



## Decision and Reasons for Decision

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**Citation:** *F86 and Office of the Director of Public Prosecutions [2023] QICmr 41 (28 August 2023)*

**Application Number:** 316744

**Applicant:** F86

**Respondent:** Office of the Director of Public Prosecutions

**Decision Date:** 28 August 2023

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - LEGAL PROFESSIONAL PRIVILEGE - request for information regarding prosecution of another individual relating to traffic offences - whether information is exempt on the basis of legal professional privilege - section 47(3)(a) and schedule 3, section 7 of the *Right to Information Act 2009 (Qld)*

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST - information relating to traffic offences and driving history of another individual - personal information and privacy - whether disclosure would, on balance, be contrary to public interest - sections 47(3)(b) and 49 of the *Right to Information Act 2009 (Qld)*

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE - whether reasonable steps taken to locate all documents - whether access may be refused under sections 47(3)(e) and 52(1) of the *Right to Information Act 2009 (Qld)*

## REASONS FOR DECISION

### Summary

1. The applicant applied<sup>1</sup> to the Department of Justice and Attorney-General (**Department**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to all information<sup>2</sup>

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<sup>1</sup> Access application dated 16 February 2022. On 2 March 2022, the Department notified the applicant that the application had been transferred to the Office of the Director of Public Prosecutions (**ODPP**).

<sup>2</sup> For the period 27 July 2017 (date of the accident) to 16 February 2022.

- regarding the prosecution of another individual in relation to a fatal motor vehicle accident.<sup>3</sup>
2. The Department<sup>4</sup> located 971 pages<sup>5</sup> and released over 200 pages to the applicant. In relation to the remainder of the documents, the Department decided<sup>6</sup> to refuse access on the grounds that:
    - information was exempt due to legal professional privilege
    - disclosure of information would, on balance, be contrary to public interest; or
    - other access was available to certain information.
  3. The Department also decided that access to some of the information sought could be refused on the ground it was nonexistent.
  4. The applicant applied<sup>7</sup> for internal review of the Department's refusal of access decision<sup>8</sup> and raised concerns that not all documents sought had been located and considered by the Department. While the Department conducted further searches, no additional documents were located. In relation to the original documents located, the Department decided<sup>9</sup> to disclose some further information within 3 pages<sup>10</sup> and otherwise upheld the original decision.
  5. The applicant applied<sup>11</sup> to the Office the Information Commissioner (**OIC**) for external review of the Department's internal review decision refusing access and maintained his submission that not all documents had been located by the Department.
  6. During the external review, the Department reconsidered its disclosure position on 10 pages<sup>12</sup> and agreed to release parts of those pages to the applicant. Agreement was also reached with the applicant not to pursue access to certain information, but he maintained his position that the driver should not be entitled to privacy with respect to his traffic history/offence information, and that it should therefore, be released in its entirety. The applicant also remained concerned about the Department's failure to locate and/or disclose to him a traffic history request.
  7. For the reasons explained below, I affirm the Department's internal review decision. I find that access to the information remaining in issue may be refused under section 47(3)(a) of the RTI Act on the ground that it comprises exempt information which is subject to legal professional privilege or under section 47(3)(b) of the RTI Act because disclosure would, on balance, be contrary to the public interest. I also find the Department has taken all reasonable steps to locate documents sought by the applicant and that access to any further documents may be refused on the ground they are nonexistent or unlocatable.

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<sup>3</sup> The applicant sought a broad range of information relating to the prosecution, including sentencing and communications between ODPP lawyers. After negotiations with the Department regarding the resources required to process his application, the applicant agreed to exclude photo evidence, statements of witnesses, case law, duplicate information and coroners or autopsy reports.

<sup>4</sup> On behalf of the ODPP. The Department is the delegated decision maker for ODPP RTI Act applications.

<sup>5</sup> 1 page comprising an 'audio recording'.

<sup>6</sup> Decision dated 6 April 2022.

<sup>7</sup> Submission dated 12 April 2022.

<sup>8</sup> Except in relation to the decision that other access to certain documents was available.

<sup>9</sup> Decision dated 16 May 2022.

