



## Decision and Reasons for Decision

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**Citation:** *Nine Entertainment Co Pty Ltd and Hon Anastacia Palaszczuk MP, Premier and Minister for the Olympic and Paralympic Games [2023] QICmr 6 (7 February 2023)*

**Application Numbers:** 316742 and 316884

**Applicant:** Nine Entertainment Co Pty Ltd (ACN 122 205 065)

**Respondent:** Hon Anastacia Palaszczuk MP, Premier and Minister for the Olympic and Paralympic Games

**Decision Date:** 7 February 2023

**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 *Right to Information Act 2009 (Qld)* applies

### REASONS FOR DECISION

#### Summary

1. The applicant (represented by a journalist) made two applications of a similar nature to the Office of the Premier and Minister for the Olympic and Paralympic Games (**Premier's Office**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**). These applications sought access to mobile phone records concerning communications between the Premier and a specified private mobile telephone number, including copies of electronic messages<sup>1</sup> and logs of calls and messages. The time period for application 316742 was 1 November 2020 to 19 April 2021. The time period for application 316884 was 15 June 2021 to 15 July 2022.
2. The applications were processed on behalf of the Premier's Office by the Department of the Premier and Cabinet (**Department**).<sup>2</sup> The Department decided<sup>3</sup> to neither confirm nor deny the existence of requested documents, under section 55 of the RTI Act.
3. The applicant applied<sup>4</sup> to the Office of the Information Commissioner (**OIC**) for review of the Department's decisions.

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<sup>1</sup> Specifically including text messages, iMessages and Whatsapp messages.

<sup>2</sup> Under section 31 of the RTI Act.

<sup>3</sup> Decisions dated 3 June 2022 in review 316742, and 25 August 2022 in review 316884.

<sup>4</sup> External review application received on 6 June 2022 in review 316742, and on 31 August 2022 in review 316884.

4. For the reasons set out below, I affirm the decisions under review.

### **Background**

5. These are another two applications made by the applicant in a series of access applications made either to the Premier's Office, or to the Department. The applicant requests access to mobile phone records (including WhatsApp messages, iMessages, text messages, phone call logs, etc) concerning communications between the Premier and a private individual. The applicant considers that this information, if it exists, would be relevant to an inquiry by the applicant into certain '*untested allegations*' concerning the Premier, and would assist in proving or disproving those allegations.
6. OIC published a decision about similar issues for determination raised by the applicant in *Nine Entertainment Co Pty Ltd and Department of the Premier and Cabinet [2022] QICmr 31 (21 June 2022) (Nine and DPC)*.
7. During the course of these reviews, OIC advised the applicant that it maintained that the decisions under review should be affirmed, for the same reasons given in *Nine and DPC*. However, the applicant disputed OIC's views and continued to pursue the applications for review, thereby requiring a published decision in order to finalise the applications.

### **Reviewable decision**

8. The decisions under review are the 'neither confirm nor deny' decisions made by the Department on behalf of the Premier's Office dated 3 June 2022 (review 316742) and 25 August 2022 (review 316884).

### **Evidence considered**

9. Evidence, submissions, legislation and other material I have considered in reaching this decision are set out in these reasons (including footnotes and Appendix).
10. I have also had regard to the *Human Rights Act 2019 (Qld) (HR Act)*, particularly the right to seek and receive information.<sup>6</sup> I consider a decision-maker will be '*respecting, and acting compatibly with*' that right, and others prescribed in the HR Act, when applying the law prescribed in the RTI Act and the *Information Privacy Act 2009 (Qld)*.<sup>7</sup> I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:<sup>8</sup> '*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.*'<sup>9</sup>

### **Issue for determination**

11. The issue for determination is whether the Department may, under section 55 of the RTI Act, neither confirm nor deny the existence of documents requested by the applicant in its access applications.

### **Relevant law**

12. 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.

