



Decision and Reasons for Decision

Application Number: 311080

Applicant: Gapsa

Respondent: Department of Transport and Main Roads

Decision Date: 12 April 2013

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – GROUNDS ON WHICH ACCESS MAY BE REFUSED – UNLOCATABLE AND NONEXISTENT DOCUMENTS – applicant contends additional documents exist – an agency may refuse access to a document because the document is nonexistent or unlocatable – whether the agency has taken all reasonable steps to locate the documents but the documents cannot be found or do not exist – sections 47(3)(e) and 52 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – GROUNDS ON WHICH ACCESS MAY BE REFUSED – EXEMPT INFORMATION – an agency may refuse access to a document to the extent the document comprises exempt information – information subject to legal professional privilege – whether the information would be privileged from production in a legal proceeding on the ground of legal professional privilege – sections 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – GROUNDS ON WHICH ACCESS MAY BE REFUSED – CONTRARY TO PUBLIC INTEREST INFORMATION – an agency may refuse access to a document to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest – 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 to the Department of Transport and Main Roads (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to a range of information relating to various aspects of his employment with the Department including information about complaints he lodged with the Department.

2. The Department identified 1827 pages responding to the access application and decided to grant full access to 1495 pages, partial access to 11 pages and refuse access to the remaining information.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision to refuse access to information and also contended that the Department had not located all relevant documents.
4. For the reasons set out below, access to the remaining information in issue is refused on the basis that (i) it comprises exempt information as it would be privileged from production in a legal proceeding on the ground of legal professional privilege and (ii) its disclosure would, on balance, be contrary to the public interest. In relation to the additional documents the applicant contends have not been located, the Department has taken all reasonable steps to locate the additional documents and there is a reasonable basis to be satisfied that any additional documents are nonexistent or unlocatable.

Background

5. Significant procedural steps relating to the application and the external review are set out in the appendix to this decision.

Reviewable decision

6. The decision under review is the Department's decision dated 24 May 2012.

Evidence considered

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

Issues for determination

8. The remaining¹ issues for determination in this review are whether:²
 - (i) there is a reasonable basis to be satisfied that the additional documents the applicant contends exist are nonexistent or unlocatable (**sufficiency of search issues**)³
 - (ii) access to information can be refused on the basis that it would be privileged from production in a legal proceeding on the ground of legal professional privilege (**Category A Information**);⁴ and

¹ A number of issues were informally resolved on external review. In relation to the refusal of access issues, the applicant did not contest OIC's view that particular information was irrelevant to or outside the scope of the access application or was a post-application document. The applicant advised OIC that he did not seek access to (i) information about individuals' health, feelings or private concerns (except to the extent this information relates to opinions expressed about the applicant) (ii) personal email addresses or (iii) mobile phone numbers and home phone numbers of other individuals. This information is no longer in issue on external review and is not considered in these reasons for decision. In relation to the sufficiency of search issues, the Department conducted further searches for documents on external review and located a number of additional documents relevant to the access application. To the extent these documents satisfy the sufficiency of search issues raised by the applicant, these sufficiency of search issues are not considered in these reasons for decision.

² During the external review, the Department located a number of additional documents relevant to the access application. Where OIC formed the view that access to any of the additional information could be refused on the basis that (i) it comprises exempt information as its disclosure would be privileged from production in a legal proceeding on the ground of legal professional privilege or (ii) its disclosure would, on balance, be contrary to the public interest, this information forms part of the information in issue which is the subject of this decision.

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

⁴ Sections 47(3)(a), 48 and schedule 3 section 7 of the RTI Act. The Category A Information comprises 353 full pages and eight part pages.

(iii) access to information can be refused on the basis that its disclosure would, on balance, be contrary to the public interest (**Category B Information**).⁵

9. During the external review, the applicant provided OIC with extensive submissions expressing concerns about the Department's processing of his access application, including that:
 - he was not given the opportunity to seek internal review of the Department's decision
 - the Department breached his privacy by sending document retrieval requests to Departmental officers, revealing that the applicant had made an access application; and
 - officers assisting the Department's Right to Information Unit (**RTI Unit**) to process his access application did not hold delegations to perform these tasks.
10. The applicant's submissions on these issues are largely irrelevant to the issues for determination in this review and there is no evidence to indicate that the Department's processing of the access application or conduct on external review was inappropriate. In any event, on external review OIC's role is to conduct a merits review of the decision made by the government agency. The RTI Act provides that the Information Commissioner has power to decide any matter in relation to the access application that could have been decided by the agency under the RTI Act.⁶ To the extent the applicant's submissions on procedural issues are relevant to the issues for determination, I will address them below.

Is there a reasonable basis to be satisfied that the additional documents are nonexistent or unlocatable?

