



Decision and Reasons for Decision

Citation:	<i>R59NHS and Department of Transport and Main Roads [2019] QICmr 17 (14 May 2019)</i>
Application Number:	314153
Applicant:	R59NHS
Respondent:	Department of Transport and Main Roads
Decision Date:	14 May 2019
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - SCOPE OF ACCESS APPLICATION - application for information concerning a marine incident - documents outside the scope of the application - information irrelevant to the terms of the application - section 73 of the <i>Right to Information Act 2009</i> (Qld) ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST - application for information concerning a marine incident - whether disclosure would on balance be contrary to the public interest - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld) ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT DOCUMENTS - applicant contends that further documents should exist in relation to his navigation aid request - whether agency has taken all reasonable steps to locate responsive documents - whether access may be refused on the basis the documents do not exist - sections 47(3)(e) and 52(1)(a) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Transport and Main Roads (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents generally concerning a marine incident involving the applicant's vessel and his request regarding navigation aids.
2. The Department located 425 pages and 83 audio recordings in response to the access application and decided¹ to refuse access to some of that information.² The Department

¹ On 25 June 2018.

² Comprising portions of information appearing in written documents and eight voice recordings (numbered 17, 18, 28, 41, 43, 44, 51 and 65) on the ground that disclosure of that information would, on balance, be contrary to the public interest.

also deleted mobile telephone numbers from responsive documents it decided to release to the applicant, on the basis they were irrelevant to the access application. However, as the Department was unable to remove a mobile telephone number from one audio recording it had decided to disclose,³ the Department did not release that audio recording.⁴

3. The applicant sought⁵ internal review of the Department's decision and raised concerns that the Department had not located all relevant information. On internal review, the Department located and released an additional 10 pages to the applicant and otherwise affirmed⁶ its original decision.
4. The applicant then applied⁷ to the Office of the Information Commissioner (**OIC**) for an external review of the Department's decision. The applicant also raised concerns that the Department had not located all relevant documents.
5. For the reasons set out below, I vary the Department's decision and find that access to the information being considered in this review may variously be refused on the grounds that:
 - it is outside the scope of, or irrelevant to, the access application
 - its disclosure would, on balance, be contrary to the public interest; and
 - it does not exist.

Background

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

Reviewable decision

7. The decision under review is the Department's internal review decision dated 22 August 2018.

Evidence considered

8. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and the Appendix).

Information in issue

9. The application seeks, inter alia, a '*communications log*' for all transmitted and received calls with specified entities on a specified date. I note that the Department located 83 audio recordings and a transcript of audio recordings, marked '*not verified*',⁸ in response to this part of the application. While these documents do not comprise a '*communications log*', the Department chose to process them as responsive documents.
10. During the external review, the applicant confirmed that he did not seek access to:⁹

³ Being audio recording numbered 48.

⁴ In its original decision, the Department explained the reason for this as follows: '*With the existence of a transcript of phone recordings and no facility to remove information from the actual voice recording, I have not released this document.*'

⁵ On 24 July 2018.

⁶ On 22 August 2018.

⁷ External review application dated 13 September 2018.

⁸ The contents of the transcript were released to the applicant subject to deletion of mobile telephone numbers and portions of personal information.

⁹ As confirmed in OIC's email to the applicant dated 19 February 2019.

- mobile telephone numbers appearing in the documents released by the Department; and
 - refused portions of personal information¹⁰ appearing in the written documents released by the Department.
11. The information remaining for consideration in this review (**Information in Issue**) consists of 11 audio recordings, numbered 7, 17, 18, 28, 31, 41, 43, 44, 48, 51 and 65.
12. While I am restricted under the RTI Act about the level of detail that I am able to provide about the Information in Issue,¹¹ I am able to confirm that audio recordings numbered 7 and 31 record no voices and the other audios record voices of individuals other than the applicant.

Issues for determination

13. As set out in paragraph 10, some issues have been resolved informally during the review process. The remaining issues to be determined are whether:
- certain information may be excluded from consideration on the basis that it falls outside the scope of, or is irrelevant to, the access application
 - access to information may be refused on the ground that its disclosure would, on balance, be contrary to the public interest; and
 - access to information may be refused on the ground that it does not exist.
14. I note that external review by the Information Commissioner¹² is merits review, which is an administrative reconsideration of a case. In conducting that merits review, I have considered the documents the Department located as responsive to the access application (including the Information in Issue).

Preliminary issues

15. Before considering the issues for determination, it is necessary to deal with the following preliminary issues arising from concerns expressed in the applicant's submissions.

Department's disclosure log

16. On external review, the applicant raised¹³ concerns about how the Department recorded the applicant's access application in its disclosure log. I understand that the applicant's concerns in this regard raise two discrete issues:
- firstly, that there are errors in the Department's disclosure log,¹⁴ because it omitted parts of the application;¹⁵ and

¹⁰ Such as names, dates of birth, contact details and signatures.

