



Decision and Reasons for Decision

Citation: *X10 and Queensland Building and Construction Commission [2024] QICmr 37 (13 August 2024)*

Application Number: 317189

Applicant: X10

Respondent: Queensland Building and Construction Commission

Decision Date: 13 August 2024

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - communications between lawyer and client - whether communications attract privilege - sections 47(3)(a) and 48 and schedule 3, section 7 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - PARLIAMENTARY PRIVILEGE - briefing notes prepared for use in Parliament - whether communications attract privilege - sections 47(3)(a) and 48 and schedule 3, section 6(c)(i) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - PRESCRIBED CRIME BODY - investigative material - whether obtained, used or prepared for an investigation by a prescribed crime body or another agency - whether investigation is about the applicant - sections 47(3)(a) and 48 and schedule 3, section 10(4) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - DISCLOSURE PROHIBITED BY AN ACT - public interest disclosure information - whether disclosure is prohibited under section 65(1) of the *Public Interest Disclosure Act 2010* (Qld) - sections 47(3)(a) and 48 and schedule 3, section 12(1) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - personal information and privacy of individuals - unsubstantiated allegations - prejudice to management function of an agency - prejudice to future supply of confidential information - whether disclosure would, on balance, be contrary to the public

interest - sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - applicant submits agency did not locate all relevant documents - scope of access application - whether agency has conducted all reasonable searches - whether applicant has discharged onus - whether access to further documents may be refused on the basis they are nonexistent or unlocatable - sections 47(3)(e) and 52(1) of the *Right to Information Act 2009* (Qld)

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 emails containing the applicant's name as held in the email account of a named QBCC officer, including all 'deleted' or 'archived' emails, as well as all emails, attachments and associated documents that formed part of a responsive email chain.¹
2. On 25 November 2022, the applicant clarified the scope of his request by consenting to the exclusion of duplicate email chains, '*so long as the occurrence of any unique or singular information is not excluded*'.
3. QBCC located 3073 responsive pages and one MP4 file. It decided to give the applicant access to some information but refused access to other information on the grounds that it was:
 - exempt information
 - contrary to the public interest information
 - irrelevant information; or
 - information falling outside the scope of the RTI Act.²
4. The applicant applied for internal review of QBCC's decision.³ On internal review, QBCC varied the initial decision by giving the applicant access to additional information. It also withdrew reliance upon its claim that information was irrelevant to the terms of the access application. It released some of this information to the applicant, but continued to refuse access to other information on alternative grounds. QBCC otherwise maintained a refusal of access to the remaining information on the same grounds as identified in the initial decision.⁴
5. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QBCC's decision.⁵ The applicant also raised a sufficiency of search issue on

¹ Access application received by QBCC on 27 September 2022.

² See Attachment B to QBCC's decision dated 19 December 2022.

³ On 18 January 2023. On 30 January 2023, the applicant provided a submission in support of his application for an internal review.

⁴ Decision dated 16 February 2023.

⁵ By email on 17 March 2023. The application was made one day outside the requisite timeframe, however, QBCC did not object to OIC allowing the applicant a longer period under section 88(1)(d) of the RTI Act. See OIC's letters to the applicant and QBCC dated 4 May 2023.

external review, based primarily upon his interpretation of the applicable date range of his access application.

6. During the course of the external review, QBCC agreed to give the applicant access to additional information. The applicant also withdrew his application for access to some categories of information. For the reasons explained below, I decide to affirm QBCC's decision that access to the remaining information in issue may be refused under the RTI Act on the grounds set out in QBCC's internal review decision. In addition, I find that the searches and inquiries that QBCC conducted in an effort to locate all responsive documents have been reasonable in all the circumstances and that there are no reasonable grounds for expecting that additional documents falling within the scope of the access application exist in QBCC's possession or under its control.

Reviewable decision

7. The decision under review is QBCC's internal review decision dated 16 February 2023.

Evidence considered

8. Evidence, submissions,⁶ legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and appendix).
9. 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.⁷ 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,⁸ 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.*'⁹

Irrelevant information

10. In his letter dated 12 July 2024, in response to OIC's preliminary view letter dated 18 April 2024, the applicant submitted that the preliminary view letter had omitted to address the information that had been deleted by QBCC on the ground that it was irrelevant information under section 73 of the RTI Act. However, QBCC's internal review decision states that the internal review decision-maker '*abandoned the deletion of information and pages based on section 73*'. The internal review decision-maker decided either to grant access to information that had been deleted by the initial decision-maker as irrelevant, or to refuse access to it on alternative grounds, as set out in Attachment B to the internal review decision.
11. Accordingly, the decision under review did not rely on section 73 of the RTI Act to refuse access to information, and this issue therefore does not arise for consideration in this external review.

⁶ Including the submissions made by the applicant in his internal and external review applications, and in his letter dated 12 July 2024.

⁷ As embodied in section 21 of the HR Act.

⁸ *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].

⁹ *XYZ* at [573].

Information in issue

12. With the exception of the information released to the applicant on external review,¹⁰ and the categories of documents to which the applicant no longer pursues access (as indicated in his letter dated 12 July 2024), the information in issue is identified in Attachment B to QBCC's internal review decision dated 16 February 2023.

Issues for determination

13. The issues for determination are:
 - whether access to information may be refused on the grounds that it is exempt information
 - whether access to information may be refused on the grounds that its disclosure would, on balance, be contrary to the public interest; and
 - whether the searches and inquiries that QBCC has conducted in an effort to locate all responsive documents have been reasonable in all the circumstances.

General submissions made by the applicant

14. The submissions made by the applicant that address the requirements of the relevant refusal provisions relied upon by QBCC will be discussed below. However, the applicant has made submissions of a more general nature about the external review process that I will address here.
15. In response to QBCC's reliance upon exemption provisions in the RTI Act to refuse him access to information, the applicant complained in his application for external review that *'Without reference to the underlying documents and evidence, I have no verification of the validity of this exemption'*. He made a similar submission in his letter dated 12 July 2024: *'I have no reference to the information in issue at all, and therefore I am at a distinct disadvantage and unable to make meaningful submissions'*.
16. Section 108 of the RTI Act prohibits the Information Commissioner from disclosing information that is claimed to be exempt information or contrary to the public interest information. Section 108(1) provides the Information Commissioner with power to give any directions necessary to ensure that information that is claimed to be exempt or contrary to public interest information, and information that the Information Commissioner considers may be protected by legal professional privilege, is not disclosed to an access applicant. Section 108(2) permits the Information Commissioner to receive evidence in the absence of an access applicant if it is necessary to do so to prevent disclosure to that person of information claimed to be exempt or contrary to public interest information. Lastly, section 108(3) prohibits the Information Commissioner from including in a decision, any information that is claimed to be exempt information or contrary to the public interest information.
17. Section 108 therefore imposes clear restrictions upon the level of detail with which applicants can be provided about the nature and content of information that an agency claims is exempt information or contrary to the public interest information. I acknowledge that this may hamper an applicant's ability to make meaningful submissions about whether or not the requirements of the relevant refusal provision have been satisfied. However, that is the effect of section 108 of the RTI Act. It is

¹⁰ All or parts of pages 254-282, 1075-1079, 1080-1169, 1170-1179, 1290-1291, 1292-1295, 1296-1385, 1386-1389, 1430-1471, 2306-2309, 2371-2397, 2403-2429, 2432-2453, 2455-2457, 2459-2465, 2468-2469 and 2502-2508.

