



## Decision and Reasons for Decision

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Citation:	<i>76PNOH and the Department of Communities, Child Safety and Disability Services</i> [2014] QICmr 24 (5 June 2014)
Application Number:	311890
Applicant:	76PNOH
Respondent:	Department of Communities, Child Safety and Disability Services
Decision Date:	5 June 2014
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - DISCLOSURE PROHIBITED BY ACT - application on behalf of child for all information about that child - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) - whether disclosure prohibited by section 187 of the <i>Child Protection Act 1999</i> (Qld) - whether exempt - section 47(3)(a) and section 48 and schedule 3, section 12 of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE CHILD'S BEST INTERESTS - application on behalf of child for all information about that child - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) - whether disclosure of the information would not be in the child's best interests - sections 47(3)(c) and 50 of the <i>Right to Information Act 2009</i> (Qld)</p>

## REASONS FOR DECISION

### Summary

1. A mother applied under the *Information Privacy Act 2009* (Qld) (**IP Act**) on behalf of her fourth child to the Department of Communities, Child Safety and Disability Services (**Department**) for access to documents relating to that child (**applicant**).<sup>1</sup>
2. The Department decided<sup>2</sup> to grant access to 225 full pages and refuse access to 846 part and 1051 full pages on various grounds under the IP Act and *Right to Information Act 2009* (Qld) (**RTI Act**).
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the decision by the Department to refuse access on the basis that:

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<sup>1</sup> The definition of 'applicant' in schedule 5 and section 45(1) of the IP Act provides that where an application is made on behalf of a child, the child is taken to be the applicant.

<sup>2</sup> Decision dated 11 October 2013 and affirmed by the Department's internal review decision dated 13 January 2014.

- the documents comprised exempt information as disclosure is prohibited by the *Child Protection Act 1999* (Qld) (**CP Act**) (**Category A**);<sup>3</sup> or
  - disclosure of the documents would not be in the child's best interests (**Category B**).<sup>4</sup>
4. For the reasons given below, the Department's internal review decision refusing access to the Category A and B documents is affirmed.

## Background

5. The mother does not currently have custody of her four children including the applicant in this matter, her fourth child, a son. Section 45 of the IP Act provides that a child's mother is a parent who may make an access application on behalf of the child. The section does not require the parent to have parental responsibility for the child. The IP Act also makes clear that in such circumstances the applicant is taken to be the child rather than the parent.<sup>5</sup>
6. Significant procedural steps relating to the application and external review are set out in the appendix.

## Reviewable decision

7. The decision under review is the Department's internal review decision dated 13 January 2014.

## Evidence considered

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

## Information in issue

9. The information in issue comprises the documents to which access was refused by the Department on the basis that either:
- the documents comprised exempt information as disclosure is prohibited by the CP Act;<sup>6</sup> or
  - disclosure of the documents would not be in the child's best interests.<sup>7</sup>
10. While I cannot provide details of the Information in Issue,<sup>8</sup> it generally comprises documents held by the Department about the applicant who, following child protection proceedings, is no longer in the care of his biological parents and has been in the Department's care for a number of years.

## Category A - Child Protection Information

### Relevant law

11. As previously noted, section 45(1) of the IP Act provides that where an application is made on behalf of a child by their parent, the applicant is taken to be the child rather than

<sup>3</sup>Specifically, 537 pages refused in full and 823 pages refused in part.

<sup>4</sup>Specifically, 35 pages refused in full and 20 pages refused in part under sections 47(3)(C) and 50 of the RTI Act.

<sup>5</sup>See section 45(1) note 2 and the definition of 'applicant' in Schedule 5 of the IP Act.

<sup>6</sup>Under sections 47(3)(a), 48 and schedule 3, item 12 of the RTI Act.

<sup>7</sup>Under sections 47(3)(c) and 50 of the RTI Act.

