



## Decision and Reasons for Decision

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Citation:	<i>D92 and Queensland Police Service [2021] QICmr 28 (9 June 2021)</i>
Application Number:	315644
Applicant:	D92
Respondent:	Queensland Police Service
Decision Date:	9 June 2021
Catchwords:	<p><b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - IRRELEVANT INFORMATION</b> - whether information may be deleted on the basis it is irrelevant to the terms of the access application - section 73 of the <i>Right to Information Act 2009</i> (Qld)</p> <p><b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST</b> - personal information of other individuals - safeguarding personal information and the right to privacy of other individuals - whether disclosure would, on balance, be contrary to the public interest - whether access may be refused under section 47(3)(b) of the <i>Right to Information Act 2009</i> (Qld)</p>

## REASONS FOR DECISION

### Summary

1. The applicant applied<sup>1</sup> to the Queensland Police Service (**QPS**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to various documents regarding QPS's management of the applicant as an employee.
2. QPS did not make a decision within the relevant processing period<sup>2</sup> and was therefore deemed to have made a decision refusing access to the information sought.<sup>3</sup>
3. The applicant applied<sup>4</sup> to the Office of the Information Commissioner (**OIC**) for external review of QPS's deemed decision refusing access.

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<sup>1</sup> Access application dated 29 May 2020.

<sup>2</sup> Set out in section 18 of the RTI Act.

<sup>3</sup> Under section 46(1)(a) of the RTI Act. QPS advised the applicant of the deemed decision by letter dated 4 August 2020.

<sup>4</sup> External review application dated 4 August 2020.

4. OIC granted<sup>5</sup> QPS further time to deal with the access application.<sup>6</sup>
5. QPS did not make a decision within the further time granted and was therefore taken to have made a decision affirming the deemed decision.<sup>7</sup>
6. The applicant applied<sup>8</sup> to OIC for external review of QPS's decision affirming the deemed decision.
7. For the reasons set out below, I vary QPS's deemed decision<sup>9</sup> and find that:
  - some information may be deleted on the ground it is irrelevant to the access application;<sup>10</sup> and
  - access to the remaining information in issue<sup>11</sup> may be refused on the ground that disclosure would, on balance, be contrary to the public interest.

### Reviewable decision

8. The decision under review is the decision QPS is deemed to have made refusing access to the information sought.

### Evidence considered

9. Significant procedural steps taken during the external review are set out in the Appendix.
10. In reaching my decision, I have had regard to the submissions, evidence, legislation, and other material referred to throughout these reasons (including footnotes and Appendix).
11. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**),<sup>12</sup> particularly the right to seek and receive information.<sup>13</sup> I consider a decision-maker will be '*respecting and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the RTI Act.<sup>14</sup> I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation<sup>15</sup>: '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*'<sup>16</sup>

### Information in issue

12. During the review:
  - QPS located 265 pages and agreed<sup>17</sup> to release 95 pages and parts of 136 pages to the applicant;<sup>18</sup> and

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<sup>5</sup> On 20 August 2020.

<sup>6</sup> Under section 93(2) of the RTI Act.

<sup>7</sup> Under section 93(3) of the RTI Act.

<sup>8</sup> Application for external review dated 25 September 2020.

<sup>9</sup> Under section 46(1) of the RTI Act.

<sup>10</sup> Referred to as the **Category A Information** in this decision.

<sup>11</sup> Referred to as the **Category B Information** in this decision.

<sup>12</sup> The HR Act came into force on 1 January 2020.

<sup>13</sup> Section 21 of the HR Act.

<sup>14</sup> *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

<sup>15</sup> *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>16</sup> **XYZ** at [573].

<sup>17</sup> As set out in QPS's submission, and attached schedule, to OIC dated 23 October 2020.

<sup>18</sup> QPS released this information to the applicant by email dated 12 February 2021.

