



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>F30 and Department of Education [2023] QICmr 9 (2 March 2023)</i></b>
<b>Application Number:</b>	<b>316703</b>
<b>Applicant:</b>	<b>F30</b>
<b>Respondent:</b>	<b>Department of Education</b>
<b>Decision Date:</b>	<b>2 March 2023</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - documents relating to the applicant's employment - personal information and privacy - whether disclosure would, on balance, be contrary to the public interest - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)</b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied<sup>1</sup> to the Department of Education (**Department**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to records held by specific areas of the Department.
2. The Department located 765 documents and decided<sup>2</sup> to disclose 517 pages in full, and 243 pages in part, subject to the refusal of information that would, on balance, be contrary to the public interest to disclose. The Department also:
  - deleted irrelevant information from 10 pages; and
  - refused access to documents from a specific area of the Department on the basis that they were nonexistent.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision<sup>3</sup> and on external review confirmed that he only sought review with respect to some of the refused information.
4. For the reasons below, I affirm the Department's decision refusing access to the information remaining in issue on the ground that disclosure would, on balance, be contrary to the public interest.

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<sup>1</sup> Access application received 6 February 2022.

<sup>2</sup> Decision dated 22 April 2022.

<sup>3</sup> External review application dated 10 May 2022, received 13 May 2022.

## Background

5. Significant procedural steps in this external review are set out in the Appendix.
6. During the external review, OIC conveyed preliminary views to the applicant.<sup>4</sup> In a letter to the applicant dated 31 January 2023, OIC confirmed that, based on the applicant's submissions<sup>5</sup> and a telephone conversation between the applicant and OIC,<sup>6</sup> it was understood that the information remaining in issue was contained on four pages, and could be categorised as shared personal information.

## Reviewable decision

7. The decision under review is the Department's decision dated 22 April 2022.

## Evidence considered

8. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and the Appendix).
9. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>7</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 IP Act and the *Right to Information Act 2009* (Qld) (**RTI Act**).<sup>8</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 similar pieces of Victorian legislation<sup>9</sup> that '*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>10</sup>

## Information in issue

10. Following extensive correspondence between OIC and the applicant on external review to clarify the information of concern to the applicant,<sup>11</sup> the information remaining in issue for decision is contained on four pages (**Information in Issue**).<sup>12</sup> It comprises statements made by individuals other than the applicant relating to the applicant's employment.

## Issue for determination

11. The issue for determination is whether the Department may refuse access to the Information in Issue as disclosure would, on balance, be contrary to the public interest.

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<sup>4</sup> Email to the applicant dated 18 July 2022, and letters to the applicant dated 6 September 2022 and 31 January 2023.

<sup>5</sup> Applicant's emails dated 13 August 2022 (received 14 August 2022) and 4 October 2022 (received 5 October 2022).

<sup>6</sup> Telephone conversation on 15 December 2022.

<sup>7</sup> Section 21(2) of the HR Act.

<sup>8</sup> *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]. I further note that OIC's approach to the HR Act set out in this paragraph was considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (where Judicial Member McGill saw '*no reason to differ*' from our position).

<sup>9</sup> *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>10</sup> *XYZ* at [573].

<sup>11</sup> Email to the applicant dated 18 July 2022, and letters to the applicant dated 6 September 2022 and 31 January 2023.

<sup>12</sup> Documents 5, 101, 104 and 105 of the 765 documents located by the Department.

