



Decision and Reasons for Decision

Citation:	<i>M87 and Queensland Corrective Services [2023] QICmr 48 (7 September 2023)</i>
Application Number:	317163
Applicant:	M87
Respondent:	Queensland Corrective Services
Decision Date:	7 September 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - application for correspondence about the applicant - accountability, transparency, fair treatment and administration of justice - personal information and privacy - whether disclosure would, on balance, be contrary to the public interest - section 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> and sections 47(3)(b) and 49 of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied to Queensland Corrective Services (**QCS**) under the *Information Privacy Act 2009 (Qld)* (**IP Act**) to access an email about him, which was sent between QCS officers during the period 31 December 2022 and 1 January 2023.¹
2. QCS decided² to neither confirm nor deny the existence of the requested document.
3. The applicant then applied³ to the Office of the Information Commissioner (**OIC**) for external review of QCS' decision.
4. For the reasons set out below, I vary QCS' decision and find that access may be refused to the requested document, on the basis its disclosure would, on balance, be contrary to the public interest.⁴

¹ The access application is dated 1 January 2023 and was received by QCS on 19 January 2023.

² Decision dated 9 February 2023.

³ The external review application is dated 15 February 2023 and was received by OIC on 27 February 2023.

⁴ Under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the *Right to Information Act 2009 (Qld)* (**RTI Act**). Section 67(1) of the IP Act sets out that an agency may refuse access to information in the same way and to the same extent that the agency could refuse access to the document under section 47 of the RTI Act were the document the subject of an access application under the RTI Act.

Reviewable decision

5. The decision under review is QCS' decision dated 9 February 2023.

Evidence considered

6. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix). The significant procedural steps taken during the external review are set out in the Appendix.
7. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information and the right to privacy and reputation.⁵ I consider a decision-maker will be '*respecting and acting compatibly with*' these rights and others prescribed in the HR Act, when applying the law prescribed in the IP Act and RTI Act.⁶ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.⁷

Information in issue

8. While I am unable to describe the content of the document requested by the applicant in any detail,⁸ I can confirm that it comprises a two page email chain between QCS officers (**Information in Issue**).

Issue for determination

9. External review by the Information Commissioner⁹ is merits review.¹⁰ As such, the Information Commissioner has the power to decide any matter in relation to an application that could have been decided by the agency, under the IP Act.¹¹
10. As noted in paragraph 2 above, QCS decided to neither confirm nor deny the existence of documents responding to the application. Under section 69 of the IP Act, an agency is entitled to neither confirm nor deny the existence of a document where, assuming the existence of the document, it would contain prescribed information.¹² Generally, that provision will only apply where confirming the very existence of documents is likely to cause the harm that an agency would otherwise seek to avoid by refusing access to the relevant information.¹³

⁵ Sections 21 and 25 of the HR Act. I have also given specific consideration to the right of recognition and equality before the law (section 15 of the HR Act), given the applicant's reference, in the external review application, to his right to protection from discrimination.

⁶ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111]. I note that OIC's approach to the HR Act set out in this paragraph was considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (where Judicial Member McGill saw '*no reason to differ*' from our position).

⁷ I also note the following observations made by Bell J in *XYZ* at [573], on the interaction between equivalent pieces of Victorian legislation (namely, the *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)): '*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.*'

⁸ Section 121(3) of the IP Act which relevantly requires the Information Commissioner not to disclose information that is exempt or claimed to be contrary to the public interest information in a decision or reasons for a decision.

⁹ Or delegate.

¹⁰ That is, an administrative reconsideration of a case which can be described as 'stepping into the shoes' of the primary decision-maker to determine what is the correct and preferable decision.

¹¹ Section 118(1)(b) of the IP Act.

¹² Schedule 5 of the IP Act defines '*prescribed information*' as information, which is exempt pursuant to schedule 3, section 1, 2, 3, 4, 5, 9 or 10 or personal information the disclosure of which would, on balance, be contrary to the public interest.

¹³ Section 69(3) of the IP Act also confirms that a decision to neither confirm nor deny the existence of a document is a decision refusing access to the document under section 67.

11. During the review, I conveyed a preliminary view to QCS that, in the particular circumstances of this matter, section 69 of the IP Act could not apply to the application.¹⁴ QCS accepted this view.¹⁵
12. Accordingly, the issue for determination in this review is whether access to the Information in Issue may be refused on the ground that disclosure would, on balance, be contrary to the public interest.

