



Decision and Reasons for Decision

Citation:	<i>Y29 and Queensland Human Rights Commission</i> [2020] QICmr 45 (6 August 2020)
Application Number:	314979
Applicant:	Y29
Respondent:	Queensland Human Rights Commission
Decision Date:	6 August 2020
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - ACCESS APPLICATION - application not confined to documents containing the applicant's personal information - application for access to documents other than to the extent they contain the applicant's personal information - whether access application purportedly made under the <i>Information Privacy Act 2009</i> (Qld) should have been made under the <i>Right to Information Act 2009</i> (Qld) - whether agency can refuse to deal with the access application - section 54(5)(b) of the <i>Information Privacy Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Queensland Human Rights Commission (**QHRC**) for access to:
 1. *Any email, calendar entry, meeting minute, text, electronic or paper record in use at QHRC or ADCQ created by or sent to from CEO Scott MacDougall* [sic].^[2]
 2. *Emails to and from Respondents.*
2. The applicant's application did not indicate whether it was made under the *Information Privacy Act 2009* (Qld) (**IP Act**) or made under the *Right to Information Act 2009* (Qld) (**RTI Act**).
3. QHRC wrote³ to the applicant stating that it appeared that her application was one that should be made under the RTI Act. QHRC confirmed that, if this was the case, the applicant would need to pay an application fee to make her application compliant. QHRC also stated that, if the applicant wanted her application to proceed under the IP Act, the applicant would need to confine it to documents that contained her personal information.

¹ Access application dated 23 September 2019, however it was received on 18 September 2019.

² Mr Scott MacDougall is the Queensland Human Rights Commissioner.

³ Letter dated 18 October 2019.

4. After receiving a response from the applicant, QHRC decided⁴ to refuse to deal with the access application under section 54(5)(b) of the IP Act.
5. The applicant applied⁵ to the Office of the Information Commissioner (**OIC**) for external review of QHRC's decision refusing to deal with her access application.
6. For the reasons set out below, I find that the applicant's application seeks 'access to document[s] other than to the extent [they] contain the applicant's personal information'.⁶ I therefore find that the application cannot be made under the IP Act and QHRC can therefore refuse to deal with it under section 54(5)(b) of the IP Act.

Background

7. Significant procedural steps taken during the external review are set out in the Appendix to this decision.

Reviewable decision

8. The decision under review is QHRC's decision dated 11 November 2019.

Evidence considered

9. The applicant provided several submissions during the review. While I have considered the entirety of submissions before me, in this decision I have only referred to those parts of the submissions which I consider have relevance to the issues to be determined in this external review.
10. In reaching my decision, I have had regard to the submissions, evidence, legislation and other material referred to throughout these reasons (including footnotes and Appendix).⁷

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 and others, the applicant has made submissions alleging that the Information Commissioner and Right to Information Commissioner and I have shown bias towards her.⁸ I have carefully considered these submissions, alongside the High Court's test for assessing apprehended bias for a decision maker. The High Court's test requires consideration of 'if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide'.⁹ The High Court has also noted that '[t]he question of whether a fair-minded

⁴ Decision dated 11 November 2019.

⁵ External review application dated 11 November 2019.

⁶ Section 54(1) of the IP Act.

⁷ Generally, it is necessary that decision makers have regard to the *Human Rights Act 2019* (Qld) (**HR Act**). However, given section 11(1) of the HR Act provides that '[a]ll individuals **in Queensland** have human rights' (my emphasis), and given the applicant resides in a State other than Queensland, I have not had direct regard to the HR Act in this review. I have, of course, observed and respected the law prescribed in the IP and RTI Acts in making this decision. Where the HR Act applies, doing so is construed as 'respecting and acting compatibly with' the rights prescribed in the HR Act (*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]). Accordingly, had it been necessary for me to have regard to the HR Act in this review, the requirements of section 58(1) of that Act would be satisfied, and the following observations of Bell J about the interaction between the Victorian analogues of Queensland's IP and RTI Acts and HR Act would apply: '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' (*XYZ* at [573]).

⁸ For example, emails identified as submissions in this review dated 27 February 2020 and 12 March 2020 regarding the Information Commissioner and Assistant Information Corby. The applicant has made similar allegations regarding the Right to Information Commissioner and myself in submissions regarding other external reviews.

