



## Decision and Reasons for Decision

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Citation:	<i>O72 and Queensland Building and Construction Commission</i> [2022] QICmr 49 (4 November 2022)
Application Number:	316378
Applicant:	O72
Respondent:	Queensland Building and Construction Commission
Decision Date:	4 November 2022
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - INFORMATION DISCLOSURE OF WHICH WOULD BE CONTEMPT OF COURT OR PARLIAMENT - Parliamentary briefing documents - whether disclosure of information would infringe the privileges of Parliament - whether access may be refused under sections 47(3)(a) and 48 and schedule 3, section 6(c)(i) of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - communications between agency staff and legal advisers - whether information would be privileged from production in a legal proceeding on the ground of legal professional privilege - improper purpose - whether information exempt under section 48 and schedule 3, section 7 of the <i>Right to Information Act 2009</i> (Qld) - whether access may be refused under section 47(3)(a) of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - SUFFICIENCY OF AGENCY SEARCH EFFORTS - whether agency has taken reasonable steps to identify and locate documents requested by applicant - section 130 and sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld)</p>

## REASONS FOR DECISION

### Summary

1. The applicant applied to the Queensland Building and Construction Commission (**QBCC**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents concerning an engineering report commissioned by QBCC.

2. QBCC identified more than 1200 pages, a number of which were disclosed. Access to some pages (or parts) was refused, on the grounds the information they contain comprised:
  - information irrelevant to the access application<sup>1</sup>
  - exempt information, as information subject to Parliamentary or legal professional privilege;<sup>2</sup> or
  - personal information, disclosure of which would, on balance, be contrary to the public interest.<sup>3</sup>
3. The applicant applied<sup>4</sup> to the Office of the Information Commissioner (**OIC**) for external review of QBCC's decision to refuse him access to information. The applicant also submitted that QBCC had failed to locate all relevant documents.
4. Negotiations during the external review significantly narrowed the range of matters in dispute. At OIC's request, QBCC conducted additional searches and located further documents, most of which were released to the applicant. The applicant, meanwhile, did not contest OIC's preliminary view that aspects of QBCC's decision were justifiable, and agreed to resolve certain 'missing' document issues.<sup>5</sup>
5. The applicant does not, however, accept that access may be refused to information on the grounds of Parliamentary or legal professional privilege. The applicant further contends that by not having dealt with a specific electronic folder, QBCC has not taken reasonable steps to locate and identify all documents relevant to his access application. The applicant also queries whether QBCC has taken reasonable steps to locate 'communications' between QBCC officers, referred to in an email disclosed to him.
6. For the reasons explained below, I am satisfied that the information in issue comprises exempt information, to which QBCC may refuse access – namely, information subject to either Parliamentary or legal professional privilege.
7. I am also satisfied that reasonable steps to locate information relevant to the applicant's access application do not extend to requiring QBCC to deal with the electronic folder pursuant to that application. The 'communications', meanwhile, comprise some of the abovementioned exempt information to which QBCC may refuse access. Relevant information has therefore been identified and located, and thus gives rise to no 'missing' document issues.

## Background

8. Significant procedural steps are set out in the Appendix to this decision.

## Accusations of bias, procedural complaints

9. Late in the review the applicant complained that I held a bias against him, intimated that I had closed my mind to impartially adjudicating aspects of his application, and stated that he was conceding those aspects under 'duress'.<sup>6</sup> These statements were made in response to my letter dated 17 August 2022, in which I conveyed a preliminary view that the applicant's submissions about the electronic folder lacked merit, and, that even if they had had merit, the particular circumstances in which they had been ventilated by

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<sup>1</sup> Section 73(2) of the RTI Act.

<sup>2</sup> Sections 47(3)(a) and 48, and schedule 3, sections 6(c)(i) and 7 of the RTI Act.

<sup>3</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>4</sup> External review application dated 21 October 2021.

<sup>5</sup> Applicant's submissions dated 15 July 2022.