- the applicant no longer sought access to certain information.<sup>19</sup>
13. Therefore, the information remaining for consideration is the refused information appearing within:
- pages 64, 100-103, 107-109, 115-117 and 122-124 (**Category A Information**); and
  - pages 1-4, 42-52 and 70-77 (**Category B Information**).

### Issues for determination

14. The issues for determination are whether:
- **Irrelevant information:** certain information can be deleted on the basis that it is irrelevant to the terms of the access application.
  - **Contrary to the public interest information:** access to other information can be refused on the ground that its disclosure would, on balance, be contrary to the public interest.

### Irrelevant information – Category A

#### *Relevant law*

15. Section 73 of the RTI Act allows an agency to delete or refuse information that is irrelevant to the scope of an access application.

#### *Findings*

16. I have reviewed the Category A Information which has been deleted by QPS on the basis that it was irrelevant to the access application. While this information is contained within documents which also contain information which responds to the access application, the deleted Category A information itself does not respond to the terms of the access application. Rather it relates to other management actions of QPS about:<sup>20</sup>
- conduct of other officers
  - recording overtime for cost purposes relating to deployment for bushfires and the state of emergency declared for bushfires in 2019
  - Road Policing Command QLiTE excessive data usage in October 2019; and
  - a warning order for a specific operation.
17. Accordingly, I find that the Category A Information can be deleted from the copies of the documents released to the applicant on the basis that it is irrelevant to the terms of the applicant's application for access.

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<sup>19</sup> In his submissions to OIC dated 1 March 2021, the applicant only continued to seek review of the refused information contained within pages 1-4, 42-52, 64, 70-77, 100-103, 107-109, 115-117 and 122-124. The applicant also sought review of the refused information contained in page 114, however, page 114 was released to the applicant in full by QPS.

<sup>20</sup> OIC's letter to the applicant dated 31 March 2021 provided the applicant with additional information regarding the nature of the other management actions of QPS.

## Contrary to the public interest information – Category B

### Relevant law

18. Under the RTI Act, access to information may be refused where its disclosure would, on balance, be contrary to the public interest.<sup>21</sup>
19. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:<sup>22</sup>
  - identify any irrelevant factors and disregard them
  - identify relevant public interest factors favouring disclosure and nondisclosure
  - balance the relevant factors favouring disclosure and nondisclosure; and
  - decide whether disclosure of the information would, on balance, be contrary to the public interest.
20. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of public interest lies in a particular case. I have carefully considered these lists, together with all other relevant information, in reaching my decision. Additionally, I have kept in mind the RTI Act's pro-disclosure bias<sup>23</sup> and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.<sup>24</sup>

### Findings

#### Irrelevant factors

21. During the external review, the applicant made a submission<sup>25</sup> which raised two irrelevant factors, being that:
  - disclosure of the information may cause embarrassment or loss of confidence in QPS;<sup>26</sup> and
  - the person who created the document containing the information was or is of high seniority.<sup>27</sup>
22. I have not taken these, or any other, irrelevant factors into account in reaching my decision.

#### Factors favouring disclosure

23. The applicant also submitted<sup>28</sup> that public interest factors favouring disclosure '*have not been significantly discharged*' and that disclosure of the remaining information sought could '*enhance QPS's transparency and accountability by allowing [the applicant] to*

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<sup>21</sup> Section 47(3)(b) and 49 of the RTI Act. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual. See Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 AIAL Forum 12, 14-16.

<sup>22</sup> Section 49(3) of the RTI Act.

<sup>23</sup> Section 44 of the RTI Act.

<sup>24</sup> Section 47(2) of the RTI Act.

<sup>25</sup> Submission dated 26 February 2021.

<sup>26</sup> Schedule 4, part 1, item 1 of the RTI Act.

<sup>27</sup> Schedule 4, part 1, item 4 of the RTI Act.

<sup>28</sup> Submission dated 26 February 2021.

verify Sgt [A]'s conduct was in accordance with his supervisory responsibilities as outlined within ... *'The Queensland Police Service Integrity Framework'*.

