



Decision and Reasons for Decision

Application Number: 310219

Applicant: Qualtime Association Inc

Respondent: Department of Communities

Decision Date: 29 June 2011

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION ACT – application for access to information about the investigation of a complaint made about a disability service provider and its accreditation and compliance with certification conditions – section 47(3)(a), section 48 and schedule 3, section 7 of the *Right to Information Act 2009* (Qld) – whether information would be privileged from production in a legal proceeding on the ground of legal professional privilege

ADMINISTRATIVE LAW – RIGHT TO INFORMATION ACT – application for access to information about the investigation of a complaint made about a disability service provider and its accreditation and compliance with certification conditions – section 47(3)(a), section 48 and schedule 3, section 10(1)(c) of the *Right to Information Act 2009* (Qld) – whether disclosure of information could reasonably be expected to endanger a person's life or physical safety

ADMINISTRATIVE LAW – RIGHT TO INFORMATION ACT – application for access to information about the investigation of a complaint made about a disability service provider and its accreditation and compliance with certification conditions – section 47(3)(a), section 48 and schedule 3, section 10(1)(d) of the *Right to Information Act 2009* (Qld) – whether disclosure of information could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation

ADMINISTRATIVE LAW – RIGHT TO INFORMATION ACT – application for access to information about the investigation of a complaint made about a disability service provider and its accreditation and compliance with certification conditions – section 47(3)(b) and section 49 of the *Right to Information Act 2009* (Qld) – whether disclosure of information would, on balance, be contrary to the public interest

Contents

REASONS FOR DECISION	3
Summary	3
Background	3
Reviewable decision	3
Information in Issue	3
Evidence considered	4
Procedural issues raised by Qualtime	4
Timeframe for Qualtime to provide submissions in response to the preliminary view	4
Accurate assessment of the Information in Issue	5
Investigation into a person Qualtime believes is the access applicant and declaration that the person is vexatious	6
Whether access to the Information in Issue should be refused	7
Onus on external review	7
Qualtime's submissions	7
Does the Information in Issue comprise exempt information on the ground of legal professional privilege?	7
Relevant law	7
Findings	8
Letter from Hall Payne Lawyers to Qualtime	9
Letter from Qualtime to DSQ	9
Letter from Hall Payne Lawyers to another government agency	9
Remaining Information in Issue	10
Could disclosure of the Information in Issue reasonably be expected to endanger a person's life or physical safety?	10
Relevant law	10
Findings	10
Could disclosure of the Information in Issue reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation?	11
Relevant law	11
Findings	11
Would disclosure of the Information in Issue, on balance, be contrary to the public interest? ...	11
Relevant law	12
Findings	12
Irrelevant factors	12
Relevant factors favouring disclosure	12
Relevant factors favouring nondisclosure	13
Prejudice regarding personal information and privacy	13
Prejudice to the future supply of confidential information	14
Prejudice to the financial affairs of entities	15
Balancing the relevant public interest factors	16
DECISION	17
APPENDIX A	18
Significant procedural steps	18
APPENDIX B	20
Qualtime's submissions on extensions of time	20
APPENDIX C	22
Qualtime's submissions on grounds of refusal	22

REASONS FOR DECISION

Summary

1. The access applicant made an application to the Department of Communities (**Department**) under the *Right to Information Act 2009 (RTI Act)* for access to information held by Disability Services Queensland (**DSQ**)¹ about:
 - the accreditation of Qualtime Association Inc (**Qualtime**)
 - Qualtime's compliance with any special conditions of certification; and
 - the investigation of a complaint made to DSQ about Qualtime's management.
2. Qualtime is a non-government disability and respite service provider that receives funding from the Department, through DSQ.
3. The Department notified Qualtime about the possible release of information relevant to the access application and invited Qualtime to provide its view about whether the information should be disclosed. Qualtime objected to disclosure of all of the information and provided reasons in support of its case.
4. The Department decided to disclose the information to the access applicant contrary to Qualtime's view and Qualtime applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision. On external review, Qualtime strongly objected to disclosure of all of the information and raised a number of procedural issues about the conduct of the review.
5. For the reasons set out below, I vary the Department's decision and find that the relevant information can be disclosed to the access applicant.

Background

6. Significant procedural steps relating to the application are set out in Appendix A to this decision.

Reviewable decision

7. The decision under review is the Department's internal review decision dated 28 April 2010.

Information in Issue

8. The information in issue in this review (**Information in Issue**) is the information the Department decided to disclose to the access applicant which is contrary to Qualtime's view together with a letter identified as file 4 folios 290 – 313.²
9. The Information in Issue comprises 135 pages³ and can be characterised in the following general terms:

¹ Disability Services Queensland is now known as Disability and Community Care Services. It is a service delivery area of the Department of Communities.

² OIC has provided the Department with a copy of the Information in Issue marked up in accordance with this decision.

³ The reviewable decision refers to 102 pages. However, after examining the redacted Information in Issue provided to OIC by the Department and requesting clarification from the Department, I am satisfied that the Information in Issue comprises 135 pages.

- correspondence from Qualtime to DSQ and another individual
 - correspondence from Hall Payne Lawyers to Qualtime and another government agency
 - Register of Qualtime Policies
 - Qualtime meeting minutes, agendas and notice of the appointment of a proxy
 - Qualtime's Constitution; and
 - miscellaneous internal Qualtime documents including correspondence between Qualtime staff, a draft report, a job description, a staff training schedule and training discussion questions.
10. The Information in Issue does not include information which can be characterised as personal information such as the names and signatures of Qualtime employees and other non government employees, information about individuals receiving Qualtime's services and information about family members and health. Information of this nature is not in issue on external review.