<sup>8</sup>Section 123(7) of the IP Act prohibits the Information Commissioner from including information that is claimed to be exempt in reasons for a decision on external review.

the parent.<sup>9</sup>

12. Under the IP Act, the applicant has a right to access documents of an agency to the extent those documents contain the applicant's personal information.<sup>10</sup> It is Parliament's intention that an agency should decide to give access unless giving access would, on balance, be contrary to the public interest.<sup>11</sup> The right of access is subject to other provisions of the IP Act and RTI Act, including the grounds on which access to information may be refused.<sup>12</sup>
13. Relevantly, access may be refused to exempt information.<sup>13</sup> Schedule 3 of the RTI Act sets out information which Parliament considers is exempt information on the basis that disclosure would, on balance, be contrary to the public interest.<sup>14</sup> Schedule 3, section 12 of the RTI Act provides that information is exempt if its disclosure is prohibited by a number of listed provisions, including section 187 of the CP Act.<sup>15</sup> Section 187 of the CP Act makes it an offence to disclose certain information obtained under the CP Act. If this provision applies to the Category A Information, it will be exempt from disclosure under the RTI Act.

### **Findings**

14. Submissions made by the applicant's mother raise concerns about the Department not following the correct process in relation to section 187 of the CP Act. The applicant's mother submits that a 'deed' was put in place by a tribunal regarding the application of section 187 of the CP Act and that there is 'an extra layer' that the Department has to follow in relation to this section. The applicant's mother has not elaborated on this submission to OIC claiming that it relates to confidential matters.<sup>16</sup>
15. OIC sought further information from the Department in relation to the submission. The Department is not aware of any binding judgements or deeds that impact on the application of section 187 of the CP Act in this external review. It has explained that while there have been discussions with the applicant's representatives regarding this section in other legal proceedings, these do not affect the application of the relevant sections of the RTI Act.<sup>17</sup>
16. Having assessed the submission made by the applicant's mother and the Department's response, I consider that the submission does not affect the findings I have made below.
17. To be exempt from disclosure under section 187 of the CP Act, the Category A Information must:
  - a) be information about a person's affairs
  - b) have been received by a listed person performing functions under or relating to the administration of the CP Act; and
  - c) not be subject to an exception in section 187 of the CP Act.

<sup>9</sup> See section 45(1) note 2 and the definition of 'applicant' in Schedule 5 of the IP Act.

<sup>10</sup> Section 40 of the IP Act.

<sup>11</sup> Section 64 of the IP Act. This is referred to as the 'pro-disclosure bias'.

<sup>12</sup> Section 67 of the IP Act provides that access may be refused to information in the same way and to the same extent provided for under section 47 of the RTI Act.

<sup>13</sup> Section 47(3)(a) of the RTI Act. The categories of exempt information are listed in schedule 3 to the RTI Act.

<sup>14</sup> See also, section 48 of the RTI Act.

<sup>15</sup> See Appendix B for the text of the relevant parts of section 187 of the CP Act.

<sup>16</sup> The applicant's written submissions dated 18 May 2014, oral submissions dated 9 May 2014, email submission and oral submissions dated 6 May 2014, email and oral submissions dated 22 April 2014.

<sup>17</sup> Department submission dated 24 April 2014.

**(a) Is the information about a person's affairs?**

18. The term 'person's affairs' is not defined in the CP Act or the *Acts Interpretation Act 1954* (Qld). The relevant dictionary definitions for 'affair/s' are 'matters of interest or concern' and 'a private or personal concern'.<sup>18</sup>
19. I have carefully examined the Category A information and I am satisfied that it contains information of a private or personal concern to the applicant and the applicant's family members.

**(b) Was the information received under the CP Act?**

20. I am satisfied that the Category A information is information received by Departmental officers (public servants) under the CP Act.
21. Section 187 of the CP Act lists a public service employee as a person to whom section 187 applies.
22. I have examined the Category A Information and am satisfied that it was received by Departmental officers in the course of performing functions under or relating to the CP Act.