OIC's role on external review to conduct an independent examination of the information in question and to scrutinise the agency's decision in order to decide whether it should be affirmed, varied or set aside.¹¹

18. In *BGC (Australia) Pty Ltd v Fremantle Port Authority*,¹² Heenan J of the Western Australian Supreme Court said the following in relation to a similar argument by an applicant in connection with the application of exemption provisions contained in the *Freedom of Information Act 1992* (WA):

*One can readily appreciate that, as with any doubting Thomas, the appellant may not be convinced of the justification for this particular conclusion unless it sees and examines the evidence itself. However, on the basis that the confidentiality clause is itself part of the confidential information which may not be disclosed, that result is inescapable in the light of s 74(1) and (2) and s 90(1) and (3) of the Act. The legislation expressly acknowledges that it may be necessary to receive evidence and hear argument in the absence of the public and any party or representative of the party in order to preserve the confidentiality of exempt matter (s 90(2)). By this means the legislation ensures that the objective terms and effect of matter which is asserted to be exempt from disclosure because of confidentiality may be examined by an officer quite independent of the agency asserting a claim to confidentiality, namely, the Information Commissioner and, on appeal, by a Judge of this Court. That this scrutiny and examination, in order to protect the confidentiality of the material if the claim is justified, must be conducted without disclosure to the applicant, its counsel or solicitors is one example of these rare instances in which a party to litigation is deprived of full access to all material documents. However, this is not an isolated exception, and policy considerations which have prompted its acceptance, have been recognised in other areas of the law such as the power of a court to inspect documents in respect of which a claim for legal professional privilege has been made, or to scrutinise material relied upon for the issue of a search warrant, or to inspect documents for which a claim of public interest immunity has been asserted, without disclosing them to the party seeking inspection – see *Sankey v Whitlam* (1978) 142 CLR 1 at 46, 110. None of these examples constitutes any denial of natural justice because, if the claim for privilege, confidentiality or public interest immunity is justifiably made, the party seeking to inspect the documents has no right of any kind to do so. Justice is achieved and the law applied in these situations by an examination of the documents by an independent officer or court acting on settled principles.*

19. More recently, the Queensland Civil and Administrative Tribunal (**QCAT**) found that the Information Commissioner is not required, on external review, to provide the applicant with a list that describes the documents under review. QCAT rejected the applicant's argument that such a list would not comprise exempt information, and stressed that the clear focus of the legislation is on the protection of the right to access information by means of a merits review by an independent specialist Commissioner who is able to examine the relevant material and decide whether or not there is a right of access in accordance with the legislation.¹³
20. The applicant's proposal to overcome the disadvantage under which he considers himself in presenting his case is for the Information Commissioner to allow him to 'confidentially' view the refused information. In his letter dated 12 July 2024, in respect of information that QBCC claims is exempt because it is subject to Parliamentary privilege, the applicant submitted:

¹¹ Section 110(1) of the RTI Act.

¹² (2003) 28 WAR 187 at [16].

¹³ *Mokbel v Queensland Police Service* [2023] QCATA 158 at [8] to [12].

Consistent with Eaves¹⁴ and in the interest of fairness in presenting my case, and public confidence in the QBCC, the Minister and the Parliamentary process, I propose to make myself available or a suitable representative available to the Information Commissioner at a mutually convenient time to review the information in issue confidentially. I expect that I will be able to quickly, and succinctly, and likely with reference to the QBCC's own documents and information, demonstrate to you that the information in issue was created, and/or used, for an improper purpose.

21. Similarly, in respect of information that QBCC claims is contrary to the public interest information, the applicant submitted:

Again, consistent with Eaves and in the interest of fairness in presenting my case, and public confidence in the QBCC, the CCC, the CCC's corruption functions and the CCC's overriding responsibility to promote public confidence in the way corruption within a unit of public administration is dealt with, I propose to make myself or a suitable representative available to the Information Commissioner at a mutually convenient time to review the information in issue confidentially. I expect that I will be able to quickly, and succinctly, and likely with reference to the QBCC's own documents and information, demonstrate to you that there are no unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct in the information in issue.

22. The applicant has extensive experience with the operation of the RTI Act, having made many access applications, and many external review applications to OIC, since 2017. As such, it is difficult to accept that his submission is made in good faith. He is aware of the prohibition, contained in section 108 of the RTI Act, on disclosure by the Information Commissioner of information that is claimed by an agency to be exempt or contrary to the public interest information. He was referred to this provision in OIC's preliminary view letter dated 18 April 2024, and in numerous other of his previous applications for external review. While he cites OIC's decision in *Eaves* as apparently supportive of his position, there is nothing in that decision that suggests that a breach of section 108 of the RTI Act is warranted to allow an applicant to be better able to present his case for disclosure.
23. In effect, the applicant is proposing not only that the Information Commissioner breach section 108 of the RTI Act by allowing him to view the information in issue, but in doing so, to render both the QBCC's objections to disclosure of the information, and the Information Commissioner's role on external review as the independent arbiter, nugatory.
24. It is sufficient to record, merely for the sake of completeness, that the applicant's proposal is rejected. Like any other applicant, if the applicant considers a decision of the Information Commissioner contains an error of law, he has a right of appeal to QCAT.

Exempt information - relevant law

25. The RTI Act's primary object is to give a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access.¹⁵ The Act must be applied and interpreted to further this primary object,¹⁶ and is to be administered with a pro-disclosure bias.¹⁷

¹⁴ *Eaves v Commissioner of Police* [2018] QCAT 180 (*Eaves*).

¹⁵ Section 3(1) of the RTI Act.

¹⁶ Section 3(2) of the RTI Act.

¹⁷ Section 44 of the RTI Act.