⁹ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ. See also *Michael Wilson & Partners Limited v Nicholls* (2011) 244 CLR 427 at [31] per Gummow ACJ, Hayne, Crennan and Bell JJ.

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'.¹⁰

12. OIC is an independent statutory body that conducts merits review of government decisions about access to, and amendment of, documents. The procedure to be followed on external review is, subject to the IP Act, within the discretion of the Information Commissioner.¹¹ In order to ensure procedural fairness (as required by both the IP Act¹² and common law), it is the practice of OIC to convey a preliminary view, based on an assessment of the material before the 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 any further information they consider relevant to those issues. Following difficulties communicating with the applicant by telephone in previous contact with OIC, the applicant was asked to communicate with OIC by written document or audio file, sent by email or saved to USB or CD and posted. I am satisfied that this has had no bearing on the extent to which OIC has been able to communicate with the applicant in this review, or my consideration of the issues relevant to the issue for determination in the review.
13. In terms of the applicant's allegations of bias regarding the Information Commissioner and Right to Information Commissioner, I confirm that Assistant Information Commissioner Corby and I are the delegates of the Information Commissioner¹³ for this review. I also confirm that the procedures followed and decisions made throughout the course of this review have been determined by Assistant Information Commissioner Corby or myself. Consequently, there is nothing before me to suggest that the applicant's allegations of bias by the Information Commissioner and Right to Information Commissioner are possessed of any substance.
14. In terms of the applicant's allegations of bias regarding Assistant Information Commissioner Corby and myself, apart from this external review and other external reviews sought by the applicant regarding which I am a delegate of the Information Commissioner,¹⁴ I have not to my knowledge dealt with the applicant in any capacity, and cannot identify any conflict of interest in my dealing with her application for review of QHRC's decision. I do not consider that the fact that the applicant has requested that I be joined to proceedings in which she alleges that her human rights have been breached¹⁵ has altered my conduct of the review or consideration of the issues before me in any way. Similarly, I am satisfied that Assistant Information Commissioner Corby had no dealings with the applicant prior to her external reviews, and the applicant's complaints regarding Assistant Information Commissioner Corby have not altered the procedures followed in this review.
15. Further, the fact that my preliminary view conveyed to the applicant in this review¹⁶ did not adopt the applicant's view that the access application is one which can made under the IP Act does not, of itself, demonstrate bias against the applicant. I advised the applicant that she could respond to my preliminary view and provide additional information supporting her case, which would be considered and may influence the outcome.¹⁷ I consider that this advice demonstrates that I was not so committed to my

¹⁰ *Isbester v Knox City Council* (2015) 255 CLR 135 at [20] per Kiefel, Bell, Keane and Nettle JJ.

¹¹ Section 108 of the IP Act.

¹² Section 110 of the IP Act.

¹³ Section 139 of the IP Act.

¹⁴ Under section 139 of the IP Act.

¹⁵ Email dated 31 January 2020 sent in relation to another external review sought by the applicant.

¹⁶ On 27 February 2020.

¹⁷ Footnote 1. of OIC's letter to the applicant dated 27 February 2020.

preliminary view that my conclusions were already formed and incapable of alteration, whatever evidence or arguments may be presented by her.¹⁸

16. 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, 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 I¹⁹ might not bring an impartial and unprejudiced mind to the resolution of this matter.

Issue for determination

17. I will now turn to consideration of the issue for determination in this review. The issue I must determine is whether, following consultation, the application *'is for access to document[s] other than to the extent [they] contain the applicant's personal information'*²⁰ – that is, whether the access application seeks access to documents that do not contain her personal information.

Relevant law

18. The IP Act forms part of an information access scheme that allows individuals to access information held by the Queensland Government. The IP Act creates a right for an individual to access documents held by an agency such as QHRC *'to the extent the documents contain the applicant's personal information'*.²¹

19. Personal information is:²²

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.

