



Decision and Reasons for Decision

Citation: *A88 and Queensland Police Service [2020] QICmr 2 (30 January 2020)*

Application Number: 314367

Applicant: A88

Respondent: Queensland Police Service

Decision Date: 30 January 2020

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - internal agency email involving government legal officer - whether the communication attracts legal professional privilege - whether evidence of a current practising certificate is required - whether access to information may be refused under section 67(1) of the *Information Privacy Act 2009 (Qld)* and section 47(3)(a) and schedule 3 section 7 of the *Right to Information Act 2009 (Qld)*

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LAW ENFORCEMENT INFORMATION - complaint information in a workplace context - whether information was obtained, used or prepared for an investigation in performing the prescribed functions of the prescribed crime body - whether access to information may be refused under section 67(1) of the *Information Privacy Act 2009 (Qld)* and section 47(3)(a) and schedule 3 section 10(4) of the *Right to Information Act 2009 (Qld)*

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - information about other individuals in connection with a workplace disciplinary matter - accountability and transparency - fair treatment and procedural fairness - personal information and privacy - whether disclosure would, on balance, be contrary to the public interest - whether access to information may be refused under section 67(1) of the *Information Privacy Act 2009 (Qld)* and section 47(3)(b) of the *Right to Information Act 2009 (Qld)*

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - documents relating to applicant's suspension from employment and disciplinary matters - whether agency has taken all reasonable steps to locate documents - whether documents are nonexistent or unlocatable - whether access to documents may be refused under section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(e) and 52(1) of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Queensland Police Service (**QPS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to the following information:

*'The interim investigation report and further material referred to in Notice of Suspension dated 29 April 2010 ... including but not limited to executive briefing notes, internal memos, emails, transcripts of recorded conversations, investigation reports and further material.'*¹

2. QPS located 126 pages and granted the applicant full access to 90 of those pages. QPS decided to refuse access to one page and parts of 35 pages² on the basis that the information was exempt or would, on balance, be contrary to the public interest to disclose.³
3. The applicant applied to QPS⁴ for internal review and submitted that further documents should have been located. QPS affirmed the original decision, refusing access to any further information on the basis that documents did not exist or could not be located.⁵
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QPS's decision to refuse access to particular information and raised concerns about the sufficiency of QPS's searches.⁶ During the review, QPS located some further information⁷ and agreed to partially release it to the applicant. However, some of the information requested by the applicant could not be found.⁸ The applicant remained dissatisfied with the searches conducted by QPS and submitted that QPS should be required to undertake more comprehensive enquiries to find the missing documents.
5. I vary QPS's decision and find that access may be refused⁹ to the requested information on the following grounds:
 - one page is entirely exempt due to legal professional privilege¹⁰

¹ Access application dated 16 August 2018.

² In these reasons, I refer to these pages collectively as the **Partially Released Pages**.

³ QPS decision dated 30 October 2018.

⁴ Internal review application dated 16 November 2018.

⁵ Section 47(3)(e) of the *Right to Information Act 2009* (Qld) (**RTI Act**). Internal review decision dated 29 November 2018.

⁶ External review application dated 26 December 2018.

⁷ An Executive Briefing Note, dated April 2010 (**EBN**), which was one of the specific documents the applicant identified as missing.

⁸ Namely, *'the interim investigation report and further material'* as referred to in the Notice of Suspension dated 29 April 2010 (**Notice**).

⁹ Under section 67(1) of the IP Act and the corresponding sections in section 47 of the RTI Act, as noted below.

¹⁰ Section 47(3)(a) and schedule 3, section 7 of the RTI Act.

- certain information in 12 pages is exempt as it comprises information that was obtained, used or prepared for an investigation by QPS in the performance of the prescribed functions of a prescribed crime body¹¹
- disclosure of certain information in four pages would, on balance, be contrary to the public interest;¹² and
- there are reasonable grounds to be satisfied that the interim investigation report and any further material regarding the Notice cannot be located, despite QPS having taken reasonable steps to locate those documents.¹³

Background

6. Significant procedural steps taken in the external review are set out in the Appendix.
7. The evidence, submissions, legislation and other material I have considered in reaching my decision are as disclosed in these reasons (including in footnotes and Appendix). I have also had regard to the *Human Rights Act 2019* (Qld),¹⁴ particularly the right to seek and receive information.¹⁵ I consider a decision-maker will be '*respecting and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the RTI Act.¹⁶ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation¹⁷: '*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.*'¹⁸
8. The reviewable decision is QPS's internal review decision dated 29 November 2018.