26. Section 23 of the RTI Act gives effect to the Act's primary object by conferring a right to be given access to documents. This right is subject to other provisions of the RTI Act,¹⁸ including grounds on which access may be refused.¹⁹ These grounds are to be interpreted narrowly.²⁰
27. One of these grounds permits an agency to refuse access to information to the extent that it is exempt information under sections 47(3)(a) and 48, and schedule 3 of the RTI Act. The categories of exempt information upon which QBCC relied in refusing access to information are as follows:
- legal professional privilege
 - Parliamentary privilege
 - the prescribed crime body exemption; and
 - disclosure is prohibited by an Act.

Application of schedule 3, section 7 of the RTI Act - legal professional privilege

28. An agency may refuse access to information where it would be privileged from production in a legal proceeding on the ground of legal professional privilege.²¹ This exemption reflects the requirements for establishing privilege at common law.²²
29. Broadly, for information to be subject to legal professional privilege it must be a confidential communication made:
- in the course of a lawyer/client relationship for the dominant purpose of seeking or providing legal advice or assistance (advice privilege); or
 - for the dominant purpose of use in existing or reasonably anticipated legal proceedings (litigation privilege).
30. If these elements are satisfied, the agency must still consider if:
- the privilege has been waived; or
 - the circumstances give rise to the improper purpose exception.

Discussion

31. The information in question can be described as:
- a) a handwritten file note created by the QBCC's Chief Legal Officer (**CLO**) that records the CLO's analysis and opinion regarding a complaint that the applicant made to the Premier about the QBCC Commissioner²³
 - b) references in an email dated 20 October 2020 that disclose requests for legal advice made to QBCC's Director of Legal Services, and legal advice provided by the Director of Legal Services;²⁴ and

¹⁸ Section 23(1) of the RTI Act.

¹⁹ Section 47 of the RTI Act.

²⁰ Section 47(2)(a) of the RTI Act.

²¹ Schedule 3, section 7 of the RTI Act.

²² 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**).

²³ Pages 80-81 and duplicated at pages 307-308.

²⁴ Pages 247-248 and duplicated at page 2059.

- c) an email chain between QBCC officers and QBCC's CLO that provides relevant information to the CLO in connection with a request for the provision of legal advice.²⁵

Category a) information

32. On external review, the applicant argued²⁶ that privilege in the CLO's file note either did not exist, or had been waived, for the following reasons:
- he had been given access to the covering email from the CLO²⁷ that attached the CLO's note and that indicated that the CLO had briefed the Chair of the QBCC (who was not legally qualified) about the matter
 - the CLO referred in the covering email to section 40A of the *Crime and Corruption Act 2001* (Qld) (**CC Act**) (which requires a public official to make a record if it is decided that a complaint about alleged corrupt conduct is not required to be notified to the Crime and Corruption Commission (**CCC**)), which indicates that the CLO, in compiling the file note, was acting in the capacity of a 'public official' rather than a lawyer providing legal advice in the course of a lawyer-client relationship; and
 - he had been given access to another email between two non-legally qualified QBCC officers²⁸ that referred to the CLO's file note and that stated that, although it was not considered that an assessment under section 40A of the CC Act was required, it was undertaken '*so if someone comes a knockin then we can say that we turned our mind to it*', indicating that the CLO's file note was intended for disclosure to parties outside any lawyer-client relationship.
33. I do not accept the applicant's contention that the CLO's reference in his covering email to a section 40A assessment under the CC Act indicates that the CLO was not acting in a legal capacity in compiling the file note and that privilege therefore cannot attach to it. The note contains analysis and opinion of a legal nature, made by a legally qualified officer acting in a professional legal capacity, regarding the complaint made by the applicant and what, if any, action should be taken by QBCC in response. The fact that it may have served as a record under section 40A of the CC Act does not, in my view, detract from the privileged nature of the file note as a confidential communication created by the CLO for the dominant purpose of providing legal advice or assistance to QBCC as client.
34. In response to the applicant's argument that the file note cannot be subject to a claim of privilege because it was intended that it be disclosed if requested by the CCC, I acknowledge that section 40A(5) of the CC Act requires a public official to give the CCC access to the record, if requested. However, section 40A does not evince a clear legislative intent to override a claim of legal professional privilege in the record.²⁹ Furthermore, even if the record were to be disclosed to the CCC, I do not consider that such a disclosure, for the limited and specific purpose of demonstrating compliance with a statutory obligation, would necessarily amount to a waiver of privilege in the record *vis-à-vis* the world at large.³⁰ In any event, as far as I am aware, the CCC has

²⁵ Pages 2496-2500.

²⁶ Submission dated 12 July 2024.

²⁷ Page 79.

²⁸ Page 305.

²⁹ Absent clear legislative intent to the contrary, there is no obligation to provide regulators with privileged communications because legal professional privilege is a fundamental common law immunity: *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543.

³⁰ Limited waiver is where a privileged document is shared with a third party, such as a regulator, for a limited and specific purpose on terms that the third party will treat the information disclosed as confidential: *Cantor v Audi Australia Pty Ltd* [2016] FCA 1391.

made no such request, the file note has not been disclosed, and the issue of waiver in those circumstances therefore does not arise.

35. Nor do I accept that the privilege that I consider exists in the CLO's file note has been waived by disclosure to the applicant of the covering email from the CLO. The covering email, which is directed to two other QBCC officers, does not disclose the substance of the CLO's assessment or opinion. It simply refers the recipients of the email to the attached assessment, and states that the CLO has briefed the Chair about the matter. That is not sufficient to amount to a waiver of privilege.³¹ The applicant's point in emphasising that the Chair was not legally qualified is not clear. The CLO briefed the Chair about the relevant matters in the context of a lawyer-client relationship.
36. In summary, I am satisfied that the category a) information meets the requirements to establish a claim of legal professional privilege. The relevant information records a confidential communication between lawyer and client made for the dominant purpose of providing legal advice or assistance. I consider that the CLO who provided the advice or assistance was suitably qualified and of a sufficiently independent character. For the reasons explained above, I am further satisfied that privilege in the category a) information has not been waived. There is also nothing before me to suggest that the improper purpose exception applies to displace the privilege.

Category b) information

37. In his submission dated 12 July 2024, the applicant submitted that the parties to the relevant email exchange were not legally qualified and so the communications in question were not made in the course of a lawyer-client relationship. He further submitted that, even if the relevant information once attracted privilege, it had been waived by virtue of it being contained in an email exchange between two non-lawyers.
38. The applicant's submission is misconceived. The information in issue comprises discrete parts of an email between QBCC officers that refer to the nature of previous requests made to QBCC legal officers for legal advice, and the legal advice provided by QBCC legal officers in response. I am satisfied that the initial communications attracted privilege as confidential communications between lawyer and client made for the dominant purpose of requesting and providing legal advice or assistance. The confidentiality that exists in the communications is not lost through the communications being repeated or referred to in subsequent communications between other officers of the client organisation entitled to the benefit of the privilege. In such circumstances, privilege is not waived because the privilege-holder has not acted in a way that is inconsistent with the maintenance of the confidentiality of the communications.³²
39. Again, there is also nothing before me to suggest that the improper purpose exception applies to displace the privilege that exists in the communications.