<sup>10</sup> Comprising pages 38-40 of File 6.

<sup>11</sup> External review application received 8 June 2022.

<sup>12</sup> Pages 396-400 of File 1 and pages 50-54 of File 2.

## Background

8. The applicant's adult daughter was a pedestrian when she was fatally injured by a motor vehicle in late July 2017. Queensland Police Service (**QPS**) charged the driver of the vehicle, and the driver later pled guilty to the relevant charge and was sentenced in open court in early 2019.
9. The applicant seeks access any information held about the prosecution of the driver in relation to the accident. The applicant also requested access to information about the investigation and prosecution of other charges appearing on the driver's traffic history, including in relation to a subsequent incident in August 2018 (**2018 incident**).<sup>13</sup>
10. The applicant made a separate RTI Act access application to QPS, also seeking access to information about QPS's investigation of the accident and 2018 incident. That review<sup>14</sup> involves different documents<sup>15</sup> that were located by QPS however, the reviews have been considered concurrently as they raise similar public interest considerations. I have today issued a separate decision on the QPS review.<sup>16</sup>

## Reviewable decision

11. The decision under review is the Department's internal review decision dated 16 May 2022.

## Evidence considered

12. Significant procedural steps relating to the external review are set out in the appendix to these reasons. In reaching my decision, I have had regard to the submissions, evidence, legislation, and other material referred to throughout these reasons (including footnotes and appendix).
13. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>17</sup> I consider that a decision-maker will be '*respecting and acting compatibly with*' this right, and others prescribed in the HR Act, when applying the law prescribed in the RTI Act. I have acted in this way in making this decision, as required under 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:<sup>18</sup> '*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>19</sup>

## Information in issue and issues for determination

14. The information which is the subject of this decision has been significantly narrowed from what the Department refused the applicant access to in its internal review decision.<sup>20</sup> This narrowing of issues was achieved primarily due to the applicant's willingness to

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<sup>13</sup> The applicant provided OIC with an unredacted copy of the first page of the driver's traffic history for the period up to 23 April 2021 with his submission dated 29 May 2023, advising that he '*was able to obtain [it] from another source*'.

<sup>14</sup> External Review No. 316732.

<sup>15</sup> Noting however, there are some duplicated between the two matters.

<sup>16</sup> *O85 and Queensland Police Service* [2023] QICmr 40 (28 August 2023).

<sup>17</sup> Section 21 of the HR Act.

<sup>18</sup> *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>19</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]. I further note that OIC's approach to the HR Act set out in this paragraph was considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (where Judicial Member McGill saw '*no reason to differ*' from our position).

<sup>20</sup> Being the audio recording, 603 full pages and 121 part pages.

engage with OIC's informal resolution and preliminary view processes, and participate in productive negotiations to focus his submissions on information of key interest to him.<sup>21</sup> I note that despite the applicant's significant concerns about the conduct of the prosecution, he was willing to accept aspects of OIC's preliminary view<sup>22</sup> and concede pursuit of certain information.<sup>23</sup> The Department also agreed to disclose parts of 10 pages to the applicant during the review.<sup>24</sup>

15. In summary, the applicant's outstanding concerns in this review are obtaining access to the refused information in the following:

- *Page 396 of File 1*: two entries from August 2018 in the traffic history record generated on 17 January 2019; and
- *Page 48 of File 2*: paragraph 11 of the submissions that were filed by the driver's legal representatives in relation to his prosecution, dated 1 February 2019.

16. The applicant also considers that the Department has failed to locate the following documents:

- the request for the traffic history record, generated on 23 April 2018 and presented<sup>25</sup> to the presiding judge at sentencing; and
- any correspondence between ODPP and the driver's legal representative relating to the traffic record generated on 17 January 2019.

17. As a result of the above, the information which is the subject of this decision appears in one full and two part pages<sup>26</sup> and the issues for determination are whether:

- access may be refused to:
  - page 8 of File 4 (**LPP Document**) under section 47(3)(a) of the RTI Act on the ground that it comprises exempt information due to legal professional privilege; and
  - page 396 of File 1 (**Traffic History Entries**), and page 48 of File 2 (**Submission**) under section 47(3)(b) of the RTI Act, on the ground that disclosure would, on balance, be contrary to the public interest; and
- the Department has taken all reasonable steps to locate documents responding to the access application and whether access to further documents may be refused under section 47(3)(e) on the ground they are nonexistent or unlocatable.