<sup>6</sup> Submissions dated 31 August 2022.

the applicant<sup>7</sup> inclined me not to deal with this issue, on the ground that this part of his application was vexatious.<sup>8</sup>

10. The applicant, who has had multiple external review applications dealt with by OIC and is experienced in the RTI process, has previously made similar complaints about the bias of other OIC decision-makers. See, for example, paragraphs 13-20 of *Z32 and Queensland Building and Construction Commission; J26 (Third Party)*,<sup>9</sup> and 13-14 of *K27 and Queensland Ombudsman*,<sup>10</sup> for examples in this regard. As in each of those matters,<sup>11</sup> his allegations in this case are without merit.
11. The letter to which the applicant was replying was, as I have noted, a preliminary – not a final – view,<sup>12</sup> and left open to the applicant the option to make further submissions; which option the applicant, in effect, exercised – his ultimate concession under ‘duress’ only coming at the end of his submissions, after he had put his case in reply.
12. I am satisfied that no fair-minded and reasonably informed observer<sup>13</sup> would perceive any bias on my part, actual or apparent. I have previously had involvement in external reviews involving the applicant some four to six years ago, but have at no stage had any interest in his applications beyond ensuring they are determined according to law, and no relationship nor motivation to prefer the cause of the QBCC to that of the applicant’s.
13. Indeed, any objective contemplation of the course of this review – involving as it has various issues being resolved in the applicant’s favour, and him securing, via OIC’s neutral and objective conduct of the review,<sup>14</sup> access to various documents that would not otherwise have occurred – could to my mind lead to no other conclusion than that the applicant and his application have been dealt with fairly, impartially, and according to law.
14. Similarly, his accusations of ‘threats’ and ‘duress’ are groundless. I gave him, and he availed himself of, the opportunity to make submissions. It is true that, when giving him the opportunity to make submissions, I cautioned him to ‘stick to the issues’, and gave directions as to the length and content of his submissions.<sup>15</sup> Doing so, however, was within the powers conferred on the Information Commissioner by the Parliament (and me, as her delegate).<sup>16</sup> I exercised my discretion in this regard as a direct consequence of the applicant’s tendency in communicating with OIC to<sup>17</sup> engage in discursive, repetitive, and largely irrelevant correspondence,<sup>18</sup> given that combing through such material to identify submissions relevant to the matters in issue unnecessarily and inequitably dissipates our limited public resources.

<sup>7</sup> That is, being raised for the first time in this external review approximately 6 months after the applicant became aware of the folder and 4 months after QBCC correspondence which, in his view, indicated that folder’s contents fell within the scope of his access application (on 25 January 2022 and 3 March 2022 respectively, according to his submissions dated 15 July 2022), and only, according to QBCC’s 29 July 2022 submissions, after the applicant had excluded the folder from a subsequent access application lodged with QBCC.

<sup>8</sup> Section 94(1)(a) of the RTI Act.

<sup>9</sup> [2021] QICmr 52 (14 October 2021).

<sup>10</sup> [2021] QICmr 58 (11 November 2021).

<sup>11</sup> Which allegations were made against other OIC officers.

<sup>12</sup> Expressions of which by OIC have been accepted as procedurally fair: *Community Care Inc v Taylor, Information Commissioner & Ors* [2007] QSC 148 at [21], Helman J noting that OIC’s ‘reaching a preliminary view did not signify a mind closed to persuasion to a contrary view and provides no proper basis for an apprehension of bias.’

<sup>13</sup> Paraphrasing the relevant test, as stated in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

<sup>14</sup> Which conduct included requiring further, fruitful, searches for additional documents.

<sup>15</sup> Letters to the applicant dated 24 June 2022 and 17 August 2022.

<sup>16</sup> Section 95 of the RTI Act.

<sup>17</sup> Unless directed to do otherwise: the applicant having been diligent in complying with OIC directions.

<sup>18</sup> His application for external review, for example, spanning some nine pages and 58 paragraphs, much of which consisted of matters he has already ventilated in other external reviews with OIC and canvassing issues outside our limited jurisdiction.

