



Decision and Reasons for Decision

Citation:	<i>ODW0PH and Queensland Bulk Water Supply Authority trading as Seqwater</i> [2017] QICmr 3 (13 February 2017)
Application Number:	312757
Applicant:	ODW0PH
Respondent:	Queensland Bulk Water Supply Authority trading as Seqwater
Decision Date:	13 February 2017
Catchwords:	<p>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – INFORMATION PRIVACY ACT – REFUSAL OF ACCESS – CONTRARY TO THE PUBLIC INTEREST INFORMATION – information relating to workplace investigation involving complaint against the applicant – whether disclosure would, on balance, be contrary to the public interest – section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – INFORMATION PRIVACY 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>

REASONS FOR DECISION

Summary

1. The applicant applied to Queensland Bulk Water Supply Authority trading as Seqwater (**Seqwater**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to specific information about a workplace investigation involving the applicant.¹
2. Seqwater located 85 numbered pages and an unspecified number of policy documents and decided to:

¹ Seqwater is a statutory authority established under the *South East Queensland Water (Restructuring) Act 2007* comprising an agency for the purpose of the access application 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**).

- refuse access to three of the 85 numbered pages in full
 - refuse access to five of the 85 numbered pages in part; and
 - release in full the remaining pages and part pages comprising the 85 numbered pages and policy documents.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Seqwater's decision. On external review, the applicant submitted that Seqwater had not located specific additional information and also requested that OIC review the information to which Seqwater refused access.
4. On external review, Seqwater located an additional 138 pages of information, of which 78 pages comprised information responsive to the access application.² Seqwater agreed to release 63 of these pages in full and one page in part.
5. For the reasons set out below, I am satisfied that Seqwater is entitled to refuse:
- the information³ refused in Seqwater's decision, on the ground that its disclosure would, on balance be contrary to the public interest
 - 14 pages and one part page of the information located on external review on the ground that disclosure of this information would, on balance, be contrary to the public interest; and
 - certain documents the applicant contends Seqwater failed to locate on the ground that they are nonexistent or unlocatable.

Background

6. Significant procedural steps relating to the external review are set out in the Appendix.

Reviewable decision

7. The decision under review is Seqwater's decision dated 22 January 2016.

Evidence considered

8. Evidence, submissions, legislation and other material that I have considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).
9. Submissions were provided to OIC by the applicant on a number of occasions.⁴ I have summarised and addressed the applicant's submissions below, to the extent they are relevant to the issues for determination. In respect of the submissions that are not relevant to the issues for determination, these generally relate to the applicant's concerns about the conduct of Seqwater's officers. OIC's jurisdiction under the IP Act relates only to decisions about access to documents held by agencies and does not extend to any consideration of these matters.

Information in issue

10. The access application sought access to documents relating to the investigation that was conducted by Seqwater including the following information:
- investigation/findings report

² The remaining 60 pages contained information the applicant excluded from the scope of the application.

³ Consisting of three full pages and five part pages of the 85 numbered pages.

⁴ As set out in the Appendix.

- original complaint and any amended complaints
- authorisation documents
- documents addressing the investigation issues including risks; and
- any other documents relating to the investigation.⁵

11. The information that remains in issue (**Information in Issue**) comprises 17 pages and six part pages.⁶

Issues for determination

12. The issues remaining for determination in this review are whether:

- access to the Information in Issue may be refused on the ground that its disclosure would, on balance, be contrary to the public interest; and
- access to certain documents the applicant contends should have been located by Seqwater may be refused on the ground that they are nonexistent or unlocatable.

Contrary to the public interest information

Relevant law

13. Under section 40 of the IP Act, a person has a right to be given access to documents of an agency to the extent they contain the individual's personal information. However, this right is subject to a number of exclusions and limitations including grounds for refusal of access. These grounds are contained in section 47 of the RTI Act.⁷

14. Sections 47(3)(b) and 49 of the RTI Act provide a ground for refusal of access where disclosure of information would, on balance, be contrary to the public interest.⁸ In determining whether disclosure of the information sought would, on balance, be contrary to the public interest I must:

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

Analysis

15. No irrelevant factors arise in the circumstances of this case. I will now consider the factors favouring disclosure and nondisclosure of this information.

⁵ The date range of the documents was from November 2012 to February 2013.