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<sup>21</sup> OIC held a telephone conference with the applicant on 27 June 2023 in which he accepted OIC's view that certain information was exempt due to legal professional privilege and that logbooks in connection with the driver's Special Hardship Order could not be located. The applicant also confirmed that he was not seeking access to personal information of third parties, including witness statements, victim impact statements or photographs.

<sup>22</sup> During a telephone conversation on 30 March 2023, in a letter dated 24 April 2023 and confirmed on 27 June 2023 in a telephone conversation.

<sup>23</sup> For example, information deemed to be irrelevant to the scope of the application, including mechanical inspection reports and the extracted contents of the driver's mobile phone which were obtained by QPS as evidence. The extraction report comprised over 330 pages, with only one page containing information relevant to the time of the accident. The applicant did not seek to pursue access any part of the extraction report or the mechanical inspection reports and they are not considered in these reasons.

<sup>24</sup> The driver's traffic record generated on 17 January 2019 (pages 396-400 of File 1) and the driver's traffic record generated on 23 April 2018 (pages 50-54 of File 2).

<sup>25</sup> The traffic record presented to the presiding judge at sentencing appears at pages 50-54 of File 2 and was disclosed to the applicant in part on external review. The applicant seeks access to ODPP's request for that record.

<sup>26</sup> Page 396 of File 1, page 48 of File 2 and page 8 of File 4.

## Refusal of access

18. The RTI Act gives a person a right of access to documents of a Queensland government agency.<sup>27</sup> This right is, however, subject to other provisions of the RTI Act, including grounds on which access to information may be refused. Relevantly, access to information may be refused if:
- it comprises exempt information;<sup>28</sup> or
  - disclosure would, on balance, be contrary to the public interest.<sup>29</sup>

## Exempt information

### Relevant law

19. 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.<sup>30</sup> Relevantly, information is exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.<sup>31</sup> This exemption reflects the requirements for establishing legal professional privilege at common law.<sup>32</sup>
20. 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.<sup>33</sup>
21. When each of these requirements is met, legal professional privilege is established.<sup>34</sup> Relevantly, litigation privilege attaches to confidential communications between a lawyer and client made for the dominant purpose of use in, or in relation to, litigation. The litigation must have begun or have been reasonably anticipated at the time the communication was made.<sup>35</sup>

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<sup>27</sup> Section 23(1)(a) of the RTI Act.

<sup>28</sup> Sections 47(3)(a) and 48 of the RTI Act.

<sup>29</sup> Sections 47(3)(b) and 49 of the RTI Act. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

<sup>30</sup> Section 47(3)(a) allows refusal of access to exempt information.

<sup>31</sup> Schedule 3, section 7 of the RTI Act.

<sup>32</sup> 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 [552] 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 (*Esso*).

<sup>33</sup> *Esso and Daniels*.

<sup>34</sup> 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.

<sup>35</sup> *Mitsubishi Electric Australia Pty Ltd v Victorian Work Cover Authority* (2002) 4 VR 332; *Visy Industries Holdings Pty Ltd v Australian Competition and Consumer Commission* (2007) 161 FCR 122; *Farnaby v Military Rehabilitation and Compensation Commission* [2007] AATA 1792.