Category c) information

40. The applicant's only submission, in response to OIC's preliminary view about the category c) information, was to contend that the email exchanges appeared to relate to media clips and that he was unable to make meaningful submissions without being

³¹ See *ASIC v ANZ (No 2)* [2020] FCA 1013 where the Court found that a letter that merely touched upon, but did not reveal the substance of legal advice, was insufficient to waive privilege in the advice.

³² *Mann v Carnell* (1999) 201 CLR 1 at [34].

given further details about the contents of the documents. In response to this submission, I refer to the discussion at paragraphs 14-24 above.

41. I have reviewed the email chain in question and I am satisfied that the relevant communications exchanged between QBCC's CLO and other QBCC officers attract legal professional privilege because they comprise confidential communications between lawyer and client made for the dominant purpose of seeking or providing legal advice or assistance. I consider that the CLO was suitably legally qualified and of a sufficiently independent character. There is nothing before me to suggest that the qualification or exceptions to the privilege apply.

Finding

42. For the reasons explained above, I am satisfied that access to the category a), b) and c) information may be refused under schedule 3, section 7 of the RTI Act because the communications in question are subject to legal professional privilege and therefore comprise exempt information.

Application of schedule 3, section 6(c)(i) of the RTI Act - Parliamentary privilege

43. Information is exempt information if its public disclosure would, apart from this Act and any immunity of the Crown, infringe the privileges of Parliament.³³ Parliamentary privilege exists to enable the Parliament, its committees, members and officers to proceed with their business without interference. It refers to the rights, powers and immunities which are essential to ensure that the Parliament operates effectively.³⁴
44. Section 8(1) of the *Parliament of Queensland Act 2001* (Qld) (**PQ Act**) provides that the freedom of speech and debates or proceedings in the Assembly cannot be impeached or questioned in any court or any place outside the Assembly. Section 9 of the PQ Act links Parliamentary privilege to 'proceedings in the Assembly' which is defined as '*all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee*'³⁵ and includes:
- a) evidence provided before the Assembly, committee or inquiry
 - b) a document presented or submitted to the Assembly, committee or inquiry
 - c) a document tabled in the Assembly, committee or inquiry
 - d) preparing a document for the purpose of presenting or submitting a document to or providing evidence before the Assembly, committee or inquiry; and
 - e) preparing, making or publishing a document or report under the direction of the Assembly or a committee.

45. The exemption can also apply to a document prepared specifically for use by a Minister for conducting business in the Assembly, even if it is not actually used.³⁶

Discussion

46. QBCC described the relevant information as follows in its internal review decision:

The information being exempted in the instances of this application were created specifically for use by the Queensland Building and Construction Commission Commissioner and the Minister for Energy and Public Works and includes documents and evidence prepared for the purpose of presenting information before an Assembly. These include briefing notes for

³³ Schedule 3, section 6(c)(i) of the RTI Act.

³⁴ As defined in the *Queensland Parliamentary Procedures Handbook*.

³⁵ See section 9.

³⁶ *Moriarty and Department of Health* (Unreported, Queensland Information Commissioner, 15 September 2010) at [10].

[the Minister] responding to enquiries arising in parliament, as well as documents prepared for appearance before budget estimates hearings. I note that this includes the correspondence associated with the drafting and approval of these briefs.

47. As noted above at paragraph 20 above, the applicant's submission is that, like legal professional privilege, he considers that Parliamentary privilege is subject to an improper purpose exception, and that if he were to be given an opportunity to view the information in question, he could demonstrate that it was created and/or used for an improper purpose.
48. Parliamentary privilege and legal professional privilege are different in nature and serve to protect different interests. I do not accept that Parliamentary privilege is subject to an improper purpose exception and the applicant has provided no legal authority for such a proposition. Furthermore, such a proposition, which would, in effect, involve the questioning outside the Assembly of a proceeding in the Assembly, would seem to defeat the very purpose for which the privilege exists. If it can be established that a document has been created in the course of, or for the purposes of, or incidental to, transacting business of the Assembly or a committee, it will attract Parliamentary privilege and qualify for exemption under schedule 3, section 6(c)(i) of the RTI Act. That is the only issue for the Information Commissioner to consider. To go on to consider whether a document that was created for the purposes of transacting business in the Assembly involved some improper purpose in its creation, would be to question a proceeding in the Assembly. Such an inquiry can only be undertaken by the Assembly itself.³⁷
49. In any event, the applicant is unable to provide evidence or other supporting material that is relevant to the issue of the purpose for which the documents in question were prepared. He has submitted that he may be able to do so if he is given the opportunity to view the documents. I have explained above why this would be in breach of section 108 of the RTI Act.

Finding

50. Having reviewed the relevant information that QBCC claims is subject to Parliamentary privilege, I am satisfied that it was prepared in the course of, or for the purposes of, or incidental to, transacting business of the Assembly or a committee. I am therefore satisfied that the information is subject to Parliamentary privilege and that access may be refused because it is exempt information under section 48 and schedule 3, section 6(c)(i) of the RTI Act.

Application of schedule 3, section 10(4) of the RTI Act - prescribed crime body exemption

51. Schedule 3, section 10(4) of the RTI Act provides that information is exempt if it was obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in performance of the prescribed functions of the prescribed crime body. A 'prescribed crime body' is defined in the RTI Act as the CCC. However, if the investigation has been finalised **and** the information applied for is about the applicant, it will not be exempt under the CCC exemption. This only applies to information that satisfies both requirements.³⁸

³⁷ See section 37ff of the PQ Act.

³⁸ Schedule 3, section 10(6) of the RTI Act.

Discussion

52. In its internal review decision, QBCC described the relevant information in issue as follows:

I have identified documents which consist of information obtained, used, or prepared for an investigation in the performance of the prescribed functions of the Crime and Corruption Commission. These also include where the investigation may have been referred back to the QBCC for investigation. I am satisfied that the exemption applies to these documents.

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

54. Section 46 of the CC Act allows the CCC to refer allegations of corrupt conduct back to the relevant agency to deal with (known as the ‘devolution principle’), subject to the CCC’s monitoring role, and with or without a requirement that the agency advise the CCC of the outcome of the investigation. In these circumstances, information ‘obtained, used or prepared’ for the investigation by the agency will be subject to the CCC exemption, because the agency has taken on the role of investigator and is performing the prescribed function of the CCC.

