



Decision and Reasons for Decision

Citation:	<i>Queensland Newspapers Pty Ltd and Department of Justice and Attorney-General</i> [2018] QICmr 52 (18 December 2018)
Application Number:	313895
Applicant:	Queensland Newspapers Pty Ltd (ACN 009 661 778)
Respondent:	Department of Justice and Attorney-General
Decision Date:	18 December 2018
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - audio recordings made by police in connection with a missing person/murder investigation - whether disclosure would, on balance, be contrary to the public interest - section 47(3)(b) and section 49 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to a copy of 'police audio/video and/or recordings of interviews and/or interactions and/or conversations relating to Gerard BADEN-CLAY and QLD Police Service between 20.04.2012 – 14.06.2012'.
2. The Department of Justice and Attorney-General (**DJAG**) located 50 audio recordings in response to the applicant's request. It decided² to refuse access to all recordings on the ground that their disclosure would, on balance, be contrary to the public interest.
3. The applicant applied³ to the Office of the Information Commissioner (**OIC**) for external review of DJAG's decision.
4. For the reasons set out below, I affirm DJAG's decision to refuse access to the audio recordings on the ground that disclosure would, on balance, be contrary to the public interest.

Background

5. On 20 April 2012, Mrs Allison Baden-Clay was reported missing by her husband, Mr Gerard Baden-Clay. Her body was found 10 days later. The police investigation, and

¹ Application dated 19 February 2018.

² Decision dated 26 March 2018.

³ Application dated 26 April 2018.

the subsequent trial of Mr Baden-Clay for his wife's murder, were some of the most high-profile and widely publicised events in Queensland's recent criminal history. Mr Baden-Clay was convicted of murder and given a life sentence. He successfully appealed the murder conviction to the Queensland Court of Appeal, which downgraded the conviction to manslaughter. However, following an appeal by the Director of Public Prosecutions (DPP), the High Court reinstated the murder conviction. All appeal processes have now concluded and Mr Baden-Clay is presently serving a custodial sentence for murder.

6. As part of the intensive police investigation into Mrs Baden-Clay's disappearance and death, officers of the Queensland Police Service audio recorded interviews and conversations between police and a number of persons, as well as the execution of search warrants at various locations.
7. Significant procedural steps relating to this external review are set out in the appendix to these reasons.

Reviewable decision

8. The decision under review is DJAG's decision dated 26 March 2018.

Evidence considered

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

Information in issue

10. The information in issue comprises 50 audio recordings, of varying lengths, of police interviews and conversations with a number of persons in connection with the investigation into the disappearance and death of Mrs Baden-Clay, including audio recordings of the execution of search warrants (**Information in Issue**).

Issue for determination

11. The issue for determination is whether disclosure of the Information in Issue would, on balance, be contrary to the public interest.

Relevant law – public interest balancing test

12. A ground for refusing access is where disclosure would, on balance, be contrary to the public interest.⁴ 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.⁵
13. The RTI Act lists factors which may be relevant to deciding the balance of the public interest⁶ and sets out the following steps⁷ to decide where the public interest lies in relation to disclosure of information:

⁴ Sections 47(3)(b) and 49 of the RTI Act.

⁵ For example, where disclosure of the information could reasonably be expected to contribute to the administration of justice for a person (schedule 4, part 2, item 17 of the RTI Act).

⁶ In schedule 4 of the RTI Act. However, this list is not exhaustive and factors not listed may be relevant in a particular case.

⁷ In section 49(3) of the RTI Act.

- 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 would, on balance, be contrary to the public interest.
14. No irrelevant factors, including those in schedule 4, part 1 of the RTI Act, arise for consideration in this case and I have taken none into account.