¹¹ Section 108(3) of the RTI Act provides that the Information Commissioner must not include information that is claimed to be exempt or contrary to the public interest in the reasons for decision on external review.

¹² Or delegate.

¹³ External review application and submissions dated 30 October 2018, 2 December 2018 and 21 January 2019.

¹⁴ Under section 78 of the RTI Act, a department must, as soon as practicable after a valid access application is made, include specified information about the application in a disclosure log, including '*details of the information being sought by the applicant, as stated in the application*'.

¹⁵ In the external review application, the applicant identified these omissions as: (1) the '*Office of the Director-General of DTMR, of any correspondence with MSQ/the Australian Maritime Safety Authority (AMSA)*'; and (2) '*A request to MSQ for reports of any internal investigation into the sinking*' of his vessel '*being as a Marine and Pollution Investigation Report or a Marine Incident Report*'.

- secondly, that the Department failed to locate all relevant documents as a result of altering the terms of the application.¹⁶
17. The applicant submitted¹⁷ that, as the Information Commissioner has a general power to ‘do all things that are necessary or convenient to be done for or in connection with the performance of the commissioner’s functions under an Act’¹⁸ and can require an agency to conduct further searches for documents,¹⁹ I have the necessary power in this external review to address his concerns arising from the Department’s disclosure log.
18. While it is clear that the first issue is of concern to the applicant, it is not an issue that I have jurisdiction to consider. Under the RTI Act, a person affected by a reviewable decision²⁰ may apply to have the decision reviewed by the Information Commissioner. The Department’s determination about the details included in its disclosure log is not a ‘reviewable decision’ under the RTI Act. As such, OIC’s jurisdiction in this review does not extend to investigating, making any findings or providing any remedy to the applicant about his concern that there are errors in the Department’s disclosure log.²¹
19. As to the second issue, this decision gives consideration to the applicant’s concerns in determining whether the further documents requested by the applicant fall within the scope of the access application and whether the Department has taken all reasonable steps to locate documents relevant to the access application.

Released information

20. The applicant also submitted²² that, as part of the external review, OIC should consider whether the information the Department fully released to him on internal review—consisting of 10 pages—was relevant to his access application.
21. This is not an issue that I have jurisdiction to consider on external review because the Department’s decision to *fully disclose* these 10 pages of information to the applicant is not a ‘reviewable decision’ under the RTI Act.²³
22. I will now turn to consideration of the substantive issues to be determined in this review.

Information outside the scope of, or irrelevant to, the access application

Relevant law

23. Under the RTI Act, an individual has a right to be given access to documents of an agency.²⁴
24. The terms of an access application set the parameters for an agency’s search efforts and therefore are of primary importance where an applicant contends, as is the case in this review, that the agency has not located all relevant documents.²⁵

¹⁶ In the external review application, the applicant submitted that the decision under review makes no reference to ‘communications between the Director-General’s office and other parties, nor any report from MSQ as requested’.

¹⁷ Submissions dated 21 January 2019.

¹⁸ Section 125 of the RTI Act.

¹⁹ Under section 102 of the RTI Act.

²⁰ ‘Reviewable decision’ is defined in schedule 5 of the RTI Act.

²¹ This was explained to the applicant in OIC’s letters dated 19 November 2018 and 4 January 2019.

²² External review application and submissions dated 30 October 2018, 2 December 2018 and 21 January 2019.

²³ This was explained to the applicant in OIC’s letters dated 19 November 2018 and 4 January 2019.

²⁴ Section 23 of the RTI Act.

²⁵ *Usher and Department of Natural Resources and Mines* [2014] QICmr 51 at [15]. See also *Lonsdale and James Cook University* [2015] QICmr 34 at [9] and *Van Veenendaal and Queensland Police Service* [2017] QICmr 36 at [15].

25. If a document does not contain *any* information that is relevant to the terms of the access application, it is outside the scope of the access application and that document is therefore excluded from consideration in any access decision under the RTI Act.
26. Section 73 of the RTI Act permits an agency to delete *parts* of a document that the agency reasonably considers are not relevant to the access application before giving access to a copy of the document. This is not a ground for refusal of access, but a mechanism to allow irrelevant information to be deleted from documents which are identified for release to an applicant.²⁶
27. In deciding whether information is relevant, it is necessary to consider whether the information has any bearing upon, or is pertinent to, the terms of the application.²⁷

Applicant's submissions

28. On external review, the applicant submitted²⁸ that certain communications by the Office of the Department's Director-General (**ODG**), which he considers are relevant to his application, exist and have not been located by the Department. These are communications about his navigation aid request between the ODG and:
- the Federal Department of Infrastructure and Regional Development (**DIRD**); and
 - the Australian Maritime Safety Authority (**AMSA**).²⁹
29. The applicant also requested access to audio recordings numbered 7 and 31. I note that, in its original decision, the Department identified that these audio recordings do not contain '*voices of a telephone conversation*'.

What are the terms of the access application?

