



Decision and Reasons for Decision

Citation: *F60XCX and Public Service Commission* [2016] QICmr 29
(2 August 2016)

Application Number: 312407

Applicant: F60XCX

Respondent: Public Service Commission

Decision Date: 2 August 2016

Catchwords: ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - EXEMPT INFORMATION - INVESTIGATION BY PRESCRIBED CRIME BODY - whether information obtained, used or prepared for an investigation by a prescribed crime body, or other agency, in performing the prescribed functions of the prescribed crime body - whether exempt - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(a) and 48 and schedule 3, section 10(4) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - personal information of individual other than applicant - about cessation of employment - appearing in statement of officer under investigation - about individual who declined to provide statement to investigation - whether disclosure would, on balance, be contrary to the public interest - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - applicant contends additional documents exist - whether the agency has taken all reasonable steps to locate the documents - whether access may be refused on the basis that the documents do not exist or are unlocatable - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(e) and 52 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Public Service Commission (**PSC**)¹ under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to all documents relating to the applicant for a specific date range.
2. PSC located 1592 pages relevant to the access application and decided to:
 - grant access to 1015 full pages;² and
 - refuse access to 576 full pages and 1 part page.³
3. On internal review, PSC upheld its original decision and found that its searches for documents responsive to the applicant's application had been sufficient.
4. The applicant then applied to the Office of the Information Commissioner (**OIC**) for an external review regarding the grounds for refusing access relied on by PSC, and whether PSC had located all documents responsive to his access application. During the course of the external review, PSC released some information to the applicant.
5. For the reasons set out below, I vary PSC's internal review decision. I concur that most of the information in issue may be refused on the ground that it is exempt information, and find that the remainder is information that may be refused on the ground that its disclosure would, on balance, be contrary to the public interest. Further, I find that documents the applicant contends PSC failed to locate may be refused on the ground that they are nonexistent or unlocatable.⁴

Background

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

Reviewable decision

7. The decision under review is PSC's internal review decision dated 4 March 2015.

Evidence considered

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

Information in issue

9. The following information is no longer in issue:
 - 17 pages and parts of 4 pages,⁵ comprising information that PSC released to the applicant on external review⁶

¹ The Department of the Premier and Cabinet has acted on PSC's behalf in relation to the applicant's access application. As PSC is the relevant agency, this decision refers to PSC rather than this Department.

² Mobile telephone numbers were deleted on some of these pages, in accordance with the applicant's confirmation to PSC by email dated 20 December 2014 that he did not seek such information.

³ Under section 67(1) of the IP Act and section 47(3)(a) of the *Right to Information Act 2009* (Qld) (**RTI Act**).

⁴ Under section 67(1) of the IP Act and section 47(3)(a), (b) and (e) of the RTI Act respectively.

⁵ Pages 467, 495, 500-502, 504-507, 515, 517-520, 599 and 769-770, and parts of pages 496-497, 514 and 516 of Batch 2. Note—the parts of pages 496-497, 514 and 516 that remain in issue comprise the Category B Information considered in this decision.

- 4 full pages and 1 part page of information⁷ that the applicant accepted⁸ were exempt information,⁹ namely information subject to legal professional privilege;¹⁰ and
- 2 pages¹¹ that were outside the scope of the applicant's application, as they did not contain the applicant's personal information or appear to relate to any aspect of it.¹²

10. The rest of the information that PSC located but refused to release to the applicant remains in issue. In the following reasons, I have categorised and referred to this information as Category A Information (comprising 549 pages) and Category B Information (comprising 4 part pages).

Issues for determination

11. The issues remaining for determination in this review are:

- whether access to the **Category A Information** may be refused on the ground that it is exempt information, namely information subject to the prescribed crime body exemption
- whether access to the **Category B Information** may be refused on the ground that its disclosure would, on balance, be contrary to the public interest; and
- whether access to additional documents the applicant contends PSC failed to locate may be refused on the ground that they are nonexistent or unlocatable.

Category A Information

12. The Category A Information comprises 549 pages.¹³

Relevant law

13. The IP Act confers on an individual a right to access documents of an agency, to the extent they contain the individual's personal information.¹⁴ This right of access is subject to limitations, including grounds for refusal of access.¹⁵ One ground for refusal of access is if the information sought comprises exempt information.¹⁶
14. Relevantly, information is exempt information if it was obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in the performance of

⁶ PSC's decisions had determined that this information was exempt information under schedule 3, section 10(4) of the RTI Act; however, on external review, PSC accepted OIC's preliminary view dated 5 February 2016 that this was not the case. PSC confirmed to OIC that it had released this information on 14 March 2016, subject to the deletion of mobile telephone numbers, given the applicant's confirmation that he did not seek such information.

⁷ Pages 638-641 of Batch 2 and part of page 35 of Batch 1.

⁸ By email dated 3 June 2016, OIC confirmed that, as the applicant's submissions in response to OIC's preliminary view dated 11 March 2016 had not addressed this aspect of the preliminary view, it was OIC's understanding that he accepted it.

⁹ Under section 47(3)(a) of the RTI Act.

¹⁰ Under schedule 3, section 7 of the RTI Act.

¹¹ Pages 603-604 of Batch 2.