11. Yes, for the reasons that follow.

Relevant law

12. Under the RTI Act, a person has a right to be given access to documents of an agency.⁷ However, this right is subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.⁸ Access to a document may be refused if the document is nonexistent or unlocatable.⁹ 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 the document but it cannot be found.¹⁰ A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.¹¹
13. The RTI Act is silent on how an agency can be satisfied that a document does not exist. However in *PDE and The University of Queensland*,¹² the Information Commissioner explained that, to be satisfied that a document does not exist, an agency must rely on its particular knowledge and experience, having regard to various key factors including:

⁵ Sections 47(3)(b) and 49 of the RTI Act. The Category B Information comprises 60 full pages and 29 part pages.

⁶ Section 105 of the RTI Act.

⁷ Section 23 of the RTI Act.

⁸ As set out in section 47 of the RTI Act.

⁹ Sections 47(3)(e) and 52 of the RTI Act.

¹⁰ Section 52(1)(b) of the RTI Act.

¹¹ Section 52(1)(a) of the RTI Act.

¹² (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*). Although *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld), the requirements of that section are replicated in section 52 of the RTI Act.

- 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 the request relates to.
14. When these factors are properly considered and a conclusion reached that the document does not exist, it may be unnecessary for searches to be conducted. Alternatively, an agency may rely on searches to justify a decision that the document sought does not exist. If an agency relies on searches, all reasonable steps must be taken to locate the requested document. In determining whether all reasonable steps have been taken, regard should be had to the factors listed in *PDE* as set out above.

Findings

Applicant's submissions on the conduct of Departmental officers

15. As noted above, the applicant has raised a number of procedural issues in his submissions to OIC which, in his view, are relevant and should be taken into account in determining the remaining issues in this review. I have carefully considered all of the applicant's voluminous submissions and supporting documents. To the extent the submissions are relevant to the issues for determination, I have addressed them below.
16. In summary, the applicant submits that officers involved in performing searches for documents relevant to his access application were also involved to some degree in his employee complaint matters and that, as a result, these officers have not produced all records and influenced the Department's decision in relation to his access application. He also alleges that senior officers of the Department have:
- interfered with the decision-making process without any delegated authority
 - influenced the conduct of the access application in order to protect their own interests by not retrieving documents which relate to the access application or by highlighting concerns to the Departmental decision-maker about the possible release of documents under the RTI Act; and
 - breached section 177 of the RTI Act by providing false and misleading information to OIC.
17. The applicant contends that, as a result, it is likely that all relevant documents have not been properly identified and considered by the Departmental decision-maker and that this gives rise to a large number of sufficiency of search issues. Despite OIC's request that the applicant direct all queries relating to this review to OIC, the applicant proceeded to make direct contact with officers of the Department and questioned them about the nature of the searches they performed for documents and their involvement in the processing of his access application. The applicant then conveyed this information to OIC as part of his submissions.

18. In his access application, the applicant identified that the requested documents would be located in Lotus Notes, the G drive (general network drive) or H drives (personal drives) of:
 - eighteen individual named officers; and
 - other relevant officers with roles in the Employee Relations and Human Resources Management Unit of the Department.
19. In processing the access application, the Department asked a number of the named officers to perform searches for the relevant documents and to forward the documents to the RTI Unit of the Department. This was appropriate given the nature of the access application and the locations identified by the applicant. The documents were then considered by the delegated decision-maker, together with any concerns expressed by the relevant officers or business units, and were the subject of the Department's decision. It was also appropriate that:
 - the RTI Unit liaised with the relevant business units where the documents were located; and
 - the particular officers involved in creating the documents (who had knowledge of the subject matter and background to the issues covered) identified any possible concerns about releasing the information under the RTI Act.
20. I have carefully considered the information the Department provided to OIC including:
 - information about the processing of the access application including the Department's RTI processing file which consists of all:
 - communications with the applicant
 - consultations and internal communications relating to document search requests; and
 - subsequent responses from relevant divisions of the Department
 - detailed information about the additional searches and enquiries the Department conducted on external review; and
 - search certifications provided by the relevant officers involved in performing searches for documents relevant to the access application.
21. On the information available to me, there is no evidence to support the applicant's submissions set out at paragraph 16 above. I am not satisfied that the Department has provided false or misleading information to OIC or that there has been any inappropriate conduct by Departmental officers in the processing of the access application or on external review as the applicant alleges.

