



Decision and Reasons for Decision

Citation: *W52 and Crime and Corruption Commission* [2021] QICmr 57 (28 October 2021)

Application Number: 316000

Applicant: W52

Respondent: Crime and Corruption Commission

Decision Date: 28 October 2021

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - in-house legal advice and assistance - whether information would be privileged from production in a legal proceeding - whether access may be refused under section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(a) and 48 and schedule 3, section 7 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - INVESTIGATION BY PRESCRIBED CRIME BODY - investigation information - information obtained, used or prepared for an investigation by a prescribed crime body or another agency in performing the prescribed functions of the prescribed crime body - service delivery complaint information ancillary to investigation by a prescribed crime body - whether access may be refused under section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(a) and 48 and schedule 3, section 10(4) of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Crime and Corruption Commission (**CCC**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to:

All documents including correspondence, diary notes and electronic database references (for example, showing date of receipt or creation of document and location) regarding my complaint of 16 Jan 2018, and my follow-up correspondence of 2 May 2018. The scope of this request should be interpreted to include correspondence with other agencies or myself

¹ Application dated 30 November 2020.

regarding these matters. The two letters of complaint, addressed to Mr MacSporran, were originally sent to the CCC by post. CCC should have the hard copies.

I also request an image that has been taken of the front page of the hard copy of each of the two said letters of complaint.

[Applicant's emphasis]

2. Correspondence was then exchanged between the applicant and the CCC over a period of more than three months concerning the scope of the application and procedural issues and questions raised by the applicant. The applicant made complaints about the CCC's handling of his application. Eventually, the CCC gave the applicant an access decision² under the IP Act in response to the following scope:³

Two letters of complaint (dated 16 January 2018 and 2 May 2018) were forwarded by post to the CCC, addressed to Mr MacSporran QC as the CCC Chairperson. Except where stated below, this request does not include any email correspondence with CCC sent by or to myself.

Any disclosure includes

- *copies of the front page of the hard copy version of these two letters. (2 items)*
- *all documents, in whole or part, consistent with an IP application, including correspondence, diary notes and electronic database entries (excluding filing references) which discuss or are in relation to the complaint correspondence from myself dated 16 January 2018 and 2 May 2018, and this includes correspondence with external agencies. (n [sic] items)*
- *the CCC filing references and locations (or email account names) of 4 emails that were sent by myself to the CCC on the dates of 28 May 2018, 10 December 2018 and 27 February 2019 where the email subject line is i) 'Missing Correspondence' (and minor email variations Fw: Re:) and ii) 'Correspondence Resend'. This includes the original 4 emails and Commission emails which forward the originals. Each disclosure item should indicate whether the attachments were present. (4 known items). I also restrict this search to a maximum of 8 items – 2 per email.*
- *the CCC filing references and locations of the original hard copy letters and all paper copies of the said letters that were made by officers of the Commission. This is limited to 5 reference/location pairs total but it priorities [sic] the Integrity Services Unit, Office of Exec. Director Corruption and Office of the Chairperson. Lowest priority is the office of the CEO and this reference/location pair may be excluded if there are at least 5 other matches, unless the original hard copies are held there which makes it the top priority match. (5 items).*

3. The CCC identified 184 responsive documents. It decided to give the applicant full access to 15 documents, partial access to 7 documents, and to refuse access to 162 documents.⁴
4. The applicant applied⁵ to the Office of the Information Commissioner (**OIC**) for external review of the CCC's decision.
5. For the reasons set out below, I affirm the CCC's decision to refuse access to the information in issue under section 67(1) of the IP Act and sections 47(3)(a) and 48 of the *Right to Information Act 2009 (Qld) (RTI Act)*.

² Dated 18 March 2021.

³ As set out in the CCC's decision.

⁴ Access to four documents was refused on the basis that they were copies of documents already considered: documents 87, 227, 254 and 255.

⁵ On 9 April 2021.

Reviewable decision

6. The decision under review is the CCC's decision dated 18 March 2021.

Evidence considered

7. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).
8. Significant procedural steps relating to this review are set out in the Appendix.

