Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	***Q20 and Department of Justice and Attorney-General* [2020] QICmr 40 (23 July 2020)**
Application Number:	**315263**
Applicant:	**Q20**
Respondent:	**Department of Justice and Attorney-General**
Decision Date:	**23 July 2020**
Catchwords:	**ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - documents in relation to judicial or quasi-judicial functions - entity to which the Act does not apply in relation to a particular function - access application outside scope of Act - application of sections 17, 32(1)(b)(ii) and schedule 2, part 2 of the *Right to Information Act 2009* (Qld)**

REASONS FOR DECISION

Summary

1. The applicant applied[1] to the Queensland Civil and Administrative Tribunal (**QCAT**) for access under the *Right to Information Act 2009* (Qld) (**RTI Act**) to documents created since 17 May 2010 that:

   - contained his personal information; and
   - constituted, evidenced or related to communications passing between QCAT and a party to any of the nine QCAT proceedings to which the applicant was also a party, and that had not already been disclosed to the applicant.

2. Although the application requested access to documents of QCAT, it was processed by the Department of Justice and Attorney-General (**DJAG**), apparently on behalf of QCAT but without a delegation from QCAT under section 30(3) of the RTI Act.[2] DJAG decided[3] to refuse access to the requested documents. It decided that the application was outside the scope of the RTI Act under section 32(1)(b)(ii) of the RTI Act because QCAT was an entity to which the RTI Act did not apply when it was exercising its judicial or quasi-judicial functions, and the requested documents were in relation to such functions.

[1] Application dated 1 December 2019.
[2] The decision notice contains no reference to the decision-maker holding a delegation from QCAT. On 13 July 2020, the Director of DJAG's RTI unit confirmed to OIC that DJAG did not hold a delegation from QCAT and that the initial and internal review decisions were made by DJAG.
[3] On 18 December 2019.

3. The applicant applied[4] for internal review of DJAG's decision. DJAG confirmed that QCAT had advised it that the only documents QCAT held that contained the applicant's personal information were in relation to QCAT proceedings to which the applicant was a party and which therefore were in relation to the exercise by QCAT of its judicial or quasi-judicial functions. DJAG therefore affirmed its decision[5] under section 32(1)(b)(ii) of the RTI Act.

4. The applicant applied[6] to the Office of the Information Commissioner (**OIC**) for external review of DJAG's decision.

5. For the reasons explained below, I set aside DJAG's decision under section 32(1)(b)(ii) of the RTI Act on the grounds that DJAG is not an entity to which the RTI Act does not apply and therefore has no jurisdiction to make a decision under section 32(1)(b)(ii) of the RTI Act. In substitution, I decide that access to the requested documents may be refused on the grounds that the entity to which the access application was made and which has possession and control of the requested documents - QCAT - is an entity to which the RTI Act does not apply under section 17(b) in relation to the functions mentioned in schedule 2, part 2 of the RTI Act. I find that the requested documents are in relation to the exercise of such functions and that the access application is therefore outside the scope of the RTI Act under section 32(1)(b)(ii) of the RTI Act.

Background

6. The applicant was a party to a series of QCAT proceedings relating to a domestic building dispute arising out of the renovation of the applicant's home. The applicant had terminated the contract with the builder and subsequently made a claim on the statutory insurance scheme administered by the Queensland Building and Construction Commission (**QBCC**). QBCC declined the claim, which gave rise to the various QCAT proceedings involving the applicant, QBCC and the builder.

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

Reviewable decision

8. The decision under review is DJAG's internal review decision dated 14 February 2020.

Processing of the application by DJAG

9. As noted, although the access application sought access to documents of QCAT,[7] it was received and processed by DJAG, apparently on QCAT's behalf, but without a formal delegation.[8] This has been the practice of DJAG for some time,[9] and continues despite the jurisdictional issues to which it gives rise, as is demonstrated by DJAG's reliance in its decision under review on section 32(1)(b)(ii) of the RTI Act, which provision does not, by its wording, apply to DJAG.

10. The relationship between DJAG, which is responsible for providing administrative support to courts and tribunals, and courts and tribunals as separate entities under the

[4] On 16 January 2020.
[5] On 14 February 2020.
[6] On 11 March 2020.
[7] QCAT is a public authority, and therefore an agency, for the purposes of the RTI Act and capable of receiving and processing RTI applications: see sections 14, 16 and 24 of the RTI Act.
[8] Section 30(3) of the RTI Act provides that an agency's principal officer may, with the agreement of another agency's principal officer, delegate the power to deal with the application to the other agency's principal officer.
[9] QCAT's website directs persons wishing to apply for RTI access to 'departmental information' to DJAG's website.

