



Decision and Reasons for Decision

Citation:	<i>S36 and Office of the Director of Public Prosecutions [2023] QICmr 18 (17 May 2023)</i>
Application Number:	316838
Applicant:	S36
Respondent:	Office of the Director of Public Prosecutions
Decision Date	17 May 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - request for brief of evidence used in criminal proceedings against the applicant - accountability and transparency considerations - administration of justice and procedural fairness - personal information of other individuals - whether disclosure would, on balance, be contrary to the public interest - section 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> and sections 47(3)(b) and 49 of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Office of the Director of Public Prosecutions (**ODPP**) under the *Information Privacy Act 2009 (Qld)* (**IP Act**) for access to the full brief of evidence used in the prosecution of the applicant (**Brief**)² and an exit report from a rehabilitative program completed by the applicant at a correctional centre.³
2. The ODPP located 473 pages of information responsive to the access application and decided⁴ to grant full access to 51 pages, partial access to 221 pages and refuse access to 201 pages.
3. The applicant then applied⁵ to the Office of the Information Commissioner (**OIC**) for review of ODPP's decision.

¹ Access application dated 20 May 2022. The access application was originally made to the Department of Justice and Attorney-General (**DJAG**) and was then transferred to ODPP. DJAG has delegated power to deal with applications made under the IP Act for access to documents in ODPP's possession or control.

² The search period for the Brief was 1 January 2016 to 31 December 2017.

³ In a letter to the applicant dated 31 May 2022, DJAG advised the applicant that any exit report and rehabilitative program completion documents would be held by Queensland Corrective Services. Accordingly, the exit report has not been considered as part of the external review.

⁴ Decision dated 24 June 2022.

⁵ External review application received 2 August 2022 and dated 9 July 2022.

4. For the reasons set out below, I affirm ODPP's decision and find that access to the information in issue may be refused as disclosure would, on balance, be contrary to the public interest.⁶

Reviewable decision

5. The decision under review is ODPP's decision dated 24 June 2022.

Evidence considered

6. The significant procedural steps taken during the external review are set out in the Appendix to this decision.
7. The evidence, submissions, legislation and other material I have considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).
8. In making this decision I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), in particular, the right of the applicant to seek and receive information.⁷ I consider that a decision-maker will, when observing and applying the IP Act and RTI Act, be '*respecting and acting compatibly with*' these rights and others prescribed in the HR Act.⁸ I further consider that, having done so when reaching my decision, I have acted compatibly with and given proper consideration to relevant human rights, as required under section 58(1) of the HR Act.⁹

Information in issue

9. The information remaining in issue comprises 221 part-pages and 153 full pages contained in the Brief (**Information in Issue**).
10. Following receipt of the applicant's external review application, OIC advised the applicant that the issue to be addressed during the external review process was whether access may be refused to the information comprised in the Brief.¹⁰ I conveyed a preliminary view to the applicant that some of the information in the Brief, comprises handwritten margin notes on various witness statements and that I did not consider that this was evidence that was put before the Court during the prosecution proceedings.¹¹ The applicant did not raise any objection to my view in this respect and accordingly the handwritten notes are not considered as part of this decision.

⁶ Pursuant to section 67(1) of the IP Act and sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld) (**RTI Act**). Section 67(1) of the IP Act provides that an agency may refuse access to the document of an agency in the same way and to the same extent the agency could refuse access to the document under the RTI Act (section 47) were the document to be the subject of an access application under that Act.

⁷ Section 21 of the HR Act.

⁸ See *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; and *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

⁹ I note the observations by Bell J on the interaction between equivalent pieces of Victorian legislation in *XYZ*, [573]: '*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.*' I also note that OIC's approach to the HR Act set out in this paragraph has recently been considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (noting that Judicial Member McGill saw '*no reason to differ*' from our position).

¹⁰ Letter to the applicant dated 18 August 2022. Included in the 473 pages of information located by ODPP was some information that ODPP categorised as '*traffic history*' and '*criminal history*'. ODPP refused access to this information pursuant to section 47(3)(f) of the RTI Act. OIC conveyed a view to the applicant, that ODPP's decision in that respect appeared to be correct and accordingly OIC did not propose to consider those issues in the external review.

¹¹ On this basis I consider that this information may be deleted under section 88 of the IP Act, as it does not form part of the Brief.