Information in issue

9. The information remaining in issue in this review appears in:
 - an internal QPS email (**Legal Email**)¹⁹
 - portions of internal QPS complaint records (**Complaint Information**);²⁰ and
 - portions of the EBN that refer to other individuals (**Third Party Information**).²¹

Issues for determination

10. The issues for determination are whether:
 - access to the Legal Email may be refused, in its entirety, on the basis that it is subject to legal professional privilege and is therefore, exempt information²²
 - access to the Complaint Information may be refused because it was obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in the

¹¹ Section 47(3)(a) and schedule 3, section 10(4) of the RTI Act.

¹² Section 47(3)(b) of the RTI Act.

¹³ Sections 47(3)(e) and 52(1)(b) of the RTI Act.

¹⁴ Referred to in these reasons as the **HR Act**, and which came into force on 1 January 2020.

¹⁵ Section 21 of the HR Act.

¹⁶ *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 [11].

¹⁷ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁸ *XYZ* at [573].

¹⁹ Page 66.

²⁰ 12 pages: pp. 10, 11, 50, 51, 52, 53, 57, 58, 59, 117, 118 and 119 of the Partially Released Pages.

²¹ On pages 2 and 3 of the EBN. QPS located two versions of the EBN (both unsigned). The only difference in content is an additional sentence in paragraph 6, however, the redacted information is duplicated across the two versions.

²² Section 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act.

performance of the prescribed functions of the prescribed crime body, and is therefore, exempt information²³

- access to certain information in the EBN may be refused on the basis that its disclosure would, on balance, be contrary to the public interest;²⁴ and
- QPS has taken reasonable steps to locate all relevant information, and there are grounds to be satisfied that any further information, including *'the interim investigation report and further material'*, is unlocatable.²⁵

Exempt information

11. An individual has a right, under the IP Act, to be given access to documents of an agency to the extent the documents contain the individual's personal information.²⁶ It is Parliament's intention that the IP Act is to be administered with a pro-disclosure bias²⁷ and that the grounds for refusing access to information are interpreted narrowly.²⁸
12. The right of access is subject to certain limitations, including the grounds for refusing access to information.²⁹ One ground for refusing access is where information is exempt.³⁰ Schedule 3 of the RTI Act sets out the categories of exempt information, the disclosure of which Parliament has deemed to be contrary to the public interest.³¹
13. In this review, it is relevant to consider two categories of exempt information: information which is subject to legal professional privilege and prescribed crime body information. The application of these categories to the Legal Email and Complaint Information, is discussed below.

Legal professional privilege

14. Information will be exempt if it would be privileged from production in a legal proceeding on the ground of legal professional privilege (**LPP**).³² This exemption reflects the requirements for establishing LPP at common law.³³
15. 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, for use in legal proceedings either on foot or reasonably anticipated, at the time of the relevant communication.³⁴ The privilege can extend to internal communications repeating legal advice, verbatim or in substance.³⁵
16. LPP may protect communications between salaried employee legal advisors of a government department or statutory authority and his/her employer as client (including communications through other employees of the same employer) provided there is a

²³ Section 47(3)(a) and 48 and schedule 3, section 10(4) of the RTI Act.

²⁴ Section 47(3)(b) and 49 of the RTI Act.

²⁵ Section 47(3)(e) and 52(1)(b) of the RTI Act.

²⁶ Section 40 of the IP Act.

²⁷ Section 64 of the IP Act.

²⁸ Section 67(2)(a) of the IP Act.

²⁹ Section 67 of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent the agency could refuse access to the document under section 47 of the RTI Act, were the document to be the subject of an access application under the RTI Act.

³⁰ Section 47(3)(a) of the RTI Act.

³¹ Section 48(2) of the RTI Act.

³² Schedule 3, section 7 of the RTI Act.

³³ *Ozcare and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 May 2011) at [12].

³⁴ *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. These principles were recently confirmed by the High Court in *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 at [23]-[25].