55. In addition to stating that he relied upon a submission that he had made to OIC in another of his review applications concerning the operation of the CCC exemption,³⁹ the applicant submitted as follows in his letter dated 12 July 2024:

Broadly, the CCC has failed to have regard to the performance of its own corruption functions in a way that is appropriate, and the CCC has failed its overriding responsibility to promote public confidence in the way corruption within a unit of public administration is dealt with. The corruption functions of the CCC are void, and so the CCC Exemption does not apply to any of the Information in Issue.

It is not sufficient for the QBCC to form the view that the CCC Exemption applies because the QBCC at the time believed the information was created or dealt with for the purpose of a prescribed crime body investigation, when the QBCC itself was acting in a way that contributed to the erosion of the CCC’s corruption functions and the removal of the CCC Exemption.

It is open and reasonable to expect that any analysis, and the question of whether a viable corruption function applies or not, should be referred to the Tribunal to decide under s118 of the RTI Act. If the Tribunal decides, based on the evidence provided, that the CCC’s corruption function is void, then the CCC Exemption does not apply.

56. I have had regard to the applicant’s submissions above, as well as to those he made in the other review that he has referenced (to the extent that the submissions in that other review have relevance to the refused information in this review). The applicant’s concerns stem from the devolution principle and the CCC’s decision to refer back to the QBCC to deal with, an allegation of corrupt conduct made against a QBCC officer. The applicant considers that this practice of the CCC undermines public confidence in the CCC’s role of combating corruption in the Queensland public sector⁴⁰ and effectively ‘voids’ the CCC’s corruption function, resulting in the ‘removal’ from the RTI Act of the CCC exemption contained in schedule 3, section 10(4). He also argues that QBCC

³⁹ Submission dated 10 April 2024.

⁴⁰ Section 34(d) of the CC Act provides that the CCC has an overriding responsibility to promote public confidence in the integrity of agencies and the way in which corruption is dealt with.

has acted in a way in dealing with the complaint that has contributed to the 'erosion' of the CCC's corruption functions.

57. I acknowledge the applicant's submission. However, the concerns he raises regarding the provisions of the CC Act, and the manner in which the CCC exercises its corruption functions pursuant to the CC Act, are not matters that the Information Commissioner has jurisdiction to take into account or respond to under the RTI Act in the course of dealing with an application for external review. The Information Commissioner's role is to apply the provisions of the RTI Act, as currently enacted by Parliament, and decide whether or not access to information may be granted pursuant to those provisions. Despite the applicant's contentions, the CCC exemption contained schedule 3, section 10(4) of the RTI Act has not been removed, and the Information Commissioner is therefore bound to consider the application of this provision to the refused information in accordance with the principles set out above.
58. Having reviewed the refused information, I am satisfied that it was obtained, used or prepared for an investigation by the CCC (a prescribed crime body), or by QBCC (on referral back from the CCC), in the performance of the prescribed functions of the CCC. It therefore satisfies the requirements of schedule 3, section 10(4) of the RTI Act.
59. The exception to the CCC exemption applies only where the investigation is finalised and the information is 'about' the applicant. Whether information is about the applicant is a question of fact to be determined by the decision-maker. 'About' is a non-technical word not defined by the RTI Act, which means it is given its ordinary meaning. The Information Commissioner has previously decided that information will be *about* the applicant where they are the *subject* of the relevant investigation.⁴¹
60. I am satisfied that none of the information in question can properly be regarded as being about the applicant as the subject of any investigation. The exception therefore does not apply.

Finding

61. I find that the requirements of schedule 3, section 10(4) of the RTI Act are satisfied by the relevant information, and that the exception in schedule 3, section 10(6) does not apply. Access may therefore be refused on that basis.

Application of schedule 3, section 12 of the RTI Act - information the disclosure of which is prohibited by an Act

62. Schedule 3, section 12 of the RTI Act lists a number of Acts which contain provisions prohibiting the disclosure of information. Such information will be exempt information under the RTI Act.
63. One such Act is the *Public Interest Disclosure Act 2010 (Qld)* (**PID Act**). Section 65(1) of the PID Act provides that if a person gains confidential information because of the person's involvement in the administration of the PID Act, the person must not make a record of the information, or intentionally or recklessly disclose the information to anyone, except in specified circumstances. Section 65(7) defines '*confidential information*' as including information about the person who made the public interest

⁴¹ *G8KPL2 and the Department of Health* (Unreported, Queensland Information Commissioner, 31 January 2011) at [32]. This decision was affirmed on appeal: *Minogue v Office of the Information Commissioner Queensland and Anor* [2012] QCATA 191. See also *Darlington and Queensland Police Service* [2014] QICmr 14 (11 April 2014). An appeal against this decision was also dismissed: *Darlington v Office of the Information Commissioner & Queensland Police Service* [2015] QCATA 167.

disclosure (**PID**), or against whom the PID was made, as well as information disclosed by the PID.

Discussion

64. In his letter dated 12 July 2024, the applicant made no submissions in response to OIC's preliminary view that the requirements of the exemption provision were satisfied by the refused information. However, neither did he confirm that he accepted OIC's preliminary view nor withdraw his application for access to this category of documents.

Finding

65. Accordingly, for the sake of completeness, I confirm that I am satisfied that the refused information comprises confidential information for the purposes of section 65(7) of the PID Act, and that its disclosure is therefore prohibited under section 65(1) of the PID Act. As such, it is exempt information under section 48 and schedule 3, section 12 of the RTI Act, and access may be refused on that basis.

Application of the public interest balancing test

66. Under the RTI Act, access to information may be refused where disclosure would, on balance, be contrary to the public interest.⁴² The RTI Act identifies various factors that may be relevant to deciding the balance of the public interest⁴³ and explains the steps that a decision-maker must take in deciding the public interest as follows:⁴⁴
- a) identify any irrelevant factors and disregard them⁴⁵
 - b) identify relevant public interest factors favouring disclosure and nondisclosure
 - c) balance the relevant factors favouring disclosure and nondisclosure; and
 - d) decide whether disclosing the information in issue would, on balance, be contrary to the public interest.
67. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of the public interest lies in a particular case.

Discussion

68. In OIC's preliminary view letter to the applicant, the information in respect of which QBCC objected to disclosure on public interest grounds, was described as falling into one of three categories:
- 1) QBCC staff personal information comprising mobile phone numbers of staff and information about staff availability, leave arrangements, and health and personal circumstances, including emotional responses/opinions concerning incidents and interactions
 - 2) QBCC staff complaint information including internal correspondence concerning the investigation of unsubstantiated complaints/allegations made against QBCC staff; and

⁴² Section 47(3)(b) of the RTI Act. The 'public interest' '...is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interests of an individual or individuals': *Director of Public Prosecutions v Smith* (1991) 1 VR 63. The concept 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, although there are some recognised public interest considerations that may apply for the benefit of an individual: Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 *AIAL Forum* 12, 14.