Factors favouring disclosure

15. In its decision, DJAG recognised the following factor favouring disclosure of the Information in Issue:
- disclosure would allow greater access to government-held information and enhance the government's accountability.
16. In the submissions that accompanied its application for external review,⁸ the applicant identified the following factors as favouring disclosure:
- disclosure could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability⁹
 - disclosure could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest;¹⁰ and
 - disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official.¹¹

Factors favouring disclosure

17. The central public interest factors favouring nondisclosure are:
- disclosure could reasonably be expected to prejudice the protection of a person's right to privacy;¹² and
 - disclosure could reasonably be expected to cause a public interest harm by disclosing personal information of individuals.¹³
18. The definition of 'personal information' in the RTI Act¹⁴ refers to the definition in the *Information Privacy Act 2009* (Qld) (**IP Act**), which provides that:¹⁵
- Personal information is 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.*
19. The RTI Act recognises that disclosure would cause a public interest harm if it would disclose personal information of a person, whether living or dead.

⁸ Dated 26 April 2018.

⁹ Schedule 4, part 2, item 1 of the RTI Act.

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

¹¹ Schedule 4, part 2, item 5 of the RTI Act.

¹² Schedule 4, part 3, item 3 of the RTI Act.

¹³ Schedule 4, part 4, section 6 of the RTI Act.

¹⁴ Section 10 and schedule 5 of the RTI Act.

¹⁵ Section 12 of the IP Act.

Discussion

20. The applicant submitted¹⁶ that the Baden-Clay case was one of the most high-profile murder investigations in recent Australian history and that it would use the Information in Issue to *'further open discussion about the criminal justice system, and the role of police and the judiciary, to enhance government accountability'*. It also submitted that the murder trial and subsequent appeals garnered significant public interest and that thousands attended a rally to protest at the Court of Appeal's decision to downgrade the murder conviction. The applicant argued that allowing it access to the Information in Issue would allow further positive and informed debate on the matter.
21. In respect of factors favouring nondisclosure, the applicant submitted that there would be no prejudice to the protection of any person's right to privacy because the majority of the Information in Issue would likely already be in the public domain via the criminal trial, where a number of taped interviews had been played to the jury. Further, any recordings that were not tendered as exhibits in the criminal proceedings, *'likely touched on the same topics'*. The applicant also referred to the information contained in the detailed summing up given to the jury by The Honourable Justice Byrne. The applicant argued that where Information in Issue has already been aired in public, release under the RTI Act will not constitute a *'disclosure'* and it cannot reasonably be expected that release will prejudice the protection of an individual's right to privacy.¹⁷
22. In response, I expressed the preliminary view to the applicant that any public interest in disclosure was outweighed by the strong public interest in protecting the personal information and the right to privacy of those persons concerned with the Information in Issue.¹⁸ I acknowledged the high-profile nature of the Baden-Clay case, and the intense publicity that surrounded it. I also noted the wealth of information already in the public domain about the investigation and subsequent trial of Mr Baden-Clay, as well as the fact that all court processes had concluded and that Mr Baden-Clay was currently serving a custodial sentence for murder.
23. The Information in Issue records police interactions with numerous persons. I accept that much of the information was presented in evidence by the DPP at Mr Baden-Clay's trial and is on the public record. A number of the audio recordings were played to the jury during the trial. This information has been discussed and analysed in detail not only in the context of the trial itself, where the media reported daily on the evidence that was presented, but also in the extensive media coverage and expert analysis and opinion that surrounded and followed the trial. I expressed to the applicant that disclosure of such information under the RTI Act would not advance the public interest in any way. It would not enhance the accountability of the police for the manner in which they conducted the investigation, nor the accountability of the DPP for the manner in which that office conducted the prosecution. From their point of view at least, the criminal trial of Mr Baden-Clay was successful and resulted in a conviction for murder. Furthermore, I noted that the Information in Issue was not relevant, and would not lead, to an enhanced understanding of the Court of Appeal's decision to downgrade the conviction to manslaughter. That decision was based solely on the evidence presented at the criminal trial and which is contained in publicly-available transcripts. The same is true of the High Court's decision to overturn the Court of Appeal's decision.

¹⁶ Submissions dated 26 April 2018.

