



Decision and Reasons for Decision

Citation: *Ross and Department of Justice and Attorney-General* [2017] QICmr 46 (14 September 2017)

Application Number: 313027

Applicant: Ross

Respondent: Department of Justice and Attorney-General

Decision Date: 14 September 2017

Catchwords: ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - EXEMPT INFORMATION - whether disclosing particular intelligence information could reasonably be expected to prejudice a system or procedure for the protection of persons, property or the environment - section 47(3)(a) and schedule 3, section 10(1)(i) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - whether disclosing information about other offenders, victims and the applicant's family and friends would, on balance, be contrary to the public interest - section 47(3)(b) of the *Right to Information Act 2009* (Qld)

RIGHT TO INFORMATION - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - NONEXISTENT AND UNLOCATABLE DOCUMENTS - applicant submits agency has failed to locate all documents relating to his request - whether access to the requested documents can be refused on the grounds that they are nonexistent or unlocatable - section 47(3)(e) of the *Right to Information Act 2009* (Qld)

Summary

1. The applicant applied under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to all documents held by Queensland Corrective Services (**QCS**)¹ about him, including any correspondence provided to any person in relation to his release from prison, for the period of 27 April 2012 to 26 August 2015.
2. The Department located 600 pages in response to the request and decided to release 494 pages in full, 62 pages in part and refused access to 44 pages in full. Access to this information was refused on the basis that it was either exempt information or its disclosure would, on balance, be contrary to the public interest.²

¹ The Department of Justice and Attorney-General (**Department**) processed the application as QCS forms part of the Department.

² The Department also excluded some of this information as it was irrelevant to the applicant's request and refused access to some information on the basis that other access was available. The applicant did not seek external review of these issues and they are not addressed in these reasons for decision.

3. The applicant applied for internal review of the decision to refuse access to this information and submitted that the Department had not located all of the requested information relevant to his application.
4. On internal review, the Department affirmed the decision to refuse access to this information and notified the applicant that the additional information to which he sought access did not exist.
5. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision. The Department located additional documents on external review which it agreed to release to the applicant. However, the applicant continued to seek review of certain refusal of access issues and remained of the view that the Department had not located all of the requested information.
6. For the reasons set out below, I affirm the Department's decision in relation to the refusal of access issues and, in addition, I find that the additional documents to which the applicant seeks access are nonexistent or unlocatable.

Background

7. Significant procedural steps taken by OIC in conducting the external review are set out in the appendix to these reasons.

Reviewable decision

8. The decision under review is the Department's internal review decision dated 21 September 2016.

Evidence considered

9. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and appendix).

Issues for determination

10. A number of issues were informally resolved on external review.³ The remaining issues for determination are whether:
 - certain information is exempt information on the basis that its disclosure could reasonably be expected to prejudice a system or procedure for the protection of persons, property or the environment
 - disclosing certain information would, on balance, be contrary to the public interest; and
 - access to the additional information which the applicant believes exists can be refused on the basis that it is nonexistent or unlocatable.

Exempt information

11. This information comprises 10 full pages⁴ and 10 part pages⁵ and can be described as intelligence and risk assessment information gathered by QCS about the applicant (**Intelligence Information**).

³ The applicant agreed to not seek access to certain information. The Department also located additional information relevant to the applicant's sufficiency of search submissions and agreed to release this information to the applicant.

⁴ File 1, pages 1-10.

⁵ File 2, pages 42, 44-47, 55, 63 and 147 and File 3, pages 133 and 138.

Relevant law

12. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent they contain the individual's personal information.⁶ However, this right is subject to other provisions of the IP Act and *Right to Information Act 2009* (Qld) (**RTI Act**), including the grounds on which access may be refused.⁷ An agency may refuse access to a document to the extent it comprises exempt information.⁸ Schedule 3 of the RTI Act sets out the types of information the disclosure of which the Parliament has considered would, on balance, be contrary to the public interest.⁹
13. Information will be exempt if its disclosure could reasonably be expected to prejudice a system or procedure for the protection of persons, property or the environment.¹⁰ For this exemption to apply to information, the following three elements must be satisfied:¹¹
 - there exists an identifiable system or procedure
 - it is a system or procedure for protection of persons, property or the environment; and
 - disclosure could reasonably be expected to prejudice that system or procedure.

