



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>P64 and Queensland Police Service [2019] QICmr 56 (6 December 2019)</i></b>
<b>Application Number:</b>	<b>314415</b>
<b>Applicant:</b>	<b>P64</b>
<b>Respondent:</b>	<b>Queensland Police Service</b>
<b>Decision Date:</b>	<b>6 December 2019</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE CHILD'S BEST INTERESTS - application on behalf of child for a transcript of the child's interview with police - section 93A of the <i>Evidence Act 1977 (Qld)</i> - section 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> - whether disclosure of the information would not be in the child's best interests - sections 47(3)(c) and 50 of the <i>Right to Information Act 2009 (Qld)</i></b>

## REASONS FOR DECISION

### Summary

1. An application on behalf of a child<sup>1</sup> was made, under the *Information Privacy Act 2009 (Qld)* (**IP Act**), to Queensland Police Service (**QPS**) for access to documents relating to the child's interview with police.
2. QPS located 26 pages and decided<sup>2</sup> to refuse access some information on the basis that disclosure would, on balance, be contrary to the public interest.
3. The child's mother applied on behalf of the child for external review,<sup>3</sup> seeking a copy of the transcript of the child's interview with police. She submitted that '*the child's welfare and protection is the paramount consideration*'.
4. I vary QPS's decision and find that access to the information in issue may be refused on the basis that its disclosure would be contrary to the best interests of the child.<sup>4</sup>

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<sup>1</sup> The application was dated 7 March 2018.

<sup>2</sup> Decision notice dated 2 May 2018. QPS also deleted some irrelevant information.

<sup>3</sup> External review application received by the Office of the Information Commissioner (**OIC**) on 25 January 2019. The application was accepted outside the statutory timeframe under section 101(d) of the IP Act.

<sup>4</sup> Under section 67(1) of the IP Act and section 47(3)(c) of the *Right to Information Act 2009 (Qld)* (**RTI Act**).

## Background

5. Significant procedural steps relating to the external review are set out in the Appendix. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and Appendix).

## Reviewable decision

6. The decision under review is QPS's decision dated 2 May 2018.<sup>5</sup>

## Information in issue

7. In the application for external review, the applicant's mother advised that she was requesting a 'copy of the transcript of interview' conducted under section 93A of the *Evidence Act 1977* (Qld) (**Evidence Act**)<sup>6</sup> between the child and QPS. Therefore, the information in issue in this review is one-part page and one full page of a QPRIME Occurrence that comprises the **Interview Transcript**.<sup>7</sup>

## Issue for determination

8. The issue for determination is whether disclosure of the Interview Transcript would not be in the child's best interests, under section 47(3)(c) of the RTI Act.

## Relevant law

9. The IP Act provides an individual a right to access documents of an agency to the extent they contain the individual's personal information.<sup>8</sup> The right of access is subject to certain limitations, including grounds for refusing access.<sup>9</sup> Access to information may be refused where:
  - a) the information is sought under an application made by or for a child
  - b) the information sought comprises the child's personal information; and
  - c) the disclosure of that information would not be in the child's best interests.<sup>10</sup>
10. 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.*'
11. The IP Act and RTI Act provide limited guidance as to what factors are to be considered in deciding whether disclosure of the information would not be in the best interests of the child.<sup>11</sup>

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<sup>5</sup> The external review application referred to several applications and decisions by QPS for certain information. Following consultation with the applicant's mother, the Information Commissioner decided to accept the application for external review, outside of the relevant timeframe, in relation to QPS's first decision of 2 May 2018.

<sup>6</sup> OIC confirmed the narrowed scope of the review in an email dated 17 October 2019 and telephone discussion with the applicant's mother on 18 October 2019.

<sup>7</sup> That is, pages 11 and 12 of the partially released Occurrence. Certain information appearing on page 11 does not comprise the transcript of interview and therefore is not in issue in this external review.

<sup>8</sup> Section 40 of the IP Act.

<sup>9</sup> Section 67(1) of the IP Act sets out 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. Section 47(2) of the RTI Act states that it is Parliament's intention that the grounds on which access may be refused are to be interpreted narrowly.

<sup>10</sup> Sections 47(3)(c) and 50 of the RTI Act.

<sup>11</sup> Noting that section 50(3) of the RTI Act sets out that an agency must have regard to whether the child has the capacity to understand the information and the context in which it was recorded and make a mature judgement as to what might be in his or her best interests, **unless** the access application was made for the child, as is the case in this review.