Application of the Human Rights Act

9. I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁶ I consider a decision-maker will be '*respecting and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the IP Act and RTI Act.⁷ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:⁸ '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*'⁹

Information in issue

10. During the course of the review, the CCC decided to give the applicant access to an additional four documents.¹⁰
11. The information remaining in issue comprises the documents to which the CCC refused access, either fully or in part. The CCC decided that this information was exempt pursuant to:
 - schedule 3, section 7 of the RTI Act because it qualified for legal professional privilege (**LPP Information**);¹¹ or
 - schedule 3, section 10(4) of the RTI Act because it was information obtained, used or prepared for an investigation by a prescribed crime body in the performance of the crime body's prescribed functions (**Investigation Information**).¹²

Issue for determination

12. The issue for determination is whether access to the LPP Information and Investigation Information may be refused on the basis that it is exempt information under schedule 3 of the RTI Act.
13. Before addressing this issue, I will firstly address procedural concerns and complaints made by the applicant during the review.

⁶ Section 21 of the HR Act.

⁷ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

⁸ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁹ *XYZ* at [573].

¹⁰ Documents 146, 149, 159 and 175 with deletion of some personal/irrelevant information.

¹¹ Documents 1 - 3, 5 - 15, 18 - 20, 108 (part), 112 - 117, 120 - 127, 129, 130 - 132, 134 - 137, 139 and 140.

¹² Documents 16 (part), 22, 25, 39, 40, 42, 43, 44, 46, 47 (part), 59, 64, 66, 77, 85, 86, 88 - 92, 93 (part), 94 - 97, 101, 103 - 107, 108 (part), 157, 163, 164, 170, 174, 176, 181, 183, 187, 188, 190 - 206, 208 - 213, 215 - 226, 228 - 231, 235, 236, 238 - 243, 245 - 247, 249 - 253, 256, 261, 262 (part), 263 - 266, 268, 269 (part), 270, 271 (part), and 272 - 277.

External review process and complaints made by the applicant

14. Following a review of the refused information, the CCC's decision, and the material provided by the applicant in support of his application for review, the Right to Information Commissioner (RTIC) wrote to the applicant¹³ to communicate a preliminary view that there existed grounds for refusing access to the information in issue. The issues to be determined, as identified by the RTIC following a preliminary assessment, were explained to the applicant. If he did not accept the RTIC's preliminary view, the applicant was invited to provide a written submission in support of his case for disclosure.
15. However, rather than responding to the issues for determination as set out in the RTIC's letter, the applicant raised a long series of procedural issues, complaints and questions over the following three months, including sending a number of emails directly to the Information Commissioner (IC) in which he demanded that the IC take over conduct of the review because he was not satisfied that 'Federal Law' was being applied, particularly 'the Doctrine of Natural Justice and procedural fairness'.¹⁴ He demanded that the IC confirm that OIC was required to comply with various laws when conducting a review.¹⁵

... That allows me to ask you the key question about the Office of the Independent [sic] Commissioner. I have been given cause on many, many occasions, including in this case [1] and in the last case (315704) to doubt that the functioning of the Office of the Independent [sic] Commissioner is founded in Australian Law.

That's really shocking for a public service agency. This conduct is paid for by taxpayers. I therefore ask you the following key question :

Q1. As CEO of the OIC, could you please confirm that the OIC formally recognises any of the following as applicable law for your agency :

*Australian Federal Law
Australian Common Law
The Doctrine of Natural Justice
Procedural Fairness*

I see this as the make or break question for yourself, being the leader of the agency.

*The circumstances **presented** in OIC cases demand that there is a positive answer to this question.*

If you again conduct yourself as though the circumstances presented have not arisen, where the correspondence disagrees with you, you are breaching Federal Law as well as several Acts of the Queensland Parliament. For example, each agency CEO is required to be Honest and Fair whilst also acting in the Public Interest and with Integrity. That's Queensland Legislation [2]. I could also cite the ethical Code of Conduct.

You appear to be failing at the most basic level, demolishing the various Acts, as is your second-in-command. The evidence is there.

...

References

¹³ Letter dated 20 July 2021.

¹⁴ See the applicant's emails of 26 July 2021 (responded to on 28 July 2021), 2 August 2021 (responded to on 4 August 2021), 4 August 2021 (responded to on 5 August 2021), 9 August 2021 (responded to on 10 August 2021), 12 August 2021 (responded to on 12 August 2021), 19 August 2021 (responded to on 19 August 2021), 19 August 2021 (second email) (responded to on 20 August 2021), 20 August 2021 (responded to on 23 August 2021), 23 August 2021 and 25 August 2021 (responded to on 26 August 2021), 26 August 2021 and 2 September 2021 (responded to on 2 September 2021), 3 September 2021 and 7 September 2021 (responded to by both the IC and RTIC on 8 September 2021), 8 and 9 September 2021 (responded to on 10 September 2021), 10 and 14 September 2021 (responded to on 15 September 2021), 16 September 2021 (responded to on 17 September 2021), 22 September 2021 (responded to on 18 October 2021), and 22 October 2021 (responded to on 25 October 2021).

