



Decision and Reasons for Decision

Citation:	<i>E104YO and Queensland Fire and Emergency Services [2018] QICmr 42 (16 October 2018)</i>
Application Number:	313665
Applicant:	E104YO
Respondent:	Queensland Fire and Emergency Services
Decision Date:	16 October 2018
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - CONTRARY TO THE PUBLIC INTEREST - information provided by complainant and witnesses in a workplace investigation - accountability and transparency - procedural fairness - personal information and privacy - prejudice to management function - whether disclosure would, on balance, be contrary to the public interest - whether access to information may be refused under section 47(3)(b) of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Queensland Fire and Emergency Services (**QFES**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to a report concerning allegations that had been made against the applicant in the workplace (**Investigation Report**). QFES engaged an external investigator to conduct the investigation and prepare the Investigation Report. The investigator found the allegations to be unsubstantiated.
2. QFES decided² to refuse access to parts of the Investigation Report³ that would identify the complainant and witnesses, and reveal the information those individuals provided in their statement and interviews, on the basis that disclosure would, on balance, be contrary to the public interest.⁴
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QFES' refusal of access decision.⁵ The applicant considers that he has a right to know what people have said about him during the investigation, and submits that witnesses are afforded too much protection in an investigation process, and under the RTI Act.

¹ Access application dated 8 October 2017.

² Decision dated 21 November 2017.

³ Including attachments.

⁴ Sections 47(3)(b) and 49 of the RTI Act.

⁵ External review application dated 8 December 2017.

4. For the reasons set out below, I affirm the decision to refuse access to parts of the Investigation Report, and relevant attachments, under section 47(3)(b) of the RTI Act.

Background

5. Significant procedural steps relating to the external review are set out in the Appendix.

Reviewable decision

6. The decision under review is QFES' decision dated 21 November 2017.

Evidence considered

7. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).

Information in issue

8. The Investigation Report comprises the report prepared by the investigator and various attachments.⁶ The information which remains in issue comprises the following (**Information in issue**):
 - parts of the report prepared by the investigator⁷
 - transcripts of interviews of the complainant and two witnesses (**Transcripts**);⁸ and
 - a typed statement of the complainant (**Statement**).⁹

Issues for determination

9. The issue for determination is whether access to the Information in issue may be refused under section 47(3)(b) of the RTI Act, on the basis that disclosure would, on balance, be contrary to the public interest.

Relevant law

10. The RTI Act gives people a right to access information held by government agencies¹⁰ and is to be administered with a pro-disclosure bias.¹¹ There are however, limitations on this right, including grounds for refusal of access. Relevantly, access to information may be refused if its disclosure would, on balance be contrary to the public interest.¹² The RTI Act identifies various factors that may be relevant to deciding the balance of the public interest.¹³ It also explains the steps that a decision-maker must take in deciding the public interest.¹⁴

⁶ During the external review, the applicant confirmed to OIC that he wanted to obtain access to the statements made and information provided by other individuals. On this basis, some of the attachments to the Investigation Report not comprising that type of information was not considered by OIC, e.g. the applicant's own transcript of interview and documents he provided to the investigator.

⁷ Parts of 43 pages.

⁸ Attachments no. 4, 5 and 6 to the Investigation Report, in their entirety.

⁹ Attachment no. 9 to the Investigation Report, in its entirety.

¹⁰ Section 23 of the RTI Act.

¹¹ Section 44 of the RTI Act.

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

¹³ These are listed in schedule 4 of the RTI Act, though this list of factors is not exhaustive; in other words, additional factors that are not listed may also be relevant.

¹⁴ Section 49(3) of the RTI Act sets out that in order to decide where the balance of public interest lies, a decision-maker must (i) identify any irrelevant factors and disregard them, (ii) identify any relevant public interest factors favouring disclosure and nondisclosure, (iii) balance the relevant factors favouring disclosure and nondisclosure; and (iv) decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

11. The term 'public interest' is not defined in the RTI Act, but is generally accepted to refer to considerations affecting the good order and functioning of the community and government affairs for the well-being of its 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.

Findings

12. For the reasons that follow, I am satisfied that access to the Information in issue may be refused, on the basis that disclosure would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.

