



## Decision and Reasons for Decision

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<b>Citation:</b>	<i>Lester and Department of Justice and Attorney-General [2018] QICmr 6 (7 February 2018)</i>
<b>Application Number:</b>	313278
<b>Applicant:</b>	Lester
<b>Respondent:</b>	Department of Justice and Attorney-General
<b>Decision Date:</b>	7 February 2018
<b>Catchwords:</b>	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - crime scene photographs - deceased person - personal information and privacy - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)

### REASONS FOR DECISION

#### Summary

1. The applicant applied to the Department of Justice and Attorney-General (**Department**) for access under the *Right to Information Act 2009* (Qld) (**RTI Act**) to crime scene photographs (**Photographs**) of his deceased wife admitted as evidence in the applicant's trial.<sup>1</sup> The applicant is currently serving a term of imprisonment, having subsequently been convicted of his wife's murder.
2. The Department located 508 Photographs (1016 pages back and front) obtained by the Department from the Office of the Director of Public Prosecutions.
3. The Department refused access to the Photographs on the basis that their disclosure would, on balance, be contrary the public interest.<sup>2</sup> The applicant applied to this Office (**OIC**) seeking external review of this decision.<sup>3</sup>
4. For the reasons set out below, I affirm the Department's decision to refuse access to the Photographs because their disclosure would, on balance, be contrary to the public interest.<sup>4</sup>

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<sup>1</sup> Access application dated 15 February 2017, received by the Department on 21 February 2017.

<sup>2</sup> Under section 47(3)(b) and 49 of the RTI Act.

<sup>3</sup> External review application dated 23 March 2017.

<sup>4</sup> Under section 47(3)(b) and 49 of the RTI Act.

## Background

5. The applicant is serving a sentence of imprisonment after being convicted, in separate trials, of two serious charges. A series of Photographs, taken by police investigators, were tendered as evidence at the applicant's trial for the more serious of the charges.
6. The applicant's appeal to overturn his conviction for the murder of his wife has been heard by the Queensland Court of Appeal and that appeal was unsuccessful. The applicant sought leave to the appeal to the High Court of Australia and that application was dismissed.
7. The applicant submits that the Photographs are evidence which supports an alternative case theory that his wife was killed by another person for reasons having nothing to do with the applicant.<sup>5</sup> Accordingly, the applicant contends that access to the Photographs is required to assist the applicant in applying to the Governor of Queensland for a pardon against his conviction.<sup>6</sup>

## Significant procedural steps

8. Significant procedural steps relating to the application and the external review are set out in the Appendix.

## Reviewable decision

9. The decision for review is the Department's decision dated 14 March 2017, refusing access to the Photographs on the ground that their disclosure would, on balance, be contrary to the public interest.

## Evidence considered

10. Evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including in the footnotes and Appendix).
11. The applicant has urged OIC to view the Information in Issue before reaching a decision.<sup>7</sup> Where the nature of any documents is evident from the terms of the access application, OIC may not require the agency to provide OIC with the relevant documents.<sup>8</sup> I am aware of the nature of the information in issue and am satisfied that it comprises images of the applicant's deceased wife in the context of the crime scene.<sup>9</sup> On that basis, it is not necessary to view each image in order to reach my determination.<sup>10</sup> In the circumstances of this case, OIC did not ask the Department to provide copies of the Photographs.

## Information in issue

12. The information in issue in this review comprises 508 Photographs (1016 pages back and front). The Photographs include images of the applicant's deceased wife, the scene of her death and images of another person involved in that death.

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<sup>5</sup> Applicant's submission dated 16 May 2017.

<sup>6</sup> External review application dated 29 March 2017, and the applicant's submissions dated 16 May 2017 and 18 July 2017.

<sup>7</sup> Applicant's submissions dated 16 May 2017 and 18 July 2017.

<sup>8</sup> Under section 95(1)(a) of the RTI Act, the procedure to be followed on external review is, subject to the RTI Act, within the discretion of the Information Commissioner.

<sup>9</sup> In accordance with the reduced scope of the information in issue as described in the applicant's submissions dated 16 May 2017.

<sup>10</sup> Under section 95(1)(c) of the RTI Act, on an external review the Information Commissioner is not bound by the rules of evidence and may inform himself or herself in any way the Information Commissioner considers appropriate.

13. On external review the applicant narrowed the information in issue to a limited number of the Photographs located.<sup>11</sup> The applicant has stated that he does not seek access to all of the Photographs of the crime scene, just those that depict his deceased wife (**Photographs in Issue**).<sup>12</sup>

### Issue for determination

14. The issue for determination in this review is whether disclosure of the Photographs in Issue would, on balance, be contrary to the public interest under the RTI Act.