³⁵ *Brambles Holdings v Trade Practices Commission* (No. 3) (1981) 58 FLR 452 at 458-459, citing *Komacha v Orange City Council* (Supreme Court of New South Wales, Rath J, 30 August 1979, unreported).

professional relationship of legal advisor and client, which secures to the advice an independent character notwithstanding the employment.³⁶ The Information Commissioner has consistently applied this reasoning when considering the position of legal officers employed within Queensland government agencies.³⁷

Findings

17. I am limited in the extent to which I can describe the particular nature of the Legal Email.³⁸ However, I can say that it comprises an email sent by a QPS officer to the QPS Solicitors Office seeking legal advice, including instructions relevant to that advice request and referring to previous legal advice received. On its face, I am satisfied that the Legal Email comprises a confidential communication between the client, QPS, and its internal legal advisors, the QPS Solicitors Office, that was prepared for the dominant purpose of obtaining legal advice and professional legal assistance.
18. The applicant submits that legal professional privilege only applies to lawyers holding a current practising certificate, and particularly, not to government lawyers, and cited several cases in apparent support of this submission.³⁹
19. As set out in paragraph 16 above, the position of government legal officers, and the application of LPP to their communications is well-settled, and requires evidence of a professional relationship and independence. In *Potter*, the Information Commissioner considered that holding a current practising certificate is not a necessary requirement for establishing the requisite degree of independence.⁴⁰ I also observe that the *Legal Profession Act 2007* (Qld) (**LP Act**) allows a government legal officer engaged in government work to engage in legal practice even though the government legal officer does not hold a current practising certificate.⁴¹
20. I accept that, in a case cited by the applicant, the absence of a practising certificate contributed to a claim of legal professional privilege being set aside.⁴² However, I consider that case can be distinguished from the facts of this review on the basis that it concerned a salaried employee in the private sector, not a government legal officer.
21. I am satisfied that the authorities cited at paragraph 19 above set out the correct approach, that is, communications between a government legal officer and their client must meet the usual requirements for establishing LPP, including evidence of a professional relationship and independence, but this does not extend to requiring the legal officer to hold a practising certificate. Based on the evidence available to me, I am satisfied that legal officers in the QPS Solicitors Office are employed in a professional legal capacity, to provide independent legal advice and legal services to QPS, as the client.
22. There is no evidence before me to suggest that the Legal Email was not kept confidential or that QPS has otherwise waived privilege. Accordingly, I am satisfied that the Legal Email is protected by legal professional privilege and therefore, access to it may be refused on the basis that it comprises exempt information.⁴³

³⁶ *Waterford v Commonwealth* (1986) 163 CLR 54 per Mason and Wilson JJ at paragraph 7 of their Honours' judgement.

³⁷ *Potter and Brisbane City Council* (1994) QAR 37 (**Potter**); F60XCX and Department of Natural Resources and Mines [2017] QICmr 19 (9 June 2017); *Gapsa and Department of Transport and Main Roads* (Unreported, Queensland Information Commissioner, 12 April 2013) (**Gapsa**); *Hillier and Redland City Council* (Unreported, Queensland Information Commissioner, 9 June 2011).

³⁸ Section 121(3) of the IP Act.

³⁹ Applicant submissions dated 1 December 2019, page 2, paragraph 3.

⁴⁰ At [26]. See also, *Gapsa* at [53].

⁴¹ See sections 6, 12 and 44 of the LP Act.

⁴² Including *Australian Hospital Care v Duggan* [1991] VSC 131 as cited by the applicant.

⁴³ Under sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act.

Prescribed crime body information

23. Information will also be exempt if it is obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in the performance of the prescribed functions of the prescribed crime body (**Prescribed Crime Body Exemption**).⁴⁴ This exemption includes an exception for information that is about the applicant **and** where the investigation has been finalised.⁴⁵

Findings

24. The Complaint Information appears in documents which are compiled by QPS in managing complaints, including workplace matters. The documents have been partially released to the applicant, with the disclosed information revealing that the applicant was the subject of a number of complaints in the workplace which were investigated by QPS, subject to monitoring by the (then) Crime and Misconduct Commission (**CMC**).⁴⁶
25. The CCC (and its predecessor, the CMC) is a prescribed crime body under the RTI Act⁴⁷ and its functions include monitoring and investigating allegations of police misconduct.⁴⁸ The information released to the applicant demonstrates that the complaints against the applicant were categorised as allegations of misconduct. Based on the content of the Complaint Information and the surrounding released information, I am satisfied, that it was obtained, used or prepared for an investigation by QPS and that QPS was performing the prescribed functions of the prescribed crime body, in conducting the investigations. For these reasons, I find that the requirements of the Prescribed Crime Body Exemption are met, under schedule 3, section 10(4) of the RTI Act.