12. The 'best interests of the child' principle is set out in the United Nations' *Convention on the Rights of the Child* (1989),<sup>12</sup> and has since been applied in Australia in a number of legal contexts, particularly in family law<sup>13</sup> and administrative law.<sup>14</sup>
13. In the family law context, courts have recognised that the 'best interests of the child' is not a straightforward test. For example, in the High Court decision of *CDJ v VAJ*<sup>15</sup> the majority stated that:

*It is a mistake to think that there is always only one right answer to the question of what the best interests of a child require. Each judge is duty bound to make the order which he or she thinks is in the best interests of the child... Best interests are values, not facts. They involve a discretionary judgement in respect of which judges can come to opposite but reasonable conclusions.*
14. Determining the best interests of the child is a multi-faceted test and includes consideration of the wellbeing of the child, and factors that will affect the future of the child, the happiness of the child, immediate welfare and other matters relevant to the child's healthy development.<sup>16</sup>
15. In *Re Bradford and Director of Family Services; Commissioner, Australian Federal Police*,<sup>17</sup> the applicant sought access under the *Freedom of Information Act 1982* (Cth) to information about her four children that were held by the Director of Family Services. In that case, President Curtis noted that if there are child protection issues, disclosure of any information that undermines the relationship between the child and the agency charged with the protection of children may not be in the child's best interests.<sup>18</sup>
16. The Information Commissioner has also previously recognised that it would not be in a child's best interests to disclose information where that disclosure may impact the child's trust in a child protection agency or which may result in damage to the relationship between the child and the agency.<sup>19</sup>

## Findings and analysis

17. In this case, I am satisfied that the information is sought under an application made for a child.
18. The Interview Transcript records a conversation between the child and QPS regarding events involving the child and the child's recollection of the events. I am therefore satisfied that this information comprises the child's personal information.

## Contrary to the child's best interests

19. In considering whether the disclosure of the Interview Transcript would not be in the child's best interests, I acknowledge that a parent is generally the most appropriate person to judge what is in the best interests of their child. The child's mother and representative is genuinely concerned about the child's best interests and I understand

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<sup>12</sup> Ratified by Australia in December 1990. This convention provides that the best interests of the child is a 'primary consideration' in decisions concerning children and defines 'children' as everyone under 18 years.

<sup>13</sup> For guidance, see section 60CC of the *Family Law Act 1975* (Cth) (**Family Law Act**) and Australian Human Rights Commission, *Human Rights Brief No. 1: The Best Interests of the Child* (March 1999) available at <<https://www.humanrights.gov.au/our-work/human-rights-brief-no-1>> (accessed on 5 December 2019).

<sup>14</sup> *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273.

<sup>15</sup> (1998) 197 CLR 172 at 219.

<sup>16</sup> See section 60CC of the Family Law Act.

<sup>17</sup> (1998) 52 ALD 455 (**Re Bradford**).

<sup>18</sup> *Re Bradford* at 458-459.

<sup>19</sup> *2YSV6N and the Department of Communities, Child Safety and Disability Services* [2014] QICmr 25 (5 June 2014).

that she is seeking the Interview Transcript for this reason. In considering the best interests of the child in this case, particularly given the very young age of the child, I have carefully considered each of the submissions put forward by the child's mother.

20. The applicant's mother submits that the Interview Transcript should be released to enable her to protect the child.<sup>20</sup> I accept that protecting the child and ensuring the child's health and wellbeing is a paramount consideration in determining whether disclosure is in the child's best interests. While the specific information appearing in the Interview Transcript has not been released, the child has disclosed the nature of this information to her mother,<sup>21</sup> police discussed the subject matter of the interview with the child's mother at the time of the interview, and some information has been released through the IP access process. I acknowledge that release of the Interview Transcript would reveal specific detail about what the child said in the interview, however having considered the content of the Interview Transcript as well as the information already provided to the child's mother, I am satisfied that the mother is sufficiently apprised of the relevant issues in order to care for and protect her child.
21. The applicant's mother submits that the child was '*interrogated by police without me being present and without informed consent. I only allowed my child to be alone, without me with the police officers on the understanding that I would receive a copy of what was said. It is a serious offence to interrogate a child without her parent being present.*'<sup>22</sup> She further submits that it is contrary to the public interest for police to interview children without parental consent or a parent being present, as this would deter parents from encouraging their children to trust in the police.<sup>23</sup> It has also been submitted that refusing access to the Interview Transcript would discourage parents from allowing children to be interviewed by police.<sup>24</sup>
22. I acknowledge that police are generally not permitted to question a child suspect<sup>25</sup> without a support person present.<sup>26</sup> However, there is nothing before me to suggest that the child was interviewed as a suspect. Instead, it appears that the child was interviewed as the victim of an alleged crime. QPS's Operational Procedures Manual states that a parent should not be the support person for the interview of a child who is the suspected victim of an offence.<sup>27</sup> Further, it is an offence for a person to have unauthorised possession of, or dealing with, statements obtained under section 93A of the *Evidence Act*.<sup>28</sup> The information previously released to the applicant indicates that police gave a general report regarding the interview to the applicant's mother shortly after its completion. There is also no objective evidence before me to support the assertion that the interview was conducted without the informed consent of the child's parent or that there was a mutual understanding that a copy of the interview transcript would be provided to the child's parent following the interview.
23. I consider that the presence of a parent may influence a child's willingness or ability to speak freely and frankly to police, and for this reason, QPS interviews of this nature are conducted without the presence of a parent. There is no evidence before me that QPS's current practice has resulted in a reluctance of parents to engage with police and I