Evidence considered

11. In making this decision, I have considered the following:
- the access application to the Department and subsequent correspondence relating to the scope of the access application
 - the Department's letter to Qualtime dated 10 December 2009, initial decision and internal review decision
 - Qualtime's letter to the Department dated 15 February 2010, internal review application and external review application
 - Qualtime's correspondence to OIC
 - file notes of telephone conversations between staff of the Department and OIC during the external review
 - the Information in Issue
 - relevant sections of the RTI Act
 - previous decisions of the Information Commissioner as set out below; and
 - other relevant cases as set out below.

Procedural issues raised by Qualtime

12. Qualtime raised a number of procedural issues during the course of this external review in addition to claiming that the Information in Issue should not be disclosed under the RTI Act. These issues are addressed below.

Timeframe for Qualtime to provide submissions in response to the preliminary view

13. Qualtime submits that OIC has not allowed it sufficient time to respond to the preliminary view and that, as a result, Qualtime has not been afforded natural justice.
14. The background to this issue is as follows:
- a) By letter dated 12 April 2011, OIC conveyed to Qualtime the preliminary view that the Information in Issue did not comprise exempt information or information the disclosure of which would, on balance, be contrary to the public interest. OIC provided Qualtime with a copy of the Information in Issue and invited Qualtime to provide submissions in support of its case by 3 May 2011 if it did not accept the preliminary view.

- b) By fax on 21 April 2011, Qualtime requested an extension for making submissions *"until at least 2nd June 2011"*.
 - c) By letter dated 27 April 2011, OIC extended the time for Qualtime to respond to the preliminary view until 11 May 2011.
 - d) By fax on 28 April 2011, Qualtime requested a second extension of time until *"far past 11 May 2011"*.
 - e) By letter dated 3 May 2011, OIC extended the time for Qualtime to respond to the preliminary view until 17 May 2011.
 - f) By fax on 4 May 2011, Qualtime requested a further extension *"beyond 17 May 2011"*.
 - g) By letter dated 6 May 2011, OIC extended the time for Qualtime to respond to the preliminary view until 14 June 2011.
 - h) In its submissions dated 14 June 2011, Qualtime stated that *"[u]nfortunately you have not permitted Qualtime sufficient time to prepare a proper response ..."*.
15. Relevant parts of Qualtime's facsimiles requesting extensions and submissions dated 14 June 2011 are set out in Appendix B to this decision.
16. External review participants are ordinarily given two weeks to respond to a preliminary view unless there are exceptional circumstances or the issues are complex. Qualtime originally requested an extension of time until *"at least 2 June 2011"* to provide submissions in support of its case. OIC allowed Qualtime until 14 June 2011 to provide the requested submissions, a period of nine weeks. In these circumstances, and after careful consideration of Qualtime's position as a non-government disability and respite service provider and nature of the issues addressed in the preliminary view, I am satisfied that Qualtime has been afforded the opportunity to respond to the preliminary view within a reasonable timeframe.

Accurate assessment of the Information in Issue

17. Qualtime submits that a number of errors have been made by the various parties who have assessed the documents and specifically that:

It does concern Qualtime that a number of errors have been made by the various parties outside of Qualtime who have assessed the documents for the RTI release.

At each stage of this RTI including when the matter was handed to your office there have been documents withdrawn which otherwise would have been released had the process not been challenged by Qualtime. Even as late as 24 May 2011 a further error has been corrected even though the papers have been with your office for over twelve months and even after your preliminary view had been issued to Qualtime.

Certainly Qualtime is concerned that other errors may be in existence and not yet discovered by your office.

18. By letter dated 24 May 2011, OIC wrote to Qualtime to clarify the preliminary view in relation to one document of the Information in Issue and specifically confirm that OIC did not propose that this document be disclosed. I am unaware of any other errors that have been made in assessing the Information in Issue as Qualtime suggests.

Investigation into a person Qualtime believes is the access applicant and declaration that the person is vexatious

19. Qualtime submits that OIC should investigate the activities of a person who it believes is the access applicant and declare the person vexatious. Specifically, Qualtime submits that:

Qualtime demands that your office take all necessary action to thoroughly investigate the vexatious activity undertaken by the applicant ... against Qualtime and some of its Management Committee members and others so that the Commissioner can be satisfied. To this end Qualtime therefore makes formal application for the applicant to be investigated and declared accordingly. Certainly [the person] and the party whom he works in tandem with has tied up a disproportionate amount of Qualtime's resources which otherwise would have been devoted to people living with a disability. This in itself is not in the public interest.

20. Qualtime is of the view that it knows who the access applicant is. Nothing in this decision should be taken to either confirm or deny Qualtime's suspicions on this issue.

21. Section 114 of the RTI Act allows the Information Commissioner, on his/her own initiative or on the application of one or more agencies, to declare in writing that a person is a vexatious applicant if he/she is satisfied that:

- the person has repeatedly engaged in access actions;⁴ and
- one of the following applies:
 - the repeated engagement involves an abuse of process⁵ for an access action
 - a particular access action in which the person engages involves, or would involve, an abuse of process for that access action; or
 - a particular access action in which the person engages would be manifestly unreasonable.

22. There is no evidence available to me, other than Qualtime's general allegations of "vexatious activity undertaken by the applicant... against Qualtime and some of its Management Committee members and others",⁶ that the person who Qualtime believes is the access applicant has repeatedly engaged in access actions or that one of the three relevant criteria applies. On this basis, if it was the case that the access applicant is that person, the requirements for declaring that a person is a vexatious applicant under section 114 of the RTI Act are not satisfied. Similarly, on the information before me, there is insufficient evidence to support refusing to deal with the access application on the ground that it is vexatious under section 94(1)(a) of the RTI Act.

