



Decision and Reasons for Decision

Citation:	<i>Cherry and Department of Justice and Attorney-General</i> [2021] QICmr 26 (4 June 2021)
Application Number:	315260
Applicant:	Cherry
Respondent:	Department of Justice and Attorney-General
Decision Date:	4 June 2021
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - personal information of other individuals, including deceased persons - safeguarding personal information and the right to privacy of other individuals - avoiding prejudice to flow of information to law enforcement agencies - whether disclosure would, on balance, be contrary to the public interest - section 47(3)(b) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of Justice and Attorney-General (**the Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to witness statements 'tendered or referred to' during the committal and trial of the applicant for the murder of two individuals to whom he was related.²
2. The Department located various witness statements relevant to the access application. By decision dated 26 February 2020, the Department decided³ to:
 - refuse to deal with the access application, insofar as it sought access to 75 pages of witness statements, on the basis these statements were the subject of a previous application for the same documents (**Category 1 Information**); and
 - refuse access to 297 full pages and parts of 43 pages, on the ground disclosure of this latter information would, on balance, be contrary to the public interest (**Category 2 Information**).

¹ Application dated 19 November 2019.

² The statements were listed in an annexure to the applicant's access application.

³ Decision dated 26 February 2020. Under section 43 and sections 47(3)(b) and 49 of the RTI Act respectively. The Department also decided to release 31 pages in full, and refuse access to five witness statements under sections 47(3)(e) and 52(1) of the RTI, on the basis these statements were nonexistent or unlocatable.

3. By application dated 4 March 2020,⁴ the applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.⁵
4. During the review, I accepted submissions from the applicant⁶ that his access application was not a previous application for same documents subject to the application of section 43 of the RTI Act, to the extent it requested access to the Category 1 Information. I advised the Department of my view in this regard,⁷ which it did not contest.⁸
5. The consequence of the above is that no grounds exist to refuse to deal with that part of the applicant's access application that seeks access to the Category 1 Information. For the reasons set out below, however, I find that:
 - Access to those pages of the Category 1 Information to which the applicant continues to seek access⁹ may, however, be refused, on the ground that disclosure would, on balance, be contrary to the public interest.
 - Access may also, as the Department decided, be refused to the Category 2 Information, on the same grounds.

Background

6. Significant procedural steps are set out in the appendix to this decision.

Reviewable decision

7. The decision under review is the Department's decision dated 26 February 2020.

Evidence considered

8. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).
9. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹⁰ 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 *Information Privacy Act 2009* (Qld) (**IP Act**) and RTI Act.¹¹ 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:¹² '*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*'.¹³

⁴ Received 11 March 2020.

⁵ In his application for external review, the applicant stated that he did not seek review of the Department's decision to refuse access to five witness statements under sections 47(3)(e) and 52(1) of the RTI, and I have therefore not addressed that aspect of the Department's decision in these reasons.

⁶ Dated 10 November 2020.

⁷ Email dated 23 April 2021.

⁸ Email from the Department dated 29 April 2021.

⁹ In his application for external review, the applicant stated that he did not seek access to the statements of certain individuals that the Department's decision decided to refuse to deal with under section 43 of the RTI Act. In my letter to the applicant dated 16 October 2020, I noted this advice and identified the statements remaining in issue. These comprise 42 of 75 pages dealt with in this aspect of the Department's decision.

¹⁰ Section 21 of the HR Act.

¹¹ *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].

¹² *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹³ *XYZ* at [573].

10. The applicant's submissions¹⁴ refer to section 59(2) and (4) of the HR Act. Respectively, these provisions note that a person can seek relief regarding the unlawfulness of a public entity's conduct under section 58 of the HR Act even if the other cause of action on which that action is 'piggybacked' is unsuccessful; and that section 59 does not affect the person's right to seek other relief regarding a public entity's conduct, including judicial review and declaratory remedies. While these provisions clarify avenues for relief, they have no bearing on the operation of section 58 of the HR Act itself – which, as noted above, I have acted in accordance with in making this decision.

Information in issue

11. The 'information in issue' comprises the 42 pages of Category 1 Information to which the applicant continues to seek access,¹⁵ and all of the Category 2 Information:¹⁶ in total, 339 full pages and 43 part pages of various witness statements.

Issue for determination

12. The issue for determination in this review is whether disclosure of the information in issue would, on balance, be contrary to the public interest.