13. 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 access would be refused under section 47(3) of the RTI Act,<sup>5</sup> to the extent it contained 'prescribed information'.<sup>6</sup>
14. 'Prescribed information'<sup>7</sup> includes personal information<sup>8</sup> the disclosure of which would, on balance, be contrary to the public interest.
15. Determining this issue essentially requires a decision maker to conduct a hypothetical public interest<sup>9</sup> 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,<sup>10</sup> including identifying public interest factors that would operate to favour disclosure and nondisclosure, assuming the existence of relevant documents.<sup>11</sup>

### The applicant's submissions

16. In its decisions, the Department neither confirmed nor denied the existence of responsive documents but found that if responsive documents did exist, they would contain personal information the disclosure of which would, on balance, be contrary to the public interest.
17. In a letter to the applicant dated 28 June 2022 in review 316742, the Acting Right to Information Commissioner stated:

*This application raises near identical issues to those addressed in my decision finalising review 316529, Nine Entertainment Co Pty Ltd and Department of the Premier and Cabinet. There is nothing presently before me that would persuade me to decide this application any differently.*

*As matters stand, my preliminary view is that the neither confirm nor deny decision made by the Department on behalf of the Premier and Minister for the Olympics should be affirmed, applying the reasoning set out in Nine and DPC. Critically, the scope of the application again includes a mobile telephone number (alleged to belong to a private individual), raising personal information and privacy public interest factors that*

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<sup>5</sup> Grounds on which access may be refused.

<sup>6</sup> 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) at [11], citing *Tolone and Department of Police* (Unreported, Queensland Information Commissioner, 9 October 2009) at [28].

<sup>7</sup> Defined in schedule 5 of the RTI Act.

<sup>8</sup> 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 5 of the RTI Act.

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> *Nadel and Queensland Police Service* [2020] QICmr 19 (6 April 2020) at [15].

would weigh against disclosure of requested information. In my preliminary view, the requested information, if it exists, would therefore comprise personal information, the disclosure of which would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act. [footnotes omitted]

18. A similar view was expressed to the applicant in review 316884.<sup>12</sup>
19. The applicant's representative did not agree to withdraw the applications for review, but instead provided written submissions in support of his position.<sup>13</sup> In those submissions, he referred to matters concerning the private individual to whom he asserted the mobile number referred to in the access applications belonged, and attached a link to a newspaper article that he considered to be of relevance. The applicant's representative described certain 'untested allegations', stating: *'The purpose of my application is to obtain information that goes to proving or disproving those untested allegations ... Material proving or disproving these allegations is directly relevant to the Premier's conduct as a Minister and her basic responsibilities to the people of Queensland.'*
20. The applicant's representative further submitted as follows:
  - *While I accept that disclosing the information sought may require the disclosure of information that could be considered "personal information", in light of the matters set out above disclosing this information is, on balance, in the public interest as:*
    - *There is a pro-disclosure bias under the Right to Information Act - the documents sought ought to be disclosed unless giving access would, on balance, be contrary to the public interest. Whether disclosure of the information could reasonably be expected to cause embarrassment to, or a loss of confidence in, the government is irrelevant. (Schedule 4, Part 1, item 1)*
    - *Disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability (Sch 4, Part 2, item 1).*
    - *If the Premier did [engage in certain conduct] it is clear that disclosing this information would enable the public to hold the Government accountable for those decisions. Disclosure of the information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official (Sch 4, Part 2, item 5).*
    - *Disclosure of the information could reasonably be expected to reveal whether in [sic] agency or official has engaged in misconduct or improper - and potentially unlawful - conduct (sch 4, Part 2, item 6).*
    - *Disclosure of the information could reasonably be expected to contribute to the administration of justice generally (Sch 4, Part 2, item 16).*
    - *The ability for members of the media and public to hold key members of the Government accountable by investigating such matters is a fundamental purpose of the RTI Act.*

### **Application of the hypothetical public interest balancing test**

21. As in *Nine and DPC*, the applicant's case is that the mobile telephone number stated in the access applications belongs to a private citizen. The applicant's representative identified this individual in his submissions, and asserted that he had called this person on the stated number on several occasions. He advised that he would be prepared to provide an affidavit attesting to this fact, if necessary.

