submitted<sup>27</sup> that the relevant document was created after the Department's receipt of the access application on 4 September 2018.
29. Assistant Information Commissioner Rickard accepted the Department's submission that the document upon which the 4 October 2018 email was based was created after the Department's receipt of the access application. In light of this, Assistant Information Commissioner Rickard conveyed the view<sup>28</sup> to the applicant that the document sought by the applicant in example 1B comprised a post-application document<sup>29</sup> which could not be considered in this review. After being advised of this, the applicant submitted:<sup>30</sup>

*While this refusal may comply with the 'letter of the law', I suggest that it violates the spirit of transparency which the Queensland Government claims to uphold.*

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<sup>26</sup> 3 July 2019 submission.

<sup>27</sup> Submission dated 13 May 2019.

<sup>28</sup> Letter dated 29 July 2019.

<sup>29</sup> Section 27(1) of the RTI Act provides: 'An access application is taken only to apply to documents that are, or may be, in existence on the day the application is received.'

<sup>30</sup> 3 July 2019 submission.

30. I acknowledge the applicant's position that non-disclosure of this email '*violates the spirit of transparency*'. However, the date range of an access application forms part of the scope of the terms of an application. A number of previous decisions of the Information Commissioner have found that, given that an agency's searches are guided by the terms of the access application an applicant cannot seek to unilaterally expand the parameters of the terms of an access application.<sup>31</sup> Seeking to include a document created after the date of the application is effectively seeking to change the date parameters of the application itself. While it is the case that an agency may choose to provide access to a post application document in order to informally resolve an external review,<sup>32</sup> the Information Commissioner does not have the discretion to do so. Thus, if an agency is not amenable to the disclosure of a post application document, as is the case in this matter, the Information Commissioner has no jurisdiction or discretion to include such a document for consideration in a formal decision.
31. The applicant is at liberty to make a fresh application to the Department for the particular document.

### Examples 2A and 2B

32. In relation to the applicant's concerns set out at examples 2A and 2B, the Department conducted further searches and located the Additional Documents<sup>33</sup> comprising 16 pages, which included documents responding to the applicant's specific concerns as follows:
- Example 2A: Page 5 of the Additional Documents comprises an email from Officer Z also a recipient of the email from Officer G to the Deputy Director-General, to Officer M; and
  - Example 2B: Page 1 of the Additional Documents comprises the email from Officer P to Officer G dated 27 July 2018.
33. I have reviewed the emails noted above, and I am satisfied that they are responsive to the applicant's contentions outlined in examples 2A and 2B and as such the Department has taken reasonable steps to identify and locate the documents applied for by the applicant. Accordingly, there is no reasonable basis to require the Department to undertake further searches.

### Other Concerns

34. In addition to the above matters, the applicant also raised concerns<sup>34</sup> at Example 2B about the deletion of a portion of the email from Officer P to Officer G from the email at pages 43-44 of File 1 of the documents located as set out at Example 2B above. There is nothing before me to indicate that additional information has been deleted from these pages by the Department prior to releasing them to the applicant. Rather, it appears that Officer G may have edited the email prior to forwarding it to the Deputy Director-General. Therefore, I am satisfied that the Department's searches in relation to such email have been sufficient and there is no reasonable basis to require the Department to undertake further searches.

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<sup>31</sup> *Robbins and Brisbane North Regional Health Authority* (1994) 2 QAR 30 and *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 paragraph 8. While these decisions have considered the issue in the context of the *Freedom of Information Act 1992* (Qld) the principles have equal application to a consideration of the issue in the context of the RTI Act, and were applied in that context in *Bade and Gympie Regional Council* (Unreported, Queensland Information Commissioner, 14 February 2012) and *Fennelly and Redland City Council* (Unreported, Queensland Information commissioner, 21 August 2012).

<sup>32</sup> Section 90 of the RTI Act.

<sup>33</sup> See paragraph 4.

<sup>34</sup> Application for external review dated 14 November 2018, page 7.



35. During the external review, the applicant submitted<sup>35</sup> that emails between the applicant and Officer L are ‘*specific to how [the applicant’s] confidential disclosure to the ESU has been handled by*’ the Deputy Director-General of Justice Services, which is relevant to part 1. of the access application. In support, the applicant provided a copy of an email which the applicant sent to Officer L on 22 August 2018. The applicant submitted<sup>36</sup> that as ‘*these communications exist and yet have not been disclosed to me, I am requesting the OIC to instruct [the Department] to provide them to me or to provide me with the reasons why they have not been made explicit.*’

36. I note that Part 1. of the access application seeks access as follows:

*All documents **showing** the internal/external **disclosure** of all/part of "Statement made by [the applicant] in relation to [Employee X]'s employment with the [Statutory Body] dated 29 April 2018" **by or to [the Deputy Director-General]**. [my emphasis]*

37. Given the wording of this request, I consider that it seeks documents *showing* alleged disclosure of Statement 1 by or to the Deputy Director-General. I do not consider that the request extends to emails between the applicant and Officer L *about the applicant’s concerns* regarding this alleged disclosure. Accordingly, I am satisfied that the emails between the applicant and Officer L raised by the applicant fall outside the scope of the access application, and therefore cannot be considered in this review.

## **Conclusions**

38. Having carefully considered the applicant’s submissions, the search records and submission provided by the Department, and taking into account the outcome of my enquiries regarding the applicant’s specific concerns, I am satisfied that:

- searches undertaken by the Department have been appropriate and targeted
- all reasonable steps have been taken to locate the documents the applicant seeks; and
- in relation to;
  - Example 1A; there is no reasonable basis to require the Department to undertake further searches
  - Example 1B; the document the applicant seeks is outside the scope of the terms of the access application and therefore outside the jurisdiction of this review
  - Examples 2A and 2B; there is no reasonable basis to require the Department to undertake further searches; and
  - Other Concerns; there is no reasonable basis to require the Department to undertake further searches and the emails between the applicant and Officer L are outside the scope of the terms of the access application and therefore outside the jurisdiction of this review.