**(c) Do any of the exceptions apply?**

23. The exemption in schedule 3, section 12(1) of the RTI Act will not apply if the relevant information comprises *only* the applicant's personal information.<sup>19</sup>
24. Section 187 and 188 of the CP Act contain a number of exceptions where information given or received under the CP Act may be disclosed. In this case, section 187(4)(a) is relevant. It provides that access may be given to another person if the information is *about* that other person.
25. While I acknowledge that the Category A information is about the applicant, it is also intertwined with the information of others, including the applicant's siblings, parents, healthcare providers and Departmental staff. After careful assessment, I find that it is not solely about the applicant.<sup>20</sup>

**Conclusion**

26. I am satisfied that the Category A information:
  - is about a person's affairs
  - was received under the CP Act
  - is prohibited from disclosure under the CP Act
  - is not subject to the exceptions in schedule 3, section 12(2) of the RTI Act and section 187(4)(a) of the CP Act; and
  - is accordingly exempt from disclosure under the RTI Act.

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<sup>18</sup> 7CLV4M and Department of Communities (Unreported, Queensland Information Commissioner, 21 December 2011) at paragraph 30.

<sup>19</sup> Schedule 3, section 12(2) of the RTI Act. '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.': schedule 6 of the RTI Act, and section 12 of the IP Act.

<sup>20</sup> In *Hughes and Department of Communities, Child Safety and Disability Services* (Unreported, Queensland Information Commissioner, 17 July 2012), Assistant Information Commissioner Corby considered whether the exception in section 187(4)(a) applies to shared information about the applicant and other persons. She observed at paragraph 26: "The CP Act exception only applies where the information is solely about the applicant. Thus where information is simultaneously about the applicant and others, the CP Act exception will not apply."

## Category B – Disclosure not in the best interests of the child

### Relevant law

27. Access may also be refused to information under section 47(3)(c) of the RTI Act where:

- the information is sought under an application made by or for a child
- the information sought comprises the child's personal information; and
- the disclosure of that information would not be in the child's best interests.<sup>21</sup>

28. Section 50 of the RTI Act provides that regard must be had to whether the child has the capacity to:

- understand the information and the context in which it was recorded; and
- make a mature judgment as to what might be in his or her best interests.

29. The IP Act and RTI Act provide limited guidance as to what factors are to be considered in deciding whether disclosure of the information would not be in the best interests of the child.

30. The principle 'best interests of the child' is set out in the United Nations' *Convention on the Rights of the Child* (1989) (**Convention**),<sup>22</sup> and has since been applied in Australia in a number of legal contexts, particularly in family law and administrative law.<sup>23</sup> In the family law context, courts have recognised that the 'best interests of the child' is not a straightforward test. For example, in the High Court decision of *CDJ v VAJ*<sup>24</sup> the majority stated that:

*It is a mistake to think that there is always only one right answer to the question of what the best interests of a child require. Each judge is duty bound to make the order which he or she thinks is in the best interests of the child.*

31. Courts have also recognised that 'best interests' is a multi-faceted test and incorporates the wellbeing of the child, all factors which will affect the future of the child, the happiness of the child, immediate welfare as well as matters relevant to the child's healthy development. The concept includes not only material wealth or advantage but also emotional, spiritual and mental wellbeing.<sup>25</sup>

32. In *Re Bradford and Director of Family Services; Commissioner, Australian Federal Police*<sup>26</sup> the applicant sought access under the *Freedom of Information Act 1982* (Cth) to various documents about herself and her four children that were held by the Director of Family Services. In that case, President Curtis noted that if there are child protection issues, anything that undermines the relationship between the child and the agency charged with the protection of children may not be in the child's best interests:

*Where a child is in care ..., it is in the best interests of the child that it should be able to be open with those in whom it has confidence about its relationships with its parents. The confidence might be destroyed if the information concerned went back*

<sup>21</sup> As explained in section 50 of the RTI Act.

<sup>22</sup> Ratified by Australia in December 1990. This convention provides that the best interests of the child is a 'primary consideration' in decisions concerning children and defines 'children' as everyone under 18 years.

