



Decision and Reasons for Decision

Citation:	<i>F60XCX and Office of the Queensland Parliamentary Counsel</i> [2016] QICmr 42 (13 October 2016)
Application Number:	312167
Applicant:	F60XCX
Respondent:	Office of the Queensland Parliamentary Counsel
Decision Date:	13 October 2016
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION ACT - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - whether information would be privileged from production in a legal proceeding on the ground of legal professional privilege - section 9A of the <i>Legislative Standards Act 1992</i> (Qld) - whether exempt - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(a) and 48 and schedule 3, section 7 of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION ACT - REFUSAL OF ACCESS - EXEMPT INFORMATION - INVESTIGATION BY PRESCRIBED CRIME BODY - whether information obtained, used or prepared for an investigation by a prescribed crime body, or other agency, in performing the prescribed functions of the prescribed crime body - whether exempt - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(a) and 48 and schedule 3, section 10(4) of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION ACT - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - applicant contends additional documents exist - whether the agency has taken all reasonable steps to locate the documents - whether access may be refused on the basis that the documents do not exist or are unlocatable - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL TO DEAL WITH ACCESS APPLICATION - EFFECT ON AGENCY'S FUNCTIONS - whether the work involved in dealing with application would, if carried out, substantially and unreasonably divert resources of agency from their use</p>

**by agency in performing its functions - sections 60 and 61 of
the *Information Privacy Act 2009* (Qld)**

REASONS FOR DECISION

Summary

1. The applicant made two separate access applications under the *Information Privacy Act 2009* (Qld) (**IP Act**) to the Department of the Premier and Cabinet (**Department**) and the Office of the Queensland Parliamentary Counsel (**OQPC**)¹ for access to a wide range of information about the applicant's employment at OQPC and the ending of that employment.²
2. The Department had a delegation from OQPC to process the application to OQPC.³ The Department processed both access applications, was the contact agency for both external reviews, and made one decision in respect of both access applications. The decision considered 5943 pages in total, 1452 pages of which were located by OQPC officers. In relation to these 1452 pages, the Department decided:
 - grant access to 723 pages and parts of 235 pages; and
 - refuse access to 494 pages and the remainder of the 235 part pages.⁴
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the decision to refuse access to information, and also contended that all relevant documents had not been located.
4. Given the scope of the two applications, the OQPC's delegation to the Department regarding the OQPC application and the Department's processing of both applications, OIC determined that it was most efficient and convenient for both participants and OIC to address issues arising in the two external reviews concurrently.⁵ However, given that two access applications to two entities that comprise separate agencies for the purpose of the IP Act have been considered on external review, two decisions are required. This decision relates to the Department's decision insofar as it involves the application to OQPC.
5. For the reasons set out below, I set aside the Department's decision regarding the applicant's application to OQPC, and find that OQPC may refuse:
 - access to the remaining information in issue that was refused in the Department's decision and some information located on external review on the ground that the information is exempt information

¹ OQPC is a statutory authority established by section 5 of the *Legislative Standards Act 1992* (Qld) (**LS Act**), and therefore a public authority comprising an agency for the purpose of access applications under the IP Act—section 17 of the IP Act and sections 14 and 16 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

² The applicant initially set out a scope for the OQPC application in correspondence dated 27 May 2014 (received by OQPC on 4 June 2014, and by the Department on 18 June 2014). The Department and applicant agreed to exclude certain information from the scope of both applications in emails on 7 July 2014.

³ Given this background, for ease of reference throughout the decision, I have referred to steps taken by the Department as delegate of OQPC as having been simply taken by the Department.

⁴ Note—of this information, 118 pages and 51 part pages were considered outside the scope of the information or irrelevant to it, while the remainder were considered exempt information.

⁵ The manner in which an external review is conducted is, subject to the IP Act, at the Information Commissioner's discretion, and the overriding obligation on the Information Commissioner is to ensure that the procedures adopted in an external review are fair to all participants—sections 108(1) and 110(2)(a) of the IP Act.

- access to certain documents the applicant contends OQPC failed to locate on the ground that they are nonexistent or unlocatable; and
- to process, or further process, the remaining documents located on external review on the basis that the work involved in dealing with these documents would substantially and unreasonably divert resources from their use in the performance of OQPC's functions.

Background

6. Significant procedural steps relating to the applications and external reviews are set out in the Appendix.

Reviewable decision

7. The decision under review is the Department's decision dated 20 August 2014 insofar as that decision relates to the applicant's application to OQPC.

Evidence considered

8. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and Appendix).

Information in issue

9. On external review, OIC advised the applicant⁶ that it would not consider seven categories of information⁷ any further in the two reviews, unless the applicant advised OIC otherwise. As the applicant did not address any of the seven categories of information in subsequent correspondence⁸ or telephone discussions,⁹ OIC confirmed to the applicant that they no longer formed part of the information in issue in these reviews.¹⁰ Further, in a telephone conversation with an OIC staff member,¹¹ the applicant advised that he did not seek an eighth category of information.¹²
10. The rest of the information refused in the Department's decision remains in issue,¹³ as do approximately 11,113 pages located on external review. In the following reasons, I have referred to this information as Category A Information (comprising 343 pages and 3 part pages) and Category B Information (comprising 3 pages), or have addressed it in terms of the substantial and unreasonable diversion of resources issue.

⁶ In OIC's preliminary view dated 13 August 2015.

⁷ That is, categories of information which the applicant had stated (to the Department and/or OIC) that he did not seek, or which OIC considered he was unlikely to seek, in light of these statements. The seven categories were:

- i) information which is irrelevant to or outside the scope of the access application
- ii) personal information of other individuals, comprising details such as names, details of work performance, pay level and leave
- iii) work mobile telephone numbers
- iv) the name of draft legislation, details about draft legislation and copies of draft legislation
- v) a credit card number, username and password
- vi) information relating to consultation with an OQPC officer by another agency from which the applicant had requested documents; and
- vii) a letter from Crown Law confirming its retainer, including its schedule of fees.

The pages and part pages corresponding to these seven categories were identified in the appendix to OIC's preliminary view to the applicant dated 13 August 2015.

⁸ Including the applicant's submissions dated 20 August 2015 and 29 August 2015.

⁹ On 21 August 2015, 27 August 2015, 28 August 2015 and 3 September 2015.

¹⁰ Letter to the applicant dated 4 September 2015.

¹¹ On 27 August 2015.

¹² That is, viii) documents relating to the applicant's workers compensation matters.

¹³ Apart from pages and part pages of that information that the Department released to the applicant during the external reviews.

Issues for determination

11. The issues remaining for determination in these reviews are whether:

- access to the **Category A Information** may be refused on the ground that it is exempt information, namely information that would be privileged from production in a legal proceeding on the ground of legal professional privilege
- access to the **Category B Information** may be refused on the ground that it is exempt information, namely information 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
- access to certain documents that the applicant contends should have been located may be refused on the ground that they are nonexistent or unlocatable; and
- OQPC may refuse to process, or further process, approximately 11,113 pages located on external review, on the basis that the work involved in dealing with these documents would substantially and unreasonably divert resources from their use in the performance of OQPC's functions.

Category A Information

12. The Category A Information comprises 343 pages and 3 part pages.¹⁴

Relevant law

13. The IP Act confers on an individual a right to access documents of an agency, to the extent they contain the individual's personal information.¹⁵ This right of access is subject to limitations, including grounds for refusal of access.¹⁶ One ground for refusal of access is if the information sought comprises exempt information.¹⁷
14. Relevantly, information is exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege (**LPP**).¹⁸ This exemption reflects the requirements for establishing LPP at common law.¹⁹ Therefore, the exemption requires an examination of how the common law principles of LPP apply.
15. At common law, LPP attaches to confidential communications between a client and their lawyer, made for the dominant purpose of giving or obtaining legal advice or the provision of legal services.²⁰ When these requirements are met, LPP is established. Qualifications

¹⁴ That is, 298 pages and 3 part pages considered in the Department's decision and 38 pages located during the external review (which were set out in the appendix to OIC's preliminary view to the applicant dated 13 August 2015 and letter to the Department of the same date); and a further 7 pages subsequently located on external review (referred to in the Department's letter to OIC dated 5 April 2016 and OIC's preliminary view to the applicant dated 26 April 2016).

¹⁵ Section 40(1)(a) of the IP Act. Section 12 of the IP Act defines personal information 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*'.

¹⁶ Grounds for refusal of access are set out in section 47 of the RTI Act. Section 67(1) of the IP Act provides that access to information may be refused under the IP Act on the same grounds as in section 47 of the RTI Act.

¹⁷ Sections 47(3)(a) and 48 of the RTI Act.

¹⁸ Schedule 3, section 7 of the RTI Act.

¹⁹ The Electoral and Administrative Review Commission, *Report on Freedom of Information*, Report No 90/R6 (1990) at [7.152] states that '[t]he exemption incorporates the common law concept of legal professional privilege'. This statement was confirmed in the context of the RTI Act in *Ozcare and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 May 2011) at [12].

²⁰ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [9].

and exceptions to LPP²¹ may, in particular circumstances, affect the question of whether information attracts or remains subject to it.

16. In the present circumstances, it is also relevant to note that section 9A of the LS Act provides that confidential communications between OQPC²² and its clients²³ are subject to LPP,²⁴ if they are made in or for the performance of or incidental to particular functions—including drafting government bills and providing advice when doing so.²⁵ I consider that section 9A of the LS Act is a reflection of the common law principles of LPP, and thus I must turn my mind to the application of the common law principles of LPP in any event.²⁶

Department's position

17. The Department considers that the Category A information is subject to legal professional privilege.²⁷

Applicant's submissions

18. In relation to LPP, the applicant submits²⁸ that:

I find it hard to believe that all the documents identified in Table 8^[29] attract legal professional privilege. It is difficult for me to make specific submissions about the documents without even knowing the general nature of each document. I would like these documents to be more closely scrutinised.

19. The applicant has not made any further submissions about LPP, except to confirm that he does not accept OIC's preliminary views in this regard.³⁰

Findings

20. In relation to the applicant's statement that it '*is difficult for [him] to make specific submissions about the documents without even knowing the general nature of each document*', I note that:

- there are limitations on the amount of detail OIC can use to describe the Category A Information, in view of the prohibitions in the IP Act on OIC disclosing information which is claimed to be exempt information;³¹ and

²¹ Such as waiver or improper purpose.

²² The LS Act establishes OQPC and sets out its functions: sections 5 and 7 of the LS Act. These include the drafting of government bills and the provision of certain types of advice to Ministers and government entities when doing so: section 7(a) and (g) of the LS Act. The definition of '*government entity*' in schedule 1 of the LS Act refers to the definition in section 24 of the *Public Service Act 2008* (Qld), which includes—at section 24(1)(a)—a department.

²³ Which section 7(a), (b), (g) and (i) of the LS Act indicate are Ministers, other members of Parliament and government entities. This is supported by the examples provided at section 9A(2) of the LS Act.

²⁴ Section 9A(2) of the LS Act.

²⁵ Section 9A(1) of the LS Act, which refers to the functions set out in section 7(a) to (i) of the LS Act.

²⁶ See also *F60XCX and Department of Natural Resources and Mines* [2015] QICmr 17 (27 July 2015) at [29].

²⁷ Decision dated 20 August 2014 (at page 17); letter to OIC dated 3 August 2015; and letter to OIC dated 5 April 2016.

²⁸ Submission dated 29 August 2015.

²⁹ Of OIC's letter to the applicant dated 13 August 2015.

³⁰ See the applicant's submissions dated 12 June 2016, 3 July 2016 and 12 July 2016, and the telephone discussion between an OIC officer and the applicant on 1 July 2016.

³¹ See sections 120 and 121 of the IP Act.