¹⁷ The applicant relied upon OIC's decision in *Queensland Newspapers and Department of Justice and Attorney-General: Carmody (Third Party)* [2016] QICmr 23 (27 June 2016) (**Carmody decision**) wherein the then RTI Commissioner observed at [191]: *'If the public is already aware of information, by whatever means, the public interest in protecting a person's privacy regarding that information is necessarily lessened'*.

¹⁸ Letter to the applicant dated 8 August 2018.

24. As I was unable to identify anything in the Information in Issue that would give rise to any suggestion of deficiencies in the conduct or administration of an agency or official in connection with the police investigation or subsequent trial, I advised the applicant that I did not consider that disclosure could reasonably be expected to allow or assist inquiry into any such deficiency.
25. In terms of the information contained in the recordings that was not already in the public domain via the trial process, I expressed the view that such information was assessed by the police and DPP as being irrelevant to the prosecution of Mr Baden-Clay and was therefore not relied upon at trial. Given that the audio recordings run for the entire duration of, for example, a visit to a witness's home to discuss unfolding events, the recordings capture a great deal of ancillary information, including personal information of police officers and personal information of witnesses and other persons, that was wholly unrelated to the investigation.
26. Lastly, I explained to the applicant that I was unable to identify any information that was not already in the public domain where I considered that its disclosure could reasonably be expected to enhance the accountability of the police or the DPP for the manner in which they conducted the investigation and trial. Nor did I consider that disclosure of such information under the RTI Act could reasonably be expected to contribute to positive or informed debate on important matters or matters of serious interest, or that it would enhance the public's understanding of the events surrounding the investigation and trial. I noted that the justice system had run its course and the court process was open and transparent at all times. All information upon which the trial and subsequent appeals were based was already in the public domain.
27. I accepted that disclosure of the Information in Issue might possibly enhance the public's understanding of the manner in which police conduct an investigation, including the taking of statements and the execution of search warrants. However, while I acknowledged that there is a public interest in understanding and scrutinising the way in which a government agency conducts its publicly-funded operations, I advised the applicant that I would afford this public interest factor only low weight in the public interest balancing test, given that the methodologies used by the police appeared to have been standard policing techniques, and taking account of the information that was already publicly available about the manner in which the police investigation was conducted.
28. As to the public interest factors favouring nondisclosure, I expressed the view that the bulk of the Information in Issue was highly sensitive and highly personal information about a wide variety of persons who, given the nature of the information, as well as the information that was already in the public domain, were either identifiable or whose identities could reasonably be ascertained. The information therefore comprised their personal information and a public interest harm automatically arose from disclosure.
29. As noted above, the applicant submitted that the public interest in protecting an individual's right to privacy should be reduced because of the amount of information already in the public domain. However, while that may be true of a certain amount of information in the audio recordings, such information is sometimes inextricably intertwined with highly sensitive personal information that is not in the public domain.
30. In addition, I noted that there were a number of recordings of interviews or conversations with persons who were not called to give evidence at trial and whose statements were not tendered in evidence. Regardless of whether or not that information '*touched on the same topics*' as those interviews that had been aired at the trial, I expressed the preliminary view that there was a significant public interest in protecting the right to privacy of those persons.