24. I consider the following public interest factors favouring disclosure arise in the circumstances of this matter:
- Disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability.<sup>29</sup>
  - Disclosure of the information could reasonably be expected to 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.<sup>30</sup>
  - Disclosure of the information could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.<sup>31</sup>
25. These public interest factors favouring disclosure of information will arise if disclosure could reasonably be expected to enhance the accountability and transparency of QPS regarding its management of staff, for example, by revealing background or contextual information for decisions. The Category B Information comprises information provided to management by other individual/s about the applicant. I accept that disclosing this information would advance these factors to some degree. However, having reviewed the information disclosed to the applicant and the information not disclosed, I consider that the information which QPS has disclosed to the applicant has furthered his understanding of what information was available to QPS and provided background information to management decisions made about the applicant. Accordingly, I afford these three public interest factors in favour of disclosure moderate weight in relation to the Category B Information.
26. The applicant submitted:<sup>32</sup>
- procedural fairness requires that the substance of an allegation be put to a subject officer and this has not occurred as there is information which has been released which has *'not been put to [the applicant] for response either by informal or formal processes'*
  - the applicant has been absent from the workplace since January 2020 because of a psychological injury incurred due to unreasonable management action
  - the applicant has commenced a WorkCover claim and further disclosure is required to *'establish whether a civil writ under common law may be taken against the QPS due to sustaining an injury and suffering loss of income'*; and
  - the applicant considers that disclosure of the information will demonstrate that his supervisor's *'conduct was not only unreasonable, but his behaviour was continually repeated, victimizing, intimidating and or threatening towards'* the applicant and disclosure would assist him in making a complaint and in substantiating his claim.
27. These submissions give rise to a consideration of the following public interest factors favouring disclosure:

<sup>29</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>30</sup> Schedule 4, part 2, item 3 of the RTI Act.

<sup>31</sup> Schedule 4, part 2, item 11 of the RTI Act.

<sup>32</sup> Submission dated 26 February 2021.

- Disclosure of the information could reasonably be expected to reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.<sup>33</sup>
  - Disclosure of the information could reasonably be expected to contribute to the administration of justice generally, including procedural fairness.<sup>34</sup>
  - Disclosure of the information could reasonably be expected to contribute to the administration of justice for a person.<sup>35</sup>
28. In terms of the public interest in ensuring fair treatment and procedural fairness, I note that, at common law, 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.<sup>36</sup> This does not mean that the person is entitled to access copies of all relevant material. Rather, the person must be provided with adequate information about the material that is credible, relevant and significant to the adverse finding to be made, so that the person can be given the opportunity to make effective representations to the decision-maker.<sup>37</sup> In the present circumstances, I have reviewed the information which has been disclosed to the applicant and it details information that was available to his supervisor, and actions taken, when making decisions about the management of the applicant's work performance. Given this, and noting the content of the Category B Information, I do not consider that disclosure of the Category B Information could reasonably be expected to advance the applicant's fair treatment or afford him procedural fairness. Therefore, I am satisfied that the fair treatment and procedural fairness factors are not relevant to the public interest test under the RTI Act in the circumstances of this matter. And, even if it could be accepted that they were relevant, they would warrant no more than low weight, given the nature of the Category B Information.
29. In relation to the public interest in the administration of justice for a person (that person being the applicant), having, as noted previously, reviewed the information which QPS has released to the applicant, I consider that it is sufficient to assist him to pursue a legal remedy, or evaluate whether a remedy is available or worth pursuing.<sup>38</sup> While the Category B Information would provide the applicant with some further detail or source material, it would not, in my view, advance or alter the applicant's understanding of the circumstances of which he is already aware, and therefore would not assist him in the pursuit of any actionable wrong. Consequently, I am satisfied that the public interest factor favouring disclosure, the administration of justice for a person factor, is not relevant to the public interest test under the RTI Act in the circumstances of this matter. And, even if it could be accepted that it was, it would only warrant low weight, given the nature of the Category B Information.
30. The applicant submitted that:<sup>39</sup>
- disclosure of the information could assist investigators from external agencies, such as the Human Rights Commission, Industrial Relations Commission and Workplace Health & Safety, and, if *'corrupt conduct is observed to have taken place'*, the Crime and Corruption Commission
  - if misconduct is identified within the information, he has an obligation to report it

<sup>33</sup> Schedule 4, part 2, item 6 of the RTI Act.