23. OIC does not have jurisdiction to investigate Qualtime's general allegations about the motivations or conduct of the person who Qualtime believes made the access application under the RTI Act. OIC's jurisdiction in this review is limited to a review of the Department's decision to disclose information under the RTI Act contrary to Qualtime's view. To the extent Qualtime's submissions give rise to potential grounds for refusing access to the Information in Issue under section 47(3) of the RTI Act, I will consider them below.

⁴ An access action is defined as an access application, an internal review application or an external review application—see section 114(6) of the RTI Act.

⁵ An abuse of process is defined to include 'harassing or intimidating an individual or an employee of an agency in relation to the access application'—see section 114(6) of the RTI Act.

⁶ As set out in paragraph 19 and in Appendix C.

Whether access to the Information in Issue should be refused

Onus on external review

24. Section 87(2) of the RTI Act provides that if the decision under external review is a disclosure decision,⁷ the participant in the external review application who opposes it has the onus of establishing that a decision not to disclose the information is justified or that the Information Commissioner should give a decision adverse to the access applicant. As the Department decided to disclose the Information in Issue to the access applicant contrary to Qualtime's view, Qualtime has the onus in this external review of establishing that the Information in Issue should not be disclosed under the RTI Act.

Qualtime's submissions

25. I have carefully reviewed Qualtime's submissions to identify the grounds for refusal of the Information in Issue that Qualtime submits are applicable. Relevant parts of Qualtime's submissions are set out in Appendix C to this decision.
26. Based on my review, Qualtime's objection to disclosure appears to be that:
- the Information in Issue comprises exempt information⁸ as:
 - it would be privileged from production in a legal proceeding on the ground of legal professional privilege⁹
 - disclosure could reasonably be expected to endanger a person's life or physical safety;¹⁰ and/or
 - disclosure could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation¹¹
 - the Information in Issue comprises information the disclosure of which would, on balance, be contrary to the public interest.¹²

Does the Information in Issue comprise exempt information on the ground of legal professional privilege?

27. The answer to this question is no for the following reasons.

Relevant law

28. Schedule 3, section 7 of the RTI Act provides that information is exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.
29. Legal professional privilege protects the confidentiality of certain communications made in connection with giving or obtaining legal advice or in the provision of legal services, such as representation in legal proceedings. The exemption in schedule 3, section 7 of the RTI Act turns on the application of common law principles relating to legal

⁷ *Disclosure decision* is defined in section 87(3)(a) of the RTI Act as a decision to disclose a document or information contrary to the views of a relevant third party obtained under section 37 of the RTI Act.

⁸ Section 47(3)(a) and section 48 of the RTI Act.

⁹ Schedule 3, section 7 of the RTI Act.

¹⁰ Schedule 3, section 10(1)(c) of the RTI Act.

¹¹ Schedule 3, section 10(1)(d) of the RTI Act.

¹² Section 47(3)(b) and section 49 of the RTI Act.

professional privilege.

30. Confidential communications between a lawyer and client will be privileged where the communications are for the dominant purpose of:
 - seeking or giving legal advice (advice privilege); or
 - use in existing or anticipated legal proceedings (litigation privilege).
31. Advice privilege protects confidential communications between a lawyer and client made for the dominant purpose of giving or seeking legal advice. Litigation privilege protects confidential communications between a lawyer and client, made for the dominant purpose of preparing for or use in existing or reasonably anticipated proceedings.
32. However, even where the elements of advice privilege or litigation privilege are established, communications may not be subject to legal professional privilege because privilege has been waived, either expressly or impliedly. It is relevant to consider whether any legal professional privilege has been waived when applying schedule 3, section 7 of the RTI Act.
33. At common law, legal professional privilege can be waived by a client either:
 - intentionally disclosing a privileged communication (express waiver); or
 - engaging in conduct that is inconsistent with the maintenance of confidentiality that privilege is intended to protect (implied waiver).
34. The level of inconsistency required to constitute implied waiver will depend upon the circumstances of the case and the conduct of the privilege holder, viewed objectively. In *Mann v Carnell*,¹³ the majority judges set out the following statement with respect to implied waiver:

Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". ... What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.
35. In *Osland v Secretary to the Department of Justice*,¹⁴ the majority judges recognised that a limited disclosure of the existence and effect of legal advice could be consistent with maintaining confidentiality in the actual terms of the advice. It has also been recognised that disclosure of a privileged communication for a limited purpose in a specific context, may not amount to waiver of legal professional privilege.¹⁵ To ensure that only a limited and specific purpose waiver occurs, it is critical that the privilege holder retains full control of the further dissemination of the relevant communication.¹⁶

Findings

36. Qualtime has not identified the Information in Issue it claims is subject to legal

¹³ (1999) 201 CLR 1 at 13.

¹⁴ (2008) 234 CLR 275 at paragraphs 48-50.

¹⁵ *Goldberg v Ng* (1994) 33 NSWLR 639; *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* [1999] FCA 1061 (4 August 1999).