### Relevant law

15. A person has a right to be given access to documents of an agency under the RTI Act.<sup>13</sup> However, this right is subject to other provisions of the RTI Act, including the grounds on which an agency may refuse access to documents.<sup>14</sup> One ground upon which an agency may refuse access to information is where its disclosure would, on balance, be contrary to the public interest.<sup>15</sup>
16. The term '*public interest*' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.
17. The RTI Act identifies a number of factors that may be relevant to deciding the balance of the public interest.<sup>16</sup> Section 49(3) of the RTI Act explains the steps that a decision maker must take in deciding where the balance of the public interest lies, as follows:
- identify any irrelevant factors and disregard them<sup>17</sup>
  - identify relevant public interest factors favouring disclosure and nondisclosure
  - balance the relevant factors favouring disclosure and nondisclosure; and
  - decide whether disclosing the information would, on balance, be contrary to the public interest.
18. The RTI Act specifically recognises that disclosure of another individual's '*personal information*' is a factor favouring nondisclosure<sup>18</sup> which could reasonably be expected to lead to a public interest harm.<sup>19</sup> The term '*personal information*' is defined in section 12 of the IP Act as follows:

*information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*

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<sup>11</sup> Applicant's submission dated 16 May 2017.

<sup>12</sup> Applicant's submission dated 16 May 2017.

<sup>13</sup> Section 23 of the RTI Act.

<sup>14</sup> Section 47 of the RTI Act.

<sup>15</sup> Section 47(3)(b) and 49 of the RTI Act.

<sup>16</sup> Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.

<sup>17</sup> No irrelevant factors arise in these circumstances and I have not taken any into account.

<sup>18</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>19</sup> Schedule 4, part 4, section 6 of the RTI Act.

## Findings

19. I am satisfied that disclosing the Photographs in Issue would, on balance, be contrary to the public interest for the reasons that follow.

### **Factors favouring disclosure**

#### **Personal information of applicant and deceased persons**

20. There is a public interest in individuals being able to obtain access to their own personal information.<sup>20</sup> The Photographs in Issue do not depict the applicant or anything that identifies him. I am satisfied that the information in issue does not contain any personal information of the applicant and that this factor does not apply.
21. A factor favouring disclosure arises where the information is the personal information of an individual who is deceased and the applicant is an 'eligible family member'.<sup>21</sup> As the spouse of the deceased, the applicant is an eligible family member therefore giving rise to the public interest factor favouring disclosure.<sup>22</sup> The Photographs in Issue consist of images of the deceased person in the context of a crime scene, comprising their personal information.<sup>23</sup>
22. However, given the circumstances of this case, particularly that the applicant was estranged from his wife at the time of her death and subsequently convicted of her murder, I afford little to no weight to this factor favouring disclosure.

#### **Possible deficiencies, misconduct or negligent, improper or unlawful conduct**

23. The applicant has submitted that '*the only reason he could think of* for being denied access to the Photographs before, during and after the court proceedings is because those Photographs '*could expose the Detectives mishandling of the murder investigation...*'<sup>24</sup>.
24. The RTI Act gives rise to factors favouring disclosure where disclosing information could reasonably be expected to:
- allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;<sup>25</sup> or
  - reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.<sup>26</sup>
25. There is no evidence on the information before me to support the applicant's contention that QPS mishandled the murder investigation. Further, the applicant has failed to identify how disclosure of the Photographs in Issue would assist him to support his claims about the conduct of Queensland Police Service (**QPS**). I also note that the Photographs in Issue were tendered as evidence at the applicant's criminal trial and the veracity of

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<sup>20</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>21</sup> Schedule 4, part 2, item 9 of the RTI Act.

<sup>22</sup> Schedule 4, part 2, item 9 of the RTI Act. The fact that the applicant was the spouse of the deceased at the time of her death is the only relevant consideration when determining if he is an eligible family member for the purposes of this disclosure factor.

<sup>23</sup> Section 12 of the *Information Privacy Act 2009 (IP Act)* defines 'personal information' as information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'

<sup>24</sup> Submissions dated 18 July 2017.

<sup>25</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>26</sup> Schedule 4, part 2, item 6 of the RTI Act.

the murder investigation conducted by QPS was tested by the Supreme Court of Queensland and subsequently by the Queensland Court of Appeal.