RTI Act, was brought into focus in the series of RTI decisions and appeals concerning the former Chief Justice of the Supreme Court, His Honour Justice Carmody.[10]

11. Pursuant to sections 12 and 24 of the RTI Act, a person may apply to an agency for access to a document that is *'in the physical possession or under the control of that agency.'*

12. In the *Carmody appeals*, Justice Hoeben of QCAT[11] made clear that a court or tribunal cannot be regarded as part of DJAG for the purposes of the RTI Act and that DJAG has no *'legal entitlement to use or physically possess'*[12] the judicial documents of courts or tribunals, as this would amount to an interference by the executive in the independence of courts and tribunals. In discussing the Supreme Court of Queensland and its relationship with DJAG, Justice Hoeben said:[13]

> *… The framework established by both the Constitution of Queensland 2001 (Qld) and the SCQ Act* [Supreme Court of Queensland Act 1991 (Qld)] *demonstrate that the Supreme Court, while receiving administrative support from DJAG, is in fact an independent entity*.
> …
> *It is clear that by the SCQ it is the Chief Justice and not DJAG who exercises management and control of the Court (and access to its documents). The fact that s 91 of the SCQ Act provides that the Court is "part of the Department" for financial purposes reinforces the conclusion that the Court is a stand-alone entity, separate from the executive in the discharge of its functions.* ***It follows that there is no justification in either the SCQ Act nor in the RTI Act for the Supreme Court to be treated as part of DJAG for the purposes of section 12 of the RTI Act. …***
> …
> *As a general proposition, the executive … could not … compel the production of documents… created by, and passing between, members of the judiciary.* ***This reflects the well established status of the judiciary as wholly independent of the executive and immune from interference by it. …***
> …
> *The IC identified the Supreme Court as a "business unit" within DJAG. There are difficulties with that nomenclature in that it obscures the independent standing of the Supreme Court* ***and the fact that it is not part of, nor subject to, the control of DJAG****.*
> …
> *The definition of "document of an agency" in s 12 of the RTI Act is specifically delimited (as is s 23) by the concept of an "agency". For the reasons set out above, the word "agency" cannot be read so as to include the entity, which is the Supreme Court, (as a department) in relation to the court's judicial functions. This is so, even if* ***contrary to my interpretation****, the Supreme Court were part of DJAG for RTI Act purposes. …*
>
> *The expression "possession"* [in section 12 of the RTI Act] *where used to describe the documents of an agency, must be construed … so as not to capture documents where DJAG is not able to in fact produce them (or where to do so would interfere with judicial independence). The High Court has held in the context of subpoenas, that the concept of "possession' assumes that a person to whom it is directed "has the ability or capability to produce them."*
> …
> *…In relation to the electronic documents, although DJAG had possession of the servers upon which those documents were stored, it had no present legal entitlement to access the documents (or files) stored upon them. …*
> …

[10] The primary decision in a series of six decisions is *Carmody v Information Commissioner & Ors* [2018] QCATA 14 (2 March 2018) (collectively referred to as the ***'Carmody appeals'*** in this decision and reasons for decision).
[11] His Honour Justice Hoeben is Chief Judge at Common Law of the New South Wales Supreme Court. He was appointed as a supplementary judicial member of QCAT during the relevant period to assist with QCAT's caseload.
[12] At [69].
[13] At [41] to [70].

> … ***There is no basis for concluding that the documents (or all documents) of the Supreme Court are in the possession or under the control of the Supreme Court.***
> …
> *… The Supreme Court, whilst receiving administrative and technical assistance from DJAG,* ***is an independent entity*** *and is not subject to the control of DJAG ….*
>
> [Footnotes omitted and emphasis added]

13. I consider that these findings apply equally to QCAT as a court of record constituted under the *Queensland Civil and Administrative Act Tribunal 2009* (Qld) (**QCAT Act**).[14] The President of QCAT, and not DJAG, exercises management and control over the business of QCAT.[15] There is no basis for treating QCAT as part of DJAG for the purposes of the RTI Act, such as to permit DJAG to make decisions about access to documents of QCAT without a delegation. QCAT falls with the definition of 'public authority' in section 16 of the RTI Act, and therefore is itself an agency under section 14 except where section 17(b) applies. Justice Hoeben made clear in his decisions in the *Carmody appeals* that DJAG has no right to possess or control judicial documents of courts and tribunals. Such documents cannot therefore be regarded as documents of DJAG within the meaning of section 12 of the RTI Act, and DJAG has no jurisdiction to make decisions about access to them. It is clear from this external review, and from others that have been made to the Information Commissioner since the *Carmody appeals* concerning requests to access QCAT documents, that DJAG's RTI decision-makers do not have possession of (nor any right to possession of) responsive documents when making decisions about access to QCAT documents, but rely on advice from QCAT as to the existence, nature and characterisation of the documents.