Exception

26. The exception applies where the investigation is finalised and the information is about the applicant.⁴⁹ It is uncontentious that the investigations into allegations against the applicant have been finalised.⁵⁰
27. The applicant submits that a brief of evidence was provided to her in 2013 (in legal proceedings relating to her suspension) and therefore, she is aware of the substance of the allegations and the identities of other individuals involved. The applicant argues that therefore, the Complaint Information is about her, triggering the exception to the exemption.⁵¹
28. Information that is solely *about* the applicant, ie. her personal information has been released, so too has procedural information pertaining to the complaints. The remaining Complaint Information concerns other individuals, including the complainants or other subjects of the complaint/s. I am satisfied that, while the applicant may be aware of this information, it is not *about* the applicant. Instead, it is *about* those other individuals, and therefore, the exception to the exemption does not apply.
29. The applicant also seeks to set aside the Prescribed Crime Body Exemption on the basis of findings made under the *Public Interest Disclosures Act 2010* (Qld) by the Anti-

⁴⁴ Under schedule 3, section 10(4) of the RTI Act.

⁴⁵ Schedule 3, section 10(6) of the RTI Act.

⁴⁶ Currently known as the Crime and Corruption Commission (**CCC**).

⁴⁷ Schedule 3, section 10(9) of the RTI Act.

⁴⁸ As part of the 'corruption' function. See sections 33, 35(c) and 47(b) and (c) of the *Crime and Corruption Act 2001* (Qld) (**CC Act**).

⁴⁹ Schedule 3, section 10(6) of the RTI Act.

⁵⁰ QPS submissions dated 1 April 2019.

⁵¹ Applicant's submission dated 1 December 2019, page 3, paragraph 4(b).

Discrimination Commission Queensland in connection with her suspension from the workplace.⁵² While I accept that there is evidence that a matter involving QPS and the applicant was conciliated in the Queensland Civil and Administrative Tribunal in 2013, there is no basis, under the IP Act or RTI Act to set aside the Prescribed Crime Body Exemption on the basis of the outcome of those proceedings.

Public interest considerations

30. The applicant argues that public interest considerations should be taken into account on the basis that the Complaint Information does not, in her view, satisfy the requirements for exemption.⁵³ As set out above, I am satisfied that the Prescribed Crime Body Exemption does apply and therefore, I am precluded from considering public interest arguments. Where the requirements of an exemption are established, the IP and RTI Acts do not provide for a decision-maker to take into account public interest factors. This is because, in creating the categories of exempt information, Parliament has already decided that it would be contrary to the public interest for this type of information to be released.⁵⁴ While an agency retains the discretion to give access to exempt information,⁵⁵ OIC does not have the same discretion.⁵⁶

Contrary to public interest information

Relevant law

31. Access to information may also be refused under the IP Act and RTI Act if its disclosure would, on balance, be contrary to the public interest.⁵⁷ The term '*public interest*' is not defined in the legislation, but is generally accepted to refer to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. A public interest consideration is generally common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests.⁵⁸
32. A decision-maker is required to take specific steps in reaching a decision on disclosure⁵⁹ and various factors may be relevant to deciding where the balance of the public interest lies.⁶⁰ I have set out below my assessment of, and findings in relation to, the public interest factors which I consider are relevant in this case.⁶¹

Findings

Factors favouring disclosure

33. The Third Party Information is limited to the names, badge numbers and health information of other QPS officers who were involved in the investigation into allegations of misconduct against the applicant. To support her arguments in favour of disclosure,

⁵² External review application dated 26 December 2018, paragraphs 7 and 8.

⁵³ Applicant's submissions dated 1 December 2019, page 3, paragraph 4(c).

⁵⁴ Section 48(2) of the RTI Act.

⁵⁵ Section 67(2)(b) of the IP Act.

⁵⁶ Section 118(2) of the IP Act.

⁵⁷ Section 67 of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

⁵⁸ However, there are some recognised public interest considerations that may apply for the benefit of an individual.