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<sup>35</sup> 3 July 2019 submission.

<sup>36</sup> Pages 2-3 of 3 July 2019 submission.

## Irrelevant - Category A information

### Relevant law

39. Under the RTI Act, an agency may delete information that is irrelevant to the scope of the terms of the original application.<sup>37</sup> This is not a ground for refusal of access, but a mechanism to allow irrelevant information to be deleted from documents which are identified for release to an applicant. In deciding whether information is irrelevant, it is necessary to consider whether the information is pertinent to the terms of the access application.

### Findings

40. The pages containing Category A information are set out within the table in Appendix 2. I have considered the Category A information and I am satisfied that it is not information which responds to either part of the applicant's access application as set out at paragraph 1 above. Rather, the Category A information is about other individuals and/or matters being dealt with by the Department.
41. The applicant submitted:<sup>38</sup>

*I do not accept the OIC's assertion that certain information cannot be disclosed to me as it may contravene another person's (presumably Employee X's) privacy. I argue that, where the person has waived their right to privacy in relation to specified information, it would be inappropriate for [the Department] to contravene the pro-disclosure bias of the RTI Act by withholding the identified information. Employee X informed me by email on 10 October 2018 that they instructed [the Department's] RTIP unit to provide me with Employee X's termination of employment letter as it holds information relevant to point 2. of my RTI access application request. A section of Employee X's email states:*

Regarding your RTI application, I can confirm that I've been contacted by the RTI unit and asked to consent to the release of a section of a single document, namely the letter [the Deputy Director-General] used to notify me of my termination. I can also confirm that I intend to give my full consent for its disclosure

*Despite the relevance of this document to my RTI request, the entire content of the letter was redacted by [the Department] on the basis of 'irrelevancy'. This decision regarding 'relevancy' cannot be justified, particularly given [the Department]'s disclosure of information that a reasonable person would consider had no relevance whatsoever to my RTI access application (I refer to the personal opinions and inaccurate comments about me which were made by [Officer B] – these comments include such statements as ...). Somehow [Officer B's] comments reached [the Department]'s threshold for 'relevancy', while the contents of Employee X's termination of employment letter (which were highly relevant to my RTI access application) were classified by [the Department] as 'irrelevant'. It is unacceptable that [the Department] chose to disclose irrelevant, gratuitous and unfairly subjective comments and opinions about me (while simultaneously denying me access to other instances of my personal information) that had no relevance to the scope of my RTI application while simultaneously redacting information that is fully relevant to my RTI request. Such inconsistency in redaction and handling of information indicates – at best – seriously flawed decision-making by [the Department] in relation to determinations about what information would be disclosed/non-disclosed to me and why. At worst it indicates a deliberate intention to manipulate the outcomes of my RTI access application using arbitrary and inconsistent approaches to redaction.*

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<sup>37</sup> Section 73(2) of the RTI Act.

<sup>38</sup> 3 July 2019 submission.

42. The termination letter for Employee X appears at pages 1-17 of File 3 of the documents located by the Department.
43. I have carefully considered the portions of the termination letter which the Department has deleted on the basis that it is irrelevant to the scope of the access application along with correspondence relating to the Department's consultation with Employee X.<sup>39</sup> I note that when consulting with Employee X, the Department only sought Employee X's views in relation to relevant portions of the termination letter contained within pages 2-4 and 8, not the whole of the termination letter. Further, I note that Employee X in their email<sup>40</sup> to the applicant stated that they have been asked to consent to *'the release of a section of a single document'*.
44. In relation to the portions of the termination letter which the Department has deleted on the basis that it is irrelevant to the scope of the access application, I am satisfied that it is not information which responds to either of the applicant's requests within the access application as set out at paragraph 1 above. Rather, it is about other matters relevant to Employee X and the termination of their employment.
45. As I am satisfied that the Category A Information is not responsive to the terms of the access application and has no relevance to the information being sought by the applicant, I find that it may be deleted under section 73 of the RTI Act on the basis that it is not relevant to the access application.

## Legal professional privilege - Category B information

### Relevant law

46. Under the RTI Act, access to information may be refused where information is exempt.<sup>41</sup> Information will be exempt where it would be privileged from production in a legal proceeding on the basis that it is protected by legal professional privilege (**LPP**).<sup>42</sup>
47. LPP protects confidential communications between a lawyer and their client, made for the dominant purpose of:
  - seeking or giving legal advice or professional legal assistance; or
  - use in legal proceedings either on foot or reasonably anticipated, at the time of the relevant communication.<sup>43</sup>
48. LPP can extend to copies of non-privileged documents where they are attached to privileged communications,<sup>44</sup> and to internal client communications repeating legal advice, whether verbatim or in substance, or gathering information necessary in order to seek legal advice.<sup>45</sup> LPP can also apply to parts of non-privileged documents which refer to the details of legal advice given or received, provided that waiver is not established.<sup>46</sup>

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<sup>39</sup> Provided by the Department on 17 December 2018.

<sup>40</sup> The applicant submitted that Employee X had emailed the applicant on 10 October 2018 and stated: *"Regarding your RTI application, I can confirm that I've been contacted by the RTI unit and asked to consent to the release of a section of a single document, namely the [termination letter]. I can also confirm that I intend to give my full consent for its disclosure..."*

<sup>41</sup> Section 47(3)(a) of the RTI Act.