14. OIC has previously raised with DJAG's Director-General the appropriateness of DJAG continuing with the practice of making decisions in response to requests for access to documents held by courts and tribunals, contrary to the clear indication in the *Carmody appeals* that courts and tribunals are not to be regarded as part of DJAG for the purposes of the RTI Act. However, as noted, both the initial and internal review decisions issued by DJAG in this review were made without a delegation from QCAT. The internal review decision refers to QCAT as a 'DJAG entity'. In contrast, the Queensland Courts website now describes the position of Queensland courts (including QCAT) as follows:

> *Each court sits independently of the Queensland Department of Justice and Attorney-General and Queensland Government, while Court Services Queensland are located within the DJAG portfolio.*

15. The documents sought by the applicant in this review do not relate to the court administrative services provided to QCAT by DJAG. On a proper interpretation of the provisions of the RTI Act, and applying the findings of Justice Hoeben in the *Carmody appeals*, applications seeking access to judicial documents of courts and tribunals should either be received and processed by the relevant court or tribunal itself, or may continue to be dealt with by DJAG on the court or tribunal's behalf, provided that a delegation is requested and given under section 30(3) of the RTI Act.

16. This conclusion is supported by the wording used in section 32(1)(b)(ii) of the RTI Act, upon which DJAG relied in making its decisions in this review. It indicates that Parliament's intention was that it apply where the entity to which the access application is made is also the entity to which the RTI Act does not apply.[16] On a strict interpretation,

[14] Section 164 of the QCAT Act.
[15] Section 172(2) of the QCAT Act. Section 162 of the QCAT Act provides that, in exercising its jurisdiction, QCAT must act independently and is not subject to direction or control by any entity
[16] As per the use of 'the entity' in both section 32(1)(b) and section 32(1)(b)(ii), indicating a reference to the same entity.

it has no application to DJAG as DJAG is not an entity to which the RTI Act does not apply.

Effect of the *Carmody appeals* on the Information Commissioner's jurisdiction

17. The decisions by Justice Hoeben in the *Carmody appeals* effectively nullify, on a practical basis, the right to external review by the Information Commissioner under the RTI Act of a decision that refuses access to documents where it is decided that the documents are in relation to the exercise by the court or tribunal of judicial or quasi-judicial functions under schedule 2, part 2, items 1 to 8 of the RTI Act.

18. In such circumstances, the relevant court or tribunal to which the application was made is excluded from the definition of 'agency' in section 14 and is an entity to which the Act does not apply in section 17(b). The application is regarded as being outside the scope of the RTI Act by virtue of the application of section 32(1)(b)(ii).

19. A written notice of that decision is required to be given to the applicant under section 32(2) of the RTI Act. That decision is a *'reviewable decision'* under schedule 5 of the RTI Act and a person affected may apply to have the decision reviewed by the Information Commissioner under section 85 of the RTI Act, with the Information Commissioner having the right to exercise the powers set out in chapter 3, part 9 of the RTI Act, including an entitlement to *'full and free access at all times to the documents of the agency or Minister concerned'*.[17]

20. However, the decisions by Justice Hoeben in the *Carmody appeals* found that nothing in the RTI Act should be construed so as to permit interference with the independence of courts and tribunals:[18]

> *As a general proposition, the executive (and an independent statutory appointee such as the IC)* [Information Commissioner] *could not (in the face of those protections) compel the production of documents and recorded communications created by, and passing between, members of the judiciary. This reflects the well established status of the judiciary as wholly independent of the executive and immune from interference by it. Judicial office stands "uncontrolled and independent and bowing to no power but the supremacy of the law". As stated by Viscount Simons in* Attorney General v The Queen*:*
>
> > "…in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive."
>
> *This independence is constitutionally enshrined. The State of Queensland is obliged by the Constitution of Australia to maintain a Supreme Court capable of being invested with federal judicial power exercised by judges which are (and are seen to be) independent from the legislature and the executive. Independence from the executive of a Supreme Court is one of the key assumptions upon which Chapter III of the Constitution of Australia is based.*
>
> *It follows that the RTI Act should not be construed so as to permit interference with the Independence of the Court. If it were accepted, as the IC's decision asserts, that all documents of the Court are documents of DJAG, then a statutory right exists subject, in particular cases to the judgment of the IC, for anyone to require access to all such documents at any time. That includes the executive, individual ministers (often litigants in the courts), their advisers and adversaries and others. A judiciary subject to such scrutiny (qualified only by the exercise of a discretionary judgment by the IC) is not independent. Its institutional integrity is fundamentally flawed. Such a consequence cannot have been intended by the legislature and is indicative of error on the part of the IC in her interpretation of the RTI Act.*

[17] Section 100 of the RTI Act.
[18] At [47]-[49] and [60].