⁵⁹ Section 49 of the RTI Act. The steps include: disregarding any irrelevant factors, identifying relevant factors favouring disclosure and nondisclosure and balancing the relevant factors.

⁶⁰ Including the non-exhaustive list of factors in schedule 4 of the RTI Act.

⁶¹ No irrelevant factors arise in the circumstances of this case and I have not taken any irrelevant factors set out in schedule 4 part 1 of the RTI Act into account.

the applicant relies on the fact that in 2013, she was provided with a brief of evidence by QPS and is therefore, '*cognisant of all parties involved*'.⁶²

34. I accept that disclosure of the Third Party Information would serve to enhance QPS's accountability and transparency,⁶³ reveal background and contextual information pertaining to QPS decisions⁶⁴ and contribute to the applicant's fair treatment⁶⁵ and procedural fairness.⁶⁶ However, given that the Third Party Information is of such a limited nature, and comprises only a very small percentage of the EBN,⁶⁷ I afford low weight to these factors.
35. I have also considered whether disclosure of the Third Party Information would allow the applicant to access her own personal information,⁶⁸ allow or assist inquiry into possible deficiencies in an agency's conduct or administration,⁶⁹ reveal or substantiate misconduct or negligent, improper or unlawful conduct,⁷⁰ reveal that the information is incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant⁷¹ or contribute to the enforcement of the criminal law.⁷² Again, due to the very limited nature of the Third Party Information, I find that its disclosure would not advance these factors and therefore, they do not apply.

Factors favouring nondisclosure

36. As noted above, the Third Party Information comprises the names, badge numbers and health information of other QPS officers. I am satisfied that it comprises the '*personal information*' of those other individuals, giving rise to a public interest harm factor favouring nondisclosure.⁷³
37. I accept however, that the applicant is likely to be aware of at least some of the Third Party Information, eg. the names of other individuals involved in the investigation of allegations against her. Therefore, some of the Third Party Information may not be subject to the harm factor as releasing it would not constitute a *disclosure* if the applicant is already aware of it.⁷⁴ The applicant's submissions do not however, confirm that she is aware of *all* the Third Party Information, and on that basis, I am satisfied that disclosure would cause a public interest harm to the extent that information is not already known to the applicant.
38. The Third Party Information connects the other individuals to a sensitive workplace investigation into misconduct allegations, either as witnesses, victims, or as subjects of allegations. I am satisfied that this type of information raises a further factor favouring nondisclosure in terms of prejudicing other individuals' right to privacy.⁷⁵ The concept of

⁶² Applicant's submissions dated 1 December 2019, page 3, paragraph 5(a).

⁶³ Schedule 4, part 2, items 1 and 3 of the RTI Act.

⁶⁴ Schedule 4, part 2, item 11 of the RTI Act.

⁶⁵ Schedule 4, part 2, item 10 of the RTI Act.

⁶⁶ Schedule 4, part 2, items 16 of the RTI Act.

⁶⁷ Of the four page EBN, information has been redacted from six paragraphs across two pages only.

⁶⁸ Schedule 4, part 2, item 7 of the RTI Act. Section 12 of the IP Act defines personal information as '*information or 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.*'

⁶⁹ Schedule 4, part 2, item 5 of the RTI Act.

⁷⁰ Schedule 4, part 2, item 6 of the RTI Act.

⁷¹ Schedule 4, part 2, item 12 of the RTI Act.

⁷² Schedule 4, part 2, item 18 of the RTI Act.

⁷³ Schedule 4, part 4, section 6 of the RTI Act.

⁷⁴ While 'disclose' as used in the Harm Factor is not defined in the RTI Act, the word is defined in section 23 of the IP Act as it relates to the application of the Information Privacy Principles – to 'disclose personal information' relevantly means to give that information to an entity who does not otherwise know the information and is not in a position to find it out. This accords with the ordinary dictionary definition of 'disclose': relevantly, to 'make known; reveal': Macquarie Dictionary Online: <www.macquariedictionary.com.au> (accessed 23 January 2020).

⁷⁵ Schedule 4, part 3, item 3 of the RTI Act.

privacy is not defined in the IP Act, however, it can be viewed as the right of an individual to preserve their personal sphere from the interference of others.⁷⁶ I am satisfied that a person's involvement or implication in a workplace misconduct investigation is a matter falling within their private sphere. I have also taken into account the fact that, once information is disclosed under information access legislation such as the IP Act, there are no limitations on its further use or disclosure. For these reasons, I find that disclosure of the Third Party Information would prejudice the right to privacy of the other individuals referred to in the EBN and afford this factor significant weight in favour of nondisclosure.