11. I am constrained about the level of detail I can provide about the remaining Information in Issue,¹² however I can say that it comprises the personal information¹³ of individuals other than the applicant and can generally be described as:

- names and other identifying information of individuals other than the applicant; and
- information (including observations and opinions) other individuals provided to Queensland Police Service (**QPS**).

Issue for determination

12. The issue for determination is whether access may be refused to the Information in Issue, on the ground that disclosure would, on balance, be contrary to the public interest.¹⁴

Relevant law

13. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent they contain the individual's personal information.¹⁵ However, the right of access is subject to the provisions of the IP Act, including the grounds on which an agency may refuse access to a document.

14. In deciding whether disclosure of information would, on balance, be contrary to the public interest,¹⁶ the RTI Act requires a decision-maker to:¹⁷

- identify any irrelevant factors and disregard them
- identify relevant public interest factors favouring disclosure and nondisclosure
- balance the relevant factors favouring disclosure and nondisclosure; and
- decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

15. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of public interest lies in a particular case. I have considered these lists, together with all other relevant information, in reaching my decision. I have kept in mind the IP Act's pro-disclosure bias¹⁸ and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.¹⁹

Findings

16. In deciding whether disclosure of the Information in Issue would, on balance, be contrary to the public interest, I have taken no irrelevant factors into account in making my decision.

¹² Section 121(3) of the IP Act.

¹³ Personal information' is defined in section 12 of the IP Act as '*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*'.

¹⁴ Pursuant to section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

¹⁵ Under section 40(1)(a) of the IP Act.

¹⁶ 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.

¹⁷ Section 49 of the RTI Act.

¹⁸ Section 64 of the IP Act.

¹⁹ Section 67(2) of the IP Act.

Public interest factors favouring disclosure

17. The RTI Act recognises that public interest factors favouring disclosure will arise where disclosing the information could reasonably be expected to:
 - enhance the Government's accountability and transparency;²⁰ and
 - reveal the reason for a government decision and any background or contextual information that informed that decision.²¹
18. Disclosing the Information in Issue would give the applicant a more complete picture of the information in the possession of ODPP at the time it prosecuted the applicant. ODPP has partially disclosed information from the Brief, which demonstrates the steps it has taken in prosecuting the applicant's case. The information that has already been disclosed to the applicant has substantially advanced ODPP's accountability and transparency and provided the applicant with the relevant background or contextual information that informed any decisions. Taking into account, the nature of the Information in Issue and the information which has already been disclosed to the applicant, I attribute moderate weight to these factors.
19. There is a public interest in individuals being able to obtain access to their own personal information held by government. Having reviewed the Information in Issue, I am satisfied that to the extent that it relates to the applicant, it is the applicant's personal information. Accordingly, this disclosure factor applies to the applicant's personal information within the Information in Issue and I afford it significant weight. However, the information relating to the applicant is intertwined with the personal information of other individuals to such an extent that it cannot be disclosed without also disclosing the personal information of those other individuals (giving rise to the nondisclosure factors discussed below) in the sensitive context of criminal proceedings.
20. The applicant submits that he is currently incarcerated and intends to appeal his convictions and sentence when he is out of prison.²² The applicant states that he requires the Information in Issue as he will be self-represented. Given the applicant's submissions, I have considered whether disclosure of the Information in Issue could reasonably be expected to:
 - advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies²³
 - contribute to the administration of justice generally, including procedural fairness;²⁴ and
 - contribute to the administration of justice for a person.²⁵
21. The fundamental requirements of procedural fairness²⁶ - that is, an unbiased decision-maker and a fair hearing, should be afforded to a person who is the subject of an investigation or decision.²⁷ There is no information before me to suggest that the applicant was not afforded an opportunity to respond to the charges against him during

²⁰ Schedule 4, part 2, item 1 of the RTI Act.

²¹ Schedule 4, part 2, item 11 of the RTI Act.

²² Letter from the applicant dated 9 July 2022.

²³ Schedule 4, part 2, item 10 of the RTI Act.

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

²⁵ Schedule 4, part 2, item 17 of the RTI Act.

²⁶ Schedule 4, part 2, item 16 of the RTI Act.