Complaint management file

22. The applicant contends that the Department has not identified documents forming part of a file relating to the management of his complaints (**Complaints Management File**).
23. In relation to the Complaints Management File, the Department made enquiries with a number of relevant officers and provided the following submissions:
 - the Complaints Management File was a physical file and was kept in the relevant Principal Advisor's office within the Office of the General Manager
 - the relevant officer moved to a different building and, as a result, the Complaints Management File cannot be located; and

- attempts to locate the physical file include:
 - looking through all boxes that were packed up and moved across from the previous building
 - going through cupboards in the previous building to ensure no files were left behind
 - checking with records staff to see if the file had been handed to them for archiving; and
 - searching the desks of officers in the relevant section for the file.
24. Other Departmental officers advised that they were not aware of a physical file being created and that the documents relating to this matter were managed electronically. These officers submit that all documents relating to the Complaints Management File were identified and produced during processing of the access application.
25. The Department also submits that:
- the documents relevant to the subject matter were captured by searches conducted by the Legal and Prosecution Services Unit; and
 - on external review additional searches were performed of the case management folder in the network drive of the Human Resources and Governance Unit and no additional documents were located.
26. During the external review, the applicant contacted Departmental officers who he considered may have handled the Complaints Management File. The applicant submits that the information he obtained from these officers conflicts with the information provided to OIC on external review and that some officers have been deliberately dishonest in their responses, stating that *'it is far more probable that the file does exist and is merely not being produced for reasons of unaccountability and secrecy'*.¹³
27. I acknowledge that the Department has provided OIC with conflicting information about whether the Complaints Management File was a physical or electronic file. However, I have carefully considered both the Department and the applicant's submissions and do not consider the information provided by the applicant is inconsistent with the information provided by the Department. In any event, having considered the Category A Information and the information released to the applicant, I am satisfied that the Department has identified a significant number of documents which would likely form part of the Complaints Management File.
28. The Department has conducted comprehensive searches of areas in which the physical file may be located in addition to targeted searches of its electronic records for any relevant documents. Accordingly, I am satisfied that:
- the Department has taken all reasonable steps to locate the Complaints Management File and documents that would fall within the Complaints Management File, whether in electronic or hard copy form; and
 - there is a reasonable basis to be satisfied that the additional information is nonexistent or unlocatable.

Metadata in relation to a file note

29. The Department located and partially released to the applicant a file note dated 12 March 2012. The author of the file note is identified on the first page of the file note

¹³ Applicant's submissions to OIC dated 20 February 2013.

by name and position and this information was released to the applicant. However on external review, the applicant requested access to the metadata about the file note 'to help establish the authorship of the file note'.¹⁴

30. In response to the applicant's submission, the Department made enquiries with the relevant officer and explained that the file note was created by a particular officer following its contents being dictated by another officer. This information (including the names of the particular officers) was conveyed to the applicant. However, the applicant continues to seek access to the metadata about the file note.
31. The RTI Act provides that an access application for a document is not taken to include an application for access to metadata about the document unless the access application expressly states that it does.¹⁵ I am satisfied that the access application in this case did not expressly include metadata about the file note. On this basis, if the metadata about the file note exists, it is not relevant to the scope of the access application and the Department is not required to perform searches to locate this information.

File notes in specific network locations

32. The applicant submits that the Department has not located all relevant documents from two specific locations in G drive. The relevant officer of the Department performed further searches of these locations on external review and advised OIC that no additional documents relevant to the access application exist. The Department also provided OIC with a search certification completed by the relevant officer who performed the searches and a screen print from the relevant network drive which identifies the documents saved in those locations. Based on the information provided by the Department, I am satisfied that the Department has performed the appropriate searches and that no additional documents relevant to the access application exist in these locations.

Documents from the Legal and Prosecution Services Unit

33. The access application included documents in the possession of a particular officer in the Legal and Prosecution Services Unit of the Department. The applicant submits that the particular officer may have only identified the legal files and not searched Lotus Notes or G or H drives for additional documents relevant to the access application.
34. The Department relevantly submits that:
 - the particular officer has left the Department
 - the Executive Director (Legal and Ethical Standards) advised that it was normal practice and an expectation that all lawyers ensure that hard copy files are kept up to date and contain all documents created/received on the subject matter; and
 - accordingly, all documents relevant to the scope of the access application would have been contained on the hard copy file at the time of processing the applicant's access application.
35. I accept the Department's submission as to its recordkeeping practices for these types of documents. I am satisfied that the relevant documents are located on the hard copy file and that no additional documents exist. It is relevant to note that the majority of these documents are subject to legal professional privilege and are dealt with below.

¹⁴ Applicant's submissions to OIC dated 18 July 2012.

¹⁵ Section 28(1) of the RTI Act. Section 28(3) of the RTI Act defines metadata, about a document, as including *information about the document's content, author, publication date and physical location*.