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<sup>20</sup> External review application dated 24 January 2019.

<sup>21</sup> This is clear from the information that has been previously released to the applicant.

<sup>22</sup> Submissions dated 5 June 2019. Similar submissions were made in the external review application dated 24 January 2019 and submissions dated 8 August 2019.

<sup>23</sup> Applicant submissions dated 6 June 2019.

<sup>24</sup> Submissions dated 8 August 2019 and similar submissions were made in a telephone conversation on 21 May 2019.

<sup>25</sup> Section 415 of the *Police Powers and Responsibilities Act 2000* (Qld) (**PPRA**) provides that part 3 applies to a person being questioned as a suspect of an indictable offence.

<sup>26</sup> Section 421 of the PPRA.

<sup>27</sup> QPS Operational Procedures Manual, issue 70 (Public Edition) chapter 7.6.1.

<sup>28</sup> Section 93AA of the *Evidence Act*.

- consider it unlikely that parents would avoid seeking police assistance where they suspect their child has been harmed.
24. I consider it is important for QPS officers to be able to conduct interviews and communicate with very young children in confidence, to obtain the relevant evidence necessary to properly investigate a matter involving a child. I am satisfied that the disclosure of the specific information exchanged between QPS and a child in an interview where that child's parent is explicitly not present, could potentially undermine the relationship of confidence between the child and QPS as the agency charged with the protection of that child in this circumstance.<sup>29</sup>
25. Where a parent applies to access information under the IP Act on behalf of the child,<sup>30</sup> the child is taken to be the applicant. Practically though, disclosure of information through this process will mean that the parent accesses the information requested on behalf of their child. Disclosure of the Interview Transcript in this way may impact the child's willingness to speak freely with police officers in the future if there are concerns about the contents being reported to their parent, and in turn, prejudice QPS's ability to obtain information from the child. I am satisfied that this would not be in the child's best interests.
26. The child's mother submits that disclosure of the Interview Transcript would not prejudice QPS's investigative processes because there is no investigation pending.<sup>31</sup> I am satisfied that there does not have to be a *current* investigation for prejudice to occur to an investigative *process*. Whilst the information obtained in a particular interview may not, in itself, be enough to lead to a successful prosecution, it does not preclude this information being used in support of any future proceedings, should they arise.<sup>32</sup>
27. Disclosure of the Interview Transcript through this process may have a negative bearing on any future QPS investigation into similar allegations by the child by reducing the weight that can be attributed to the child's past or future statements. I am satisfied that this outcome would also not be in the best interests of the child.
28. The applicant's mother submits that the investigation information may be destroyed if the child has to wait until she reaches the age of majority to obtain information, and destruction of the Interview Transcript would '*deprive the child of her rights*.'<sup>33</sup> QPS's Retention and Disposal Schedule<sup>34</sup> requires the retention of all investigation material relating to allegations of child abuse for 75 years after the last action on the matter. Given the relatively recent date of the interview,<sup>35</sup> I consider it unlikely that the Interview Transcript will be destroyed prior to the child reaching the age of majority.
29. The applicant's mother submits that police officers explained that the interview information can be used as exploitation material.<sup>36</sup> While I am unable to disclose in these reasons the content of the Interview Transcript,<sup>37</sup> I note that both the *Criminal Code Act 1995 (Cth)*<sup>38</sup> and *Criminal Code Act 1849 (Qld)*<sup>39</sup> respectively define '*child abuse material*' and '*child exploitation material*' as including information that '*describes*' a child in a specific context. On that basis and taking into account the reason that the child was

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<sup>29</sup> As established in *Re Bradford* at 458-459.