## Relevant law

12. Under the IP Act, an individual has a right to be given access to documents to the extent they contain the individual's personal information.<sup>13</sup> However, this right is subject to the provisions of the IP Act and the RTI Act.<sup>14</sup> Relevantly, an agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.<sup>15</sup>
13. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision-maker must:<sup>16</sup>
  - identify and disregard any irrelevant factors
  - identify factors in favour of disclosure
  - identify factors in favour of nondisclosure; and
  - decide whether, on balance, disclosure of the information would be contrary to the public interest.
14. Schedule 4 of the RTI Act contains factors that may be relevant in determining where the balance of the public interest lies in a particular case. I have considered these lists,<sup>17</sup> together with all other relevant information, in reaching my decision. I have also applied the IP Act's pro-disclosure bias<sup>18</sup> and considered Parliament's intention that grounds for refusing access to information are to be interpreted narrowly.<sup>19</sup>

## Findings

15. I have taken no irrelevant factors into account in arriving at this decision.

## Factors favouring disclosure

16. I have considered the various submissions made by the applicant<sup>20</sup> as to why disclosure of the Information in Issue would be in the public interest, and linked the applicant's submissions to the public interest factors favouring disclosure that I have discussed below.
17. The Information in Issue could be considered the applicant's personal information.<sup>21</sup> I acknowledge that there is a significant public interest in individuals accessing their personal information.<sup>22</sup> In the circumstances of this matter however, the Information in Issue provides limited details about the applicant and I consider this factor carries low weight. Further to this, I note the applicant's personal information is intertwined with the personal information of other individuals and cannot be disclosed without also disclosing their personal information. This raises two factors favouring nondisclosure, which I have addressed below.

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<sup>13</sup> Section 40 of the IP Act.

<sup>14</sup> Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent it could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under that Act.

<sup>15</sup> Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

<sup>16</sup> Section 49(3) of the RTI Act.

<sup>17</sup> I have considered each of the public interest factors outlined in schedule 4 of the RTI Act, and any relevant factors are discussed below. Some factors have no relevance, for example, the factor concerning innovation and the facilitation of research.

<sup>18</sup> Section 64 of the IP Act.

<sup>19</sup> Section 67(2) of the IP Act and section 47(2) of the RTI Act.

<sup>20</sup> Submissions received via emails dated 13 August 2022 (received 14 August 2022) and 4 October 2022 (received 5 October 2022), and an undated letter received by email dated 13 February 2023.

<sup>21</sup> 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.*'

<sup>22</sup> Schedule 4, part 2, item 7 of the RTI Act.

18. I also consider that granting the applicant access to the Information in Issue may advance the Department's accountability and transparency.<sup>23</sup> However, taking into account the content of the Information in Issue and given that the Department has already released considerable information to the applicant, I consider that disclosure of the Information in Issue would not enhance the accountability or transparency of the Department to any significant degree. I therefore afford these factors low weight.
19. Given the applicant's concerns about the conduct of the Department in its dealings with him, I have also considered whether disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official,<sup>24</sup> or reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.<sup>25</sup> Given the limited nature of the Information in Issue, being the personal opinions or short statements of individual Department employees, I am satisfied that neither of these factors apply to the Information in Issue.
20. Noting the applicant's submissions regarding discrimination by the Department, I have also considered whether disclosure could reasonably be expected to contribute to the administration of justice for him personally.<sup>26</sup> For this factor to apply, the applicant must be able to demonstrate that:
  - (a) loss, damage or some kind of legal wrong has been suffered, in respect of which a legal remedy is, or may be available
  - (b) he has a reasonable basis for seeking to pursue the remedy; and
  - (c) disclosure of the Information in Issue would assist him to pursue the remedy, or to evaluate whether a remedy is available or worth pursuing.<sup>27</sup>
21. The applicant has submitted that the Department discriminated against him. The documents relate to the applicant's employment with the Department. On the information before me, I am unable to identify how disclosure of the Information in Issue can satisfy the above criteria – in particular, I am unable to identify any connection between disclosure of the Information in Issue and the remedy or remedies the applicant may be considering. The applicant has not provided details of the remedy he is pursuing or evaluating. In this case I am not satisfied that disclosure of the specific Information in Issue could reasonably be expected to contribute to the administration of justice for the applicant personally.<sup>28</sup>
22. I have carefully considered the applicant's submissions and the Information in Issue and have not identified any further public interest factors in favour of disclosure.<sup>29</sup>

### **Factors favouring nondisclosure**

23. As noted above, the Information in Issue comprises limited statements made by individuals other than the applicant and does not form part of the routine work information of those individuals. I am satisfied that these statements comprise the personal information of individuals other than the applicant.