²⁷ The fair hearing aspect of procedural fairness requires that, before a decision that will deprive a person of some right, interest or legitimate expectation is made, the person is entitled to know the case against them and to be given the opportunity of replying to it (*Kioa v West* (1985) 159 CLR 550 at [584] per Mason J).

the criminal proceedings which I understand were finalised in 2017.²⁸ In these circumstances, I am not satisfied that there is a reasonable expectation that disclosure of the Information in Issue would, in any meaningful way, advance the applicant's fair treatment or contribute to the administration of justice, including procedural fairness. On this basis, while these factors may apply,²⁹ I afford them only moderate weight.

22. I have also considered whether the disclosure of the Information in Issue could reasonably be expected to contribute to the administration of justice for a person – namely, the applicant.³⁰ For this factor to apply, it must be established that the applicant has suffered some kind of wrong in respect of which a remedy is, or may be available under the law, that there is a reasonable basis for seeking to pursue any such remedy and that disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available or worth pursuing.³¹
23. Following the decision of *Bruce Dulley Family Lawyers v WorkCover Queensland*,³² I am not satisfied that the applicant's intention to appeal his sentence and conviction, is the type of wrong contemplated by this factor favouring disclosure and accordingly I afford this factor no weight. I also note here that there are other processes for disclosure available to individuals seeking to appeal a criminal conviction.
24. The applicant submits that there are several sections of the *Criminal Code Act 1899* (Qld) (**Code**) which support disclosure of the Information in Issue,³³ and in particular section 590 'where it states disclosure of such information **must be made**'. Section 590 of the Code provides that when a person has been charged with an indictable offence and has been committed for trial, the Director of ODPP or a Crown prosecutor must present the indictment no later than six months. As the applicant has been tried, convicted and is serving a prison sentence, I do not consider that section 590 of the Code is relevant in the circumstances of this matter. In addition, I note that there is no information before me to suggest that the disclosure requirements of the Code were not followed during the proceedings against the applicant.
25. Similarly, the applicant also submits that he has a right to a full copy of the Brief, in particular 'what was used and not used against' him in his trial, as provided in section 32 of the HR Act.³⁴ Section 32 of the HR Act provides rights for a person charged with a criminal offence, including for example, to be informed promptly and in detail of the nature and reason for a charge³⁵ and to be tried without unreasonable delay.³⁶ As noted above, as the applicant has been tried, convicted and is serving a prison sentence, I consider that with the exception of section 32(4) of the HR Act,³⁷ section 32 of the HR Act is not relevant in the circumstances of this matter.
26. I also consider the Information Commissioner's comments in *Phyland v Department of Police* are relevant:³⁸

²⁸ Page 1 of the information disclosed to the applicant.

²⁹ Schedule 4, part 2, items 10 and 16 of the RTI Act.

³⁰ Schedule 4, part 2, item 17 of the RTI Act.

³¹ *Willsford and Brisbane City Council* (1996) 3 QAR 368 at [17]; confirmed in *10S3KF and Department of Community Safety* (Unreported, Queensland Information Commissioner, 16 December 2011) at [16].

³² (Unreported, Queensland Information Commissioner, 26 July 2012) at [31]. While I acknowledge that the findings in that matter related to a civil matter, I consider that the findings apply equally to a criminal matter.

³³ Letter to OIC dated 9 December 2022.

³⁴ Letter to OIC dated 9 December 2022.

³⁵ Section 32(2)(a) of the HR Act.

³⁶ Section 32(2)(c) of the HR Act.

³⁷ Section 32(4) of the HR Act provides a person convicted of a criminal offence has the right to have the conviction and any sentence imposed in relation to it reviewed by a higher court in accordance with the law.

³⁸ (Unreported, Queensland Information Commissioner, 31 August 2011) at [24], cited in *Sedlar and Logan City Council* [2017] QICmr 52 (& November 2017) at [59]. While I acknowledge that this case was in relation to an access application made under the RTI Act, I consider that the comment applies equally to an access application made under the IP Act.

The RTI Act was not ... designed to serve as an adjunct to court processes, but to comprise a stand-alone mechanism for enabling public access to government-held information. Obviously, the applicant is entitled to elect to pursue access under the right of access conferred by the RTI Act. In doing so, however, she must accept the qualifications upon and limitations to that right imposed by the Act itself: including refusal of access where ... disclosure would disclose personal information or infringe upon an individual's right to privacy.