Relevant law

13. Under section 40 of the IP Act, an individual has a right to be given access to documents of an agency to the extent they contain the individual's personal information.¹⁶ However, this access right is also subject to limitations, including grounds for refusal of access.¹⁷
14. One ground for refusing access is where disclosure of information would, on balance, be contrary to the public interest.¹⁸ 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.¹⁹
15. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:²⁰
 - 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.

Findings

16. I have not taken any irrelevant factors into account in making this decision.

Factors favouring disclosure

17. Some of the Information in Issue relates to the applicant and comprises his personal information. This gives rise to a factor favouring disclosure,²¹ to which I attribute high weight. However, this information about the applicant is intertwined with the personal information of other individuals to such an extent that it cannot be disclosed without also disclosing the personal information of those other individuals (giving rise to factors favouring nondisclosure discussed below).

¹⁴ On 23 May 2023. It is the practice of OIC to convey a preliminary view, based on an assessment of the material before the Information Commissioner or her delegate at that time, to an adversely affected participant. This is to explain the issues under consideration to the participant and affords them the opportunity to put forward any further information they consider relevant to those issues. It also forms part of the Information Commissioner's processes for early resolution of external reviews.

¹⁵ On 31 May 2023. Therefore, that provision is not examined in these reasons for decision.

¹⁶ '*Personal information*' is defined in section 12 of the IP Act 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*'.

¹⁷ The grounds on which access can be refused are set out in section 47 of the RTI Act. As noted above, section 67(1) of the IP Act provides that access may be refused to information in the same way and to the same extent as information may be refused under the RTI Act.

¹⁸ Sections 47(3)(b) and 49 of the RTI Act.

¹⁹ However, there are some recognised public interest considerations that may apply for the benefit of an individual.

²⁰ Section 49(3) of the RTI Act.

²¹ Schedule 4, part 2, item 7 of the RTI Act.

18. The RTI Act recognises that public interest factors favouring disclosure will arise where disclosing information could reasonably be expected to:
- enhance the government's accountability²²
 - 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,²³ and
 - reveal the reason for a government decision and any background or contextual information that informed the decision.²⁴
19. There is a strong public interest in QCS, and its staff, being accountable for their treatment of prisoners. However, taking into account the particular nature of the Information in Issue, I do not consider its disclosure would advance these factors in any significant way and accordingly, I afford the factors relating to QCS' accountability and transparency²⁵ only low weight.
20. The applicant submitted that:
- he is aware '*word for word*' of what the Information in Issue states²⁶
 - he believes the Information in Issue was created '*as a form of reprisal*';²⁷ and
 - he has been discriminated against by certain QCS officers.²⁸
21. Factors favouring disclosure will arise where disclosing information could reasonably be expected to allow or assist enquiry into, or reveal or substantiate, deficiencies in the conduct of QCS or its officers.²⁹ I acknowledge that the applicant disagrees with the concerns he considers are raised by QCS officers within the Information in Issue. However, I am not satisfied that there is anything within the Information in Issue itself which gives rise to an expectation that its disclosure would reveal, or substantiate, any agency, or officer, conduct deficiencies. Accordingly, I find that these factors do not apply to favour disclosure of the Information in Issue.
22. Public interest factors favouring disclosure also arise where disclosing information could reasonably be expected to:
- advance the fair treatment of individuals in accordance with the law in their dealings with agencies³⁰
 - contribute to the administration of justice generally, including procedural fairness;³¹ and
 - contribute to the administration of justice for a person.³²
23. As noted above, the applicant submitted that he is aware of the contents of the Information in Issue. The applicant also confirmed that he has made a complaint to QCS

²² Schedule 4, part 2, item 1 of the RTI Act.

²³ Schedule 4, part 2, item 3 of the RTI Act.

²⁴ Schedule 4, part 2, item 11 of the RTI Act.

²⁵ Schedule 4, part 2, items 1, 3 and 11 of the RTI Act.

²⁶ In the external review application, the applicant submitted that the Information in Issue has been read to him on two occasions.

²⁷ Submissions dated 7 June 2023, as received by OIC on 13 June 2023. To avoid identifying the applicant, I am unable to provide further detail of this submission.

²⁸ Submissions dated 7 June 2023, as received by OIC on 13 June 2023. In these submissions, the applicant also referenced '*the continued un-ethical conduct of the two officers who in my opinion created this email*' and that '*QCS have done the wrong thing*'. In his submissions dated 30 July 2023 (received by OIC on 7 August 2023), the applicant raised similar concerns about officer conduct. The IP Act does not give OIC jurisdiction to investigate concerns about agency (or officer) conduct or agency processes. For this reason, I cannot address the applicant's concerns about the conduct of officers in this decision.