¹⁶ *Australian Competition and Consumer Commission v Cadbury Schweppes* [2009] FCAFC 32.

professional privilege or addressed the relevant requirements of schedule 3, section 7 of the RTI Act and, as a result, has not discharged the onus under section 87(2) of the RTI Act. However I have identified that Qualtime's general submissions on this issue may be relevant to the following information as it appears to contain or refer to legal advice:

- letter from Hall Payne Lawyers to Qualtime dated 22 December 2006¹⁷
- letter from Qualtime to DSQ dated 16 February 2007;¹⁸ and
- letter from Hall Payne Lawyers to another government agency dated 6 February 2007.¹⁹

Letter from Hall Payne Lawyers to Qualtime

37. I am satisfied that this letter was a confidential communication for the dominant purpose of providing Qualtime with legal advice and that the elements of legal professional privilege have been established. While the material before me does not indicate how the legal advice was previously provided to DSQ, there is nothing in this letter which would indicate that the legal advice was being provided to DSQ on a confidential basis or that control over further dissemination of the legal advice would be retained by Qualtime. I am satisfied that Qualtime has waived legal professional privilege and the letter does not comprise exempt information under schedule 3, section 7 of the RTI Act.²⁰

Letter from Qualtime to DSQ

38. Legal professional privilege can extend to any document which directly reveals, or which allows a reader to infer, the content or substance of a privileged communication.²¹
39. I am satisfied that parts of this letter directly reveal legal advice which has been provided to Qualtime by its lawyers and disclosure of those parts would reveal the content of a privileged communication. There is nothing in this letter which would indicate that the legal advice was being provided to DSQ on a confidential basis or that control over further dissemination of the legal advice would be retained by Qualtime. I am satisfied that Qualtime has waived legal professional privilege and the letter does not comprise exempt information under schedule 3, section 7 of the RTI Act.

Letter from Hall Payne Lawyers to another government agency

40. I am not satisfied that this letter is a confidential communication for the dominant purpose of seeking or providing legal advice or for use in existing or anticipated legal proceedings. In my view, the dominant purpose of the communication is to provide another government agency with information to assist an investigation.
41. To the extent this document directly reveals legal advice which may have been provided to Qualtime, I am satisfied that Qualtime has waived legal professional

¹⁷ File 4 folios 290 – 313.

¹⁸ File 4 folios 82, 84 – 95.

¹⁹ File 4 folios 133 – 134.

²⁰ The Department decided to refuse access to this document under schedule 3, section 7 of the RTI Act. On external review however, the Department withdrew its claim that the document comprises exempt information and agreed to its release subject only to the deletion of the names of certain individuals on the basis that the names comprise personal information, the disclosure of which would, on balance, be contrary to the public interest.

²¹ *Mann v Carnell* (1999) 201 CLR 1 at 9 and *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2000] FCA 593 at [8] per Justice Lehane.

privilege in disclosing the advice to DSQ and another government agency. While the material before me does not indicate how the legal advice was previously provided to DSQ, there is nothing in this letter which would indicate that the legal advice was being provided on a confidential basis or that control over further dissemination of the legal advice would be retained by Qualtime.

Remaining Information in Issue

42. As noted above, Qualtime has not identified the Information in Issue it claims is subject to legal professional privilege. In any event, I am satisfied that the remaining Information in Issue does not comprise exempt information under schedule 3, section 7 of the RTI Act.

Could disclosure of the Information in Issue reasonably be expected to endanger a person's life or physical safety?

43. The answer to this question is no for the following reasons.

Relevant law

44. Schedule 3, section 10(1)(c) of the RTI Act provides that information is exempt information if its disclosure could reasonably be expected to endanger a person's life or physical safety.
45. The Information Commissioner has previously explained that:²²

... The question of whether disclosure of certain matter could reasonably be expected to endanger a person's life or physical safety is to be objectively judged by the authorised decision-maker under the FOI Act, in the light of all relevant evidence, including any evidence obtained from or about the claimed source of danger, and not simply on the basis of what evidence is known to persons claiming to be at risk of endangerment.

46. The phrase 'could reasonably be expected to' in this context requires a consideration of whether the expectation that disclosure of the Information in Issue could endanger a person's life or physical safety is reasonably based.²³

Findings

47. As noted above, Qualtime bears the onus of establishing on external review that a decision to refuse access to the Information in Issue under schedule 3, section 10(1)(c) of the RTI Act is justified. Qualtime's submissions are set out in Appendix C.
48. Qualtime makes general assertions about the effect it anticipates disclosure of the Information in Issue will have but these submissions do not provide sufficient evidence for me to form a reasonably based view that disclosure of the Information in Issue could reasonably be expected to endanger a person's life or physical safety.
49. Accordingly, I am not satisfied that the Information in Issue comprises exempt information in accordance with schedule 3, section 10(1)(c) of the RTI Act.

²² *Murphy and Treasury Department* (1995) 2 QAR 744 at paragraph 47. These comments were made in the context of section 42(1)(c) of the now repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**) but provide useful guidance on the interpretation of schedule 3, section 10(1)(c) of the RTI Act.

²³ Applying the observations of Bowen CJ and Beaumont J in *Attorney-General v Cockcroft* (1986) 64 ALR 97, in interpreting section 43(1)(c)(ii) (business affairs exemption) contained in the Commonwealth *Freedom of Information Act 1982* (at 106).

Could disclosure of the Information in Issue reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation?

50. The answer to this question is no for the following reasons.

Relevant law

51. Schedule 3, section 10(1)(d) of the RTI Act provides that information is exempt information if its disclosure could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation.
52. The Information Commissioner has previously explained that the question of whether disclosing certain information could reasonably be expected to²⁴ result in a serious act of harassment or intimidation should be considered objectively, in light of all relevant information, including information from and/or about the claimed source of harassment or intimidation.²⁵
53. Depending on the circumstances of the particular review, a range of factors may be relevant in determining whether a serious act of harassment or intimidation could reasonably be expected to occur. These factors may include, but are not limited to:²⁶
- past conduct or a pattern of previous conduct
 - the nature of the relevant information in issue
 - the nature of the relationship between the parties and/or third parties; and
 - relevant contextual and/or cultural factors.