Remaining sufficiency of search issues

36. As set out above at paragraphs 15 to 21, as a result of his concerns about the conduct of Departmental officers, the applicant submits that the Department has not identified a number of additional documents relevant to his access application. As the Department has conducted searches in response to the sufficiency of search issues, it is relevant to consider whether the Department has taken all reasonable steps to locate the additional documents.
37. OIC made enquiries with the Department on several occasions during the external review in response to the sufficiency of search issues. As a result of performing further searches on external review, the Department located a number of additional documents, many of which the Department agreed to release to the applicant. Where required, the Department responded to the applicant's specific submissions about the existence of particular documents and provided OIC with detailed information about how its records are stored and why particular search locations were chosen in relation to particular documents. In deciding the remaining sufficiency of search issues, I do not consider it necessary to deal separately with each of the numerous contentions raised by the applicant, nor the Department's individual responses as to why particular documents do not exist or cannot be located.
38. The Department submits that during the initial processing of the access application:
 - it spent more than 46 hours searching for the requested documents
 - searches were performed by officers ranging from AO5 to PO6 and SO3 level positions
 - searches produced 1,827 pages and 1,495 of these pages were released to the applicant in full; and
 - searches included key word searches of emails and attachments in Lotus Notes and files from network drives.
39. On external review and in response to the sufficiency of search issues raised by the applicant, the Department submits:
 - it performed approximately 14 hours of additional searches
 - it located and agreed to release a number of additional documents to the applicant (either in full or in part)
 - searches were performed by senior officers in most cases
 - the Department performed electronic searches of emails in Lotus Notes and files from network drives by keywords, date, sender and recipient
 - the Department performed physical searches of the Ethical Standards compactus, cupboards, desks of individual officers and boxes which were relocated when staff moved to another location; and
 - where the individual officer named in the access application was no longer with the Department or was on leave, other staff were asked to search the relevant records where possible.
40. In reaching my view on the sufficiency of search issues, I have had regard to:
 - the information in issue in this review, along with the documents already released to the applicant
 - the applicant's submissions on the sufficiency of search issues
 - the Department's submissions particularly in relation to its recordkeeping practices for the types of documents to which the applicant seeks access and explanations as to why particular documents do not exist or cannot be located

- the nature and extent of the searches conducted by the Department in processing the access application and on external review; and
 - the signed certifications provided to OIC by Departmental officers.
41. The Department has spent approximately 60 hours conducting searches for documents relevant to the access application. These searches include physical searches of specific locations and targeted searches of its electronic record management systems using a range of search terms designed to identify all relevant documents. Where particular officers were unavailable to conduct further searches, other officers from the relevant area conducted the necessary searches. Departmental officers also provided signed search certifications which:
- identify the searches performed; and
 - confirm that all documents in their possession have been located and provided to the RTI Unit.
42. I am satisfied that the Department's approach to these searches was appropriate based on the nature of the information requested by the applicant and the Department's recordkeeping practices and organisational structure. I accept the Department's evidence in relation to its search efforts and enquiries. I also accept the search certifications as further evidence that the Department has taken all reasonable steps to find documents. Having reviewed all of the material before me, and in view of the extensive nature of the Department's searches, both in processing the access application and on external review, I am satisfied that:
- the Department has taken all reasonable steps to locate the relevant documents; and
 - there is a reasonable basis to be satisfied that any additional documents do not exist or cannot be located.¹⁶

Is the Category A Information subject to legal professional privilege?

43. Yes, for the reasons that follow.

Relevant law

44. The RTI Act provides that access may be refused to documents to the extent that they comprise exempt information.¹⁷ Schedule 3 of the RTI Act sets out categories of information the disclosure of which Parliament has deemed to be contrary to the public interest, and therefore exempt from disclosure.¹⁸ Schedule 3, section 7 of the RTI Act provides that information will be exempt from disclosure if it would be privileged from production in a legal proceeding on the ground of legal professional privilege. This exemption reflects the requirements for establishing legal professional privilege at common law.¹⁹
45. The general principles of legal professional privilege were summarised by the High Court of Australia in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*²⁰ as follows:

¹⁶ Sections 47(3)(e) and 52 of the RTI Act.

¹⁷ Section 47(3)(a) of the RTI Act.

¹⁸ Section 48(2) of the RTI Act.

¹⁹ *Ozcare and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 May 2011) at [12].

²⁰ (2002) 213 CLR 543 at [9].

It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings...

Findings

Confidential communications

46. The Category A Information generally comprises file notes of conversations and emails together with their attachments. There is no evidence they have been disclosed to the applicant or any other party outside of the relevant units of the Department. I am satisfied the Category A Information can be characterised as confidential communications.

Dominant purpose

47. The dominant purpose is ‘*the ruling, prevailing, or most influential purpose*’²¹ and is to be determined objectively, having regard to the evidence, the nature of the document and the parties’ submissions. Legal advice can involve more than just advising a client about the law—it also includes advice as to ‘*what should prudently and sensibly be done in the relevant legal context*’.²² However, it does not include advice that is predominantly for administrative, financial, personal, commercial or public relations purposes.²³
48. The applicant submits that the communications were created for administrative purposes and not for the dominant purpose of seeking or providing legal advice on the basis that:
- the complaints he lodged required administrative decisions in accordance with the processes for internal complaint management within the public service
 - all parties to an employee complaint must represent themselves and there is no provision for a party to the complaint to engage legal representation; and
 - the documents were created for administrative purposes to assist in the management of an employee complaint and do not attract legal professional privilege.
49. While it may be that parties to an employee complaint must represent themselves, this does not preclude a party from seeking legal advice in relation to a complaint. I acknowledge there are policies which are relevant to the Department’s handling of internal complaints and that the decisions made in relation to the complaints may have been administrative in nature. However, the relevant question is whether the communications in the Category A Information were made for the dominant purpose of seeking and providing legal advice.
50. There is no evidence before me to support the applicant’s submission that the dominant purpose of the communications was administrative in nature. Having carefully reviewed the Category A Information, I am satisfied that the communications were made for the dominant purpose of requesting and providing legal advice in relation to the handling of the applicant’s complaints.