## Reviewable decision

15. The decision under review is QBCC's internal review decision dated 27 September 2021.

## Evidence considered

16. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).
17. In making this decision I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>19</sup> I consider that in observing and applying the law prescribed in the RTI Act, an RTI decision-maker will be '*respecting and acting compatibly with*' this right and others prescribed in the HR Act,<sup>20</sup> and that I have done so in making this decision, as required under section 58(1) of the HR Act. In this regard, I note Bell J's observations on the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: '*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.*'<sup>21</sup>

## Information in issue

18. The information in issue comprises:
- 79 full pages, subject to a claim for exemption under schedule 3, section 6(c) of the RTI Act;<sup>22</sup> and
  - 255 pages,<sup>23</sup> subject to a claim for exemption under schedule 3, section 7 of the RTI Act.<sup>24</sup>

## Issues for determination

19. The issues for determination are whether QBCC may refuse access to information claimed to be subject to Parliamentary or legal professional privilege, and whether QBCC has taken reasonable steps to identify and locate documents applied for by the applicant. I have addressed each below, beginning with questions of privilege.
20. In making my findings I have, given the relatively large number of pages to be considered, adopted a degree of generalisation, in order that this review may proceed as expeditiously as possible. 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*,<sup>25</sup> His Honour observing that:

<sup>19</sup> As embodied in section 21 of the HR Act.

<sup>20</sup> *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].

<sup>21</sup> *XYZ* at [573]. OIC's approach to the HR Act set out in this paragraph has recently been considered and endorsed by QCAT, Judicial Member McGill in *Lawrence v Queensland Police Service* [2022] QCATA 134 noting that he saw '*no reason to differ*' from our position ([23]).

<sup>22</sup> The Parliamentary privilege exemption, detailed below.

<sup>23</sup> Including part pages.

<sup>24</sup> The legal professional privilege exemption, also set out in further detail below. Copies of relevant pages, marked up in accordance with my decision, will accompany the copy of these reasons forwarded to QBCC. There are certain instances of withheld information within the 255 pages noted at the second dot point above that are not in issue in this review: principally, mobile telephone numbers (access to which the applicant did not pursue, following expression by me of my 24 June 2022 preliminary view that access to same may be refused), and a segment of information toward the bottom of page 'ECM 920989 333'. This latter segment comprises duplicated information, which I advised the applicant in my letter dated 24 June 2022 I did not propose dealing with further (and which advice the applicant did not contest).

<sup>25</sup> (1984) 57 ALR 550.

... 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 generalisation appropriate to the case.<sup>26</sup>

## Relevant law

21. The RTI Act confers a right of access to documents of government agencies such as QBCC.<sup>27</sup> This right is subject to other provisions of the RTI Act, including grounds on which access may be refused.<sup>28</sup>
22. Agencies such as QBCC may refuse access to information requested under the RTI Act to the extent the information comprises 'exempt information'.<sup>29</sup> 'Exempt information'<sup>30</sup> includes:
  - information, if its public disclosure would infringe the privileges of Parliament (**Parliamentary Privilege**);<sup>31</sup> and
  - information that would be privileged from production in a legal proceeding on the ground of legal professional privilege (**LPP**).<sup>32</sup>

## Parliamentary Privilege

23. The Parliamentary Privilege exemption was considered in some detail in OIC's decision *Waratah Coal Pty Ltd and Department of State Development, Infrastructure and Planning (Waratah Coal)*.<sup>33</sup> A recent application of the provision can be found in *Hart MP and Queensland Building and Construction Commission*.<sup>34</sup>
24. For information to be exempt under schedule 3, section 6(c)(i) of the RTI Act, it must be the case that:
  - the information was prepared for the purposes of, or incidental to, the transacting of business of the Parliament; and
  - public disclosure of the information would hinder, impede or impair the making of similar communications in the future for the purpose of transacting the business of the Parliament.
25. I am satisfied that information to which QBCC refused access under schedule 3, section 6(c)(i) of the RTI Act satisfies the above requirements and therefore attracts Parliamentary Privilege. Relevant pages<sup>35</sup> comprise Parliamentary briefing materials; documents prepared for the purposes of or incidental to the transacting of Parliamentary business.<sup>36</sup>
26. Consistently with *Waratah Coal* – and several decisions from other jurisdictions in which courts and tribunals have found that release of similar Parliamentary briefing materials<sup>37</sup>

<sup>26</sup> Page 562.