Relevant law

13. Under the RTI Act, a person has a right to be given access to documents of an agency.¹⁷ This right is, however, subject to limitations, including grounds for refusal of access.¹⁸ Relevantly, access may be refused to documents where disclosure would, on balance, be contrary to the public interest.¹⁹
14. The RTI Act requires a decision-maker to take the following steps in deciding the public interest:²⁰
 - identify any irrelevant factors and disregard them
 - identify relevant public interest factors favouring disclosure and nondisclosure of relevant information
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosure of the information would, on balance, be contrary to the public interest.
15. Schedule 4 to the RTI Act contains non-exhaustive lists of irrelevant factors, and factors favouring disclosure and nondisclosure. I have had regard to the entirety of schedule 4 in reaching this decision, considered whether any other public interest considerations may be relevant,²¹ and disregarded irrelevant factors stated in schedule 4, part 1 of the RTI Act. I have followed the steps prescribed in section 49 of the RTI Act, and also kept in mind both the RTI

¹⁴ Dated 10 November 2020.

¹⁵ See footnote 9.

¹⁶ 297 pages and 43 part pages.

¹⁷ Section 23(1)(a) of the RTI Act.

¹⁸ Section 47 of the RTI Act sets out the grounds on which access may be refused to information.

¹⁹ Section 47(3)(b) 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. Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 *AIAL Forum* 12, 14.

²⁰ Section 49 of the RTI Act.

²¹ I.e., considerations beyond the factors expressly prescribed in the lists stated in schedule 4 of the RTI Act.

Act's pro-disclosure bias,²² and Parliament's intention that grounds for refusing access to information be interpreted narrowly.²³

Findings

Factors favouring disclosure

16. I recognise the general public interest in promoting access to government-held information,²⁴ and the public interest in:
 - disclosing to a person their own personal information²⁵ and
 - disclosing to eligible family members personal information of deceased persons.²⁶
17. As a general public interest factor, the public interest in advancing access to government-held information warrants a concomitantly 'general', or modest, weight.
18. As for the remaining factors identified in paragraph 16, the substance of the information in issue concerns events the subject of committal, trial and appeal proceedings. While I note the applicant's protestations that he has not had access to this information,²⁷ I am satisfied that he has a more than passing knowledge of matters traversed in this information, as a consequence of his status as defendant and appellant and via the operation of relevant rules of criminal practice and procedure.
19. Given this, I am not persuaded that disclosure to the applicant of the information in issue is likely to significantly enhance his knowledge or comprehension of the events to which it relates. Accordingly, I attribute only moderate weight to each factor.
20. In conducting this review, I originally considered that several 'administration of justice factors'²⁸ and considerations²⁹ may apply to favour release of information to the applicant.³⁰ However, having had the opportunity to further consider the information in issue, and the applicant's submissions, my view now is that none of these factors apply to favour disclosure of any of the information in issue. There is, in short, no probative material before me justifying the application of any of these considerations.
21. The applicant speculates that the information in issue may contain exculpatory information, disclosure of which may assist him in pursuing an application for special leave to appeal to the High Court, a re-opening of a coronial inquest into the death of one of the persons for whose murder he was convicted, or a possible pardon.³¹ I can, however, identify nothing in the information in issue – all of which, as I understand, existed at the time of the applicant's trial

²² Section 44 of the RTI Act.

²³ Section 47(2)(a) of the RTI Act.

²⁴ Implicit in, for example, the objects of the RTI Act.

²⁵ Schedule 4, part 2, item 7 of the RTI Act. 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': section 12 of the IP Act, schedule 5 of the RTI Act.

²⁶ Schedule 4, part 2, item 9 of the RTI Act. Significant portions of the information in issue comprise information about two persons who are deceased, being the applicant's wife and stepdaughter. As a spouse and parent of those deceased persons, the applicant is an 'eligible family member' within the meaning of the definition stated in schedule 5 of the RTI Act.

²⁷ Submissions dated 6 May 2021, received on 12 May 2021.

²⁸ A public interest factor favouring disclosure will arise if disclosing information could reasonably be expected to contribute to the administration of justice for a person, for example, by allowing a person subject to adverse findings or conviction access to information that may assist them in mounting a defence or clearing their name: schedule 4, part 2, item 17 of the RTI Act. Similar factors arise for consideration where disclosure could reasonably be expected to enhance the fair treatment of individuals in accordance with the law in their dealings with agencies (schedule 4, part 2, item 10 of the RTI Act), contribute to the administration of justice generally including procedural fairness (schedule 4, part 2, item 16 of the RTI Act), or contribute to the enforcement of the criminal law (schedule 4, part 2, item 18 of the RTI Act).

²⁹ Arguably arising under provisions of the HR Act, such as sections 29(3) and 59.