27. In this regard, I note that it is reasonable to expect that the applicant may use the disclosure processes available to him when he makes his application for leave to appeal his conviction/s and/or sentence. I have carefully considered all factors listed in schedule 4, part 2 of the RTI Act and the applicant's submissions. Having done so, I can identify no other public interest considerations favouring disclosure of the Information in Issue.

Public interest factors favouring nondisclosure

28. The RTI Act recognises that disclosing an individual's personal information to someone else can reasonably be expected to cause a public interest harm³⁹ and that disclosing information which could reasonably be expected to prejudice the protection of an individual's right to privacy gives rise to a public interest factor favouring nondisclosure.⁴⁰
29. As noted at paragraph 11, the Information in Issue broadly comprises information which identifies or is about individuals other than the applicant and information that was provided to QPS by other individuals. I am satisfied that it comprises the personal information of those other individuals. Most of the Information in Issue is of a highly sensitive and highly personal nature,⁴¹ and as noted above, some of it is intertwined with the applicant's personal information.
30. Given the nature of the Information in Issue and the context in which it appears, I consider that disclosure would be a significant intrusion into the privacy of those other individuals. While I acknowledge that some of the information may be known to the applicant, as it comprises evidence that was provided or referenced in the applicant's court process, I do not consider that this reduces the weight of these nondisclosure factors to any significant degree, as the IP Act does not have protections or controls on the dissemination of documents once released in this process. For these reasons, I afford these public interest harm and privacy factors significant weight.
31. Finally, the release of third-party personal information which has been provided to and treated by QPS as confidential, could reasonably be expected to prejudice the future flow of information.⁴² The routine disclosure of third-party personal information could reasonably be expected to discourage the public from providing information, negatively impacting QPS's ability to obtain information required to perform its investigative functions. In the circumstances, of this matter I afford moderate weight to this factor favouring nondisclosure.

Balancing the public interest factors

32. I have taken into account the pro-disclosure bias in deciding access to the Information in Issue under the IP Act.⁴³ I have afforded significant weight to the factor favouring disclosure of the applicant's personal information within the Information in Issue. In addition, and for the reasons outlined above, I have found that the factors relating to

³⁹ Schedule 4, part 4, section 6 of the RTI Act.

⁴⁰ Schedule 4, part 3, item 3 of the RTI Act.

⁴¹ Such as the information (including observations and opinions) other individuals provided to QPS.

⁴² Schedule 4, part 3, item 13 and schedule 4, part 4, section 8 of the RTI Act.

⁴³ Section 64 of the IP Act.

ODPP's transparency and accountability, revealing the reason for a government decision and the fair treatment and administration of justice, including procedural fairness factors are deserving of moderate weight, taking into account the nature of the Information in Issue and the information which has been disclosed to the applicant.

33. On the other hand, I have found that the nondisclosure factors which relate to protecting the personal information and right to privacy of other individuals, in a highly sensitive context, are deserving of significant weight. I have also afforded moderate weight to the nondisclosure factor relating to the prejudice of the flow of information to QPS.
34. On balance, I am satisfied that the public interest factors favouring nondisclosure of the Information in Issue outweigh the factors favouring disclosure. Accordingly, I find that disclosure of the Information in Issue would, on balance, be contrary to the public interest and access may be refused on that basis.⁴⁴

DECISION

35. For the reasons set out above, I affirm the ODPP's decision that access to the Information in Issue may be refused as disclosure would, on balance, be contrary to the public interest.⁴⁵
36. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

S Martin
Assistant Information Commissioner

Date: 17 May 2023

⁴⁴ Under section 47(3)(b) of the RTI Act.

⁴⁵ Pursuant to section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

APPENDIX**Significant procedural steps**

Date	Event
2 August 2022	OIC received the application for external review. OIC requested preliminary documents from ODPP.
3 August 2022	OIC received the preliminary documents from ODPP.
18 August 2022	OIC advised the applicant and ODPP that the application for external review had been accepted. OIC requested the Information in Issue from ODPP.
19 August 2022	OIC received the Information in Issue from ODPP.
1 December 2022	OIC conveyed a preliminary view to the applicant.
15 December 2022	OIC received submissions from the applicant contesting OIC's preliminary view.
1 February 2023	OIC advised ODPP that the matter would proceed to formal decision.