Findings

54. As noted above, Qualtime bears the onus of establishing on external review that a decision to refuse access to the Information in Issue under schedule 3, section 10(1)(d) of the RTI Act is justified. Qualtime's submissions are set out in Appendix C.
55. Qualtime makes general assertions about the effect it anticipates disclosure of the Information in Issue will have but these submissions do not provide sufficient evidence for me to form a reasonably based view that disclosure of the Information in Issue could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation.
56. On this basis, I am not satisfied that the Information in Issue comprises exempt information in accordance with schedule 3, section 10(1)(d) of the RTI Act.

Would disclosure of the Information in Issue, on balance, be contrary to the public interest?

57. The answer to this question is no for the following reasons.

²⁴ I have discussed at paragraph 46 above, the meaning of the phrase 'could reasonably be expected to' which is also relevant to the interpretation of schedule 3, section 10(1)(d) of the RTI Act.

²⁵ *Sheridan and South Burnett Regional Council and Others* (Unreported, Queensland Information Commissioner, 9 April 2009) (***Sheridan***) at paragraph 201. These comments were made in the context of section 42(1)(ca) of the FOI Act but provide useful guidance on the interpretation of schedule 3, section 10(1)(d) of the RTI Act.

²⁶ *Sheridan* at paragraph 193.

Relevant law

58. Section 49(1) of the RTI Act provides that if an access application is made to an agency for a document, the agency must decide to give access to the document unless disclosure would, on balance, be contrary to the public interest.
59. To decide whether disclosure of the Information in Issue would be contrary to the public interest, I must:²⁷
 - 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 of the information, on balance, would be contrary to the public interest.

Findings

Irrelevant factors

60. Qualtime submits that “[t]hose who are vexatious and mischievous seek to obtain as many documents as possible, troll through them and launch bogus attacks designed to cause harm, and to frustrate”.
61. I have addressed at paragraphs 19 to 23 above Qualtime’s request for OIC to declare vexatious the person it believes is the access applicant.
62. The suggestion that disclosure of the Information in Issue could reasonably be expected to result in mischievous conduct by the access applicant is an irrelevant factor²⁸ and I have not taken it into account in my application of the public interest test. It is a basic principle of the FOI Act and RTI Act that an access applicant’s motivations for seeking access to information are irrelevant. In *State of Queensland v Albiez*,²⁹ Justice De Jersey of the Supreme Court³⁰ explained:

*... the Freedom of Information Act does not confer any discretion on the Information Commissioner, or the Supreme Court, to stop disclosure of information because of any particular motivation in the applicant. **Even were I satisfied that [the applicant] intended to do nothing more constructive than cause mischief and trouble for departmental officers, and that he was maliciously motivated, I would have no discretion under this supposedly beneficial legislation to remove his right to the disclosure.** There has certainly been some attempt, through s. 42 for example, to impose a limitation on disclosure by reference to undesirable possible consequences. But there is no expressed general discretion, and none can be implied. Obviously the legislative intent is to free-up, rather than restrict, the availability of information ...*

[emphasis added]

Relevant factors favouring disclosure

63. The Department, through DSQ, provides funding to non-government disability service providers under certain conditions and in accordance with the *Disability Services Act 2006* (Qld) (**DS Act**). One of the objects of the DS Act is to ensure that disability services funded by DSQ are safe, accountable and respond to the needs of people

²⁷ Section 49(3) of the RTI Act.

²⁸ Schedule 4, part 1, item 3 of the RTI Act.

²⁹ [1996] 1 Qd R 215 at 222.

³⁰ As His Honour was then.

with a disability.³¹ This is achieved by DSQ regulating the services it funds.³² The DS Act confers broad powers on DSQ to monitor and investigate the compliance of service providers with the legislative requirements and funding agreements. There is a strong public interest in promoting DSQ's accountability for the effective oversight, monitoring and investigation of service providers which it funds.

64. Qualtime is a non-government disability service provider which receives significant funding from DSQ and another government agency. It is subject to the requirements of the DS Act and its compliance with the legislation is therefore regulated and monitored by DSQ. By virtue of its relationship with DSQ and its reliance on funding from public monies, Qualtime's operations will inevitably be subject to a certain degree of scrutiny.
65. The Information in Issue relates to Qualtime's accreditation, compliance with its conditions of certification and an investigation into a complaint made to DSQ about its management. Having carefully considered the Information in Issue, I am satisfied that its disclosure could reasonably be expected to:
- promote open discussion of public affairs and enhance the Government's accountability³³
 - inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community,³⁴ and
 - ensure effective oversight of expenditure of public funds.³⁵
66. The access applicant also seeks access to information about the investigation of a complaint made about Qualtime's management. To the extent the Information in Issue is relevant to the issues surrounding the investigation, I consider its disclosure could reasonably be expected to reveal the reasons for a government decision and any background or contextual information that informed the decision.³⁶
67. I am satisfied that some of the Information in Issue can be characterised as the access applicant's personal information. 'Personal information' is information, 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.³⁷ This gives rise to a public interest factor³⁸ in relation to the relevant Information in Issue.

Relevant factors favouring nondisclosure

68. In its submissions, Qualtime makes reference to a number of public interest factors favouring nondisclosure which I will now consider.

Prejudice regarding personal information and privacy

69. Qualtime submits that "[a] number of documents specifically refer to an individual service recipient and it would be considered a breach of Federal and State privacy legislation to release this information to any third party without the express consent of said service recipient".

³¹ Section 6(b) of the DS Act.

³² Section 7(c) of the DS Act.

³³ Schedule 4, part 2, item 1 of the RTI Act.

³⁴ Schedule 4, part 2, item 3 of the RTI Act.

³⁵ Schedule 4, part 2, item 4 of the RTI Act.

³⁶ Schedule 4, part 2, item 11 of the RTI Act.

³⁷ Section 12 of the *Information Privacy Act 2009* (Qld).