Findings

14. As noted above, the Intelligence Information is intelligence and risk assessment information gathered by QCS about the applicant. Intelligence and monitoring of offenders in custody and on parole comprises a system designed to ensure the safety and security of offenders, correctional centres and the greater community, including monitoring and detection of unlawful or undesirable behaviour or to anticipate and prevent it. I am satisfied that the first two elements identified above are satisfied in these circumstances.
15. If offenders are informed of the specific ways in which their behaviour is monitored or assessed in a correctional centre or in the community, or become aware of the specific systems that are used by the Department to gather intelligence and assess risk, those systems could be compromised as offenders may modify their behaviour to avoid detection or achieve favourable assessments. This could also compromise the Department's ability to ensure the safety and security of offenders (while in custody and on parole), staff and the community as a whole. In my view, disclosing the Intelligence Information could reasonably be expected to prejudice the ongoing effectiveness of QCS' intelligence and monitoring system and the third element identified above is also satisfied.
16. For these reasons, I find that access to the Intelligence Information can be refused under section 47(3)(a) of the RTI Act as it is exempt information under schedule 3, section 10(1)(i) of the RTI Act.
17. The applicant notified OIC that he does not seek access to the Intelligence Information unless it contained *'anything that pertains to advice to be given to any person/s regarding my imminent release from prison and any application and considerations given to such'*.¹² I note that the Department, in its internal review decision, explained to the

⁶ Section 40 of the IP Act.

⁷ Under section 67(1) of the IP Act, an agency may refuse access to a document in the same way and to the same extent the agency could refuse access to a document under section 47 of the RTI Act.

⁸ Section 47(3)(a) of the RTI Act.

⁹ Section 48(2) of the RTI Act.

¹⁰ Schedule 3, section 10(1)(i) of the RTI Act.

¹¹ As set out in *I3C1ST and Department of Community Safety* (Unreported, Queensland Information Commissioner, 30 August 2011) at [12].

¹² Submission to OIC dated 5 June 2017.

applicant that it had made enquiries with the relevant Probation and Parole Officer and information relating to the applicant's release from prison was not released to any other person. In any event, the applicant essentially seeks advice about the content of the Intelligence Information. As I consider this information comprises exempt information, I am prevented from describing it in any more detail and I am unable to address the applicant's submission.¹³

Contrary to public interest information

18. This information comprises 18 full pages¹⁴ and 34 part pages¹⁵ (**Third Party Information**) and can be described as:

- highly sensitive personal information about other individuals and information which could reasonably be expected to identify victims
- information provided to QCS by the applicant's family and friends; and
- identifying information about other offenders.

Relevant law

19. Access to information may be refused if its disclosure would, on balance, be contrary to the public interest.¹⁶ The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest and explains that a decision-maker must take specific steps in reaching a decision, as follows:¹⁷

- identify any irrelevant factors and disregard them¹⁸
- identify relevant public interest factors favouring disclosure and nondisclosure
- balance the relevant factors favouring disclosure and nondisclosure; and
- decide whether disclosing the information in issue would, on balance, be contrary to the public interest.

Findings

20. No irrelevant factors arise in the circumstances and I have not taken any into account.

Personal information and privacy

21. I am satisfied that the Third Party Information comprises the personal information of other individuals including other offenders, victims, and the applicant's family and friends.¹⁹ Accordingly, I have considered whether disclosing this information could reasonably be expected to:

¹³ Section 121(3) of the IP Act expressly prevents me from disclosing information which is claimed to be exempt or contrary to public interest on external review.

¹⁴ File 2, pages 200-208 and File 3, pages 75-83.

¹⁵ File 2, pages 49, 59, 133-135, 152, 158-159, 161-162 and 181, File 3, pages 27, 33-34, 36-37, 56, 142, 149, 156, 160, 163, 166, 169, 174, 220-222, 237, 249, 252 and 270-271 and File 4, page 16.

¹⁶ Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act. The term '*public interest*' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests.

¹⁷ Section 49 of the RTI Act.

¹⁸ In my view, no irrelevant factors arise in this case.

¹⁹ '*Personal information*' is defined in section 12 of the IP Act as '*information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion*'.

- prejudice the protection of an individual's right to privacy;²⁰ and
- cause a public interest harm through disclosure of another individual's personal information.²¹

22. In considering the weight to be attributed to these factors, I note that some of the Third Party Information is particularly sensitive, as it identifies victims and describes the relevant offending in detail.²² In relation to the other Third Party Information, while this information is not as sensitive, I still consider that its disclosure would be a significant intrusion into the individuals' private sphere, as it contains details of individuals' interactions with QCS. I accept that the applicant is aware of the circumstances of the offences and much of the other content of the Third Party Information, and I consider that this reduces the weight to be attributed to these factors to some extent. However, given the context and sensitivity of the information, I remain of the view that these factors carry significant weight.
23. I also have considered that some of the Third Party Information comprises the applicant's personal information and this gives rise to a factor favouring disclosure.²³ However, where this is the case, the applicant's personal information is intrinsically connected to others' personal information. Further, in practical terms, to the extent that the applicant's personal information is intertwined with the personal information of others, the applicant is generally aware of its content as it relates to him.²⁴ Accordingly, in my preliminary view, this factor carries only low weight.