³⁰ See my letter to the applicant dated 16 October 2020.

³¹ Submissions dated 6 May 2021, received on 12 May 2021.

and subsequent appeal against conviction – which might assist the applicant in any of these endeavours.

22. Nor can I identify any objective material tending to substantiate his related avowals that he has been denied fair treatment,³² or subject to a maladministration of the law. Further, in terms of the applicant's submissions about the denial of his right to liberty, I am unable to identify any objective material to indicate that he has been deprived of liberty other than on grounds, and in accordance with procedures, established by law.³³ On the contrary, I note that the applicant was convicted following a lawful trial, an appeal against which was subsequently dismissed.³⁴
23. Additionally, there is no aspect of the criminal law, enforcement of which could reasonably be expected³⁵ to be aided by disclosure to the applicant of the statements of others.³⁶
24. None of these administration of justice factors or considerations operate to favour disclosure of the information in issue.

Factors favouring nondisclosure

25. As for factors favouring nondisclosure, the information in issue comprises both the personal information of the individuals who made relevant statements, and others the subject of those individuals' statements: including the individuals in relation to whose deaths the applicant was convicted.³⁷ This information contains sensitive private information about others' personal circumstances, such as their daily activities, expressions of emotion and feelings. Given the very sensitive and private nature of the information discussed, my view is that the public interest harm resulting from unrestricted disclosure³⁸ of this personal information would be significant.³⁹
26. A public interest factor favouring nondisclosure will arise if disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy.⁴⁰ An additional factor favouring nondisclosure arises where the personal information is of a deceased individual, the applicant is an eligible family member of the deceased person and the disclosure of the information could reasonably be expected to impact on the deceased person's privacy if the deceased person were alive.⁴¹

³² Noting, again, the fact that the applicant had the opportunity to test relevant matters by way of appropriate appeal processes, which opportunity he pursued.

³³ Section 29(3) of the HR Act.

³⁴ *R v Cherry* [2004] QCA 328 (**Cherry**).

³⁵ The phrase 'could reasonably be expected' requires a decision-maker to distinguish '*between what is merely possible ... and expectations that are reasonably based*' and for which '*real and substantial grounds exist*': *B and Brisbane North Regional Health Authority* [1994] QICmr 1, a decision of the Information Commissioner analysing the equivalent exemption in the repealed *Freedom of Information Act 1992* (Qld), at [154]-[160]. Other jurisdictions have similarly interpreted the phrase '*as distinct from something that is irrational, absurd or ridiculous*': See *Smolenski v Commissioner of Police, NSW Police* [2015] NSWCATAD 21 at [34], citing *Commissioner of Police, NSW Police Force v Camilleri* (GD) [2012] NSWADTAP 19 at [28], *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [61] and *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at [190].

³⁶ In this regard, I note the applicant's submission dated 10 November 2020 contends that police did not act on crucial information conveyed by him. Even if there existed objective material to support these submissions, it is not in any way apparent to me how disclosure to him of information conveyed by others would address his assertions about the manner in which QPS handled a firearm, or his allusion to a failure on QPS's part to consider a missing individual in its investigations.

³⁷ This information satisfying the definition in section 12 of the IP Act, it being, in short, about individuals whose identity is apparent (or reasonably ascertainable) from the information.

³⁸ As Judicial Member McGill SC recently observed '*... the effect of the IP Act is that, once information has been disclosed, it comes under the control of the person to whom it has been disclosed. There is no provision of that Act which contemplates any restriction or limitation on the use which that person can make of that information, including by way of further dissemination*': *FLK v Information Commissioner* [2021] QCATA 46, [17]. These comments are equally applicable to access obtained via the cognate mechanisms of the RTI Act.

³⁹ Even allowing for considerations discussed below, at paragraph 29.

⁴⁰ Schedule 4, part 3, item 3 of the RTI Act. The concept of 'privacy' is not defined in the IP Act or RTI Act. It can, however, be viewed as the right of an individual to preserve their personal sphere free from interference from others – see 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 11 August 2008, at paragraph 1.56.

⁴¹ Schedule 4, part 3, item 5 of the RTI Act.