<sup>23</sup> Section 60CC of the *Family Law Act 1975* (Cth) and also see *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273.

<sup>24</sup> (1998) 197 CLR 172 [151] per McHugh, Gummow and Callinan JJ.

<sup>25</sup> *O'Conner v A and B* [1971] 1 WLR 1227 at [1237]; *In the Marriage of Bishop* (1981) 6 Fam LR 882 at paragraph 888; *McGrath (Infants)* [1893] 1 Ch 143, 148.

<sup>26</sup> (1998) 52 ALD 455.

*to a parent, especially if the parent were to take some disciplinary action against the child.*<sup>27</sup>

33. The Family Court has also recognised the right of children with sufficient maturity and understanding to form their own views and to express those views in all matters affecting them. Those views are then given due weight in accordance with the age and maturity of the child.<sup>28</sup>
34. A child's right to privacy is also recognised in the Convention. Australian courts accept that children reach varying levels of autonomy and independence prior to turning 18 and that a right to privacy, whilst generally low for a young child in relation to their parent, will strengthen as the child's understanding and maturity grows.<sup>29</sup>
35. The Australian Law Reform Commission (**ALRC**) also specifically addressed the decision - making ability of individuals under the age of 18 in ALRC Report 108 *For Your Information: Australian Privacy Law and Practice*.<sup>30</sup> It noted that '*in many jurisdictions the age of presumption of legal capacity in relation to privacy decisions has been set at 16*'. Determining when a child has a separate right to privacy can be a difficult balancing exercise. The ALRC acknowledged this, stating that '*the family is the fundamental unit of society, but that children are individuals who are not wholly subsumed by their family*'.<sup>31</sup>

### **Findings**

36. Turning first to the submissions made by the applicant's mother, she contends that the Department is not acting in the best interests of the child by withholding information about the child from her and that she already knows some information about her son.<sup>32</sup> She also submits that she has a right to know what is going on in her child's life so she knows how to interact with the child.<sup>33</sup>
37. The applicant's mother also contends that the ALRC Report is not binding and therefore has no legal bearing. I accept this submission and agree that the ALRC Report does not establish any binding legal principles.
38. I note that determining whether disclosure would or would not be in the best interests of a child is a difficult question of fact. I have most carefully considered the particular circumstances of the child in this case, the submissions made by the child's mother and the Category B information prior to making these findings. I have also considered the guidance offered by other material such as the cases mentioned above, the Convention and the ALRC Report.
39. The applicant child is 11 years of age and his biological mother has not had responsibility for the day to day care of the child for at least the past five years. While the child is taken to be the applicant in this matter, the child's mother has not sought the views of her son in making this application on his behalf.
40. While I am unable to disclose the contents of the Category B information, having thoroughly examined it I am satisfied that this information is the sensitive personal information of the

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<sup>27</sup> Bradford at paragraph 459.

<sup>28</sup> These issues are discussed in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 cited in *Marion's case* (Secretary, Department of Health and Community Services v JWB and another) (1992) 175 CLR 218.

<sup>29</sup> *Marion's case* (Secretary, Department of Health and Community Services v JWB and another) (1992) 175 CLR 218 at paragraph 19 referring to *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112.

<sup>30</sup> Accessible from: <http://www.alrc.gov.au/publications/report-108> as at 28 May 2014

<sup>31</sup> See *For Your Information: Australian Privacy Law and Practice*, chapter 68 at paragraph 68.13. Ultimately, the ALRC recommended that children aged over 15 should be presumed to be capable of giving consent, making a request or exercising a right of access. See *For Your Information: Australian Privacy Law and Practice*, chapter 68.

<sup>32</sup> External review application received by OIC on 20 January 2014.

<sup>33</sup> Applicant submissions dated 18 May 2014.

child including information provided by the child to Departmental staff. This information is not already known or available to the child's biological mother.