## Findings

22. I have considered the LPP Document. The extent to which I can describe the document is limited by the RTI Act.<sup>36</sup> I can however confirm that the LPP Document contains the request which the applicant has identified as missing information, as set out in paragraph 16 above.<sup>37</sup>
23. Based on the information available to me, I am satisfied that the LPP Document:
- was communicated confidentially by the ODPF to the Department of Transport and Main Roads (**DTMR**)<sup>38</sup> for the dominant purpose of obtaining information for use in legal proceedings, i.e. the impending prosecution of the driver
  - the ODPF salaried legal officer who initiated the request was acting professionally, independently and with relevant qualifications<sup>39</sup>; and
  - there is nothing before me to suggest that the qualification or exceptions to litigation privilege apply.
24. I acknowledge the submissions advanced by the applicant as to how he considers the public interest favours disclosure. However, where information is found to comprise exempt information under the RTI Act, there is no scope to take into account public interest arguments favouring disclosure, no matter how compelling. This is because Parliament has decided that disclosure of exempt information would be contrary to the public interest.<sup>40</sup> Also, the Information Commissioner does not have power to direct that access to the information, is to be given.<sup>41</sup>
25. Accordingly, I find that the LPP Document attracts legal professional privilege and is therefore, exempt information to which access may be refused under the RTI Act.<sup>42</sup>

## **Contrary to public interest**

### **Relevant law**

26. To decide whether disclosure of information would, on balance, be contrary to the public interest, the RTI Act requires a decision maker to:<sup>43</sup>
- identify any irrelevant factors and disregard them
  - identify relevant public interest factors favouring disclosure and nondisclosure
  - balance the relevant factors favouring disclosure and nondisclosure; and
  - decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.
27. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of public interest lies in a particular case. I have considered these lists of factors,<sup>44</sup> together with other relevant information in reaching my decision. I have had regard to the RTI Act's pro-disclosure bias<sup>45</sup> and Parliament's

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<sup>36</sup> Section 108 of the RTI Act.

<sup>37</sup> As such, I have not considered the request as nonexistent or unlocatable information, in the context of this review.

<sup>38</sup> Representing the State of Queensland.

<sup>39</sup> *Waterford v Commonwealth* (1987) 163 CLR 54.

<sup>40</sup> Sections 44(1) and 44(2)(a) of the RTI Act.

<sup>41</sup> Section 105(2) of the RTI Act.

<sup>42</sup> Section 47(3)(a) and schedule 3, section 7 of the RTI Act.

<sup>43</sup> Section 49(3) of the RTI Act.

<sup>44</sup> I have considered each of the public interest factors outlined in schedule 4 of the RTI Act, and any relevant factors are discussed below.

<sup>45</sup> Section 44 of the RTI Act.

intention that grounds for refusing access to information are to be interpreted narrowly.<sup>46</sup> Also, I have not taken any irrelevant public interest factors into account in making this decision.

## Findings

### ***Factors favouring disclosure***

28. The applicant is dissatisfied with ODPP's prosecution of the driver. He argues that all relevant evidence was not presented to the Court at the driver's sentencing hearing<sup>47</sup> and the requested information is needed to support future complaints he intends to make in relation to the conduct of the prosecution.<sup>48</sup> He is also seeking to establish whether the driver's licence was suspended and find out the reasons why decisions were (or were not) made.<sup>49</sup> The applicant also submits that the release of the documents sought '*should be automatic*' and that the driver should not be entitled to a right to privacy in the circumstances.<sup>50</sup>
29. Taking into account the applicant's submissions and the nature of the Information in Issue, I find that there are several relevant factors favouring disclosure; I examine these, as they apply in the circumstances of this case, below.
30. I accept that disclosure of the Traffic History Entries and Submission would provide the applicant with a more complete picture of what is held by ODPP in relation to the driver and his traffic history, though noting the information is limited to two entries on the driver's traffic history record and a brief statement made by the driver's legal representative in submissions presented to the Court about the driver's personal circumstances and traffic history. This would, I consider, advance the accountability<sup>51</sup> and transparency of ODPP to the extent that it would show the type of evidence gathered by ODPP and generally inform the community of ODPP's operations.<sup>52</sup> I also observe however, because of the limited nature of the information in the Traffic History Entries and Submission, it does not show how ODPP conducted the prosecution.
31. It is reasonable to expect that information regarding prosecution of a fatal motor vehicle accident would be likely to generate a significant level of community interest.<sup>53</sup> However, the Traffic History Entries relate to a separate incident that occurred in August 2018. While the 2018 incident *preceded* the date of the driver's sentencing for the accident,<sup>54</sup> the Traffic History Entries do not reveal any information about the prosecution or decisions made by the ODPP in relation to that prosecution. Also, while the information in the Submission was before the Court in relation to the prosecution, the nature of the information is such that it describes the personal circumstances of the driver and does not relate to the circumstances of the accident, or how the ODPP conducted the prosecution. As set out above, the applicant has obtained access to some information through this review process. In my view, the information already available to the applicant has served to discharge the accountability and transparency factors to a significant degree. For the reasons set out in this and the preceding paragraph, I afford moderate weight to these factors.