> …
> *It may be inferred that Parliament's intention in legislating s 17 and item 1 of schedule 2, part 2 was to ensure that the independence of the judiciary was not compromised.. Parliament is presumed not to have legislated beyond its constitutional bounds and the RTI A should accordingly be interpreted consistently with it being intra vires. Section 9 of the* Acts Interpretation Act 1954 *(Qld) similarly provides that an Act is to be interpreted as operating to the full extent of, but not to exceed, Parliament's legislative power.*
>
> [Footnotes omitted]

21. Following the decisions in the *Carmody appeals*, where the Information Commissioner has received applications seeking external review of decisions made by DJAG on behalf of QCAT in reliance upon section 32(1)(b)(ii) of the RTI Act, QCAT has declined to provide OIC with copies of responsive documents for the purposes of conducting the review. I acknowledge and respect that this refusal is in accordance with the decisions in the *Carmody appeals*, and for the purposes of preserving the judicial independence of QCAT. It remains the fact though, that under the RTI Act as it is presently enacted, such a decision is reviewable, and the Information Commissioner has a statutory obligation to conduct the review. OIC is therefore in the unsatisfactory position of being statutorily required to make a decision about whether to affirm, vary or set aside the decision under review without being able to call for and view the requested documents, or make an independent assessment of whether or not they are in relation to judicial or quasi-judicial functions. While it may often times be clear merely from a description of the requested documents that they can properly be so characterised (and I acknowledge that 'in relation to' was read extremely widely by Justice Hoeben in the *Carmody appeals* so as to cover virtually every activity and function carried out by a court or tribunal), the Information Commissioner's practical powers on review, such as calling for and examining the responsive documents, are effectively nullified.

22. I accept that this is the effect of the decision of the *Carmody appeals* and I respect Justice Hoeben's findings about the importance of protecting the independence of the judiciary. However, the position is confusing for affected applicants who expect, from the provisions of the RTI Act as presently enacted, that the Information Commissioner has jurisdiction to conduct an independent merits review of all reviewable decisions made by agencies under the RTI Act.

23. OIC has previously raised with DJAG, as the agency responsible for the administration of the RTI Act, the potential confusion for applicants arising from the impact of the decisions in the *Carmody appeals* on the administration of the RTI Act. Amendment of legislation is a policy decision for the Queensland government.

Evidence considered

24. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and Appendix).

25. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**),[19] particularly the right to seek and receive information as embodied in section 21 of that Act. I consider that in observing and applying the law prescribed in the RTI Act, an RTI decision-maker will be *'respecting and acting compatibly with'* this right and others prescribed in the HR Act,[20] and that I have done so in making this decision, as required under section 58(1) of the HR Act. In this regard, I note Bell J's observations on the interaction between the

[19] Which came into force on 1 January 2020.
[20] *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].

Victorian analogues of Queensland's RTI Act and HR Act: *'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.'*[21]

Information in issue

26. The information in issue comprises documents responding to the terms of the applicant's access application dated 1 December 2019, as summarised at paragraph 1 above.

Issue for determination

27. The issue for determination is whether the access application is outside the scope of the RTI Act under section 32(1)(b)(ii) of the RTI Act because the requested documents are documents of an entity that is excluded from the operation of the RTI Act by section 17(b) of the RTI Act when exercising specified functions. That is, the documents are in relation to the exercise by the entity (QCAT) of its judicial or quasi-judicial functions under schedule 2, part 2, items 1 to 8 of the RTI Act.

Relevant law

28. Section 23 of the RTI Act relevantly provides that, subject to the Act, a person has a right to be given access under the Act to documents of an agency.

29. Section 24 relevantly provides that a person who wishes to be given access to a document of an agency under the RTI Act may apply to the agency for access to the document.

30. Section 12 relevantly provides that 'document of an agency' means a document in the possession or under the control of the agency.

31. Section 14(1) contains the definition of 'agency', which includes a public authority. Section 14(2) provides that 'agency' does not include an entity to which the RTI Act does not apply.

32. Section 17 relevantly provides that 'entity to which this Act does not apply' means an entity mentioned in schedule 2, part 2 in relation to the function mentioned in that part.

33. Schedule 2, part 2, items 1-8 provide that an entity to which the RTI Act does not apply includes:

- a court, or the holder of a judicial office or other office connected with a court, in relation to the court's judicial functions
- a tribunal in relation to the tribunal's judicial or quasi-judicial functions
- a tribunal member or the holder of an office connected with a tribunal, in relation to the tribunal's judicial or quasi-judicial functions; and
- a registry of a tribunal, or the staff of a registry of a tribunal in their official capacity, so far as its or their functions relate to the tribunal's judicial or quasi-judicial functions.