41. While I note that the applicant's mother is acting on behalf of her child in seeking the Category B information, the practical effect of disclosure of information in this matter is that the applicant's mother will access the information.<sup>34</sup>
42. I acknowledge that the child in this matter is 11 years old and his biological mother is likely to already know a lot of information about his care. However, in the specific circumstances of this case, I also consider that the child can expect a right to privacy to some extent from his biological mother. I do not consider that it would always be in the best interests of the child to provide any and all information about him to his biological mother.
43. Having assessed the Category B information carefully, I am satisfied that the child is capable of understanding that a request for information has been made on his behalf by his biological mother and that disclosure of the relevant information will have an effect on the child's privacy. There is no evidence before me to suggest that the child has given consent for his biological mother to seek information on his behalf or expressed any interest in sharing the relevant information with his biological mother.
44. I consider that disclosure of the information in issue to the child's biological mother, without the consent of the child would have a negative effect of the interests of the child as it would prejudice the privacy of that child.
45. I also note that the child has shared sensitive personal information during his years in care including his own personal opinions to the Department to assist the Department in its care for the child. I am satisfied that the disclosure of the Category B information in these circumstances will have a detrimental impact on the child's relationship with the Department and his willingness to provide information to the Department in the future.

### **Conclusion**

46. I am satisfied that disclosure of the Category B information would not be in the best interests of the applicant and access can therefore be refused under section 47(3)(c) of the RTI Act.
47. In the particular circumstances of this matter and for the reasons outlined above, the submissions outlined at paragraph [36] do not persuade me that disclosure of the Category B information would not be contrary to the best interests of the applicant.

### **DECISION**

48. I affirm the Department's decision and find that access may be refused to the Category A information under sections 67(1) of the IP Act and 47(3)(a) of the RTI Act and to the Category B information under sections 67(1) of the IP Act and 47(3)(c) of the RTI Act.
49. I have made this decision as a delegate of the Information Commissioner, under section 139 of the *Information Privacy Act 2009* (Qld).

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**J S Mead**  
**Right to Information Commissioner**

**Date: 5 June 2014**

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<sup>34</sup> Section 17 of the *Law Reform Act 1995* (Qld) provides that the age of majority is 18 years. Also, 'adult' is defined in Schedule 1 of the *Acts Interpretation Act 1954* (Qld) as an individual who is 18 years or more.

## APPENDIX

### Significant procedural steps

Date	Event
21 June 2013	The Department received the applicant's valid access application under the IP Act.
11 October 2013	The Department issued its decision on the access application.
18 December 2013	The applicant applied for internal review of the Department's decision.
13 January 2014	The Department issued its internal review decision.
19 January 2014	The applicant applied to OIC for external review of the Department's internal review decision.
22 January 2014	OIC requested that the Department provide copies of procedural documents.
23 January 2014	The Department provided OIC with the requested procedural documents.
4 February 2014	OIC notified the applicant and the Department it had accepted the application for external review and asked the Department to provide OIC with copies of the information in issue.
11 April 2014	OIC conveyed a preliminary view to the applicant that the Department was entitled to refuse access to the information in issue and invited the applicant to provide submissions.
22 April 2014	The applicant provided submissions contesting the preliminary view. OIC staff contacted the applicant to discuss the external review. The applicant requested an extension of time to provide submissions in response to OIC's preliminary view.
23 April 2014	OIC requested that the Department provide information relevant to the external review by 2 May 2014.
24 April 2014	The Department provided OIC with the requested information.
6 May 2014	The applicant requested that the Information Commissioner refer a question of law to the Queensland Civil and Administrative Tribunal under section 118 of the RTI Act.
8 May 2014	OIC notified the applicant that the Information Commissioner would not refer the matter to Queensland Civil and Administrative Tribunal under section 118 of the RTI Act.
9 May 2014	The applicant requested an extension of time to provide submissions in response to OIC's preliminary view until 16 May 2014. OIC granted the extension of time.
18 May 2014	The applicant provided OIC with submissions in response to OIC's preliminary view dated 11 April 2014.