30. The access application identified the categories of information sought by the applicant in the following terms:
1. *Communications log (VHF, UHF, landline and mobile phones) of Vessel Traffic Services (Port of Brisbane, Pinkenba) with ship [named vessel]; Voluntary Marine Rescue unit(s); Brisbane Water Police duty officers and senior Water Police officers; Queensland Police Communications Centre (Brisbane); Maritime Safety Queensland management; Brisbane Harbour Master; Marine Parks; to any other authority or persons, from 02.30 to 13.30 December 4 2016. NOTE: Communications log to show all transmitted calls and received calls on the above modes of transmission.*
 2. *Report as an internal investigation by Maritime Safety Queensland into the grounding and sinking of the [named vessel], December 4 2016; report compiled as a Marine and Pollution Incident Investigation Report; or a Marine Incident report.*
 3. *Marine Incident report of [named vessel] crewman Mr [K], made to Brisbane Marine Police on the morning of December 4 2016.*
 4. *All communication from February 12 2018 to April 12 2018 by Maritime Safety Queensland (MSQ) as email, letter or telephone conversation (if by telephone conversation, record of the conversation[s]) with the Australian Maritime Safety Authority and between MSQ officials and the office of the Director General of the Department of Transport and Main Roads, Qld, on the subject of a request by [the applicant] for a navigation aid for Flat Rock or the Point Lookout lighthouse.*

²⁶ *Wyeth and Queensland Police Service* [2015] QICmr 26 at [12].

²⁷ *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) (**O80PCE**) at [52].

²⁸ External review application.

²⁹ However, in submissions dated 2 December 2018, the applicant also acknowledged that, based on the '*strict wording*' of the access application, he did not expressly request communications between the ODG and AMSA officials.

5. All documents relating to the investigation of and decision (reasons for) to install a red sector-light at North Point, Cape Moreton, and a north cardinal light at Flinders Reef; and all documents relating to the investigation of and decision (reasons for) to install an isolated danger mark (light) on a reef northeast of Leekes Beach, Great Keppel Island.

Findings – request to access additional communications with the Office of the Department’s Director-General

31. Item 4 of the access application seeks two discrete categories of communication concerning the applicant’s navigation aid request—firstly, between Maritime Safety Queensland (**MSQ**) and the Australian Maritime Safety Authority (**AMSA**); and secondly, between MSQ and ODG.
32. I consider the terms of item 4 of the access application are clear. They do not make *any* reference to communications with DIRD, nor do they seek communications *between* ODG and AMSA. It is not open for an access applicant to unilaterally expand the scope of an access application on external review.³⁰ Assessing the application scope objectively and without undue technicality,³¹ I find that these additional communications requested by the applicant, if they exist, fall outside the scope of the access application.
33. On external review, the applicant also requested³² confirmation about whether ODG engaged with these other agencies about his navigation aid request—that is, the applicant seeks an answer to his question about whether certain documents exist. As a result of my above finding, it is unnecessary for me to consider whether these additional communications exist or whether the Department has taken reasonable steps to locate them. Further, OIC’s jurisdiction under the RTI Act relates only to decisions about access to documents³³ held by agencies and does not extend to any consideration of this question.

Findings – audio recordings numbered 7 and 31

34. In item 1 of the access application, the applicant requested a communications log for all transmitted and received calls with specified entities between ‘02.30 and 13.30’ on 4 December 2016.
35. As noted in paragraph 9, the Department located 83 audio recordings and a transcript as responsive to item 1 of the application.
36. I have carefully reviewed audio recordings numbered 7 and 31. As noted in paragraph 12, these documents do not contain any recorded voices.³⁴ I also note that the transcript provided to the applicant describes the content of audio recordings numbered 7 and 31 as ‘*nil on audio*’.
37. On the basis that audio recordings numbered 7 and 31 have no content, I find that these audio recordings fall outside the scope of the access application.

³⁰ *Robbins and Brisbane North Regional Health Authority* (1994) 2 QAR 30 at [17]. See also *8RS6ZB and Metro North Hospital and Health Service* [2015] QICmr 3 at [14].

³¹ *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 at [8] and *O80PCE* at [33].

³² External review application.

³³ And, where relevant, amendment of documents.

³⁴ The Department noted this in its decision dated 25 June 2018 at page 5 and OIC also confirmed this to the applicant on 19 November 2018, 4 January 2019 and 19 February 2019.

Contrary to the public interest information

38. I will now consider the remaining issue for determination, namely, whether access may be refused to information under the RTI Act.
39. The Department refused access to audio recordings numbered 17, 18, 28, 41, 43, 44, 51 and 65 and, as noted in paragraph 2, the Department decided to disclose, but did not release, audio recording numbered 48 to the applicant (collectively, the **Remaining Audio Recordings**).