²⁹ Schedule 4, part 2, items 5 and 6 of the RTI Act.

³⁰ Schedule 4, part 2, item 10 of the RTI Act.

³¹ Schedule 4, part 2, item 16 of the RTI Act.

³² Schedule 4, part 2, item 17 of the RTI Act.

about the creation of the Information in Issue³³ and he has other complaint processes 'pending'.³⁴ I accept that disclosure of the Information in Issue would provide confirmation to the applicant about its contents. However, the applicant has commenced one complaint process based on information he already possesses and I consider it is reasonable to expect that separate disclosure processes may be available to the applicant in the pending complaint processes he described in his submissions. In light of these considerations, I am unable to determine how disclosure of the Information in Issue would, in any meaningful way, advance the fair treatment of the applicant in his dealings with QCS (or any other agency) or contribute to the general administration of justice. Accordingly, while these factors may apply,³⁵ I afford them only low weight.

24. In determining whether the disclosure of the Information in Issue could reasonably be expected to contribute to the administration of justice for the applicant, I must consider whether:³⁶

- 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.

25. The applicant submitted³⁷ that:

- while he knows the contents of the Information in Issue 'word for word', he wishes to tender the Information in Issue 'into evidence in relation to [his] pending human rights complaint and discrimination matter'; and
- it would be easier for him to provide a copy of the document to the relevant authorities in his complaint processes, rather than making reference to it.

26. In these circumstances, although disclosure of the Information in Issue may provide some assistance to the applicant in his existing and foreshadowed complaints, I am not satisfied that such disclosure is required to enable the applicant to pursue a legal remedy or evaluate whether a remedy (legal or otherwise) is available or worth pursuing.³⁸ On this basis, while this factor may also apply,³⁹ I afford it only low weight.

27. The applicant submitted⁴⁰ that QCS officers made up 'vexatious and damaging allegations' which he contends are within the Information in Issue. The RTI Act also recognises a factor favouring disclosure where disclosing information could reasonably be expected to reveal the information was incorrect, out of date, misleading, gratuitous, unfairly subjective, or irrelevant.⁴¹ Having carefully considered the Information in Issue (together with the applicant's submissions), there is nothing before me to suggest that this information is incorrect, out of date, misleading, gratuitous, unfairly subjective, or irrelevant. On this basis, I find that this factor does not apply to favour disclosure of the Information in Issue.

³³ Submissions dated 7 June 2023, received by OIC on 13 June 2023. I acknowledge that the applicant also expressed concern in these submissions about the outcome he anticipates from that existing complaint process.

³⁴ External review application.

³⁵ Schedule 4, part 2, items 10 and 16 of the RTI Act.

³⁶ *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] and *C98 and Cairns and Hinterland Hospital and Health Service* [2021] QICmr 46 (9 September 2021) at [26].

³⁷ External review application.

³⁸ I also note that the access right in the RTI Act is not meant to serve as an adjunct to separate court, or complaint, disclosure processes (*Phyland and Department of Police* (Unreported, Queensland Information Commissioner, 31 August 2011) at [24]).

³⁹ Schedule 4, part 2, item 17 of the RTI Act.

⁴⁰ Submissions dated 30 July 2023, received by OIC on 7 August 2023.

⁴¹ Schedule 4, part 2, item 12 of the RTI Act.

28. Taking into account the particular nature of the Information in Issue, I cannot identify any other public interest considerations favouring its disclosure.⁴²