⁴³ Schedule 4 of the RTI Act lists factors that may be relevant when deciding whether disclosure of information would, on balance, be contrary to the public interest. This list is not exhaustive and, therefore, other factors may also be relevant in a particular case.

⁴⁴ Section 49(3) of the RTI Act.

⁴⁵ No irrelevant factors arise in the circumstances of this case and I have not taken any into account in making this decision.

- 3) Third party information comprising information about other individuals/entities involved in QBCC matters/complaints, and their identifying information, information about their business or commercial affairs, information they have provided to QBCC about their matters, information revealing how QBCC handled their matters, and information about RTI applications made to QBCC by third parties.

69. In his letter dated 12 July 2024, the applicant indicated that he wished to pursue access to only the second category of information (**QBCC staff complaint information**).⁴⁶ He disputed that any complaint made against a QBCC officer could be regarded as unsubstantiated. I will discuss the applicant's submissions on this issue further below. He did not otherwise engage in a discussion about the public interest balancing test or identify factors weighing for and against disclosure of this category of information.

70. I have considered the complete list of public interest factors contained in schedule 4 of the RTI Act. I have identified the following public interest factors that I consider apply in favour of disclosure of the QBCC staff complaint information:

- disclosure could reasonably be expected to enhance QBCC's accountability and transparency⁴⁷
- disclosure could reasonably be expected to inform the community of QBCC's operations⁴⁸
- the information is the applicant's personal information;⁴⁹ and
- disclosure could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.⁵⁰

71. I have identified the following nondisclosure/harm factors that I consider weigh against disclosure:

- disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy⁵¹
- disclosure could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct⁵²
- disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information⁵³
- disclosure could reasonably be expected to prejudice the management function of an agency;⁵⁴ and
- disclosure could reasonably be expected to cause a public interest harm through the disclosure of personal information⁵⁵ of a person.

⁴⁶ Identified in schedule B to QBCC's internal review decision as pages containing unsubstantiated allegations.

⁴⁷ Schedule 4, part 2, item 1 of the RTI Act.

⁴⁸ Schedule 4, part 2, item 3 of the RTI Act.

⁴⁹ Schedule 4, part 2, item 7 of the RTI Act.

⁵⁰ Schedule 4, part 2, item 11 of the RTI Act.

⁵¹ Schedule 4, part 3, item 3 of the RTI Act. The concept of 'privacy' is not defined in either the IP Act or the RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their personal sphere free from interference from others (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).

⁵² Schedule 4, part 3, item 6 of the RTI Act.

⁵³ Schedule 4, part 3, item 16 of the RTI Act.

⁵⁴ Schedule 4, part 4, section 3(c) of the RTI Act.

⁵⁵ Schedule 4, part 4, section 6(1) of the RTI Act. Section 12 of the IP Act defines 'personal information' as 'information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'.

72. As noted, I am limited in the information I can give about the nature and content of the refused documents, given the restrictions imposed by section 108 of the RTI Act. I note, however, that some of the refused information is contained within case lists generated by QBCC's Integrity and Complaints Branch (**ICB**). These ICB case lists, and associated correspondence, contain references to individuals who are the subjects of complaints, as well as the identities of parties who made complaints. Much of this information does not concern complaints made by the applicant.

Nondisclosure factors

73. Given its nature, I do not consider that the information can properly be regarded as concerning the routine work information of the officers in question. Rather, it is the personal information of the relevant individuals. In these circumstances, the RTI Act recognises factors favouring nondisclosure that aim to protect the personal information and right to privacy of the relevant individual. I consider it is the type of sensitive personal information that those persons are entitled to keep private, and that its disclosure under the RTI Act would be an unwarranted intrusion into their privacy, particularly when it is considered that there are no restrictions upon what a person may do with information released to them under the RTI Act, including the possibility of further dissemination.⁵⁶ I am satisfied that the extent of the public interest harm that could be anticipated from disclosure is significant. I therefore afford the personal information/privacy nondisclosure and harm factors significant weight when balancing the public interest.
74. I also consider that disclosing this information could reasonably be expected to prejudice the fair treatment of individuals because the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct.
75. As noted above, the applicant asserts that complaints that are made against QBCC officers cannot be regarded as unsubstantiated, and that, if he were to be given an opportunity to view the documents confidentially, he is confident that he would be able to demonstrate this (see paragraph 21 above). However, I have already noted that some of the refused information does not concern the applicant or complaints made by the applicant.
76. As an example of what the applicant asserted was the substantiated nature of allegations, the applicant focused in his submission on the conduct of two QBCC officers in particular. He referred to a number of disclosed pages in arguing that these officers had engaged in misconduct, or unlawful, negligent or improper conduct, in connection with a complaint that the applicant had made about an alleged conflict of interest involving one of the officers.
77. Despite the applicant's assertions, there is nothing in the material before me that establishes that the complaints or allegations against QBCC officers that are referenced in the QBCC staff complaint information have been substantiated through a formal investigation process, conducted by a proper authority, in which adverse findings have been made against the subject of the complaint or allegation.⁵⁷ I note the applicant's allegations against two officers, and I have reviewed the disclosed pages to which he refers. Whether or not the applicant's assertions about what the officers

⁵⁶ 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.

⁵⁷ See *Pope and Department of Health* (1994) 1 QAR 616 at [96]. See also *F60XCX and Queensland Ombudsman* [2014] QICmr 28 (13 June 2014) at [40] which rejected the applicant's submission that this factor is limited to circumstances where an allegation has been unsubstantiated as a result of a formal finding.

knew at relevant times are correct or otherwise, it remains the fact that there is nothing before OIC, including in the documents in issue, to indicate that the applicant's allegation regarding a conflict of interest has been substantiated through a formal investigation process. While the applicant may personally hold the opinion that allegations are substantiated (and he is clearly dissatisfied with the way in which his various complaints have been dealt with by both QBCC and the CCC), that is not sufficient for the purposes of the application of this public interest nondisclosure factor. I also note that the documents in issue refer on numerous occasions to the fact that the applicant's various complaints and allegations have been dealt with and finalised by QBCC, with the applicant being notified of the final outcome. Presumably, if a final outcome notification had advised the applicant that a complaint against a QBCC officer had been substantiated, the applicant would have sought to rely upon this in his submission.