26. Therefore, I consider that these factors do not apply.

### **Contribute to the administration of justice**

27. The RTI Act recognises that the public interest will favour disclosure of information where disclosure could reasonably be expected to contribute to the administration of justice for a person.<sup>27</sup> In *Wilsford and Brisbane City Council*<sup>28</sup> the Information Commissioner found that this factor arises if the applicant demonstrates:

- they have suffered loss, damage or some kind of wrong, in respect of which a remedy is, or may be available under the law
- there is a reasonable basis for seeking to pursue the remedy; and
- disclosing the information would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available or worth pursuing.

28. The applicant's submissions are, in essence, that the Photographs in Issue are evidence which support what could be termed an 'alternative case theory' in relation to the murder of his wife. The applicant believes access to the Photographs in Issue would allow him to demonstrate that another person had a particular motive for killing his wife; a motive that would show that the applicant had no involvement in the murder.<sup>29</sup> I have carefully considered the applicant's submissions regarding his belief that disclosure of the Photographs in Issue is necessary for legal reasons to '*overturn the judgement of [his] conviction and 15 years sentence and to prove [his] innocence.*'<sup>30</sup>

29. While I consider that the first two of the three cumulative elements in *Wilsford*, as outlined at paragraph 27, may be satisfied, I find that that the third element is not. The intent of this element as established in *Wilsford* was to give access to information that, without which, an applicant was not able to proceed any further with seeking a remedy. This is not the case here. On the information before me, the applicant's appeal to overturn his conviction has been heard by the Queensland Court of Appeal and that appeal was unsuccessful.<sup>31</sup> The applicant sought leave to appeal to the High Court of Australia and that application was dismissed.<sup>32</sup> Therefore, the legal remedy being sought by the applicant has been pursued in the past and the nondisclosure of the information in issue did not prevent the applicant from seeking a remedy on those occasions.

30. Further, the applicant's submissions indicate that he has evaluated the legal remedy he wishes to pursue, that is, lodging a petition to the Governor of Queensland for a pardon against his conviction. Further, as to whether the applicant has a reasonable basis for seeking to pursue this remedy, I note that the Photographs in Issue were admitted as evidence in the applicant's trial and the alternative case theory as set out in the applicant's submission was considered in detail and dismissed by the Queensland Court of Appeal.<sup>33</sup> It is my view that the Photographs in Issue are not required for the applicant to petition the Governor of Queensland for a pardon, or to evaluate whether this remedy is available.<sup>34</sup>

<sup>27</sup> Schedule 4, part 2, item 17 of the RTI Act.

<sup>28</sup> (1996) QAR 368 (*Wilsford*).

<sup>29</sup> Applicant's submissions dated 16 May 2017.

<sup>30</sup> Submissions dated 18 July 2017.

<sup>31</sup> *R v Lester* [2010] QCA 152 (18 June 2010).

<sup>32</sup> *Lester v The Queen*, [2011] HCA Trans 126 (13 May 2011).

<sup>33</sup> *R v Lester* [2010] QCA 152 at [46] – [49] and [59] – [60].

<sup>34</sup> Compare *EF9T08 and Department of Transport and Main Roads* [2016] QICmr 19 (3 June 2016) where the application required the registered garaging address of a vehicle to pursue a lawful remedy.

31. The applicant's submissions did not identify how access to the Photographs in Issue would assist the applicant in applying for a pardon, noting that these photographs have already been tendered as evidence at the applicant's trials and appeals. The applicant has not demonstrated the necessity of obtaining copies of the Photographs in Issue for the purposes of petitioning the Governor of Queensland for a pardon which only occurs in the most exceptional circumstances. I am, therefore, unable to conclude that the applicant has demonstrated that disclosing them would assist him in pursuing a pardon, or in evaluating the prospects of success of seeking a pardon.
32. I am satisfied that the circumstances of this case do not meet the requirements set out in *Wilsford*. I do not consider that access to the Photographs in Issue is essential for the applicant to pursue his petition to the Governor of Queensland for a pardon and therefore, I am satisfied that this factor favouring disclosure does not apply.

### **Factors favouring nondisclosure**

#### **Personal information of others**

33. The RTI Act provides that disclosing personal information of a person, whether living or dead, could reasonably be expected to cause a public interest harm.<sup>35</sup>
34. The Photographs in Issue show highly sensitive images of the applicant's deceased wife. Given the sensitivity and very private nature of the personal information contained in the crime scene photographs depicting the deceased, I consider the public interest harm resulting from disclosure of this sensitive personal information would be significant and afford significant weight to this factor favouring nondisclosure.