<sup>42</sup> Schedule 3, section 7 of the RTI Act.

<sup>43</sup> *Esso Australia Resources Ltd v Commission of Taxation* (1999) 201 CLR 49; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552.

<sup>44</sup> *Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

<sup>45</sup> *Brambles Holdings v Trade Practices Commission (No. 3)* (1981) 58 FLR 452 at 458-459; *Komacha v Orange City Council* (Supreme Court of New South Wales, Rath J, 30 August 1979, unreported).

<sup>46</sup> *College of Law Limited v Australian National University* [2013] FCA 492 at [24].

49. LPP will not attach to confidential communications between a client and solicitor created for the purpose of committing or furthering a crime, fraud or an improper purpose.<sup>47</sup> For this exception to apply, there must be evidence that the actual communication in issue was made in furtherance of that wrongdoing<sup>48</sup> and the client had knowledge of the wrongdoing.<sup>49</sup>

### Findings

50. The pages containing Category B information are set out within the table in Appendix 2. I have considered the Category B information and, while I am limited by the operation of the RTI Act in the extent to which I can describe this information,<sup>50</sup> on the evidence available to me, I am satisfied that:

- it is in the nature of a request for and receipt of legal advice
- the advice was sought or received from a suitably qualified and independent legal advisor
- the communications were between the Department and Crown Law legal advisors and were for the dominant purpose of seeking and/or providing legal advice; and
- there is no evidence indicating that the communications were not confidential or that the Department has otherwise waived privilege.

51. The applicant has raised a number of concerns regarding the Department's refusal on the basis of LPP.

52. Firstly, the applicant contended<sup>51</sup> that the '*non-disclosure of almost two-thirds of identified pages on the basis of legal professional privilege seems to be a disproportionate, if not an excessive, legal response to the issues [the applicant] raised with [the Department] prior to lodging the RTI access application...*'. The applicant is clearly sceptical about the extent of the LPP claim. However, I have carefully reviewed the Category B information and I am satisfied that it meets the criteria to qualify for LPP as set out at paragraph 50 above and is therefore exempt from disclosure.

53. Secondly, the applicant submitted<sup>52</sup> that the Department had redacted information which the applicant had authored and such redaction was not appropriate. As explained above, LPP may attach to a copy of a non-privileged document if the copy was made for the dominant purpose of giving or obtaining legal advice.

54. Assistant Information Commissioner Rickard conveyed<sup>53</sup> the above to the applicant. In response the applicant further submitted:<sup>54</sup>

*Using the reasonable person argument, I ... do not accept that information I have authored cannot be released to me for reasons of LPP. While the legal advice itself can remain under privilege (presuming it was not procured for the purpose of covering-up wrongdoing), there is no sound rationale for withholding information that can be released into the public domain at any time by its author, particularly given the underpinning thrust of RTI legislation in general (pro-disclosure and 'pushing' information out into the public sphere). I therefore do not accept*

<sup>47</sup> *R v Cox and Railton* (1884) 14 QBD 153 at [165]; *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at [145] and *Attorney-General (NT) v Kearney* (1958) 158 CLR 500 at 511.

<sup>48</sup> *Murphy and Treasury Department* (1998) 4 QAR 446 (**Murphy**) at [35] and [37].

<sup>49</sup> *Murphy* at paragraph 38.

<sup>50</sup> Section 108 of the RTI Act.

<sup>51</sup> At page 7 of the letter attached to the application for external review dated 14 November 2018.

<sup>52</sup> At page 1 of the submission dated 17 February 2019.

<sup>53</sup> Letter dated 6 June 2019.

<sup>54</sup> At page 4 of the 3 July 2019 submission.

*the OIC's justification for not requiring [the Department] to disclose all of the material I have authored.*

55. Generally, the rationale for the application of LPP to copies of non-privileged documents is that disclosing the copy of the document sent with the request for legal advice, risks disclosing the nature of the advice sought. Given the established position at common law that LPP may attach to a copy of a non-privileged document if the copy was made for the dominant purpose of giving or obtaining legal advice, I am satisfied that if an email authored by the applicant and sent to the Department was then forwarded to Crown Law for the purpose of seeking legal advice, that copy of the applicant's email which forms part of the request for legal advice sent to Crown Law will be exempt on the basis that it is subject to LPP.
56. Thirdly, the applicant contended that to the applicant's knowledge, *'there is no legal action being undertaken in relation to the issues and questions [the applicant] raised, nor has anyone within [the Department] or another agency advised [the applicant] that such action is pending'*,<sup>55</sup> and the Department cannot rely on the LPP exemption where no legal proceedings are anticipated and that the Department's use of LPP *'must still comply with the model litigant rules.'*<sup>56</sup> The applicant appears to be contending that litigation privilege cannot apply, but does not take into consideration the other form of LPP – that is, advice privilege. The information to which the applicant is seeking access appears in the context of the Department dealing with a workplace investigation regarding another individual (Employee X). The Department's claim of LPP is not in response to the issues raised by the applicant with the Department prior to lodging the access application. As noted above, I am satisfied that the communications in question were for the dominant purpose of seeking and/or providing legal advice – and consequently they attract legal professional privilege.
57. Finally, the applicant contends<sup>57</sup> that *'LPP does not apply to legal communications that identify fraud or crime.'* The applicant has raised concern that the Deputy Director-General of Justice Services may have passed on Statement 1, which the applicant provided to the Ethical Standards Unit on 29 April 2018, to the individuals about whom the applicant made complaints, in breach of section 67 of the *Public Interest Disclosure Act 2010* (Qld). The applicant argued<sup>58</sup> that in these circumstances *'the assertion of LPP by [the Department] (which would have the effect of covering up an unethical or illegal action) would be in clear breach of the model litigant rules, not to mention legislation and professional standards regulating legal conduct.'* The applicant also submitted<sup>59</sup> that if the Department is aware that the Deputy Director-General of Justice Services has passed on the applicant's confidential statement, then the Department *'should not be contesting my application in any form [as to] do so would constitute contesting a true claim and would be in breach of the model litigant rules.'*
58. As noted at paragraph 50 above, I am limited by the operation of the RTI Act in the extent to which I can describe the Category B information.<sup>60</sup> However, having carefully considered the Category B information, I am satisfied that:
- there is no evidence of a relevant wrong doing
  - the evidence before me does not establish that any of the communications comprising the Category B information were made in furtherance of any improper purpose; and

<sup>55</sup> At page 8 of the application for external review dated 14 November 2018.