31. I also stated that, while I accepted that the privacy interests of a person may be reduced where the relevant information is already in the public domain, that interest is reduced rather than destroyed.¹⁹ There exists a residual privacy interest that must be recognised. In this case, it is necessary to take account of the highly personal and extremely sensitive nature of the information in question and the significant detrimental impact that re-publication of this information could reasonably be expected to have on the residual privacy interests of the many persons involved in the investigation, including Mr and Mrs Baden-Clay's children, parents and siblings. Given that the court processes concluded nearly two and a half years ago, with the matter now largely out of the public eye, my view was that the public interest in protecting the right to privacy of the persons involved, and referred to, in the recordings, even in respect of information that was disclosed at trial, remained significant.
32. The applicant did not accept my preliminary views and made the following additional submissions in support of its case for disclosure of the Information in Issue:²⁰
- the fact that the court and appeal processes have concluded and that much of the Information in Issue was presented at trial and is already in the public domain is irrelevant to the applicant's application
 - the factors favouring disclosure identified by the applicant are not limited to the circumstances referred to above, but are broad and include disclosures that could reasonably be expected to promote open discussion of public affairs and that could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest
 - the Information in Issue undeniably falls into the above categories
 - that there has already been positive and informed debate on these issues does not diminish the significance of this factor: rather, it points to the seriousness and importance of the Information in Issue
 - while some parts of the Information in Issue were not led in evidence at trial, this does not necessarily mean that that information was assessed as irrelevant: it may have been inadmissible, or the police and the DPP may have made strategic decisions about what evidence they would and would not rely upon
 - even if some of the Information in Issue was irrelevant to the prosecution of Mr Baden-Clay, that does not mean it should not be disclosed under the RTI Act
 - the applicant's reporting of the Information in Issue will contribute to positive and informed debate on important issues as it will lead to a greater understanding of criminal proceedings and police investigations; and
 - if information has been published before, it is no longer private and there are no residual privacy interests to be protected.
33. The applicant also submitted that it was aware that a similar RTI application had been made by another media organisation to Queensland Police Service which resulted in the applicant being granted access to audio recordings produced in the course of the investigation into the death of a foster child, and the subsequent criminal prosecution of her foster family, the Thorburns. The applicant submitted that the same decision should be made in this case, in terms of balancing privacy interests against the public interest in disclosure.
34. Lastly, the applicant argued that, even if disclosure of some of the Information in Issue was decided to be contrary to the public interest, DJAG should consider whether deletion of that information would be practicable under section 75 of the RTI Act. The applicant

¹⁹ This is consistent with the views expressed in the Carmody decision – see footnote 17.

²⁰ Letter dated 24 August 2018.

stated that it would be prepared to assist in redacting, or cutting the audio recordings, if OIC or DJAG were to identify which parts of the recordings ought not to be released.

35. Having given careful consideration to the applicant's further submissions, I am not persuaded to alter the preliminary view I had formed in this matter,²¹ namely, that disclosure of the Information in Issue would, on balance, be contrary to the public interest.
36. Given the wealth of information already in the public domain concerning the Baden-Clay case, I do not consider that disclosure of the Information in Issue would advance the public interest in open discussion of public affairs. Nor am I able to identify an important issue or matter of serious interest about which disclosure of the Information in Issue could reasonably be expected to contribute to a positive and informed debate. I acknowledge that disclosure of the Information in Issue could possibly contribute to an enhanced understanding of the way in which police investigations are conducted. However, I maintain that that factor should only be afforded low weight in the public interest balancing test given that standard policing techniques were used (interviews and search warrants) and taking account of the information that is already publicly available about the manner in which the police investigation was conducted.
37. In terms of information that is already in the public domain, I find that it is sometimes inextricably intertwined with highly sensitive personal information that is not in the public domain, the disclosure of which would be contrary to the public interest. Furthermore, the task of identifying precise information that is not in the public domain and redacting it from the tapes is not practicable under section 75 of the RTI Act given the number of recordings and the length of many of them. The applicant's proposal that all of the tapes be released to it to allow it to undertake their editing is not permissible under the RTI Act. The Information Commissioner has no discretion to release information that is contrary to the public interest information.²² In any event, even in respect of information that has already been released publicly, I maintain the view that the re-publication of this information in all the circumstances of this extremely high-profile and well-known case could reasonably be expected to cause a significant prejudice to the protection of the relevant persons' residual right to privacy.
38. I am unable to comment on the Thorburn case that the applicant contends raises similar issues. This matter was not the subject of external review before the Information Commissioner and I am not aware of the details of the access application, the specific information in issue, or the basis upon which the relevant agency may have made its decision. Each case must be considered on an individual basis in any event, and regard given to the particular circumstances of each. While, as I have said, I am not aware of the specifics of the Thorburn matter, I would simply observe that it may have been a relevant consideration in that case, in terms of privacy considerations, that all four members of the Thorburn family were charged with, and found guilty of, the commission of various criminal offences.²³ In the Baden-Clay case, only Mr Baden-Clay was charged with and convicted of an offence. The bulk of the audio recordings in issue are with persons not involved in the commission of a crime and I find that the public interest in protecting their personal information and their right to privacy is significant.