Relevant law

40. The right of access under the RTI Act is subject to a number of exclusions and limitations, including grounds for refusal of access.³⁵ Access may be refused to documents where disclosure would, on balance, be contrary to the public interest.³⁶ The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest and also explains the steps that a decision-maker must take in deciding the public interest³⁷ as follows:
- identify factors irrelevant to the public interest and disregard them
 - identify factors in favour of disclosure of information
 - identify factors in favour of nondisclosure of information; and
 - decide whether, on balance, disclosure of the information would be contrary to the public interest.
41. 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.³⁸

Findings

42. I do not consider that any irrelevant factors arise in the circumstances of this case and I have taken none into account.

Factors favouring disclosure

Applicant's personal information

43. There is a public interest in individuals being able to obtain access to their own personal information³⁹ held by government. I have carefully reviewed the Remaining Audio Recordings. A small amount of the applicant's personal information appears in some of these audio recordings.⁴⁰ Accordingly, a factor favouring disclosure⁴¹ arises regarding the applicant's personal information within the Remaining Audio Recordings. Ordinarily, for such information there is a significant weight to be given to this public interest factor

³⁵ Section 47 of the RTI Act sets out the grounds on which access may be refused to documents.

³⁶ Sections 47(3)(b) and 49 of the RTI Act.

³⁷ Section 49(3) of the RTI Act.

³⁸ However, there are some recognised public interest considerations that may apply for the benefit of an individual.

³⁹ 'Personal information' is defined in section 12 of the *Information Privacy Act 2009* (Qld) 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'.

⁴⁰ Under section 108(3) of the RTI Act, I am unable in these reasons for decision to provide any further detail about that personal information as it is captured in the information claimed by the Department to be contrary to the public interest to disclose.

⁴¹ Schedule 4, part 2, item 7 of the RTI Act.

favouring disclosure. However, in this case, the applicant has been provided with a transcript of the recordings and is therefore aware of the personal information about him in the Remaining Audio Recordings. Accordingly, the weight of this public interest factor is reduced and carries only moderate weight. Also, I note that the personal information of the applicant is intertwined with that of other persons. I discuss the impact of this in paragraph 72 below.

Accountability, transparency and contributing to debate on matters of serious interest

44. Public interest factors favouring disclosure arise where disclosure of information could reasonably be expected to:
- enhance the Government's accountability⁴²
 - contribute to a positive and informed debate on important issues or matters of serious interest⁴³
 - inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community;⁴⁴ and
 - reveal the reason for a government decision and any background or contextual information that informed the decision.⁴⁵
45. There is a public interest in transparent processes regarding the handling of marine incidents and their investigation to ensure that the public is properly informed about the roles and responsibilities of Government in respect of such incidents. I also consider that marine safety is a matter of serious interest for the community. However, there are circumstances in which disclosure of some, but not all, information in an agency's possession will achieve an accountable and transparent Government and contribute to debate on matters of serious interest.
46. The applicant submitted⁴⁶ that the Department should make a commitment to marine safety similar to its commitment to road safety as marine safety *'is of no less concern than that of road safety, an issue of such concern to the [Department] that it has met more than a reasonable obligation to the motoring public in a commitment to signage and other devices to warn of potential danger'*. The applicant also submitted that the Department has *'withheld information relevant to [his] enquiry about marine safety'*.
47. While I acknowledge that both road safety and marine safety are issues of significant public concern, it is unclear how the applicant considers disclosure of the Remaining Audio Recordings would serve to enhance the Department's commitment to marine safety. In this matter, the Department released most of the information it located, including:
- the Marine Incident Report, submitted by the applicant and dated 4 December 2016, concerning the incident involving the applicant's vessel
 - a Marine Incident summary report, prepared by MSQ and dated 4 December 2016, concerning the incident involving the applicant's vessel
 - 75 audio recordings together with an unverified transcript of audio recordings

⁴² Schedule 4, part 2, item 1 of the RTI Act.

⁴³ Schedule 2, part 2, item 2 of the RTI Act.

⁴⁴ Schedule 4, part 2, item 3 of the RTI Act.

⁴⁵ Schedule 4, part 2, item 11 of the RTI Act.

⁴⁶ Submissions dated 21 January 2019.

- emails between MSQ and AMSA concerning the applicant's navigation aid request and the responses both agencies sent to the applicant concerning the request; and
 - historical information concerning navigation aids installed near North Stradbroke Island.
48. On the wider issue of marine safety, I note that the Department produces an annual Marine Incidents Report.⁴⁷
49. I consider that the information provided to the applicant affords him a detailed understanding of the interactions and reporting which occurred in respect of the marine incident involving his vessel. I also consider that the annual Marine Incidents Report serves to inform the public generally about marine safety issues.
50. The applicant queried⁴⁸ whether '*OIC fully met its obligation to ensure transparency and accountability of [the Department] in upholding its duty to marine safety*'. As noted in paragraph 40, in assessing whether disclosure of the Remaining Audio Recordings would, on balance, be contrary to the public interest, I must apply the balancing test specified in section 49(3) of the RTI Act and these factors relating to the accountability and transparency of Government and contributing to a debate on matters of serious interest may not necessarily be determinative of the public interest.
51. In circumstances where most of the audio recordings have been fully disclosed to the applicant, together with an unverified transcript of recordings, I am not satisfied that disclosure of the Remaining Audio Recordings would further advance the Department's accountability and transparency or contribute to a debate on marine safety in any meaningful way. Accordingly, I afford low weight to the public interest factors relating to the Department's accountability and transparency, informing the community about the Department's operations and contribution to a debate on marine safety,⁴⁹ particularly in circumstances where the applicant has received a transcript of the recordings (albeit, an unverified one).