- also, in view of the relatively large volume of the Category A Information, OIC has employed a degree of generalisation in its identification and discussion of this information—rather than identifying the general nature of each document.³²
21. I have carefully considered the nature and purpose of the communications contained in 38 pages of the Category A Information,³³ and the context in which they occurred. In relation to these 38 pages, I am satisfied that:
- OQPC provides legal advice and legal drafting services when drafting government bills
 - the former Department of Environment and Resource Management (**DERM**) engaged OQPC to advise on and draft legislation
 - the information in the 38 pages comprises confidential communications; and
 - the communications:
 - are between OQPC as legal advisor and DERM as client; and
 - were for the dominant purpose of seeking and/or providing instructions and advice regarding the drafting of legislation.
22. I have also carefully considered the nature and purpose of the communications contained in the remaining Category A Information, and the context in which they occurred. I am satisfied that:
- Crown Law was engaged by the Department and OQPC to provide legal services regarding issues relating to the applicant's employment
 - the information in the remaining Category A Information comprises confidential communications; and
 - the communications:
 - are between the Department and/or OQPC as client and Crown Law as legal advisor; and
 - were for the dominant purpose of seeking and/or providing legal advice regarding issues relating to the applicant's employment.
23. In view of the above, I am satisfied that each of the requirements of LPP is satisfied in respect of the Category A Information, and therefore this information is subject to LPP.
24. Further, I am satisfied that no exception or qualification to LPP applies. In this regard, I note that the applicant did not raise any exception or qualification to LPP in his submissions, and that there is no other evidence before me to suggest that any such qualification or exception may be relevant.
25. In these circumstances, I find that access to the Category A Information can be refused on the ground that it is subject to the LPP exemption, and is therefore exempt information.³⁴

³² This is in keeping with the approach to voluminous applications endorsed by Woodward J of the Federal Court of Australia in *News Corporation Ltd & Ors v National Companies and Securities Commission* (1986) 57 ALR 550, 562, in which Woodward J observed that '... if the Freedom of Information legislation is to remain workable, it must be open to a respondent, and to the AAT [as the independent review tribunal], to deal with large numbers of documents with a degree of generalization appropriate to the case.'

³³ That is, the 38 pages located during the external review identified in the appendix to OIC's preliminary view to the applicant dated 13 August 2015.

³⁴ Section 67(1) of the IP Act and section 47(3)(a) and schedule 3, section 7 of the RTI Act.

Category B Information

26. The Category B Information comprises 3 pages.³⁵

Relevant law

27. As noted above,³⁶ one ground for refusal of access is if the information sought is exempt information.³⁷ Relevantly, information may be refused on the ground that it is exempt information if it was obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in the performance of the prescribed crime body's prescribed functions.³⁸ The only exception to this exemption is where the information is 'about' the applicant and the investigation is finalised.³⁹

28. Accordingly, information will be subject to the prescribed crime body exemption if:

- the information was obtained, used or prepared for an investigation
- the investigation was conducted by a prescribed crime body, or another agency, in the performance of a prescribed function of the prescribed crime body; and
- the exception to the exemption does not apply.

Findings

Was the Category B Information obtained, used or prepared for an investigation?

29. Yes. Having considered the contents of the 3 pages that comprise the Category B Information, I am satisfied that these pages comprise information which was either obtained, used or prepared for an investigation arising out of a complaint by the applicant to the Public Service Commission (**PSC**).

Was the investigation conducted by a prescribed crime body, or another agency, in the performance of a prescribed function of the prescribed crime body?

30. Yes, for the reasons that follow.

31. Under the RTI Act, the Crime and Corruption Commission (**Commission**)⁴⁰ is a prescribed crime body.⁴¹ The Commission's prescribed functions⁴² include corruption

³⁵ The 3 pages were located in the external review. They were identified in the appendix to OIC's preliminary view to the applicant dated 13 August 2015 and letter to the Department of the same date.

³⁶ At paragraph 13.

³⁷ Sections 47(3)(a) and 48 of the RTI Act.

³⁸ Schedule 3, section 10(4) of the RTI Act.

³⁹ Schedule 3, section 10(6) of the RTI Act.

⁴⁰ The Commission was, at the time of the investigation, called the Crime and Misconduct Commission. The *Crime and Misconduct Act 2001* (Qld), which established this Commission, was amended by the *Crime and Misconduct and Other Legislation Amendment Act 2014* (Qld) (**CMOLA Act**). Among other things, the amendments changed the name of the Act to the *Crime and Corruption Act 2001* (Qld) (**CC Act**) and the name of the Commission to the Crime and Corruption Commission. For ease of reference, these reasons refer to the CC Act and Commission.

⁴¹ See definition of *prescribed crime body* in schedule 3, section 10(9) of the RTI Act.

⁴² See definition of *prescribed functions* in schedule 3, section 10(9) of the RTI Act.

functions.⁴³ These functions involve dealing with complaints about corrupt conduct⁴⁴ in an appropriate way.⁴⁵

32. While the Commission has primary responsibility for dealing with complaints about corrupt conduct,⁴⁶ it may refer a complaint to a public official, including the chief executive officer of a unit of public administration,⁴⁷ to be dealt with by them, or dealt with by them in cooperation with the Commission, subject to the Commission's monitoring role.⁴⁸ The public official has a responsibility to deal with a complaint that is referred to it by the Commission,⁴⁹ subject to the Commission's monitoring role.⁵⁰
33. The Department advised OIC that the Category B Information relates to an investigation conducted by PSC, and provided OIC with the following information about the investigation from PSC:⁵¹
 - [T]he PSC received a complaint from [the applicant] which was assessed as including allegations that if proven, could constitute potential official misconduct (in line with the applicable definition in the former Crime and Misconduct Act). On the basis of that assessment a referral was made to the (then) CMC.
 - [T]he CMC determined that the matter was one that could be investigated by the PSC with a report back to the CMC ahead of the matter being finalised. The PSC conducted an investigation which included the telephone interview referred to and reflected in pages 1-3 of the documentation ...
 - The investigation was finalised and [the applicant] was advised of the outcome of his complaint.
34. In these circumstances, I am satisfied that the information before me supports a finding that PSC's investigation was carried out in the performance of the Commission's corruption functions⁵²—and therefore in the performance of a prescribed function of a prescribed crime body under the RTI Act.

Does the exception to the exemption apply?

35. No, for the reasons that follow.
36. The exception to the CCC exemption applies if the information is 'about' the applicant and the investigation is finalised.⁵³

⁴³ See definition of *corruption functions* in schedule 3, section 10(9) of the RTI Act, which refers to the definition in section 33 of the CC Act. The amendments effected by the CMOLA Act replaced the Commission's misconduct function, as set out in section 33 of the CC Act, with the corruption functions.

⁴⁴ See definition of *corrupt conduct* in section 15 of the CC Act. The amendments effected by the CMOLA Act also replaced what was, at the time of PSC's investigation, referred to as official misconduct with the concept of corrupt conduct (see sections 15(1) and 400(c) of the CC Act). A similar definition at section 8 of the *Independent Commission Against Corruption Act 1988* (NSW) was considered in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 (15 April 2015).

⁴⁵ Having regard to principles set out in section 34 of the CC Act—see section 33 of the CC Act.

⁴⁶ Section 45(1) of the CC Act.

⁴⁷ See definitions of *public official* in schedule 2 of the CC Act and *unit of public administration* in section 20 of the CC Act.

⁴⁸ Sections 35(1)(b), (d) and (e) and 46(2)(b) of the CC Act. The nature of the Commission's monitoring role is set out at section 48 of the CC Act.

⁴⁹ Section 43 of CC Act.

⁵⁰ Section 44(2) of CC Act.

⁵¹ Submission dated 3 August 2015.

⁵² See footnote 43.

⁵³ Schedule 3, section 10(6) of the RTI Act.

37. The applicant submits that:⁵⁴

My complaint to PSC may have been about [Officer A's] conduct towards me; but, in reality, the bulk of the evidence obtained by PSC was about me.

38. Given this submission, it is necessary to consider whether the Category B Information is 'about' the applicant for the purpose of this exception.

39. In *G8KPL2 and Department of Health*,⁵⁵ the Right to Information Commissioner found that an investigation report, while created as a result of the applicant's complaint, was not *about* the applicant—rather, it was *about* the staff members who were the subject of the allegations and related investigation. Similarly, in *Darlington and Queensland Police Service*,⁵⁶ it was determined that documents relating to an investigation of the applicants' complaint about police officers (including correspondence, statements and reports) were not *about* the applicants—rather, they were *about* the police officers.

40. I have carefully considered the Category B Information and note that, while the applicant's submissions indicate that he considers that he has a personal interest in the investigation, he was not the subject of the investigation; rather, the subject was the individual about whom he had made allegations. In these circumstances, in accordance with the reasoning in *G8KPL2* and *Darlington*, I consider that the Category B Information itself is not *about* the applicant; rather, it is *about* the subject of the investigation.

41. The information before me indicates that the investigation was finalised. However, as the first aspect of the exception is not satisfied (that is, the Category B information is not *about* the applicant), I find that the exception to the exemption cannot apply.

Conclusion

42. Based on the information available to OIC in this review, I am satisfied that:

- the Category B Information was obtained, used or prepared for an investigation
- the investigation was conducted by an agency in the performance of a prescribed function of the prescribed crime body; and
- the exception to the exemption does not apply.

43. In these circumstances, I find that access to the Category B Information can be refused on the ground that it is subject to the prescribed crime body exemption, and is therefore exempt information.⁵⁷

⁵⁴ Submission dated 12 June 2016.

⁵⁵ (Unreported, Queensland Information Commissioner, 31 January 2011) at [25]-[33]. An appeal of this decision to the Queensland Civil and Administrative Tribunal (QCAT) was dismissed on the basis that there was no question of law to be determined: *Minogue v Office of the Information Commissioner and Anor* [2012] QCATA 191 (5 March 2012).

⁵⁶ [2014] QICmr 14 (11 April 2014) at [21]-[22]. An appeal of this decision to QCAT was also dismissed on the basis that there was no question of law to be determined: *Darlington v Office of the Information Commissioner & Queensland Police Service* [2015] QCATA 167 (3 December 2015).

⁵⁷ Section 67(1) of the IP Act and section 47(3)(a) and schedule 3, section 10(4) of the RTI Act.

Other matters raised by the applicant

44. In relation to the Category B Information, the applicant also submits that:⁵⁸

- PSC's assessment report has no credibility
- PSC's investigation was flawed, was not conducted in an open and transparent manner and denied him natural justice
- evidence provided by the subject of the complaint to the investigation '*trashed*' the applicant's reputation
- the applicant was given no opportunity to sight this evidence or respond to it before PSC finalised its investigation
- the applicant is entitled to know everything that was stated about him during the investigation, as it is personal information about him which he is entitled to access; and
- the applicant needs this information so he can demonstrate the flaws in the investigation and show that there is a prima facie case for the investigation to be reopened.

45. In effect, these submissions raise or allude to matters, including some public interest considerations, that the applicant considers favour disclosure of the Category B Information. However, as I am satisfied that the Category B Information is subject to the prescribed crime body exemption,⁵⁹ I cannot take matters such as those raised by the applicant into account and have no discretion to release such information.⁶⁰

Unlocated documents

46. On consideration of the applicant's submissions, it is OIC's understanding that the applicant contends that the following types of documents should have been located, but were not:

- (i) Handwritten file notes of Officer B regarding meetings in 2010 and 2011, including on or about 18 and 19 August 2011⁶¹
- (ii) Handwritten file notes of Officer C regarding meetings in 2010 and 2011, including on or about 18 August 2011⁶²
- (iii) File notes of Officer A regarding meetings on 19 August 2011⁶³
- (iv) Other file notes of Officer A⁶⁴
- (v) The applicant's leave history from 20 November 2008 to 19 November 2011⁶⁵
- (vi) Documents relating to the applicant's performance review on 21 July 2011⁶⁶
- (vii) Other performance planning and review documents⁶⁷
- (viii) Documents related to the discussion of the applicant's performance at the OQPC's Executive Management Group (**EMG**) meeting on 31 October 2011⁶⁸
- (ix) Documents authored or received by Officer D in 2010 and 2011⁶⁹

⁵⁸ Submission dated 12 June 2016.

