



Decision and Reasons for Decision

Citation:	<i>W34 and Department of Agriculture and Fisheries [2023] QICmr 10 (8 March 2023)</i>
Application Number:	316887
Applicant:	W34
Respondent:	Department of Agriculture and Fisheries
Decision Date:	8 March 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NEITHER CONFIRM NOR DENY - request for documents relating to a complaint about the applicant - whether requested documents would comprise prescribed information - whether the existence of responsive information can be neither confirmed nor denied - section 55 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of Agriculture and Fisheries (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to the following (**Requested Documents**):²

Information in connection with the complaint made against [the applicant] by [named individual] (the "Complainant"). In particular documents sought are listed below:

*Copy of emails or other written correspondence/documents exchanged with the Complainant or other third parties in connection with the complaint;
File notes maintained by the Department in connection with the complaint, and specifically file notes and photos maintained by the person who attended [the applicant's] property; and
Reports, assessments or similar documents prepared by the Department in response to the complaint.*

2. The Department decided to neither confirm nor deny the existence of the Requested Documents, under section 55 of the RTI Act,³ specifically because the access application was worded in a way that identified the suspected complainant. As the Department decided to neither confirm nor deny the existence of documents, its decision notice to the applicant did not include any further reasons.

¹ The access application was received on 12 July 2022 and became compliant by payment of the application fee on 20 July 2022.

² Dated between 1 January 2020 to 30 June 2022.

³ Decision dated 5 August 2022.

3. The applicant applied to the Office of the Information Commissioner (**OIC**) for review of the Department's decision.⁴
4. For the reasons set out below, I affirm the Department's decision and find that the Department was entitled to neither confirm nor deny the existence of the Requested Documents.⁵ I am satisfied that, given the way in which the access application was worded, if the Requested Documents as described by the applicant were to exist, and the Department confirmed the existence of such information, the Department would be disclosing 'prescribed information', that is, personal information, the disclosure of which would, on balance, be contrary to the public interest under section 47(3)(b) and section 49 of the RTI Act.
5. I acknowledge that, generally, an individual is entitled to access certain information about an investigation into them and their activities. In this case, however, as the applicant has identified the relevant investigation records with reference to a particular suspected complainant, I am satisfied that the Department's decision to neither confirm nor deny the existence of documents is the correct response.

Reviewable decision

6. The decision under review is the Department's decision dated 5 August 2022.

Evidence considered

7. Significant procedural steps are set out in the Appendix to this decision.
8. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix).
9. In making this decision I have had regard to the *Human Rights Act 2019 (Qld)* (**HR Act**), in particular the right of the applicant to seek and receive information.⁶ I consider that a decision-maker will, when observing and applying the RTI Act, be '*respecting and acting compatibly with*' these rights and others prescribed in the HR Act.⁷ 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.⁸

Issue for determination

10. During the review, OIC wrote to the applicant to express the preliminary view that a 'neither confirm nor deny' response was appropriate, given the way in which the applicant had framed their access application, that is, by requesting information concerning a complaint made by a specifically named individual.⁹

⁴ External review application dated 2 September 2022.

⁵ Under section 55 of the RTI Act.

⁶ Section 21 of the HR Act.

⁷ 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].

⁸ I note the observations by Bell J on the interaction between similar 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).

⁹ Letter to the applicant's representative dated 19 September 2022.

11. The applicant stated that they did not accept OIC's preliminary view, thereby requiring a published decision to finalise the application. The applicant did not provide any further submissions in response to OIC's preliminary view, except to request a formal decision.
12. Accordingly, the issue for determination in this review is whether the Requested Documents sought by the applicant, if they exist, would contain prescribed information under section 55 of the Act, thereby permitting a decision to be made to neither confirm nor deny the existence of such documents.