¹² In OIC's preliminary view dated 11 March 2016, OIC advised the applicant that these two pages related to another individual who was, at the time the documents were created, an employee of Queensland Health.

¹³ Pages 13, 22-25, 33-39, 43-77, 84-91, 112-116, 132-156, 158-159, 164-177, 439-442, 444-449, 451, 466, 469-471, 480, 485, 523-526, 528-532, 536-544, 546-551, 553-564, 574-582, 586-597, 600, 606, 614-617, 623-624, 633-637, 642, 648-670, 674-685, 689-707, 711-722, 724-768, 774-778, 813-820, 844-861, 867-869, 876-884, 921, 937, 1041-1055, 1057-1058, 1110-1112, 1138-1139, 1155-1158, 1223, 1228-1252, 1255-1270, 1272-1279, 1282-1289, 1293-1300, 1340-1358 and 1361-1390 of Batch 2; and pages 1-14, 17-18, 41-58, 73-78, 82-85 and 105-123 of Batch 3.

¹⁴ Section 40(1)(a) of the IP Act.

¹⁵ Grounds for refusal of access are set out in section 47 of the RTI Act. Section 67(1) of the IP Act provides that access to information may be refused under the IP Act on the same grounds as in section 47 of the RTI Act.

¹⁶ Sections 47(3)(a) and 48 of the RTI Act.

the prescribed crime body's prescribed functions.¹⁷ The only exception to this exemption is where the information is 'about' the applicant and the investigation is finalised.¹⁸

15. Accordingly, information will be subject to the prescribed crime body exemption if:
- the information was obtained, used or prepared for an investigation
 - the investigation was conducted by a prescribed crime body, or another agency, in the performance of a prescribed function of the prescribed crime body; and
 - the exception to the exemption does not apply.

Findings

Was the Category A Information obtained, used or prepared for an investigation?

16. Yes. I have carefully considered the contents of the 549 pages that comprise the Category A Information, and am satisfied that each of these pages comprises information which was either obtained, used or prepared for an investigation arising out of a complaint by the applicant to PSC.

Was the investigation conducted by a prescribed crime body, or another agency, in the performance of a prescribed function of the prescribed crime body?

17. Yes, for the reasons that follow.
18. Under the RTI Act, the Crime and Corruption Commission (**Commission**)¹⁹ is a prescribed crime body.²⁰ The Commission's prescribed functions²¹ include corruption functions.²² These functions involve dealing with complaints about corrupt conduct²³ in an appropriate way.²⁴
19. While the Commission has primary responsibility for dealing with complaints about corrupt conduct,²⁵ it may refer a complaint to a public official, including the chief executive officer of a unit of public administration,²⁶ to be dealt with by them, or dealt with by them in cooperation with the Commission, subject to the Commission's monitoring role.²⁷ The public official has a responsibility to deal with a complaint that is referred to it by the Commission,²⁸ subject to the Commission's monitoring role.²⁹

¹⁷ Schedule 3, section 10(4) of the RTI Act.

¹⁸ Schedule 3, section 10(6) of the RTI Act.

¹⁹ The Commission was, at the time of the investigation, called the Crime and Misconduct Commission. The *Crime and Misconduct Act 2001* (Qld), which established this Commission, was amended by the *Crime and Misconduct and Other Legislation Amendment Act 2014* (Qld) (**CMOLA Act**). Among other things, the amendments changed the name of the Act to the *Crime and Corruption Act 2001* (Qld) (**CC Act**) and the name of the Commission to the Crime and Corruption Commission. For ease of reference, these reasons refer to the CC Act and Commission.

²⁰ See definition of *prescribed crime body* in schedule 3, section 10(9) of the RTI Act.

²¹ See definition of *prescribed functions* in schedule 3, section 10(9) of the RTI Act.

²² See definition of *corruption functions* in schedule 3, section 10(9) of the RTI Act, which refers to the definition in section 33 of the CC Act. The amendments effected by the CMOLA Act replaced the Commission's misconduct function, as set out in section 33 of the CC Act, with the corruption functions.

²³ See definition of *corrupt conduct* in section 15 of the CC Act. The amendments effected by the CMOLA Act also replaced what was, at the time of PSC's investigation, referred to as official misconduct with the concept of corrupt conduct (see section 15(1) and section 400(c) of the CC Act). A similar definition at section 8 of the *Independent Commission Against Corruption Act 1988* (NSW) was considered in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 (15 April 2015).

²⁴ Having regard to principles set out in section 34 of the CC Act—see section 33 of the CC Act.

²⁵ Section 45(1) of the CC Act.

²⁶ See definitions of *public official* in schedule 2 of the CC Act and *unit of public administration* in section 20 of the CC Act.

²⁷ Sections 35(1)(b), (d) and (e) and 46(2)(b) of the CC Act. The nature of the Commission's monitoring role is set out at section 48 of the CC Act.

²⁸ Section 43 of CC Act.

²⁹ Section 44(2) of CC Act.

20. In PSC's original decision, PSC stated that the applicant's complaint:³⁰

... was referred to the Crime and Corruption Commission (CCC) for investigation. The CCC referred the matter back to the PSC to investigate on behalf of the CCC.

...

The investigation undertaken by the PSC ... on behalf of the CCC ... was done in the "performance of the prescribed functions of the prescribed crime body".