Factors favouring disclosure

13. Disclosing the entire Investigation Report would, to some extent, enhance QFES' transparency in terms of how it handles workplace complaints¹⁵ and disclosing the Transcripts and Statement would reveal background and contextual information to decisions made by QFES in relation to complaints against the applicant.¹⁶ However, taking into account that the substance of the allegations was put to the applicant during the investigation, the significant portion of the Investigation Report which has been released to the applicant and the limited nature of the information that remains redacted from the Investigation Report, I am satisfied that these disclosure factors have been largely discharged and therefore, carry only low weight in favour of disclosure.
14. The applicant is named in the Information in issue and there are references to his actions and behaviour, as expressed by other individuals. I am satisfied that this information comprises the applicant's personal information¹⁷ giving rise to a factor favouring disclosure.¹⁸ I acknowledge the public interest in providing individuals with access to their personal information held by government, however, the applicant's personal information appears in such a way that it cannot be separated from the personal information of others (as discussed below). Therefore, to release it would also result in disclosure of the personal information of those other individuals. I find that this limits the weight of this factor, and therefore, afford it moderate weight.
15. The applicant is concerned about false allegations and statements about him appearing in the Information in issue.¹⁹ The RTI Act recognises that where disclosure could reasonably be expected to reveal that the information is incorrect, out of date, misleading, gratuitous, unfairly subjective, or irrelevant, this will give rise to a factor favouring disclosure.²⁰ In a comparable workplace investigation context, the Information Commissioner previously found that information provided by witnesses and complainants:

... is, by its very nature, the particular opinions and versions of events expressed by the relevant individuals who provided statements in the investigation... It is shaped by factors such as the individuals' memories of relevant events and subjective impressions. This inherent subjectivity does not mean that the [information] is necessarily incorrect or unfairly subjective.²¹

¹⁵ Schedule 4, part 2, item 1 of the RTI Act.

¹⁶ Schedule 4, part 2, item 11 of the RTI Act.

¹⁷ As defined in section 12 of the *Information Privacy Act 2009* (Qld) (**IP Act**).

¹⁸ Schedule 4, part 2, item 7 of the RTI Act.

¹⁹ Telephone conversation with OIC on 21 June 2018.

²⁰ Schedule 4, part 2, item 12 of the RTI Act.

²¹ *F60XCX and Department of Natural Resources and Mines* [2017] QICmr 19 (9 June 2017) at [52].

16. Statements appearing in the Information in issue are the subjective recollection of events by other individuals, however, I am not satisfied that this subjectivity means this information is incorrect or unfairly subjective.²² Disclosure of the statements made by others would, at best, reveal that the other individuals may have described or recalled events differently to the applicant. Objectively, this does not show that information provided by witnesses or the complainant is incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant, and I am therefore, satisfied that this factor does not apply in this case.
17. The applicant submits that he was not given all the precise details of information gathered against him, and believes he was not afforded natural justice or procedural fairness during *prior* investigations.²³ I acknowledge that disclosure of information about allegations, in an investigation context, may contribute to procedural fairness, thereby giving rise to a factor favouring disclosure.²⁴ However, it is clear from the content of the Investigation Report and the information already in the applicant's possession²⁵ that the external investigator put the substance of the allegations to him, he was given a reasonable opportunity to respond to these complaints, and ultimately, the external investigator cleared the applicant of any wrongdoing. While it appears that the applicant considers there to have been deficiencies in the processes involved in prior investigations, the information available to OIC demonstrates that he was afforded procedural fairness in the context of this particular investigation. Accordingly, I am satisfied that disclosure of the Transcripts, Statement and information redacted from the Investigation Report would advance the public interest in procedural fairness only to a limited extent and afford that factor low weight.

Factors favouring nondisclosure

18. The Information in issue comprises the names of the complainant and witnesses involved in the investigation, and their recollection of events as set out in the Statement and Transcripts. I am satisfied that this comprises the personal information of those individuals as they can be identified and the information is about them.²⁶
19. The investigation occurred in a public sector workplace. The Information Commissioner has previously recognised that the *routine* work information of public sector employees may generally be released under the RTI Act, given the limited privacy and higher accountability in disclosure.²⁷ However, the Information in issue here does not fall into the routine category, nor does it relate to the day to day duties of a public service officer.²⁸ I consider that a public servant's involvement in a workplace complaint process, as complainant, subject, or witness does not form part of their routine duties. Therefore, the public interest nondisclosure factors relating to personal information and privacy arise for consideration.²⁹
20. The concept of 'privacy' is not defined in the RTI Act, however, it can be viewed as the right of an individual to preserve their personal sphere free from the interference of others.³⁰ The applicant submits that witness statements should be considered less

²² *Marshall and Department of Police* (Unreported, Queensland Information Commissioner, 25 February 2011) at [15]-[20].

²³ Telephone conversation with OIC on 21 June 2018.

²⁴ Schedule 4, part 2, item 16 of the RTI Act.

²⁵ For example, his own transcript of interview.

²⁶ Section 12 of the IP Act.

²⁷ *Mewburn and Department of Natural Resources and Mines* [2016] QICmr 31 (19 August 2016) at [43]-[47].

²⁸ See, for example, *Castley-Wright and Mareeba Shire Council* [2018] QICmr 25 (22 May 2018) at [22] and *Gapsa and Department of Transport and Main Roads* (Unreported, Queensland Information Commissioner, 12 April 2013) at [71].

²⁹ Schedule 4, part 3, item 3 and schedule 4, part 4, section 6 of the RTI Act.