Relevant law

13. 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.
14. Section 55 of the RTI Act allows a decision maker to neither confirm nor deny the existence of a document. It 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 requested is liable to cause the detriment that the key grounds for refusal prescribed in the RTI Act are intended to avoid.¹⁰
15. Before applying the exception contained in section 55, a decision-maker must be satisfied that if the requested documents existed, they would contain 'prescribed information'. Prescribed information¹¹ includes personal information the disclosure of which would, on balance, be contrary to the public interest.¹²
16. Personal information is defined as *information or an opinion ... 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.*¹³

Findings

17. While the applicant has stated that the named individual made a complaint about her to the Department, the applicant has not provided any information to OIC which independently confirms that she has been made aware that the named individual made the specific complaint. Further, nothing in these reasons should be taken to confirm or deny that the named individual made this allegation, or that the Requested Documents exist.
18. If the Requested Documents exist, it is reasonable to expect that both the disclosure of these documents and the confirmation of their existence would disclose the complainant's personal information, in particular, the complainant's name and other personal information provided in connection with making a complaint to the Department.
19. In assessing whether disclosure of the personal information would, on balance, be contrary to the public interest, a decision-maker must:¹⁴
 - identify factors irrelevant to the public interest and disregard them

¹⁰ *Tolone and Department of Police* (Unreported, Queensland Information Commissioner, 9 October 2009) at [47]-[50], *Phylard and Department of Police* (Unreported, Queensland Information Commissioner, 31 August 2011) at [30] and *Winchester and Queensland Police Service* [2017] QICmr 56 (4 December 2017) at [16].

¹¹ Defined in schedule 5 of the RTI Act.

¹² Under section 47(3)(b) of the RTI Act.

¹³ See schedule 5 of the RTI Act and section 12 of the *Information Privacy Act 2009* (Qld) (**IP Act**).

¹⁴ Section 49(3) of the RTI Act.

- identify factors in favour of disclosure of information
 - identify factors in favour of nondisclosure of the information; and
 - decide whether, on balance, disclosure of the information would be contrary to the public interest.
20. From the information before me, no irrelevant factors arise in the circumstances of this matter and I have not taken any into account in making my decision.¹⁵
21. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant to determining where the balance of the public interest lies in a particular case. I have carefully considered these factors, the RTI Act's pro-disclosure bias¹⁶ and Parliament's requirement that grounds for refusing access to information be interpreted narrowly¹⁷ in reaching this decision.

Public interest factors favouring disclosure

22. The applicant submits that the named individual made a complaint to the Department about the applicant's horses, which resulted in the Department taking action against the applicant.¹⁸ The applicant further submits that the information is, the applicant's personal information, in that it pertains to complaint information made about the applicant by the named individual¹⁹ and that that disclosure of the Requested Documents could reasonably be expected to:
- inform the community of the Department's operations, including in particular, the policies, guidelines and codes of conduct followed by the Department in its dealings with members of the community;²⁰ and
 - reveal the reason for the Department's decision to investigate the condition of the applicant's horses on her property and may provide the context which informed that decision.²¹
23. Revealing information about the Department's complaint management processes could reasonably be expected to enhance the Department's accountability for the outcomes of those processes,²² in addition to informing the community of the Department's operations and providing the applicant with the relevant background or contextual information that informed any decisions as raised by the applicant. Accordingly, should the Requested Documents exist, I consider these factors favouring disclosure attract high weight.
24. Given the nature of the Requested Documents, if they exist, they would comprise the applicant's personal information, which raises a factor favouring disclosure. In the circumstances of this matter, I also afford this factor high weight.

Public interest factors favouring nondisclosure

25. I have considered the application of the following nondisclosure factors to the Requested Documents, if they were to exist:

¹⁵ Set out in schedule 4, part 1 of the RTI Act.

¹⁶ Section 44 of the RTI Act.

¹⁷ Section 47(2) of the RTI Act.

¹⁸ Letter to OIC dated 2 September 2022.

¹⁹ Schedule 4, part 2, item 7 of the RTI Act.

²⁰ Schedule 4, part 2, item 3 of the RTI Act.

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

²² Schedule 4, part 2, item 1 of the RTI Act.