[21] *XYZ* at [573].

Conduct of the external review

34. Following a review of the access application, DJAG's initial and internal review decisions, and correspondence passing between the applicant and DJAG,[22] I wrote to the applicant[23] to express the preliminary view that the documents to which he had requested access appeared to be properly characterised as in relation to the exercise by QCAT of its judicial or quasi-judicial functions. I stated that QCAT's decisions in the *Carmody appeals* appeared to be directly applicable, with the effect that the applicant had no right of access to the requested documents because QCAT, which was in possession and control of any such documents, could not be regarded as an 'agency' in such circumstances.

35. The applicant did not accept my preliminary view and made further submissions in support of his case for disclosure,[24] which I will discuss below.

36. After considering the applicant's submissions, I wrote again[25] to advise that I maintained my preliminary view, as explained previously. The applicant responded[26] by advising that he did not withdraw his application *'and will not do so in future'*. It is therefore necessary to prepare formal reasons for decision to finalise this review.

37. The applicant marked his initial submissions to OIC as 'Confidential' and purported to place restrictions on their use. After explaining to the applicant that, in conducting an external review, OIC is obliged to observe the requirements of procedural fairness and to give full reasons for its decisions, including a discussion of relevant submissions put forward by the parties to the review, the applicant withdrew his claim for confidentiality.[27]

The applicant's submissions

38. It is clear from the applicant's submissions that he is dissatisfied with QCAT's conduct of the proceedings in which he was involved that concerned his dispute with QBCC and the builder.[28] He provided DJAG and OIC with a copy of a letter he had sent to QCAT's President on 31 August 2018 in which he raised a number of matters of concern to him.

39. Amongst other issues, it appears that the applicant believes that there may have been secret and improper communications between QCAT and other parties to the proceedings, or communications that evidence or express bias by QCAT, and therefore a failure by QCAT to maintain judicial independence, or breach of other statutory duties.

40. In his letter to DJAG dated 17 December 2019, the applicant submitted:

> *As discussed, I contend that the true construction of paragraphs 3 to 5 of Part 2 of Schedule 2 includes that references to "judicial or quasi-judicial functions" are confined to such functions discharged or exercised properly. Amongst other things, those references do not include functions discharged or exercised in a manner that is, or is reasonably arguable, to be improper because, for example, it evidences or expresses bias and/or constitutes misbehaviour within the meaning of s. 61(2)(a) of the* Constitution of Queensland Act*,* 2001 *or s. 43(1) of the* Land Court Act, 2000*.*
>
> *This construction is consistent with the pro-disclosure objective and interpretation*

[22] Letters to DJAG from the applicant dated 17 December 2019 and 10 February 2020.
[23] Letter dated 29 April 2020.
[24] Letter dated 27 May 2020.
[25] Letter dated 3 June 2020.
[26] Letter dated 11 June 2020.
[27] Email dated 27 May 2020.
[28] See paragraph 6 above.

principle expressed at s. 3 of the RTI Act*.*

41. In my 'preliminary view' letter to the applicant dated 29 April 2020, I discussed the application of the decisions in the *Carmody appeals* and stated:

> *You have argued that the exclusion of documents from the RTI Act that relate to the exercise of judicial or quasi-judicial functions of a tribunal is confined to those functions when they are discharged or exercised properly,* 'and [does] not prevent access to documents that evidence or manifest bias or constitute or evidence a failure to maintain judicial independence or breach of other statutory duties'.
>
> *It is not the role of the Information Commissioner under the RTI Act to investigate or make any kind of judgement about such matters. The role of this Office is to apply the provisions of the RTI Act in determining whether or not access should be granted to requested documents. On the face of your request, the documents you seek to access are* prima facie *excluded from the operation of the RTI Act under schedule 2, part 2. Justice Hoeben made it clear in the* Carmody decisions *that any attempt by a statutory body such as OIC to even attempt to compel the production of judicial or quasi-judicial documents from a court or tribunal for the purposes of a review under the RTI Act (far less investigate or question their contents, or the motives of the officers who generated them) amounted to an interference in the judicial independence of the court or tribunal.*
>
> *If you have concerns about the actions of an officer of QCAT and the manner in which they have discharged their functions, it is appropriate that you raise those issues with the President of QCAT, or the Attorney-General, or the Crime and Corruption Commission, or the Queensland Parliament.*