<sup>56</sup> At page 2 of the submission dated 17 February 2019.

<sup>57</sup> At page 2 of the submission dated 17 February 2019.

<sup>58</sup> At page 2 of the submission dated 17 February 2019.

<sup>59</sup> At pages 2-3 of the submission dated 17 February 2019.

<sup>60</sup> Section 108 of the RTI Act.

- therefore, the exception does not operate to prevent LPP from attaching to the Category B information.

59. After Assistant Information Commissioner Rickard conveyed the above view to the applicant, the applicant further submitted.<sup>61</sup>

*I disagree with the OIC's claim that there is no prima facie evidence to support my contention that [the Department] has shared my confidential statements and communications with [Officer B] (I note relevant pages in Files 02, 03 and 04 along with information I have been given external to [the Department]). As such, I cannot accept the OIC's claim that LPP is appropriately upheld in all instances and that all information currently held under LPP should remain undisclosed.*

60. I have reviewed the information disclosed to the applicant within File02, File03 and File04 located by the Department. The statement referred to in the majority of these documents is Statement 2 which was provided to the Department's Human Resources Unit in relation to Employee X's employment with the Statutory Body. In dealing with the employment matter and concerns raised by the applicant within Statement 2 about Officer B and Officer D, the Deputy Director-General of Justice Services provided a copy of Statement 2 to Officer B and Officer D. On this basis, I am satisfied that this does not constitute a wrong doing under the improper purpose exception to LPP.

61. In relation to pages 99-100 of File03, Officer H of the Department's Ethical Standards Unit was seeking advice as to whether Statement 1 provided to the ESU is 'substantially the same as' Statement 2 provided to Human Resources in regard to Employee X's employment with the Statutory Body. I have carefully reviewed the information located by the Department in response to the access application. I cannot see any indication that the Deputy Director-General of Justice Services has disclosed Statement 1, which the applicant provided to the Ethical Standards Unit on 29 April 2018, to the individuals about whom the applicant made complaints. On this basis, I am satisfied that no wrong doing has occurred and the improper purpose exception to LPP is not enlivened.

62. On the basis of the above, I find that the Category B information is subject to LPP, the improper purpose exception does not operate to prevent LPP from attaching to the Category B information and, therefore, the Category B information comprises exempt information under schedule 3, section 7 of the RTI Act. Accordingly, access to the Category B information may be refused under section 47(3)(a) of the RTI Act.

### **Contrary to public interest - Category C and D information**

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

63. While the RTI Act is to be administered with a pro-disclosure bias,<sup>62</sup> the right of access is subject to a number of exclusions and limitations, including grounds for refusal of access.

64. Section 47(3) of the RTI Act relevantly permits an agency to refuse access to documents to the extent they comprise information the disclosure of which would, on balance, be contrary to the public interest.<sup>63</sup>

65. 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,

<sup>61</sup> At page 4 of the 3 July 2019 submission.

<sup>62</sup> Section 44 of the RTI Act.

<sup>63</sup> Section 47(3)(b) of the RTI Act.

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>64</sup>

66. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:<sup>65</sup>
- identify factors irrelevant to the public interest and disregard them
  - identify factors in favour of disclosure of information
  - identify factors in favour of nondisclosure of information; and
  - decide whether, on balance, disclosure of the information would be contrary to the public interest.

### **Findings - Category C information**

67. The Category C information is predominately the personal information of third parties intertwined with some personal information of the applicant, which can generally be described as information provided by, sent to or about Employee X and witnesses in connection with the Department's dealing with a workplace investigation about Employee X's employment with the Statutory Body.

#### **Irrelevant factors**

68. The application for external review stated<sup>66</sup> that the following irrelevant factors '*should ... have been acknowledged by the [Department's] decision-maker as potentially influencing decision-making and generating bias, and then actively disregarded*':
- Disclosure of the information could reasonably be expected to cause embarrassment to the Government or to cause a loss of confidence in the Government;<sup>67</sup> and
  - The person who created the document containing the information was or is of high seniority within the agency.<sup>68</sup>
69. I acknowledge these concerns, and have not taken these factors, or any other irrelevant factors, into account in reaching my decision.

#### **Factors favouring disclosure**

70. The Category C information appears in the context of the Department dealing with a workplace investigation regarding Employee X. I accept that the Department must be transparent and accountable in how it deals with workplace investigations. However, this requirement does not, in my view, oblige the Department to reveal *all* of the information gathered during its investigation to the applicant, particularly given the relevant matter relates to another individual. In my view, the factors favouring disclosure relating to the Department being open and accountable<sup>69</sup> and the public being provided with background or contextual information about how the Department dealt with Statement 2 in the context of the workplace investigation<sup>70</sup> would only be slightly

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<sup>64</sup> However, there are some recognised public interest considerations that may apply for the benefit of an individual.

<sup>65</sup> Section 49(3) of the RTI Act.

