



Decision and Reasons for Decision

Citation:	<i>Nine Entertainment Co Pty Ltd and Department of the Premier and Cabinet [2022] QICmr 31 (21 June 2022)</i>
Application Number:	316529
Applicant:	Nine Entertainment Co Pty Ltd ACN 122 205 065
Respondent:	Department of the Premier and Cabinet
Decision Date:	21 June 2022
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - INFORMATION AS TO EXISTENCE OF PARTICULAR DOCUMENTS - request for access to records relating to telephone communications - whether requested documents would comprise prescribed information - neither confirm nor deny - whether section 55 of the <i>Right to Information Act 2009</i> (Qld) applies

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of the Premier and Cabinet (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to various telephone communication records between the Premier of Queensland and a specified mobile telephone number, including copies of electronic messages and logs of calls and messages.
2. The Department decided² to neither confirm nor deny the existence of requested documents, under section 55 of the RTI Act.
3. I affirm the Department's decision.

Background

4. Significant procedural steps relating to the external review are otherwise as set out in the Appendix to this decision.

Reviewable decision

5. The decision under review is the Department's decision dated 7 January 2022.

¹ Application dated 29 November 2021.

² Decision dated 7 January 2022.

Evidence considered

6. Evidence, submissions, legislation and other material I have considered in reaching this decision are set out in these reasons (including footnotes and Appendix).³

Issue for determination

7. The access application requested access to several categories of documents in connection with telephone communications involving the Premier and a specified telephone number. From a recordkeeping perspective, if relevant documents existed, some would be held by the Office of the Premier (i.e., the Minister) whereas others would, if they existed, be held by the Department.⁴
8. Under the RTI Act, a Minister is a separate entity to an agency. Where an application seeks *documents of an agency* as well as *documents of a Minister*,⁵ the requests essentially comprise separate applications, with each subject to a separate application fee, one to be processed by the Minister's Office and one to be processed by the Department.⁶
9. In this case, the applicant paid one application fee and the application was processed by the Department.⁷ This decision thus only considers whether the Department may neither confirm nor deny the existence of telephone records which, if they existed, would be documents of the agency (the '**Requested Documents**').
10. To summarise, the issue I must determine is whether the Department may neither confirm nor deny the existence of the Requested Documents, under section 55 of the RTI Act.

Relevant law

11. Section 23 of the RTI Act relevantly provides that a person has a right to be given access to documents of an agency, such as the Department. This right is subject to other provisions of the RTI Act, including section 55 of the RTI Act.
12. Section 55 of the RTI Act allows a decision maker to neither confirm nor deny the existence of a document which, assuming its existence, would be a document to which

³ Including the *Human Rights Act 2019 (Qld) (HR Act)*, to the extent necessary to do so. The participants in this review are not 'individuals', and only individuals have human rights under the HR Act: section 11. However, Kingham J in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 at [90] indicated that where section 58(1) of the HR Act applies, there need be no mover to raise human rights issues because that section requires the relevant public entity to properly consider engaged human rights and to not act or make a decision that is not compatible with human rights. To the extent then that it is necessary to observe relevant rights under section 58(1) of the HR Act, I am satisfied that I have done so. This is because in observing and applying the law prescribed in the RTI Act, as I have done in this case, an RTI decisionmaker will be '*respecting and acting compatibly with*' applicable human rights as stated 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].) In this regard, I note Bell J's observations at [573] of XYZ on the interaction between the 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.*'

⁴ Letter from the Department dated 11 April 2022.

⁵ As that concept is defined in section 13 of the RTI Act.

⁶ A matter explained to the applicant in an OIC letter dated 19 April 2022.

⁷ The access application was lodged via a 'whole of government' online application form, which requires a selection of options from various 'drop down' boxes, including entities to whom an applicant intends to direct the application. The applicant selected an option it thought would ensure the access application was directed to both the Department and the Office of the Premier – which based on the material the applicant has supplied to me, was not entirely unreasonable. It does remain the case, however, that only one application fee was paid, thereby enlivening only one application.

access would be refused under section 47(3) of the RTI Act,⁸ to the extent it contained 'prescribed information'.⁹

13. 'Prescribed information'¹⁰ includes personal information¹¹ the disclosure of which would, on balance, be contrary to the public interest.
14. Determining this issue essentially requires a decision maker to conduct a hypothetical public interest¹² balancing exercise, making a judgment as to where the balance of the public interest would lie, were requested documents to exist. This involves a notional application of the public interest balancing test, as prescribed in section 49 of the RTI Act,¹³ including identifying public interest factors that would operate to favour disclosure and nondisclosure, assuming the existence of relevant documents.¹⁴

Discussion

15. The applicant's representative stated¹⁵ he has 'evidence' of the existence of the Requested Documents. OIC invited the applicant to supply any such evidence¹⁶ to assist OIC in reviewing the merits of the Department's decision under section 55 of the RTI Act.
16. The applicant's representative declined to supply such evidence, relevantly noting that it had been '*...given to me in confidence for preparation of a story. I cannot disclose it to a 3rd party without permission.*'¹⁷
17. In the absence of such evidence, I am left to conduct the hypothetical balancing exercise required by section 55 of the RTI Act on the strength of the information and submissions before me.
18. Having regard to that information, my view is that if the Requested Documents existed in the Department's possession or under its control, they would comprise prescribed information, that is, personal information the disclosure of which would, on balance, be contrary to the public interest.