³⁸ Schedule 4, part 2, item 7 of the RTI Act.

70. If disclosure of information could reasonably be expected to prejudice the protection of an individual's right to privacy, this will give rise to a public interest factor favouring nondisclosure.³⁹ The RTI Act also recognises that disclosure of information could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person other than the access applicant.⁴⁰
71. As noted above at paragraph 10, the Department decided to refuse access to certain information on the basis that it comprises personal information, the disclosure of which would, on balance, be contrary to the public interest. This information does not form part of the Information in Issue considered in this decision. Having carefully considered the Information in Issue, I am not satisfied that these factors are relevant.

Prejudice to the future supply of confidential information

72. Qualtime submits that the Information in Issue is "*of a highly confidential and private nature*".
73. If disclosure of information could reasonably be expected to prejudice an agency's ability to obtain confidential information, this will give rise to a public interest factor favouring nondisclosure.⁴¹ The RTI Act also recognises that disclosure of information could reasonably be expected to cause a public interest harm if:⁴²
- the information consists of information of a confidential nature that was communicated in confidence; and
 - disclosure of the information could reasonably be expected to prejudice the future supply of information of this type.
74. In its internal review decision, the Department notes that Qualtime did not claim confidentiality at the time it provided the Information in Issue to DSQ and DSQ does not appear to have received the Information in Issue on that basis.
75. Qualtime has not addressed how the Information in Issue consists of information of a confidential nature and was communicated to DSQ in confidence. In the absence of any submissions from Qualtime on this issue, I am not satisfied that the Information in Issue meets these requirements.
76. I am not satisfied that disclosure of the Information in Issue could reasonably be expected to prejudice the future supply of such information from a substantial number of non-government disability service providers.⁴³ I am satisfied that Qualtime is under an obligation to continue to supply such information to DSQ if it wishes to continue to receive funding and would be disadvantaged by withholding such information. On this basis, I do not accept that disclosure of the Information in Issue could reasonably be expected to prejudice DSQ's ability to obtain confidential information or prejudice the future supply of information of this type. For these reasons, I do not consider these factors are relevant.

³⁹ Schedule 4, part 3, item 3 of the RTI Act.

⁴⁰ Schedule 4, part 4, item 6 of the RTI Act.

⁴¹ Schedule 4, part 3, item 16 of the RTI Act.

⁴² Schedule 4, part 4, item 8 of the RTI Act.

⁴³ See *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at paragraph 161. These comments were made in the context of section 45(1)(c) of the FOI Act but provide useful guidance on the interpretation of these factors.

Prejudice to the financial affairs of entities

77. Qualtime submits that it has been under “a sustained attack of a vexatious and mischievous nature” and that disclosure of the Information in Issue will result in “a waste of public monies and divert valuable resources away from people living with a disability and their carers” and “already thousands of dollars have been wasted”. This submission appears to be based on Qualtime’s belief that disclosure of the Information in Issue will lead to further complaints and/or court actions which in turn would divert funds away from Qualtime’s primary activity – that is, the provision of disability services.
78. The RTI Act gives rise to a public interest factor favouring nondisclosure where disclosure could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of entities.⁴⁴ The RTI Act also recognises that disclosure of information could reasonably be expected to cause a public interest harm if:⁴⁵
- it concerns the business, professional, commercial or financial affairs of an agency or another person; and
 - disclosure could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of this type to government.
79. On the information before me, I am satisfied that the Information in Issue relates to the business or financial affairs of Qualtime.
80. In relation to the question of whether disclosure could reasonably be expected to have an adverse effect on such affairs, the Information Commissioner has previously made the following observations in relation to the meaning of “adverse effect”:⁴⁶
- an adverse effect will almost invariably be financial in nature, whether directly or indirectly (for example, an adverse effect on an entity’s ‘business reputation or goodwill ... is feared ultimately for its potential to result in loss of income or profits, through loss of customers’); and
 - in most instances the question of whether disclosure of information could reasonably be expected to have an adverse effect will turn on whether the information is capable of causing competitive harm to the relevant entity – a relevant factor in this is whether the entity enjoys a monopoly position or whether it operates in a commercially competitive environment.
81. I have carefully considered whether disclosure of the Information in Issue is capable of causing competitive harm to Qualtime. In my view, it is relevant that Qualtime is a not for profit organisation and does not operate in a commercially competitive environment.
82. The Information Commissioner had previously accepted that risk of litigation could be an adverse effect, albeit one where countervailing considerations favouring disclosure are also likely to apply.⁴⁷

⁴⁴ Schedule 4, part 3, item 2 of the RTI Act.

⁴⁵ Schedule 4, part 4, item 7(1)(c) of the RTI Act.

⁴⁶ *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 at paragraphs 82 - 84. These comments were made in the context of section 45(1)(c) of the FOI Act but provide useful guidance on the interpretation of schedule 4, part 4, item 7(1)(c) of the RTI Act.

⁴⁷ *Cairns Port Authority and Department of Lands; Cairns Shelf Co No.16 Pty Ltd (Third Party)* (1994) 1 QAR 663 at paragraphs 103 – 104. These comments were made in the context of section 45(1)(c) of the FOI Act but provide useful guidance on the interpretation of this factor.