<sup>66</sup> At pages 14-15 of the application for external review dated 14 November 2018.

<sup>67</sup> Schedule 4, part 1, item 1 of the RTI Act.

<sup>68</sup> Schedule 4, part 1, item 4 of the RTI Act.

<sup>69</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>70</sup> Schedule 4, part 2, item 11 of the RTI Act.

advanced by the disclosure of the Category C information as it does not detail actions taken by the Department in relation to Statement 2.<sup>71</sup> Therefore, I afford each of these factors favouring disclosure<sup>72</sup> low weight.

71. The applicant stated<sup>73</sup> that, ‘*all personal information in the identified documents that constitutes [the applicant’s] personal information...*’ was required to be disclosed. I acknowledge that the applicant’s personal information<sup>74</sup> appears in the Category C information as there are accounts given by other individuals in response to issues raised in Statement 2 and, more generally, about the workplace issues raised by the applicant. This raises a factor favouring disclosure.<sup>75</sup> Generally, this factor carries high weight as one of the purposes of the RTI Act is to provide individuals with a mechanism to access information held by government, including their personal information. However, the nature of the Category C information is such that multiple individuals’ personal information is involved, which raises a factor favouring nondisclosure.<sup>76</sup>
72. In this case, the Category C information predominately contains the personal information of other individuals being Employee X and witnesses in connection with the Department’s dealing with a workplace investigation about Employee X’s employment with the Statutory Body. The applicant’s personal information is inextricably linked with the personal information of those other individuals and their information cannot sensibly be removed to enable a version of the Category C information that solely concerns the applicant’s personal information to be disclosed. Further, in addition to raising the nondisclosure factor, I am satisfied that the intertwined nature of the personal information lessens the weight of the factor favouring disclosure of the applicant’s personal information to a moderate degree.
73. In addition to the above factors, the applicant raised<sup>77</sup> the following additional factors favouring disclosure where disclosure of the information could reasonably be expected to:
- allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official<sup>78</sup>
  - reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct;<sup>79</sup> and
  - contribute to the administration of justice generally, including procedural fairness.<sup>80</sup>
74. The applicant submitted:<sup>81</sup>

*...my right to natural justice (to correct false, unfairly subjective and potentially defamatory personal information about me which has been circulated within a Queensland Government department) and rights under the IPPs have effectively been quashed. Such an approach hardly seems equitable given the relative impact of exposure of these various types of information: the leave details of public servants are frequently communicated in electronic out-of-office notifications to stakeholders and members of the public (so can hardly be considered*

<sup>71</sup> I note that these factors have been advanced by the information which has been released to the applicant by the Department.

<sup>72</sup> Schedule 4, part 2, items 1 and 11 of the RTI Act.

<sup>73</sup> At page 5 of the submission dated 17 February 2019, responding to OIC’s letter dated 4 February 2019.

<sup>74</sup> ‘*Personal information*’ is ‘*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*’ – see definition in schedule 5 of the RTI Act and section 12 of the IP Act.

<sup>75</sup> Schedule 4, part 2, item 7 of the IP Act.

<sup>76</sup> Schedule 4, part 4, section 6 of the RTI Act. This factor is discussed further below.

<sup>77</sup> At pages 14-15 of the application for external review dated 14 November 2018.

<sup>78</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>79</sup> Schedule 4, part 2, item 6 of the RTI Act.

<sup>80</sup> Schedule 4, part 2, item 16 of the RTI Act.

<sup>81</sup> At page 5 of the 3 July submission.



*'top secret') yet the impact of [Officer B's] highly subjective and unsubstantiated comments is likely to be highly prejudicial (particularly in relation to my reputation and future employment). This decision by the OIC is most disappointing and gives the impression that the OIC is privileging the low-risk scenario (public servants' leave details) over the high-risk one (damaging the reputations of the applicant) when the opposite is what should have occurred.*

75. In this case, the Department located a total of 491<sup>82</sup> pages. I have carefully considered the information which the Department has released. I consider its disclosure advances the above public interest factors identified by the applicant significantly. The Category C information is limited, being predominately the personal information of third parties intertwined with some personal information of the applicant which was provided by, sent to or about Employee X and witnesses in connection with the Department's dealing with a workplace investigation about Employee X's employment with the Statutory Body. Therefore, while disclosure of the Category C information may provide the applicant with greater understanding of the information which informed the Department's workplace investigation regarding Employee X, disclosure would, in my view, advance these public interest factors only marginally.
76. In relation to procedural fairness, while an agency has an obligation to afford procedural fairness to the subject of a complaint, the obligation to provide procedural fairness to a complainant, as in this case, is less onerous. There is no evidence before me to suggest that the applicant's complaint was disregarded or not properly considered by the Department. Therefore, I do not consider that disclosing the Category C information will advance the applicant's fair treatment by the Department or contribute to the administration of justice.
77. For the above reasons, I afford each of the three factors favouring disclosure noted at paragraph 73 above only limited weight.

#### **Factors favouring nondisclosure**

78. While the applicant's personal information appears in the Category C information, it is intertwined with sensitive personal information of other individuals including their opinions, observations and experiences offered during the context of a workplace investigation regarding Employee X. For this reason, it is relevant to consider whether disclosing the Category C information could reasonably be expected to prejudice the protection of an individual's right to privacy<sup>83</sup> and cause a public interest harm by disclosing personal information of a person other than the applicant.<sup>84</sup>
79. Although the information appears in an employment context, it is not routine personal work information<sup>85</sup> as it comprises sensitive personal information of others provided during the course of a workplace investigation and is information which would *not* ordinarily be released under the RTI Act. I am satisfied that the individuals involved would have a reasonable expectation that their privacy would be maintained when disclosing this information to the Department.