⁵⁹ As concluded at paragraph 43 above.

⁶⁰ Section 118(2) of the IP Act.

⁶¹ Submission dated 14 October 2014.

⁶² Submissions dated 14 October 2014 and 29 August 2015.

⁶³ Submissions dated 14 October 2014, 6 May 2015, and 29 August 2015.

⁶⁴ Submission dated 29 August 2015.

⁶⁵ Submissions dated 14 October 2014 and 29 August 2015.

⁶⁶ Submissions dated 14 October 2014 and 29 August 2015.

⁶⁷ Submissions dated 14 October 2014, 6 May 2015 and 29 August 2015.

⁶⁸ Submission dated 29 August 2015.

⁶⁹ Submissions dated 19 July 2015 and 29 August 2015.

- (x) Documents on the applicant's 'employee record' or 'staff file'⁷⁰
- (xi) Additional electronic records and hard copy files;⁷¹ and
- (xii) '[A]ll the minutes of the OQPC executive management group meetings from 2009 onwards and ... those parts of these minutes which contain [the applicant's] personal information'.⁷²

Relevant law

47. Under the IP Act, one of the grounds for refusal of access to a document is that the document sought is nonexistent or unlocatable.⁷³ A document is nonexistent if there are reasonable grounds to be satisfied it does not exist.⁷⁴ 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.⁷⁵
48. 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:
 - 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 the 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.⁷⁶
49. By considering the above factors, an agency may ascertain that a particular document was not created because, for example, its processes do not involve creating the specific document. In such instances, it is not necessary for the agency to search for the document. It is sufficient that the relevant circumstances to account for the nonexistent document are explained.
50. An agency may also rely on searches to satisfy itself that documents do not exist. If an agency relies on searches to justify a decision that documents do not exist, all reasonable steps must be taken to locate the documents.⁷⁷ Such steps may include enquiries and searches of all relevant locations identified after consideration of the key factors listed above.

⁷⁰ Submissions dated 14 October 2014, 6 May 2015, and 29 August 2015.

⁷¹ External review application dated 3 September 2014, and submissions dated 14 October 2014, 6 May 2015, 19 July 2015, and 29 August 2015.

⁷² Submission dated 12 June 2016.

⁷³ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

⁷⁴ Section 52(1)(a) of the RTI Act.

⁷⁵ Section 52(1)(b) of the RTI Act.

⁷⁶ *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 Acting Information Commissioner's findings in *PDE* are relevant here.

⁷⁷ As set out in *PDE* at [49]. See also section 137(2) of the IP Act.

51. In assessing whether a document exists, but 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.⁷⁸
52. In answering these questions, regard should be had to the circumstances of the case and to the key factors set out above.⁷⁹

Findings

Documents responsive to items (i) and (ii)

53. As set out at items (i) and (ii) above, the applicant submits that the following types of documents should have been located, but were not:
- (i) handwritten file notes of Officer B regarding meetings in 2010 and 2011, including on or about 18 and 19 August 2011; and
 - (ii) handwritten file notes of Officer C regarding meetings in 2010 and 2011, including on or about 18 August 2011.
54. The above types of documents authored by officers of the Department were not among those specified in the applicant's access application to OQPC. However, they are listed (possibly in error) as being within the scope of the OQPC application in the decision that is the subject of this external review.
55. In these circumstances, I consider that documents responsive to items (i) and (ii) do not fall within the scope of the applicant's application to OQPC, and therefore the issue of whether all reasonable searches for such documents have been conducted does not arise.
56. However, if I am wrong in this respect, and it is the case that these types of documents are within the scope of the applicant's application to OQPC because they were listed in the decision, I am in any event satisfied that documents of these types would (if they exist) have been created by Departmental officers and, given their nature, would not have been provided to OQPC. In these circumstances, on consideration of the factors listed in *PDE*—in particular, the Department's and OQPC's structures and recordkeeping practices—I am satisfied that documents responsive to items (i) and (ii) in the possession of OQPC never existed and, in terms of the applicant's application to OQPC, are therefore nonexistent for the purpose of the IP Act.

Documents responsive to item (iii)

57. The types of documents raised by the applicant included, at item (iii) above, file notes of Officer A regarding meetings on 19 August 2011.
58. In response to the applicant's concerns about '*very detailed*' **handwritten** file notes Officer A made of discussions with the applicant at meetings in the morning and

⁷⁸ Section 52(1)(b) of the RTI Act.

⁷⁹ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [21].

afternoon of 19 August 2011,⁸⁰ OIC made a series of enquiries of the Department regarding these file notes. As a result, the Department located 3 pages of notes⁸¹ written by Officer A containing summaries of meetings occurring on 18 and 19 August 2011, and released these pages in full to the applicant.⁸²

59. Having received these 3 pages, the applicant submits that:⁸³

- Officer A's handwritten file note from the morning of 19 August 2011 is '*quite minimal in content*', and she should be asked to produce the full file note; and
- Officer A would have also prepared a **typed** file note of the meeting in the morning of 19 August 2011, given the nature of that meeting, and she should be asked about that and asked to produce that file note.

60. There is nothing before me, apart from the applicant's assertions, to suggest that any further file notes regarding the meetings on 19 August 2011 were either handwritten or made electronically by Officer A. I have carefully considered the applicant's assertions. However, the content of Officer A's handwritten notes regarding discussions with the applicant in both the morning and afternoon of 19 August 2011, and the structure, recordkeeping practices and document management systems within OQPC,⁸⁴ satisfy me that the Department has taken all reasonable steps to locate file notes of Officer A regarding the meetings on 19 August 2011, and further file notes that the applicant submits exist are nonexistent.

Documents responsive to item (v)

61. As set out at item (v) above, the applicant submits documents regarding his leave history from 20 November 2008 to 19 November 2011 should have been located, but were not.

62. OIC made enquiries of the Department about the applicant's submission⁸⁵ that further documents about his leave history from 20 November 2008 to 19 November 2011 should be available from the payroll provider for the OQPC, namely Queensland Shared Services (**QSS**), and they should exist in electronic form. On external review, the Department obtained a 3 page document from QSS detailing the applicant's leave history, and released these pages in full to the applicant.⁸⁶ It also obtained a 1 page leave balance report, and released this page,⁸⁷ subject to the redaction of personal information of other OQPC employees that the applicant was taken to have agreed to exclude.⁸⁸

63. OIC explained to the applicant⁸⁹ that, in response to OIC's request for clarification about whether the leave history document covered the applicant's leave history for the entirety of the stated period, QSS had confirmed to the Department that:

⁸⁰ Submission dated 29 August 2015.

⁸¹ Comprising two handwritten pages, and one typed page.

⁸² On 3 May 2016.

⁸³ Submission dated 12 June 2016.

⁸⁴ Considered in OIC's series of enquiries regarding item (iii) documents. For example, see paragraphs 66 and 68 below.

⁸⁵ Submission dated 29 August 2015.

⁸⁶ On 3 May 2016.

⁸⁷ Page 11 of the 182 page document, also released on 3 May 2016.

⁸⁸ As noted at paragraph 9 above.

⁸⁹ Preliminary view dated 26 April 2016.

... based on the records extracted from the Aurion Payroll system [the applicant] *did not have any leave takings during the periods 20 November 2008-29 December 2008 and 8 September 2011 to 19 November 2011.*

64. The applicant made no further submissions regarding the item (v) information.⁹⁰ Given that the entirety of the applicant's leave history for the relevant period has been located and released to the applicant, I am satisfied that the Department has taken all reasonable steps to locate the item (v) information, and that further information of this nature is nonexistent.

Documents responsive to items (iv), (vi), (vii), (viii), (ix), (x), (xi) and (xii) and any other documents responsive to the application to OQPC

65. As set out above, the applicant submits that the following types of documents should have been located, but were not:

- (iv) Other file notes of Officer A
- (vi) Documents relating to the applicant's performance review on 21 July 2011
- (vii) Other performance planning and review documents
- (viii) Documents related to the discussion of the applicant's performance at the OQPC's EMG meeting on 31 October 2011
- (ix) Documents authored or received by Officer D in 2010 and 2011
- (x) Documents on the applicant's '*employee record*' or '*staff file*'
- (xi) Additional electronic records and hard copy files; and
- (xii) '*[A]ll the minutes of the OQPC executive management group meetings from 2009 onwards and ... those parts of these minutes which contain [the applicant's] personal information*'.

Steps taken to locate documents

66. In response to OIC's initial enquiries regarding OQPC's searches, the Department provided OIC with records of searches and certifications indicating that:

- Officer A spent approximately 3 hours searching her office, the secure file room and Outlook, including the applicant's staff file and a Legal Proceedings file. Electronic searches used the search terms '*[applicant's first name]*' and '*[applicant's last name]*'.
- Officer E explained that, to the best of his knowledge, he provided all relevant documents to the Department's RTI Officer at the time of the initial request.
- Officer F spent 1 hour searching filing cabinets, cupboards and shelves in her office and searched Outlook and One Drive For Business using search terms '*[applicant's first name]*' and '*[applicant's last name]*'. Officer F also explained that she provided the Department's RTI Officer with documents which had been left in her possession by Officer G upon Officer G ceasing employment with OQPC at the time of the initial request.
- Officer H searched each item within the paper drafting file for the *Water and Other Legislation Amendment Bill 2011*, as well as conducting searches of folders on his desktop which he utilised for storing miscellaneous emails of relevance to him using '*[applicant's first name]*' and '*[part of the applicant's last name]*' as search terms.
- Officer I spent 30 minutes conducting manual searches of personal folders on his computer and located nine documents.

⁹⁰ Submissions dated 12 June 2016, 3 July 2016 and 12 July 2016.

67. As a result of these initial search enquiries, 798 additional pages were located and considered. Of these, 251 pages and 55 part pages were released to the applicant. The pages and part pages that were not released comprised information the applicant was taken to have excluded,⁹¹ information forming part of the Category A Information, and information comprising the Category B Information.
68. Subsequently, in response to OIC's enquiries regarding searches for documents including the documents at items (iv), (vi), (vii), (viii), (ix), (x) and (xi) in particular, the Department provided further search records and certifications regarding searches by Officer F and Officer J. Relevantly, these search records and certifications indicated that:
- Officer F spent a further 8 hours and 40 minutes conducting:
 - electronic searches of the applicant's Personal Performance Review folder on OQPC's N: Drive and Staff folders on OQPC's N: Drive for six specified former staff members; and
 - manual searches of a 2 drawer filing cabinet relocated from Officer A's office, in which the records of Officer A, Officer D and Officer K in relation to the applicant were held, and Officer A's office and an adjacent file room, which contains 3 filing cabinets with staff files; and
 - Officer J spent 3 hours conducting electronic searches of:
 - OQPC's TRIM records management system (which he advised OQPC commenced using in October 2008), using the applicant's name, supervisor names and date ranges as search parameters; and
 - OQPC's network file server, conducting searches for the applicant's name, his archived staff folder and supervisors' staff folders.
69. In relation to Officer F's and Officer J's searches, the Department advised OIC that:
- they located approximately 3800 pages during their searches for the documents at items (iv), (vi), (vii), (viii), (ix), (x), and (xi)
 - however, in relation to these pages, Officer F noted that the documents located by her *'appear to have been provided previously but copies attached'*, while Officer J noted that those located by him were *'duplicates found of hard copy files already discovered (and supplied)'*; and
 - nevertheless, the Department raised these documents with OIC in an abundance of caution, in case some of them had not been located and considered earlier.
70. On the same basis, OIC considered the Department's description of the types of documents comprising the approximately 3800 pages, and requested copies of approximately 1702 pages which it appeared reasonable to expect could contain relevant documents.⁹²
71. OIC neither requested nor considered the remaining pages among the approximately 3800 pages that the Department had located, totalling approximately 2050 pages according to the Department's estimates,⁹³ given that the applicant was taken to have

⁹¹ As noted at paragraph 9 above.