<sup>27</sup> Section 23 of the RTI Act.

<sup>28</sup> Section 47 of the RTI Act. These grounds are to be interpreted narrowly: section 47(2)(a) of the RTI Act, a requirement I have borne in mind in making my decision, together with Parliament's intention that the Act be administered with a pro-disclosure bias (section 44 of the RTI Act).

<sup>29</sup> Section 47(3)(a) of the RTI Act.

<sup>30</sup> Section 48(4) of the RTI Act.

<sup>31</sup> Schedule 3, section 6(c)(i) of the RTI Act.

<sup>32</sup> Schedule 3, section 7 of the RTI Act.

<sup>33</sup> (Unreported, Queensland Information Commissioner, 10 December 2012).

<sup>34</sup> [2022] QICmr 7 (18 February 2022).

<sup>35</sup> Comprising (adopting QBCC's file naming and numbering) ECM Correspondence Contents Search pages 49-127.

<sup>36</sup> Satisfying the first of the two requirements noted above.

<sup>37</sup> Including drafts.

would infringe Parliamentary Privilege<sup>38</sup> – I am further satisfied that public disclosure of relevant documents would hinder, impede or impair the preparation or assembly of documentary information for future debates and proceedings in the Parliament. As the NSW Supreme Court has found, in considering a request for disclosure of analogous Commonwealth Parliament briefing documents:<sup>39</sup>

*...production of these documents would "impeach"... "proceedings in Parliament"... It seems to me necessarily true, and not dependent upon the evidence of the particular case, that if briefings and draft briefings to Parliamentarians for Question Time and other Parliamentary debate are amenable to subpoenas and other orders for production, the Commonwealth officers whose task it is to prepare those documents will be impeded in their preparation, by the knowledge that the documents may be used in legal proceedings and for investigatory purposes that might well affect the quality of information available to Parliament.*

27. Public disclosure of any this information under the RTI Act would, in my view, infringe the privileges of Parliament. It therefore comprises exempt information, to which access may be refused under section 47(3)(a) of the RTI Act.
28. The applicant rejects the above reasoning, essentially on the basis that relevant materials were, in his view, composed for a misleading or improper purpose, and should thus be disqualified from attracting Parliamentary Privilege.<sup>40</sup> As I explained to him during the review,<sup>41</sup> the law to my knowledge recognises no such 'improper purpose' exception to Parliamentary Privilege. The very essence of this privilege is to prohibit the questioning of the propriety of Parliamentary matters by those outside of Parliament.
29. The relevant information comprises exempt information, to which access may be refused.<sup>42</sup>

### **Legal professional privilege**

30. Information will also qualify as exempt information if it would be privileged from production in a legal proceeding on the ground of LPP.<sup>43</sup> LPP will attach to confidential '*...communications between a client and his or her lawyer made for the dominant purpose of seeking or giving professional legal assistance, including representation in legal proceedings.*'<sup>44</sup> Such assistance may be given by external or in-house employed legal professionals.<sup>45</sup> LPP extends to internal circulations or repetitions of privileged communications,<sup>46</sup> and copies of non-privileged documents, where made for a privileged purpose.<sup>47</sup>

<sup>38</sup> See *Re OPEL Networks Pty Ltd (in liq)* (2010) 77 NSWLR 128 (**Re OPEL Networks**); *Tziolas v NSW Department of Education and Communities* [2012] NSWADT 69; *Tebbutt v Minister for Lands and Water* [2015] NSWCATAD 95 (12 May 2015) and *Sportsbet Pty Limited v State of New South Wales (No 3)* [2009] FCA 1283, in which equivalent documents in the NSW and Commonwealth jurisdictions were all found to attract Parliamentary Privilege.

<sup>39</sup> *Re OPEL Networks* at [118] (Austin J).

<sup>40</sup> Submissions accompanying the application for external review dated 21 October 2021 and further submissions dated 15 July 2022.

<sup>41</sup> Letter dated 24 June 2022.

<sup>42</sup> As an aside, I note that substantial parts of relevant pages relate to individuals and issues entirely unrelated to matters targeted in the applicant's access application, and thus could have been amenable to deletion on the ground of irrelevance, under section 73 of the RTI Act.

