



Decision and Reasons for Decision

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| Citation: | <i>D38 and Department of Child Safety, Seniors and Disability Services [2023] QICmr 56 (19 October 2023)</i> |
| Application Number: | 317218 |
| Applicant: | D38 |
| Respondent: | Department of Child Safety, Seniors and Disability Services |
| Decision Date: | 19 October 2023 |
| Catchwords: | ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - DISCLOSURE PROHIBITED BY ACT - information relating to a notification of suspicion of harm or suspected harm to a child - information about the affairs of a person other than the applicant - identifying notifier information which was acquired by a person carrying out functions under the <i>Child Protection Act 1999 (Qld)</i> - whether disclosure is prohibited by sections 186 - 188 of the <i>Child Protection Act 1999 (Qld)</i> - section 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> and 47(3)(a) and 48 of the <i>Right to Information Act 2009 (Qld)</i> |

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of Children, Youth Justice and Multicultural Affairs (**Department**)² under the *Information Privacy Act 2009 (Qld)* (**IP Act**) seeking access to child protection '*Notifications, Assessment & Outcomes, Review Reports, Case Notes & Documents relating to [specific date]*'.³
2. The Department located 81 pages in response to the application and decided⁴ to refuse access to 14 pages and parts of 50 pages on the ground the information comprised exempt information as its disclosure was prohibited by sections 186 - 188 of the *Child Protection Act 1999 (Qld)* (**Child Protection Act**).

¹ Dated 23 January 2023.

² Following a machinery of government change on 18 May 2023, the agency currently a party to this external review is the Department of Child Safety, Seniors and Disability Services.

³ The applicant had initially sought access to all electronic child safety documents in relation to the applicant as a parent for a specified timeframe. On 7 February 2023, the Department provided the applicant with a Notice of Intention to Refuse to Deal with the application pursuant to section 60 of the IP Act. Subsequently, the amended scope referred to in paragraph 1 was agreed between the parties.

⁴ Decision dated 13 March 2023.

3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.⁵
4. For the reasons set out below, I affirm the Department's decision and find that access to the information may be refused on the ground that it comprises exempt information.⁶

Background

5. Significant procedural steps in the external review are set out in the Appendix.
6. During the external review, the applicant made submissions to OIC which largely raised issues that are beyond OIC's external review jurisdiction, such as the applicant's dissatisfaction with the Department and their view that the Department's behaviour was corrupt and harmful.⁷ OIC has advised the applicant of the limits of OIC's jurisdiction, including that OIC cannot investigate complaints about the conduct of agencies.⁸ In making this decision, I address the applicant's submissions to the extent they are relevant to the issues for determination in the context of the remaining information in issue below.
7. Further, the applicant raised concern that there is inconsistency in how the Department has treated each parent. The applicant submits that the Department has provided the other parent with access to information, which is now being denied to them.⁹ In support of this the applicant provided an email from a Senior Child Safety Officer of the Department to the other parent which advised that records of interviews and assessment and outcome documents are available via right to information.¹⁰ While I note the Senior Child Safety Officer may have provided that advice, there is no information before me to indicate if the other parent made an access application under the RTI Act or IP Act, and if so, if access was provided to any information. Nevertheless, this has no bearing on the present review. My role in conducting a merits review is to 'step into the shoes' of the primary decision-maker, consider matters relating to the agency's decision afresh and determine the correct and preferable decision.¹¹

Reviewable decision

8. The decision under review is the Department's decision dated 13 March 2023.

Evidence considered

9. The evidence, submissions, legislation and other material I have considered in reaching this decision are set out in these reasons (including the footnotes and Appendix).
10. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the rights to seek and receive information, and the protection of families and children.¹² I consider a decision-maker will be '*respecting and acting compatibly with*' those rights

⁵ Received 3 April 2023.