<sup>12</sup> OIC's letter dated 15 November 2022.

<sup>13</sup> Email of 12 July 2022 in review 316742. The substance of the submissions made in that email were repeated in an email from the applicant on 1 December 2022 that applied to both reviews.

22. I have not required the applicant to provide the offered evidence concerning ownership of the phone number because, even if I were to be satisfied that the mobile number belongs to the individual identified by the applicant, I do not consider that that fact advances the applicant's case in any significant way. I have read the newspaper article which the applicant contends is about this individual. Even if I were to be satisfied about that, I do not consider the information in the article to have particular relevance to the issues under consideration. Nor do I consider that it would significantly shift the weight that I would afford to the public interest factors favouring disclosure and nondisclosure.
23. The thrust of the access applications is to obtain access to documents that, if confirmed to exist, would establish that the private citizen identified by the applicant engaged in communications with the Premier.
24. 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.<sup>14</sup>
25. I am satisfied that disclosure of the requested information, if it existed, could reasonably be expected to prejudice protection of another individual's right to privacy.<sup>15</sup> Information showing a private individual's mobile phone communications with others is, to my mind, very much a matter within an individual's personal sphere. Unrestricted disclosure of such information under the RTI Act<sup>16</sup> (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. Similarly, if they were to exist, disclosure of itemised telephone billing records for the Premier's mobile number showing dates and times of outbound calls and messages sent to the phone number identified by the applicant could reasonably be expected to prejudice protection of the relevant person's right to privacy.
26. 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. As in *Nine and DPC*, I see no reason either should be given anything less in these reviews.
27. The applicant's representative has identified a number of public interest factors that he considers would weigh in favour of disclosure of the requested information if it were to exist. As noted, he relies upon a newspaper article about the individual to whom he asserts the mobile phone number belongs. I am unable to discuss the article in any detail as to do so would likely lead to the identification of the individual. It is sufficient to note that the article discusses the individual's background and business interests. The applicant appears to rely on a particular unattributed assertion in the article.

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<sup>14</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>15</sup> 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.

<sup>16</sup> 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.

28. If the requested documents did exist, the general public interest in promoting access to government-held information favours disclosure.<sup>17</sup> Additionally, if such documents did exist, then they would self-evidently concern use, by the Premier, of a government-owned (or, at least, funded) telecommunications device, giving rise to public interest factors favouring disclosure in terms of enhancing Government accountability and transparency.<sup>18</sup>
29. The applicant argues that the requested information, if it exists, will either prove or disprove certain untested allegations involving the Premier. In addition to the Government accountability and transparency factors, the applicant also argues that disclosure of the requested information, if it exists, could therefore reasonably be expected to:
- allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official<sup>19</sup>
  - reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct;<sup>20</sup> and
  - contribute to the administration of justice generally.<sup>21</sup>
30. I am satisfied that the administration of justice factor does not apply in the circumstances of this case. 'Administration of justice' in the context of this factor ordinarily refers to information relevant to a person's pursuit of a legal remedy, or the commencement of legal proceedings. Even on the applicant's best case, neither is relevant in this case.
31. As to the application of the other two factors, they are undoubtedly important factors and I accept that if the requested documents were to exist, and if they were to support the applicant's allegations, disclosure could reasonably be expected to have the effects provided for by the factors. However, the applicant is speculating not only about the existence of the requested information, but also about what the information may contain if it were to exist. I can confirm that, regardless of the existence or content of the requested documents, I have not taken into account the irrelevant factor noted by the applicant<sup>22</sup> nor any other irrelevant factor. Otherwise, however, I must observe that speculation about not only the existence, but also the content, of the requested documents presents a significant difficulty when trying to afford weight to the pro-disclosure factors in a hypothetical public interest balancing test.
32. The applicant's representative acknowledges that the allegations that the applicant is seeking to investigate are untested. The applicant has provided nothing to OIC during the course of the reviews that offers some support to the substance of the allegations. I do not accept that the newspaper article to which the applicant refers provides such support, and I give little weight to the unattributed assertion in that article upon which the applicant apparently relies. I acknowledge the issues that may be faced by journalists regarding public disclosure of their sources, and I also acknowledge the important investigative role played by journalists in holding government accountable. However, it remains the fact that the applicant is arguing for the release of highly personal information (if, in fact, it exists) about a private individual on the basis of speculative and unsupported allegations about the conduct of a public official.