²¹ *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at [416].

²² *Balabel v Air India* [1988] 1 Ch 317 per Lord Justice Taylor at [330] and referred to with approval in *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 at [382].

²³ *Three Rivers District Council v Governor and Company of the Bank of England (No.6)* [2005] 4 All ER 948 at [989]; *Barnes v Commissioner of Taxation* [2007] FCAFC 88 at [8] and *Waterford v Commonwealth* (1987) 163 CLR 54 at [77] and [85].

Professional relationship and independence

51. Legal professional privilege may protect communications between salaried employee legal advisers of a government department or statutory authority and his/her employer as the client (including communications through other employees of the same employer) provided there is a professional relationship of legal adviser and client, which secures to the advice an independent character, notwithstanding the employment.²⁴
52. The Category A Information comprises communications between officers of the Legal and Prosecution Services Unit of the Department (**Departmental legal officers**) and other Departmental officers who were involved in handling the relevant issues.
53. The applicant submits that the Departmental legal officers do not have the necessary degree of independence because they are not admitted to practice and do not hold current practicing certificates (according to his searches of the Queensland Law Society website). Holding a current practising certificate is not a necessary requirement for establishing the requisite degree of independence.²⁵
54. The applicant refers to information from the OIC website²⁶ on the application of legal professional privilege which explains that *'[d]espite any legal qualifications, Directors cannot provide independent legal advice to a company because the Director is the "mind" of the company and cannot advise itself'*. Based on this, the applicant submits that the Director (Legal Services) and Assistant Director (Legal Services) of the Department are unable to provide independent legal advice and given their job titles, there is a *'real perception of conflict between protecting the department from liability and meeting its legislative obligations'* under the RTI Act.²⁷ The applicant's submissions on this issue are misguided. The Director (Legal Services) and Assistant Director (Legal Services) are employees in the legal services unit of a government department and are not company directors.
55. The applicant submits that the Departmental legal officers lacked the necessary degree of independence for the following reasons:
 - the Director (Legal Services) and Assistant Director (Legal Services) of the Department were involved in the management of his complaints and processing of the access application
 - these officers supervised another legal officer within the Legal and Prosecution Services Unit who provided legal advice in relation to the management of the applicant's complaints
 - in these circumstances, the supervisory relationship gives rise to a strong perception of control and direct interference in the duties of the legal officer under supervision
 - the legal officer providing the advice was affected by personal loyalties and interests; and
 - the Department relied on legal professional privilege to prevent the exposure of any deficiencies and to use secrecy to hinder the administration of justice.
56. On the information available to me, there is no evidence to support the applicant's contentions that the Departmental legal officers lacked the necessary degree of independence.

²⁴ *Waterford v Commonwealth* (1987) 163 CLR 54.

²⁵ *Potter and Brisbane City Council* (1994) 2 QAR 37 at [26].

²⁶ <http://www.oic.qld.gov.au/annotated-legislation/right-to-information/schedule-3-exempt-information/7-information-subject-to-legal-professional-privilege/legal-professional-privilege-at-common-law/application-of-legal-professional-privilege>.

²⁷ Applicant's submissions to OIC dated 20 February 2013.

57. Based on my review of the Category A Information and the information provided to OIC by the Department, I am satisfied that the relevant Departmental officers:

- were salaried government legal officers engaged in legal work
- provided legal advice with the requisite degree of independence; and
- gave legal advice to the Department which attracts legal professional privilege.

Waiver and the improper purpose exception

58. In some cases, communications may not be subject to legal professional privilege because privilege has been waived, either expressly or impliedly, or the improper purpose exception applies. There is no evidence before me to indicate that legal professional privilege has been waived in relation to the Category A Information or that the improper purpose exception applies.

Public interest factors favouring disclosure

59. The applicant identifies several public interest factors which he believes are relevant and favour disclosure of the Category A Information. Parliament considers disclosing the types of information identified in schedule 3 of the RTI Act would, on balance, be contrary to the public interest.²⁸ As I am satisfied that the Category A Information is exempt, the applicant's submissions on public interest factors in relation to the Category A Information are not relevant and I have not taken them into account.

Would disclosure of the Category B Information, on balance, be contrary to the public interest?