⁶ Under section 67(1) of the IP Act and sections 47(3)(a), 48 and schedule 3, section 12(1) of the *Right to Information Act 2009* (Qld) (**RTI Act**). Section 67(1) of the IP Act provides 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.

⁷ Emails to OIC dated 3 April 2023, 11 May 2023, 23 June 2023 and 31 July 2023.

⁸ Letter to the applicant dated 28 July 2023.

⁹ Emails to OIC dated 11 May 2023 and 23 June 2023.

¹⁰ Attached to the applicant's email to OIC dated 23 June 2023.

¹¹ Section 118(1)(b) of the IP Act.

¹² Sections 21(2) and 26 of the HR Act.

and others prescribed in the HR Act, when applying the law prescribed in the IP Act.¹³ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.¹⁴

Preliminary issue – alleged bias

11. Before addressing the issues for determination, I will first deal with a preliminary issue raised by the applicant. In the course of this external review, the applicant has made a submission alleging that OIC has formed a biased opinion against the applicant.¹⁵ I have carefully considered this submission, alongside the High Court's test for assessing apprehended bias for a decision-maker. The High Court's test requires a decision-maker to consider '*if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide*'.¹⁶ The High Court has also noted that '[t]he question of whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made'.¹⁷
12. OIC is an independent statutory body and as noted above, conducts merits review of government decisions about access to, and amendment of, documents.¹⁸ In order to ensure procedural fairness (as required by both the IP Act¹⁹ and common law), it is the practice of OIC to convey a preliminary view, based on an assessment of the information before the A/Information Commissioner or her delegate at that time, to an adversely affected party. This appraises that party of the issues under consideration and affords them the opportunity to put forward further information they consider relevant to those issues.
13. The fact that the preliminary views conveyed to the applicant in this review,²⁰ did not adopt the applicant's view that all of the information should be disclosed to them does not of itself, demonstrate bias against the applicant. The applicant was advised that they could respond to the preliminary views and provide additional information supporting their case, which would be considered and may influence the outcome. I consider that this advice demonstrates that OIC was not so committed to its preliminary views that conclusions were already formed and incapable of alteration, no matter what evidence or arguments may have been presented by the applicant.
14. For the purpose of this decision, I have reviewed the entirety of the applicant's submissions and carefully considered them to the extent they are relevant to the issues for determination. In these circumstances and paraphrasing the High Court's test, I am unable to identify any basis for finding that a fair-minded lay observer might reasonably apprehend that I²¹ might not bring an impartial and unprejudiced mind to the resolution of this matter.

¹³ *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].

¹⁴ I note the observations by Bell J on the interaction between equivalent pieces of Victorian legislation in *XYZ*, [573]: '*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.*' I also 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] (noting that Judicial Member McGill saw '*no reason to differ*' from our position).

¹⁵ Email to OIC dated 11 May 2023.

¹⁶ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6]. See also *Michael Wilson & Partners Limited v Nicholls* (2011) 244 CLR 427 at [31].

¹⁷ *Isbester v Knox City Council* (2015) 255 CLR 135 at [20].

¹⁸ The procedure to be followed on external review, is subject to the IP Act, within the discretion of the Information Commissioner – section 108 of the IP Act.

¹⁹ Section 110 of the IP Act.

²⁰ On 11 May 2023 and 28 July 2023.

²¹ As a delegate of the A/Information Commissioner under section 139 of the IP Act.

Information in issue

15. The information in issue is comprised of 14 full pages and 50 part pages to which access was refused (**Information in Issue**). I am limited in the extent to which I can describe the Information in Issue,²² except to note that it is either information that identifies a person/s making a notification of a suspicion that a child has been or is likely to be harmed, or is about the affairs of individuals other than the applicant.

Issue for determination

16. The issue for determination is whether access to the Information in Issue can be refused on the ground that it comprises exempt information the disclosure of which is prohibited by sections 186 - 188 of the Child Protection Act.