78. Therefore, on the material before me, I am satisfied that the allegations against QBCC officers contained in the QBCC staff complaint information can properly be regarded as unsubstantiated. Given their nature, I am also of the view that their disclosure under the RTI Act could reasonably be expected to adversely affect the reputation of the subject officers which, in turn, would prejudice their fair treatment. I afford this nondisclosure factor significant weight in the public interest.
79. Additionally, I consider that disclosure of this type of unsubstantiated complaint information under the RTI Act (noting again that there are no restrictions on its further dissemination) could reasonably be expected to have a substantial adverse effect not only on the future flow to QBCC of confidential information of this nature, but also on the ability of QBCC to manage its staff. I am satisfied that it is reasonable to expect that disclosure under the RTI Act would have a significant chilling effect both on the willingness of persons to make complaints, and on the subjects of the complaints to freely and fully cooperate in the investigation process. This, in turn, could reasonably be expected to prejudice QBCC's ability to manage its staff. Given the sensitive nature of the information, I afford these nondisclosure factors significant weight in the public interest balancing test.

Disclosure factors

80. I acknowledge the RTI Act's pro-disclosure bias and the general public interest in furthering access to government-held information. I also consider that disclosing some of the refused information could reasonably be expected to promote the accountability and transparency of QBCC regarding the way in which it handles complaints, and the information that it relies upon in reaching decisions in response to those complaints. I afford these disclosure factors moderate weight, taking into account that, in the case of allegations that were raised by the applicant, and the public interest in the applicant being informed of how those matters were dealt with, QBCC asserts that the applicant has been provided with letters detailing the outcome of the relevant investigation, where appropriate.⁵⁸
81. I acknowledge that some of the refused information is the applicant's personal information, and that there is a public interest in an individual accessing their personal information held by government. I afford this factor moderate weight in the public interest balancing test in recognition of the fact that the bulk of the personal information in question is information supplied by the applicant himself, in the context of the various complaints and allegations he has made to QBCC and other entities. I also note that,

⁵⁸ See page 16 of QBCC's internal review decision, and supported by references appearing throughout the responsive documents, for example, on pages 5, 225, and 232.

for the most part, this information is intertwined with information concerning the subject of the complaint, which, for the reasons explained above, is sensitive personal information of the subject.

Finding

82. After weighing the various factors favouring both disclosure and nondisclosure of the QBCC staff complaint information, I am satisfied that the balance of the public interest favours its nondisclosure, and access may be refused on that basis.

Sufficiency of search

83. The RTI Act also permits an agency to refuse access to information where the requested information is nonexistent or unlocatable.⁵⁹
84. A document will be *nonexistent* if there are reasonable grounds to be satisfied it does not exist.⁶⁰ To be satisfied that a document does not exist, the Information Commissioner has previously had regard to various key factors including the agency's record-keeping practices and procedures (including, but not limited to, its information management approaches).⁶¹ By considering the relevant factors, the decision maker may conclude that a particular document was not created because, for example, the agency's processes do not involve creating that specific document. In such instances, it is not necessary for the agency to search for the document. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.
85. 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*'.⁶² 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.⁶³
86. A document is *unlocatable* if it has been or should be in the agency's possession and all reasonable steps have been taken to find it, but it cannot be found. In determining whether a document is unlocatable, it is necessary to consider the specific circumstances of each case,⁶⁴ and in particular whether:
- there are reasonable grounds for the agency to be satisfied that the requested documents have been or should be in the agency's possession; and
 - the agency has taken all reasonable steps to find the document.⁶⁵

⁵⁹ Sections 47(3)(e) and 52(1) of the RTI Act.

⁶⁰ Section 52(1)(a) of the RTI Act. For example, a document has never been created.

⁶¹ *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.

⁶² As set out in *PDE* at [49].

⁶³ As set out in *PDE* at [38].

⁶⁴ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [21]. See also, *F60XCX and Office of the Queensland Parliamentary Counsel* [2016] QICmr 42 (13 October 2016) at [84] and [87], and *Underwood and Minister for Housing and Public Works* [2015] QICmr 27 (29 September 2015) at [33]-[34] and [49].

⁶⁵ Section 52(1)(b) of the RTI Act.

87. The agency that made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.⁶⁶ Where the issue of missing documents is raised on external review, the agency must demonstrate that reasonable steps have been taken to identify and locate relevant documents.⁶⁷ If the applicant maintains further documents exist, the applicant bears a practical onus of demonstrating that the agency has not discharged its obligation. Suspicion and mere assertion will not satisfy this onus.⁶⁸

Discussion

Scope of the access application

88. As noted at paragraph 5 above, the applicant argues that additional responsive documents ought reasonably be expected to exist in QBCC's possession or under its control because he considers the applicable date range for his application is 18 May 2018 to 25 November 2022: *'The relevant time period was up to and including the contemporary date the RTI Request was deemed compliant, being the date the Scope was clarified and agreed upon on 25 November 2022'*.⁶⁹
89. The applicant's access application states that the date range of the application is 'as per RTIIP-1250' (referring to another of the access applications he had made to QBCC). In RTIIP-1250, the date range of the applicant's application was stated to be '18 May 2018 - Present/contemporary'. That application was received by QBCC on 18 February 2022. However, in further negotiations with the applicant, QBCC accepted the date range for that application as 18 May 2018 to 31 March 2022.
90. In my view, given what was clearly stated in the applicant's current access application about the intended date range, it was open to QBCC to proceed on the basis that the date range for this application was also 18 May 2018 to 31 March 2022 (as per RTIIP-1250). However, QBCC considered the relevant date range was 18 May 2018 to 21 October 2022, with 21 October 2022 being the date the application fee was paid. In its internal review decision, QBCC responded as follows in response to the applicant's contention that the relevant date range of his application should be 18 May 2018 to 25 November 2022:

'I note your reference to your email of 25th November 2022, which was in response to [the initial decision-maker's] earlier email of the 22nd of November. I note particularly that nowhere in this correspondence is the suggestion that the application was up until that point, noncompliant, and that the processing period had not yet started. In fact, one of the purposes of [the initial decision-maker's] email was to seek an extension to the processing period.'

91. In my preliminary view letter to the applicant dated 18 April 2024, I stated that the access application was received by QBCC on 27 September 2022. Section 27(1) of the RTI Act provides that an access application is taken only to apply to documents that are, or may be, in existence on the day the application is received. It does not refer to the date that an application becomes compliant. In accordance with OIC's decision in *Poyton and Department of Education*,⁷⁰ I advised the applicant that I considered the relevant date for determining whether a document is a post-application document is the date the access application is received by the agency, even if the application is noncompliant at that point. I therefore interpreted the date range for his

⁶⁶ Section 87 of the RTI Act.

⁶⁷ Section 130(2) of the RTI Act.

⁶⁸ *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36].

⁶⁹ Application for external review.

⁷⁰ [2023] QICmr 13 (16 March 2023) (*Poyton*), and which I noted to the applicant is currently on appeal to QCAT.

access application as being 18 May 2018 to 27 September 2022, and advised the applicant that any documents that were created after 27 September 2022 would be post-application documents, and would not be considered on external review.