⁹² That is: *Personal Performance Review Documents (57 pages approx.) ... [Officer K] envelope (200 pages approx.) ... Executive Group Management Papers (150 pages approx.) ... [Officer D] legal file (290 pages approx.) ... [Officer D] file (250 pages approx.) ... OQPC staff file (305 pages approx.) ... Legislation Water and other Bill (450 pages approx.)*.

⁹³ That is: *PSC Complaint File (40 pages approx.) Legislation worked on by applicant (600 pages approx.) Legislation drafting Fair Trading (350 pages approx.) ... QComp Legal File (whole file LPP) (350 pages approx.) Workcover claim file (450 pages approx.) Workcover file ... (100 pages approx.) QIRC Appeal file (160 pages approx.)*.

excluded certain information, including draft legislation and documents relating to his workers' compensation matters,⁹⁴ and given that the *PSC Complaint File* appeared likely to contain information exempt from disclosure on the same ground as the Category B Information discussed above.

72. In response to OIC's request that the Department provide copies of approximately 1702 pages, the Department provided OIC with 2477 pages (not 1702 as had been estimated). OIC assessed these 2477 pages in terms of items (iv), (vi), (vii), (viii) and (ix), and identified that 181 pages were responsive to these items.⁹⁵

73. The Department agreed to release 174 of the 181 pages,⁹⁶ subject to the redaction of information that the applicant was taken to have excluded.⁹⁷ When advising the applicant that the Department had agreed to release this information,⁹⁸ OIC noted that:

... there is a strong possibility that some of the 182 pages^[99] have already been released to you or considered by the Department for release, given that it was neither practical, nor a responsible use of time and resources, for either OIC or the Department to examine the very large volume of documents already considered by the Department to the extent necessary to identify all instances where each document of the 182 pages may have already been considered.

74. OIC also advised the applicant that OIC's assessment of the 2477 pages had determined that the entire *OQPC staff file* totalling 672 pages met the general description at item (x), being documents on the applicant's 'employee record' or 'staff file'—however, given that most of the 672 pages had no relevance to the specific types of documents identified by the applicant when raising his sufficiency of search concerns, OIC did not consider it an appropriate use of resources to consider whether each page could be released. Instead, OIC confined its assessment to identifying the documents within the 672 pages of the file which met the descriptions of the types of documents raised by the applicant at items (iv), (vi), (vii), (viii) and (ix). This process yielded 29 pages.¹⁰⁰

75. Similarly, OIC advised the applicant that OIC's assessment of the 2477 pages had not identified any documents responsive to item (xi) (*Additional electronic records and hard copy files*), in view of the lack of specificity regarding this item, which results in it appearing to capture **all** of the 2477 pages.

76. The applicant raised item (xii) in response to OIC's most recent preliminary view. I note that one of the packs of OQPC documents considered in the Department's decision was the 129 page PDF titled '*Documents from OQPC - Pack 3 (IPD14)*', comprising minutes

⁹⁴ As noted at paragraph 9 above.

⁹⁵ Specifically, OIC identified that the following pages were responsive to each item:

Item	Type of information	Page no.
(iv)	Typed file note of Officer A	123
	Notes which appear to have been handwritten by Officer A	132; 134-148
(vi)	<i>Performance Agreement and Performance Review 2010 – 11</i>	99-100; 101-115; 158-168
(vii)	Documents about performance plans	58-60; 62
	<i>Individual Performance Plan 2009</i>	149-152
	[The applicant's] <i>Documented Performance History (from 1 July 2011)</i> (with attachment)	153-157
(viii)	Emails regarding 31 October 2011 EMG meeting	50-57, 124-131
(ix)	Emails received or sent by Officer D (including attachments where located)	1-5; 8-10; 12-57; 66-94; 133; 169-182
	Memoranda drafted by Officer D	6-7; 61-65; 95-100; 116-122

⁹⁶ The seven pages not released form part of the Category A Information discussed above.

⁹⁷ As noted at paragraph 9 above.

⁹⁸ The Department released these 174 pages to the applicant on 3 May 2016.

⁹⁹ In correspondence with the applicant and Department regarding these pages dated 26 April 2016, 182 pages, rather than 181, were referred to, given that one page (page 11) responsive to item (v) was also addressed at the same time. See paragraph 62 above.

¹⁰⁰ That is, pages 124-152 noted in the table at footnote 95 above.

of twelve EMG meetings occurring within this period. The parts of these pages relevant to the applicant were released.

Findings

77. The applicant provided extensive submissions regarding the issue of sufficiency of search on a number of occasions,¹⁰¹ and the Department has relied on searches by OQPC officers to demonstrate that all relevant documents have been located. The question I must consider is whether the Department has taken all reasonable steps to locate documents responsive to items (iv), (vi), (vii), (viii), (ix), (x), (xi) and (xii), or otherwise responsive to the applicant's application to OQPC. This does not require me to deal separately with each of the applicant's submissions or to make separate findings about the Department's search efforts in relation to each of the many additional documents he believes exist.¹⁰² I have carefully considered the applicant's submissions and, to the extent they are relevant to the issue for determination, in that they may arguably be construed as supporting his contention that the searches conducted by the Department do not comprise all reasonable searches for the abovementioned documents, I have addressed them below.

78. I have carefully considered:

- all of the applicant's submissions
- the extent and nature of the information that has been located by OQPC officers and either released to the applicant or refused access
- the Department's submissions, particularly in relation to OQPC's 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 OQPC officers in processing the access application and on external review; and
- the signed certifications and statutory declarations provided to OIC by a large number of OQPC officers.

79. The applicant submits that all reasonable searches have not yet been conducted, and that it remains necessary for OIC to:

- *'direct the agency and OQPC to conduct full and proper searches ... [of] all electronic databases and document management systems of the agency'*¹⁰³ and *'direct OQPC to also locate and search all hard copy files and records'*¹⁰⁴ (emphasis added)
- ensure that the Department's searches are undertaken by someone who is independent of the officers of the Department and OQPC who brought the documents into existence or were otherwise involved with the documents¹⁰⁵ given his concern that these officers *'have withheld ... documents [or] ... destroyed or disposed of the documents in breach of the Public Records Act 2002'*¹⁰⁶ and

¹⁰¹ Pages 1 to 2 of external review application, pages 1 to 4 of submission dated 14 October 2014, pages 2 to 3 of submission dated 18 October 2014, page 1 of submission dated 22 October 2014, pages 1 to 3 of submission dated 6 May 2015, pages 1 to 2 of submission dated 19 July 2015, pages 1 to 6 of submission dated 29 August 2015, pages 1 to 3 of submission dated 18 October 2015, pages 1 to 5 of submission dated 12 June 2016, and pages 2 to 3 of submission dated 3 July 2016.

¹⁰² *Goodman and Department of Justice and Attorney-General* [2014] QICmr 4 (6 February 2014) at [23].

¹⁰³ Page 2 of external review application.

¹⁰⁴ Page 6 of submission dated 29 August 2015.

¹⁰⁵ Page 2 of external review application, and page 4 of submission dated 14 October 2014.

¹⁰⁶ Pages 1 to 2 of external review application.

- direct that certain officers produce specific documents that he considers they must have created¹⁰⁷ and retained as their personal property.¹⁰⁸
80. I note that the manner in which an external review is conducted is, subject to the IP Act, at the Information Commissioner's discretion, and the overriding obligation on the Information Commissioner is to ensure that the procedures adopted in an external review are fair to all participants.¹⁰⁹ I do not believe that the above steps raised by the applicant are required before I may conclude that the documents sought by him do not exist or cannot be located, or to otherwise afford him procedural fairness.
81. This is because, as noted above, the question I must consider is whether the Department has taken all reasonable steps to locate documents. This, in my view, entails consideration of whether the Department has required OQPC to conduct sufficient searches of all locations where the documents in question could reasonably be expected to be found. It does not require searches of *all* of OQPC's electronic databases, document management systems and hard copy files, as suggested by the applicant.
82. Further, I am satisfied that the procedures adopted to search for the documents in question, including the conduct of the searches by various officers, have been appropriate, fair and reasonable. There is nothing before me, apart from the applicant's assertions, to suggest documents were either withheld or disposed of by any OQPC officer.
83. In terms of the specific documents the applicant suggests that certain officers created and retained personally, I note that such documents (should they exist) may comprise both records for the purpose of the *Public Records Act 2002* (Qld) and documents for the purpose of the IP Act. I consider that OQPC's search records indicate that relevant officers have conducted searches and made enquiries reasonably likely to identify any such documents or, at least, other documents which referred to them or otherwise indicated that they had been created; however, no such documents were located. Accordingly, apart from the applicant's submissions, there is no evidence before me to support the position that the specific documents raised by the applicant were created by any of the relevant officers. Given this position, it follows that no evidence suggests that such documents remain in the personal possession of any of the relevant officers. In these circumstances, I do not consider it necessary to undertake any further searches or enquiries regarding such documents.
84. The above comprises my consideration of the applicant's submissions that all reasonable searches have not yet been conducted. Otherwise, in my examination of the question to be determined—that is, whether the Department has taken all reasonable steps to locate documents responsive to items (iv), (vi), (vii), (viii), (ix), (x), (xi) and (xii), or otherwise responsive to the applicant's application to OQPC—I have considered the information provided to OIC by the Department regarding both the initial searches and enquiries by OQPC on receipt of the applicant's application, and the further searches and enquiries in response to OIC's enquiries. I have done so with reference to the factors listed in *PDE*, and in particular OQPC's structures, recordkeeping practices and document management systems.

¹⁰⁷ Based on his view that failure to do so would be in breach of their obligations under the *Public Records Act 2002* (Qld).

¹⁰⁸ Page 3 of submission dated 14 October 2014, page 4 of submission dated 29 August 2015, and page 5 of submission dated 12 June 2016.

¹⁰⁹ Sections 108(1) and 110(2)(a) of the IP Act.

85. In summary, I note that:

- OQPC officers spent at least 16 hours¹¹⁰ conducting searches for documents relevant to the access application
- these searches have been performed by senior officers in most cases, and have included physical and electronic searches of areas where relevant documents could reasonably be expected to be held; and
- OIC has been provided with:
 - statutory declarations concerning the existence of documents; and
 - signed search certifications which identify the searches performed and confirm that all documents in the certifiers' possession have been located.

86. I also note that the Department's initial decision considered 1452 pages of documents located by OQPC officers. Further, on external review, an additional 3281 pages¹¹¹ have been located and considered in light of the applicant's specific sufficiency of search concerns.

Conclusion about documents responsive to items (iv), (vi), (vii), (viii), (ix) and (xii)

87. On the basis of the above considerations, in terms of the types of documents identified at items (iv), (vi), (vii), (viii), (ix) and (xii), I am satisfied that the Department has made enquiries with all relevant officers regarding the possible existence and location of documents requested by the applicant, and ensured that these officers have conducted comprehensive, appropriately targeted searches of all relevant electronic and hardcopy document management systems for relevant documents. I accept the Department's evidence in relation to its search efforts and enquiries, and also accept the search certifications and statutory declarations as further evidence that the Department has taken all reasonable steps to find these documents. Further, I consider that the files located by OQPC on external review, and requested and assessed by OIC to identify documents responsive to items (iv), (vi), (vii), (viii), (ix) and (xii), comprise all located files that could reasonably be expected to contain such documents. Also, while I acknowledge that approximately 2050 additional pages were located but not considered, I am, from the Department's description of these files,¹¹² satisfied that these pages could not reasonably be expected to contain among them the specific types of documents in question. In these circumstances, I am satisfied that there are no reasonable grounds for OIC to require the Department to conduct further searches for documents in OQPC's possession responsive to items (iv), (vi), (vii), (viii), (ix) and (xii).