⁶ Consisting of three full pages and five part pages of the 85 numbered pages and 14 full pages and one part page of the 78 pages responsive to the access application located on external review.

⁷ Section 67(1) of the IP Act.

⁸ The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual. Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.

Factors favouring disclosure

Accountability and transparency

16. The applicant contends that:⁹
- there are '*indications of possible unlawful and unethical conduct*' and that there '*may be a basis for referring the investigator of the workplace complaint to the CMC [sic]*'
 - much trust is placed in investigators and people administering '*organisational justice procedures*' and the standards expected of them should be high and there ought to be '*little tolerance for abuse of trust*'; and
 - there is '*much discontent ... within Seqwater about improper practices used by the HR department*' and there is a wide scope for '*investigations/HR managers*' to '*exploit loopholes*' to abuse processes.
17. The applicant also contends¹⁰ that the main concern was to check that the investigator had properly conducted the investigation and to clarify whether the relevant evidence was fairly recorded and presented in the report findings.
18. The applicant's submissions raise the following factors favouring disclosure:
- disclosure could reasonably be expected to enhance Seqwater's accountability;¹¹ and
 - disclosure could reasonably be expected to reveal the reason for a government decision and any background or contextual information informing the decision.¹²
19. I have carefully considered the applicant's submissions. I note that information released to the applicant by Seqwater reveals:
- the substance of the complaint that was made against the applicant
 - how Seqwater responded to the complaint; and
 - that the complaint was investigated, with the outcome being that the applicant was issued with a first and final warning.
20. I note that the applicant has also been provided with the evidence and considerations of the investigator which were outlined in the investigation report.
21. After reviewing the information that has been disclosed to the applicant by Seqwater, I consider that this has significantly discharged its public interest obligations of transparency and accountability. I note that some of this information could also have been considered contrary to the public interest to disclose; however, Seqwater exercised its discretion to release this information under the IP Act.
22. Taking these considerations into account, I am satisfied that disclosing the Information in Issue would only marginally promote these factors favouring disclosure. Accordingly, I have attributed a low weight to each of them.

⁹ Applicant's submission dated 18 February 2016.

¹⁰ Applicant's submission dated 18 February 2016.

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

¹² Schedule 4, part 2, item 11 of the RTI Act.

Personal information of the applicant

23. The Information in Issue relates to a complaint made about the applicant and includes information disclosed to Seqwater during the course of the investigation. Most of the Information in Issue is the personal information¹³ of the applicant. This information is intertwined with the personal information of other individuals.
24. Where the Information in Issue relates to the applicant and comprises the applicant's personal information, this gives rise to a factor favouring disclosure.
25. I acknowledge the importance of providing individuals with access to their own personal information¹⁴ held by government authorities and I afford significant weight to this factor to the extent the Information in Issue comprises the applicant's personal information.

Contribute to the administration of justice

26. The applicant has raised that there are '*indications of possible unlawful and unethical conduct*' and that there '*may be a basis for referring the investigator of the workplace complaint to the CMC [sic].*'
27. Given these submissions, it is necessary to consider whether disclosing the Information in Issue could reasonably be expected to contribute to the administration of justice generally or to the administration of justice for a person, including procedural fairness.¹⁵
28. I note that in the context of a workplace investigation, procedural fairness generally requires that a person is adequately informed of the allegations made against them, given an opportunity to respond to the allegations and to be informed of the outcome of those allegations.¹⁶
29. As I have outlined above,¹⁷ the information Seqwater released to the applicant reveals:
 - the substance of the allegations made against the applicant
 - how the investigation was conducted
 - a summary of the findings made by the investigator; and
 - the investigator's analysis and conclusions.
30. On careful consideration of the information before me, I consider that the applicant was adequately informed of the substance of the allegations and was also provided an opportunity to respond to them during the investigation process and was accordingly afforded procedural fairness. Taking into account the information that has already been released to the applicant and the nature of the Information in Issue (which, in general terms, is witness statements and personal information of the complainant), I find that disclosure of the Information in Issue will not further advance procedural fairness. Further, on careful consideration of the material before me, I am unable to envisage how disclosure of the Information in Issue could otherwise contribute to the administration of justice in terms of the applicant's abovementioned concerns regarding misconduct. Therefore, I afford these factors no weight in the circumstances.

¹³ 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*'.