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<sup>23</sup> Schedule 4, part 2, items 1 and 3 of the RTI Act.

<sup>24</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>25</sup> Schedule 4, part 2, item 6 of the RTI Act.

<sup>26</sup> Schedule 4, part 2, item 17 of the RTI Act.

<sup>27</sup> *Willsford and Brisbane City Council* (1996) 3 QAR 368 at [17].

<sup>28</sup> Schedule 4, part 2, item 17 of the RTI Act.

<sup>29</sup> For example, I am satisfied disclosure of the Information in Issue could not reasonably be expected to contribute to the protection of the environment or contribute to the maintenance of peace and order (schedule 4, part 2, items 13 and 15 of the RTI Act).

24. The identities of the individuals who made the statements have already been disclosed to the applicant by the Department.<sup>30</sup> Given their identities have already been disclosed (meaning there is no way to disclose their statements without those statements being connected to the individuals) and the sensitive workplace context in which the statements appear, I consider significant weight applies to the following two factors favouring nondisclosure:
- disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy;<sup>31</sup> and
  - disclosure could reasonably be expected to cause a public interest harm by disclosing personal information of a person.<sup>32</sup>
25. I also consider disclosing the Information in Issue could reasonably be expected to prejudice the management function of the Department.<sup>33</sup> Managers need to be able to have frank and full discussions about employees. Routinely disclosing this type of sensitive information could reasonably be expected to have a detrimental effect on an agency's ability to manage its staff, as it is likely to cause managers to discuss such matters less fully and openly. I consider that the nature of the Information in Issue is such that disclosure could reasonably be expected to prejudice the Department's management function, and I afford this factor significant weight.

### ***Balancing the public interest***

26. The Information in Issue comprises the personal information of individuals other than the applicant in the context of workplace concerns. It provides limited information about the applicant or Department's decision making processes. I consider that on balance, the public interest nondisclosure factors I have discussed above outweigh the relevant disclosure factors and are determinative.<sup>34</sup> Accordingly I find disclosure of the Information in Issue would, on balance, be contrary to the public interest and access may be refused by the Department.

### **DECISION**

27. For the reasons above, I affirm the Department's decision to refuse access to the Information in Issue on the ground that disclosure would, on balance, be contrary to the public interest.
28. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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S Martin  
**Assistant Information Commissioner**

**Date: 2 March 2023**

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<sup>30</sup> Decision dated 22 April 2022.

<sup>31</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>32</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>33</sup> Schedule 4, part 3, item 19 of the RTI Act.

<sup>34</sup> Section 67(1) of the IP Act and sections 47(3)(b) and 49(3) of the RTI Act.

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
13 May 2022	OIC received the application for external review. OIC requested preliminary documents from the Department. The Department provided preliminary documents.
23 June 2022	OIC advised the applicant and the Department that the external review application had been accepted. OIC requested the Department provide copies of the information in issue and its search records.
27 June 2022	OIC received the information in issue and search records from the Department.
18 July 2022	OIC conveyed a preliminary view to the applicant.
1 August 2022	The applicant sought and received an extension of time to respond to the preliminary view.
14 August 2022	The applicant made submissions in response to OIC's preliminary view (dated 13 August 2022).
6 September 2022	OIC conveyed a further preliminary view to the applicant.
15 September 2022	The applicant sought an extension of time to respond to the preliminary view, which was subsequently granted.
5 October 2022	The applicant made submissions in response to OIC's preliminary view (dated 4 October 2022).
31 January 2023	OIC confirmed and clarified its preliminary view and the information remaining in issue with the applicant.
13 February 2023	The applicant made submissions in response to OIC's preliminary view.