88. Accordingly, on the material before me, I consider that there is a reasonable basis to be satisfied that additional documents in OQPC's possession responsive to items (iv), (vi),

¹¹⁰ This total of at least 16 hours is calculated using the figures in the search records provided to OIC on 20 May 2015 (4 hours, 30 minutes) and 16 October 2015 (11 hours, 40 minutes)—see the summaries of these records at paragraphs 66 and 68 above. In reaching this total of 16 hours, I note that many of the provided search records did not provide any approximation of time spent searching for documents.

¹¹¹ Being:

- the 798 further located pages received by OIC on 17 June 2015 (as noted at paragraph 67 above)
- the 6 further located pages received by OIC on 16 October 2015 (as referred to in paragraphs 58 and 62 above); and
- the 2477 pages received by OIC on 12 February 2016 of the approximately 3800 pages (as noted at paragraphs 70 and 72 above).

¹¹² That is: *PSC Complaint File* (40 pages approx.) *Legislation worked on by applicant* (600 pages approx.) *Legislation drafting Fair Trading* (350 pages approx.) ... *QComp Legal File (whole file LPP)* (350 pages approx.) *Workcover claim file* (450 pages approx.) *Workcover file ...* (100 pages approx.) *QIRC Appeal file* (160 pages approx.).

(vii), (viii), (ix) and (xii) are nonexistent or unlocatable. I find that access to such documents may be refused on this basis.¹¹³

Conclusion about documents responsive to (x) and (xi) and any other documents responsive to the application to OQPC

89. I note that 2477 of the additional 3281 pages¹¹⁴ assessed on external review were not examined in terms of other documents falling within the scope of the applicant's application to OQPC, including any general types of documents responsive to items (x) and/or (xi). Further, approximately 2050 pages of documents were not examined by the Department or OIC at all. Given that the scope of the applicant's application to OQPC included the entirety of his 'employee record',¹¹⁵ it appears reasonable to expect that the pages not considered in light of items (x) and (xi), and the pages not considered at all, could contain some information responsive to that application. While the large volume of documents located but unconsidered, or only partially considered—that is, approximately 4345 pages in total¹¹⁶—is indicative that extensive searches have been undertaken, this large volume has prevented the Department and/or OIC from assessing the pages in question in terms of the abovementioned general types of documents. In the absence of such an assessment, I cannot conclude that all reasonable searches for all documents responsive to the applicant's application have been conducted, nor can I make a finding that any further documents falling within the scope of the applicant's application to OQPC, including any documents responsive to items (x) and/or (xi), are nonexistent or unlocatable.
90. In these circumstances—where a large volume of pages has precluded me from making a finding regarding the sufficiency of searches for OQPC documents responsive to items (x) and (xi), or otherwise falling within the scope of the applicant's application to OQPC—I have instead considered whether assessing these pages would be a substantial and unreasonable diversion of resources.¹¹⁷

Substantial and unreasonable diversion of resources

91. The following pages located on external review have not been considered by the Department or OIC:
- approximately 6768 pages located by Departmental officers;¹¹⁸ and
 - approximately 2050 pages located by OQPC officers.¹¹⁹
92. Further, 2477 pages located on external review by OQPC officers were assessed by OIC, but only in terms of the specific types of documents at items (iv), (v), (vi), (vii), (viii), (ix) and (xii).¹²⁰ In this regard, 182 pages were considered (and 175 of these were released, except for excluded information); however, the remaining 2295 pages have not been considered in terms of any further documents falling within the scope of the applicant's application to OQPC, including any documents responsive to items (x) and/or (xi).

¹¹³ Under section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act.

¹¹⁴ That is, the pages referred to at footnote 111 above.

¹¹⁵ As defined in section 10(1) of the PS Regulation.

¹¹⁶ Being the total of the 2477 pages and the approximately 2050 pages, less the 182 pages discussed at paragraphs 72 and 73 above.

¹¹⁷ Under the heading '*Substantial and unreasonable diversion of resources*' below.

¹¹⁸ Which are identified at paragraph 103.

¹¹⁹ Which are identified at paragraphs 71 and 103.

¹²⁰ The items referred to in this paragraph are set out at paragraph 46 above.

93. As set out above,¹²¹ due to the large volume of pages yet to be assessed, or further assessed, I have been unable to make a finding regarding the sufficiency of searches for particular types of OQPC documents that the applicant contends should have been located. Given this position, and noting that the scope of the application to OQPC included the entirety of his ‘*employee record*’,¹²² it appears reasonable to expect that the above pages located by OQPC officers could contain some information responsive to that application.
94. Also, on the information before me, it appears reasonable to expect that responsive information created by OQPC officers, could, at some stage, have been provided by OQPC to the Department and consequently be among the documents located by Departmental officers, given the Department’s involvement (as evidenced in some of the information released to the applicant) in some of OQPC’s human resources matters and industrial relations proceedings involving the applicant. Further, it appears reasonable to expect that at least some of such documents remain in OQPC’s control, and therefore remain OQPC documents¹²³ falling within the scope of the applicant’s application to OQPC.
95. Given these considerations, I consider that the entirety of the pages noted above—totalling approximately 11,113 pages (**Remaining Documents**)¹²⁴—may contain information responsive to the applicant’s application to OQPC. However, given the large volume of these Remaining Documents, the issue of substantial and unreasonable diversion of resources arises for consideration.

Relevant law

96. Parliament intends that an agency receiving an access application will deal with that application unless dealing with the application would not be in the public interest.¹²⁵ The only circumstances in which dealing with an access application will not be in the public interest are set out in sections 59, 60 and 62 of the IP Act.
97. Relevantly, section 60 of the IP Act permits an agency to refuse to deal with an access application if the agency considers the work involved in dealing with the application would, if carried out, substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions.¹²⁶
98. Before making a decision to refuse to deal with an application on this basis, the agency must fulfil certain procedural prerequisites, namely:¹²⁷
- give the applicant a written notice:
 - stating an intention to refuse to deal with the application
 - advising that, for the prescribed consultation period, the applicant may consult with the agency with a view to making the application in a form that would remove the ground for refusal; and

¹²¹ See paragraph 89 regarding OQPC documents falling within the scope of the applicant’s application to OQPC, including any general types of documents responsive to items (x) and/or (xi).

¹²² As defined in section 10(1) of the PS Regulation.

¹²³ Given the definition of document of an agency in section 13 of the IP Act and section 12 of the RTI Act.

¹²⁴ That is, the sum of the approximately 6768, 2050 and 2295 pages referred to at paragraphs 91-92 above.

¹²⁵ Section 58 of the IP Act.

¹²⁶ Section 60(1)(a) of the IP Act.

¹²⁷ Section 61(1) of the IP Act.

- stating the effect of section 61(2)-(6) of the IP Act
- give the applicant a reasonable opportunity to consult with the agency; and
- as far as is reasonably practicable, give the applicant any information that would help the making of an application in a form that would remove the ground for refusal.

99. In deciding to refuse to deal with an application on this basis, an agency:

- must not have regard to any reasons the applicant gives for applying for access or the agency's belief about what are the applicant's reasons for applying for access;¹²⁸ and
- must have regard to the resources that would be used for:¹²⁹
 - identifying, locating or collating the documents
 - making copies, or edited copies of any documents
 - deciding whether to give, refuse or defer access to any documents, including resources that would have to be used in examining any documents or conducting third party consultations; or
 - notifying any final decision on the application.

100. On external review, OIC may decide any matter in relation to an access application that could, under the IP Act, have been decided by an agency.¹³⁰ Accordingly, OIC may determine that requiring an agency to process an access application would be a substantial and unreasonable diversion of the agency's resources, and decide to refuse to deal with an application under section 60 of the IP Act.

101. The IP Act does not expressly address the procedural requirements to be met by OIC before making a decision to refuse to deal with an application on this basis. However, generally, the IP Act provides that the procedure to be taken on external review is, subject to the IP Act, at the discretion of the Information Commissioner.¹³¹

Summary of steps taken by OIC

102. In this case, the issue of substantial and unreasonable diversion of resources arose on external review, following the location of additional documents as a result of OIC's enquiries. In these circumstances, I am not required to make any determination regarding the Department's satisfaction of the procedural prerequisites in section 61 of the IP Act.

103. However, it is relevant to note that, in the course of the two reviews, OIC has taken the following steps, similar to those outlined in section 61 of the IP Act, to afford procedural fairness to the applicant:

- The applicant was given the opportunity to respond to the following OIC correspondence regarding the issue of substantial and unreasonable diversion of resources:
 - OIC's initial correspondence¹³²—which noted that the work envisaged to consider the Remaining Documents would constitute a substantial and unreasonable diversion of the Department's resources; asked the applicant

¹²⁸ Section 60(3) of the IP Act.

¹²⁹ Section 60(2) of the IP Act.

¹³⁰ Section 118(1)(b) of the IP Act.

¹³¹ Section 108(1)(a) of the IP Act.

¹³² On 8 July 2015.

to advise if he was able to limit the extent of these documents; and indicated an intention that OIC was considering whether to refuse to deal with the application on the basis that to do so would cause a substantial and unreasonable diversion of resources

- OIC's first preliminary view¹³³—which considered the applicant's first proposal to limit the Remaining Documents, and advised that OIC considered that the ground of substantial and unreasonable diversion of resources could be relied on, despite the applicant's proposal to limit these documents; and
- OIC's response¹³⁴ to the applicant's request¹³⁵ for general descriptors of the various categories of information in issue—which explained and clarified OIC's first preliminary view as follows:

... the work involved in identifying the types of information nominated by you for elimination from consideration would be extensive, and require examination [of] the entirety of the Remaining Documents in some detail. ... [E]xamining the Remaining Documents to the degree necessary to categorise them and provide descriptors would require [an] extensive amount of work.

- OIC described the Remaining Documents to the applicant as follows:
 - the approximately 6768 pages located by Departmental officers—
emails located by [Officer G] of the Department (about 1,370 pages)
emails located by [Officer B] of the Department (about 4,400 pages); and
documents located on the Department's N: Drive (Human Resources) (about 1,000 pages).
 - the approximately 2050 pages located by OQPC officers—
PSC Complaint File (40 pages approx.)
Legislation worked on by applicant (600 pages approx.)
Legislation drafting Fair Trading (350 pages approx.)
...
QComp Legal File (whole file LPP) (350 pages approx.)
Workcover claim file (450 pages approx.)
Workcover file ... (100 pages approx.)
QIRC Appeal file (160 pages approx.)
 - the 2295 pages as being the pages out of the 2477 pages¹³⁶ which were assessed on external review as **not** containing information responding to the applicant's specific sufficiency of search concerns identified at items (i), (ii), (iv), (v), (vi), (vii), (viii), (ix) and (x).
- OIC provided the applicant with the following information, in an effort to help the applicant reduce the volume of Remaining Documents to an extent that would remove the ground for refusal:

In considering these options and whether you are able to narrow the scope of the terms of your application or reduce the number of documents to be reviewed, you may like to consider whether there are documents of a particular type, created within a particular time period, authored by particular individuals, or emailed to or by certain individuals to which you particularly seek access. You may also consider whether you wish to pursue access to documents if they are duplicates of documents to which you have already been given access.^[137]

¹³³ Dated 13 August 2015.

¹³⁴ On 21 August 2015.

¹³⁵ On 20 August 2015.

¹³⁶ That is, the 2477 pages provided to OIC in response to OIC's request for copies of the following approximately 1702 pages: *Personal Performance Review Documents (57 pages approx.) ... [Officer K] envelope (200 pages approx.) ... Executive Group Management Papers (150 pages approx.) ... [Officer D] legal file (290 pages approx.) ... [Officer D] file (250 pages approx.) ... OQPC staff file (305 pages approx.) ... Legislation Water and other Bill (450 pages approx.)*.

¹³⁷ OIC's 8 July 2015 letter.