¹⁵ Email of 20 August 2021.

1. Recent examples of the Right to Information Commissioner being caught acting unlawfully

26th July 2021 at 3:49pm - email 'Application No. 316000', addressed to [the RTIC]:
"Lawyers should act lawfully. I've noted this before. I now extend it :

Lawyers should understand the law.

"

This point had been made in case 315704 as well (on 7th June 2021).

2. Public Service Act 2008

...

"26 Work performance and personal conduct principles

(1) In recognition that public service employment involves a public trust, a public service employee's work performance and personal conduct must be directed towards—
(a) achieving excellence in service delivery; and

...

(g) carrying out duties **impartially and with integrity**; and
(h) **acting honestly, fairly and in the public interest**; and

...

[Applicant's emphasis]

16. The applicant made allegations of misconduct against the RTIC, apparently arising out of the preliminary view letter, and complained about OIC's processes and procedures in this review. He also continued to complain about the conduct by OIC of a previous review that had been finalised by way of a formal decision.
17. It is clear from the applicant's persistent engagement with OIC that he is dissatisfied with OIC's responses to his numerous emails. He continues to assert that he has been denied procedural fairness in this review (and in his previous review) and that OIC has not complied with other, generally unspecified legal obligations in conducting the review.
18. I have considered the complaints raised by the applicant during the course of the review and reject them as without substance. I am satisfied that OIC responded in a timely and appropriate manner to all issues that the applicant raised about the conduct of the review. I am further satisfied that OIC has complied with its obligation to afford the applicant procedural fairness in respect of the issues for determination in this review. Those issues were explained to him, and he was granted a number of extensions of time to provide a submission in support of his position regarding those issues. To the extent that any of his emails address the issues for determination, I will discuss them below.
19. I reject the applicant's allegation of misconduct against the RTIC as without substance. I note that the IC also considered and rejected the applicant's allegation during the course of the review.¹⁶ He appears to base this allegation on the fact that he disagrees with the preliminary view expressed by the RTIC in the letter dated 20 July 2021 and that he considers that the law has been misapplied. I will discuss this further below.
20. Upon advising the applicant that I would now be the decision-maker in this review due to the RTIC's extended absence from the office, the applicant requested that I provide him with my own preliminary view and an opportunity to comment upon it.¹⁷ If I refused his request, he demanded that the case be 'escalated' to the IC:

¹⁶ IC's email of 20 August 2021.

¹⁷ Applicant's email of 16 September 2021.

...

Allowing me an opportunity to comment on your own preliminary view ought to be possible but if you cannot agree to allow me that then I now escalate the case to [the IC]. As you may read in the file, one of my major concerns was that the previous preliminary view would be converted to a final view, inclusive of the various known legal errors.

Those errors were basic ones, appearing to show a desire by the OIC not to apply the IP Act and/or RTI Act in full.

Since those Acts are central to the work of the OIC, a failure to support them in a preliminary view document, done as an accident, would be implausible. That leaves failure to support the Acts by design. This is removal of the OIC external review, in practice.

Please confirm that you will allow me an opportunity to comment on your own preliminary view as the next step. If that's not possible I provisionally escalate this case to the CEO now, with the case OPEN.

(I note that this situation mirrors closely what happened in case 315704. The case was closed.)

I emphasise that we must have procedural fairness since it is applicable law in the OIC, deriving from Common Law.

Lawyers in public service agencies are expected to apply applicable law.

[Applicant's emphasis]

21. I responded by email on 17 September 2021, advising the applicant that I had not yet had an opportunity to review the matter but that if, following my review, I formed a view that was adverse to his interests and that involved the application of provisions of the RTI or IP Acts that the RTIC had not already communicated to him, I would give him an opportunity to comment in response, in accordance with the requirements of procedural fairness. The applicant responded again:¹⁸

Thank you for your email dated 17th Sep 2021, copied below for context.

The assurance that you provide is welcome but it still permits the case to be closed improperly in a large number of ways. This is suspicious and not what I had expected.

I therefore clarify and notify my revised position :

Once you have reviewed the case documents, whatever action you plan to take next should be deferred until you have provided me with an indication of your planned action.

At that point I will assess whether any legislation has been breached (or possibly breached), not just the IP Act and RTI Act.

I reserve the right to escalate the case to the CEO in an OPEN state.

I note that the CEO has not yet confirmed that the Common Law of Australia is respected within the OIC.

This is very concerning. That could remove the OIC, in effect, removing statutory services.