³⁰ Paraphrasing the Australian Law Reform Commission's definition of the concept, in *For your information: Australian privacy law and practice* Australian Law Reform Commission Report No. 108 released 11 August 2008 at [1.56].

sensitive than that of a complainant.³¹ Having considered the Information in issue, I find that disclosure of both complainant and witness statements would intrude on those individuals' privacy as it would reveal their personal views and opinions provided in a sensitive workplace context. I afford this factor high weight in favour of nondisclosure.

21. In assessing the weight of the public interest harm factor concerned with *disclosure* of personal information, I accept that the applicant is likely to be aware of the identities of the other individuals who were involved in the investigation process, given the complaint arose within a workplace context. Therefore, those individuals' names may not necessarily be subject to the harm factor. However, disclosure of the words those individuals used and the feelings they expressed in their Statement and Transcripts, and where that information is quoted or paraphrased in the Investigation Report, would reveal the sensitive personal information of those individuals. I find that disclosure of such information would cause a moderate public interest harm as it could result in employees being less forthcoming in workplace investigations, prejudice the efficacy of those processes and generally reduce employee confidence/morale. Accordingly, I afford the harm factor moderate weight.
22. The RTI Act also recognises that a factor favouring nondisclosure will arise where disclosure of the information could reasonably be expected to prejudice an agency's management function.³² I am satisfied that disclosure of this type of information under the RTI Act, where there is no restriction on its use, dissemination or re-publication, could reasonably be expected to result in witnesses and complainants being deterred from providing fulsome accounts to investigators in workplace investigations. It is also reasonable to expect that if witness statements were disclosed under the RTI Act, public servants may choose not to raise grievances, or refuse to participate in investigation processes. In turn, this could reasonably be expected to adversely affect QFES' ability to manage workplace complaints and investigations, thereby significantly prejudicing QFES' management function. I afford this factor significant weight in favour of nondisclosure.

Balancing the public interest

23. There is some weight, though low, to be afforded to the public interest in enhancing QFES' transparency in handling workplace complaints, and providing background and contextual information that was presented to the investigator retained by QFES to conduct the investigation. I have also afforded only low weight to the public interest in procedural fairness, in the circumstances of this case. I am however, satisfied that the public interest in the applicant having access to his personal information carries moderate weight in favour of disclosure. On the other hand, the public interest in ensuring the privacy of the complainant and witnesses carries high weight, and I have found there is moderate public interest harm in disclosing the personal information of other individuals. Lastly, the public interest in ensuring workplace grievance processes are not prejudiced through disclosure of complainant and witness statement information is particularly significant in this case.
24. I am satisfied that the public interest nondisclosure factors outweigh the disclosure factors in this case. I find that, on balance, disclosure of the Information in issue would be contrary to the public interest and therefore, access to it may be refused under section 47(3)(b) of the RTI Act.

³¹ Telephone conversation with OIC on 21 June 2018.

³² Schedule 4, part 3, item 19 of the RTI Act.

DECISION

25. I affirm the decision under review to refuse access to the Information in issue under section 47(3)(b) of the RTI Act.
26. I have made this decision under section 110 of the RTI Act, as a delegate of the Information Commissioner, under section 145 of the RTI Act

K Shepherd
Assistant Information Commissioner

Date: 16 October 2018

APPENDIX

Significant procedural steps

Date	Event
8 December 2017	OIC received the external review application.
15 December 2017	OIC notified QFES and the applicant that that the external review application had been received and requested relevant procedural information from QFES.
19 December 2017	OIC received the procedural information from QFES.
12 January 2018	OIC notified the applicant and QFES that the application for external review had been accepted. OIC asked QFES to provide the documents located in response to the access application, information about the searches conducted on the application and a copy of any correspondence with consulted third parties.
16 January 2018	QFES provided OIC with the requested documents.
1 March 2018	OIC orally conveyed a preliminary view to the applicant that disclosure of the Information in issue, would, on balance, be contrary to the public interest.
8 May 2018	OIC confirmed its preliminary view to the applicant, in writing.
21 May 2018	The applicant provided oral submissions in response to OIC's preliminary view.
7 and 18 June 2018	OIC spoke to QFES to obtain further information about its decision and the Information in issue.
21 June 2018	In a telephone conversation with OIC, the applicant provided details about the information he was seeking and the reasons he was seeking access to this information. The applicant also provided oral submissions to support his entitlement to access information.
22 June 2018	OIC emailed the applicant to confirm the oral submissions he had provided to OIC on 21 June 2018, and that he did not seek a copy of his own witness statement.
10 July 2018	OIC wrote to the applicant confirming the preliminary view that access to the Information in issue could be refused on the basis that its disclosure would, on balance, be contrary to the public interest.
8 August 2018	The applicant advised OIC, by telephone, that he did not accept the preliminary view and requested the review be finalised by formal decision.
7 September 2018	OIC requested copies of attachments to the Investigation Report from QFES.
28 September 2018	OIC received the requested information from QFES.