Also, you may wish to consider setting out a further proposal to assist in making the effect of dealing with the Remaining Documents less detrimental to both the Department and OIC's performance of their functions. Your proposal could, as noted under the heading 'Your advice' above, identify that you only require certain types of documents that can easily be searched for among the Remaining Documents.^[138]

... your proposal could identify that you only require certain types of documents that can easily be searched for among the Remaining Documents – for example, documents of a particular type, created within a particular time period, authored by particular individuals, or emailed to or by certain individuals.^[139]

- The applicant was provided with a further preliminary view,¹⁴⁰ which considered the applicant's second proposal to limit the Remaining Documents, and advised that OIC considered that the ground of substantial and unreasonable diversion of resources could be relied on, despite the applicant's proposals.

Summary of the applicant's responses

Applicant's initial proposal

104. Initially, the applicant advised OIC¹⁴¹ that he did not seek access to the following types of information within the Remaining Documents:

- duplicates of documents to which he had already been given access, except for those duplicate documents that have additional notations or comments
- work mobile phone numbers and personal information of other individuals
- Cabinet documents; and
- legislation drafted by the applicant.

105. I acknowledge that the applicant's agreement to exclude Cabinet documents and legislation drafted by the applicant would likely reduce the Remaining Documents to some extent.

106. However, I consider that the applicant's agreement regarding duplicates would not reduce the amount of work required to examine the Remaining Documents, given the work involved in identifying duplicates.¹⁴² In reaching this view, I have noted that:

- Given the extent of documents already released—4557 full and 1194 part pages¹⁴³—it would be a significant imposition for the Department or OIC to identify duplicates of released documents. For example, if a document within the Remaining Documents comprises a particular email sent from one individual at a certain time and date, to identify whether there is a released duplicate of that email, the Department or OIC would be required to examine the 5751 fully or partly

¹³⁸ OIC's 13 August 2015 letter.

¹³⁹ OIC's 21 August 2015 letter.

¹⁴⁰ Dated 26 April 2016.

¹⁴¹ Submission dated 19 July 2015.

¹⁴² In reaching this conclusion, I acknowledge that the applicant's proposal was partly based on what OIC had said the applicant may wish to consider in our 8 July 2015 letter.

¹⁴³ Comprising:

- Departmental documents—2992 full pages and 847 part pages pursuant to the Department's decision, and 410 full pages and 57 part pages in August 2015; and
- OQPC documents—723 full pages and 235 part pages pursuant to the Department's decision, 251 full pages and 55 part pages in August 2015, and 181 pages in late April 2016.

released pages in order to ascertain whether there is a duplicate of that specific email.

- Further, given the conditions the applicant said he would agree to in excluding duplicates, the Department or OIC would then also need to spend further time in considering:
 - whether the document is one to which the applicant had already been given access; and
 - whether it contains any additional notations or comments.

107. Similarly, in terms of the applicant's agreement to exclude the work mobile phone numbers and personal information of other individuals, I consider that this would not reduce the amount of work required to examine the Remaining Documents. In order to identify work mobile phone numbers and personal information of other individuals, it would be necessary to examine each page of the Remaining Documents. Even if only a small amount of time per page were required to identify such information, this would add up to an extensive amount of time, given the large number of pages requiring consideration.

Applicant's second proposal

108. The applicant made a further proposal¹⁴⁴ to limit the Remaining Documents to the following categories of documents:

- (1) *Documents relating to my work performance or work conduct at OQPC created from 2009 onwards (including emails and file notes).*
- (2) *Documents expressing an opinion, appraisal, feedback or observation about me or my work, authored by [Officer A], [Officer D] or [Officer E] and created from 2009 onwards (including emails and file notes).*
- (3) *Documents dealing with the possible, proposed or actual termination of my employment at OQPC created from 2009 onwards (including emails and file notes).*
- (4) *File notes or other recordings of meetings I had with [Officer C], [Officer B] and/or [Officer G] of the Department in 2010 and 2011.*
- (5) *File notes or other recordings of the meeting I had with [Officer A] in her office in the morning of 19 August 2011, at which [Officer B] was present.*

109. I note that, for categories (4) and (5) of these five categories, these categories overlap with items (i) to (iii) raised by the applicant in terms of the sufficiency of the searches for responsive documents.¹⁴⁵ My findings at paragraphs 53 to 60 above and paragraphs 31 to 48 of OIC's decision regarding the applicant's application to the Department address most of the documents within these two categories. Relevantly, the findings conclude that documents regarding the meetings in question created by Officer C and Officer B, and further documents created by Officer A (other than the 3 pages released to the applicant), are nonexistent or unlocatable. Further, in terms of category (4), insofar as it relates to documents created by Officer G, I note that the Department provided OIC with a statutory declaration signed by Officer G which relevantly states as follows:

... I remember meeting with [the applicant] early in 2010, [and] any relevant records that I may have created in relation to these meetings would have been placed on his rehabilitation files.

¹⁴⁴ On 29 August 2015.

¹⁴⁵ These items are set out at paragraph 46 above.

I understand that these rehabilitation files have already been addressed as part of [the applicant's] original Information Privacy access application.

110. In relation to categories (1), (2) and (3), I note that these categories overlap with items (vi) to (ix) raised by the applicant in terms of the sufficiency of the searches for responsive documents.¹⁴⁶ I also note that a substantial number of documents responsive to these categories have already been released to the applicant. For example, based on a brief assessment of a small portion of the located information—namely, the 1452 pages of OQPC documents considered in the Department's decision—123 pages responsive to categories (1), (2) and (3) were identified as having being released to the applicant.¹⁴⁷
111. In these circumstances, I consider that my reasoning regarding duplicate documents (at paragraph 106 above) is apposite to the information covered by categories (1), (2), (3) and (4) insofar as category (4) relates to Officer G. I also note that, if the issue of duplicates was avoided (that is, if all responsive documents were simply identified and considered, regardless of whether or not they were duplicates that had previously been considered), the broadness of categories (1), (2) and (3) appears likely to capture a significant number of documents. Given these considerations, I consider that the applicant's proposal to limit the Remaining Documents to the above five categories would not reduce the amount of work required to deal with the Remaining Documents to such an extent as to remove the ground for the refusal to deal.

Other matters raised by the applicant

112. The applicant submits that OIC should afford him a further opportunity to narrow the scope of the Remaining Documents.¹⁴⁸ The applicant was afforded three opportunities¹⁴⁹ to limit the amount of the Remaining Documents, and made two proposals in this regard.¹⁵⁰ In these circumstances, OIC determined that a further opportunity to narrow the scope of the Remaining Documents was not required. The IP Act provides that the procedure to be taken on external review is at the discretion of the Information Commissioner,¹⁵¹ subject to the requirement to adopt procedures that are fair.¹⁵² In the present case, I am satisfied that the approach taken has been procedurally fair. Indeed, I note that, in giving three opportunities and considering two responses, OIC has exceeded the prerequisites in section 61 that apply to agencies.

¹⁴⁶ These items are set out at paragraph 46 above.

¹⁴⁷ The following table identifies a number of pages released to the applicant corresponding to each category:

Category of information	Example of released information (including part released documents)
(1) Documents relating to my work performance or work conduct at OQPC created from 2009 onwards (including emails and file notes).	OQPC – Pack 2, pp 1-14 OQPC – Pack 5, pp 186-187, 219-233
(2) Documents expressing an opinion, appraisal, feedback or observation about me or my work, authored by [Officer A], [Officer D] or [Officer E] and created from 2009 onwards (including emails and file notes).	OQPC – Pack 1, pp 1-2, 107-118, 121-125, 129-131, 140-168 OQPC – Pack 2, 15-19, 103-106 OQPC – Pack 4, pp 1-18 OQPC – Pack 5, pp 1-4, 154-155, 201-202, 208-211, 242-243
(3) Documents dealing with the possible, proposed or actual termination of my employment at OQPC created from 2009 onwards (including emails and file notes).	OQPC – Pack 2, pp 27-31 OQPC – Pack 3, pp 104-129 OQPC – Pack 5, pp 212-218

¹⁴⁸ In a submission dated 12 June 2016, in a telephone conversation with an OIC staff member on 1 July 2016 and by letter dated 3 July 2016.

¹⁴⁹ On 8 July 2015, 13 August 2015 and 21 August 2015.

¹⁵⁰ On 19 July 2015 and 29 August 2015.

¹⁵¹ Section 108(1)(a) of the IP Act.

¹⁵² Section 110(2)(a) of the IP Act.

113. The applicant also expresses concern that the volume of the Remaining Documents is unnecessarily large, because the Department's searches on external review were too broad. It is my understanding that he considers that the issue of substantial and unreasonable diversion of resources would not require consideration, had the Department conducted better searches.¹⁵³
114. At the time the applicant initially raised concerns about the broadness of the Department's searches, the Department had already considered 5943 pages in its decision. The applicant has continued to express such concerns following receipt of OIC's more recent advice¹⁵⁴ that:
- a very high number of pages—7429¹⁵⁵— have now been considered for release both initially and on external review, with the large majority of these pages—4557 full¹⁵⁶ and 1194 part¹⁵⁷ pages—released to the applicant
 - as noted above,¹⁵⁸ based on a brief assessment of the 1452 pages of OQPC documents considered in the Department's decision (that is, **not** a comprehensive assessment of all considered information)—123 pages responsive to categories (1), (2) and (3) were identified as having being released to the applicant; and
 - a large number of individuals conducted extensive searches for relevant documents.¹⁵⁹
115. At the same time as expressing these concerns, the applicant also continues to raise sufficiency of search concerns.¹⁶⁰ Given that the applicant's sufficiency of search concerns remain despite the consideration of 7429 pages, and full or partial release of 5751 of these pages, I consider it reasonable for the Department's searches to be broad in nature, in an effort to locate any documents which may not have been located in earlier searches.

Findings

Would the work substantially divert the Department's resources?

116. The Department has not made a specific estimate of the resources that would be used in performing the tasks set out at section 60(2) of the RTI Act. When advising OIC of the location of 6768 pages of the Remaining Documents, the Department calculated that it would take 20 weeks to review that portion.¹⁶¹ However, this calculation did not estimate the time that the work involved in reviewing the 6768 pages would consume—rather, it estimated the time that the RTI and Privacy Unit would need to review those pages, while also progressing other, unrelated applications and fulfilling other functions.
117. I consider that a very conservative estimate for the amount of time to be spent on assessing which of the Remaining Documents fall within the applicant's proposed limited scope would be 15 seconds per page. As the Remaining Documents comprise 11,113

¹⁵³ The applicant raised such concerns in submissions dated 19 July 2015, 20 August 2015, 29 August 2015 and 12 June 2016.

¹⁵⁴ On 26 April 2016.

¹⁵⁵ Comprising the 5943 pages initially considered in the decisions, 1298 further pages considered in August 2015, and 6 and 182 pages considered in OIC's letter dated 26 April 2016.

¹⁵⁶ Comprising 2992 and 723 pages initially, 661 pages in late August 2015, and 6 and 175 as a result of OIC's letter dated 26 April 2016.

¹⁵⁷ Comprising 847 and 235 pages initially, and 112 pages in late August 2015.

¹⁵⁸ At paragraph 110.

¹⁵⁹ As summarised at paragraphs 66-69, and set out in further detail at pages 7 to 12 of the preliminary view dated 26 April 2016.

¹⁶⁰ See the submissions referred to in footnote 153.

¹⁶¹ Submission dated 18 June 2015.

pages, this would total 2778.25 minutes—or, in other words, approximately 46 hours, 20 minutes.