If you cannot agree with the line in bold, please let me know. That's all I need from you at the moment.

¹⁸ Email of 22 September 2021.

If the answer is 'No' (communicated or not) then this case is escalated to [the Information Commissioner], effective immediately. I actually suspect that it is, based on your statement below.

[Applicant's emphasis]

22. I then conducted a review of the information in issue, the decision under review, the material provided by the applicant in support of his application for external review, and his subsequent emails. By email on 18 October 2021, I advised the applicant that I had formed the preliminary view that access to the information in issue may be refused under schedule 3, sections 7 and/or 10(4) of the RTI Act. The application of these provisions had already been explained in the RTIC's preliminary view letter. I therefore gave the applicant a final opportunity to provide a submission that addressed the application of these exemption provision to the information in issue.
23. The applicant responded on 22 October 2021 in an email addressed to the IC and sent to the IC's direct email address, and copied to the Clerk of the Parliament and the Secretary of the Committee of the Legislative Assembly. He complained that OIC had apparently ignored the submissions he had made about receiving partial access to documents with exempt information deleted. I will discuss this issue below. The applicant also queried whether the RTIC and I had been '*driven*' or '*directed*' to '*mishandle [his] case*' and requested that another decision-maker be appointed to this review. He also again requested that the IC confirm that OIC '*formally recognises any of the following as applicable law for your agency: Australian Federal Law, Australian Common Law, The Doctrine of Natural Justice and Procedural Fairness*'.
24. The IC responded by email on 25 October 2021, advising the applicant that he had already received a response regarding the issues he had raised about receiving partial access to documents; procedural unfairness; and other procedural issues. The IC also advised that she did not propose to make the alternative arrangements that the applicant had requested.
25. In summary, I am satisfied that the applicant has been afforded procedural fairness; that he has been treated fairly in the conduct of the review; that he has been given a reasonable opportunity to provide a submission about the issues identified for determination; and that the review has been conducted in the ordinary manner.

Exempt information – legal professional privilege

Relevant law

26. Schedule 3 of the RTI Act specifies the types of information Parliament has determined are exempt because release would be contrary to the public interest.¹⁹ Relevantly, information is exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.²⁰ This exemption reflects the requirements for establishing legal professional privilege at common law.²¹

¹⁹ Section 67(1) of the IP Act provides that an agency or Minister may refuse access in the same way and to the same extent as under section 47 of the RTI Act. Section 47(3)(a) allows refusal of access to exempt information. Section 48(2) provides that schedule 3 sets out the types of information the disclosure of which Parliament has considered would, on balance, be contrary to the public interest.

²⁰ Schedule 3, section 7 of the RTI Act.

²¹ The doctrine of legal professional privilege is both a rule of evidence and a common law right. The High Court in *Daniels Corporation International Pty Ltd v Australian and Consumer Commissioner* (2002) 213 CLR 543 (**Daniels**) at [9] relevantly noted '*It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings*' (footnotes omitted). See also *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [111] (**Esso**).

27. Establishing whether legal professional privilege applies to information at common law requires that the information must comprise a communication:
- made in the course of a lawyer-client relationship
 - that was and remains confidential; and
 - which was made for the dominant purpose of seeking or providing legal advice or for use in existing or reasonably anticipated legal proceedings.²²
28. When each of these requirements is met, legal professional privilege is established.²³

Finding

29. I have considered the LPP Information. I am satisfied that the communications in question are confidential communications between legal officers of the CCC, or between legal officers and other staff of the CCC, made for the dominant purpose of seeking or providing legal advice or assistance to the CCC. I am satisfied that a lawyer/client relationship existed in respect of the relevant communications, and that the officers providing legal advice and assistance were employed by the CCC as lawyers and were of a sufficiently independent character.²⁴ There is nothing before me to suggest that any qualification or exception to privilege applies.
30. The applicant has provided no submissions in support of an argument that privilege does not apply to the relevant information.
31. As such, I find that access to the LPP Information may be refused on the grounds that it would be privileged from production in a legal proceeding and is therefore exempt information under section 67(1) of the IP Act, and sections 47(3)(a), 48 and schedule 3, section 7 of the RTI Act.

Exempt information – the Prescribed Crime Body Exemption

Relevant law

32. Another category of exempt information is that contained in schedule 3, section 10(4) of the RTI Act (**Prescribed Crime Body Exemption**), being information obtained, used or prepared for an investigation by a prescribed crime body or another agency, during its performance of a prescribed function of the prescribed crime body.
33. The application of the Prescribed Crime Body Exemption was explained in detail in *Cronin and Crime and Corruption Commission*.²⁵ I note that the CCC also discussed its application in detail in its decision.²⁶

Findings

Was the information obtained, used or prepared by the CCC for an investigation conducted by the CCC in performing its prescribed functions?