27. The information in issue concerns sensitive information about traumatic events affecting the lives of those giving the statements,⁴² and those the subject of those statements, including the applicant's deceased wife and stepdaughter. I am satisfied relevant information comes well within the personal sphere of those involved – including the deceased eligible family members – such that disclosure could, as the case may be, reasonably be expected to prejudice protection of an individual's right to privacy or impact on the deceased person's privacy if the deceased person were alive.
28. The two nondisclosure factors identified in paragraph 26 therefore also apply to favour nondisclosure of the information in issue.
29. The applicant submits⁴³ *[n]o statement that I have requested can expose the identity of the provider/witness of that statement because I have provided the identity of that provider/witness'*. The statements comprising the information in issue do not convey just the identities of the relevant individuals; rather, they convey those individuals' recollections regarding particular events. Even so, I acknowledge that the applicant has or had knowledge of much of the information in issue as a consequence of his central role in relevant criminal proceedings – which proceedings, the events giving rise to them, and witnesses' recollections of those events – were also the subject of contemporaneous media coverage. These considerations attenuate the very substantial privacy interests that might ordinarily affix to personal information of the kind in issue.
30. The applicant also submits⁴⁴ *[t]he right to privacy today is as equal to the privacy surrendered by each witness when they gave the statement when the cause of that statement would have been identified to them.* It is my understanding that the applicant contends that each individual who provided a statement 'surrendered' their privacy, and presumably the privacy of other individuals referred to in their statement, because they would have been made aware of *'the cause of that statement'*. It is reasonable to expect that the individuals in question provided their statements in the knowledge that they may be used in an investigation, and possibly a prosecution. This, however, cannot be equated with the individuals giving up for all time their right to privacy regarding the statements.
31. More than two decades have now passed since relevant proceedings and media coverage, such that I think it reasonable to consider the privacy interests attaching to the statements in issue have gained potency or strengthened somewhat in the many years between then and today. On the other hand, as noted above, I recognise that the use of the statements in the proceedings, and the applicant's (and others) consequent knowledge of information in those statements, somewhat attenuates the very substantial privacy interest that generally attaches to such sensitive personal information.
32. I am satisfied that the extent to which the statements were used does not, however, attenuate that privacy interest to any significant degree – or if it did, then, as noted above, my view is the effluxion of time between that use and today has substantially restored that interest. Given the sensitive nature of the information in the statements and the traumatic events they record, I am satisfied that these interests are only minimally reduced and remain significant. Accordingly, the public interest in avoiding prejudice to the protection of the privacy of others, both living and deceased, should be afforded substantial weight.

⁴² In this regard, I note that certain statements are those of professional law enforcement or forensic officers; while their personal information, I would not wish to contend that events traversed in their statements - generally, professional discharge of duties - traumatised those officers. The statements contain, however, sensitive personal information, including health information, about individuals other than the applicant.

⁴³ External review application at page 11.

⁴⁴ External review application at page 11. Applicant's emphasis.

33. Much of the information in issue comprises information provided to the Queensland Police Service (**QPS**) by members of the public. A public interest factor favouring nondisclosure arises if disclosing information could reasonably be expected to prejudice the flow of information to a law enforcement or regulatory agency.⁴⁵
34. There is a strong public interest in protecting the free flow of information to regulatory and enforcement agencies such as QPS, to enable them to fulfil their functions, particularly in respect of issues regarding public safety. Such information is often provided in the expectation it will be treated as confidential and be used only for the purpose of enforcing the law and protecting public safety. Routinely disclosing such information would tend to discourage individuals from coming forward with such information if they believe their personal information will be released. As such, I do not consider it irrational, absurd, remote or fanciful to expect that disclosing the information may deter others from supplying similar information to QPS in the future. This in turn would significantly prejudice QPS's ability to effectively discharge its law enforcement functions, for example, the investigation of serious crimes.
35. Given, however, the age of the information in issue, the fact that, as noted, it (or at least its substance) has been the subject of criminal court proceedings, and the general preparedness of many in the community to assist law enforcement in the investigation of serious crimes such as those of which the applicant was convicted, I do not wish to overstate the extent of this specific prejudice. I therefore afford it only moderate weight in balancing the public interest.

Public interest balancing

36. As discussed above, in my view the only considerations favouring disclosure of the information in issue are the general public interest in promoting access to government-held information, and, as regards some of the information in issue, the public interest in disclosing to an individual their own personal information and the personal information of a deceased family member. As noted, I afford these considerations moderate weight.
37. These pro-disclosure considerations are comfortably displaced by the strong public interest in safeguarding personal information⁴⁶ and protecting individual privacy (including the privacy of deceased persons): considerations of themselves sufficient, in my view, to tip the balance of the public interest in favour of nondisclosure. As noted, I afford these considerations significant weight. To these, however, may also be added the – in this case – moderately-weighted public interest in preserving the flow of information to law enforcement agencies.
38. There is a clear public interest in ensuring that government protects privacy and treats with respect the personal information it collects from members of the community.⁴⁷ This is particularly so in relation to information collected in a police investigation of very serious criminal offences.
39. Further, an important principle underpinning both the RTI Act and the IP Act is that individuals should have a measure of control over their own personal information, and, by extension, an access applicant should not be put in a position to control dissemination of the personal information of other individuals, unless the balance of the public interest requires otherwise in the circumstances of a particular case. Disclosure to the applicant of the personal information in issue in this case would prejudice that control, in circumstances where there are insufficient reasons to justify such prejudice.