⁸ Grounds on which access may be refused.

⁹ Section 55 of the RTI Act is appropriately used where there is something about the way in which, whether by accident or design, an access application is framed which will mean that the agency acknowledging the existence or non-existence of the particular kind of information is liable to cause the very kinds of detriment that key grounds for refusal prescribed in the RTI Act are intended to avoid – in this case, revealing personal information, by impliedly confirming whether or not communications have been made by individuals. The procedure to be followed in cases of this kind – and the limitation on what information can be conveyed to an applicant – was explained by the Information Commissioner in *EST and Department of Family Services and Aboriginal and Islander Affairs* (1995) 2 QAR 645 at [20], the Commissioner noting that such a review '*...must largely proceed in private...*'. See also *Phyland and Queensland Police Service* (Unreported, Queensland Information Commissioner, 31 August 2011) [11], citing *Tolone and Department of Police* (Unreported, Queensland Information Commissioner, 9 October 2009) [28].

¹⁰ Defined in schedule 5 of the RTI Act.

¹¹ Personal information comprises '*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.*': section 12 of the *Information Privacy Act 2009* (Qld) (**IP Act**) and schedule 6 of the RTI Act.

¹² 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, although there are some recognised public interest considerations that may apply for the benefit of an individual: Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 AIAL Forum 12, 14.

¹³ In summary terms, section 49 of the RTI Act requires a decision maker to identify any irrelevant factors and disregard them; identify relevant public interest factors favouring disclosure and nondisclosure of subject information; balance relevant factors favouring disclosure and nondisclosure; and decide whether disclosure of the subject information would, on balance, be contrary to the public interest. I have taken no irrelevant factors into account.

¹⁴ *Nadel and Queensland Police Service* [2020] QICmr 19 (6 April 2020) at [15].

¹⁵ In an email to OIC dated 3 February 2022.

¹⁶ By email dated 7 March 2022.

¹⁷ Email from the applicant's representative dated 7 March 2022.

19. The applicant's case is that the mobile telephone number stated in its access application is that of a private citizen. I have no evidence to the contrary and therefore, I have proceeded on the basis that the number stated in the application belongs to a private individual.
20. The identity of the owner of the stated number, however, remains a matter unknown to me. The applicant has referred me to a media article concerning an individual and their contact with the Premier, and essentially invited me to infer that the individual the subject of that article is the owner of the phone number stated in the access application.¹⁸ There is, however, nothing before me definitively establishing ownership of the stated mobile number by a particular individual, and in the absence of better evidence, I am not prepared to assume the veracity of the applicant's assertion.
21. What I am left to consider is an access application framed as seeking access to documents that, if confirmed to exist, would establish that the individual with whom that number is associated – who, as noted above, I assume is a private individual – engaged in telephone communications with the Premier.
22. Such information would comprise the personal information of the relevant individual (and, potentially, the Premier), as information being about that individual, from which their identity could reasonably be ascertained (either because that identity is known, at least to the applicant according to its submissions, or because it could be ascertained by calling the stated number). The RTI Act presumes that disclosure of personal information would give rise to a public interest harm.¹⁹
23. The Department indicated that if the Requested Documents existed, they would be in the form of itemised telephone billing records, showing '*... dates and times of outbound calls and outbound text messages including the number to which the call or text was sent to*', from the Premier's mobile number.²⁰ I am satisfied that disclosure of itemised telephone bills, if they existed, could reasonably be expected to prejudice protection of another individual's right to privacy.²¹ Records showing when a private individual is contacted on their telecommunications device is, to my mind, very much a matter within an individual's personal sphere. Unrestricted disclosure of such information under the RTI Act²² (in the event it existed) would obviously intrude upon that aspect of their personal sphere, and thus prejudice protection of the individual's right to privacy.
24. Safeguarding personal information and protecting individual privacy are fundamental public interests, each of which ordinarily attract substantial weight for the purposes of balancing the public interest. I see no reason either should be given anything less in this review.
25. Favouring disclosure is the general public interest in promoting access to government-held information.²³ Additionally, if the Requested Documents did exist, then they would self-evidently concern use, by the Premier, of a government-owned (or, at least, funded)

¹⁸ Emails from the applicant's representative to OIC dated 7 March and 19 April 2022.

¹⁹ Schedule 4, part 4, section 6 of the RTI Act.

²⁰ Letter from the Department dated 11 April 2022.

²¹ A factor favouring nondisclosure of information: schedule 4, part 3, item 3 of the RTI Act. The concept of 'privacy' is not defined in the IP Act. OIC has adopted the Australian Law Reform Commission's definition of the concept, being the right of an individual to preserve their personal sphere free from interference from others: "For your information: Australian Privacy Law and Practice" Australian Law Reform Commission Report No. 108 released 11 August 2008, at paragraph 1.56.