20. Applications seeking documents containing an applicant's personal information are to be made under the IP Act,²³ while applications seeking documents other than those containing an applicant's personal information fall under the RTI Act.²⁴

21. Where an applicant seeks information under the IP Act which 'on its face' should be sought under the RTI Act, section 54(2) of the IP Act requires the agency to make reasonable efforts to contact the applicant within 15 business days and inform the applicant that:

- a) the application is not an application that can be made under the IP Act
- b) the application could have been made under the RTI Act if the application fee were paid; and
- c) the applicant may consult with the agency with a view to:
 - making the application under the IP Act by changing the application; or
 - having the application dealt with under the RTI Act by paying the application fee.

¹⁸ With reference to the test for prejudgment noted in *Minister for Immigration v Jia Le Geng* (2001) 205 CLR 507 at [72] per Gleeson CJ and Gummow J.

¹⁹ As a delegate of the Information Commissioner under section 139 of the IP Act.

²⁰ Section 54(1) of the IP Act.

²¹ Section 40(1)(a) of the IP Act.

²² Section 12 of the IP Act.

²³ Section 43(1) of the IP Act.

²⁴ Section 24(1) of the RTI Act.

22. An agency must not refuse to deal with an application purportedly made under the IP Act without first giving the applicant a reasonable opportunity to consult with the agency.²⁵ If, after a reasonable opportunity to consult has been given and any consultation happens, the applicant does not either change the application so it can be made under the IP Act, or pay the application fee so that it can be processed under the RTI Act, section 54(5)(b) of the IP Act enables an agency to decide that an application purportedly made under the IP Act cannot be made under the IP Act.

Findings

Does the applicant's application seek access to documents that do not contain her personal information?

23. I have read the applicant's application form. As noted at paragraph 1 above, this application requested access to:
1. *Any email, calendar entry, meeting minute, text, electronic or paper record in use at QHRC or ADCQ created by or sent to from CEO Scott MacDougall [sic].*
 2. *Emails to and from Respondents.*
24. Further, as noted at paragraph 2 above, this application did not indicate whether it was made under the IP Act or the RTI Act. The application was made on the approved form, which poses the question '*Which description most closely describes your application for access?*'²⁶ and enables an applicant to indicate that their application is made under the IP Act by ticking a box stating '*All of the documents I'm applying for contain my personal information ... IP application, no application fee*'. The applicant did not tick any box in response to this question.
25. The Information Commissioner has recognised that the scope of an access application should not be interpreted legalistically or narrowly.²⁷ Balanced against this is the need for agencies to be able to restrict their searches for documents with reference to the terms used in the application.²⁸
26. Based on a plain, rather than legalistic or narrow, reading of the applicant's application, I consider that some documents requested at item 1. of the applicant's application could feasibly contain the applicant's personal information. However, I am also satisfied that an extensive amount of documents falling within item 1. would not contain the applicant's personal information. Consequently, I find that the applicant's application seeks access to documents that do not contain her personal information.
27. Given my finding regarding item 1., it is unnecessary for me to go on to consider item 2. However, for sake of completeness, I note that it is not possible for me to make a finding regarding about whether documents falling within item 2. would or would not contain the applicant's personal information. This is because there is insufficient information before me to identify the '*Respondents*' referred to in this item, and therefore insufficient information to identify the documents sought.²⁹

²⁵ Section 54(3) of the IP Act.

²⁶ Question 1. under the heading 'Application Details' on page 2 of the approved application form.

²⁷ *Fennelly and Redland City Council* (Unreported, Queensland Information Commissioner, 21 August 2012) at [21].

²⁸ *Kelson and Queensland Police Service* [2017] QICmr 7 (3 March 2017) at [18].

²⁹ My further comments in this regard are set out at paragraph 43 below.

Was the applicant given a reasonable opportunity to consult?