¹⁴ Schedule 4, part 2, item 7 of the RTI Act.

¹⁵ Schedule 4, part 2, item 16 and 17 of the RTI Act.

¹⁶ *Gapsa and Department of Transport and Main Roads* (Unreported, Queensland Information Commissioner, 6 September 2013).

¹⁷ At paragraph 19.

Factors favouring nondisclosure

Personal information and privacy of other individuals

31. I have carefully reviewed the Information in Issue and I consider that it comprises highly sensitive personal information including the names and signatures of individuals other than the applicant who were involved in a workplace investigation, and the opinions, observations and experiences of those individuals offered during the context of that investigation.
32. A small amount of the Information in Issue is the “stand alone” personal information of individuals other than the applicant who were involved in the investigation, including their names and signatures.
33. The remaining Information in Issue, as noted at paragraph 23, comprises both the applicant’s personal information and the personal information of individuals other than the applicant. Given the nature of this information and the way it is presented (the applicant’s personal information is intertwined with the personal information of other individuals) it is not possible to separate the applicant’s personal information from that of others.
34. The nature of the Information in Issue renders it relevant to consider whether disclosing it could reasonably be expected to:
 - prejudice the protection of an individual’s right to privacy;¹⁸ and
 - cause a public interest harm by disclosing personal information of a person.¹⁹
35. The applicant submitted²⁰ that there are no concerns about ‘*privacy or the involvement of witnesses in future investigations*’, as information that has already been disclosed refers to the evidence and considerations of the investigator which were outlined in the investigation report. While the applicant may generally be aware of the substance of the Information in Issue including the identity of the complainant and witnesses, I consider that this only slightly reduces, but does not negate, the weight to be afforded to these factors favouring nondisclosure. Further, the way in which the information is presented does not allow this information to be de-identified simply by deleting the names of the relevant individuals involved in the investigation.
36. I am satisfied that the information provided in the context of this workplace investigation is very personal and sensitive in nature. I am also satisfied that the complainant and other individuals involved in the workplace investigation would have a reasonable expectation that their right to privacy would be preserved by Seqwater other than to the extent necessary to afford procedural fairness to the applicant during the investigation. I therefore consider that disclosure of the Information in Issue—containing details beyond those required to ensure procedural fairness and outside the investigation process, under the IP Act—would be a significant intrusion into the privacy of those individuals and prejudice the right to privacy of those individuals. I also consider that the extent of the public interest harm that could be anticipated from disclosure is significant.
37. It is for these reasons, I afford both of the above public interest factors favouring nondisclosure of the personal information of others significant weight.

¹⁸ Schedule 4, part 3, item 3 of the RTI Act.

¹⁹ Schedule 4, part 4, item 6(1) of the RTI Act.

²⁰ Applicant’s submission dated 18 February 2016.

Prejudice management function and flow of confidential information

38. I have also considered whether disclosing the Information in Issue could reasonably be expected to prejudice:
- Seqwater's management function in relation to the management of its own staff;²¹ and
 - Seqwater's ability to obtain confidential information in the context of workplace investigations.²²
39. The applicant disputes the version of events given by the complainant and recorded in the investigation report.²³ While I acknowledge that the applicant disputes the complainant's version of events, it is not OIC's role to express an opinion about whether the statements made about the applicant are false or whether Seqwater properly conducted the investigation.
40. Even in circumstances where it may result in an agency investigating false allegations, there is a strong public interest in protecting the flow of information to an agency regarding the conduct and competency of public servants. This is because agencies rely on information provided by public servants and members of the public to become aware of and, if necessary, investigate any issues that concern the conduct of public servants in order to maintain a high standard of conduct in public service.
41. Further, in workplace investigations, information is usually provided by witnesses on the understanding that the information will be used only for the purposes of the investigation and any subsequent disciplinary action. Information that is received is ordinarily treated confidentially, except to the extent that procedural fairness requires otherwise. However, disclosing this information outside the investigation process where there is no restriction on its use, dissemination or republication could reasonably be expected to adversely impact Seqwater's ability to conduct workplace investigations and manage its staff in future.
42. For the reasons outlined above, I afford these nondisclosure factors significant weight in the circumstances.