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<sup>82</sup> Initial release of 475 pages plus Additional Documents 16 pages.

<sup>83</sup> Schedule 4, part 3, item 3 of the RTI Act

<sup>84</sup> Schedule 4, part 4, item 6(1) of the RTI Act.

<sup>85</sup> *Routine personal work information* is information that is solely and wholly related to the routine day to day work duties and responsibilities of a public sector employee, such as a work email address or phone number, the fact of authorship of a work document or a work responsibility. Generally, it is not considered to be contrary to the public interest to disclose routine personal work information. However, it is considered to be contrary to the public interest to disclose sensitive personal information of public sector employees, such as complaints made by or about a public sector employee and reasons why an officer is accessing leave entitlements of any kind or when they have taken, or intend to take, leave.

80. The applicant submitted:<sup>86</sup>

*The OIC appears to have taken the position that the provision of my personal information is an 'all or nothing' affair: that is, if my personal information is disclosed to me, then the privacy of others is automatically compromised. This position is not reasonable, nor is it congruent with [section 73 of the RTI Act] which allows for the deletion of irrelevant information from a document to facilitate a request for personal information: that is, careful and selective redaction of documents would enable the disclosure of my personal information without compromising the privacy of others. Furthermore, [the Department] has already demonstrated that this approach to providing access to my personal information is possible.*

81. While I generally agree with the applicant's submission that personal information can be disclosed after redaction of the personal information of other individuals, in the circumstances of this matter the applicant's personal information contained within the Category C information is intertwined with the personal information of other individuals such that it cannot be separated. Therefore, if the applicant's personal information within the Category C information were to be disclosed, the personal information of other individuals would also be disclosed. I therefore consider that disclosure of the Category C information would be a significant intrusion into the privacy of these individuals, and that the extent of the public interest harm that could reasonably be anticipated from disclosure is significant. For these reasons, I afford significant weight to these two factors favouring nondisclosure.

82. The circumstances of this matter give rise to other factors favouring nondisclosure such as where disclosing information could reasonably be expected to prejudice an agency's ability to obtain confidential information<sup>87</sup> and have a detrimental effect on the Department's management functions.<sup>88</sup>

83. Staff usually supply information during a workplace investigation and/or complaint process on the understanding that it will be used for that purpose only. I am satisfied that disclosing the Category C information outside of these processes and under the RTI Act, where there can be no restriction on its use, dissemination or republication, could reasonably be expected to make staff reluctant to fully participate in future workplace investigations and prejudice the future flow of information to agencies. This, in turn, could reasonably be expected to adversely impact the Department's ability to manage staff and to investigate and respond to future workplace complaints.

84. The applicant submitted:<sup>89</sup>

*This position is untenable given the underpinning reasons for my RTI access application. In 2018, I made disclosures to [the Department] about unethical conduct by public figures within the Queensland Government. These disclosures were effectively ignored by the ESU and then apparently selectively circulated within [the Department] (despite written assurances of confidentiality) without my knowledge and permission for purposes (a workplace investigation) completely unrelated to the explicit purpose of the documents (a disclosure of unethical conduct by a public official). In summary, the confidentiality of my disclosures was breached with no apparent regard to the impact of these breaches on others, including me. It hardly seems equitable that the OIC has made no comment about [the Department]'s handling of my actual disclosures about unethical conduct and inappropriate management action in the public service and yet is championing the confidentiality of possible disclosures that may be solicited in relation to Queensland Government-initiated investigations. The OIC is effectively touting the privacy and confidentiality of other people's possible disclosures as a reason for refusing me access to my personal information, while ignoring the fact that my own disclosure was not*

<sup>86</sup> At page 5 of the 3 July 2019 submission.

<sup>87</sup> Schedule 4, part 3, section 16 of the RTI Act.

<sup>88</sup> Schedule 4, part 3, item 19 of the RTI Act.

<sup>89</sup> At page 6 of the 3 July 2019 submission.

*afforded any such protections. This argument lacks integrity and I therefore do not accept it as sufficient reason to deny me my right to access my personal information.*

85. The applicant provided two statements to the Department, Statement 1 to the Ethical Standards Unit regarding concerns about public figures and Statement 2 to Human Resources regarding employment matters about Employee X. As set out at paragraph 61 above, there is no indication that the Deputy Director-General of Justice Services disclosed Statement 1 to the individuals about whom the applicant made complaints. In relation to Statement 2, this was used by the Deputy Director-General of Justice Services in making a decision in relation to the employment of Employee X and, as part of this process, Statement 2 was disclosed to Officer B and Officer D to afford them procedural fairness in responding to allegations by the applicant that they had inappropriately managed Employee X. I consider that these disclosures of Statement 2 were for a purpose contemplated in the circumstances of the workplace investigation. There is nothing before me to suggest that Statement 2 has been disclosed outside the workplace investigation regarding Employee X.
86. Similar to Statement 2, the Category C information was provided to the Department as part of the workplace investigation regarding Employee X. As set out at paragraph 83 above, I consider that disclosure outside of this process could reasonably be expected to make staff reluctant to fully participate in future investigations and prejudice the future flow of information to agencies. This, in turn, could reasonably be expected to adversely impact the Department's ability to manage staff and to investigate and respond to future workplace complaints. For the above reasons, I afford the factors set out at paragraph 82 above significant weight.