<sup>43</sup> Schedule 3, section 7 of the RTI Act. This exemption reflects LPP at common law: *Ozcare and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 May 2011) at [12].

<sup>44</sup> *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [9], per Gleeson CJ, Gaudron, Gummow and Hayne JJ and following *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

<sup>45</sup> *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.

<sup>46</sup> *Komacha v Orange City Council* (Supreme Court of New South Wales, Rath J, 30 August 1979, unreported).

<sup>47</sup> *Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

31. Relevant pages<sup>48</sup> satisfy the above requirements. These documents comprise confidential communications brought into existence for a privileged purpose – requesting or conveying<sup>49</sup> professional legal assistance, from or by lawyers advising and/or representing QBCC. Subject to any exception applying,<sup>50</sup> they thus attract LPP.
32. The applicant contends that such an exception does apply: that LPP otherwise subsisting in relevant documents should be set aside, on the grounds of illegal or improper purpose.<sup>51</sup> The applicant's claims in this regard are, in short, founded on various assertions as to the propriety, or otherwise, of certain legal advisors' professional conduct in dealing with matters of concern to him.
33. For the improper purpose exception to apply there must be some prima facie evidence that relevant information was made in preparation for, or furtherance of, some illegal or improper purpose:<sup>52</sup>

*This exception operates to displace legal professional privilege where evidence exists that the ... client has embarked on a deliberate course of action knowing that the proposed actions were contrary to law, and has made the relevant communications in furtherance of that illegal or improper purpose.*

*.... In establishing improper purpose, the standard of proof is high. The High Court has observed that it "is a serious thing to override legal professional privilege where it would otherwise be applicable" and as a result "vague or generalised contentions of crimes or improper purposes will not suffice."*

34. As I advised the applicant by letter dated 25 July 2022, there is no objective material before me of any probative weight meeting the required standard of proof. The LPP information appears to have been brought into existence for entirely proper and uncontroversial purposes. The improper purpose exception to LPP has no application.
35. The applicant also queried<sup>53</sup> how it was that a passage redacted from a page otherwise released to him<sup>54</sup> could be characterised as a legally privileged communication. As I explained to him in my 25 July 2022 letter, the redacted passage comprises an internal circulation within QBCC of instructions given to a professional legal advisor, and attracts LPP, for reasons explained above. As I also explained to him in the same 25 July 2022 letter,<sup>55</sup> a greater impediment to any case for access to this information under the RTI Act, however, is the fact that the document containing this particular passage comprises a document excluded from the operation of that Act, in accordance with the reasoning of Hoeben J in *Carmody v Information Commissioner & Ors (5)*<sup>56</sup> and adopted by OIC in *T71 and Queensland Police Service*,<sup>57</sup> such that the status of this redacted passage is not an issue I even have jurisdiction to further entertain.

<sup>48</sup> Being pages (or parts) ECM Correspondence Contents Search pages 1-3, A FOL2826864 3-93, A FOL2826864 96, A FOL2826864 222-337, A FOL2826864 338-339, A FOL2826864 472, FOL2826864 528-530, FERM Report correspondence 31-33, FERM Report correspondence 87-90, FERM Report correspondence 94, FERM Report correspondence 103-104, FERM Report correspondence 111-112, FERM Report correspondence 174-176, ECM 920989 330, ECM 920989 332-333, '[Applicant's name] correspondence' 3, 'P Emails' 41, 'M Emails' 10, 17-28, 30-34). The above generally adopts QBCC's file naming/numbering, modified in one case ('[Applicant's name]') to avoid disclosure of the applicant's personal information. The final two groups of documents listed – 'P Emails' and 'M Emails' – consist of documents located by QBCC during the review, following further searches of, relevantly, two named officers' email accounts. The naming here was applied by OIC, and comprises a truncated version of the naming used during the review, to avoid disclosure of each officers' personal information (namely, their surnames).

<sup>49</sup> Or repeating the substance of.

<sup>50</sup> I.e., waiver or improper purpose.

<sup>51</sup> See especially submissions dated 15 July 2022.

