



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>E41 and Queensland Police Service [2022] QICmr 13 (17 March 2022)</i></b>
<b>Application Number:</b>	<b>316192</b>
<b>Applicant:</b>	<b>E41</b>
<b>Respondent:</b>	<b>Queensland Police Service</b>
<b>Decision Date:</b>	<b>17 March 2022</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST - access to response to allegations provided by third party in law enforcement investigation - transparency and accountability of police - administration of justice and procedural fairness for the applicant - prejudice another individual's right to privacy - public interest harm through disclosure of third party's personal information - prejudice to flow of information to law enforcement - whether disclosure would, on balance, be contrary to the public interest - whether access to information may be refused under section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and section 47(3)(b) of the <i>Right to Information Act 2009</i> (Qld)</b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied<sup>1</sup> to the Queensland Police Service (**QPS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to a third party's correspondence to QPS.
2. QPS did not make a decision within the relevant processing period<sup>2</sup> and instead issued a deemed decision.<sup>3</sup>
3. The applicant applied<sup>4</sup> to the Office of the Information Commissioner (**OIC**) for external review of the deemed decision.

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<sup>1</sup> Application dated 8 April 2021.

<sup>2</sup> If the applicant is not given a written notice of decision by the end of the processing period then the principal officer of the agency is taken to have made a decision refusing access to the documents (**deemed decision**) as per section 66 of the IP Act.

<sup>3</sup> Deemed decision dated 7 July 2021.

<sup>4</sup> Application dated 8 July 2021.

4. For the reasons set out below, I vary QPS's deemed decision refusing access<sup>5</sup> to the third party's correspondence, and find that disclosure would, on balance, be contrary to the public interest and access may be refused on this basis.<sup>6</sup>

## Background

5. The applicant was the director of multiple companies which appointed the third party as an administrator to oversee liquidation. The third party was later a witness in the applicant's criminal trial regarding his directorship of the companies. QPS was provided with a brief of evidence to support an allegation that the third party committed perjury. QPS sought the third party's response to the allegation. QPS advised the applicant it would not prosecute the third party for perjury after considering legal advice and the third party's response.<sup>7</sup>
6. The applicant seeks access to the third party's response to understand the reasons for QPS's decision not to prosecute<sup>8</sup> and to assist the applicant in achieving 'a fair and proper outcome to an ongoing legal matter.'<sup>9</sup>

## Reviewable decision

7. The decision under review is QPS's deemed decision of 7 July 2021.

## Evidence considered

8. Significant procedural steps taken during the external review are set out in the Appendix. In reaching my decision, I have considered the factual background set out in the applicant's submissions,<sup>10</sup> as well as all other submissions, evidence, legislation, and other material referred to throughout these reasons (including in footnotes and the Appendix).
9. I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>11</sup> 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 IP Act and the RTI Act.<sup>12</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>13</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>14</sup>

## Information in issue and issue for determination

10. The information in issue comprises correspondence from a third party to QPS in response to perjury allegations and contains information about individuals other than the applicant (**information in issue**).

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<sup>5</sup> Under section 67 of the IP Act, an agency may refuse access to a document in the same way and to the same extent as under section 47 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

<sup>6</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>7</sup> As outlined in the applicant's submission dated 26 October 2021.

<sup>8</sup> Applicant's submission received 26 October 2021.

<sup>9</sup> Applicant's submission received 8 July 2021.

<sup>10</sup> As outlined in the Appendix of this decision.

<sup>11</sup> Section 21(2) of the HR Act.

<sup>12</sup> *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; and *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

<sup>13</sup> *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>14</sup> *XYZ* at [573].