Balancing the relevant factors

43. The RTI Act is to be administered with a pro-disclosure bias, meaning that access to information should be granted unless giving access would, on balance, be contrary to the public interest.²⁴
44. In the circumstances of this review, I consider that there is a significant public interest in the personal information of the applicant being accessible. I also consider that there is a low public interest in the accountability and transparency of Seqwater for properly investigating the complaint, taking into account the nature and extent of information that has already been disclosed to the applicant.
45. I am satisfied that the information that has already been released to the applicant furthers the applicant's understanding of how the investigation was conducted and the outcome of the investigation. In these circumstances, I do not consider that disclosing the

²¹ Schedule 4, part 3, item 19 of the RTI Act.

²² Schedule 4, part 3, item 16 of the RTI Act.

²³ Applicant's submission dated 18 February 2016.

²⁴ Section 44 of the RTI Act.

Information in Issue could reasonably be expected to contribute to the administration of justice, including procedural fairness.

46. On the other hand, I recognise the public interest in protecting the privacy of other individuals, including the complainant, as well as the strong public interest in protecting the free flow of information to Seqwater from its staff and preserving Seqwater's management function. I consider that these factors carry significant weight in the circumstances of this review.
47. On balance, I am satisfied that the factors favouring nondisclosure of this information outweigh the factors favouring disclosure. Accordingly, I find that disclosure of the Information in Issue is contrary to the public interest and access to it may therefore be refused.²⁵

Nonexistent or unlocatable documents

Relevant law

48. An agency may refuse access to documents which:
 - do not exist; or
 - have been (or should be) in an agency's possession, but cannot be located.²⁶
49. A document is nonexistent²⁷ if there are reasonable grounds for an agency or Minister dealing with the application to be satisfied the document does not exist. To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors.²⁸
50. By considering these 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.
51. In assessing whether documents are nonexistent, an agency may also conduct searches. Where searches are conducted, an agency must demonstrate that it has taken all reasonable steps to locate responsive documents, prior to deciding that the documents are nonexistent. In determining whether all reasonable steps have been taken, regard should be had to the key factors.
52. A document is unlocatable²⁹ if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document but it cannot be found.

²⁵ Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

²⁶ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

²⁷ Section 52(1)(a) of the RTI Act.

²⁸ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (*Pryor*) at [19] which adopted the Information Commissioner's comments in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]. The key factors include: the administrative arrangements of government; the agency structure; the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it); the agency's practices and procedures (including but not exclusive to its information management approach); and other factors reasonably inferred from information supplied by the applicant, including the nature and age of the requested document/s and the nature of the government activity to which the request relates.

²⁹ Section 52(1)(b) of the RTI Act.

53. In answering these questions, regard should again be had to the circumstances of the case and the key factors.³⁰

Applicant's submissions

54. In the applicant's application for external review dated 18 February 2016, the applicant submitted that the following information had not been located by Seqwater during its processing of the access application:
- a) the applicant's interview transcript
 - b) copies of any further emails between the applicant and the investigator in late 2012
 - c) the interview transcripts for the complainant, subsequent emails between the applicant and the complainant, the extent to which the complainant was discussing the events of 13 July 2012 within Seqwater and any testing of the complainant's motivation to misrepresent the events of 13 July 2012 to the investigator
 - d) information provided by witnesses
 - e) any investigation authorisation documentation; and
 - f) any risk and/or issues assessments.
55. In a submission dated 7 April 2016, the applicant submitted that the following information had also not been located by Seqwater:
- g) any further email correspondence provided by the complainant that has not been included in the investigation report; and
 - h) any further email correspondence between Ms Herbst and the other managers involved.
56. On 9 August 2016, the applicant submitted that the following additional information had not been located by Seqwater:
- i) additional policy documents relevant to the investigation.

Searches and enquiries conducted by Seqwater

57. In the initial stages of the external review, Seqwater conducted further searches for information in response to the access application at OIC's request. Seqwater located an additional 138 pages of information relating to the investigation. On 8 July 2016, OIC advised the applicant that 78 pages of this information included information responsive to categories a), b), c) and d) above, and the remaining 60 pages comprised information which the applicant had explicitly excluded from the scope of the access application. In absence of any response from the applicant contending that further documents responsive to categories a), b), c) and d) should exist but had not been located by Seqwater, it is OIC's understanding that Seqwater's location of the 78 pages satisfied the applicant's concerns regarding these particular categories of documents.
58. In relation to the remaining categories of documents—that is, categories e) to i)—OIC requested:
- further information from Seqwater regarding whether Seqwater's searches prior to its decision and in the initial stages of the external review had included searches for information in response to the above categories e) to i); and

³⁰ Pryor at [21].