Deficiencies in the conduct or administration of an agency or official

52. Where disclosure of information could reasonably be expected to allow or assist inquiry into possible conduct deficiencies of agencies or officials, or reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct, public interest factors favouring disclosure will arise.⁵⁰
53. The applicant has not raised these factors in respect of the Remaining Audio Recordings, however, I have given them consideration as the applicant submitted there is a need for the Department to make a '*commitment*' to signage and other devices, as it has with road safety, and he has also referenced current litigation concerning the marine incident involving his vessel.
54. Having carefully considered the Remaining Audio Recordings, I am not satisfied that, in the circumstances of this matter (where a transcript of audio recordings has been released to the applicant), disclosure of these audio recordings could reasonably be expected to allow or assist inquiry into possible conduct deficiencies of the Department or any officers. Nor am I satisfied that there is any reasonable expectation that disclosure of the Remaining Audio Recordings could reveal or substantiate any deficiencies in the

⁴⁷ These reports are accessible at <www.msq.qld.gov.au>.

⁴⁸ Submissions dated 21 January 2019.

⁴⁹ Schedule 4, part 2, items 1, 2, 3 and 11 of the RTI Act.

⁵⁰ Schedule 4, part 2, items 5 and 6 of the RTI Act.

conduct of the Department or any officers. On this basis, I find that these factors favouring disclosure do not apply.

Advance fair treatment and contribute to the administration of justice

55. The RTI Act also gives rise to factors favouring disclosure in circumstances where disclosing information could reasonably be expected to:
- advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies⁵¹
 - contribute to the administration of justice generally, including procedural fairness;⁵² and
 - contribute to the administration of justice for a person.⁵³
56. Again, while the applicant submissions do not directly raise these factors favouring disclosure, he has indicated that he is involved in litigation regarding the incident involving his vessel. I have therefore considered whether these factors arise in respect of the Remaining Audio Recordings.
57. The public interest factor relating to advancing the fair treatment of individuals does not require a decision-maker to ensure that an applicant is provided with sufficient information to enable the applicant to be subjectively satisfied that he or she received fair treatment. Rather, it is about providing information to ensure fair treatment in an applicant's future dealings with agencies.⁵⁴ I consider that the information which has been disclosed to the applicant has provided him with a detailed understanding of the actions taken in respect of the incident involving his vessel. I consider this has substantially advanced his fair treatment and I am not satisfied that disclosure of the Remaining Audio Recordings would further advance the applicant's fair treatment in his future dealings with the Department in any significant way. On this basis, I afford low weight to this factor⁵⁵ favouring disclosure.
58. The fundamental requirements of procedural fairness—that is, an unbiased decision-maker and a fair hearing—should be afforded to a person who is the subject of a decision. The fair hearing aspect of procedural fairness requires that, before a decision that will deprive a person of some right, interest or legitimate expectation is made, the person is entitled to know the case against them and to be given the opportunity of replying to it.⁵⁶
59. In March 2018, the Department notified the applicant that it considered the investigation into the incident involving the applicant's vessel was closed. The information released to the applicant records that, prior to this notification, the Department responded to a number of requests (including the navigation aid request) made by the applicant before closing that investigation. Taking into consideration the extensive information which has been disclosed to the applicant about the investigation of the incident, I consider procedural fairness for the applicant would, if at all, only be marginally advanced by disclosure of the Remaining Audio Recordings. Accordingly, I afford this factor⁵⁷ low weight.

⁵¹ Schedule 4, part 2, item 10 of the RTI Act.

⁵² Schedule 4, part 2, item 16 of the RTI Act.

⁵³ Schedule 4, part 2, item 17 of the RTI Act.

⁵⁴ *F60XCX and Department of Natural Resources and Mines* [2017] QICmr 19 at [89]-[90].

⁵⁵ Schedule 4, part 2, item 10 of the RTI Act.

⁵⁶ *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J.

⁵⁷ Schedule 4, part 2, item 16 of the RTI Act.