28. I have read QHRC's letter to the applicant dated 18 October 2019 (**Consultation Letter**). The Consultation Letter stated:
- given the documents the applicant had requested, it appeared that her application was made under the RTI Act, but no application fee was received; and
 - if the applicant intended to make an application under the IP Act, she would need to confine the scope of her application to documents that contain her personal information.³⁰
29. The applicant sent two emails to QHRC responding to the Consultation Letter.³¹ In one of the emails, she stated that '[QHRC] were not permitted a consultation'.³² This statement appears to relate to the applicant's access application, which specified 'NO CONSULT'.
30. Despite the applicant's wishes regarding consultation, section 54(3) of the IP Act requires that an applicant be given a reasonable opportunity to consult before the agency can refuse to deal with an application under section 54(5)(b) of the IP Act.
31. On external review, I wrote to the applicant³³ and advised that:
- her application did not –
 - indicate whether it was an application under the IP Act
 - limit the scope to documents that contained her personal information; and
 - accordingly, it was my preliminary view that her application could not be made under the IP Act and QHRC could refuse to deal with it under section 54(5)(b) of the IP Act.³⁴
32. The applicant made submissions in this review both before and after receiving my preliminary view.³⁵
33. Noting these circumstances,³⁶ I am satisfied that the applicant has been informed of the matters in section 54(2) of the IP Act and has been given a reasonable opportunity to consult as required by section 54(3) of the IP Act.

Did the applicant change her application so that it is confined to documents that contain her personal information?

34. The applicant's only pertinent submission in response to the Consultation Letter was to state that her application was '*clearly marked as an IP application*'.³⁷ Otherwise, she did not respond to the matters she was asked to address.
35. On external review, the applicant submitted:³⁸

³⁰ The consultation letter also stated that, in either case, the applicant needed to identify the '*Respondents*' in Item 2. of the scope.

³¹ Dated 18 October 2019 (timed 2.34 pm and 2.38 pm).

³² Email dated 18 October 2019 at 2.38 pm.

³³ Letter dated 27 February 2020.

³⁴ I also advised that the application had not identified what the applicant meant by '*Respondents*' in Item 2. of the scope.

³⁵ See paragraphs 35 and 36 and footnote 42 below.

³⁶ Whether I only take into account QHRC's consultation with the applicant, or also take into account OIC's communications with the applicant (given the Information Commissioner decides cases according to the material facts and circumstances which apply at the time the Information Commissioner comes to make the external review decision – see *Palmer and Townsville City Council* [2019] QICmr 43 (3 October 2019) at [21]-[40]).

³⁷ Email dated 18 October 2019 at 2.38 pm.

³⁸ Email dated 25 January 2020 at 7.28 am.

How long will it be until you release the personal information about me involving or created by QHRC Ian McDougall [sic]?

36. Then, in response to my preliminary view, the applicant submitted:³⁹

I have never made any application other than an IP application...

I am requesting any communication or record about me to any person which involves Scott McDougall.

Most importantly I seek emails with Rachael Rangihaeata.^[40]

...

I do not seek consult by attached convoluted letters where you [OIC] split hairs and obfuscate your vexatious bad faith demands in order to deny my access to evidence needed for my litigation.

37. I have carefully considered the applicant's response to QHRC's Consultation Letter and submissions to OIC.
38. As noted at paragraph 24 above, the applicant did not indicate whether she was making an IP application or an RTI application. Also, as noted at paragraph 26 above, I am satisfied that many documents falling within item 1. of the scope specified in the applicant's application would not contain the applicant's personal information. Given these considerations, I am unable to accept the applicant's submission to QHRC that her application was '*clearly marked as an IP application*' or her submission to OIC that she '*never made any application other than an IP application*'. Further, I am unable to construe either of these submissions as changing her application in the manner contemplated by section 54(2)(c)(i) of the IP Act, so as to make an application under the IP Act. Rather, these submissions simply state the applicant's views regarding her original, unchanged application.
39. I have also carefully considered the applicant's submissions to OIC, which indicate that she does not accept my preliminary view.⁴¹ In particular, I have considered the applicant's submissions asking '*how long will it be until you release the personal information about me involving or created by QHRC Ian McDougall [sic]*' and '*I am requesting any communication or record about me to any person which involves Scott McDougall*'. Again, I am unable to construe either of these submissions as changing the application in the manner contemplated by section 54(2)(c)(i) of the IP Act, so as to make an application under the IP Act. Neither submission makes any reference to the scope of the applicant's application or includes any comments which could be construed as a request to change that scope. In these circumstances, I consider that the two submissions go no further than identifying documents falling within Item 1. of the original, unchanged application of particular interest to the applicant.⁴²
40. In summary, the applicant's submissions either insist that her application was made under the IP Act – however, this is not supported by the application form itself; or raise particular documents falling within the scope of her application – but make no reference to changing or confining the scope of that application.