118. Assuming, on a very conservative basis, that only a small proportion—20%—of the Remaining Documents fall within the applicant's proposed limited scope of five categories, this would nonetheless result in the identification of approximately 2000 pages requiring further consideration.
119. Again, I consider that a very conservative estimate for the amount of time to be spent on:
- scanning these pages
 - determining if the pages are exact duplicates of documents to which the applicant has already been given access
 - if not—
 - determining whether to give, refuse or defer access to any information within the pages
 - marking-up the pages to redact any refused information or information which the applicant has agreed to exclude; and
 - conducting third party consultations; and
 - providing submissions to OIC regarding the Department's assessment of the Remaining Documents

would equate to approximately 1 minute per page. This would total approximately 2000 minutes—or, in other words, 33 hours, 20 minutes.

120. The combined total of these estimates is approximately 79 hours and 40 minutes. This equates to approximately 11 working days for one full time decision-maker working exclusively on the Remaining Documents—that is, a little less than half the usual processing period allowed for processing an application.¹⁶²
121. Whether the work involved in dealing with an application would, if carried out, substantially and unreasonably divert the resources of an agency is a question of fact in each individual case.¹⁶³ The volume of documents is not the only consideration. In each case, it is necessary to assess the work required to deal with the application in the context of the agency's other functions.
122. In the present circumstances, I consider that the work already performed is relevant to the question of whether the further work involved in dealing with the Remaining Documents amounts to a substantial diversion of resources. In this regard, I consider it relevant to note the 130 hours (that is, approximately 18 working days) that the Department estimates have already been spent on dealing with these applications initially and on external review,¹⁶⁴ as well as the above estimate of 79 hours and 40 minutes.

¹⁶² Under section 22 of the IP Act, the processing period for an access application is 25 business days. Whilst this period can effectively be extended in certain circumstances as certain periods do not count as part of the processing period, it is relevant to have regard to this timeframe when considering whether the time involved in processing a single access application will have a substantial impact on an agency's resources.

¹⁶³ *Davies and Department of the Prime Minister and Cabinet* [2013] AICmr 10 (22 February 2013) at [28].

¹⁶⁴ Submission dated 16 October 2015.

123. I have carefully considered the total of the above estimates which, as stated above, I consider to be very conservative. I have also noted that this amount applies across two applications to entities that are separate agencies under the IP Act. Further, I have considered the present size of the Department's RTI and Privacy Unit, as well as the size of the Department and OQPC themselves, and noted the relatively limited capacity of the Department and OQPC to devote existing RTI and Privacy Unit resources, or other Departmental and OQPC resources, to continuing to deal with the applicant's applications relative to processing other applications under the RTI and IP Acts and performing other Departmental and OQPC functions. Taking into account these matters, I am satisfied that the work involved in processing,¹⁶⁵ or further processing,¹⁶⁶ the Remaining Documents would, if carried out, **substantially** divert the resources of the Department from their use in the performance of the Department's and OQPC's functions.

Would the work unreasonably divert the Department's resources?

124. In determining whether the work involved in dealing with an application is unreasonable, it is not necessary to show that the extent of the unreasonableness is overwhelming. Rather, it is necessary to weigh up the considerations for and against, and form a balanced judgement of reasonableness, based on objective evidence.¹⁶⁷

125. Factors that have been taken into account in considering this question include:¹⁶⁸

- whether the terms of the request offer a sufficiently precise description to permit the agency, as a practical matter, to locate the documents sought within a reasonable time and with the exercise of reasonable effort
- the public interest in disclosure of documents relating to the subject matter of the request
- whether the request is a reasonably manageable one, giving due but not conclusive, regard to the size of the agency and the extent of its resources usually available for dealing with access applications
- the agency's estimate of the number of documents affected by the request, and by extension the number of pages and the amount of officer time
- the reasonableness or otherwise of the agency's initial assessment and whether the applicant has taken a cooperative approach in redrawing the boundaries of the application
- the timelines binding on the agency
- the degree of certainty that can be attached to the estimate that is made as to the documents affected and hours to be consumed; and in that regard, importantly whether there is a real possibility that processing time may exceed to some degree the estimate first made; and
- whether the applicant is a repeat applicant to that agency, and the extent to which the present application may have been adequately met by previous applications to the agency.

126. As the issue of substantial and unreasonable diversion of resources only arose on external review, some of these factors are not relevant in this case.

¹⁶⁵ The approximately 8818 pages referred to at paragraph 91 above.

¹⁶⁶ The 2295 pages referred to at paragraph 92 above.

¹⁶⁷ *Smeaton v Victorian WorkCover Authority (General)* [2012] VCAT 1550 (**Smeaton**) at [30], citing *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

¹⁶⁸ *Smeaton* at [39].

Repeat applicant

127. There is no information before me to suggest that the applicant is a repeat applicant to the Department or OQPC in their capacity as agencies, nor that his applications may have been adequately met by previous applications to them.

Applicant's cooperation

128. I note that the applicant endeavoured to take a cooperative approach by proposing to reduce the categories of information to be considered within the Remaining Documents. However, for the reasons at paragraphs 104 to 111 above, I am satisfied that the applicant's proposals would not reduce the documents to be considered to such an extent as to remove the ground for the refusal to deal.

Sufficiently precise terms

129. I consider that categories (1), (2) and (3), as proposed by the applicant, are still broad and insufficiently precise to enable the Department to locate such documents within a reasonable time and with the exercise of reasonable effort. In this regard, I have noted that, for:

- category (1)¹⁶⁹—it could reasonably be expected that there would be numerous documents which relate to the applicant's work performance or work conduct at OQPC over a period of years
- category (2)¹⁷⁰—there are likely to be many emails authored by these individuals expressing an observation about the applicant or the applicant's work over a period of years; and
- category (3)¹⁷¹—this category would extend to nearly all documents created during proceedings after the time the applicant's employment ended, and it is also likely that there would be a substantial number of documents created about this prior to the ending of the applicant's employment.

Public interest

130. The applicant has indicated to OIC on a number of occasions that he is seeking the information for specific purposes. I acknowledge this, but cannot take this aspect of the applicant's submissions into account.¹⁷² However, in accordance with the factors noted above, I am able to consider the public interest in disclosure of the categories of documents nominated by the applicant among the Remaining Documents. In this regard, my views are necessarily qualified, given that they are based on my understanding of the nature of such documents (as gleaned from consideration of other located documents and the parties' submissions), rather than a thorough awareness of their contents. Noting this qualification, I consider that there is some public interest in the applicant having access to his own personal information, and accept that the documents may relate to matters which could potentially enhance the accountability and

¹⁶⁹ Documents relating to [the applicant's] work performance or work conduct at OQPC created from 2009 onwards (including emails and file notes).

¹⁷⁰ Documents expressing an opinion, appraisal, feedback or observation about [the applicant or his] work, authored by [Officer A], [Officer D] or [Officer E] and created from 2009 onwards (including emails and file notes).

¹⁷¹ Documents dealing with the possible, proposed or actual termination of [the applicant's] employment at OQPC created from 2009 onwards (including emails and file notes).

¹⁷² Given section 60(3) of the IP Act, which provides that an agency must not have regard to any reasons the applicant gives for applying for access; or the agency's belief about what the applicant's reasons are for applying for access.

transparency of OQPC and the Department. However, it also appears that these public interest factors may apply mainly in terms of the applicant, and may be of limited interest to all or a substantial segment of the community.

131. Also in terms of the public interest, I note that, on external review, OIC prioritised consideration of the applicant's concerns regarding specific types of documents (that is, items (iv), (vi), (vii), (viii), (ix) and (xii)), and focused on files that could reasonably be expected to contain them (that is, the OQPC files comprising 2477 pages rather than those comprising approximately 2050 pages). I also note the Department's expectation that the majority of the Remaining Documents will either be duplicates, or outside the scope of the applications (but captured due to the broad nature of the searches undertaken by the Department on external review in an effort to locate any missed documents).¹⁷³ In these circumstances, I do not consider it likely that dealing with the Remaining Documents would further the public interest to any significant degree.

Reasonableness of agency's approach

132. I acknowledge the applicant's concerns about the broadness of the Department's searches that resulted in location of the Remaining Documents. However, for the reasons listed at paragraphs 113 to 115, I consider that it was reasonable for the Department to have undertaken broad searches in an effort to locate any documents which may not have been located in earlier searches.

Accuracy and certainty of estimate

133. As set out at paragraphs 117 to 123 above, for the purposes of this decision, I estimated that dealing with the Remaining Documents would take the Department approximately 79 hours and 40 minutes. In calculating this estimate, I formed my own conclusions, separate from the Department's own calculation.¹⁷⁴ I consider that my estimate is very conservative. For example, depending on the nature of particular documents, the time required to undertake the following steps noted at paragraph 119 above regarding each page could well exceed the estimated 1 minute per page.
134. In terms of the time that the Department estimates has already been spent on dealing with the applications initially and on external review, I note the Department's estimate of 130 hours, and consider this to be reasonable in light of the number of documents considered by the Department, the amount of searches conducted, the lengthy nature of the decision, and the Department's communications on external review. Noting the time spent by OIC on similar activities, I consider that this estimate is conservative.

Reasonably manageable request

135. In determining whether dealing with the Remaining Documents is reasonably manageable for the Department and OQPC, I am required to give due, but not conclusive, regard to the size of the agency and the extent of its resources usually available for dealing with access applications. I do not regard the estimate of 79 hours and 40 minutes noted above to be reasonably manageable in the current reviews, in light of the time already spent dealing with the applications, and given the need for the Department and OQPC to process other applications and attend to other Departmental and OQPC functions.

¹⁷³ Submissions dated 19 May 2015, 16 June 2015 and 16 October 2015.

¹⁷⁴ See paragraph 116.

136. Taking into account the above factors, I am satisfied that the work involved in processing,¹⁷⁵ or further processing,¹⁷⁶ the Remaining Documents would, if carried out, **unreasonably** divert the resources of the Department from their use in the performance of OQPC's functions.

Conclusion

137. I consider that the Department is entitled to refuse to deal with the Remaining Documents under section 60 of the IP Act on the basis that the work involved in processing, or further processing, them would both substantially and unreasonably divert the Department's resources from their use in the performance of OQPC's functions.

DECISION

138. For the reasons set out above, I set aside the Department's decision, and find that:

- access to the Category A Information and Category B Information may be refused on the ground that it comprises exempt information¹⁷⁷
- certain documents the applicant contends the Department failed to locate may be refused on the ground that they are nonexistent or unlocatable;¹⁷⁸ and
- OQPC may refuse to deal with the Remaining Documents on the basis that the work involved in processing, or further processing, them would substantially and unreasonably divert resources from their use in the performance of OQPC's functions.¹⁷⁹

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

A Rickard
Assistant Information Commissioner

Date: 13 October 2016

¹⁷⁵ The approximately 8818 pages referred to at paragraph 91 above.

¹⁷⁶ The 2295 pages referred to at paragraph 92 above.

¹⁷⁷ Section 67 of the IP Act and sections 47(3)(a) and 48 and schedule 3, sections 7 and 10(4) of the RTI Act.

¹⁷⁸ Section 67 of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

¹⁷⁹ Section 60(1)(a) of the IP Act.

APPENDIX

Significant procedural steps¹⁸⁰

Date	Event
21 May 2014	The Department received the access application for the Department.
30 May 2014	The Department proposed an amended scope for the access application for the Department. The applicant accepted this amended scope.
4 June 2014	OQPC received the access application for OQPC.
18 June 2014	The Department received the access application for OQPC.
7 July 2014	The Department proposed the exclusion of certain information from the scope of both applications, which the applicant accepted.
20 August 2014	The Department issued its decision in respect of both access applications.
3 September 2014	OIC received the application for external review of the decision in respect of both access applications.
5 September 2014	OIC notified the Department of the external review application and requested procedural documents in relation to both access applications.
12 September 2014	The Department provided OIC with the requested procedural documents.
24 September 2014	OIC notified the applicant and the Department that OIC had accepted the external review application. OIC asked the Department to provide a record of searches and its records regarding third party consultation by 9 October 2014.
1 October 2014	The Department provided records of its searches and its records regarding third party consultation.
14 October 2014	The applicant wrote to OIC, raising sufficiency of search concerns.
15 October 2014	An OIC staff member spoke with the applicant about the review, including about sufficiency of search concerns.
17 October 2014	OIC wrote to the applicant about the issues for consideration, including a request for specific sufficiency of search submissions.
18 October 2014	The applicant responded to OIC's 17 October 2014 correspondence.
21 October 2014	OIC wrote to the applicant about the issues for consideration.
22 October 2014	The applicant responded to OIC's 21 October 2014 correspondence.
24 October 2014	OIC wrote to the applicant.
20 November 2014	The applicant requested an update.