The Information in Issue considered under this section of the RTI Act includes emails, letters, file notes and records of interviews relating to an investigation conducted by the PSC on behalf of the CCC ...

As such, each of these documents were "obtained, used or prepared for an investigation by" the Crime and Corruption Commission.

21. I consider that the following information among the documents that PSC decided to release to the applicant provides evidence in support of this position:

The matter was referred to the [Commission], where it was assessed as meeting the threshold for suspected official misconduct and returned to the PSC for management, with reports back to the [Commission].³¹

22. In these circumstances, I am satisfied that the information before me supports a finding that PSC's investigation was carried out in the performance of the Commission's corruption functions³²—and therefore in the performance of a prescribed function of a prescribed crime body under the RTI Act.

Does the exception to the exemption apply?

23. No, for the reasons that follow.

24. The exception to the CCC exemption applies if the information is 'about' the applicant and the investigation is finalised.³³

25. PSC considers that:³⁴

... as the Right to Information Access Applicant in this case is not the subject person being investigated in this matter, I do not consider the ... exclusion to the exemption under Schedule 3, Section 10(4) of the RTI Act applies in this case.

26. The applicant submits that:³⁵

My complaint to PSC may have been about [the officer's] conduct towards me; but, in reality, the bulk of the evidence obtained by PSC was about me.

27. Given the parties' submissions, it is necessary to consider whether the Category A Information is 'about' the applicant for the purpose of this exception. In *G8KPL2 and Department of Health*,³⁶ the Right to Information Commissioner found that an investigation report, while created as a result of the applicant's complaint, was not

³⁰ At page 8 of the original decision dated 21 January 2015.

³¹ Point 1.2(e) of page 905 of Batch 2.

³² See footnotes 22 and 23.

³³ Schedule 3, section 10(6) of the RTI Act.

³⁴ At page 9 of the original decision dated 21 January 2015.

³⁵ Submission dated 29 May 2016.

³⁶ (Unreported, Queensland Information Commissioner, 31 January 2011) at [25]-[33]. An appeal of this decision to the Queensland Civil and Administrative Tribunal (QCAT) was dismissed on the basis that there was no question of law to be determined: *Minogue v Office of the Information Commissioner and Anor* [2012] QCATA 191 (5 March 2012).

about the applicant—rather, it was *about* the staff members who were the subject of the allegations and related investigation. Similarly, in *Darlington and Queensland Police Service*,³⁷ it was determined that documents relating to an investigation of the applicants' complaint about police officers (including correspondence, statements and reports) were not *about* the applicants—rather, they were *about* the police officers.

28. I have carefully considered all of the Category A Information and note that, while the applicant's submissions indicate that he considers that he has a personal interest in the investigation, he was not the subject of the investigation; rather, the subject was the individual about whom he had made allegations. In these circumstances, in accordance with the reasoning in *G8KPL2* and *Darlington*, I consider that the Category A Information itself is not *about* the applicant; rather, it is *about* the subject of the investigation.
29. I note information contained in the released documents shows that the investigation was finalised. However, as the first aspect of the exception is not satisfied (that is, the Category A information is not *about* the applicant), I find that the exception to the exemption cannot apply.

Conclusion

30. Based on the information available to OIC in this review, I am satisfied that:
- the Category A Information was obtained, used or prepared for an investigation
 - the investigation was conducted by an agency in the performance of a prescribed function of the prescribed crime body; and
 - the exception to the exemption does not apply.
31. In these circumstances, I find that access to the Category A Information can be refused on the ground that it is subject to the prescribed crime body exemption, and is therefore exempt information.³⁸

Other matters raised by the applicant

32. In relation to the Category A Information, the applicant also submits that:³⁹
- PSC's assessment report has no credibility
 - PSC's investigation was flawed, was not conducted in an open and transparent manner and denied him natural justice
 - evidence provided by the subject of the complaint to the investigation '*trashed*' the applicant's reputation
 - the applicant was given no opportunity to sight this evidence or respond to it before PSC finalised its investigation
 - the applicant is entitled to know everything that was stated about him during the investigation, as it is personal information about him which he is entitled to access
 - the applicant is also entitled to know everything that was done by PSC in relation to the investigation; and

³⁷ [2014] QICmr 14 (11 April 2014) at [21]-[22]. An appeal of this decision to QCAT was also dismissed on the basis that there was no question of law to be determined: *Darlington v Office of the Information Commissioner & Queensland Police Service* [2015] QCATA 167 (3 December 2015).

³⁸ Section 67(1) of the IP Act and section 47(3)(a) and schedule 3, section 10(4) of the RTI Act.

³⁹ Submission dated 29 May 2016.