Relevant law

17. An individual has a right to access documents of an agency to the extent they contain the individual's personal information,²³ subject to some limitations set out in the IP Act and RTI Act. Relevantly, an agency may refuse access to a document to the extent the document comprises exempt information.²⁴ Exempt information includes information the disclosure of which is prohibited by a number of provisions set out in schedule 3, section 12(1) of the RTI Act, including sections 186 - 188 of the Child Protection Act.²⁵
18. Section 186A(1) of the Child Protection Act prohibits the disclosure of the identity of a notifier, or information from which the identity of the notifier could be deduced, to another person if:
- a person has notified a specified person²⁶ of harm or suspected harm to a child or unborn child²⁷
 - release of the information could disclose the identity of the notifier, or information from which their identity could be deduced; and
 - none of the exceptions in section 186(A)(2) apply.
19. Section 187(2) of the Child Protection Act prohibits the disclosure of information about another person's affairs²⁸ obtained by specified individuals or entities involved in the administration of the Child Protection Act.²⁹ For section 187(2) to apply, all of the following elements must be satisfied:
- the information was received by a person listed in section 187(1) performing functions under or in relation to the administration of the Child Protection Act;
 - the information is about another person's affairs; and
 - none of the exceptions listed in section 187(3) or (4) apply.

²² Section 121(3) of the IP Act states that the Information Commissioner must not disclose information in a decision that is claimed to be exempt information or contrary to the public interest information.

²³ Section 40 of the IP Act. 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'.

²⁴ Section 47(3)(a) of the RTI Act.

²⁵ Section 48 of the RTI Act.

²⁶ That is, the chief executive, an authorised officer, a police officer, a doctor or a nurse – section 186 of the Child Protection Act.

²⁷ Section 186(a) and (b) of the Child Protection Act

²⁸ The term 'person's affairs' is not defined in the Child Protection Act or the *Acts Interpretation Act 1954* (Qld). Macquarie Dictionary (7th edition, 2017) defines 'affair/s' as '2. *Matters of interest or concern*' or '5. *a private or personal concern*', as adopted in *7CLV4M and Department of Communities* (Unreported, Queensland Information Commissioner, 21 December 2011) at [30].

²⁹ As listed in section 187(1)(a) of the Child Protection Act.

20. However, information does not qualify as exempt information under schedule 3, section 12(1) of the RTI Act if the exception in schedule 3, section 12(2) of the RTI Act applies *'if it is **only** personal information of the applicant'*. [emphasis added]

Findings

21. As noted above, section 186A(1) of the Child Protection Act prohibits the disclosure of the identity of a notifier to another person. I have carefully considered the Information in Issue and am satisfied that some parts of it identify a person/s who made a notification/s under the Child Protection Act. Accordingly, I am satisfied that these parts of the Information in Issue are subject to the prohibition on disclosure in section 186A(1) of the Child Protection Act and, therefore, qualify as exempt information under schedule 3, section 12(1) of the RTI Act – unless any of the exceptions apply (as discussed below).
22. In relation to the remaining Information in Issue, I am satisfied that it comprises information about the 'affairs' of individuals other than the applicant – that is, matters of private or personal interest or concern to them.³⁰ Further, I am satisfied that this information was received or obtained by Departmental officers who were performing functions under or in relation to the administration of the Child Protection Act, and note that public service employees are among the persons to whom section 187 of the Child Protection Act applies.³¹ Consequently, I am satisfied the remaining Information in Issue is subject to the prohibition on disclosure under section 187(2) of the Child Protection Act and, therefore, qualifies as exempt information under schedule 3, section 12(1) of the RTI Act – unless any of the exceptions apply (as discussed below).
23. There are a number of exceptions³² to the prohibitions on disclosure of information given or received under the Child Protection Act. Of relevance to this review, section 187(4)(a) of the Child Protection Act provides that access may be given to another person to the extent that the information is about the other person. In addition, schedule 3, section 12(2) of the RTI Act provides that information is not exempt information under schedule 3, section 12(1) of the RTI Act, if the information is only personal information of the applicant. Where information is not about the applicant, or where the information is about the applicant but is not *solely* about the applicant,³³ or where an applicant's personal information cannot be separated from the personal information of other individuals, the exceptions will not apply, and the information will remain exempt.
24. The Information in Issue comprises information about individuals other than the applicant and while it does contain references to the applicant, the applicant's personal information is intertwined with the information of other individuals. I am therefore satisfied that the exceptions in section 187(4)(a) of the Child Protection Act and schedule 3, section 12(2) of the RTI Act do not apply to the Information in Issue, on the basis that it is not solely about the applicant.
25. As I consider the requirements of sections 186A(1) and 187(2) of the Child Protection Act are met and no exceptions in the Child Protection Act or schedule 3, section 12(2) of the RTI Act apply, I find that the Information in Issue is exempt information under