83. While I accept that litigation could reasonably be expected to prejudice Qualtime's financial affairs by diverting resources away from its primary functions, on the information before me I am not satisfied that disclosure of the Information in Issue could reasonably be expected to lead to litigation. In my view, the Information in Issue largely relates to Qualtime's compliance with the requirements of the DS Act and conditions of funding.
84. In relation to the letter of advice from Hall Payne Lawyers to Qualtime in particular, I note that this letter contains legal advice. As noted above at paragraph 37, I am satisfied that this letter may have been subject to a valid claim of legal professional privilege if Qualtime had not waived privilege over the communication by providing the letter to DSQ. Given the significant passage of time since the advice was communicated to Qualtime and the fact that Qualtime has waived privilege, I do not consider that disclosure of this letter could reasonably be expected to result in litigation against Qualtime or otherwise prejudice Qualtime's business or financial affairs.
85. In conclusion, I am not satisfied that disclosure of the Information in Issue could reasonably be expected to prejudice or have an adverse effect on Qualtime's private, business, professional, commercial or financial affairs.
86. In relation to the alternative question of whether disclosure could prejudice the future supply of information regarding business, professional, commercial or financial affairs, I have addressed this question at paragraphs 72 to 76. As noted in that context, I am not satisfied that disclosure of the Information in Issue could reasonably be expected to prejudice the future supply of such information to government.

Balancing the relevant public interest factors

87. In summary, I am satisfied that the following are public interest factors favouring disclosure of:
- all of the Information in Issue:
 - disclosure could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability
 - disclosure could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community; and
 - disclosure could reasonably be expected to ensure effective oversight of expenditure of public funds
 - parts of the Information in Issue:
 - disclosure could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision; and
 - which is the access applicant's personal information.
88. I am satisfied each of these public interest factors favouring disclosure should be afforded some weight in the circumstances of this review.
89. In contrast, I am satisfied that there are no relevant public interest factors favouring nondisclosure of the Information in Issue and accordingly, no weight can be afforded to such factors.

90. On this basis, I find that disclosure of the Information in Issue would not, on balance, be contrary to the public interest.

DECISION

91. For the reasons set out above, I vary the Department's internal review decision and find that the Information in Issue does not comprise:
- exempt information under section 48 of the RTI Act; or
 - information the disclosure of which would, on balance, be contrary to the public interest under section 49 of the RTI Act.
92. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Jenny Mead
Right to Information Commissioner

Date: 29 June 2011

APPENDIX A

Significant procedural steps

Date	Event
3 July 2009	The access applicant applies to the Department under the RTI Act for access to information held by DSQ about the accreditation of Qualtime, compliance with its conditions of certification and an investigation into a complaint made to DSQ about Qualtime's management.
10 December 2009	The Department notifies Qualtime that it has received an access application under the RTI Act and consults Qualtime about the possible disclosure of the requested information.
16 December 2009	Qualtime requests an extension of time to 23 February 2010 to respond to the Department's letter.
18 December 2009	The Department grants Qualtime the requested extension of time.
22 December 2009	The Department notifies the access applicant of its decision.
15 February 2010	Qualtime notifies the Department that it objects to the disclosure of all of the information on which it was consulted.
10 March 2010	The Department notifies Qualtime of its decision in relation to the information on which it was consulted.
29 March 2010	Qualtime applies for internal review of the Department's decision.
28 April 2010	The Department notifies Qualtime of its internal review decision in relation to the information on which it was consulted.
11 May 2010	Qualtime applies to OIC for external review of the Department's decision.
20 May 2010	OIC informs the Department and Qualtime that the external review application has been accepted for review.
22 June 2010 and 31 January 2011	The Department provides OIC with a copy of the Information in Issue.
12 April 2011	OIC conveys a written preliminary view to Qualtime and asks Qualtime to provide submissions in support of its case by 3 May 2011 if it does not accept the preliminary view.
21 April 2011	Qualtime advises OIC that it does not accept the preliminary view and requests an extension of time to " <i>at least 2nd June 2011</i> " to provide submissions in response to the preliminary view.
27 April 2011	OIC extends the time for Qualtime to respond to the preliminary view until 11 May 2011.
28 April 2011	Qualtime requests an extension of time " <i>far past 11 May 2011</i> " to provide submissions in response to the preliminary view.
3 May 2011	OIC extends the time for Qualtime to respond to the preliminary view until 17 May 2011.
4 May 2011	Qualtime notifies OIC that it requires a timeframe " <i>beyond 17 May 2011</i> " to provide submissions in response to the preliminary view.
6 May 2011	OIC extends the time for Qualtime to respond to the preliminary view until 14 June 2011.
24 May 2011	OIC clarifies with Qualtime the preliminary view in relation to one document.

Date	Event
27 May 2011	A staff member of OIC conveys a preliminary view to a staff member of the Department by telephone.
31 May 2011	OIC confirms the preliminary view in writing to the Department and asks the Department to provide submissions in support of its case by 10 June 2011 if it does not accept the preliminary view.
14 June 2011	Qualtime provides brief submissions in response to the preliminary view and states that OIC has <i>“not permitted Qualtime sufficient time to prepare a proper response”</i> .
16 June 2011	The Department notifies OIC that it accepts the preliminary view.

APPENDIX B

Qualtime's submissions on extensions of time

1. In relation to the initial due date for submissions of 3 May 2011, Qualtime advised OIC as follows by fax on 21 April 2011:

Qualtime does not accept the preliminary view and requires sufficient time beyond 3 May 2011 to provide its final submission. I request that Qualtime be given at least until 2nd June 2011 to provide this whereby the matter will [be] directed to our solicitors who are currently dealing with a related issue in the courts. ... It is possible that a vexatious litigation action may ensue with considerable compensation claimed by Qualtime.

2. In relation to the first extended due date for submissions of 11 May 2011, Qualtime made the following request for a second extension of time by fax on 28 April 2011:

Qualtime is a Public Benevolent Institution and a Not for Profit solely engaged in the support of people living with a disability and providing respite to carers. Unlike your office it does not have the budget for or expertise in legal matters and RTI submissions. It therefore requires a fair and equitable period of time to seek appropriate expert advice, consult with Management Committee members and to prepare an appropriate response. Being permitted an appropriate time frame to prepare its submission is particularly important otherwise Qualtime and its clients will be put at considerable disadvantage. This is surely not in the public interest and would discriminate against those living with a disability.