- the applicant needs this information so he can demonstrate the flaws in the investigation and show that there is a prima facie case for the investigation to be reopened.
33. In effect, these submissions raise or allude to matters, including some public interest considerations, that the applicant considers favour disclosure of the Category A Information. However, as I am satisfied that the Category A Information is subject to the prescribed crime body exemption,⁴⁰ I cannot take matters such as those raised by the applicant into account to alter or override my finding that this information qualifies as exempt information. Parliament determined that disclosure of exempt information would, on balance, be contrary to the public interest in all instances,⁴¹ and I have no discretion to release such information.⁴²

Category B Information

34. The Category B Information comprises small portions of personal information of individuals other than the applicant on four pages.⁴³ Though I am constrained in the extent to which I can describe the content of the Category B Information,⁴⁴ I am able to note that it comprises a very limited amount of information, and can be summarised as:
- the name of an employee, in the context of her cessation of employment with the Queensland government
 - the name of a third party individual whose name and details were redacted from the statement of the officer under investigation; and
 - the name of, and brief summary of circumstances surrounding, an individual who declined to provide a statement as part of the investigation.
35. During the external review, OIC provided the applicant with the above summary of the Category B Information when setting out OIC's preliminary view regarding that information. Further, PSC released the remainder of these four pages to the applicant during the external review. Accordingly, the applicant has been informed of the general nature of the Category B Information, and has had the opportunity to view the information surrounding the Category B Information, and to note that it records PSC's considerations regarding the administrative release of witness statements to him.⁴⁵
36. In response to OIC's preliminary view that disclosure of the Category B Information would, on balance, be contrary to the public interest, the applicant stated that:⁴⁶
- It is impossible for me to make sensible submissions in relation to the views you have expressed in relation to this information as I don't know the nature of the information. Please provide me with a broad overview of the nature of this information.*
37. Noting the information provided to the applicant in the course of the external review outlined at paragraphs 34 and 35 above, I am satisfied that he was provided with sufficient information regarding the Category B Information to make relevant submissions regarding OIC's preliminary view about that information. While the applicant has not expressly done so, he has indicated by implication that he does not

⁴⁰ As concluded at paragraph 31 above.

⁴¹ Section 48(2) of the RTI Act.

⁴² Section 118(2) of the IP Act.

⁴³ Pages 496-497, 514 and 516 of Batch 2.

⁴⁴ Under section 121(3) of the IP Act, I must not include information in a decision that is claimed to be contrary to the public interest information.

⁴⁵ Note—PSC accepted OIC's preliminary view that, as these considerations occurred *after* the finalisation of the investigation devolved by the Commission to PSC, they were not subject to the prescribed crime body exemption.

⁴⁶ Submission dated 29 May 2016.

accept OIC's preliminary view about the Category B Information. Accordingly, I will now address this information in this decision.

Relevant law

38. As noted above,⁴⁷ the right of access to documents under the IP Act is subject to limitations, including grounds for refusal of access. One ground for refusal of access is if disclosure would, on balance, be contrary to the public interest.⁴⁸ The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest⁴⁹ and explains the steps that a decision-maker must take⁵⁰ in deciding the public interest as follows:

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

Would disclosure of the Category B Information, on balance, be contrary to the public interest?

39. Yes, for the reasons that follow.

Irrelevant factors

40. I do not consider that any irrelevant factors arise in this review.

Factors favouring disclosure

41. A public interest factor in favour of disclosure will arise where the information is the applicant's personal information.⁵¹ As noted above, the information on the four pages that has been released to the applicant relates to PSC's considerations about the administrative release of witness statements to him. However, the Category B Information contained in these four pages is personal information of individuals other than the applicant. It neither identifies the applicant, nor is it about the applicant. Therefore, I am satisfied that the Category B Information does not comprise the applicant's personal information,⁵² and this factor favouring disclosure does not arise for consideration.⁵³

42. Public interest factors favouring disclosure will arise where disclosure of information could reasonably be expected to promote open discussion of public affairs and enhance government accountability, or reveal the reasons for a government decision

⁴⁷ At paragraph 13.

⁴⁸ Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the wellbeing of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

⁴⁹ Schedule 4 of the RTI Act sets out lists of factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, these lists of factors are not exhaustive; in other words, factors that are not listed may also be relevant.

⁵⁰ Section 49(3) of the RTI Act.

⁵¹ Schedule 4, part 2, item 7 of the RTI Act.

⁵² In accordance with the definition in section 12 of the IP Act. '*Personal information*' is defined as '*information or an opinion ... whether true or not ... about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion*'.

⁵³ Compare *Eddington and Department of National Parks, Recreation, Sport and Racing* [2015] QICmr 2 (30 January 2015) at [15].

and any background or contextual information that informed the decision.⁵⁴ Given that the Category B Information is very limited, does not relate to the substance of the investigation conducted by PSC on the Commission's behalf, and PSC has released the balance of the four pages to the applicant, I find that only limited weight should be afforded to the factors favouring disclosure related to accountability and transparency.

Factors favouring nondisclosure

43. All of the Category B Information comprises the personal information of other individuals. As a result, I have considered whether disclosure could reasonably be expected to:
- prejudice the protection of an individual's right to privacy;⁵⁵ or
 - cause a public interest harm through disclosure of another individual's personal information.⁵⁶
44. As mentioned in paragraph 34, I am limited in what I can reveal about the Category B Information. However, having carefully assessed it, I confirm that it ranges from ordinary personal information to information that is very sensitive personal information. Relative to the degree of sensitivity of each particular piece of Category B Information, I am satisfied that disclosure under the IP Act would be a moderate to significant intrusion into the other individuals' privacy, and that the extent of the public interest harm that could be anticipated from disclosure also ranges from moderate to significant. Accordingly, I find that the weight attributable to the above two public interest factors varies depending on the nature of the personal information, with moderate weight attributable to the ordinary personal information, and significant weight to the more sensitive personal information.