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

### Relevant law

12. Under 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.<sup>15</sup> However, this right is subject to the provisions of the IP Act including the grounds on which an agency may refuse access to documents access to documents may be refused to the extent they comprise information the disclosure of which would, on balance, be contrary to the public interest.<sup>16</sup> An agency may refuse access to exempt information<sup>17</sup> or to information the disclosure of which would, on balance, be contrary to the public interest.<sup>18</sup>
13. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:<sup>19</sup>
  - 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.
14. 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 considered these lists, together with all other relevant information, in reaching my decision. I have kept in mind the IP Act's pro-disclosure bias<sup>20</sup> and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.<sup>21</sup>

### Applicant's submissions

15. The applicant made submissions throughout the external review,<sup>22</sup> all of which I have carefully considered to the extent they are relevant to the issue for determination.
16. The applicant asserts that there would be no public interest harm in disclosure of the information in issue.<sup>23</sup> The applicant contends that release of this information '*is of critical importance in the execution of a fair and proper outcome to an ongoing legal matter*<sup>24</sup> and will '*assist [the applicant] in understanding the QPS' actions.*<sup>25</sup> I have taken these arguments into account as factors favouring disclosure, being to improve the accountability and transparency of QPS, and improve the administration of justice and procedural fairness.<sup>26</sup>

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<sup>15</sup> Section 40 of the IP Act.

<sup>16</sup> Section 47(3)(b) of the RTI Act.

<sup>17</sup> Schedule 3 of the RTI Act specifies the types of information that Parliament has determined are exempt because release would be contrary to the public interest.

<sup>18</sup> Section 67(1) of the IP Act and 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.

<sup>19</sup> Section 49(3) of the RTI Act.

<sup>20</sup> Section 64 of the IP Act.

<sup>21</sup> Section 67(2) of the IP Act and section 47(2) of the RTI Act.

<sup>22</sup> As outlined in the Appendix of this decision.

<sup>23</sup> Applicant's submissions received 8 July 2021, 13 September 2021, 26 October 2021 and 27 November 2021.

<sup>24</sup> Including evaluating the applicant's ability to pursue legal action. Applicant submissions 8 July 2021

<sup>25</sup> Applicant's submission received 26 October 2021.

<sup>26</sup> Schedule 4, part 2, items 1, 3, 11, 16 and 17 of the RTI Act.

17. The applicant submits that the third party *'was under no obligation to provide any response, but chose to freely.'* For this reason, *'release of [the] response would have zero effect on the public's perception of the sanctity of personal privacy.'*<sup>27</sup> I have taken this submission into account as a factor favouring nondisclosure and discuss this further below.
18. Finally, the applicant raises his limited resources to pursue access to the information in issue outside of the right to information process.<sup>28</sup> However, whether the applicant can afford other processes to access the information does not raise any factors favouring disclosure.

## Findings

### ***Contrary to the public interest***

#### **Irrelevant factors**

19. No irrelevant factors<sup>29</sup> arise in the circumstances of this case and I have not taken any into account in making my decision.

#### **Factors favouring disclosure**

20. Some of the information in issue comprises the applicant's personal information,<sup>30</sup> which is a factor favouring disclosure that I afford significant weight.<sup>31</sup> However, the applicant's personal information appears in the context of the third party's response to QPS and is intertwined in such a way that it cannot be disclosed without disclosing the personal information of the third party (which raises nondisclosure factors discussed below).<sup>32</sup>
21. The applicant submits that disclosure of the information in issue would enable him to evaluate his legal options,<sup>33</sup> which I understand relate to his allegation of perjury by the third party.<sup>34</sup> In determining whether the disclosure of the information in issue could reasonably be expected to contribute to the administration of justice for the applicant,<sup>35</sup> I must consider whether:<sup>36</sup>
  - 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.
22. I acknowledge that access to the information in issue may improve the applicant's evaluation of whether a remedy is available or worth pursuing. However, the right to information process is not an adjunct to other legal processes. It is evident that the

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<sup>27</sup> Applicant's submission received 26 October 2021.

<sup>28</sup> Applicant's submission received 26 October 2021.

<sup>29</sup> As outlined in schedule 4, part 1 of the RTI Act.

<sup>30</sup> 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.'*

<sup>31</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>32</sup> And is incapable of being severed from the personal information of third parties.

<sup>33</sup> Applicant's submissions received 8 July 2021

<sup>34</sup> Applicant's submission received 26 October 2021.

<sup>35</sup> Schedule 4, part 2, item 16 and 17 of the RTI Act.