<sup>30</sup> Section 45 of the IP Act.

<sup>31</sup> Submissions dated 6 June 2019.

<sup>32</sup> If used for criminal proceedings, there are strict rules around access to and dissemination of interviews under section 93 of the Evidence Act (described in section 93AA of the Evidence Act).

<sup>33</sup> Submissions dated 26 September 2019, received by OIC on 30 September 2019.

<sup>34</sup> In an unrelated review, OIC previously obtained from QPS a copy of the *Queensland Police Service Retention and Disposal Schedule* (12 September 2008), QDAN 561 version 7.

<sup>35</sup> The interview was conducted in 2017.

<sup>36</sup> Submissions received in a telephone discussion between the applicant's mother and OIC on 6 September 2019.

<sup>37</sup> Section 121(3) of the IP Act.

<sup>38</sup> Section 473.1.

<sup>39</sup> Section 207A.

interviewed by police, I accept this submission and find that it weighs against disclosure. To be clear, I do not consider that the applicant or her mother will use the Interview Transcript inappropriately, however, I consider that unintentional or inadvertent further disclosure<sup>40</sup> may result in the risk of this harm and it is relevant to consider this when determining whether disclosure is in the best interests of the child.

30. In the family law context, the benefit to a child having a meaningful relationship with both parents is a primary consideration in determining the child's best interests.<sup>41</sup> The provisions of the Family Law Act dealing with the best interests of a child are intended to provide a framework for determining parenting orders<sup>42</sup>. For the sake of completeness here, I have turned my mind to this consideration and acknowledge that the mother has parental responsibility for the child<sup>43</sup> and disclosure of the Interview Transcript is unlikely to affect the child's relationship with either parent.<sup>44</sup>
31. The applicant's mother submits that *'there is no basis in law, and it is unethical to prioritise a (young) child's right to privacy over her right to be free and safe to disclose what she considers necessary to any authority with open communication with her parents.'*<sup>45</sup> Due to the child's very young age, I accept that the child has very little privacy from her mother and, given this application was made by the mother, on behalf of the child, I have given no weight to the child's privacy in determining whether disclosure would be contrary to the child's best interests.
32. The applicant's mother submits that the Interview Transcript contains her own personal information which she has a right to access,<sup>46</sup> and at law, the child's private information, such as intellectual property, is owned by her parents.<sup>47</sup> While the applicant's mother may have her own right to access personal information, and a parent may own their minor child's intellectual property, I am not persuaded that these arguments advance the proposition that disclosure of the Interview Transcript is in the child's best interests.
33. The applicant's mother submits<sup>48</sup> that the Interview Transcript can be disclosed with exempt, contrary to the public interest and third party personal information redacted. I have considered this submission, however I am satisfied that partial redaction would not sufficiently negate the potential harm to the child that I have set out above and even disclosure in this format would not be in the best interests of the child.
34. Finally, the applicant's mother submits<sup>49</sup> that the Information Commissioner has the discretion to release the Interview Transcript.<sup>50</sup> While an agency may give access to a document even if a ground on which access may be refused applies,<sup>51</sup> the Information Commissioner has no such discretion.<sup>52</sup>

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<sup>40</sup> Noting that, once information is disclosed under the RTI Act or IP Act there are no express limitations on its further use or disclosure.

<sup>41</sup> Section 60CC of the Family Law Act.

<sup>42</sup> Australian Law Reform Commission, *The Best Interests Principle* (29 July 2010) available at <<https://www.alrc.gov.au/publication/seen-and-heard-priority-for-children-in-the-legal-process-alrc-report-84/16-childrens-involvement-in-family-law-proceedings/the-best-interests-principle/>> (accessed on 27 November 2019).

<sup>43</sup> External review application dated 24 January 2019.

<sup>44</sup> Submissions dated 8 August 2019.

<sup>45</sup> Submissions dated 8 August 2019.

<sup>46</sup> External review application dated 24 January 2019.

<sup>47</sup> Submissions dated 8 August 2019.

<sup>48</sup> External review application dated 24 January 2019.

<sup>49</sup> External review application dated 24 January 2019.

<sup>50</sup> Under section 108 of the IP Act.