60. Yes, for the reasons that follow.

Relevant law

61. An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.²⁹ The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest³⁰ and explains the steps that a decision-maker must take³¹ in deciding the public interest as follows:

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

Findings

62. The applicant sought access to a range of documents relating to his employment with the Department, his work performance, workplace accommodation, participation in

²⁸ Section 48(2) of the RTI Act.

²⁹ Section 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. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

³⁰ Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.

³¹ Section 49(3) of the RTI Act.

work-based activities, and information about complaints he made to the Department. The Category B Information can be generally characterised as comprising:

- information relating to complaints about other individuals
- details of concerns raised and/or complaints made about the applicant by other employees
- information about other employees' health and feelings about issues in the workplace and concerns about the complaint investigation process (where it relates to opinions expressed about the applicant)
- responses to some of these concerns and/or complaints by managers; and
- names and other identifying information such as job titles of employees in the context of complaints or concerns about workplace issues.

63. No irrelevant factors arise in the circumstances of this case. I will now consider the relevant factors favouring disclosure and nondisclosure of the Category B Information.

Enhance government accountability and reveal reasons for a decision

64. The applicant submits that he wishes to understand the reasons for the actions, behaviours and decisions of certain officers but has been unable to reach an informed view about the integrity, impartiality, independence and reasonableness of actions to which the information relates.
65. I have considered whether disclosing the Category B Information could reasonably be expected to enhance the Government's accountability³² and reveal the reason for a government decision and any background or contextual information that informed the decision.³³
66. The Category B Information largely relates to concerns and complaints made in the workplace about the conduct of officers (including the applicant in some cases) and a small part of the information relates to the Department's response to the issues raised. I agree that disclosing the Category B Information to the applicant may provide him with a more comprehensive understanding of the concerns raised in the workplace, the impact these concerns had on individual staff members and steps taken by the Department to resolve some of the issues raised. However, in many cases, the Category B Information relates primarily to other individuals and not the applicant. The Department has provided the applicant with a significant amount of information relevant to his access application and complaints and I consider that these public interest factors have been significantly advanced by the release of that information. Given the limited nature of the remaining information, I afford these factors only moderate weight.

Contribute to the administration of justice and advance the fair treatment of individuals

67. The applicant submits that the Department has not complied with complaint management policies and recordkeeping and, as a result, he has been denied access to information that enables him to form an opinion that the Department has treated him fairly, reasonably and without bias. The applicant submits that disclosing the Category B Information could reasonably be expected to:
- advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies;³⁴ and

³² Schedule 4, part 2, item 1 of the RTI Act.

³³ Schedule 4, part 2, item 11 of the RTI Act.

³⁴ Schedule 4, part 2, item 10 of the RTI Act.

- contribute to the administration of justice.³⁵

68. A small amount of the Category B Information relates to the Department's responses to the employee concerns and/or complaints, particularly in relation to the applicant. Having carefully reviewed the Category B Information, I do not consider that its disclosure could reasonably be expected to further these public interest considerations and they do not apply in the circumstances of this case.

Personal information and privacy

69. Some of the Category B Information is about the applicant and comprises his personal information.³⁶ This gives rise to a factor favouring disclosure.³⁷ To the extent the Category B Information is the applicant's personal information, I afford this factor significant weight. However, this factor must be weighed against other relevant factors favouring nondisclosure of the Category B Information.

70. The Category B Information is also the personal information of others. The nature of this information is such that it is not possible to separate the applicant's personal information from the personal information of others. As a result, I have considered whether disclosing the Category B Information could reasonably be expected to:

- prejudice the protection of an individual's right to privacy;³⁸ and
- cause a public interest harm as it would disclose personal information of a person.³⁹

71. Generally, information relating to the day-to-day work duties and responsibilities of a public service officer may be disclosed under the RTI Act, despite it falling within the definition of personal information. However, agency documents can also contain personal information of public servants which is not *routine* work information.⁴⁰ Although the Category B Information appears in a workplace context, it comprises individuals' personal accounts of and emotional reactions to events in the workplace and concerns of a sensitive nature which were conveyed to management. I consider it is not related wholly to the routine day-to-day work activities of a public service officer and is not routine personal work information. It is then relevant to consider the extent of the harm that could result from disclosing the personal information of other individuals under the RTI Act. Given the sensitive nature of the Category B Information, the extent of the public interest harm that could be anticipated from disclosure is quite significant.

72. If disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy, a public interest factor favouring nondisclosure will arise.⁴¹ The Category B Information is sensitive and highly personal in nature as it identifies other individuals in the context of workplace issues and relates to their health, feelings and concerns of a private nature. Its disclosure under the RTI Act would be a significant intrusion into the privacy of these individuals.

³⁵ Schedule 4, part 2, items 16 and 17 of the RTI Act.

³⁶ *Personal information* is defined in section 12 of the *Information Privacy Act 2009* (Qld) as *information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*

³⁷ Schedule 4, part 2, item 7 of the RTI Act.