<sup>36</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) at [16].

applicant has sufficient knowledge of the circumstances to commence legal proceedings without the disclosure of the information in issue through the right to information process. For this reason, I afford this factor favouring disclosure moderate weight.

23. The fundamental requirements of procedural fairness<sup>37</sup>—that is, an unbiased decision-maker and a fair hearing—should be afforded to a person who is the subject of an investigation or decision.<sup>38</sup> Although the applicant has raised general fairness arguments, he has not enunciated how disclosure of the information in issue would contribute to his fair treatment or procedural fairness. It is my understanding that the applicant was afforded an opportunity to respond to the charges against him in his criminal trial which is now finalised. In these circumstances, I am not satisfied that there is a reasonable expectation that disclosure of the information in issue would, in any meaningful way, advance the applicant's fair treatment or contribute to the general administration of justice, including procedural fairness. On this basis, while these factors may apply,<sup>39</sup> I afford them only moderate weight.
24. QPS must be transparent and accountable when dealing with allegations of a possible contravention of the law. The applicant submits that disclosure of the information in issue would assist his understanding of QPS's actions, including the decision not to continue the perjury charges.<sup>40</sup> This enlivens factors favouring disclosure including to improve the accountability and transparency of QPS' actions.<sup>41</sup> QPS advised the applicant that it was not pursuing the perjury allegations.<sup>42</sup> As the applicant has received an outcome to his allegation, this has discharged some of QPS's accountability and transparency. I accept that disclosure of the third party's correspondence would provide the applicant with a more complete picture of the information relied on by QPS in its decision not to pursue the allegation of perjury. However, the information in issue is limited to a third party's correspondence with QPS in response to the allegation, and not QPS's investigation or actions. Therefore, disclosure could only minimally improve the accountability and transparency of QPS's actions. For this reason, I afford the transparency and accountability factors moderate weight.

### Factors favouring nondisclosure

25. The RTI Act recognises that disclosing an individual's personal information to someone else can reasonably be expected to cause a public interest harm<sup>43</sup> and that disclosing information that could reasonably be expected to prejudice the protection of an individual's right to privacy gives rise to a public interest factor favouring nondisclosure.<sup>44</sup>
26. The information in issue contains the observations and perspectives of an individual other than the applicant (their *personal information*).<sup>45</sup> This information appears in the context of the third party's response to serious allegations of a possible contravention of the law which was found to be unsubstantiated. I consider that disclosing other individuals' highly sensitive personal information would be a significant intrusion into their privacy and the extent of the harm that would arise from its disclosure would be significant. The expected harm would include loss of public confidence in the law enforcement system and reduced effectiveness and efficiency in investigation process,

<sup>37</sup> Schedule 4, part 2, item 16 of the RTI Act.

<sup>38</sup> 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 (*Kioa v West* (1985) 159 CLR 550 at [584] per Mason J).

<sup>39</sup> Schedule 4, part 2, items 10 and 16 of the RTI Act.

<sup>40</sup> Applicant's submission received 26 October 2021.

<sup>41</sup> Schedule 4, part 2, items 1, 3 and 11 of the RTI Act.

<sup>42</sup> Applicant's submission 26 October 2021.

<sup>43</sup> Schedule 4, part 4, item 6 of the RTI Act.

<sup>44</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>45</sup> Section 12 of the IP Act.

as the public may limit the information they give to QPS if concerned that their personal information will be disclosed to others without their consent.

27. While the applicant may be aware of the third party's identity, this does not reduce the weight of these nondisclosure factors to any significant degree, as the IP Act does not have protections or controls on the dissemination of documents once released in this process. As noted above, parts of the information in issue contain the applicant's personal information. However, the applicant's personal information is unable to be disclosed, without disclosing the personal information of a third party due to the context in which the information in issue was provided. That is, the applicant made allegations of perjury against the third party and the relevant information appears in the context of the third party's response to such allegations.
28. The applicant provided a letter of authority signed by a person whom he believed may be mentioned within the information in issue. However, this authority does not serve to reduce the weight of the personal information and privacy protection factors in relation to the information in issue. Accordingly, I afford those factors significant weight in favour of nondisclosure.
29. Finally, the release of third party personal information which has been provided to and treated by QPS as confidential could reasonably be expected to prejudice the future flow of information.<sup>46</sup> The routine disclosure of third party personal information could reasonably be expected to discourage the public from providing comprehensive statements, negatively impacting QPS's ability to obtain information required to perform its investigative functions. On the information available to me the third party's response was provided voluntarily to QPS, which I consider heightens the risk of prejudice to the flow of information. In the circumstances, I afford significant weight to this factor favouring nondisclosure.