Balancing the relevant public interest factors

45. I consider that only limited weight should be afforded to the factors favouring disclosure regarding accountability and transparency. However, balanced against this, I recognise that there is moderate to significant public interest in protecting the personal information and also the privacy of the individuals identified in the Category B Information.
46. For these reasons, I find that disclosing the Category B Information would, on balance, be contrary to the public interest.⁵⁷

Additional documents

47. In his external review application, the applicant stated:

In the Application,^[58] I identified specific documents containing purely my personal information that I am aware exist. However, remarkably none of these documents were located in the deficient searches conducted within the agency. ...

48. It is OIC's understanding that the documents that the applicant contends PSC has failed to locate are seven categories of information listed in his amended access

⁵⁴ Schedule 4, part 2, items 1 and 11 of the RTI Act.

⁵⁵ Schedule 4, part 3, item 3 of the RTI Act.

⁵⁶ Schedule 4, part 4, item 6 of the RTI Act.

⁵⁷ Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

⁵⁸ The applicant was referring to his access application received by PSC on 3 November 2014, and his amended access application.

application.⁵⁹ These seven categories of information may be synthesised into the following three categories of documents:

- **Applicant - PSC Documents:** documents recording communications involving the applicant and specified PSC officers (**Officer A** and **Officer B**)⁶⁰
- **Officer A - OQPC Documents:** documents recording communications involving Officer A and any officer of the Office of the Queensland Parliamentary Counsel (**OQPC**), including a specified officer;⁶¹ and
- **PSIER - OQPC Documents:** documents recording communications involving any officer of the then Public Sector Industrial and Employee Relations (**PSIER**) unit, including two specified officers (**Officer C** and **Officer D**), and any officer of OQPC, including two specified officers.^{62, 63}

49. Given the applicant's concerns, this external review has examined the sufficiency of PSC's searches for the documents responsive to the access application, including the above types of documents referred to by the applicant.

Relevant law

50. One of the grounds for refusal of access to a document is that the document sought is nonexistent or unlocatable.⁶⁴ A document is nonexistent if there are reasonable grounds to be satisfied it does not exist.⁶⁵ 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.⁶⁶

51. To be satisfied that a document does not exist, an agency must rely on its particular knowledge and experience, having regard to various key factors including:

- the administrative arrangements of government
- the agency's structure
- the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
- the agency's practices and procedures (including, but not limited to, its information management approaches); and
- other factors reasonably inferred from information supplied by the applicant, including the nature and age of the requested documents, and the nature of the government activity to which the request relates.⁶⁷

52. By considering the above factors, an agency may ascertain that a particular document was not created because, for example, its processes do not involve creating the

⁵⁹ Set out at 1. to 7. of the applicant's amended access application received by PSC on 8 November 2014.

⁶⁰ At 1. and 2. in the applicant's amended access application.

⁶¹ At 3. and 4. in the applicant's amended access application.

⁶² At 5., 6. and 7. in the applicant's amended access application.

⁶³ The applicant's amended access application also stated:

To remove any doubt, please note that my application extends to any documents transmitted, considered or otherwise dealt with as part of the abovementioned meetings, telephone discussions and other communications. This includes, but is not limited to, draft letters of termination of my employment at OQPC.

I am satisfied that these types of documents are subsumed within the types of documents noted above. I also note that, in terms of draft letters of termination, a number of these were released to the applicant at pages 13-14 and 28-33 of Batch 1.

⁶⁴ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

⁶⁵ Section 52(1)(a) of the RTI Act.

⁶⁶ Section 52(1)(b) of the RTI Act.

⁶⁷ *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]-[38]. 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 Acting Information Commissioner's findings in *PDE* are relevant here.

specific document. In such instances, it is not necessary for the agency to search for the document. It is sufficient that the relevant circumstances to account for the non-existent document are explained.

53. An agency may also rely on searches to satisfy itself that documents do not exist. If an agency relies on searches to justify a decision that documents do not exist, all reasonable steps must be taken to locate the documents.⁶⁸ Such steps may include enquiries and searches of all relevant locations identified after consideration of the key factors listed above.
54. In assessing whether a document exists, but is unlocatable, it is necessary to consider:
- whether there are reasonable grounds for the agency 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 the document.⁶⁹
55. In answering these questions, regard should be had to the circumstances of the case and to the key factors set out above.⁷⁰

PSC's steps to locate documents

56. On external review, in response to a request by OIC,⁷¹ PSC provided OIC with a copy of its initial search records and enquiries.⁷² In summary, these records demonstrated that, prior to making its original decision, PSC issued search requests to Officer B, Officer C, the Executive Director of PSC's Industrial Relations unit (formerly the PSIER unit in the Department of Justice and Attorney-General (**DJAG**)) and the Acting Director of PSC's Business Services unit. The reply emails provide evidence of the following:
- Officer B confirmed that she had completed a search of her records, that she had located only two pieces of correspondence on TRIM which had been sent to the applicant in response to letters the applicant had sent to the then Premier, and that she otherwise '[does] *not have any other documents in [her] records*'
 - Officer C conducted searches, including searches on behalf of PSIER, which included arranging extensive searches of her emails and those of Officers A and D
 - the then supervisor of the Executive Director of PSC's Industrial Relations unit advised that the Executive Director did not have any responsive documents in his records; and
 - the Acting Director of PSC's Business Services unit referred to information relating to the investigation of the applicant's complaint (that is, Category A Information which is addressed above).
57. In response to OIC's enquiries on external review,⁷³ a search certification completed by a staff member of PSC⁷⁴ regarding its initial searches indicated that:
- eight PSC officers—including those listed above—had spent in excess of 15 hours conducting searches in relation to the access application
 - searches were undertaken in various areas:

⁶⁸ As set out in *PDE* at [49]. See also section 137(2) of the IP Act.