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<sup>46</sup> Section 47(2) of the RTI Act.

<sup>47</sup> The sentencing hearing was in February 2019.

<sup>48</sup> Submissions to OIC dated 29 May 2023 and verbally on 27 June 2023.

<sup>49</sup> Submissions to OIC dated 29 May 2023 and verbally on 27 June 2023.

<sup>50</sup> Submission to OIC dated 29 May 2023 and verbally on 27 June 2023.

<sup>51</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>52</sup> Schedule 4, part 2, item 3 of the RTI Act.

<sup>53</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>54</sup> In February 2019.

32. I acknowledge that the applicant is seeking to access any information to substantiate his concerns about the perceived shortcomings of the prosecution. With this in mind, I have considered whether disclosure of the Traffic History Entries and Submission could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency<sup>55</sup> or reveal the reason for a government decision or background contextual information.<sup>56</sup> As stated above, the Traffic History Entries and Submission do not reveal any information about how the prosecution was conducted. I accept however, that disclosure of the Traffic History Entries and Submission would reveal information that was available to ODPP prior to and at the driver's sentencing. I afford these factors moderate weight in favour of disclosure.
33. I note the applicant's concern that certain evidence was not presented to the Court at sentencing. While it is beyond my jurisdiction to express a view on that issue, I acknowledge that the applicant intends to pursue future complaint processes to ventilate his broader concerns about the prosecution. In the circumstances, I consider that disclosure of the Traffic History Entries and Submission would, to some extent, contribute to the administration of justice generally<sup>57</sup> as it would enable the applicant to examine information contained within the driver's traffic history record and incorporate any information that *he considers* to be relevant, in future complaint processes.<sup>58</sup> For these reasons, I afford the administration of justice factor low weight.

#### **Factors favours nondisclosure**

34. As outlined in paragraph 30 above, the Traffic History Entries and Submission exclusively relates to the driver's traffic history and personal circumstances. While the RTI Act prevents me from describing the refused information in particular detail,<sup>59</sup> they comprise details of entries on the drivers traffic history record and certain personal details. I am satisfied that the Traffic History Entries and Submission comprise the driver's *personal information*.<sup>60</sup>
35. The RTI Act recognises that disclosure of another individual's personal information could reasonably be expected to cause a public interest harm.<sup>61</sup> In conjunction with safeguarding a third party's personal information, the RTI Act also seeks to protect an individual's right to privacy from prejudice that could arise from disclosure.<sup>62</sup> The concept of privacy is not defined in the RTI Act, but it can be viewed as the right of an individual to preserve their '*personal sphere*' free from interference from others.<sup>63</sup>
36. The applicant has provided OIC with evidence demonstrating he is aware of certain details regarding the driver's traffic history.<sup>64</sup> The applicant also has had information about the driver disclosed to him in connection with the 2017 accident, investigation and prosecution through the RTI Act, and other avenues. I consider this existing knowledge

<sup>55</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>56</sup> Schedule 4, part 2, item 11 of the RTI Act.

<sup>57</sup> Schedule 4, part 2, item 16 of the RTI Act.

<sup>58</sup> I do not however, make any finding as to whether the Information in Issue establishes grounds for complaint or supports the applicant's assertions.

<sup>59</sup> Section 108 of the RTI Act.

<sup>60</sup> '*Personal information*' is '*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*' – see definition in schedule 5 of the RTI Act and section 12 of the *Information Privacy Act 2009* (Qld).