- if not, that Seqwater undertake searches for documents in response to these categories and provide a submission to explain the searches undertaken.

59. In response to this request, Seqwater stated that:

- it is not necessarily the case that all emails or communications created or received by Seqwater are on the investigation file or relevant to the investigation
- a search certification has been completed by Ms Herbst confirming that a search has been undertaken in relation to this application and *'all documents pertaining to the request have been identified and forwarded to the RTI Advisor'*
- the relevant searches undertaken included a search on TRIM, Q Drive and also the compactus room where hard copy personnel files and disciplinary information is stored
- the majority of information was found on Q Drive and on the hard copy file and no further documents were located including categories e) to i)
- all documents within the scope of the application have been located and provided to OIC; and
- no further documents exist within the scope of the access application.

60. On the information before me, including search statements, I consider that Seqwater has conducted searches of all relevant locations for the types of information requested in the access application, including documents responsive to categories e) to i). Further, I am satisfied that Seqwater has ensured that relevant officers have undertaken comprehensive and appropriately targeted searches of these locations and there do not appear to be any further searches that would be reasonable for Seqwater to undertake. In these circumstances, I am satisfied that Seqwater has taken all reasonable steps to locate the documents responsive to the application.

61. For these reasons, I am satisfied that there are reasonable grounds to be satisfied that the categories of documents identified as e) to i) are either nonexistent or unlocatable, and may be refused on this basis.³¹

DECISION

62. For the reasons set out above, I vary Seqwater's decision and find that access to the:

- 17 full pages and 6 part pages can be refused on the ground that disclosure of this information would, on balance be contrary to the public interest; and
- documents in response to categories e) to i) may be refused on the ground that they are nonexistent or unlocatable.

63. 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 February 2017

³¹ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
18 February 2016	The applicant applied to OIC for external review of Seqwater's decision.
1 March 2016	OIC notified the applicant and Seqwater that it had accepted the external review. OIC requested that Seqwater provide a copy of the documents in issue by 15 March 2016.
20 May 2016	OIC conveyed an oral preliminary view to Seqwater and requested further information missing from the documents in issue provided by Seqwater on 15 March 2016.
2 June 2016	OIC received a further CD containing 138 pages of additional documents from Seqwater.
16 June 2016	OIC conveyed a written preliminary view to Seqwater and requested submissions by 30 June 2016.
23 June 2016	OIC received the Department's submissions.
24 June 2016	OIC conveyed an oral preliminary view to the applicant.
8 July 2016	OIC conveyed a written preliminary view to the applicant and requested submissions by 22 July 2016.
22 July 2016	OIC received the applicant's submissions.
27 July 2016	OIC confirmed and explained its preliminary view to the applicant and requested submissions by 10 August 2016.
9 August 2016	OIC received the applicant's further submissions.
17 August 2016	OIC asked Seqwater to provide further information regarding the searches it conducted for information responsive to the access application and requested submissions by 31 August 2016.
18 August 2016	OIC confirmed and explained its preliminary view to the applicant and addressed certain concerns to the extent that they were relevant to the external review. OIC advised the applicant that it would address the sufficiency of search issues after OIC received Seqwater's response regarding those issues.
26 August 2016	OIC received Seqwater's further submissions.
1 September 2016	OIC conveyed its preliminary view to the applicant on the sufficiency of search issues and requested submissions by 15 September 2016.
1 September 2016	OIC received the applicant's 'interim' submissions.
8 September 2016	OIC reiterated its preliminary view and confirmed to the applicant that certain concerns raised in the 'interim' submissions were not relevant to the substantive issues to be decided on external review. OIC requested final submissions by 15 September 2016.
15 September 2016	OIC received further submissions from the applicant.

Date	Event
21 September 2016	OIC addressed the concerns raised in the applicant's submissions and requested any further submissions the applicant wished to make by 28 September 2016.
28 September 2016	OIC received further submissions from the applicant.
4 October 2016	OIC wrote to the applicant confirming that the next step in the review would be a formal decision to finalise the matter and confirming that insofar as the concerns in the applicant's submissions related to the issues in this review, OIC would consider this in a formal decision.