42. The applicant responded in his letter dated 27 May 2020:

> *Upon the preliminary view, a person does not have a right to be given access under the* RTI Act *to documents even if the documents, without more, disclose judicial misbehaviour that is patent and egregious. That view is contrary to the primary object of the* RTI Act *in that it is "contrary to the public interest" and the statutory instruction that the act "must be applied and interpreted" to further the primary object. There are a number of reasons for that.*
>
> First, *there is a strong public interest in maintaining confidence in the administration of justice and ensuring that justice is not only done but seen to be done. Like Caesar's wife, Courts and Tribunals should be above reproach. Part of maintaining that confidence is ensuring that remedies for complaint about judicial misbehaviour are efficacious. The preliminary view construction Is contrary to the statutory instruction and public interest because it frustrates such remedies by denying a complainant a means to* compel *access to evidence. This is allied to the following considerations.*
>
> Secondly, *the public interest is in maintaining confidence in the administration of justice, not the interest (e.g. reputation or standing) of the Tribunal as it is constituted at a particular time or its then members or former members. Those interests may diverge. Such a divergence may be caused by judicial misbehaviour or reasonably based apprehension of such misbehaviour. The prospect of divergence makes it contrary to the public interest for the subject Court or Tribunal to be the sole arbiter of whether access to documents within its possession or under its control is given [volunteered].*
>
> Thirdly*, there is an inherent conflict of interest if a Tribunal is able to decide whether or not access is given to documents that may reflect adversely upon the Tribunal. It furthers the public interest that is the "primary object" of the* RTI Act *for the act to be construed and applied so that such documents are not beyond the scope of the documents to which a person has a right to* compel *access.*
>
> *…*

> Fourthly*, the public interest in the independence of the judiciary does not need the protection of the construction expressed in the preliminary view and is not threatened by the construction for which the writer contends. Rather, it is upheld. The response to an RTI application seeking access to secret communications between judicial officers hearing a proceeding and a party should be factual and straightforward: that there are no such documents. The simple act of making the contest a legal argument about the construction of the legislation, without responding as to the substance (facts) of the application, undermines confidence in the administration of justice and, here, the Tribunal.*
>
> .
>
> Fifthly, *the public interest to be furthered is wider than administration of justice* simpliciter*. The objects of the* QCAT Act *include enhancing the "openness and accountability of public administration." The Proceedings and present RTI application engage that object directly. Both flow from the Homeowner's application for review of an administrative decision made by a GOC. As mentioned in the correspondence before you already, unremedied bias and breaches of duties by a captured Tribunal permits, conceals and facilitates a GOC's breaches of duty (e.g. those under* QCAT Act*, s.21), contempt of the Tribunal (e.g. by improper attempts to influence homeowners' conduct of proceedings before the Tribunal) and other dishonest conduct. That is contrary to the above-mentioned object of the* QCAT Act*.*
>
> [Footnotes omitted]

43. The applicant referred to material that he placed before QCAT's President in his letter to the President dated 31 August 2018 and that he considered evidenced secret and improper communications passing between QCAT and other parties to the proceedings in which the applicant was involved. He disputed that the Information Commissioner could not, on a true construction of the RTI Act, investigate the matters he had raised in order to determine whether to grant access to documents, arguing that *'in relation to'* in schedule 2, part 2 of the RTI Act necessarily gives rise to investigation and judgments: '*it is not contempt to comply with a statutory obligation.*'[29] He submitted that it was wrong to assume that all documents held by QCAT that contained his personal information were in relation to the exercise of QCAT's judicial or quasi-judicial functions, contending that responsive documents needed to be examined and considered on a case by case basis in order to arrive at the correct conclusion.

44. In response,[30] I acknowledged the difficulties in administering the RTI Act in respect of its application to courts and tribunals that had been brought about by the decisions in the *Carmody appeals*. However, the Information Commissioner is bound to follow the decisions of QCAT. I maintained that the decisions in the *Carmody appeals* were directly relevant and applied to prevent the release to the applicant of any responsive documents:

> *QCAT is of the view that any documents prepared or received by it in connection with its function of administering, hearing and determining matters under the QCAT Act are 'in relation to' the exercise by it of its judicial or quasi-judicial functions and are therefore excluded from the ambit of the RTI Act. This is in reliance upon the very wide interpretation that Justice Hoeben gave to the phrase* 'in relation to … judicial or quasi-judicial functions' *in the* Carmody appeals*. Justice Hoeben, amongst other things, found that something is a 'judicial function' if, whatever else it might be, it is a task conferred upon a judge. A function that could be categorised as 'administrative' does not exclude those powers from also being 'judicial' and nor is it necessary for a judicial 'determination' to be made for a function to be considered 'judicial'.*
>
> *He further stated:*
>
> > The test for the application of the exemption for courts and judges in the RTI Act is made even wider by the use of the words 'in relation to'. These are words of wide

[29] At [19].
[30] Letter to the applicant dated 3 June 2020.