<sup>61</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>62</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>63</sup> *Matthews and Gold Coast City Council* (Unreported, Queensland Information Commissioner, 23 June 2011) at [22] paraphrasing the Australian Law Reform Commission's definition of the concept in 'For your information: Australian Privacy Law and Practice' *Australian Law Reform Commission Report No. 108* released 11 August 2008, at paragraph 1.56. The report is available at [https://www.alrc.gov.au/wp-content/uploads/2019/08/108\\_vol1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/108_vol1.pdf).

<sup>64</sup> A copy of the driver's traffic record was provided to OIC by the applicant on 29 May 2023.



lessens the weight of the privacy factor, but only to some degree. The fact remains that the Traffic History Entries and Submission contains personal details about the driver and circumstances of other, separate entries on the driver's traffic history record. In the circumstances, I am satisfied that the driver is entitled to have his personal information and private details, as they appear in the Traffic History Entries and Submission, protected from further scrutiny.

37. The applicant has argued that due to the driver's involvement in the 2017 accident, he should not be afforded privacy in relation to the subsequent 2018 incident. I understand that the applicant is grieving the loss of his daughter in tragic circumstances. I note that the applicant was granted access to information by the ODPP about prosecution of the 2017 accident and that this included certain information about the driver; this was generally because it was interwoven with the personal information of the applicant's daughter. However, it does not follow, in my view, that the applicant should be entitled to access all traffic history/personal information about the driver. Relevantly, the circumstances of the 2018 incident and traffic history preceding the 2017 accident did not involve the applicant's daughter.<sup>65</sup> Therefore, any reduction in the weight of the privacy factor which was relevant to favour disclosure of information about the 2017 accident, does not apply in relation to the 2018 incident or prior information that appears in the Traffic History Entries or Submission.
38. Further, the Information Commissioner has consistently found that individuals who are involved in QPS investigations are entitled to have their personal information and privacy protected due to the sensitive context in which the information appears.<sup>66</sup> Here, I have also taken into account that where information is released under the RTI Act, there can be no restriction or limitation on its further dissemination.<sup>67</sup>
39. For the reasons set out above, I afford significant weight to the public interest factors favouring nondisclosure.

### ***Balancing the public interest***

40. In balancing the factors for and against disclosure<sup>68</sup> of the Traffic History Entries and Submission, I have taken into account the pro-disclosure bias and several relevant factors favouring disclosure. I have afforded moderate weight to the public interest factors associated with enhancing the ODPP's accountability and transparency, allowing or assisting inquiry into possible deficiencies in the ODPP's conduct, and providing background/contextual information to decisions made by the ODPP. I also find that there is low weight to be afforded to the public interest in administration of justice generally.
41. Weighing against the pro-disclosure factors are two key factors favouring nondisclosure: prejudice to the driver's right to privacy and the public interest harm in disclosing personal information of the driver. In the particular circumstances of this case, I am satisfied that these factors carry significant and determinative weight to support a conclusion favouring nondisclosure of the Information in Issue.

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<sup>65</sup> For this reason, the 'eligible family member' factor in schedule 4, part 3, item 5 does not apply, and I have not taken it into account.

<sup>66</sup> *L80 and Queensland Police Service* [2023] QICmr 28 (19 June 2023); *E41 and Queensland Police Service* [2022] QICmr 13 (17 March 2022); and *WL1T8P and Queensland Police Service* [2014] QICmr 40 (16 October 2014).

<sup>67</sup> Noting that 'there is no provision of that Act which contemplates any restriction or limitation on the use which that person can make of that information, including by way of further dissemination' – see *FLK v Information Commissioner* [2021] QCATA 46 at [17] per McGill J.

<sup>68</sup> Section 49(3) of the RTI Act.

42. On balance, I find that disclosure of the Traffic History Entries and Submission would be contrary to public interest and therefore, access to that information may be refused under section 47(3)(b) of the RTI Act.