#### **Protection of an individual's right to privacy**

35. A public interest factor favouring nondisclosure arises where the personal information is of a deceased individual, the applicant is an eligible family member of the deceased person and the disclosure of the information could reasonably be expected to impact on the deceased person's privacy if the deceased person were alive.<sup>36</sup>
36. This Photographs in Issue contain highly sensitive personal information about the applicant's deceased wife, in the form of images taken of the deceased at a crime scene. Accordingly, I consider that the privacy interests of the deceased remain high and disclosure of the Photographs in Issue could reasonably be expected to have a substantial impact on the privacy of the deceased person were she alive.
37. On certain occasions, the Information Commissioner has found the substantial weight of the factor favouring nondisclosure of a deceased person's information may be reduced based upon the applicant's knowledge or relationship with the deceased.<sup>37</sup> However, the unique situations in those particular cases cannot be equated with the present case. Despite the applicant being an eligible family member of the deceased, he was also estranged from his wife and subsequently convicted of her murder. I do not consider the weight of this factor favouring nondisclosure is reduced by the spousal relationship between the applicant and the deceased in the circumstances of this case.

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<sup>35</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>36</sup> Schedule 4, part 3, Item 5 of the RTI Act.

<sup>37</sup> In the context of medical records such as evidence of involvement in care, extent of knowledge of medical history/incident and evidence of a special relationship/dependence; see *Summers and Cairns District Health Service; Hintz* (Third party) (1997) 3 QAR 479 at [19] and *Keogh and Department of Health* (Unreported, Queensland Information Commissioner, 31 August 2010) at [30].

38. The Photographs in Issue were exhibits at the applicant's trial, at which the applicant was present, along with members of the public observing the trials. The applicant submits that his awareness of the nature and substance of the Photographs in Issue and the possibility of them having been observed by members of the public reduces any privacy that may attach to the images.<sup>38</sup> I accept the submission that information about the applicant's wife has entered into the public domain through court proceedings and media reports. However, I have no evidence to suggest the Photographs in Issue have been made publicly available beyond the court processes. Further, there has been a considerable passage of time since the applicant's trials. I do not consider that the sensitivity and very personal nature of the images of the deceased is reduced by their disclosure at the trial and possible viewing by members of the public.
39. For these reasons, I afford this factor favouring nondisclosure significant weight.

### ***Balancing the public interest***

40. In summary, for the reasons set out above, I find factors favouring disclosure relating to:
- the administration of justice for the applicant
  - disclosure of personal information; and
  - possible deficiencies, misconduct or negligent, improper or unlawful conduct

do not apply in the circumstances of this review. As the applicant was convicted of his wife's murder, I have afforded little to no weight to the public interest factor favouring disclosure of the personal information of a deceased person to the applicant as an 'eligible family member'.

41. Balanced against this is the significant weight I have afforded to the nondisclosure factors which seek to protect the privacy and personal information of the deceased person.
42. Therefore, on balance, I find that factors favouring nondisclosure outweigh the factors favouring disclosure of the information in issue.
43. Accordingly, I find that disclosure of the information in issue would, on balance be contrary to the public interest.

### **DECISION**

44. For the reasons set out above, I affirm the Department's decision that access to the information in issue may be refused because its disclosure would, on balance, be contrary to the public interest under sections 47(3)(b) and 49 of the RTI Act.
45. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act

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**S Shanley**  
**Acting Assistant Information Commissioner**

**Date: 7 February 2018**

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<sup>38</sup> External review application dated 23 March 2017.

## APPENDIX

### Significant procedural steps

Date	Event
5 April 2017	OIC received the external review application.
5 April 2017	OIC notified the applicant and the Department that the external review application had been received. OIC notified requested relevant procedural documents from the Department.
11 April 2017	OIC received the relevant procedural documents from the Department.
4 May 2017	OIC notified the applicant and the Department that it had accepted the external review application. OIC conveyed a preliminary view to the applicant and requested submissions in response.
31 May 2017	OIC received submissions <sup>39</sup> from the applicant.
7 July 2017	OIC conveyed an additional preliminary view to the applicant, advised of next steps and requested further submissions in response.
31 July 2017	OIC received additional submissions <sup>40</sup> from the applicant.
8 September 2017	OIC received final submissions <sup>41</sup> from the applicant.
11 September 2017	OIC provided the applicant with an update on the status of the review.
15 November 2017	OIC spoke to the Department and provided them with an update on the status of the review.
15 December 2017	OIC provided the applicant with an update on the status of the review.

<sup>39</sup> Submissions dated 16 May 2017.

<sup>40</sup> Submissions dated 18 July 2017.

<sup>41</sup> Submission dated 18 July 2017.