<sup>51</sup> Section 67(2) of the IP Act.

<sup>52</sup> Section 118 of the IP Act.

## Conclusion

35. I acknowledge that the information in issue in this review is the information provided by a very young child to QPS in relation to an incident of concern. The application is made by the child's mother, on behalf of the child, for the child's personal information and in these circumstances the IP Act allows for access to be refused where disclosure would not be in the best interests of the child.
36. As I have acknowledged previously, a child's parent is often in the best position to determine what is in the best interests of a child and it is only in exceptional cases that the disclosure of information about a young child, to their parent acting on their behalf, would not be in the best interests of that child. I am satisfied that one of these exceptional circumstances is where a young child makes specific disclosures to QPS as part of an interview conducted under section 93A of the Evidence Act, where the parent of that child is not present.
37. In identifying the relevant factors for my consideration, I note that determining the best interests of a child is a multi-faceted test and includes consideration of the factors that will affect the future and immediate welfare and happiness of the child.<sup>53</sup> In this case the factors that I have identified are raised by the nature of the Interview Transcript, being a record of a conversation between the child and QPS in circumstances where the child may potentially have been the victim of a criminal offence, as well as the factors raised in submissions made by the child's mother.
38. Having considered each of the factors explained above, I am satisfied that disclosure of the Interview Transcript may impact upon the child's willingness to speak to QPS freely and prejudice the conduct of future investigations by QPS in relation to that child. I also consider that the possibility of the Interview Transcript being recognised as child exploitation material adds further weight to the conclusion that disclosure, in these circumstances,<sup>54</sup> would not be in the best interest of the child.
39. On this basis, I consider that disclosure of the Interview Transcript would not be in the best interests of the child applicant and access can be refused under section 47(3)(c) of the RTI Act.

## DECISION

40. I vary QPS's decision and find that access to the Interview Transcript may be refused under section 67(1) of the IP Act and section 47(3)(c) of the RTI Act.
41. 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: 6 December 2019**

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<sup>53</sup> For example, see section 60CC of the Family Law Act.

<sup>54</sup> As there are no express limitations on the further use or disclosure of information disclosed under the RTI Act or IP Act.

## APPENDIX

### Significant procedural steps

Date	Event
25 January 2019	OIC received the external review application dated 24 January 2019.
29 January 2019	The applicant provided additional information in support of the application.
31 January 2019	OIC notified the applicant and QPS that it had received the application for external review and requested procedural documents.
4 February 2019	OIC received the requested procedural documents from QPS.
25 February 2019	OIC notified the applicant and QPS that it had accepted the application for external review of QPS decision dated 11 January 2019 and requested additional information from QPS.
12 March 2019	OIC received the requested information from QPS.
13 March 2019	OIC requested and received further information from QPS.
18 April 2019	OIC received submissions from the applicant by telephone and OIC clarified that the applicant sought review of QPS decision dated 2 May 2018. OIC advised the applicant that it was considering whether to accept out of time the application for external review of QPS decision dated 2 May 2018.
24 April 2019	OIC clarified with QPS that the decision under review was QPS decision dated 2 May 2018 and requested additional information from QPS.
17 May 2019	OIC received the requested information from QPS.
21 May 2019	OIC received additional information from QPS by telephone and received submissions from the applicant by telephone.
23 May 2019	OIC requested and received additional information from QPS.
5 June 2019	OIC received additional submissions from the applicant.
6 June 2019	OIC received additional submissions from the applicant.
9 July 2019	OIC conveyed a preliminary view to the applicant and requested submissions in response if the view was not accepted.
11 July 2019	OIC confirmed to QPS the decision under review was QPS's decision dated 2 May 2019 and conveyed a preliminary view that disclosure of the transcript of interview would be contrary to the best interests of the child.
9 August 2019	OIC received the submissions from the applicant dated 8 August 2019.
6 September 2019	OIC received additional submissions from the applicant by telephone. OIC requested that QPS provide the previously released information to the applicant and sought to informally resolve the review with the applicant on this basis.
12 September 2019	OIC received notification from QPS that the previously released information was again provided to the applicant.
30 September 2019	OIC received an additional submission from the applicant dated 26 September 2019.
17 October 2019	OIC requested additional information from QPS regarding its retention and disposal of records.
18 October 2019	OIC received additional submissions from the applicant.
6 November 2019	OIC received submissions from QPS.
15 November 2019	OIC conveyed a preliminary view to the applicant.