QCS accountability and transparency

24. I am satisfied that, to some extent, disclosing the Third Party Information could reasonably be expected to enhance QCS' accountability and reveal the reason for a decision, particularly where it relates to the applicant's parole application, and that this gives rise to several factors favouring disclosure.²⁵ However, given the significant amount of information the applicant has already received concerning his parole applications and the limited nature of the Third Party Information, I consider these factors carry low weight.
25. In the circumstances, I am unable to identify any other relevant factors favouring disclosure which may justify the release of this information to the applicant.

Balancing the relevant public interest factors

26. I acknowledge the general public interest in furthering access to government-held information and the IP Act's pro-disclosure bias.²⁶ For the reasons explained above, I attribute significant weight to the nondisclosure factors relating to the personal information and privacy of other individuals. I find that these factors carry sufficient weight to outweigh the factors favouring disclosure. Accordingly, I find that access to the Third Party Information can be refused under section 47(3)(b) of the RTI Act as its disclosure would, on balance, be contrary to the public interest.

²⁰ Schedule 4, part 3, item 3 of the RTI Act.

²¹ Schedule 4, part 4, item 6 of the RTI Act.

²² The issue of victim information was considered in *OZH6SQ and Queensland Police Service* (Unreported, Queensland Information Commissioner, 25 May 2012).

²³ Schedule 4, part 2, item 7 of the RTI Act.

²⁴ For example, the applicant is aware of the identity of other prisoners involved in incidents with him and that he advocated for during his time in prison, and he is aware of the circumstances of his offending and the names and ages of his victims.

²⁵ Schedule 4, part 2, item 1, item 3 and item 11 of the RTI Act.

²⁶ Section 64(1) of the IP Act.

Nonexistent or unlocatable information

27. The applicant identified certain documents on external review which he considered the Department had failed to locate. The Department located a number of additional documents as a result of further searches and released these to the applicant, resolving these particular issues. The remaining issues are dealt with below.

Relevant law

28. Access to a document may be refused if it is nonexistent or unlocatable.²⁷ A document is nonexistent if there are reasonable grounds to be satisfied it does not exist.²⁸ A document is 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.²⁹

29. To be satisfied that a document does not exist, the Information Commissioner has previously recognised that an agency must rely on its particular knowledge and experience, having regard to various key factors including:

- the administrative arrangements of government
- the agency's structure
- the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and other legal obligations that fall to it)
- the agency's practices and procedures (including, but not limited to, its information management approaches); and
- other factors reasonably inferred from information supplied by the applicant, including the nature and age of the requested documents, and the nature of the government activity to which the request relates.³⁰

30. By considering the above factors, an agency may ascertain that a particular document was not created because, for example, the agency's processes do not involve creating that specific document. In such instances, it is not necessary for the agency to search for the document. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.

31. An agency may also rely on searches to satisfy itself that a document does not exist. In those cases, all reasonable steps must be taken to locate the documents.³¹ Such steps may include inquiries and searches of all relevant locations identified after consideration of the key factors listed above.

32. In determining whether a document is unlocatable, it is necessary to consider:

- whether there are reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession; and
- whether the agency has taken all reasonable steps to find the document.³²

²⁷ Sections 47(3)(e) and 52(1) of the RTI Act.

²⁸ Section 52(1)(a) of the RTI Act.

²⁹ Section 52(1)(b) of the RTI Act.

³⁰ *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]-[38]. The decision in *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld). Section 52 of the RTI Act is drafted in substantially the same terms as the provision considered in *PDE* and, therefore, the Information Commissioner's findings in *PDE* are relevant here.

³¹ As set out in *PDE* at [49]. See also section 137(2) of the IP Act.

³² Section 52(1)(b) of the RTI Act.

33. In answering these questions, regard should be had to the circumstances of the case and the key factors set out above.³³

Nature and extent of Department's search and enquiry process

34. It is relevant to summarise the nature and extent of the Department's search and enquiry process for documents relevant to the application.³⁴
- Searches were initially conducted by QCS and Victims Assist Queensland. QCS located 600 pages. Further searches of these locations were conducted on internal review and no further documents were located. More searches (as identified below) were conducted on external review and 39 additional pages were located.³⁵
 - The Department made enquiries with the relevant Probation and Parole Officer. He confirmed that information relating to the applicant's release from prison was not released to any other person.³⁶
 - The Department made enquiries with Wolston Correctional Centre and searched the relevant registers in relation to specific sufficiency of search issues raised by the applicant. These searches included recalled files and electronic records.
 - The Office of the Chief Inspector performed searches for particular documents identified by the applicant on external review and located additional documents.
 - The QCS Intelligence Unit searched the applicant's Arunta phone records and located additional documents.
 - The Central Archives Unit searched the Recfind database using the applicant's Integrated Offender Management System number and the file compactus for physical files. Documents were located and processed.