³⁰ As per the dictionary definition of *'affair/s'*.

³¹ Section 187(1)(a)(i) of the Child Protection Act.

³² Sections 186(A)(2), and 187(3) and (4) of the Child Protection Act.

³³ *Hughes and Department of Communities, Child Safety and Disability Services* (Unreported, Queensland Information Commissioner, 17 July 2012), considered whether section 187(4)(a) of the Child Protection Act applies to shared information about the applicant and other persons. It was observed at [26]: *'The [Child Protection Act] exception only applies where the information is solely about the applicant. Thus where information is simultaneously about the applicant and others, the [Child Protection Act] exception will not apply.'*

schedule 3, section 12(1) of the RTI Act and access may be refused under section 47(3)(a) of the RTI Act.

26. The applicant's submissions detail the applicant's concerns about the actions taken by the Department which the applicant considers are both '*corrupt and harmful conduct*'.³⁴ The applicant submits that disclosure of the Information in Issue is in the public interest, as the applicant intends to address the Department's conduct.³⁵ While I acknowledge the applicant's submissions, they do not raise matters I am able to take into consideration. The exemptions set out in schedule 3 of the RTI Act, do not require or allow consideration of public interest issues. This is because Parliament has determined that disclosure of these categories of information would be contrary to the public interest.³⁶ Accordingly, if information falls within one of the categories of exempt information prescribed in schedule 3 of the RTI Act, a conclusive presumption exists that disclosure would be contrary to the public interest and no further consideration is permitted.³⁷

DECISION

27. For the reasons set out above, I affirm the Department's decision and find that access to the Information in Issue may be refused on the ground that it comprises exempt information the disclosure of which is prohibited by the Child Protection Act.³⁸
28. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

S Martin
A/Right to Information Commissioner

Date: 19 October 2023

³⁴ Email to OIC dated 11 May 2023.

³⁵ Email to OIC dated 3 April 2023.

³⁶ Section 48(2) of the RTI Act.

³⁷ *Dawson-Wells v Office of the Information Commissioner & Anor* [2020] QCATA 60 at [17].

³⁸ Under section 67(1) of the IP Act and sections 47(3)(a) and 48 and schedule 3, section 12(1) of the RTI Act.

APPENDIX

Significant procedural steps

| Date | Event |
|---------------|--------------------------------------------------------------------------------------------------------------------------------------------------------|
| 3 April 2023 | OIC received the external review application. OIC requested initial procedural documents/information from the Department. |
| 11 April 2023 | The Department provided the requested documents/information. |
| 13 April 2023 | OIC advised the applicant and the Department that the external review had been accepted and requested the Department provide the Information in Issue. |
| 20 April 2023 | The Department provided the Information in Issue. |
| 11 May 2023 | OIC provided the applicant with a preliminary view. OIC received a submission from the applicant responding to the preliminary view. |
| 23 June 2023 | OIC received a further submission from the applicant. |
| 28 July 2023 | OIC provided the applicant with a further preliminary view. |
| 31 July 2023 | OIC received a further submission from the applicant. |