<sup>34</sup> Schedule 4, part 2, item 16 of the RTI Act.

<sup>35</sup> Schedule 4, part 2, item 17 of the RTI Act.

<sup>36</sup> *Kioa v West* (1985) 159 CLR 550 (*Kioa*) at 584 per Mason J.

<sup>37</sup> *Kioa* at 629 per Brennan J.

<sup>38</sup> *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).

<sup>39</sup> Submission dated 26 February 2021.

- he considers that QPS and his supervisor's management of him *'indicates that there was a clear bias against' him and 'the conduct amounted to unreasonable management action taken in an unreasonable manner'*; and
- in relation to the statistical data, he is *'conversant with the analytical layout of operations of these systems and to be provided with numbers that could have been fabricated in a constructed table from a word document is completely misleading the 'Office of the Information Commissioner'.'*

31. It is not OIC's role to determine whether there has been any maladministration or wrongdoing on the part of QPS or its officers in conducting workplace investigations. Rather, OIC is limited to a merits review of government agencies' decisions regarding access to<sup>40</sup> information under the RTI Act. However, the RTI Act recognises that the following public interest factors favouring disclosure may arise if:

- disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;<sup>41</sup> and
- disclosure of the information could reasonably be expected to reveal that the information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.<sup>42</sup>

32. Given the extent of the information which has been released to the applicant by QPS, I am satisfied that he has been provided with sufficient information to allow or assist inquiry into possible deficiencies in the conduct or administration of QPS or an official in the conduct of management decisions made about him. My careful review of the Category B Information leaves me satisfied that disclosure of that information could not reasonably be expected to further these two public interest factors. Therefore, I afford them no weight in the circumstances.

33. Finally, the applicant submitted<sup>43</sup> that the information should be disclosed as disclosure could reasonably be expected to contribute to the enforcement of the criminal law.<sup>44</sup> In support of this, the applicant stated:<sup>45</sup>

*In some of the disclosed correspondence, it is quite clear that Sgt [A] has made several false accusations against me. It is imperative that these matters are investigated, not only to prove my innocence, but also to see if Sgt [A] can be held accountable for his actions through prosecutions. Making intentionally false accusations against another person that leads to an investigation is a criminal offence and the accuser can be subsequently charged & prosecuted.*

34. It is clear from the applicant's submission that he considers that information already disclosed would contribute to the enforcement of the criminal law. What is unclear is how disclosure of the Category B Information to the applicant might advance this public interest factor. He is evidently of the view that he is already in possession of information which enlivens the criminal law and therefore, I consider there is nothing further to be achieved by disclosing the Category B Information. Beyond merely asserting its relevance, the applicant has not articulated a case for the application of this factor. Further, having carefully considered the Category B Information, I do not consider that there is anything within the Category B Information itself to suggest the type of nefarious objective on the part of the complainant that the applicant is suggesting. Based on all these considerations, I am satisfied that this factor favouring disclosure does not arise

<sup>40</sup> And, where relevant, amendment of.

<sup>41</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>42</sup> Schedule 4, part 2, item 12 of the RTI Act.

<sup>43</sup> Submission dated 26 February 2021.

<sup>44</sup> Schedule 4, part 2, item 19 of the RTI Act.

<sup>45</sup> Submission to OIC dated 1 March 2021.

for assessment in this case. Therefore, I afford this factor favouring disclosure no weight in the circumstances.