Balancing the public interest

39. I accept that disclosure of the Third Party Information would enhance QPS's accountability and transparency as it would allow the applicant to have unfettered access to a complete version of the EBN, which is a significant document in her employment history. However, I find that the weight of these factors is low due to the very limited nature of the Third Party Information. On the other hand, I am satisfied that the public interests in safeguarding other individuals' personal information and protecting their right to privacy, carry significant weight in favour of nondisclosure. On balance, I am satisfied that the weight of the nondisclosure factors exceeds that of the disclosure factors and therefore, find that access to the Third Party Information may be refused on the basis that its disclosure would, on balance, be contrary to the public interest.⁷⁷

Unlocatable documents

40. The final issue for determination is whether there are grounds to be satisfied that QPS has taken reasonable steps to locate all of the information requested in the access application.
41. As indicated at paragraph 4 above, QPS was able, through extensive further searches, to locate the EBN requested by the applicant. However, QPS's search efforts were unsuccessful in locating '*the interim investigation report and further material*' as referred to in the Notice.

Relevant law

42. The RTI Act provides that access may be refused to unlocatable documents.⁷⁸ A document will be *unlocatable* if it has been or should be in the agency's possession and all reasonable steps have been taken to find it, but it cannot be found.
43. In determining whether a document is unlocatable, a decision maker is required to consider whether there are reasonable grounds for the agency to be satisfied that the requested documents have been or should be in the agency's possession and whether the agency has taken all reasonable steps to find the documents.⁷⁹ In answering these questions, regard should be had to the circumstances of the case, and the relevant key factors.⁸⁰

⁷⁶ 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 11 August 2008 at [1.56].

⁷⁷ Sections 67(1) of the IP Act and 47(3)(b) of the RTI Act.

⁷⁸ Sections 47(3)(e) and 52(1)(b) of the RTI Act.

⁷⁹ See *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (*Pryor*) at [21]. See also, *F60XCX and Office of the Queensland Parliamentary Counsel* [2016] QICmr 42 (13 October 2016) at [84] and [87], and *Underwood and Minister for Housing and Public Works* [2015] QICmr 27 (29 September 2015) at [33]-[34] and [49].

⁸⁰ In *Pryor* at [19] the key factors were identified as 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

44. The onus rests on an agency to demonstrate that its searches have been reasonable in the particular case. However, an applicant also bears a practical onus of demonstrating, by referring to objective evidence, that the agency has not discharged this obligation. Suspicions about the existence of further documents and assertions that *'there must be more'* do not satisfy this onus.⁸¹

Submissions

45. The applicant submits that the Notice directly refers to documents which have not been located by QPS,⁸² as quoted below:

*'Having considered the **interim investigation report and further material**, the serious nature of the allegations and the cogency of the evidence obtained, it appears to me on reasonable grounds that you are liable for disciplinary action...'*

[emphasis added]

46. The applicant identified particular QPS officers and nominated several locations, which she considers would be reasonable to search for the interim investigation report and any further material relevant to the issuing of the Notice. Specifically, the applicant contends that the signatory of the Notice would have been issued with an official police diary during secondment to the Specialist Operations Command and that the diary would have been returned to the Command at the end of the secondment.⁸³ As such, the applicant contends searches should be conducted in the office of the Deputy Commissioner of Specialist Operations.⁸⁴
47. The applicant also submitted that:
- further inquiries should be made with the author of the interim investigation report, ie. the investigating officer, for a copy of the report and the 'further material' which would comprise appendices attached to the investigation report;⁸⁵ and
 - inquiries should be made with the branch of QPS where the investigating officer subsequently relocated, for any documents or diaries of the investigating officer, including inquiries with the investigating officer's (then) supervisor.⁸⁶
48. The applicant most recently submitted that she *'was advised by a reliable informant'*⁸⁷ that the investigating officer *'was disciplined for his submission of a false and misleading Investigation Report on which the decision to suspend me without pay was based'*⁸⁸ and that therefore, searches of that officer's disciplinary file should be conducted for the missing documents. The applicant pointed to the Ethical Standards Command or the Internal Investigations Group as the likely locations for retention of such a file.
49. The applicant also submits that documents relating to complaints and investigations against police officers which result in disciplinary action, stand down or suspension from duty are to be retained for a period of 40 years after the last action, and that destruction of these documents would be in breach of the *Public Records Act 2002 (Qld)* (**Public**

age of the requested document/s and the nature of the government activity to which the request relates. These factors were more recently considered in *Van Veenendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017).