34. Yes.

²² *Esso and Daniels*.

²³ However, qualifications and exceptions to privilege (such as waiver and improper purpose) may, in particular circumstances, affect the question of whether information attracts or remains subject to it, and therefore is exempt under the RTI Act.

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

²⁵ [2017] QICmr 13 (6 April 2017).

²⁶ See pages 5 to 9 of the Statement of Reasons attached to the CCC's decision which set out the relevant provisions and statutory definitions, as well as relevant excerpts from previous OIC decisions.

35. I am satisfied, firstly, that the CCC is a 'prescribed crime body' pursuant to the definition contained in schedule 3, section 10(9) of the RTI Act.
36. I am further satisfied that the Investigation Information was obtained, used or prepared²⁷ for an investigation by the CCC in the performance of its prescribed functions.²⁸ That is, it was obtained, used or prepared by the CCC in the course of investigating - examining, considering, or dealing with²⁹ - the applicant's corruption complaint about the Queensland Building and Construction Commission (and its responsible Minister) (QBCC).
37. I note that some of the Investigation Information concerns associated complaints that the applicant made to the CCC about the conduct of CCC officers in dealing with his complaint about the QBCC. These are in the nature of service delivery complaints.
38. I have considered whether these service delivery complaints can properly be regarded as information obtained, used or prepared for an investigation by the CCC in the course of it performing its corruption function.
39. I am of the view that the applicant's complaints about the CCC were incidental to, and inextricably linked with, his corruption complaint about the QBCC. That is, it was not possible for the CCC to consider the complaints made against it, without also giving further consideration to, or re-visiting, the applicant's complaints about the QBCC.
40. Upon receipt of the complaint against CCC officers, the CCC's Chief Executive Officer was required to review the CCC's handling of the corruption complaint against the QBCC with a view to determining whether a suspicion was raised that the conduct of CCC officers involved, or may have involved, improper conduct.³⁰ This was not a separate investigation, but a determination made incidental to the CCC's handling of the corruption complaint made against the QBCC.³¹
41. Accordingly, I am satisfied that the Investigation Information was obtained, used or prepared by the CCC for an investigation by the CCC in performing a prescribed function and therefore qualifies as exempt information under schedule 3, section 10(4) of the RTI Act.

Does the exception contained in schedule 3, section 10(6) of the RTI Act apply?

42. No.
43. The exception will apply if:
 - the investigation has been finalised; and
 - the information is about the applicant.

²⁷ The terms 'obtained, used or prepared' are not defined in the RTI Act or the *Acts Interpretation Act 1954* (Qld), and so are to be given their ordinary meaning.

²⁸ Prescribed functions are defined in schedule 3, section 10(9) of the RTI Act as the CCC's crime, intelligence and corruption functions.

²⁹ The term 'investigation' as used in the Prescribed Crime Body Exemption has been defined expansively, and includes the mere examination or consideration of information (paraphrasing the definition of 'investigate' contained in schedule 2 to the *Crime and Corruption Act 2001* (Qld) (**CC Act**)).

³⁰ Section 329(1) of the CC Act.

³¹ In assessing a complaint about suspected improper conduct of CCC officers, the Chief Executive Officer is acting under the CCC's power in section 174 of the CC Act to do all things necessary or convenient to be done for or in connection with, or reasonably incidental to, the performance of its functions.

44. The CCC has confirmed that the relevant investigation has been finalised. However, I am not satisfied that the Investigation Information can properly be regarded as being 'about' the applicant.
45. The word 'about' is a 'non-technical term defined according to its natural and ordinary meaning'.³²
46. The IC has decided that the word 'about' is to be construed so as to give effect to the intention of the exception: to enable persons the subject of an investigation to obtain access to information about the investigation once it is finalised.³³ The effect of this construction is that, while an investigation may be the direct result of an applicant's complaint, this does not mean that resulting investigation documents will be 'about' that applicant for the purpose of the exception to the Prescribed Crime Body Exemption (even allowing for incidental references to a complainant applicant).³⁴
47. For example, in *G8KPL2*, OIC found that an investigation report, while created as a result of the applicant's complaint, was not about the applicant but was instead about the persons who were the subject of the allegations and related Crime and Misconduct Commission investigation. Similarly, in *Cameron and Queensland Police Service*,³⁵ OIC found that while the investigation reports and investigatory materials 'came into existence as the result of the applicant's actions in...making...complaints' about public officials, the information was not about the applicant.³⁶ In each case, the thrust or substance of the relevant information was found to concern – be 'about' – those officials who were the subjects of the complaints and resulting investigations.
48. Applying the above principles, I am satisfied that the Investigation Information is properly characterised as information about the various subjects of the applicant's complaints, and not the applicant. While the documents in question may have been obtained or created as a consequence of complaints made by the applicant, the substance of the information they contain concerns – is 'about' – those persons who were the subject of the complaints and the investigations that followed. The Investigation Information therefore does not fall within the exception to the Prescribed Crime Body Exemption contained in schedule 3, section 10(6) of the RTI Act.