60. In determining whether the disclosure of the Remaining Audio Recordings could reasonably be expected to contribute to the administration of justice for the applicant, I must consider whether:
- the applicant has suffered loss, or damage, or some kind of wrong, in respect of which a remedy is, or may be, available under the law
 - the applicant has a reasonable basis for seeking to pursue the remedy; and
 - disclosing the information held by an agency would assist the applicant to pursue the remedy, or evaluate whether a remedy is available or worth pursuing.⁵⁸
61. The applicant has suffered the loss of his vessel. However, he has referenced in submissions to OIC that he is involved in current legal proceedings concerning the incident in which that loss occurred. That is, the applicant is already pursuing a remedy based on the information he has. In these circumstances, I am not satisfied that disclosure of the Remaining Audio Recordings is required to enable the applicant to pursue a remedy, or evaluate whether a remedy is available or worth pursuing. For these reasons, I do not consider this factor favouring disclosure⁵⁹ applies.

Other factors favouring disclosure

62. I have carefully considered all factors listed in schedule 4, part 2 of the RTI Act, and can identify no other public interest considerations telling in favour of disclosure of the Remaining Audio Recordings. Taking into consideration the nature of the Remaining Audio Recordings—being recordings of certain communications which occurred in respect of a particular marine incident—I cannot see how their disclosure could, for example, ensure the effective oversight of expenditure of public funds,⁶⁰ reveal the information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant;⁶¹ contribute to the protection of the environment;⁶² reveal environmental or health risks or measures relating to public health and safety;⁶³ or contribute to the maintenance of peace and order⁶⁴ or the enforcement of the criminal law.⁶⁵

Factors favouring nondisclosure

Privacy of other individuals

63. A factor favouring nondisclosure arises if disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy.⁶⁶ The concept of 'privacy' is not defined in the RTI Act, however, it can be viewed as the right of an individual to preserve their personal sphere free from interference by others.⁶⁷
64. The Remaining Audio Recordings include the spoken words of individuals other than the applicant. I am satisfied that disclosure of these recordings could reasonably be expected to prejudice the protection of the recorded individuals' right to privacy.

⁵⁸ *Willsford and Brisbane City Council* (1996) 3 QAR 368 at [17] and confirmed in *10S3KF and Department of Community Safety* (Unreported, Queensland Information Commissioner, 16 December 2011) at [16].

⁵⁹ Schedule 4, part 2, item 17 of the RTI Act.

⁶⁰ Schedule 4, part 2, item 4 of the RTI Act.

⁶¹ Schedule 4, part 2, item 12 of the RTI Act.

⁶² Schedule 4, part 2, item 13 of the RTI Act.

⁶³ Schedule 4, part 2, item 14 of the RTI Act.

⁶⁴ Schedule 4, part 2, item 15 of the RTI Act.

⁶⁵ Schedule 4, part 2, item 18 of the RTI Act.

⁶⁶ Schedule 4, part 3, item 3 of the RTI Act.

⁶⁷ 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 12 August 2008, at [1.56]. Cited in *Balzary and Redland City Council; Tidbold (Third Party)* [2017] QICmr 41 (1 September 2017) at [28].

65. While the applicant may be aware of the identity of the recorded individuals by reason of his involvement in the marine incident and information in the released transcript, in my view this reduces, but does not negate, the prejudice that disclosure of these recordings could reasonably be expected to cause to the right to privacy of these recorded individuals.
66. In the circumstances of this matter, I consider that disclosing the Remaining Audio Recordings would be a significant intrusion into the privacy of the recorded individuals. For this reason, I afford significant weight to this factor favouring nondisclosure.

Personal information of other individuals

67. The RTI Act also recognises that disclosing an individual's personal information to someone else can reasonably be expected to cause a public interest harm.⁶⁸
68. As noted above, the Remaining Audio Recordings include the spoken words of individuals other than the applicant. The Right to Information Commissioner has previously noted that:

*... a recording of a person's voice conveys a range of 'nonlexical' information, such as tone, cadence, emphasis, inflection and pauses. Such information is sensitive and highly personal in nature. The public interest harm that could ordinarily be expected to flow from disclosure of personal information of this kind is relatively significant having regard to the prejudicial effect on the protection of an individual's right to privacy. However, in some instances, it is also true that information of this type can add important meaning and context to what is being conveyed during a conversation.*⁶⁹

69. I consider that this 'nonlexical' information in the Remaining Audio Recordings could reasonably be expected to allow identification of the recorded persons, via both the words spoken by recorded individuals and the tone and character of the voice used to speak those words.⁷⁰ Accordingly, I am satisfied that the Remaining Audio Recordings comprise the personal information of individuals other than the applicant and this factor favouring nondisclosure applies.
70. I have carefully considered the Remaining Audio Recordings and I am satisfied that the 'nonlexical' information in those recordings does not add '*important meaning and context*' to the information which has been released to the applicant, including the unverified transcript.
71. While I am constrained about the detail I can provide,⁷¹ some of the individuals recorded in these audio recordings are public sector officers. Information relating to the day-to-day work duties and responsibilities of public sector officers may generally be disclosed under the RTI Act, despite it falling within the definition of personal information. Primarily, this approach is taken to ensure transparency and accountability in government processes and the performance of public duties.⁷² However, in this matter, the content of audio recordings—that is, the information which relates to the day to day work duties of the recorded public sector officers—has been disclosed to the applicant in the form of a transcript. The undisclosed information from the Remaining Audio Recordings therefore comprises the voices of the recorded individuals. I consider that the recording of a person's voice is as sensitive and personal as their signature. I am therefore satisfied that, in the circumstances of this matter, the recorded voices of public sector

⁶⁸ Schedule 4, part 4, section 6(1) of the RTI Act.