⁸¹ *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36].

⁸² External review application dated 26 December 2018, paragraph 13.

⁸³ Acting Deputy Commissioner, Regional Operations.

⁸⁴ Applicant's submissions dated 1 December 2019, paragraph 1(b).

⁸⁵ Applicant's submission dated 1 December 2019, paragraph 2. The applicant provided a comparable page from a 2018 preliminary investigation report to support this line of argument.

⁸⁶ Applicant's submissions dated 1 December 2019, paragraph 2.

⁸⁷ Applicant's submission dated 8 January 2020.

⁸⁸ Applicant's submission dated 8 December 2019. The applicant provided OIC with an email sent to her by an unidentified source, to this effect, with partial redactions.

Records Act).⁸⁹ The applicant also alleges that statements in the Notice may have been made fraudulently.⁹⁰ While I acknowledge the personal significance of this matter to the applicant, and its impact on her employment, such allegations, and issues about compliance with the Public Records Act are beyond my external review jurisdiction.

QPS searches

50. QPS has provided OIC with evidence that searches and inquiries have been conducted in the following locations:

- Operations Support Command (**OSC**)⁹¹
- Ethical Standards Command (**ESC**), including the Internal Investigations Group⁹²
- Legal and Policy Unit;⁹³ and
- IT Operations (Records Management), Public Safety Business Agency.⁹⁴

51. The evidence provided by QPS demonstrates that the ESC conducted searches on two occasions, initially in 2018 when the access application was lodged, and again on external review, at OIC's request. Initial inquiries identified two relevant case numbers, and searches of these files, involving a senior ESC officer, located two relevant Compass Summary Reports dated shortly prior to the Notice.⁹⁵ On external review, at OIC's request, further searches of relevant CSS files were conducted, including two additional CSS files; these searches located the EBN.

52. QPS submitted that searches were not requested of the office of the Deputy Commissioner of Specialist Operations because the signing Deputy Commissioner was acting in the position at the time of the Notice and his notebooks would have been returned to the office of his substantive position upon completion (which QPS has been unable to discern). As the signing Deputy Commissioner has since retired, QPS has been unable to make direct inquiries with him about the Notice, or obtain any insight from him as to where the missing information may be located.⁹⁶

53. The Records Management branch conducted searches of Objective⁹⁷ using search terms including the applicant's name, date range and the investigating officer's name. However, these searches did not locate any relevant documents.

Analysis

54. Given the terms of the access application, I consider it was reasonable for QPS to target searches to the ESC and OSC in the first instance as those areas were directly involved in the disciplinary matter and creation of the Notice. Based on the responses provided by those areas, I am satisfied that the searches conducted on two separate occasions were comprehensive. Given that those searches were eventually successful in locating the EBN, I consider this demonstrates that those locations were appropriately targeted by QPS in its searches. I am further satisfied that the additional searches conducted on external review, and the enquiries made with officers regarding recordkeeping practices and systems at the relevant time, including with Records Management, supplemented the original searches, particularly given the age of the documents.

⁸⁹ External review application dated 26 December 2018, paragraphs 14 to 17.

⁹⁰ External review application dated 26 December 2018, paragraph 18.

⁹¹ Email dated 22 May 2019.

⁹² Document search declaration dated 14 September 2018 and search response dated 14 September 2018 and 30 May 2019.

⁹³ Document search declaration dated 18 September 2018.

⁹⁴ Email dated 28 June 2019 and search declaration dated 11 July 2019.

⁹⁵ These documents formed part of the information originally released to the applicant by QPS.

⁹⁶ QPS submissions dated 1 April 2019.

⁹⁷ Objective is the records management system used by QPS.