### **Searches - reasonable steps**

43. The final issue for determination in this review is whether the Department has taken reasonable steps to locate all documents responding to the application. This has been an ongoing concern of the applicant throughout the review process despite the Department undertaking additional searches during the internal review process. While the applicant has accepted OIC's view on the nonexistence of certain documents (see paragraph 14 above), I have considered below the searches undertaken by the Department for documents responding to this application, in particular, correspondence between ODPP and the driver's legal representative relating to the driver's traffic history record obtained by ODPP in January 2019 (**Correspondence**).<sup>69</sup>

### **Relevant law**

44. 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 applicants.<sup>70</sup> The Information Commissioner has previously found that an applicant alleging missing documents has a practical onus to demonstrate there is a reasonable basis to request that the agency conduct further searches.<sup>71</sup>
45. Access to documents may be refused where they do not exist or cannot be located.<sup>72</sup> A document will be *nonexistent* if there are reasonable grounds to be satisfied it does not exist.<sup>73</sup> To be satisfied that a document does not exist, the Information Commissioner has previously identified key factors to consider, including the agency's record-keeping practices and procedures.<sup>74</sup> By considering those key factors, a decision maker may conclude that a particular document was not created because, for example, the agency's processes do not require creation of that specific document. In such instances, it is not necessary for the agency to search for the document but sufficient that the circumstances to account for the nonexistence are adequately explained by the agency.
46. The Information Commissioner may also take into account the searches and inquiries conducted by an agency in determining whether a document is nonexistent. The key question then is whether those searches and inquiries amount to '*all reasonable steps*'.<sup>75</sup> What constitutes reasonable steps will vary from case to case as the search and inquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances. Such steps may include inquiries and searches of all relevant locations identified after consideration of relevant key factors.<sup>76</sup>

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<sup>69</sup> As the request for the traffic history record, generated on 23 April 2018 and presented to the presiding judge at sentencing forms part of the LPP Document, I have not considered whether all reasonable steps have been taken to locate it.

<sup>70</sup> Section 130(2) of the RTI Act. The Information Commissioner also has power under section 102 of the RTI Act to require additional searches to be conducted during an external review.

<sup>71</sup> *Gapsa and Public Service Commission* [2016] QICmr 6 (11 February 2016) at [15]; *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36]; *A51 and Office of the Health Ombudsman* [2020] QICmr 17 (24 March 2020) at [15].

<sup>72</sup> Sections 47(3)(e) and 52(1) of the RTI Act.

<sup>73</sup> Section 52(1)(a) of the RTI Act. For example, a document has never been created.

<sup>74</sup> *Isles and Queensland Police Service* [2018] QICmr 27 (7 June 2018) at [15] which adopted the Information Commissioner's comments in *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]-[38]. *PDE* addresses the application of section 28A of the now repealed FOI Act. Section 52 of the RTI Act is drafted in substantially the same terms as the provision considered in *PDE* and, therefore, the Information Commissioner's findings in *PDE* are relevant.

<sup>75</sup> As set out in *PDE* at [49].

<sup>76</sup> As set out in *PDE* at [38].

47. The RTI Act also contemplates circumstances where a document should exist (or has existed) but is *unlocatable*. Determining this requires an agency to demonstrate that it has taken all reasonable steps to find the document having regard to the circumstances of the case and the key factors mentioned in paragraph 45 above.

### Findings

48. Given the applicant's ongoing concerns about missing documents, OIC asked the Department (as the delegate for ODPP) to provide OIC with any records of the searches conducted.<sup>77</sup> In response, the Department provided OIC with information about its searches, including responses and document/time control forms completed by staff who conducted the searches.<sup>78</sup> The Department's search records reveal that searches were conducted by ODPP for all documents relating to the prosecution of the driver. These documents were then assessed by the Department's decision maker for relevance to the scope of the access application. The Department identified 971 pages<sup>79</sup> relevant to the access application. Following the applicant's application for internal review, the Department requested ODPP to undertake further searches, however no further documents were located.
49. The applicant remains concerned that the Correspondence has not been located.<sup>80</sup> The applicant submits that as *'prosecutors and defence lawyers share evidence it is reasonable to presume that the ODPP forwarded'* a copy of the driver's traffic history record which was obtained in January 2019 to the driver's legal representative. While I accept that it is reasonable to expect that evidence to be relied upon by the prosecution would be provided to the defence, the information already disclosed to the applicant clearly establishes that the traffic history record relied upon by the prosecution at the sentencing hearing in February 2019 was the copy obtained in April 2018. There is nothing before me to suggest that the copy obtained in January 2019 was relied upon at the sentencing hearing in February 2019.<sup>81</sup> If the Correspondence exists, given the extensive searches that have been conducted to date on this application, I find that the document no longer exists or cannot be located.
50. Given the terms of the application and taking into account ODPP's knowledge and experience of its own record-keeping practices, I consider it is reasonable to be satisfied that the locations searched by ODPP both originally and during the internal review process, would have captured any responsive information if it existed or could be located in ODPP databases and physical locations. My findings in this regard are informed by the scope of the request being for documents regarding the prosecution of the driver; the search records of ODPP demonstrate that officers conducted searches for documents responding to the application.
51. In summary, based on the evidence available to me, I am satisfied that ODPP has undertaken searches of the locations where it would be reasonable to expect that the requested information would be kept and it is reasonable to expect that if the documents sought existed, they would have been located. I am also satisfied that the searches were conducted by ODPP staff familiar with applicable recordkeeping practices for the documents sought.