Conclusion

49. In these circumstances, I find that the exception in schedule 3, section 10(6) of the RTI Act does not apply and the Investigation Information may be refused on the grounds that it is exempt information under section 67(1) of the IP Act, and sections 47(3)(a), 48 and schedule 3, section 10(4) of the RTI Act.

The applicant's submissions

50. To the extent that the applicant made relevant submissions about the application of the IP Act to the information in issue, those submissions are directed to his argument that documents should be released to him in a redacted form. In this regard, the applicant's submissions erroneously refer to section 74 of the RTI Act. As his application was made under the IP Act, the correct and corresponding provision is section 89 of the IP Act.

³² *Darlington v Office of the Information Commissioner & Queensland Police Service* [2015] QCATA 167 at [52]. Relevantly - 'of; concerning; in regard to': Macquarie Dictionary Online, <http://macquariedictionary.com.au> (accessed 27 October 2021).

³³ See OIC's discussion of the Second Reading Speech and Explanatory Memorandum relating to the legislation which inserted the equivalent provision into the repealed *Freedom of Information Act 1992* (Qld) in *G8KPL2* and the *Department of Health* (Unreported, Queensland Information Commissioner, 31 January 2011) (*G8KPL2*) at [29]-[30].

³⁴ *G8KPL2* at [27] to [32].

³⁵ (Unreported, Queensland Information Commissioner, 7 August 2012) (*Cameron*).

³⁶ *Cameron* at [31], repeating the Right to Information Commissioner's similar observation in *G8KPL2* (at [32]).

51. The applicant complained to the IC that this issue had not been addressed in the RTIC's preliminary view letter:³⁷

...Your response today shows, again, that instead of using your training to help customers understand their rights, you are using them to conceal that information and use deceptions to help back up the first act. You are also attempting to present a conclusion as something much more solid i.e. as conclusion that is supported by reasoning. Of course, where you supply reasoning, it can be examined and, as necessary, challenged. Conversely, where no reasons have been supplied, all that remains is an opinion.

That is what you have presented and asked me to deal with.

On many occasions, opinion is simply not good enough, for example regarding the extent of law. Notably, your Deputy has failed to recognise the extent of law in the preliminary view document. In law the RTI Act makes a provision for supplying 'documents in issue' to the applicant in a redacted form - this is provided within s.74 of the Act.

However, using the pretence that s.74 does not exist (since it is not discussed in the preliminary view document at all) the Deputy has proposed that none of the information in any of the documents in issue should be disclosed. That is the Deputy's preliminary view and it's in writing. I hold that an inaccuracy regarding a point of law should not be present in any preliminary view document. That's because the law is clear. Moreover, a customer of the OIC may not have read the RTI Act. Therefore, where an OIC officer attempts to vary the Act, in practice, it may not be noticed by the customer. For the OIC officer, who has legal training, this absolutely is an abuse of office.

That is sufficient cause for the officer to be removed from the case but I don't see this being confirmed. The CEO is resisting this, even now, hoping not to be required to process the case personally, or have another senior officer process it (another reputation tarnished).

And if that preliminary view document is not challenged today, it becomes the final view, including the legal errors.

That's stunning, given the legal expertise that is present in the OIC.

*That would be an improper outcome and it would be founded upon a failure of a qualified lawyer to uphold the RTI Act. To be clear, this is legislation that is central to the function of the OIC, so it isn't being done accidentally. One can only wonder at the motivation here. The whole purpose of the agency appears to have been subverted by those who are running it. **The evidence is there.** Please check my concern that s.74 is not discussed.*

...

[Applicant's emphasis]

52. The applicant repeated his complaint in his email to the IC on 22 October 2021, following my email to him advising that I had formed the preliminary view that access to all information in issue may be refused because it is exempt information:

...

The case handler appears to be ignoring the submission made on 10th Sep 2021 (as well as earlier correspondence) in order to pretend that there is no critical education issue.