### **Factors favouring nondisclosure**

35. I consider the following public interest factors favouring nondisclosure arise in the circumstances of this matter:
- Disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy.<sup>46</sup>
  - Disclosure of the information could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person, whether living or dead.<sup>47</sup>
  - Disclosure of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information.<sup>48</sup>
  - Disclosure of the information could reasonably be expected to prejudice the management function of an agency or the conduct of industrial relations by an agency.<sup>49</sup>
  - Disclosure of the information could reasonably be expected to cause a public interest harm if disclosure could:
    - have a substantial adverse effect on the management or assessment by an agency of the agency's staff,<sup>50</sup> or
    - have a substantial adverse effect on the conduct of industrial relations by an agency.<sup>51</sup>
36. Factors favouring nondisclosure relating to privacy considerations and the protection of the personal information of other individuals are relevant to the public interest test I am required to apply. The nature of the Category B Information in this review is such that its disclosure could reasonably be expected to infringe on the personal sphere of individuals other than the applicant thus prejudicing their right to privacy. Additionally, disclosure of the Category B Information would disclose personal information of individuals other than the applicant thus causing a public interest harm. I am satisfied that these factors in favour of nondisclosure apply in the circumstances of this matter and should be afforded significant weight.
37. In terms of the other applicable factors favouring nondisclosure, relating to QPS's ability to obtain confidential information in the future and QPS's management and conduct of industrial relations, I am satisfied that these factors should also be afforded significant weight. While it is reasonable to expect staff, particularly managers, to monitor and provide information to senior officers about performance issues relating to other staff, I consider it equally reasonable that disclosure of the Category B Information may make staff reluctant to fully participate or to provide full and complete information, particularly where those communications convey concerns of a sensitive nature. Further, I consider that such disclosure would impact QPS's management functions and cause a public interest harm as disclosure of this type of information in these circumstances could have a substantial adverse effect on QPS's management of its staff.

<sup>46</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>47</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>48</sup> Schedule 4, part 3, item 16 of the RTI Act.

<sup>49</sup> Schedule 4, part 3 item 19 of the RTI Act.

<sup>50</sup> Schedule 4, section 3(c) of the RTI Act.

<sup>51</sup> Schedule 4, section 3(d) of the RTI Act.



### **Balancing the factors**

38. I have considered the pro-disclosure bias in deciding access to information.<sup>52</sup> On balance, I consider the public interest factors in favour of nondisclosure outweigh the public interest factors in favour of disclosure in relation to the Category B Information. Accordingly, I find that access to the Category B Information may be refused on the basis that its disclosure would, on balance, be contrary to the public interest.

### **DECISION**

39. I vary QPS's deemed decision and find that the Category A Information may be deleted under section 73 of the RTI Act and access to the Category B Information may be refused under sections 47(3)(b) and 49 of the RTI Act.
40. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**Assistant Information Commissioner Corby**

**Date: 9 June 2021**

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<sup>52</sup> Section 44 of the RTI Act.

## APPENDIX

### Significant procedural steps

Date	Event
25 September 2020	OIC received the application for external review.
29 September 2020	OIC notified QPS and the applicant that the application for external review had been accepted and requested from QPS a copy of: <ul style="list-style-type: none"> <li>• a copy of the access application</li> <li>• any correspondence between QPS and the applicant in the processing of the application</li> <li>• any correspondence with consulted third parties; and</li> <li>• a copy of all documents relevant to the access application marked-up, if necessary, to reflect QPS's position on disclosure; and</li> <li>• a submission detailing any grounds for refusing access.</li> </ul>
30 September 2020	OIC received a copy of the access application and correspondence between QPS and the applicant from QPS.
23 October 2020	OIC received a submission from QPS.
26 October 2020	OIC received a marked-up copy of all documents relevant to the access application from QPS.
21 December 2020	OIC conveyed a preliminary view to the applicant and requested QPS release information to the applicant as agreed.
12 February 2021	OIC received confirmation that QPS had released information to the applicant as agreed.
26 February 2021	OIC received a submission from the applicant.
31 March 2021	OIC conveyed a further preliminary view to the applicant.
19 April 2021	OIC received a submission from the applicant.