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

87. I have considered the pro-disclosure bias in deciding access to information<sup>90</sup> and the applicant's right to access their personal information. In relation to the information which contains the applicant's personal information, I afforded moderate weight to this factor.
88. I also accept that there is a level of accountability and transparency which would be achieved through disclosure of this information. However, these factors are largely satisfied by the release of other information to the applicant, and I do not consider that releasing this information would further these factors significantly. Accordingly, I afforded limited weight to these two factors.
89. While I acknowledge that disclosure of the Category C information may allow or assist inquiry into possible deficiencies, reveal or substantiate that an agency or official has engaged in misconduct etcetera or contribute to the administration of justice, these factors have already been significantly addressed by the information which has been released to the applicant. Accordingly, I afforded limited weight to these three factors.
90. In contrast, I considered that disclosure of this information would be a significant intrusion into the privacy of other individuals, would cause a public interest harm by disclosing their personal information and would have a significant effect on the Department's ability to obtain confidential information and manage workplace issues. Accordingly, I afforded significant weight to these four factors.
91. For these reasons, I am satisfied that the factors favouring nondisclosure of the Category C information outweigh the factors favouring its disclosure. As a result, I consider that

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<sup>90</sup> Section 44 of the RTI Act.

access to the Category C information may be refused on the basis that its disclosure would, on balance, be contrary to the public interest.

### **Findings - Category D information**

92. The Category D information can be described as work mobile phone numbers and leave details of other public service employees.
93. The test for assessing the public interest is discussed at paragraphs 63 to 66 above.

### **Irrelevant factors**

94. The same as for the Category C information as discussed at paragraphs 68 and 69 above, no irrelevant factors have been taken into account in my decision.

### **Factors favouring disclosure**

95. I have considered the pro-disclosure bias in deciding access to information.<sup>91</sup>
96. I have also considered whether disclosure of the Category D information would enhance the Department's accountability and transparency in the circumstances of this review and have concluded that it would not, given the information already released to the applicant. Accordingly, I afford these factors favouring disclosure no weight.
97. Although this information appears in documents which detail actions taken by the Department in relation to Statements 1 and 2, the information does not comprise the applicant's personal information. Accordingly, this factor favouring disclosure does not apply in relation to the Category D information.

### **Factors favouring nondisclosure**

98. Factors favouring nondisclosure arise where disclosure could reasonably be expected to prejudice the protection of other individuals' right to privacy and cause a public interest harm by disclosing their personal information.<sup>92</sup> In relation to work mobile phone numbers, the applicant contended that:
  - as they are included in official email signatures, this indicates that they *'do not comprise personal information but are used for Queensland Government business'* and therefore *'should not be considered to be "personal" property subject to personal information provisions in privacy legislation'*<sup>93</sup>
  - *'these numbers are being disclosed during email communications on an ongoing basis and are, to some degree, already in the public domain'*;<sup>94</sup> and
  - *'disclosure ... can have only negligible impact on these individuals personally.'*<sup>95</sup>
99. A factor favouring nondisclosure arises where disclosure of information could reasonably be expected to prejudice the protection of an individual's right to privacy.<sup>96</sup> The

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<sup>91</sup> Section 44 of the RTI Act.

<sup>92</sup> Schedule 4, part 3, item 3 and schedule 4, part 4, item 6(1) of the RTI Act.

<sup>93</sup> At page 3 of the submission dated 17 February 2019.

<sup>94</sup> At page 3 of the submission dated 17 February 2019.

<sup>95</sup> At page 5 of the 3 July 2019 submission.

<sup>96</sup> Schedule 4, part 3, item 3 of the RTI Act. The concept of 'privacy' is not defined in the RTI Act. It can, however, be viewed as the right of an individual to preserve their personal sphere free from interference from others: see *OP5BNI and Department of National Parks, Recreation, Sport and Racing* (Unreported, Queensland Information Commissioner, 12 September 2013),

Information Commissioner has previously found that disclosure of work mobile telephone numbers of public service officers could reasonably be expected to lead to this prejudice.<sup>97</sup> This is because such information allows officers to be contacted directly and outside of work hours. As the Assistant Information Commissioner has noted:<sup>98</sup>

*I acknowledge that agency employees are provided with mobile telephones to perform work associated with their employment. However, I also consider that a mobile telephone number which allows an individual to be contacted directly and potentially outside of working hours, falls outside the realm of routine work information and attracts a certain level of privacy.*

100. I agree. As I have noted, disclosure of work mobile telephone numbers permits potential contact with a public service officer when off duty and/or engaged in private activity, thus giving rise to a reasonable expectation of intrusion into to the officer's private life or 'personal sphere'.
101. Accordingly, I am satisfied that disclosure of the Category D information could reasonably be expected to prejudice the protection of associated individuals' right to privacy, and that the nondisclosure factor therefore applies and carries significant weight.

### **Balancing the public interest**

102. On balance, I consider the nondisclosure factors outweigh the disclosure factors in relation to this information. Accordingly, access to the Category D information may be refused under section 47(3)(b) of the RTI Act on the basis that its disclosure would, on balance, be contrary to the public interest.

### **DECISION**

103. I vary the Department's decision and find that:
- searches have been reasonable and no further searches are required
  - certain documents are outside the scope of the terms of the access application and therefore outside the jurisdiction of this review; and
  - the Information in Issue may variously be:
    - deleted from the documents located under section 73 of the RTI Act on the basis it is irrelevant
    - refused on the basis that it comprises:
      - exempt information under sections 47(3)(a) and schedule 3 section 7 of the RTI Act on the basis it is subject to legal professional privilege; and
      - information contrary to the public interest to disclose under section 47(3)(b) of the RTI Act.
104. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**Assistant Information Commissioner Corby**

**Date: 11 November 2019**

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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 August 2008, at paragraph 1.56.

<sup>97</sup> See, for example *Kiepe and the University of Queensland* (Unreported, Queensland Information Commissioner, 1 August 2012), paragraphs [18]-[21] (*Kiepe*).

<sup>98</sup> *Kiepe* at [20].