¹⁸⁰ As noted at paragraph 4 above, throughout the two external reviews, OIC has adopted the procedure of addressing issues arising in them concurrently. Consequently, the significant procedural steps summarised in this table identify the steps taken in both external reviews.

Date	Event
24 November 2014	OIC provided an update to the applicant.
12 December 2014	OIC asked the Department to provide a marked-up copy of the 5943 pages considered in its decision (being 4491 pages located by Departmental officers and 1452 pages located by OQPC officers).
15 December 2014	The Department provided a marked-up copy of the 5943 pages.
16 January 2015	OIC provided an update to the applicant.
24 February 2015	OIC provided an update to the applicant.
9 April 2015	OIC provided an update to the applicant.
28 April 2015	OIC wrote to the Department, asking for a sufficiency of search submission by 12 May 2015 and, if necessary, for further searches to be conducted. OIC provided an update to the applicant.
6 May 2015	The applicant wrote to OIC, raising sufficiency of search concerns.
8 May 2015	The Department requested an extension until 19 May 2015, which OIC granted. OIC wrote to the applicant, outlining the issues to be taken into account in addressing his sufficiency of search concerns.
19 May 2015	The Department confirmed to OIC that relevant Departmental officers' search records would shortly be provided to OIC, and that <i>'several thousand documents potentially relevant to the scope of the application [had] also [been] provided [to the Department contact] by the relevant Officers'</i> . As a result, the Department requested an extension until 16 June 2015, in order to examine these documents.
20 May 2015	OIC granted the requested extension to the Department. The Department provided records of its further searches.
3 June 2015	OIC provided an update to the applicant.
16 June 2015	The Department noted its progress to date (including that approximately 1300 pages of the documents located on external review had been reviewed and approximately 7000 pages were yet to be reviewed), and asked for either an extension or OIC's advice as to how to progress the matter further.
17 June 2015	The Department provided a marked-up copy of 1298 pages of documents located on external review, and advised that approximately 6768 further pages ¹⁸¹ had yet to be scanned and reviewed. The Department noted that at least some of these pages were duplicates of pages addressed in the Department's original decision.
18 June 2015	The Department summarised its progress to date in dealing with the documents located on external review, and the work yet to be done.

¹⁸¹ Comprising 1368 pages of emails from Officer G, approximately 4400 pages of emails from Officer B, and approximately 1000 pages of the Department's N:Drive documents.

Date	Event
8 July 2015	<p>OIC wrote to the applicant:</p> <ul style="list-style-type: none"> • informing him of the documents located on external review and reviewed by the Department • noting that the work involved in reviewing the Remaining Documents would constitute a substantial and unreasonable diversion of resources, and asking him to advise if he was able to limit the information to be considered; and • requesting a response by 22 July 2015.
13 July 2015	<p>An OIC staff member spoke with the applicant about OIC's 8 July 2015 correspondence.</p>
19 July 2015	<p>The applicant provided a response to OIC's 8 July 2015 correspondence, seeking an extension and further details about the documents in question, and advising that he did not wish to access the following types of information within them:</p> <ul style="list-style-type: none"> • duplicates of documents to which he had already been given access, except for those duplicate documents that have additional notations or comments • work mobile phone numbers and personal information of other individuals • Cabinet documents; and • legislation drafted by him.
21 July 2015	<p>An OIC staff member spoke with the applicant about OIC's 8 July 2015 correspondence.</p>
28 July 2015	<p>OIC wrote to the Department, summarising the applicant's proposal to limit the information to be considered in the documents located on external review yet to be reviewed by the Department, and asking if this would enable the Department to process these documents.</p> <p>The Department responded, noting that the applicant's proposal would not assist the Department in reducing the work involved in reviewing the documents in question.</p>
31 July 2015	<p>OIC wrote to the Department seeking clarification about the application of the LPP and CCC exemptions in respect of certain information among the documents located on external review and reviewed by the Department.</p>
3 August 2015	<p>The Department provided a written response to OIC's 31 July 2015 letter.</p>

Date	Event
13 August 2015	<p>OIC wrote to the applicant:</p> <ul style="list-style-type: none"> • advising that the Department had agreed to release some of the documents located on external review and reviewed by the Department (namely, 251 pages and 55 part pages located by OQPC officers) • conveying a preliminary view on: <ul style="list-style-type: none"> ○ the LPP and CCC exemptions ○ sufficiency of search issues; and ○ the substantial and unreasonable diversion of resources issue • asking the applicant to consider setting out a further proposal to limit the information to be considered in the documents located on external review yet to be reviewed by the Department; and • requesting a response by 26 August 2015. <p>OIC wrote to the Department, summarising the preliminary view to the applicant, and asking for information to be released to the applicant by 19 August 2015.</p>
20 August 2015	<p>The applicant wrote to OIC about the 13 August 2015 letter, requesting more details about the documents located on external review yet to be reviewed by the Department (including general descriptors of their various categories), and asking for an extension until 21 September 2015.</p>
21 August 2015	<p>An OIC staff member spoke with the applicant about OIC's 13 August 2015 letter.</p> <p>OIC wrote to the applicant in response to his 20 August 2015 letter:</p> <ul style="list-style-type: none"> • noting that: <ul style="list-style-type: none"> ○ the work involved in identifying the types of information nominated in his 19 July 2015 letter for elimination from consideration would be extensive, and require examination of the entirety of the documents located on external review yet to be reviewed by the Department; and ○ examining these documents to the degree necessary to categorise them and provide descriptors would require a similarly extensive amount of work; and • granting an extension until 2 September 2015 to respond to OIC's 13 August 2015 letter.
27 August 2015	<p>An OIC staff member spoke with the applicant about the 13 August 2015 and 21 August 2015 letters, his allegations of misconduct by agency officers and his query about action that could be taken regarding misconduct.</p>
28 August 2015	<p>An OIC staff member spoke with the applicant about the 13 August 2015 and 21 August 2015 letters, and his query about misconduct.</p>

Date	Event
29 August 2015	<p>The applicant provided a response to OIC's 13 August 2015 and 20 August 2015 letters:</p> <ul style="list-style-type: none"> • making submissions about OIC's preliminary view on the Category A Information and eleven sufficiency of search concerns • expressing concern that the large number of documents located on external review yet to be reviewed by the Department may be a result of the Department's searches having been too broad; and • including a further proposal to limit these documents.
3 September 2015	An OIC staff member spoke with the applicant about the 13 August 2015 and 21 August 2015 letters, and his query about misconduct.
4 September 2015	<p>OIC wrote to the applicant:</p> <ul style="list-style-type: none"> • confirming the remaining refusal and sufficiency of search issues • noting the applicant's further proposal to limit the information to be considered in the documents located on external review yet to be reviewed by the Department; and • providing a response to the applicant's query about misconduct. <p>An OIC staff member spoke with the applicant about the 13 August 2015 and 21 August 2015 letters, and his query about misconduct.</p>
16 September 2015	OIC wrote to the Department, asking about sufficiency of search issues and the applicant's further proposal to limit the information to be considered in the documents located on external review yet to be reviewed by the Department, and requesting a response by 2 October 2015.
22 September 2015	An OIC staff member spoke with a Departmental officer about OIC's 16 September 2015 letter.
30 September 2015	An OIC staff member spoke with a Departmental officer about OIC's 16 September 2015 letter.
1 October 2015	OIC wrote to the Department about the sufficiency of search issues.
2 October 2015	<p>The Department asked for an extension until 16 October 2015, which OIC granted.</p> <p>OIC provided an update to the applicant.</p>
13 October 2015	An OIC staff member spoke with a Departmental officer about OIC's 16 September 2015 letter.
16 October 2015	<p>The Department wrote to OIC, providing:</p> <ul style="list-style-type: none"> • search records and statutory declarations about documents • a response regarding the applicant's further proposal to limit the information to be considered in the documents located on external review yet to be reviewed by the Department • six further pages located on external review; and • details about categories of further documents located on external review by OQPC officers yet to be reviewed by it, which it approximated to total 3800 pages.

Date	Event
18 October 2015	The applicant wrote to OIC, explaining specific sufficiency of search concerns and expanding on his query about misconduct.
4 December 2015	An OIC staff member spoke with the applicant about the applicant's concerns about the sufficiency of search and substantial and unreasonable diversion of resources issues and his query about misconduct.
24 December 2015	An OIC staff member spoke with the applicant about the applicant's concerns about the sufficiency of search and substantial and unreasonable diversion of resources issues. OIC provided an update to the applicant.
29 January 2016	OIC wrote to the Department: <ul style="list-style-type: none"> • asking it to provide OIC with certain categories of documents among the approximately 3800 pages identified in its 16 October 2015 letter • seeking its position on disclosure of the six located pages provided with its 16 October 2015 letter • clarifying one aspect relating to one of the documents within the six located pages; and • requesting a search certification or statutory declaration relating to one sufficiency of search issue. OIC provided an update to the applicant.
12 February 2016	The Department wrote to OIC, responding to the issues raised in OIC's letter dated 29 January 2016, and providing OIC with 2477 pages of documents located on external review.
11 March 2016	OIC provided an update to the applicant.
1 April 2016	OIC wrote to the Department, seeking its position on disclosure of 182 of the 2477 pages provided with its 12 February 2016 letter, which contained information responding to eight of the eleven sufficiency of search concerns raised by the applicant in his submissions dated 29 August 2015.
5 April 2016	The Department confirmed its agreement to release a redacted version of the 182 pages.
26 April 2016	OIC wrote to the applicant: <ul style="list-style-type: none"> • conveying a preliminary view on: <ul style="list-style-type: none"> ○ the refused information remaining in issue, which OIC considered to be only the Category A Information ○ the sufficiency of search issues; and ○ the substantial and unreasonable diversion of resources issue regarding the documents located on external review yet to be reviewed by the Department; and • requesting a response by 13 May 2016. OIC asked the Department to release six pages and a redacted version of the 182 pages.
28 April 2016	An OIC staff member spoke with the applicant, and the applicant requested an extension of at least one month.

Date	Event
29 April 2016	OIC granted the applicant an extension until 16 June 2016. OIC suspended these reviews.
3 May 2016	The Department wrote to OIC, confirming release of the six pages and a redacted version of the 182 pages.
12 June 2016	The applicant provided a response to OIC's 26 April 2016 letter: <ul style="list-style-type: none"> • making submissions about sufficiency of search issues and OIC's preliminary view on the Category B Information • expressing concerns about OIC's preliminary view on the substantial and unreasonable diversion of resources issue • raising a query about the offence provisions of the RTI Act; and • requesting certain documents.
13 June 2016	OIC ended the suspension of the two reviews.
1 July 2016	OIC provided an update to the applicant, confirming (among other things) that OIC's next step would be a written decision addressing the applicant's concerns insofar as they relate to the issues in these reviews. An OIC staff member spoke with the applicant about OIC's 26 April 2016 letter and the applicant's 12 June 2016 response.
3 July 2016	The applicant wrote to OIC, expanding on the issues raised in his 12 June 2016 response.
6 July 2016	OIC wrote to the applicant: <ul style="list-style-type: none"> • responding to a concern of the applicant regarding the substantial and unreasonable diversion of resources issue; and • confirming that OIC's next step would be a written decision.
12 July 2016	The applicant provided a response to OIC's 6 July 2016 letter.
4 August 2016	OIC responded to the applicant's 12 July 2016 letter.