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<sup>77</sup> Letter dated 1 July 2022.

<sup>78</sup> Letter to OIC, and attachments, dated 15 July 2022.

<sup>79</sup> One 'page' being an audio recording.

<sup>80</sup> Submission to OIC dated 29 May 2023.

<sup>81</sup> I make no finding as to the appropriateness of the prosecutor's conduct in terms of which traffic history record was presented at sentencing, but note that this remains the subject of the applicant's complaint about the conduct of the prosecution.

52. Having regard to all the matters discussed above, I am satisfied that ODPP has undertaken all reasonable steps to locate the requested documents and that access to further documents may be refused on the ground they are nonexistent or unlocatable.<sup>82</sup>

## **DECISION**

53. I affirm the decision of the Department<sup>83</sup> by finding that:

- access to the LPP Document may be refused under section 47(3)(a) of the RTI Act on the ground that it comprises exempt information
- access to the Traffic History Entries and Submission may be refused under section 47(3)(b) as disclosure would, on balance, be contrary to public interest; and
- ODPP has taken reasonable steps to locate all documents relevant to the application and access to further information, including Correspondence, may be refused on the ground that it does not exist or cannot be located under sections 47(3)(e) and 52 of the RTI Act.

54. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**K Shepherd**  
**Assistant Information Commissioner**

**Date: 28 August 2023**

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<sup>82</sup> Section 47(3)(e) of the RTI Act.

<sup>83</sup> That was made under delegation by ODPP.

## APPENDIX

### Significant procedural steps

Date	Event
8 June 2022	<p>OIC received the application for external review.</p> <p>OIC requested the Department provide preliminary documents.</p>
14 June 2022	<p>OIC received the preliminary documents from the Department.</p>
1 July 2022	<p>OIC notified the applicant and the Department that the application for external review had been accepted.</p> <p>OIC requested that the Department provide copies of the information in issue, search records and a submission addressing the searches.</p>
15 July 2022	<p>OIC received the copies of the information in issue, search records and submission addressing the searches from the Department.</p>
1 December 2022	<p>OIC sought clarification from the Department about the Department's position on access to certain information and a submission from the Department to assist with assessing the applicant's concerns about the searches conducted.</p>
13 December 2022	<p>The Department advised that it agreed to disclose further information to the applicant and provided a submission in response to the applicant's concerns about the searches conducted.</p>
30 March 2023	<p>OIC requested the Department arrange disclosure of the further information to the applicant.</p> <p>OIC communicated a preliminary view to the applicant.</p>
4 April 2023	<p>The Department confirmed the further information had been disclosed to the applicant.</p>
24 April 2023	<p>OIC confirmed the preliminary view in writing to the applicant.</p>
29 May 2023	<p>OIC received submissions from the applicant.</p>
27 June 2023	<p>OIC discussed the issues remaining in the review with the applicant.</p>
28 June 2023	<p>OIC confirmed the issues remaining in the review in writing to the applicant.</p> <p>OIC received a submission from the applicant clarifying one of the issues remaining in the review.</p>