### **Balancing the public interest**

30. I have applied the pro-disclosure bias intended by Parliament<sup>47</sup> and with respect to the factors favouring disclosure, I give moderate weight to the public interest factors favouring disclosure as the information in issue could reasonably be expected to contribute to the administration of justice, including procedural fairness and enhance QPS's accountability and transparency.<sup>48</sup> I also consider that significant weight should be afforded to the public interest factor favouring disclosure of the applicant's personal information.<sup>49</sup>
31. The information in issue comprises the thoughts and recollections of a third party, against whom serious allegations were made and found to be unsubstantiated. The information in issue does not disclose the actions taken by QPS and the information was, as I understand, voluntarily provided to QPS by the third party. Further, the applicant's personal information cannot be separated to allow access without also revealing the personal information of the third party. Consequently, I have attributed significant weight to each of the public interest factors and public interest harm factor favouring nondisclosure of the information in issue relating to the third party's personal information and the reasonable expectation that disclosure would prejudice the flow of information to QPS and may impact on the ability for QPS to obtain similar information in the future.<sup>50</sup>

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<sup>46</sup> Schedule 4, part 3, items 13, 16 and schedule 4, part 4, item 8 of the RTI Act.

<sup>47</sup> Section 64 of the IP Act.

<sup>48</sup> Schedule 4, part 2, items 1, 3, 10, 11 and 16 of the RTI Act

<sup>49</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>50</sup> Schedule 4, part 3, items 13, 16 and schedule 4, part 4, item 8 of the RTI Act.

32. I consider that the significant weight of the public interest factors which favour nondisclosure of the information in issue, in this case, outweighs the public interest factors favouring disclosure. For these reasons, I find that disclosure of the information in issue would, on balance, be contrary to the public interest under section 49 of the RTI Act and access to it may be refused on that basis.

## **DECISION**

33. I vary QPS's deemed decision<sup>51</sup> and find that access to the information in issue may be refused under section 67(1) of the IP Act and section 47(3)(b) of the RTI Act as its disclosure would, on balance, be contrary to the public interest.
34. I have made this decision under section 123 of the IP Act, as a delegate of the Information Commissioner, under section 139 of the IP Act.

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**Shiv Martin**  
**Assistant Information Commissioner**

**Date: 17 March 2022**

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<sup>51</sup> I.e., the decision taken to have been made under section 46 of the RTI Act, refusing access to all information requested in the access application.

## Appendix

### Significant procedural steps

Date	Event
8 July 2021	OIC received the application for external review.
9 July 2021	OIC notified QPS that it had received the application for external review and requested preliminary documents from QPS.
29 July 2021	OIC received the preliminary documents from QPS.
2 August 2021	OIC notified the applicant that the external review application had been accepted.
3 August 2021	OIC notified QPS that the application for external review had been accepted and requested the information in issue and submissions from QPS.
2 September 2021	QPS requested an extension to provide the information in issue. OIC granted the extension request to QPS.
13 September 2021 20 September 2021	OIC received submissions from the applicant.
13 October 2021	OIC received the information in issue from QPS.
19 October 2021	OIC issued a preliminary view to the applicant.
20 October 2021	OIC issued a preliminary view to QPS.
26 October 2021	OIC received submissions from the applicant.
28 October 2021	OIC received a response from QPS.
12 November 2021	OIC issued a further preliminary view to the applicant.
26 November 2021	OIC received further submissions from the applicant. OIC issued a response to the applicant.
27 November 2021	OIC received further submissions from the applicant.
1 December 2021	OIC issued a response to the applicant.
12 February 2022	OIC received further submissions from the applicant.