92. In his submission dated 12 July 2024, the applicant maintained his claim that the date range of his application should properly be interpreted as 18 May 2018 to 25 November 2022. He disputed QBCC's claim that, in any event, no responsive documents between 27 September 2022 and 25 November 2022 existed, referring to an email he himself had sent to QBCC on 6 October 2022 that he contended would fall within scope. He stated that if QBCC had not, in fact, searched for responsive information up to 25 November 2022, then he maintained a sufficiency of search concern. The applicant also proposed that a decision in this review not be made by OIC until the appeal in *Poynton* had been heard and determined by QCAT.
93. As far as I am aware, there has been no date set by QCAT for hearing and determining the *Poynton* appeal (OIC is not a party to that appeal), and I decline the applicant's proposal to delay the determination of this review in order to await QCAT's decision. As I have noted, if the applicant considers that a decision of the Information Commissioner contains an error of law, he is entitled to appeal the decision to QCAT.

Finding

94. For the reasons explained in my preliminary view letter to the applicant, and applying the words of section 27(1) of the RTI Act and the reasoning in *Poynton*, I find that the date range for the applicant's access application is properly to be interpreted as 18 May 2018 to 27 September 2022. As such, QBCC was entitled to confine its searches to that date range. If the applicant wishes to pursue access to any responsive documents post 27 September 2022,⁷¹ he is required to make a fresh access application.

Other sufficiency of search issues

95. In his application for external review, the applicant submitted that he *'had no reference to the source and therefore verification of specific search locations for documents within the Scope of the RTI Request'*.
96. As noted in paragraph 1 above, the scope of the applicant's request was for access to emails containing the applicant's name as held in the email account of a named QBCC officer, including all 'deleted' or 'archived' emails, as well as all emails, attachments and associated documents that formed part of a responsive email chain.
97. Under section 130(2) of the RTI Act, the Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate requested documents. QCAT confirmed in *Webb v Information Commissioner*⁷² that this *'does not contemplate that [the Information Commissioner] will in some way check an agency's records for relevant documents'* and that, ultimately, the Information Commissioner is dependent on the agency's officers to do the actual searching for relevant documents.
98. The Information Commissioner also has power under section 102 of the RTI Act to require additional searches to be conducted by an agency during an external review. In assessing an agency's searches, the Information Commissioner has recently

⁷¹ Noting that QBCC processed the application on the basis that the relevant timeframe was 18 May 2018 to 21 October 2022.

⁷² [2021] QCATA 116 at [6].

confirmed the relevant question is whether the agency has taken all reasonable steps to identify and locate responsive documents, as opposed to all possible steps.⁷³

99. On external review, OIC asked QBCC to provide details of the nature and extent of the searches it had conducted in an effort to locate responsive documents. QBCC advised that it conducted an 'e-discovery' search of the relevant officer's email account, and that this search included deleted/archived/trash items. This was communicated to the applicant in my letter dated 18 April 2024, together with my preliminary view that the applicant had not discharged the onus upon him to show that the searches and inquiries conducted by QBCC for responsive documents were not reasonable in all the circumstances.
100. In his submission of 12 July 2024, the applicant refuted any suggestion that his initial submission regarding the sufficiency of QBCC's searches was vague: *'Rather, it is a reflection [of] the contentious nature of the date range of the RTI Request, and QBCC's poor communication of a decision'*.
101. The applicant did not suggest any additional avenues of search or inquiry that he contended it would be reasonable to require QBCC to undertake. He simply submitted that QBCC ought to provide *'verifiable evidence of its methods and searches...'* but that if OIC was *'content to accept the QBCC's "advice" that the QBCC discharged its obligation to locate all relevant documents, then I invite you to decide this issue in accordance with your Preliminary View'*.

Finding

102. The applicant's access request was for any emails containing the applicant's name that were held in the email account of a named QBCC officer. QBCC advised that an e-discovery search of that account, using the applicant's name as the search term, was the appropriate search tool to locate information falling within the terms of the access application. Based on that advice, I am therefore satisfied that the search conducted by QBCC was a reasonably targeted search response and should reasonably have been expected to locate any responsive information. I note that the search resulted in over 3,000 responsive pages being located and dealt with by QBCC.
103. Other than the assertions that the applicant has made about the scope of his application (and which I have discussed and rejected at paragraphs 88 to 94 above), the applicant has not identified any missing documents, nor any other avenues of search or inquiry that he contends it would be reasonable to ask QBCC to undertake. I am therefore not satisfied that he discharged the practical onus that is upon him to demonstrate that there are reasonable grounds for expecting that additional responsive documents exist, and that QBCC has not discharged its obligation to conduct all reasonable searches for those documents.
104. On the material before me therefore, I am satisfied that QBCC has taken all reasonable steps to locate all responsive information. I am unable to identify any other searches and inquiries that it would be reasonable to ask QBCC to undertake in an effort to locate any additional responsive information.

⁷³ S55 and Queensland Police Service [2023] QICmr 3 (30 January 2023) at [23], cited with approval in W55 and Brisbane City Council [2024] QICmr 13 (17 April 2024) at [19].

DECISION

105. For the reasons given above, I decide to affirm QBCC's internal review decision by finding that access to the information sought by the applicant may be refused on the grounds that:

- it is exempt information under sections 47(3)(a) and 48, and schedule 3 of the RTI Act; or
- it is contrary to the public interest information under sections 47(3)(b) and 49 of the RTI Act.

106. In respect of the sufficiency of search issue raised by the applicant, I find that the searches and inquiries for responsive documents that were conducted by QBCC were reasonable in all the circumstances and that access to any additional responsive information may therefore be refused under sections 47(3)(e) and 52(1) of the RTI Act on the ground that it does not exist or is unlocatable.

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

R Moss
Principal Review Officer

Date: 13 August 2024

APPENDIX**Significant procedural steps**

Date	Event
17 March 2023	OIC received the application for external review OIC requested preliminary documents from QBCC
24 March 2023	OIC received preliminary documents from QBCC
4 May 2023	OIC advised the parties that the application would be accepted out of time
7 September 2023	OIC requested copies of the responsive documents and additional information from QBCC
25 September 2023	OIC received QBCC's response
29 February 2024	OIC requested submissions from QBCC
15 April 2024	OIC received QBCC's response including advice that QBCC was prepared to release further information to the applicant
18 April 2024	OIC communicated a preliminary view to the applicant
23 April 2024	OIC received advice from QBCC that it had released additional information to the applicant
14 May 2024 to 9 July 2024	The applicant requested, and was granted, four extensions of time to provide a submission in response to OIC's preliminary view
12 July 2024	OIC received a submission from the applicant