... The matters and circumstances involved with this RTI are certainly complex and there are exceptional circumstances such that Qualtime's solicitors need to be given adequate time to assess each document within the context of the complex and exceptional circumstances and to advise Qualtime as to its submission to your office. There are many documents to be considered.

The number of documents, the exceptional circumstances and the complexity of the issues seem to have impacted on your office also. I note the external review was granted on 20 May 2010 and even though I phoned your office late last year to be updated with progress, your "preliminary view" was only written on 21 April 2011. It seems to me that to provide Qualtime with only a few weeks to make a submission is certainly not fair and equitable, nor is it in the public interest. ...

In the best interest of fairness, equity, natural justice and the public interest I request that Qualtime be given adequate time to prepare its submission.

3. In relation to the second extended due date for submissions of 17 May 2011, Qualtime made the following request for a third extension of time by fax on 4 May 2011:

[it] will not be bound by a time frame which is unfair, unjust and which totally disregards natural justice, due process and the impact of discrimination upon its clients.

Late last Friday Qualtime was advised that the solicitor representing Qualtime in two related legal matters has taken up a new position and I am yet to speak with his replacement. This replacement needs to be briefed by his legal firm and then briefed by Qualtime in regard to this RTI. This will surely require a timeframe beyond 17 May 2011, and added to that there will be the time necessary to draft the response and for the Qualtime Management Committee to meet and formalise its communication with your office.

4. In response to the third extended due date for submissions of 14 June 2011, Qualtime raised the following concern in its submissions dated 14 June 2011:

Unfortunately you have not permitted Qualtime sufficient time to prepare a proper response especially considering Qualtime neither has the expertise nor the funding to appropriately and properly deal with such matters. After much pleading for more time by Qualtime you have, in stages, increased the limit bit by bit until Qualtime has less than 17% of the time your office has had to respond to Qualtime. Your office has taken approximately one year to prepare its reply. Initially you only allowed Qualtime about 4% of the time your office took. Is any of this natural justice, is this fair and equitable? Certainly we do not believe so!

APPENDIX C

Qualtime's submissions on grounds of refusal

1. Qualtime provided submissions in support of its case to the Department as follows:

Our Management Committee ... has determined that these documents are of a highly confidential and private nature. A number of documents specifically refer to an individual service recipient and it would be considered a breach of Federal and State privacy legislation to release this information to any third party without the express consent of said service recipient.

Further, a number of the documents we would consider as legal-in-confidence in matters before the Federal Magistrates Court and, as such, any release of these documents to any third parties other than the Courts of law enforcement agencies may constitute a breach of legal privilege.

The Qualtime Association objects most strenuously to the RTI release of this private and confidential, and legal-in-confidence documentation.

2. In its internal review application, Qualtime confirmed its view that the "documents are of a highly confidential and private nature" and are "legal-in-confidence".
3. In its external review application, Qualtime submitted:

For approximately four years now Qualtime has been under sustained attack of a vexatious and mischievous nature. Personal safety and health have become an issue for members of the Management Committee and others. At times it has been necessary to post security guards, install security cameras and call police to the Qualtime Centre. There have been assaults, injuries, substantial WorkCover claims and payouts.

There have been complaints against Qualtime submitted to several government agencies responsible for upholding legislation and laws. Court actions have also been commenced; one is current, the previous one was successfully defended by Qualtime. It is on record that this action was undertaken due to the litigant declaring "I just want to stick it up them".

Qualtime has emerged from all accusations without tarnish and in fact currently holds the highest Home and Community Care (Department of Communities) performance rating possible. Qualtime has been subjected to several investigations, a forensic audit and many other audits. Our performance rating and Accreditation remain unaffected but the financial, emotional, safety, health and stress implications have been considerable.

The consequences of releasing any part of the documents are dire and will have considerable negative impacts for many people living with a disability. It will result in a waste of public monies and divert valuable resources away from people living with a disability and their carers. Already thousands of dollars have been wasted. It will put the personal safety and health of individuals at risk.

Those who are vexatious and mischievous seek to obtain as many documents as possible, troll through them and launch bogus attacks designed to cause harm, and to frustrate.

4. By fax to OIC on 28 April 2011, Qualtime submitted:

It is obvious that the RTI documents are being requested by one or more of the vexatious parties who have plagued and harassed Qualtime over several years regardless of the outcomes of previous Federal Magistrates Court, Industrial Relations Court, tribunal and mediation, actions, and a deed of release. One of these persons is recorded, and discovered under DSQ FOI/00535, to have said that she pursues actions against Qualtime as expressed in her statement "I just want to stick it up them". A person by the name of ... who works in tandem with this person has no doubt made the RTI application that Qualtime contests. The vexatious activity diverts extensive and valuable resources

away from being applied to those living with a disability. This is certainly not in the public interest.

5. By fax to OIC on 14 June 2011, Qualtime submitted:

Most certainly Qualtime vehemently maintains that the release of any of the documents would be a grave error and most certainly contrary to the public interest for several reasons not the least of which is the safety and security of certain Qualtime members who have reason to be fearful of vexatious and vindictive acts including harassment and intimidation by parties to the RTI application. ...

... release of any of these documents would most certainly be contrary to the public interest and would continue to disproportionately tie up Qualtime's resources and would exacerbate the ongoing vexatious harassment and intimidation of Qualtime's management Committee and certain other individuals within Qualtime. This vexatious harassment and intimidation has been ongoing for well over 4 years.