²² As Judicial Member McGill SC of the Queensland Civil and Administrative Tribunal (**QCAT**) recently observed '*... the effect of the... [Information Privacy Act 2009 (Qld)] is that, once information has been disclosed, it comes under the control of the person to whom it has been disclosed. There is no provision of that Act which contemplates any restriction or limitation on the use which that person can make of that information, including by way of further dissemination.*': *FLK v Information Commissioner* [2021] QCATA 46 at [17]. These observations apply equally to the cognate right of access conferred by the RTI Act.

²³ Implicit in the object of the RTI Act.

telecommunications device, giving rise to public interest factors favouring disclosure in terms of enhancing Government accountability and transparency.²⁴

26. These are important public interest factors. However, given the particular nature of the Requested Documents, if they existed, I am not satisfied those factors would attract weight sufficient to displace the strong public interests in protecting personal information and safeguarding individual privacy, as discussed above.
27. As noted above, the Requested Documents would, in the event they existed, comprise itemised billing records, revealing only outgoing communications from a telecommunications device used by the Premier to the number nominated in the access application, together with date and time (and, possibly, duration of contact and the charge incurred).²⁵ Essentially, they would reveal little more than the fact the Premier had contacted the particular number.
28. The mere fact a public official has had contact with (what I am assuming to be) a private individual's phone number via a government-owned/funded device is not sufficient to justify the unrestricted disclosure of the private individual's personal information and intrusion into their right to privacy. Indeed, it may also be insufficient to justify disclosing the public official's personal information and prejudicing their privacy – it being the case that public officials are often entitled to some level of personal use of official devices.²⁶ I would afford the pro-disclosure factors modest weight.
29. In reaching the above conclusion, I have carefully considered all of the applicant's submissions, including that:

This is a case where transparency is needed to see how and when there was contact.

... Showing the frequency and timing of any contact will allow ... allegations (of significant public interest) to be tested.²⁷

30. However, the applicant's submissions are premised on assumptions and unsubstantiated allegations. As set out above, I have no evidence to connect the phone number stated in the application with the individual whom the applicant submits is the owner, let alone any evidence²⁸ tending to establish other matters and allegations canvassed by it in its submissions.²⁹
31. In making this decision, I am constrained by the evidence available to me, and what the applicant has elected to provide. Having given that and all other relevant material careful consideration, I consider that when the modestly weighted factors favouring disclosure are balanced against the substantially-weighted factors telling against, the latter prevail. Disclosure of the Requested Documents would – in the event they existed – therefore comprise personal information the disclosure of which would, on balance, be contrary to the public interest. The Requested Documents³⁰ meet the definition of 'prescribed information', and the Department may neither confirm nor deny their existence, under section 55 of the RTI Act.

²⁴ In this case, schedule 4, part 2, item 1, 3 and 4 of the RTI Act.

²⁵ Commonly contained in mobile phone billing records.

²⁶ As regards to public servants employed by agencies, Information Standard 38 - 'Use of ICT services, facilities and devices policy' – provides that '[t]he use of government provided ICT services, facilities and devices is for official approved purposes. Employee limited personal use of these resources may be made available to employees on a basis approved by the department's chief executive officer.': <https://www.qgcio.qld.gov.au/documents/use-of-ict-services,-facilities-and-devices-policy-is38>.

²⁷ Email from applicant's representative dated 19 April 2022.

²⁸ Beyond the representative's assertions.

²⁹ Which, if they could be established, might potentially give rise to other factors favouring disclosure, such as schedule 2, part 2, factors 2 and 5 of the RTI Act.

³⁰ Assuming their existence.

32. Before concluding, I note that the applicant argued that neither the Premier nor the individual to whom the applicant contends the stated phone number relates, had objected to disclosure of information that may concern either party (in the event it existed).³¹ The views of third parties are only required to be obtained in circumstances stated in section 37 of the RTI Act; strictly speaking, where documents are confirmed to exist, and an agency is contemplating disclosure of same. Accordingly, consultation was not conducted in this review, and therefore, I have not taken the applicant's submission into account.

DECISION

33. I affirm the Department's decision to neither confirm nor deny the existence of the Requested Documents under section 55 of the RTI Act.
34. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

K Shepherd
Acting Right to Information Commissioner

Date: 21 June 2022

³¹ Submissions dated 19 April 2022.

APPENDIX

Significant procedural steps

Date	Event
12 January 2022	OIC received the applicant's external review application. OIC requested and received preliminary documents from the Department.
2 February 2022	OIC notified the applicant and the Department that the external review application had been accepted. OIC requested submissions from the Department.
24 February 2022	OIC received submissions from the Department.
7 March 2022	OIC requested further information from the applicant. The applicant provided OIC with further information.
25 March 2022	OIC conveyed the applicant's further information to the Department and invited a response.
11 April 2022	OIC received further submissions from the Department.
19 April 2022	OIC conveyed a preliminary view to the applicant. OIC received submissions from the applicant contesting the preliminary view.
21 April 2022	OIC referred the applicant's 19 April 2022 submissions to the Department and invited submissions in reply.
5 May 2022	The Department advised OIC it did not wish to make any further submissions.