## APPENDIX 1

## Significant procedural steps

Date	Event
15 November 2018	OIC received the applicant's external review application.
16 November 2018	OIC notified the Department and the applicant that the application for external review had been received and requested procedural documents from the Department.
20 November 2018	OIC received the requested documents from the Department.
17 December 2018	OIC notified the Department and the applicant that the application for external review had been accepted. OIC requested a copy of the following documents from the Department: <ul style="list-style-type: none"> <li>• the documents located in response to the access application</li> <li>• any correspondence with consulted third parties; and</li> <li>• search records for searches undertaken by the Department.</li> </ul> OIC received the requested documents from the Department.
28 December 2018	OIC received a submission from the applicant.
4 February 2019	OIC wrote to the applicant about the issues in this review and procedural matters.
12 February 2019	OIC wrote to the applicant to explore whether the applicant continued to seek access to certain types of information.
17 February 2019	OIC received a submission from the applicant.
6 March 2019	OIC wrote to the applicant confirming the information remaining in issue.
17 March 2019	OIC received a submission from the applicant.
27 March 2019	OIC wrote to the applicant clarifying the information remaining in issue.
2 May 2019	OIC wrote to the Department to: <ul style="list-style-type: none"> <li>• convey a preliminary view that further information could be released; and</li> <li>• request a brief submission addressing the applicant's sufficiency of search concerns.</li> </ul>
13 May 2019	OIC received the Department's response: <ul style="list-style-type: none"> <li>• advising that it accepted the preliminary view</li> <li>• providing a copy of the 16 additional pages located (<b>Additional Documents</b>) along with a submission about access to those documents and addressing the applicant's sufficiency of search concerns.</li> </ul>
29 May 2019	OIC received a submission from the applicant.
6 June 2019	OIC conveyed a preliminary view to the applicant.
17 June 2019	The applicant requested and OIC granted an extension of time to 4 July 2019.
3 July 2019	OIC received a submission from the applicant dated 3 June 2019.
29 July 2019	OIC wrote to the applicant responding to issues raised in the applicant's submissions received on 3 July 2019.
30 July 2019	OIC received a submission from the applicant.

<b>Date</b>	<b>Event</b>
31 July 2019	OIC wrote to the applicant responding to issues raised in the applicant's submission received on 30 July 2019.
1 August 2019	OIC received a submission from the applicant.
2 August 2019	OIC wrote to the applicant responding to issues raised in the applicant's submission received on 1 August 2019.
3 August 2019	OIC received a submission from the applicant.
11 August 2019	OIC received a submission from the applicant.

## APPENDIX 2

## Information in Issue

Page/s	Part or full refusal	Category of information
<b>File01</b>		
1-2	Part	Category D information
8	Part	Category D information
11	Part	Category C and D information
12	Part	Category D information
14	Part	Category D information
19	Part	Category D information
24	Part	Category D information
25-29	Part	Category C information
33-34	Part	Category C information
37	Part	Category D information
43	Part	Category D information
<b>File02</b>		
1	Part	Category A information
2	Part	Category A and C information
3	Part	Category A information
4	Part	Category D information
6	Part	Category A and C information
7	Part	Category C information
8-9	Full	Category C information
10	Full	Category C information
11	Part	Category C information
12	Full	Category C information
13-15	Part	Category C information
<b>File03</b>		
1	Part	Category A information
2-4	Part	Category A and C information
5-7	Full	Category A information
8	Part	Category A and C information
9-16	Full	Category A information

Page/s	Part or full refusal	Category of information
17	Part	Category A information
18	Part	Category C information
19	Full	Category C information
20-22	Part	Category C information
24	Full	Category B and C information
25-39	Full	Category B information
40	Part	Category D information
42	Part	Category C information
43-54	Full	Category B information
55	Part	Category C information
56	Part	Category C and D information
57-59	Part	Category C information
63-66	Part	Category C information
70	Part	Category C information
71	Part	Category C and D information
72	Part	Category C information
75	Full	Category C information
76-79	Full	Category B information
80	Part	Category C information
81	Part	Category D information
84	Part	Category C information
87	Part	Category C information
88	Part	Category C information
89-90	Full	Category C information
91	Part	Category C information
92	Part	Category C information
93-95	Part	Category C information
96	Part	Category C information
97	Part	Category D information
99	Part	Category C information
100	Part	Category D information



Page/s	Part or full refusal	Category of information
102	Part	Category C information
103	Full	Category C information
104-106	Part	Category C information
108	Part	Category C information
109-110	Full	Category C information
111	Part	Category C information
112-117	Full	Category B information
118	Part	Category B information
119-149	Full	Category B information
150	Part	Category D information
154	Part	Category B and D information
155-159	Full	Category B information
160	Part	Category D information
166	Part	Category D information
171	Part	Category D information
177	Part	Category D information
<b>File04</b>		
2-6	Part	Category A information
7-39	Full	Category B information
40	Part	Category A and B information
42-59	Full	Category B information
60	Part	Category A and B information
62	Part	Category A and B information
63-123	Full	Category B information
125-128	Full	Category B information
129	Part	Category D information
130-137	Full	Category B information
139-145	Full	Category B information

Page/s	Part or full refusal	Category of information
148-149	Part	Category A information
150-204	Full	Category B information
205	Part	Category C information
207-216	Full	Category B information
<b>File06</b>		
1	Part	Category B information
2	Part	Category A, B and D information
3	Part	Category C and D information
4-5	Part	Category C information
6	Part	Category C and D information
9	Part	Category C information
10	Part	Category C and D information
<b>Additional documents</b>		
1	Part	Category D information
5	Part	Category D information
6	Part	Category D information
11	Part	Category D information