<sup>52</sup> *Secher and James Cook University* (Unreported, Queensland Information Commissioner, 6 June 2012) at [20], summarising relevant case law. See also *R v Bell; Ex parte Lees* (1980) 146 CLR 141.

<sup>53</sup> Submissions dated 15 July 2022.

<sup>54</sup> ECM 920989 332 (duplicated on A FOL2826864 96, A FOL2826864 472, 'P Emails' 41, 'M Emails' 10).

<sup>55</sup> And which explanation he has not contested.

<sup>56</sup> [2018] QCATA 18.

<sup>57</sup> [2022] QICmr 10.

36. In conclusion, relevant information<sup>58</sup> comprises exempt information, to which access may be refused.<sup>59</sup>

### Sufficiency of search

37. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate documents applied for by an applicant.<sup>60</sup>
38. As noted in the summary paragraphs, the applicant contends that a specific electronic folder<sup>61</sup> maintained by QBCC may hold information relevant to his access application, and by not having searched this folder, QBCC has not taken reasonable steps to identify and locate all information applied for by him.
39. The applicant's submissions in this regard are premised on advice he received from QBCC via email sent at 1:22PM on 3 March 2022,<sup>62</sup> that the relevant folder may contain 'rectification quotes etc.' The applicant's case is that:

*"Rectification quotes ", and the reasons for obtaining them, fall within the scope of this Request. It is also reasonable to conclude that the folder titled " [Applicant's ...name] ...follow up actions " contains further Information in Issue, including whatever the " etc. " is...which is relevant to this External Review.*

40. The applicant further submits that reasonable steps require QBCC to search this folder, then, is premised on the QBCC's reference to its potentially containing 'rectification quotes etc.'
41. QBCC's unequivocal advice, however, is that this reference was made in error.<sup>63</sup> I accept this account, which is corroborated by the authoring QBCC officer having sent, at 2:19PM on 3 March 2022 (just under an hour after the initial email), a follow up email to 'correct an error', which went on to state that the 'phrase [i.e., 'rectification quotes etc'] was unintentionally included, and should be disregarded.'<sup>64</sup>
42. Given this, I do not, as I advised the applicant in my letter dated 17 August 2022, consider that reasonable steps to locate relevant documents require QBCC to deal with that electronic folder pursuant to the access application the subject of this review.
43. The applicant does not accept QBCC's position, nor my acceptance of that position – it is this issue that elicited the allegations of bias I have considered and addressed above.<sup>65</sup> Be that as it may, it falls to me, and not the applicant, to assess the credibility of QBCC's account. As is apparent from the preceding two paragraphs, I have no reason to gainsay that account, which is supported by the agency's contemporaneous actions in which it corrected its earlier error within the hour.

<sup>58</sup> See footnote 48.

<sup>59</sup> Except for the passage noted in paragraph 35 which would, if within my jurisdiction, be found to be subject to LPP, but appears in a document excluded from the operation of the RTI Act and therefore comprises information I am unable to consider.

<sup>60</sup> Section 130 of the RTI Act. For a relatively recent discussion of principles to sufficiency of search and nonexistent document cases, see *V45 and Queensland Police Service* [2021] QICmr 30 (16 June 2021).

<sup>61</sup> Named '[Applicant's name] follow up actions' (modified to avoid disclosure of the applicant's personal information). The existence of this electronic folder was apparently brought to the applicant's attention by a QBCC officer in January 2022: further background to this issue is set out in paragraphs 19-24 of the applicant's submissions dated 15 July 2022.

<sup>62</sup> The email was sent by QBCC in dealing with a separate information access application made by the applicant; a copy accompanied his 15 July 2022 submissions.

<sup>63</sup> QBCC submissions dated 29 July 2022.

<sup>64</sup> Also accompanying the applicant's 15 July 2022 submissions.

<sup>65</sup> In fairness to the applicant, his submissions raising relevant allegations also go on to state that he withdrew this sufficiency of search concern – that withdrawal, however, was qualified by his stating that it was made under, as noted earlier in these reasons, 'duress' and 'threats' from me. I therefore consider it appropriate to deal with the issue in these reasons.