⁶⁹ Section 52(1)(b) of the RTI Act.

⁷⁰ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [21].

⁷¹ Made on 8 April 2015.

⁷² Received on 21 April 2015.

⁷³ Made on 8 April 2015.

⁷⁴ By the Director of PSC's Business Services unit dated 21 April 2015.

- TRIM (PSC's electronic document management system)
 - Outlook email and calendar accounts
 - M drive (which was phased out in October 2014 when PSC moved to cloud computing)
 - the PSIER database from DJAG; and
 - hard copy diary and meeting notes
 - search criteria included the following:
 - the applicant's full name
 - the applicant's first name
 - the applicant's last name
 - the applicant's last name and the word '*complaint*'
 - the applicant's last name and the word '*RTI*'; and
 - the applicant's last name and the word '*IP*'; and
 - in addition to search criteria, known TRIM files were reviewed for all relevant documents.
58. Following receipt of this search information, OIC carefully reviewed the documents located by PSC in light of the concerns raised by the applicant that none of the three categories of information identified in paragraph 48 above had been located.
59. OIC's review of the located information identified that some of the three categories of documents—in particular, some Officer A - OQPC Documents and PSIER - OQPC Documents—had been released to the applicant.⁷⁵
60. On the other hand, OIC's review of the located documents did not identify any Applicant - PSC Documents or any file notes of discussions or meetings among the Officer A - OQPC Documents and PSIER - OQPC Documents that the applicant contends should exist. Given this position, OIC requested⁷⁶ that PSC provide further information about the searches it had conducted, and undertake any further necessary searches. PSC provided responses to OIC,⁷⁷ which I have summarised below.
61. In relation to the Applicant - PSC Documents involving Officer A, PSC advised:
- Officer A is no longer employed by PSC
 - Officer A's email account can no longer be retrieved, given the transition to a new operating system and the time that has elapsed since Officer A's departure from PSC (however, Officer C had searched Officer A's emails previously—see paragraph 56 above)
 - Officer A had previously advised that he did not make any file notes regarding meetings and discussions with the applicant; and
 - in any event, the Director of PSC's Business Services unit had undertaken further searches of TRIM (using the applicant's name in conjunction with the phrases '*file note*' and '*workplace bullying*'), but had not located any records, including any file notes with Officer A as the author.
62. In relation to the Applicant - PSC Documents involving Officer B, PSC advised:
- Officer B was on long term leave from PSC
 - PSC had undertaken further searches of Officer B's email account over an unlimited time period, using the applicant's last name as the search term, but had

⁷⁵ Comprising pages 1-36 of Batch 1. In OIC's preliminary view to the applicant dated 11 March 2016, OIC identified these pages.

⁷⁶ By letters dated 5 February 2016 and 24 February 2016.

⁷⁷ By letters dated 18 February 2016 and 4 March 2016.

not located any emails about the applicant and the re-crediting of sick leave or workplace bullying; and

- the Director of PSC's Business Services unit had also undertaken further searches of TRIM using the applicant's name in conjunction with the phrase 'sick leave', but had not located any documents.

63. In relation to the Officer A - OQPC Documents, PSC advised:

- the Director of PSC's Business Services unit had contacted Officer A, despite the fact that he was no longer employed by PSC, to make enquiries
- Officer A had confirmed to PSC that he made no file notes regarding his interactions with the specified OQPC officer
- Officer A also confirmed that he did not discuss or meet with any OQPC officer apart from the specified officer regarding the issues of concern to the applicant; and
- given the outcome of these enquiries, PSC had not located any further documents.

64. In relation to the PSIER - OQPC Documents, PSC advised:

- the only PSIER officers involved in the matters of concern to the applicant were Officers C and D
- Officer C is no longer employed by PSC
- the Director of PSC's Business Services unit had undertaken further searches of Officer C's email account over an unlimited time period, using the applicant's last name as the search term, but had not located any further emails
- Officer D is also no longer employed by PSC
- the Director of PSC's Business Services unit had contacted Officer D, despite the fact that he was no longer employed by PSC, to make enquiries
- Officer D had confirmed to PSC that he made no file notes regarding his interactions with the first specified OQPC officer,⁷⁸ and sent no emails in relation to the issues of concern to the applicant
- the Director of PSC's Business Services unit had undertaken further searches of TRIM (using the names of the applicant and the second specified OQPC officer⁷⁹), but had not located any documents; and
- given the outcome of these enquiries, PSC had not located any further documents.