Findings

35. As noted above, the Department located a number of additional documents on external review and released these to the applicant. As a result, a number of the applicant's sufficiency of search issues were informally resolved. The four remaining sufficiency of search issues are dealt with below.

Issue concerning who was advised of the applicant's release from prison

36. The applicant specifically applied for access to correspondence provided to any person in relation to his release from prison and submits that:³⁷
- none of the information the Department released contains information about who was advised of his imminent release from prison

³³ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) 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].

³⁴ The Department provided this information to OIC in its original decision, internal review decision and in emails and search certifications provided to OIC on 6 June 2017 and 30 June 2017.

³⁵ The Department confirmed that it released three files (in full and in part) to the applicant under cover of its letter dated 3 July 2017, labelled File01, File02 and File04 (File03 was comprised of transcripts, which were not sought by the applicant).

³⁶ The Department conveyed this information to the applicant in its internal review decision.

³⁷ As set out in the applicant's internal review application to the Department and his external review application to OIC, and in submissions to OIC dated 11 November 2016 and 5 June 2017 and 11 July 2017. The applicant requested that OIC investigate who released this information and the processes around the release of such information. He submits that the release of such information would constitute misconduct and that the Department is concealing information about this issue. He also believes that a particular person has been fraudulently or incorrectly placed on the Victims Register. OIC explained to the applicant that it does not have jurisdiction to investigate his concerns and I have not addressed these aspects of his submissions in my decision.

- he seeks confirmation about whether a particular named person was notified about his release
- he believes that either the Correctional Centre or another government agency has divulged information to a particular person warning of his imminent release and this information was either grossly inaccurate or incorrectly interpreted by someone who had been provided sensitive information about his incarceration
- he considers OIC should ask QCS to provide all information held by QCS in determining the eligibility of anyone placed on the Victims Register;³⁸ and
- he refers to documents which contain references to QCS' contact with the Victim's Register in support of his submission that QCS notified someone about his release.

37. In its internal review decision, QCS notified the applicant that:

- there are no documents which would indicate that any person was advised of his release from prison; and
- the relevant Probation and Parole Officer confirmed that information relating to the applicant's release from prison was not released to any other person.

38. The applicant essentially seeks confirmation that a particular named person is on the Victims Register and that QCS notified that person about his imminent release from prison. However, it is not necessary, nor appropriate, for me to address these questions or make any findings on whether this information exists. This is because if information about these issues does exist, I am satisfied that it is exempt under schedule 3, section 10(1)(i) of the RTI Act, as explained at paragraph 17 above.

39. In relation to this specific information, I find that:

- the Victims Register is an identifiable system, also known as the '*eligible persons register*' and is established under section 320 of the *Corrective Services Act 2006* (Qld) in relation to violent and sexual offenders
- this system exists for the protection of persons, and more particularly for the protection of victims, the family members of deceased victims, and individuals at risk of violence; and
- disclosure of information concerning whether particular individuals are '*eligible persons*' on the Victims Register or have been contacted through this register could reasonably be expected to prejudice that system.

40. In summary, if offenders are informed of whether particular individuals are '*eligible persons*' on the Victims Register (or not), then this is reasonably likely to undermine the effectiveness of the register overall. In order to function, the register relies on individuals coming forward and applying to be included as '*eligible persons*', and this is unlikely to occur if they consider information about who is on the register will be released under the RTI Act or IP Act.

41. Accordingly, if it does exist, access to this information may be refused under section 47(3)(a) of the RTI Act. In view of this finding, I do not consider it necessary to make a finding on whether this information is nonexistent or unlocatable under section 47(3)(e) of the RTI Act.

³⁸ The QCS website (<http://www.justice.qld.gov.au/corporate/business-areas/queensland-corrective-services/procedures/victims-register-placement-and-removal-of-applicants>) relevantly provides that in accordance with section 320 of the *Corrective Services Act 2006* (Qld), the chief executive is required to maintain a register called the QCS Victims Register, which records the contact details of persons eligible to receive certain information from QCS about a prisoner/offender. This record must also include the prisoners/offenders of interest to the eligible person.