³⁸ Schedule 4, part 3, item 3 of the RTI Act.

³⁹ Schedule 4, part 4, section 6(1) of the RTI Act.

⁴⁰ *Underwood and Department of Housing and Public Works* (Unreported, Queensland Information Commissioner, 18 May 2012) at [60].

⁴¹ Schedule 4, part 3, item 3 of the RTI Act.

73. Given the nature of the Category B Information and the context in which it appears, I afford significant weight to these factors favouring nondisclosure.

Prejudice the Department's management function

74. As some of the Category B Information was conveyed to the Department by employees in the context of raising workplace concerns and comprises responses to some of these concerns by managers, I have also considered whether its disclosure could reasonably be expected to prejudice the Department's management function.⁴²
75. I am satisfied that disclosing the Category B Information to other individuals under the RTI Act is likely to make employees reluctant to raise such concerns and express feelings to management in the future. It is reasonable to expect that this would significantly prejudice the Department's ability to effectively manage staffing issues in the future. For these reasons, I afford this factor significant weight in the circumstances.
76. The applicant submits that disclosing the Category B Information would not prejudice the Department's management function or make employees reluctant to raise concerns or express feelings to management in the future. He submits that disclosing the Category B Information would make staff accountable for their behaviour and that *'maintaining a veil of secrecy in this instance shall encourage further, future inappropriate behaviour of the sort that I have experienced'*.⁴³ While I acknowledge the applicant has concerns about the Department's management of his complaints and other issues within the workplace, I do not consider that this alleviates the harm that could reasonably be expected to result from disclosing the Category B Information.

Other factors

77. The applicant submits that disclosing the Category B Information could reasonably be expected to:
- allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official⁴⁴
 - reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct;⁴⁵ and
 - reveal that the information was incorrect, misleading, unfairly subjective or irrelevant.⁴⁶
78. I have addressed above the applicant's submissions about the conduct of Departmental officers in the processing of his access application and on external review. Based on my review of the Category B Information, I am not satisfied that these factors are relevant to deciding the balance of the public interest in this case.

Balancing the relevant factors

79. Disclosing some of the Category B Information could reasonably be expected to enhance the Government's accountability and reveal the reasons for a government decision and I afford moderate weight to these factors. To the extent the Category B Information is the applicant's personal information, this also gives rise to a public interest factor favouring disclosure to which I afford significant weight.

⁴² Schedule 4, part 3, item 19 of the RTI Act.

⁴³ Applicant's submissions to OIC dated 20 February 2013.

⁴⁴ Schedule 4, part 2, item 5 of the RTI Act.

⁴⁵ Schedule 4, part 2, item 6 of the RTI Act.

⁴⁶ Schedule 4, part 2, item 12 of the RTI Act.

80. However, the Category B Information is also the personal information of other individuals and its disclosure could reasonably be expected to prejudice the protection of their right to privacy and cause a public interest harm. I am also satisfied that disclosing the Category B Information could reasonably be expected to prejudice the Department's management function. Given the sensitive nature of the Category B Information, and the context in which it appears, I consider these factors warrant significant weight and outweigh the factors favouring disclosure.
81. For these reasons, disclosing the Category B Information would, on balance, be contrary to the public interest.

DECISION

82. As the Department located additional documents on external review, I vary the decision under review. For the reasons set out above, I find that:
- there is a reasonable basis to be satisfied that the Department has taken all reasonable steps to locate relevant documents and any additional documents do not exist or cannot be located⁴⁷
 - access to the Category A Information can be refused as it comprises exempt information on the basis that it is subject to legal professional privilege;⁴⁸ and
 - access to the Category B Information can be refused on the basis that its disclosure would, on balance, be contrary to the public interest.⁴⁹
83. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Tara Mainwaring
Acting Assistant Information Commissioner