Analysis

65. As PSC has relied on searches to demonstrate that it has located all relevant documents, it is relevant to decide whether PSC has taken all reasonable steps to locate them.

66. On being advised of the above searches and enquiries outlined at paragraphs 56 to 64, the applicant submitted that:⁸⁰

[[I]t is not enough for PSC and its officers to simply claim that the documents cannot be located. I object to OIC simply accepting this without challenge.

67. The applicant provided extensive submissions regarding the issue of sufficiency of search on a number of occasions.⁸¹ The question I must consider is whether PSC has

⁷⁸ That is, the officer identified at 5. in the applicant's amended access application.

⁷⁹ That is, the officer identified at 6. in the applicant's amended access application.

⁸⁰ Page 3 of submission dated 29 May 2016.

⁸¹ Pages 2 to 3 of external review application, pages 2 to 5 of submission dated 29 May 2016, and letter dated 1 June 2016.

taken all reasonable steps to locate documents relevant to the access application. This does not require me to deal separately with each of the applicant's submissions or to make separate findings about PSC's search efforts in relation to each of the many additional documents he believes exist.⁸² I have carefully considered the applicant's submissions and, to the extent they are relevant to the issue for determination, in that they may arguably be construed as supporting his contention that the searches conducted by PSC do not comprise all reasonable searches for the Applicant - PSC Documents, Officer A - OQPC Documents and PSIER - OQPC Documents, I have addressed them below.

68. The applicant submits that all reasonable searches have not yet been conducted, and that it remains necessary for OIC to:

- *'direct the agency to conduct full and proper searches ... [of] all electronic databases and document management systems of the agency'*⁸³ and *'request PSC to search all hard copy files'*⁸⁴ (emphasis added)
- ensure that PSC's searches are *'undertaken by someone who is independent of the officers of the agency who brought the documents into existence [ie, Officers A, B, C and D]'*,⁸⁵ given his concern that these officers *'have withheld ... documents [or] ... destroyed or disposed of the documents in breach of the Public Records Act 2002'*;⁸⁶ and
- direct that Officers A, B, C and D produce handwritten file notes that he considers they must have taken⁸⁷ and retained them as their personal property when they completed working for PSC.⁸⁸

69. I note that the manner in which an external review is conducted is, subject to the IP Act, at the Information Commissioner's discretion, and the overriding obligation on the Information Commissioner is to ensure that the procedures adopted in an external review are fair to all participants.⁸⁹ I do not believe that the above steps raised by the applicant are required before I may conclude that the documents sought by him do not exist or cannot be located, or to otherwise afford him procedural fairness.

70. This is because, as noted above, the question I must consider is whether PSC has taken all reasonable steps to locate documents. This, in my view, entails consideration of whether PSC has conducted sufficient searches of all locations where the documents in question could reasonably be expected to be found. It does not require searches of *all* of PSC's electronic databases, document management systems and hard copy files, as suggested by the applicant.

71. Further, I am satisfied that the procedures adopted to search for the documents in question, including the conduct of the searches by various officers, have been appropriate, fair and reasonable. There is nothing before me, apart from the applicant's assertions, to suggest documents were either withheld or disposed of by any PSC officer.

72. In terms of the handwritten notes the applicant suggests the four officers made and retained personally after they finished working for PSC, I note that handwritten file notes may comprise both records for the purpose of the *Public Records Act 2002* (Qld)

⁸² *Goodman and Department of Justice and Attorney-General* [2014] QICmr 4 (6 February 2014) at [23].

⁸³ Page 2 of external review application.

⁸⁴ Page 3 of submission dated 29 May 2016.

⁸⁵ Page 3 of external review application.

⁸⁶ Pages 1 to 2 of external review application.

⁸⁷ Based on his view that failure to do so would be in breach of their obligations under the *Public Records Act 2002* (Qld).

⁸⁸ Page 3 of submission dated 29 May 2016.

⁸⁹ Sections 108(1) and 110(2)(a) of the IP Act.

and documents for the purpose of the IP Act. However, in terms of file notes which may have been authored by Officers A and D, I note Officer A's confirmation that he did not make any file notes regarding his interactions with the applicant or the first specified OQPC officer,⁹⁰ and Officer D's confirmation that he did not make any file notes regarding his interactions with the first specified OQPC officer. Further, in terms of file notes which may have been authored by Officers B and C, I consider that PSC's search records indicate that they have conducted searches and made enquiries reasonably likely to identify any such notes or, at least, other documents which referred to them or otherwise indicated that they had been created; however, no such documents were located. Accordingly, apart from the applicant's submissions, there is no evidence before me to support the position that the handwritten file notes raised by him were taken by any of the four officers. Given this position, it follows that no evidence suggests that such notes remain in the personal possession of any of the four officers. In these circumstances, I do not consider it necessary to undertake any further searches or enquiries regarding such information.