55. I accept that the interim investigation report and any further material represent documents of significant importance to the applicant's employment history, and to QPS's decision making processes relating to disciplinary action. It is not unreasonable to expect that such documents *should* have been stored by QPS securely and in locations that could readily be accessed in the future. Regrettably however, that does not appear to have occurred in this case. I have also taken into account the fact that the documents would be almost 10 years old, the retirement of the signing Deputy Commissioner, and the imprecise description of the *'further material'* referred to in the Notice. I consider these factors impacted QPS's ability to successfully locate the documents.
56. I accept the applicant's submission that the author of the report is likely to have been the investigating officer and the *'further material'* may have been the appendices to the report. However, given the nature of the interim investigation report and its connection to a sensitive disciplinary matter, I consider the reasonable locations to search were the ESC and OSC as they were the units responsible for handling the matter/relevant files. I am not persuaded that it would be reasonable to expect the investigating officer himself, or his then supervisor, to still be in personal possession of information prepared for a disciplinary matter, conducted almost 10 years ago. In any event, I note that the name of the investigating officer was included in the search terms used by Records Management, however, no relevant documents were located through those searches.
57. In the circumstances of this case, while I acknowledge that it took QPS longer than expected to complete further searches on external review, I am satisfied that QPS has taken reasonable steps to locate any further documents referred to in the Notice. I find that the interim investigation report and the *'further material'* are documents that have been and should be in QPS's possession, however, they cannot be located (either due to having been lost/misfiled or inadvertently destroyed). On this basis, I am satisfied that access to the further information sought by the applicant may be refused on the basis it is unlocatable.⁹⁸

DECISION

58. I vary QPS's decision and find that:
- access to the Legal Email and Complaint Information may be refused as they comprise exempt information⁹⁹
 - access to certain parts of the EBN may be refused as its disclosure would, on balance, be contrary to the public interest;¹⁰⁰ and
 - access to any further documents may be refused on the basis that they are unlocatable.¹⁰¹
59. I have made this decision under section 123 of the IP Act, as a delegate of the Information Commissioner under section 139 of the IP Act.

K Shepherd
Assistant Information Commissioner

Date: 30 January 2020

⁹⁸ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(b) of the RTI Act.

⁹⁹ Section 67(1) of the IP Act and sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act.

¹⁰⁰ Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

¹⁰¹ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(b) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
26 December 2018	OIC received the external review application.
12 February 2019	OIC notified the applicant and QPS that the application for external review had been accepted and requested further information.
11, 18, 25 and 29 March 2019	OIC reiterated its request to QPS for further information.
1 April 2019	OIC received the requested information from QPS.
5 April 2019	OIC asked QPS to conduct additional searches and provide submissions.
9 May 2019	QPS advised OIC that additional searches had been requested and sought an extension to provide submissions.
5 June 2019	OIC received additional information from QPS about its searches.
6 and 17 June 2019	OIC asked QPS to conduct additional searches and provide submissions.
27 June and 2 July 2019	OIC received additional information from QPS about its searches.
3 July 2019	OIC reiterated an outstanding request to QPS for further information and received additional submissions.
10 and 16 July 2019	OIC reiterated an outstanding request to QPS for further information.
16 July 2019	OIC received additional information from QPS.
8 August 2019	OIC requested further information from QPS.
27 August 2019	OIC reiterated its request to QPS for further information. OIC received submissions from QPS and QPS requested an extension to provide further information.
13, 17, 24 September, 8 and 15 October 2019	OIC reiterated its request to QPS for further information.
16 October 2019	OIC received submissions from QPS.
18 October 2019	OIC reiterated its outstanding request to QPS for further information.
4 November 2019	QPS advised OIC that the EBN had been located. OIC asked QPS to provide a copy of the EBN.
6 and 7 November 2019	OIC reiterated its outstanding request to QPS for a copy of the EBN.
8 November 2019	OIC issued a notice to QPS, under section 116 of the IP Act, requiring QPS to produce to the Information Commissioner, a copy of the EBN, and a submission setting out its position on disclosure of the EBN.
11 November 2019	OIC conveyed a written preliminary view to the applicant.
22 November 2019	QPS provided OIC with a copy of the EBN and advice regarding its position on disclosure.
25 November 2019	OIC received submissions from QPS. OIC conveyed a further preliminary view to the applicant that access to Third Party Information in the EBN may be refused.
1 and 8 December 2019	OIC received submissions from the applicant.

Date	Event
7 January 2020	OIC asked the applicant to provide further information in relation to her submissions.
8 January 2020	OIC received further information from the applicant in support of her submissions.