²¹ As expressed in my letter to the applicant dated 5 September 2018.

²² Section 105(2) of the RTI Act.

²³ See, for example, <https://www.queenslandjudgments.com.au/case/id/301227> and <https://www.queenslandjudgments.com.au/case/id/306924> (accessed 12 December 2018).

Balancing the public interest

39. As noted above, ‘public interest’ refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. It is important to bear in mind what the courts have said the public interest is not, namely, *‘that which gratifies curiosity or merely provides information or amusement...’* Similarly it is necessary to distinguish between what is in the public interest and what is of interest to know’.²⁴
40. Having carefully reviewed the Information in Issue, I am satisfied that the information which is not already in the public domain and which was not disclosed at trial can fairly be characterised as information of the above kind. That is, while it may be interesting to know, it is not in the public interest in the sense of affecting the good order and functioning of the community and government affairs for the well-being of citizens. I do not consider that its disclosure would serve to advance, in any material way, the public interest in the accountability of government agencies or of public officers for their handling of the Baden-Clay case, or enhance scrutiny of the justice system generally. Nor do I consider its disclosure could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest. Sufficient information already exists in the public domain to allow scrutiny of the investigation and trial.
41. To the extent that disclosure of the Information in Issue may enhance the public’s understanding of police actions and methodologies in conducting a major investigation, I afford this factor low weight, for the reasons explained above.
42. While I recognise the pro-disclosure bias contained in the RTI Act, I am not satisfied that the release of information under the RTI Act that is already in the public domain would advance the public interest. Moreover, even though some of the Information in Issue might already be publicly available information, the public interest in protecting the residual privacy interests of the multiple persons involved, and referred to, in the Information in Issue remains significant. This is because of the information’s highly personal and highly sensitive nature, and the likely prejudicial effect on the privacy interests of many persons that its fresh disclosure would have, nearly two and a half years after the conclusion of the judicial process.

Finding

43. I afford significant weight to the following two public interest factors favouring nondisclosure:
- disclosure could reasonably be expected to prejudice the protection of a person’s right to privacy; and
 - disclosure could reasonably be expected to cause a public interest harm by disclosing personal information of individuals.
44. I afford low weight to the public interest in enhancing the public’s understanding of the Baden-Clay police investigation. I am not satisfied that any of other public interest factors favouring disclosure relied upon by the applicant apply to the Information in Issue.
45. I therefore find that disclosure of the Information in Issue would, on balance, be contrary to the public interest.

²⁴ *DPP v Smith* [1991] VR 63 at 73.

DECISION

46. I affirm the decision under review. I decide that access to the Information in Issue may be refused under section 47(3)(b) of the RTI Act.
47. I have made this decision under section 110 of the RTI Act as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Louisa Lynch
Right to Information Commissioner
Date: 18 December 2018

Appendix

Significant procedural steps

Date	Event
26 April 2018	Office of the Information Commissioner (OIC) received the applicant's application for external review and accompanying submissions.
15 May 2018	OIC wrote to the applicant and to the Department of Justice and Attorney-General (DJAG) advising that the application for external review had been accepted.
17 May 2018	OIC received the Information in Issue from DJAG.
8 August 2018	OIC completed a review of the Information in Issue and communicated a preliminary view to the applicant.
24 August 2018	OIC received written submissions from the applicant.
5 September 2018	OIC communicated a further preliminary view to the applicant and advised that, if a written decision was required to finalise the review, it may take up to four months to issue, given the large number of external reviews currently on hand.
10 September 2018	OIC received a letter from the applicant advising that it did not agree to informal resolution of the review and requesting a formal decision.