⁶⁹ See *McKean and Department of Justice and Attorney-General; Carmody (Third Party)* [2016] QICmr 25 (27 June 2016) at [184].

⁷⁰ In this matter, the release of the unverified transcript heightens the likelihood of identification.

⁷¹ Under section 108(3) of the RTI Act.

⁷² Schedule 4, part 2, items 1, 3 and 11 of the RTI Act, which I have considered in paragraphs 44-51 above.

officers within the Remaining Audio Recordings falls outside of the day-to-day routine work category.

72. As noted in paragraph 43, the Remaining Audio Recordings also include some personal information of the applicant. I confirm that where the personal information of the applicant appears in the Remaining Audio Recordings, it is intertwined with the personal information of other individuals. On careful consideration of it, I am satisfied that it is not possible to separate the applicant's personal information from the personal information of those other individuals. That is, disclosing the personal information of the applicant would necessarily also disclose the personal information of individuals other than the applicant.
73. As to the weight to be afforded to this factor, while the applicant may be aware of the identity of some of the recorded individuals by reason of his involvement in the marine incident and information in the released transcript, in my view and in the circumstances of this case, this marginally reduces, but does not negate, the harm and prejudice that disclosure of this personal information could reasonably be expected to cause.
74. I consider there is a community expectation that where personal information is collected by government, that information will be used for limited purposes and will not be subject to unrestricted dissemination. Given the nature of the other individuals' personal information in the Remaining Audio Recordings, I consider that the extent of the harm that could be anticipated from disclosing such personal information under the RTI Act would be significant. Accordingly, I afford this factor favouring nondisclosure⁷³ significant weight.

Balancing the public interest

75. For the reasons set out above, I am satisfied that the significant weight afforded to the nondisclosure factors relating to protection of personal information and privacy⁷⁴ outweighs the relevant factors favouring disclosure⁷⁵ of the Remaining Audio Recordings. Accordingly, I consider that disclosing these nine recordings would, on balance, be contrary to the public interest and access to them may be refused.⁷⁶

Nonexistent or unlocatable documents

Relevant law

76. Access to a document may also be refused if the document is nonexistent or unlocatable.⁷⁷
77. To be satisfied that a document is *nonexistent*, the Information Commissioner has previously recognised that a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors, including:
- the administrative arrangements of government
 - the agency structure

⁷³ Schedule 4, part 4, section 6(1) of the RTI Act.

⁷⁴ Schedule 4, part 3, item 3 and schedule 4, part 4, section 6(1) of the RTI Act.

⁷⁵ Schedule 4, part 2, items 1, 2, 3, 7, 10, 11 and 16 of the RTI Act.

⁷⁶ Under section 47(3)(b) of the RTI Act.

⁷⁷ Sections 47(3)(e) and 52 of the RTI Act. 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 the document but it cannot be found—section 52(1)(b) of the RTI Act. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist—section 52(1)(a) of the RTI Act.

- the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
- the agency's practices and procedures (including but not exclusive to its information management approach); and
- other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates.⁷⁸

78. It may not be necessary for searches to be conducted when proper consideration is given to relevant factors. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.⁷⁹
79. Searches may also be relied on to satisfy the decision-maker that a document does not exist. If searches are relied on to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents.⁸⁰ What constitutes reasonable steps will vary from case to case as the search and enquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances.
80. To determine whether a document exists, but is *unlocatable*, the RTI Act requires consideration of whether there are reasonable grounds to be satisfied that the requested document has been or should be in the agency's possession; and whether the agency has taken all reasonable steps to find it.⁸¹ In answering these questions, regard should again be had to the circumstances of the case and the key factors set out above.⁸²

Analysis

81. As noted in paragraph 16, the applicant submitted that the Department failed to locate all relevant documents as a result of altering the terms of the application.⁸³ Further, the applicant submitted⁸⁴ that the Department has not located all relevant communications about his navigation aid request between MSQ and ODG because although he cannot state '*whether such correspondence took place*' he considers '*there is a high probability that communication did take place at senior level*'.
82. In the decision under review, the Department relevantly stated:

Despite the wording used in the Department's 2018 Disclosure Log to describe [the] application, the Department's officers were asked to search for documents using the original wording of [the] application including being asked to search for communications between the Director-General's office and other parties and marine incident reports from Maritime Safety Queensland (MSQ).