That's dishonest. It's also causing me a detriment and, further, it provides a favour to the agency in question (which is the corruption watchdog). I trust that you are familiar with s.92A of the Criminal Code Act 1899. Going further, where a criminal act has been performed by a public officer this means that all of the requirements of s.15 of the Crime and Corruption Act 2001 have been met. I could therefore refer the said conduct to the corruption watchdog.

³⁷ See the applicant's email of 10 September 2021.

However, an obvious conflict of interests arises. Why should the watchdog support my suspicion of corrupt conduct against a public official who is helping the same agency to keep certain of its information secret ?

How would you suggest that I have the alleged conduct dealt with to the full extent of the law ? That's a genuine question.

It does seem proper to at least seek your opinion on that.

Moving on, what is this critical education issue ? It's about the right of a member of the public to receive a document in redacted form.

It appears that the OIC does not wish to help me in any way at all to understand how I should exercise that right.

Although I have received information which may (it's not clear) skirt around the issue [2] I am left in the dark how I should exercise that right. Whenever I mention this right, which seems to arise from s.74 of the RTI Act, the OIC clams up.

I note that s.74 was quoted on 10th Sep 2021 if you would like to scroll down.

I'm not sure that I've ever seen a letter or email from OIC which discusses s.74, no matter how many times I raise it. As mentioned, the most recent example was my submission dated 10th Sep 2021. It's about four paragraphs long commencing :

"As you can see, I have only had time to address one issue which arises from the preliminary view document but it probably is the most significant one. I look forward to you agreeing with me that s.74 of the RTI Act does exist, does apply and that redacted forms of the documents in issue can be supplied to myself.
"

I note that the lack of time issue was mentioned again. The OIC is specifically invited to agree or disagree with my understanding of the Act. It is critical information.

If the OIC had desired to behave impartially it may have responded to myself with a statement such as this : 'the Act does not work that way in spite of how it is written. In order to receive redacted documents, what you must do is X, Y and Z.'

Let's be clear again : if the OIC made a clarifying statement, that would give me chance to receive redacted documents.

However, it looks like the present case handler (as well as the last) does not wish to risk that happening.

In response to my submission on 10th Sep 2021 the handler has sought to do the following :

- receipt a different email, unrelated to the case
- defer dealing with the submission (OIC email dated 15 Sep 2021)
- defer dealing with the submission again (OIC email dated 17 Sep 2021)
- wait a month
- operate as though the submission was never made (OIC email dated 18 Oct 2021)

Perhaps the case handler believed that I would forget that I had been forced to make a limited submission under great duress. This is astonishing but completely visible.

The email sent on 18th Oct 2021

- is standalone i.e. no prior emails are attached,
- it references the officer's own two emails by date
- my recent submission is not mentioned by date or at all as a submission
- the content of the submission is not dealt with either (again there's no mention of s.74)

- there's even an implication that I have allowed 2 months to pass without making a submission

All of this is deception and dishonesty. The Acting RTI Commissioner is not going to process case 316000 to a proper outcome. There may have been criminal and corrupt conduct.

As I move to conclude this email, it's important for me to say what I would like you to do as the CEO.

One question has already arisen (as above) : How would you suggest that I have the alleged conduct dealt with to the full extent of the law ? Please answer that question.

Please appoint another case handler (which, from my perspective, could be yourself).

Please make it a priority that I receive clear advice that allows me to fairly pursue my request to receive redacted documents from the agency. I consider this to be basic information that should be available to anyone making an application under the IP Act or RTI Act. For example, is s.74 of the RTI Act dependent upon some other section of the Act (one that is not actually mentioned in s.74) ?

Please answer the following question (now raised with yourself, I believe, for the seventh time). I'll simply quote from 10th Sep 2021 :

"... As CEO of the OIC, could you please confirm that the OIC formally recognises any of the following as applicable law for your agency :

Australian Federal Law
Australian Common Law
The Doctrine of Natural Justice
Procedural Fairness

I see this as the make or break question for yourself, being the leader of the agency.
"

I look forward to case 316000 being put back on track with an impartial, honest case handler. The OIC may need to consider whether it intends to operate lawfully in the future. That's not asking too much in my view.