⁴⁵ Schedule 4, part 3, item 13 of the RTI Act.

⁴⁶ As I explained to the applicant in my letters dated 16 October 2020 and 23 April 2021, the nature of the information in issue is such that it is not possible to separate his personal information from the personal information of others. Disclosure to him, therefore, of any his own personal information would entail disclosure of the personal information of others, thereby giving rise to a public interest harm.

⁴⁷ An expectation recognised by Parliament in enacting the IP Act.

40. In the circumstances, my view is that disclosure of the information in issue would, on balance, be contrary to the public interest. Access to that information may therefore be refused.⁴⁸

Applicant's submissions

41. The substance of the reasoning at paragraphs 16-40 was conveyed to the applicant by way of my letters dated 16 October 2020 and 23 April 2021.
42. The applicant's submissions in reply⁴⁹ (to the extent they remain relevant)⁵⁰ largely comprise assertions as to his innocence, seek to revisit other issues determined at trial (and on appeal),⁵¹ and/or to agitate forensic and evidentiary matters.
43. These are, in the main, matters well outside my jurisdiction; to the extent they do bear on public interest considerations within my authority to consider, I have addressed them above.
44. Finally, in submissions dated 10 November 2020 the applicant indicated that if refused access to the information in issue under the RTI Act, he would nevertheless explore alternative avenues. As I advised the applicant in my reply dated 23 April 2021, that is entirely a matter for the applicant, and of no relevance to the issues I am required to determine in this review.

DECISION

45. I vary that part of the Department's decision refusing to deal with part of the access application under section 43 of the RTI Act, and find instead that access to relevant information⁵² may be refused under section 47(3)(b) of the RTI Act, on the ground that disclosure would, on balance, be contrary to the public interest.
46. I otherwise affirm the Department's decision to refuse access and find that the balance of the information in issue, on the same ground; ie that disclosure would, on balance, be contrary to the public interest.
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.

A Rickard
Assistant Information Commissioner

Date: 4 June 2021

⁴⁸ Under section 47(3)(b) of the RTI Act.

⁴⁹ Dated 10 November 2020 and 6 May 2021, received 12 May 2021.

⁵⁰ Noting parts of his 10 November 2020 submissions sought to contest the application of section 43 of the RTI Act (previous application for same documents) to part of his access application, which submissions I, as noted above, accepted.

⁵¹ See in this regard the *'thorough and exhaustive analysis'*, to quote McPherson JA at [1], of relevant facts, inferences and conclusions as to criminal responsibility set out in the 30-plus page judgment of Jerrard JA in *Cherry*, at [4]-[124].

⁵² Ie, the Category 1 Information discussed above.

APPENDIX

Significant procedural steps

Date	Event
11 March 2020	OIC received the applicant's application for external review dated 4 March 2020.
18 March 2020	OIC requested procedural documents from the Department.
19 March 2020	The Department supplied the requested procedural documents.
27 March 2020	OIC advised the applicant that as a consequence of COVID-19 lockdown measures, staff were working remotely and unable to send correspondence by post. OIC requested the applicant's agreement to suspension of the external review.
22 April 2020	OIC received a letter from the applicant, agreeing to suspend the external review.
29 April 2020	OIC advised the Department that the applicant's application for external review had been accepted, and requested a copy of the information in issue and other information.
1 May 2020; 19 May 2020	The Department supplied the requested information.
22 September 2020	OIC advised the applicant and the Department that the review was no longer suspended.
29 September 2020	OIC requested further information from the Department.
14 October 2020	The Department contacted OIC to clarify the status of requested information.
16 October 2020	OIC wrote to the applicant, conveying a preliminary view.
10 November 2020	OIC received submissions from the applicant in reply to OIC's preliminary view.
23 April 2021	OIC wrote to the applicant and the Department, conveying a further preliminary view.
29 April 2021	The Department advised OIC that it did not wish to make any submissions in reply to OIC's 23 April 2021 preliminary view.
12 May 2021	OIC received submissions from the applicant, dated 6 May 2021, in reply to OIC's 23 April 2021 preliminary view.