⁷⁸ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (*Pryor*) at [19], which adopted the Information Commissioner's comments in *PDE and the University of Queensland* [2009] QICmr 7 (9 February 2009) (*PDE*) at [37]. The decision in *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld). 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 here. See also *Lester and Department of Justice and Attorney-General* [2017] QICmr 17 (16 May 2017) at [11] and *F60XCX and Department of Natural Resources and Mines* [2015] QICmr 17 (27 July 2015) at [50].

⁷⁹ For example, where a particular document was not created because 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.

⁸⁰ As set out in *PDE* at [49]. See also section 130(2) of the RTI Act.

⁸¹ Section 52(1)(b) of the RTI Act.

⁸² *Pryor* at [21].

⁸³ While the applicant initially contended that further marine and pollution reports or marine incident reports existed and had not been located, during the review he accepted that such further documents did not exist. This was confirmed by OIC on 19 February 2019.

⁸⁴ Submissions dated 21 January 2019.

83. On external review, OIC made enquiries with the Department about the processing of the access application and the searches conducted for documents responsive to the access application. The Department provided OIC with search records and certifications concerning the searches it conducted in processing the application which relevantly indicate that:
- the Department used the specific terms of the access application when searching for responsive documents
 - searches were conducted by a number of officers; and
 - searches were conducted of MSQ files (relating to the incident involving the applicant's vessel and the applicant's subsequent enquiries), email databases, the Aid to Navigation Assets and Maintenance System, VHF and telephone communication records, desktop computers, a database of reported incidents, regional incident records and the Department's head office files.
84. OIC then requested that the Department conduct further searches for communications between ODG and MSQ on the subject of the applicant's navigation aid request.⁸⁵ No communications of this nature were located by the Department's further searches. The Department provided OIC with search records and certifications for the additional searches it conducted on external review, which indicate that:
- additional searches were conducted of the Department's document tracking system for official departmental correspondence, the Department's document management system and the Department's record keeping databases at SEQ South; Metro; SEQ North; Southern; Central, Northern and Mineral House; and
 - searches were conducted using the following search terms—Director General, Scales, AMSA, Regional Development, DIRD, Flat Rock, Point Lookout, the name of the applicant's vessel, Lighthouse, Navigation and the applicant's last name.
85. As the Department conducted further searches on external review, the question I must consider is whether the Department has taken *all reasonable steps* to locate documents *relevant to the access application*.
86. On the material before me, including the applicant's submissions and the Department's search records and certifications, I consider that the Department has conducted comprehensive and suitably targeted searches of all relevant locations where it was reasonable to expect that the information requested in the access application (including any communications between ODG and MSQ on the subject of the applicant's navigation aid request) would be found. I also consider that, apart from the applicant's assertions that additional communications exist, there is no material before me which indicates that the further ODG and MSQ communications sought by the applicant would have been created.
87. In these circumstances, I am satisfied that:
- the Department has taken all reasonable steps to locate documents responsive to the access application; and

⁸⁵ I note that, in seeking to resolve aspects of the external review pursuant to section 90(1) of the RTI Act, OIC also asked the Department to conduct further searches for communications between QDG and AMSA and ODG and DIRD on the subject of the applicant's navigation aid request, notwithstanding it was OIC's view that such communications fell outside the scope of the application. No such communications were located. Given my findings that any such communications, if they exist, fall outside the scope of the access application, it is not necessary for me to deal with this aspect of the Department's searches.

- there are reasonable grounds to be satisfied that there are no further documents responsive to the applicant's access application and therefore access may be refused on this basis.⁸⁶

DECISION

88. I vary the Department's decision and find that some of the information being considered in this review is outside the scope of, or irrelevant to, the application and the remaining information may be refused on the grounds that:

- its disclosure would, on balance, be contrary to the public interest; and
- it is nonexistent.

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

Assistant Information Commissioner Corby

Date: 14 May 2019

⁸⁶ Section 47(3)(e) and 52(1)(a) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
13 September 2018	OIC received the external review application.
21 September 2018	OIC notified the applicant and the Department that it had accepted the external review application and asked the Department to provide additional information.
8 October 2018	OIC received the requested information from the Department.
30 October 2018	OIC provided an update to the applicant about the external review. OIC received the applicant's submissions.
19 November 2018	OIC conveyed a preliminary view to the applicant and invited the applicant to provide submissions by 3 December 2019 if he did not accept the preliminary view.
20 November 2018	The applicant notified OIC that he did not accept the preliminary view.
2 December 2018	OIC received the applicant's further submissions.
5 December 2018	OIC asked the Department to conduct further searches for documents responsive to the access application.
21 December 2018	OIC received the Department's search submissions.
4 January 2019	OIC conveyed a further preliminary view to the applicant and invited the applicant to provide submissions by 18 January 2019 if he did not accept the preliminary view.
21 January 2019	OIC received the applicant's further submissions.
13 February 2019	OIC asked the applicant to confirm whether he continued to seek access to certain information.
18 February 2019	OIC received the applicant response about information he wished to access. OIC spoke with the applicant to clarify his response.
19 February 2019	OIC wrote to the applicant to confirm the information he no longer wished to access.