Factors favouring nondisclosure

29. The RTI Act recognises that there is a public interest harm⁴³ in disclosing an individual's personal information to someone else and that disclosing information which could reasonably be expected to prejudice the protection of an individual's right to privacy gives rise to a public interest factor favouring nondisclosure.⁴⁴ The concept of 'privacy' is not defined in the IP Act or the RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their '*personal sphere*' free from interference from others.⁴⁵
30. Having carefully reviewed the Information in Issue, I am satisfied that it includes the personal information of individuals other than the applicant, which appears in a sensitive context. As noted above, the applicant's personal information within the Information in Issue is intertwined with the personal information of other individuals.
31. The applicant submitted⁴⁶ that, to facilitate disclosure, the names of the officers who wrote the email, and any recipients, can be redacted, as he has no need for them. He also provided⁴⁷ the disclosure consent of another individual, as he considers the remaining information within the Information in Issue relates to that individual and himself.
32. While I acknowledge that the applicant may, by reason of the circumstances outlined in paragraph 20, be aware of some of the Information in Issue, I am unable to address his speculation about the content of the Information in Issue. Given the sensitive and highly personal nature of this information, I am satisfied that its disclosure would be a significant intrusion into the privacy of other individuals. Although the circumstances outlined in paragraph 31 above may, in some respects, reduce the weight of privacy considerations for some of the Information in Issue, I find that this factor favouring nondisclosure of the Information in Issue is nonetheless deserving of significant weight,⁴⁸ particularly as there can be no restriction on the use, dissemination or republication of information disclosed under the IP Act. I am also satisfied that the extent of the harm that could be expected to arise from disclosing the Information in Issue would, given its nature, be significant. On this basis, I also afford significant weight to the public interest harm factor favouring nondisclosure.⁴⁹

⁴² Having carefully considered all factors listed in schedule 4, part 2 of the RTI Act, I cannot see how disclosing the Information in Issue could, for example, contribute to positive and informed debate on important issues or matters of serious interest (schedule 4, part 2, item 2 of the RTI Act); ensure oversight of expenditure of public funds (schedule 4, part 2, item 4 of the RTI Act); or contribute to the maintenance of peace and order (schedule 4, part 2, item 15 of the RTI Act). In the event that further relevant factors exist in favour of disclosure, I am satisfied that there is no evidence before me to suggest that any would carry sufficient weight to outweigh the significant weight that I have afforded to the public interest factors that favour the nondisclosure of the Information in Issue.

⁴³ Schedule 4, part 4, section 6 of the RTI Act.

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

⁴⁵ 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 paragraph 1.56.

⁴⁶ Submissions dated 7 June 2023, received by OIC on 13 June 2023.

⁴⁷ As an attachment to his submissions dated 7 June 2023, received by OIC on 13 June 2023. In this document, the individual consents to information about them being disclosed to the applicant.

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

⁴⁹ Schedule 4, part 4, section 6 of the RTI Act.

Balancing of the factors

33. I have taken into account the pro-disclosure bias of the IP Act.⁵⁰ For the reasons set out above, I am satisfied that the nondisclosure factors relating to the protection of privacy and personal information of other individuals are deserving of significant weight.
34. On the other hand, as some of the applicant's personal information appears within the Information in Issue, I have afforded high weight to the factor favouring disclosure of that information. However, that personal information of the applicant is inextricably intertwined with the personal information of other individuals. In addition, and for the reasons outlined above, I have identified additional disclosure factors which favour disclosure of the Information in Issue (such as those relating to accountability and transparency, fair treatment and the administration of justice). However, taking into account the nature of the Information in Issue, I have afforded these factors only low weight.
35. On balance, I am satisfied that the public interest factors favouring nondisclosure outweigh the factors favouring disclosure. Accordingly, I find that disclosure of the Information in Issue would, on balance, be contrary to the public interest and access may be refused on this basis.⁵¹

DECISION

36. For the reasons set out below, I vary QCS' decision and find that access to the Information in Issue may be refused, as its disclosure would, on balance, be contrary to the public interest.⁵²
37. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

T Lake
Principal Review Officer

Date: 7 September 2023

⁵⁰ Section 64 of the IP Act.

⁵¹ Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

⁵² Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

APPENDIX**Significant procedural steps**

Date	Event
27 February 2023	OIC received the external review application.
29 March 2023	OIC notified the applicant and QCS that the external review application had been accepted and asked QCS to provide a copy of Information in Issue and a submission addressing QCS' disclosure position.
14 April 2023	OIC received QCS' submissions.
21 April 2023	OIC asked QCS to provide a copy of the Information in Issue.
2 May 2023	OIC received the requested information from QCS.
23 May 2023	OIC conveyed a preliminary view to QCS that, while it was not entitled to neither confirm nor deny the existence of the Information in Issue, access may be refused on the ground disclosure would, on balance, be contrary to the public interest.
31 May 2023	QCS accepted OIC's preliminary view.
1 June 2023	OIC conveyed a preliminary view to the applicant that access may be refused to the Information in Issue on the ground disclosure would, on balance, be contrary to the public interest. OIC invited the applicant to provide submissions if he disagreed with the preliminary view.
13 June 2023	OIC received the applicant's submissions.
12 July 2023	OIC conveyed a further preliminary view to the applicant.
7 August 2023	OIC received the applicant's further submissions.