Letter from the applicant to the QCS Official Visitor

42. The applicant sought access to a letter he sent to the QCS official visitor on 15 July 2014 and provided OIC with the first page of the letter as evidence of its existence.³⁹
43. The Department made specific enquiries about this letter with the Office of the Chief Inspector. The Office of the Chief Inspector located, and released, a copy of the Official Visitor's response to the applicant's letter but advised that they do not have a copy of the applicant's letter sent to the Official Visitor.
44. I am satisfied that the requested letter has been or should be in the Department's possession and would be held by the Office of the Chief Inspector. I consider that the Department has taken all reasonable steps to locate the letter in the circumstances. Accordingly, I find that access to the letter may be refused under sections 47(3)(e) and 52(1)(b) of the RTI Act as it is unlocatable.

Other records held by the QCS Official Visitor

45. The applicant sought access to notes or records from the QCS Official Visitor regarding her meeting with the General Manager of Wolston Correctional Centre on 18 July 2014 discussing the contents of his letter, and the Official Visitor's intention to prepare a report to the Director-General of QCS. The applicant has not provided any evidence to support the existence of these documents.
46. The Department made specific enquiries about these documents with the Office of the Chief Inspector. The Office of the Chief Inspector advised that they do not hold any records in relation to this matter.
47. I find that the Department's searches have been appropriately targeted and comprehensive and that the Department has taken all reasonable steps to locate these documents. Accordingly, I find that access to these documents may be refused under section 47(3)(e) of the RTI Act as they are nonexistent or unlocatable.

Applicant's submission to the Parole Board

48. The applicant sought access to his submission to the Parole Board which he believes was sent directly via the '*blue letter*' process on 17 September 2014 and provided OIC with a copy of a letter he wrote to the Parole Board dated 18 September 2014 as evidence of its existence.⁴⁰
49. The Department made enquiries with Wolston Correctional Centre and searches were performed of the relevant register. The Centre advised that no mail had been recorded as being sent to the President of the Parole Board between August 2014 and November 2014. I note that these searches would have identified mail sent on either 17 September 2014 or 18 September 2014 by the applicant. I consider that the relevant Parole Board may hold a copy of this document but I note that QCS is separate to the Parole Board and searches would not have covered any relevant documents in the Board's possession.
50. I am satisfied that if the requested letter was in the possession of QCS, it would have been identified in the searches performed. I consider the Department has taken all reasonable steps to locate the letter. Accordingly, I find that access to the letter may be refused under sections 47(3)(e) and 52(1)(b) of the RTI Act as it is unlocatable.

³⁹ In submissions to OIC on 11 July 2017.

⁴⁰ In submissions to OIC on 11 July 2017. I note the different dates the applicant refers to.

DECISION

51. For the reasons set out above, I find that access to:

- the Intelligence Information can be refused under section 47(3)(a) of the RTI Act as it is exempt information under schedule 3, section 10(1)(i) of the RTI Act.
- the Third Party Information can be refused under section 47(3)(b) of the RTI Act as its disclosure would, on balance, be contrary to the public interest
- any information revealing that a person was notified about the applicant's imminent release from prison or contact with anyone on the Victims Register, if it exists, can be refused as it is exempt under schedule 3, section 10(1)(i) of the RTI Act; and
- the additional documents which the applicant believes exist can be refused under section 47(3)(e) of the RTI Act as they are nonexistent or unlocatable.

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

T Mainwaring
Acting Assistant Information Commissioner

Date: 14 September 2017

APPENDIX

Significant procedural steps

Date	Event
20 October 2016	OIC received the external review application. OIC notified the Department that the external review application had been received and requested various procedural documents.
25 October 2016	OIC received the requested procedural documents from the Department.
2 November 2016	OIC notified the Department and the applicant that the external review application had been accepted. OIC also conveyed a preliminary view to the applicant and invited him to provide submissions supporting his case.
14 November 2016	OIC received submissions from the applicant.
16 December 2016	OIC requested a copy of the documents located in response to the access application and other information from the Department.
20 December 2016	OIC received the requested information from the Department.
16 May 2017	OIC requested further information from the Department.
23 May 2017	OIC conveyed a preliminary view to the applicant and invited him to provide submissions supporting his case. OIC requested further information from the Department.
5 June 2017	OIC received submissions from the applicant.
6 June 2017	OIC received the requested information from the Department.
16 June 2017	OIC requested further information from the Department.
30 June 2017	OIC received the requested information from the Department.
6 July 2017	OIC received further information from the Department.
7 July 2017	OIC provided the applicant with an update on the remaining issues in the review.
11 July 2017	OIC received further submissions from the applicant.