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<sup>17</sup> Implicit in the object of the RTI Act.

<sup>18</sup> In this case, schedule 4, part 2, items 1, 3 and 4 of the RTI Act.

<sup>19</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>20</sup> Schedule 4, part 2, item 6 of the RTI Act.

<sup>21</sup> Schedule 4, part 2, item 16 of the RTI Act.

<sup>22</sup> Schedule 4, part 1, item 1 of the RTI Act.

33. I am not satisfied in such circumstances that disclosure to the world at large of this highly personal information about a private individual, and the attendant significant intrusion on that person's right to privacy, would be justified in order to allow the applicant to test its allegations. Accordingly, even if the requested information existed, I am not satisfied that the public interest factors identified by the applicant as favouring disclosure would attract weight sufficient to displace the strong public interests in protecting personal information and safeguarding individual privacy, as discussed above.
34. Leaving aside the allegations against the Premier that the applicant is seeking to test, the mere fact a public official has had contact with a private individual via a government-owned/funded mobile phone 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.<sup>23</sup> For the same reasons as decided in *Nine and DPC*, I would therefore afford the pro-disclosure factors modest weight in the circumstances of this case.
35. As was also the case in *Nine and DPC*, in making this decision, I am constrained by the evidence available to me, and what the applicant has elected to provide. I am also somewhat constrained in my discussion of the applicant's submissions in this decision so as not to disclose the untested allegations made against the Premier. However, having given all the material before me careful consideration, I consider that the modestly-weighted factors favouring disclosure are outweighed by the substantially-weighted factors favouring nondisclosure. Disclosure of the requested information would, in the event it existed, therefore comprise personal information the disclosure of which would, on balance, be contrary to the public interest. The requested information meets the definition of '*prescribed information*', and the Department may neither confirm nor deny its existence, under section 55 of the RTI Act.

## **Decision**

36. I affirm the two decisions under review. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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Rachel Moss  
**Principal Review Officer**

**Date: 7 February 2023**

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<sup>23</sup> As regards 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>.

## APPENDIX

### Significant procedural steps

<b>Application 316742</b>	
<b>Date</b>	<b>Event</b>
6 June 2022	OIC received the application for external review. OIC requested the preliminary documents from the Department.
13 June 2022	OIC received the preliminary documents from the Department.
15 June 2022	OIC advised the applicant and the Department that the application for external review had been accepted.
28 June 2022	OIC conveyed a preliminary view to the applicant.
12 July 2022	The applicant provided a submission in response to OIC's preliminary view.
28 July 2022	OIC requested a submission from the Department.
12 August 2022	The Department requested an extension of time to provide the submission. OIC granted the extension of time.
26 August 2022	The Department provided a submission to OIC.
15 November 2022	OIC conveyed a preliminary view to the applicant.
29 November & 1 December 2022	The applicant provided submissions contesting OIC's preliminary view.

<b>Application 316884</b>	
<b>Date</b>	<b>Event</b>
31 August 2022	OIC received the application for external review.
1 September 2022	OIC requested the preliminary documents from the Department.
8 September 2022	OIC received the preliminary documents from the Department.
21 September 2022	OIC advised the applicant and the Department that the application for external review had been accepted.
15 November 2022	OIC conveyed a preliminary view to the applicant.
29 November & 1 December 2022	The applicant provided submissions contesting OIC's preliminary view.