> import and numerous cases have demonstrated that the words 'in relation to' require no more than a relationship, whether direct or indirect, between two subject matters. Item 1, part 2 of schedule 2 extends to documents which have a connection with the court's judicial functions. The exemption is not limited to the adjudication by one judge of a particular dispute before that judge but means something broader. This breadth is enhanced by the connecting words selected by the drafter namely 'in relation to'.
>
> Something which is not itself the discharge of a judicial function (an administrative one) can nonetheless 'relate to' the judicial function. The wide connecting words show that Parliament intended things which were not themselves documents produced in the performance of judicial functions, would also be within the scope of the exemption as documents 'relating to' that judicial function.

Justice Hoeben's findings on this issue are in direct conflict with the submissions you have made at paragraph 21 of your email. The Information Commissioner decided in the Carmody *external reviews that the exercise of a judicial function was limited to the hearing and determination of a dispute (in that case, the hearing of a matter by the Court of Disputed Returns) and did not cover ancillary correspondence/exchanges between judges leading up to that hearing, including discussions, for example, about which judge should hear the matter. The Information Commissioner determined that such exchanges concerned the exercise of administrative functions, and not judicial. Justice Hoeben rejected that finding, and decided that all functions exercised by a judicial member are 'in relation to' the exercise of judicial or quasi-judicial functions, including the exercise of functions that can be regarded as 'judicial administration'. Based on that finding, all documents that you refer to in paragraph 21 of your email would properly be found to be 'in relation to' the exercise of judicial or quasi-judicial functions.*

In terms of the function given to the Information Commissioner under the RTI Act to obtain copies of, and review, documents in order to determine whether or not they comprise exempt matter …, QCAT has, in the previous reviews that I referred to above, rejected the suggestion that the Information Commissioner can compel the production of, or has any role in reviewing, such documents because to do so would amount to an interference in the independence of the judiciary, which Justice Hoeben specifically rejected in the Carmody appeals. Justice Hoeben held that nothing in the RTI Act can be interpreted as permitting interference by the executive in the independence of the judiciary.

I acknowledge your submission that it is contrary to the public interest for the 'subject Court or Tribunal to be the sole arbiter of whether access to documents within its possession or under its control is given (volunteered)'. *I also accept that that would not appear to have been Parliament's intention when drafting and enacting the relevant provisions in the RTI Act. However, the practical effect of the decisions in the* Carmody *appeals is that the Information Commissioner, as a statutory office-holder appointed by the Executive, is prevented from taking any action under the RTI Act that could be regarded as interfering in the independence of the judiciary. This includes reviewing documents that a court or tribunal determines have been brought into existence in the exercise of their judicial or quasi-judicial functions.*

In any event, as previously explained, I am satisfied simply from the terms of your access application that the documents to which you seek access are in connection with your various applications made to QCAT under the QCAT Act, and are, therefore, based on the wide interpretation given to 'in relation to' in the Carmody *appeals, clearly to be characterised as having been brought into existence in relation to the exercise by QCAT of its judicial or quasi-judicial functions.*

[Footnotes omitted]

45. The applicant rejected the views I had expressed, asserting that there was a 'critical' problem with QCAT, some of its judicial officers, and the QBCC, *'that is causing life*

changing harm to many ordinary Queenslanders … and cries out for redress. The system will not self-correct but protect itself. Someone has to press for remedy.'[31]

46. The applicant argued that the decisions in the *Carmody appeals* were decisions of a single Judge that did not consider the specific issues raised by the applicant's application, and that did not express a *ratio decidendi* that concluded his application:

> *With the greatest respect to the learned judge who decided* Carmody v Information Commissioner*, the reasons err in relation to the case law about the construction of the words "in relation to". Such expressions are not intended to make it "sufficient that the [second matter] be in some way connected, however remotely, with the [first matter]…. There must … be some reasonably direct connection…. " There must be "an appropriate relationship".*
>
> *Presciently, Kirby J foresaw, in the context of judicial immunities, that "Cases might arise in which an issue as to the characterization of a judicial officer's functions and powers is presented so as, arguably, to take the exercise of those functions and powers out of the immunity provided for in the legislation. It is unnecessary in this appeal to explore the circumstances in which that might be so."*
>
> *Whether there is a "reasonably direct connection" or "appropriate relationship" so as to establish the statutory relationship ("*in relation to *the tribunal's judicial or quasi-judicial functions") is informed by the statutory purposes. (Italics added).*
>
> *The learned Judge in* Carmody v Information Commissioner *placed weight upon the statutory purpose of preserving judicial independence. That purpose is not furthered by a construction that includes documents that evidence a lack of judicial independence. Such documents include documents that constitute or evidence a secret communication between the Tribunal and a litigant, or that false information was provided by the Tribunal to a litigant about a secret communication. The evidence before you points to such a documents within the scope of the present application for access.*
>
> *There are other relevant statutory purposes that inform the construction of the words "in relation to". One of them is the public interest in the confidence of the judiciary. A construction of those words that takes documents that constitute or evidence secret communications outside the scope of documents to which access is available is directly contrary to, and would undermine, this purpose.*
>
> *The other statutory purposes include achieving the objects of the* QCAT Act*. Those purposes have been drawn to your attention by prior correspondence. Those submissions are not repeated here beyond drawing to your attention one further aspect of those objects. That is, that those considerations did not fall for consideration in* Carmody v Information Commissioner *and are thus a basis upon which that decision is distinguishable. They fall for consideration here because a GOC was a party to the proceedings before the Tribunal and the specific example of a secret communication that I have identified to you was between the Tribunal and that GOC.*
>
> *For reasons including those noticed above, your letter under reply errs when it states that "the application of schedule 2, part 2, of the RTI Act is clear, and it prevents access being given to judicial or quasi-judicial documents, regardless of their contents."*
>
> [Footnotes omitted]