[Applicant's emphasis]

53. The applicant's submissions evidence a misunderstanding about the operation of the relevant provisions of the IP Act. Section 89 of the IP Act requires access to be given to a document with exempt information deleted if it is practicable to do so. Section 90 of the IP Act requires access to be given to a document with contrary to public interest information deleted if it is practicable to do so. These provisions apply when *some* information in a document is exempt information or contrary to public interest information, but the rest of the information in the document is *not*.
54. However, here the RTIC had expressed a preliminary view that access to *all* information may be refused because it is either exempt information and/or contrary to the public interest information. Subsequently, I expressed a preliminary view that access to *all* information may be refused because it is exempt information. This remains my position, as set out at paragraphs 26 to 49 above. As neither the RTIC nor I identified any information during the course of the review to which we considered access should not be refused, the application of sections 89 and 90 of the IP Act, in terms of the possibility of giving the applicant partial access to any document, did not arise for consideration. This was explained to the applicant by the RTIC in an email on 5 August 2021 and was reiterated by the IC in emails on 19 and 20 August 2021.

Decision

55. I affirm the decision under review by finding that:

- the LPP Information is exempt information under section 67(1) of the IP Act and sections 47(3)(a), 48 and schedule 3, section 7 of the RTI Act; and
- the Investigation Information is exempt information under section 67(1) of the IP Act and sections 47(3)(a), 48 and schedule 3, section 10(4) of the RTI Act.

56. Access to this information may therefore be refused under the IP Act.

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

A Rickard
A/Right to Information Commissioner

Date: 28 October 2021

APPENDIX**Significant procedural steps**

| Date | Event |
|----------------|--|
| 9 April 2021 | OIC received applicant's external review application. OIC requested preliminary documents from CCC. |
| 13 April 2021 | OIC confirmed receipt of application to the applicant. |
| 16 April 2021 | OIC received the preliminary documents from CCC. |
| 17 May 2021 | OIC advised the applicant his application was accepted. OIC advised CCC the application had been accepted and requested the information in issue be provided. |
| 28 May 2021 | CCC requested an extension to provide the information in issue. |
| 1 June 2021 | CCC was granted an extension to provide the information in issue. |
| 7 June 2021 | OIC received the information in issue from CCC. |
| 16 June 2021 | OIC requested further clarification from CCC. |
| 16 July 2021 | OIC received the requested correspondence from CCC. |
| 20 July 2021 | OIC issued a preliminary view to the applicant. |
| 26 July 2021 | OIC received an email from the applicant requesting an extension to respond to the preliminary view. |
| 27 July 2021 | CCC confirmed release of documents to the applicant. |
| 28 July 2021 | OIC granted the applicant an extension to respond to the preliminary view. |
| 2 August 2021 | OIC issued further clarification to the applicant. OIC received an email from the applicant. |
| 4 August 2021 | OIC issued a response to the applicant. OIC received an email from the applicant. |
| 5 August 2021 | OIC issued a response to the applicant. |
| 9 August 2021 | OIC received an email from the applicant. |
| 10 August 2021 | OIC issued a response to the applicant. |
| 12 August 2021 | OIC received an email from the applicant. OIC issued a response to the applicant. |
| 19 August 2021 | OIC received an email from the applicant. OIC issued a response to the applicant. OIC received a further email from the applicant requesting another extension to respond to the preliminary view. |
| 20 August 2021 | OIC issued a response to the applicant and granted an extension. OIC received an email from the applicant. |
| 23 August 2021 | OIC issued a response to the applicant. OIC received an email from the applicant. |

| Date | Event |
|-------------------|---|
| 25 August 2021 | OIC received an email from the applicant requesting another extension to respond to the preliminary view. |
| 26 August 2021 | OIC issued a response to the applicant and granted a final extension. OIC received an email from the applicant. |
| 2 September 2021 | OIC received an email from the applicant. OIC issued a response to the applicant. |
| 3 September 2021 | OIC received an email from the applicant. |
| 7 September 2021 | OIC received an email from the applicant. |
| 8 September 2021 | OIC issued a response to the applicant. OIC issued a further response to the applicant. OIC received an email from the applicant. |
| 9 September 2021 | OIC received an email from the applicant requesting another extension to respond to the preliminary view. |
| 10 September 2021 | OIC issued a response to the applicant, refusing a further extension of time. OIC received a response from the applicant. |
| 14 September 2021 | OIC received a response from the applicant. |
| 15 September 2021 | OIC issued an update to the applicant. |
| 16 September 2021 | OIC received a response from the applicant. |
| 17 September 2021 | OIC issued an update to the applicant. |
| 22 September 2021 | OIC received an email from the applicant. |
| 18 October 2021 | OIC issued a preliminary view to the applicant. |
| 22 October 2021 | OIC received a response from the applicant. |
| 25 October 2021 | OIC issued a response to the applicant. |