³⁹ Email dated 27 February 2020 at 4.13 pm.

⁴⁰ Ms Rangihaeata is Queensland's Information Commissioner.

⁴¹ Dated 27 February 2020.

⁴² While the applicant's submissions do not accept my preliminary view and do not change the scope of her application that is the subject of this review, I am aware that she nevertheless made a further access application to QHRC on 27 February 2020 (being the day she received my preliminary view). This further application requested '*All communications, records, emails, minutes, texts, deleted or archived items, paper and electronic records about me created by, sent to or from or including or heard by CEO Scott McDougall*' (my emphasis) and indicated that it was an application made under the IP Act by ticking the box stating '*All of the documents I'm applying for contain my personal information ... IP application, no application fee*'. I am aware of this, given that OIC received an application for external review regarding QHRC's decision about this further access application on 5 June 2020.

41. In these circumstances,⁴³ I am satisfied that the applicant has not consulted with a view to changing her application. It follows that I am satisfied that the applicant has not changed her application to confine its scope to documents containing her personal information, and has not made her application an application under the IP Act, in accordance with section 54(2)(c)(i) of the IP Act.
42. Accordingly, I find that the application is not an application that can be made under the IP Act and QHRC can therefore refuse to deal with it under section 54(5)(b) of the IP Act.
43. Further, for completeness, even if the application is one which could be construed as an application made under the IP Act, I note that the applicant's reference to '*Respondents*' in item 2 of the scope does not provide any information regarding these respondents.⁴⁴ Accordingly, I consider that the application does not give sufficient information concerning the document/s sought by the applicant to enable QHRC to identify those document/s.⁴⁵ Noting that both the Consultation Letter and my preliminary view advised the applicant that she had not identified what she meant by '*Respondents*' in Item 2. of the scope,⁴⁶ I consider the applicant was given a reasonable opportunity to consult with a view to meeting this requirement.⁴⁷ Therefore, even if I could accept that the application was made under the IP Act, on the basis of the information before me I would find that QHRC was entitled to decide that the application did not comply with all relevant application requirements.⁴⁸

DECISION

44. I affirm QHRC's decision dated 11 November 2019 by finding that the application is not an application that can be made under the IP Act and QHRC can therefore refuse to deal with it under section 54(5)(b) of the IP Act.
45. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

A Rickard
Assistant Information Commissioner

Date: 6 August 2020

⁴³ Whether I only take into account QHRC's consultation with the applicant, or also take into account OIC's communications with the applicant, as mentioned at footnote 36 above.

⁴⁴ The applicant did not provide the names of the '*Respondents*', nor did she provide any information by which they could reasonably be ascertained – for example, information about the proceedings in which they are involved as respondents.

⁴⁵ Section 43(2)(b) of the IP Act.

⁴⁶ As noted at footnotes 30 and 34 above.

⁴⁷ As required by section 53(3) of the IP Act – again, whether I only take into account QHRC's consultation with the applicant, or also take into account OIC's communications with the applicant, as mentioned at footnote 36 above.

⁴⁸ Under section 53(6) of the IP Act.

APPENDIX

Significant procedural steps

Date	Event
11 November 2019	OIC received the applicant's application for external review.
14 November 2019	OIC notified QHRC and the applicant that the application for external review had been received and requested procedural documents from QHRC.
20 November 2019	OIC received the requested procedural documents from QHRC.
25 January 2020	OIC received an emailed submission from the applicant.
30 January 2020	OIC wrote to the applicant about her external review applications.
13 February 2020	OIC requested and received a copy of the access application from QHRC.
26 February 2020	OIC received an emailed submission from the applicant.
27 February 2020	OIC notified QHRC and the applicant that the application for external review had been accepted and conveyed a preliminary view to the applicant. OIC received two emailed submissions from the applicant.
5 March 2020	OIC received an emailed submission from the applicant about various matters including this review.
11 March 2020	OIC wrote to the applicant about her external review applications.
12 March 2020	OIC received an emailed submission from the applicant about various matters including this review.
1 June 2020	OIC wrote to the applicant about her external review applications.
2 June 2020	OIC received an emailed submission from the applicant about various matters including this review.