Findings

47. I have given careful consideration to the applicant's submissions. I acknowledge that he is dissatisfied with the way QCAT dealt with the proceedings in which he was involved,

[31] Letter dated 11 June 2020.

and that he wishes to ascertain whether documents may exist in QCAT's possession or under its control that may evidence improper conduct by a Tribunal member in connection with those proceedings. He is clearly frustrated at being unable to access documents under the RTI Act that would allow him to explore this issue.

48. However, I do not accept that there exist grounds for distinguishing the findings made by in the *Carmody appeals*. For the reasons explained in my correspondence with the applicant during the course of the review, and set out above, I consider that those findings apply to the circumstances of this review. I find that:

- there are no reasonable grounds before me for expecting that QCAT holds documents that fall within the terms of the applicant's access application other than in connection with QCAT administering, hearing and determining legal proceedings before QCAT to which the applicant was a party
- such documents are properly to be characterised as in relation to the exercise by QCAT of its judicial or quasi-judicial functions within the meaning of schedule 2, part 2, items 1 to 8 of the RTI Act; and
- QCAT is not an 'agency' for the purposes of the RTI Act when it is exercising its judicial or quasi-judicial functions and is therefore an entity to which the RTI Act does not apply.

49. My findings in that regard are based on:

- a description of the documents sought by the applicant as contained in his access application; and
- Justice Hoeben's interpretation of the phrase 'in relation to' contained in schedule 2, part 2 of the RTI Act.

50. I note the applicant's submissions regarding the public interest in release of the documents he seeks. However, there is no provision in the RTI Act for public interest considerations to be taken into account when considering the application of section 17 and schedule 2, part 2 of the RTI Act.

51. Justice Hoeben made clear that any attempt by a statutory office-holder appointed by the Executive, such as the Information Commissioner, to attempt to compel the production of judicial or quasi-judicial documents from a court or tribunal for the purposes of a review under the RTI Act amounted to an interference in the judicial independence of the court or tribunal, and that nothing in the RTI Act could be construed as having that effect. It follows as a consequence of that, that in preserving judicial independence, the Information Commissioner can play no role in making a judgment about whether or not a judicial officer has engaged in improper conduct or demonstrated bias in discharging their judicial duties. Concerns of that type should be raised with persons or bodies holding appropriate powers or jurisdiction.

DECISION

52. For the reasons explained, I set aside DJAG's decision under section 32(1)(b)(ii) of the RTI Act on the grounds that DJAG is not an entity to which the RTI Act does not apply under section 17 of the RTI Act and therefore has no jurisdiction to make a decision under section 32(1)(b)(ii) of the RTI Act. In substitution, I decide that access to the requested documents may be refused on the grounds that the entity to which the access application was made, and which has possession and control of the requested documents - QCAT - is an entity to which the RTI Act does not apply under section 17(b) of the RTI Act in relation to the functions mentioned in schedule 2, part 2, items 1 to 8 of

the RTI Act. I find that the requested documents are in relation to the exercise of such functions and that the access application is therefore outside the scope of the RTI Act under section 32(1)(b)(ii) of the RTI Act.

53. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Louisa Lynch
Right to Information Commissioner

Date: 23 July 2020

APPENDIX

Significant procedural steps

Date	Event
11 March 2020	OIC received the application for external review.
19 March 2020	OIC emailed the applicant acknowledging receipt of the external review application. OIC requested preliminary jurisdictional information from DJAG.
24 March 2020	DJAG provided the requested information.
29 April 2020	OIC conveyed its preliminary view to the applicant.
27 May 2020	The applicant provided OIC with submissions.
3 June 2020	OIC conveyed a further preliminary view to the applicant.
11 June 2020	The applicant provided OIC with submissions.
16 June 2020	OIC received an email from the applicant.