- disclosure could reasonably be expected to cause a public interest harm if disclosure would disclose the personal information of a person²³
 - disclosure could reasonably be expected to prejudice the protection of that person's right to privacy;²⁴ and
 - disclosure of the information could reasonably be expected to prejudice the flow of information to a regulatory authority.²⁵
26. Given the specific way in which the access application is worded, if the Requested Documents were to exist, I am satisfied that their disclosure would reveal the personal information of another individual. In the context of a complaint made about the applicant, I am satisfied that this disclosure could reasonably be expected to lead to a public interest harm by disclosing the personal information of a third party, and accordingly this factor attracts high weight.
27. Information that details an individual's interactions with a government agency attracts a level of privacy where that information forms part of an individual's private and personal sphere.²⁶ This is particularly the case where an individual seeks to make complaints confidentially to a government agency. I consider that confirming or denying the existence of the Requested Documents would reveal whether or not the individual has made a complaint to the Department. Revealing this information would have an impact on the privacy of that individual. I afford this factor high weight in favour of nondisclosure of the Requested Documents.
28. There is a recognised public interest in ensuring the Department's functions are not prejudiced through the disclosure of information provided by individuals in a complaint process. The Department relies on members of the community to provide information which assists it to administer and enforce the relevant laws relating to the welfare of animals. I am satisfied that routinely disclosing information identifying a complainant under the RTI Act (or which could reasonably be expected to enable the identification of a complainant), would discourage individuals from coming forward with information and cooperating with the Department. This in turn, could reasonably be expected to negatively impact the Department's ability to obtain information of this type in the future. I have accordingly afforded this factor significant weight in favour of nondisclosure of the Requested Documents, should they exist.

Balancing the public interest

29. In balancing the relevant public interest factors, I have had specific regard to the nature of the Requested Documents, if they exist, comprising the shared personal information of the applicant and the complainant.
30. I have identified a number of factors in favour of disclosure of the Requested Documents.²⁷ I have afforded high weight to the factors relating to the Department's accountability and transparency, informing the community of the Department's

²³ Schedule 4, part 4, section 6 of the RTI Act.

²⁴ Schedule 4, part 3, item 3 of the RTI Act.

²⁵ Schedule 4, part 3, item 13 of the RTI Act.

²⁶ The concept of 'privacy' is not defined in the IP Act or RTI Act. It can, however, be viewed as the right of an individual to preserve their personal sphere free from interference from others. See *Matthews and Gold Coast City Council* (Unreported, Queensland Information Commissioner, 23 June 2011) at [22] paraphrasing the Australian Law Reform Commission's definition of the concept in "For your information: Australian Privacy Law and Practice" *Australian Law Reform Commission Report No. 108* released 11 August 2008, at paragraph 1.56, [For Your Information: Australian Privacy Law and Practice \(ALRC Report 108\) | ALRC](#)

²⁷ Noting, for the sake of completeness, that having carefully considered both the list of factors favouring disclosure in schedule 4, part 2 of the RTI Act and the applicant's submissions, I can identify no other public interest factors or considerations that might arise favouring the disclosure of the Requested Documents should they exist.

operations, revealing the reasons for the Department's decisions and disclosing the applicant's own personal information.

31. Equally, given the nature of the Requested Documents, should they exist, I have also afforded significant weight to the nondisclosure factors safeguarding personal information and privacy, as well as the flow of information to the Department.
32. In determining where the balance of the public interest lies, I have taken into account that there is a significant public interest in an agency disclosing information to an applicant in relation to a complaint made about that applicant. However, in the circumstances of this matter, where the wording of the access application is such that, by its terms, it seeks to confirm the applicant's suspicions about the identity of the complainant, I am satisfied that the factors favouring nondisclosure are determinative. I have reached this conclusion as disclosing information (if it exists) would identify the specific individual as the complainant, thus prejudicing the protection of that individual's right to privacy and causing an associated public interest harm, as well as prejudicing the future flow of complaint information to the Department. Accordingly, I find that disclosure of the Requested Documents, if they exist, would on balance be contrary to the public interest.

DECISION

33. For the reasons set out above, I affirm the Department's decision, made under section 55 of the RTI Act, to neither confirm nor deny the existence of the Requested Documents, as to confirm the existence of the Requested Information would disclose prescribed information. I am satisfied that, if the Requested Documents were to exist in the Department's possession or under its control, they would contain 'prescribed information', that is, personal information the disclosure of which would, on balance, be contrary to the public interest under section 47(3)(b) and section 49 of the RTI Act.
34. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

S Martin
Assistant Information Commissioner

Date: 8 March 2023

APPENDIX**Significant procedural steps**

Date	Event
2 September 2022	OIC received the application for external review.
5 September 2022	OIC requested preliminary documents from the Department. OIC received the preliminary documents from the Department.
19 September 2022	OIC advised the applicant and the Department that the external review application had been accepted. OIC conveyed a preliminary view to the applicant.
5 October 2022	The applicant advised that they did not wish to resolve the matter informally and requested a formal decision.
14 October 2022	OIC invited the applicant to make submissions before issuing a formal decision.