Date: 12 April 2013

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

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

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

APPENDIX

Significant procedural steps

Date	Event
22 March 2012	The Department received the access application.
24 May 2012	The Department made its decision under the RTI Act.
18 June 2012	OIC received the application for external review together with supporting information.
19 June 2012	OIC asked the Department for a number of procedural documents.
21 June 2012	OIC received the procedural documents from the Department together with the information in issue in this review.
28 June 2012	OIC called the applicant to confirm receipt of the external review application.
4 July 2012	OIC notified the Department and the applicant that the external review application had been accepted. OIC asked the applicant to provide a submission by 20 July 2012 identifying all of the sufficiency of search issues he wished to raise on external review.
18 July 2012	OIC received the applicant's submissions.
10 August 2012	OIC asked the Department to provide submissions by 31 August 2012 addressing a number of issues and detailing the nature and extent of its searches for documents relating to the access application.
14 August 2012	The Department requested an extension of time to provide these submissions.
16 August 2012	OIC received further submissions from the applicant. OIC agreed to extend the time for the Department to provide submissions until 7 September 2012.
20 August 2012	OIC called the applicant to provide an update on the status of the external review.
27 August 2012	OIC conveyed a view to the Department in relation to some of the information it claimed was subject to legal professional privilege and invited the Department to provide submissions supporting its case by 10 September 2012 if it did not accept the view.
28 August 2012	The Department requested an extension of time to provide these submissions. OIC agreed to extend the time for the Department to provide submissions until 17 September 2012.
7 September 2012	OIC called the applicant to provide an update on the status of the external review.
14 September 2012	OIC received the Department's submissions.
12 October 2012	OIC called the applicant to provide an update on the status of the external review.
17 October 2012	OIC called the Department to provide an update on the status of the external review and to request a copy of the information it identified as duplicate documents.
29 October 2012	OIC received the requested documents from the Department.
31 October 2012	OIC forwarded a copy of the applicant's submissions to the Department and asked the Department to provide submissions supporting its case by 15 November 2012.
6 November 2012	OIC received the Department's submissions.
21 November 2012	OIC conveyed a view to the applicant in relation to the sufficiency of search

Date	Event
	issues in this review and invited the applicant to provide submissions supporting his case by 5 December 2012 if he did not accept OIC's view.
22 November 2012	OIC received the applicant's submissions. The applicant agreed to reduce the number of sufficiency of search issues for consideration on external review to around 55 issues.
29 November 2012	OIC confirmed the remaining sufficiency of search issues with the applicant and asked the Department to provide submissions addressing the sufficiency of search issues by 21 December 2012.
19 December 2012	The Department requested an extension of time to provide its submissions. OIC agreed to extend the time for the Department to provide submissions until 7 January 2013.
7 January 2013	The Department requested a further extension of time to provide its submissions. OIC agreed to extend the time for the Department to provide submissions until 14 January 2013.
10 January 2013	OIC provided the applicant with an update on the status of the external review.
11 January 2013	OIC conveyed its view to the Department that some additional information could be released to the applicant and asked the Department to provide a response by 22 January 2013.
14 January 2013	OIC received the Department's submissions in response to the sufficiency of search issues (including a detailed schedule responding to each of the issues raised by the applicant) and a copy of the additional documents located by the Department.
15 January 2013	The Department requested an extension of time to provide its submissions on the additional information for release to the applicant. OIC agreed to extend the time for the Department to provide submissions until 25 February 2013.
21 January 2013	OIC asked the Department to identify the information it did not agree to release in the additional documents located on external review.
23 January 2013	OIC received the requested submissions from the Department.
31 January 2013	OIC conveyed its view to the applicant on the issues in the review and invited the applicant to provide submissions supporting his case by 15 February 2013 if he did not accept the view. OIC provided the applicant with a copy of the Department's schedule addressing each of the sufficiency of search issues. OIC provided the Department with an update on the status of the external review and asked the Department to provide the applicant with the additional information it had agreed to release.
4 February 2013	The applicant asked OIC to provide him with a copy of all of the Department's submissions that OIC considered in reaching its view.
5 February 2013	OIC explained to the applicant that the relevant information which had been taken into account in reaching OIC's view was set out in the letter dated 31 January 2013 and in the Department's schedule which was provided to him. The Department confirmed that the additional information had been released to the applicant.
6 February 2013	OIC conveyed its view to the applicant in relation to three additional pages which had been inadvertently omitted from consideration in the letter dated 31 January 2013. OIC invited the applicant to provide submissions supporting his case by 15 February 2013 if he did not accept OIC's view in relation to these pages.

Date	Event
	The applicant identified a number of additional documents which were identified for release to him but which he did not receive from the Department. The applicant also requested that OIC provide him with the names and positions of the officers who completed the relevant searches for documents relevant to his access application. The applicant sent similar correspondence to the Department.
8 February 2013	<p>OIC provided the applicant with (i) a list of the Departmental officers who completed searches for documents relevant to the access application and provided search certifications to OIC and (ii) an updated schedule identifying all of the documents considered by OIC. OIC also requested that the applicant direct all queries relating to this review to OIC and not the Department's RTI Unit.</p> <p>OIC provided the Department with an updated schedule identifying all of the documents considered by OIC and asked the Department to release additional information to the applicant.</p>
11 February 2013	The Department contacted OIC to clarify OIC's view on a number of the documents in issue.
14 February 2013	The applicant requested an extension of time to respond to OIC's view until 20 February 2013. OIC agreed to the requested extension.
15 February 2013	The Department confirmed that it had released the additional information to the applicant.
20 February 2013	OIC received the applicant's submissions and supporting documents in response to OIC's view.
21 February 2013	OIC asked the Department to provide some additional information in relation to a number of the sufficiency of search issues raised by the applicant.
28 February 2013	The Department provided the requested information to OIC.
15 March 2013	OIC obtained some additional background information from the Department relevant to the review.