44. In his submissions dated 15 July 2022, the applicant also queried the whereabouts of 'communications' between three QBCC officers, relying on a reference to same appearing in an email released to him.<sup>66</sup> As I explained to the applicant in my letter dated 25 July 2022,<sup>67</sup> no sufficiency of search issue arises in relation to these 'communications'. I am satisfied relevant 'communications' have been identified and located by QBCC,<sup>68</sup> and form part of the material the subject of a valid claim of LPP, as addressed above.
45. In conclusion, I am, as a matter of fact, satisfied that QBCC has taken all reasonable steps to identify and locate documents applied for by the applicant in his access application.
46. While I consider the preceding finding sufficient to dispose of this issue, if it is necessary to do so, I find that access to further documents may be refused, on the ground that such documents – to the extent they would fall within the ambit or scope of that access application, as properly construed – are nonexistent or unlocatable.<sup>69</sup>

## DECISION

47. I affirm QBCC's decision to refuse access to information on the ground it comprises exempt information,<sup>70</sup> and vary that decision, to the extent necessary, to find that access may be refused to information located during this review<sup>71</sup> on the same ground.<sup>72</sup>
48. I also record my satisfaction that QBCC has taken reasonable steps to identify and locate documents relevant to the applicant's RTI access application, in terms stated in the preceding paragraph and, to the extent necessary, find that further documents may be refused on the ground they are nonexistent or unlocatable.<sup>73</sup>
49. I have made this decision under section 110 of the RTI Act, as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**A Rickard**  
**Acting Right to Information Commissioner**

**Date: 4 November 2022**

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<sup>66</sup> Dated 13 February 2020, sent 2:51PM – a copy of which appears on FERM Report correspondence 54.

<sup>67</sup> Which explanation the applicant has not contested, although, as far as I can see, neither expressly conceded, either. Again, in view of the tenor of his 31 August 2022 submissions making allegations against me, I consider it appropriate to address this matter in these reasons.

<sup>68</sup> Appearing on FERM Report correspondence 87.

<sup>69</sup> Sections 47(3)(e) and 52 of the RTI Act.

<sup>70</sup> Under sections 47(3)(a) and 48 and schedule 3, section 6(c)(i) or 7 of the RTI Act

<sup>71</sup> Being 'P Emails' and 'M Emails' – see footnote 48.

<sup>72</sup> Except for the passage noted at paragraph 35 and footnote 59 which is excluded from the operation of the RTI Act.

<sup>73</sup> Sections 47(3)(e) and 52 of the RTI Act.

## APPENDIX

### Significant procedural steps

Date	Event
21 October 2021	OIC received the external review application. OIC requested preliminary documents from QBCC.
28 October 2021	OIC received the preliminary documents from QBCC.
5 November 2021	OIC advised the applicant and QBCC that the external review application had been accepted. OIC requested the information in issue from QBCC.
8 November 2021	OIC received the information in issue from QBCC.
23 February 2022	OIC conveyed a preliminary view to QBCC.
15 March 2022	QBCC provided submissions in response to OIC's preliminary view.
28 March 2022	OIC requested further information from QBCC.
8 April 2022	QBCC provided submissions to OIC. OIC requested QBCC conduct further searches for documents.
12 & 16 May 2022	QBCC provided further information to OIC.
26 May 2022	OIC requested QBCC review proposed redactions to information in issue.
1 June 2022	QBCC provided additional submissions to OIC.
2 June 2022	OIC conveyed a further preliminary view to QBCC.
3 June 2022	QBCC accepted OIC's preliminary view.
24 June 2022	OIC requested that QBCC release documents to the applicant. OIC conveyed a preliminary view to the applicant.
15 July 2022	The applicant provided submissions in response to OIC's preliminary view.
25 July 2022	OIC requested further information from QBCC. OIC provided further information to the applicant.
29 July 2022	OIC received submissions from QBCC.
17 August 2022	OIC conveyed a further preliminary view to the applicant.
31 August 2022	The applicant provided submissions in response to OIC's preliminary view.
6 September 2022	OIC wrote to the applicant addressing his 31 August 2022 submissions and advising that the external review would proceed to formal decision.