73. The above comprises my consideration of the applicant's submissions relevant to the question to be determined. I have also noted that the types of documents the applicant contends should exist would, if they exist, necessarily have been created before the end of the applicant's employment with OQPC in November 2011. I have considered the documents located by PSC in light of this, and noted that the contents of these documents do not suggest the existence of any additional such documents. Further, I have examined the information provided to OIC by PSC regarding both its initial searches and enquiries on receipt of the applicant's application, and its further searches and enquiries in response to OIC's enquiries. I have done so with reference to the factors listed in *PDE*, and in particular the position of the four officers' work units within PSC's structure,⁹¹ recordkeeping practices and document management systems.
74. On the basis of these considerations, I am satisfied that PSC has made appropriate searches to locate all relevant documents, including making enquiries of all relevant staff regarding the possible existence and location of documents requested by the applicant; and ensuring that relevant staff have conducted comprehensive, appropriately targeted searches of all relevant electronic and hardcopy document management systems for relevant documents. In these circumstances, I am satisfied that there are no reasonable grounds for OIC to require PSC to conduct further searches for documents responsive to the access application, including Applicant - PSC Documents, Officer A - OQPC Documents and PSIER - OQPC Documents.

Conclusion

75. On the material before me, I consider that there is a reasonable basis to be satisfied that additional documents responsive to the access application, including Applicant - PSC Documents, Officer A - OQPC Documents and PSIER - OQPC Documents, are nonexistent or unlocatable. I find that access to such documents may be refused on this basis.⁹²

DECISION

76. For the reasons set out above, I vary PSC's internal review decision and I find that:

⁹⁰ Officer A also confirmed that he did not discuss or meet with any OQPC officer apart from the specified officer regarding the issues of concern to the applicant.

⁹¹ Noting, in particular, Officer C's searches of PSC's Industrial Relations unit (which was, at the time documents responsive to the access application were created or received, referred to as the PSIER unit and based in DJAG).

⁹² Under section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act.

- access to the Category A Information may be refused on the ground that it comprises exempt information⁹³
- access to the Category B Information may be refused on the basis that its disclosure would, on balance, be contrary to the public interest;⁹⁴ and
- additional documents the applicant contends PSC failed to locate may be refused on the ground that they are nonexistent or unlocatable.⁹⁵

77. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Assistant Information Commissioner Corby

Date: 2 August 2016

⁹³ Sections 47(3)(a) and 48 and schedule 3, section 10(4) of the RTI Act.

⁹⁴ Sections 47(3)(b) and 49 of the RTI Act.

⁹⁵ Sections 47(3)(e) and 52(1) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
3 November 2014	PSC received the applicant's access application seeking seven categories of documents.
8 November 2014	PSC received correspondence from the applicant which amended the terms of the access application, again specifying seven categories of documents.
3 December 2014	PSC proposed that the access application be taken to cover all documents held by PSC relating to the applicant for the period 1 January 2010 to 3 November 2014. The applicant agreed to this and confirmed that he specifically sought the seven categories of documents, including documents held by PSIER.
20 December 2014	The applicant confirmed to PSC that he did not seek access to mobile telephone numbers.
21 January 2015	PSC issued its original decision in respect of the access application.
16 February 2015	The applicant applied for internal review of the original decision.
4 March 2015	PSC issued its internal review decision.
19 March 2015	OIC received the application for external review of PSC's decision.
20 March 2015	OIC notified PSC of the external review application and asked PSC to provide procedural documents.
23 March 2015	OIC received the requested procedural documents from PSC.
8 April 2015	OIC informed the applicant and PSC that the application had been accepted for external review. OIC requested that PSC provide a copy of documents located in response to the access application, and its records regarding searches for responsive documents and third party consultation.
21 April 2015	PSC provided OIC with the requested documents.
5 February 2016	OIC conveyed a written preliminary view to PSC, requesting further information regarding PSC's searches for documents, and inviting PSC to provide submissions by 19 February 2016.
10 February 2016	OIC discussed its preliminary view with PSC that certain information was not subject to the prescribed crime body exemption and should therefore be released to the applicant.
18 February 2016	PSC responded to OIC's letter dated 5 February 2016, providing OIC with some of the further information requested regarding searches for documents, and requesting an extension of time to 18 March 2016 to provide submissions in response to the preliminary view. OIC and PSC discussed OIC's request for the further information regarding PSC's searches.

Date	Event
23 February 2016	OIC and PSC discussed OIC's request for the further information regarding PSC's searches.
24 February 2016	OIC wrote to PSC, clarifying the scope of OIC's request regarding sufficiency of search issues, and granting PSC an extension until 4 March 2016 to provide submissions.
4 March 2016	OIC received PSC's submissions.
11 March 2016	OIC conveyed a written preliminary view to the applicant, inviting the applicant to provide submissions by 31 March 2016. OIC wrote to PSC, requesting that the further documents be released to the applicant.
14 March 2016	PSC wrote to OIC, confirming that the further documents had been released to the applicant.
23 March 2016	OIC received the applicant's request for an extension of time of one month to provide submissions in response to the preliminary view.
24 March 2016	OIC granted the applicant an extension until 2 May 2016 to provide submissions.
28 April 2016	The applicant requested a further extension of time to provide submissions in response to the preliminary view.
29 April 2016	OIC granted the applicant a further extension of time until 2 June 2016 to provide submissions and suspended the external review until that time.
29 May 2016	OIC received the applicant's submissions.
1 June 2016	OIC received further submissions from the applicant.
3 June 2016	OIC confirmed the position that the applicant accepted OIC's preliminary view that certain information could be refused on the basis that it was subject to legal professional privilege, and was therefore exempt information.