



Decision and Reasons for Decision

Citation: *D34 and Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and Arts; U22 (Third Party) [2024] QICmr 27 (20 June 2024)*

Application Number: 316850

Applicant: D34

Respondent: Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and Arts

Third Party: U22

Decision Date: 20 June 2024

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LAW ENFORCEMENT OR PUBLIC SAFETY INFORMATION - SERIOUS ACT OF HARASSMENT OR INTIMIDATION - application to access certain documents relating to a Department policy review - whether disclosure could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation - sections 47(3)(a) and 48 and schedule 3, section 10(1)(d) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - application to access certain documents relating to a Department policy review - government accountability and transparency - personal information and privacy - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the former Department of Seniors, Disability Services and

¹ The access application is dated 31 May 2022.

Aboriginal and Torres Strait Islander Partnerships (**Department**)² under the *Right to Information Act 2009* (Qld) (**RTI Act**) to access briefing notes related to changes in government policy addressing Facilitated Communication³ (**FC**) in the period after a 2012 review.

2. The Department located 608 pages as relevant to the access application, released 450 pages and decided⁴ to refuse access to 29 pages and parts of 129 pages on various grounds.⁵
3. The applicant then applied⁶ to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision, identifying the specific refused information that she wished to access on external review.⁷
4. During the review, the applicant clarified the information sought on some of the pages listed in the external review application. The applicant also accepted OIC's view that access had been correctly refused to exempt information and agreed that some refused information could be excluded from further consideration. OIC conducted consultation with numerous third parties and some, but not all, of the consulted parties objected to disclosure. Following that consultation process, the Department agreed to disclose some further information to the applicant and the Third Party was joined as a participant.
5. For the reasons set out below, and having carefully considered all received submissions and disclosure objections (including those raised by the Third Party), I vary the Department's decision and, in respect of the information remaining in issue in this review, I find that there is no basis under the RTI Act to refuse access to that information, as it is neither exempt information nor would it, on balance, be contrary to the public interest to disclose.

Background

6. After receiving a commissioned external review of augmentative and alternate communication practices and procedures in 2012, the Department undertook a process to revise its policy and procedures, which generally concerned communication support for people with complex communication needs.
7. In her external review application, the applicant outlined her concerns about the Department's policy review process, including that she considers the FC community and practitioners, along with research evidence supportive of FC, were excluded from

² Following a machinery of government changes that have occurred during this external review, the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships ceased to exist and the functions of that agency are currently the responsibility of the Department of Child Safety, Seniors and Disability Services. In 2021, the Department of Children, Youth Justice and Multicultural Affairs was authorised under section 30 of the RTI Act to deal with the access application on behalf of the former Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships and made a decision under delegation on their behalf. For ease of reference in this decision, I will simply refer to the various agencies collectively as the Department.

³ Facilitated Communication is sometimes called 'assisted typing' or 'supported typing'. In generalised terms, it involves the concept of a facilitator physically supporting the arms, hands or wrists of a person while they type/point to letters or pictures on a keyboard or similar device (this reflects how FC has been described in information which has been disclosed to the applicant). Its use as a communication technique for non-verbal individuals has been the subject of a large volume of published diverging views over many years.

⁴ Decision dated 12 July 2022.

⁵ The Department also deleted irrelevant information from the disclosed documents pursuant to section 73 of the RTI Act.

⁶ On 5 August 2022.

⁷ In the external review application, the applicant identified this information as appearing on the following pages—File 2: pages 26, 30 and 41; File 3: page 6; File 4: pages 4, 6, 9, 12, 14, 18 and 20; and File 5: pages 126, 154, 167, 174, 180, 192, 202, 208, 217, 218, 235, 279, 296-324, 338, 344, 347, 349, 353, 354, 355, 361, 362, 363, 375, 376, 377, 380, 386, 387, 394, 395 and 396. This significantly narrowed the information to be considered in this external review (as the applicant did not seek review of pages on which only mobile telephone numbers had been refused or irrelevant information had been deleted).

the Department's review process. In this regard, I note that the applicant is an interested and active participant in public discussion about the use of FC and has made a number of applications to the Department seeking access to information about FC and changes to the Department's policy concerning FC. This decision is being issued in finalisation of the applicant's final external review on this topic.

8. As mentioned in paragraph 4 above, a number of third parties were consulted in this external review regarding the potential release of certain information (**Consultation Information**) that may be of concern to them.⁸ The Department required that these third parties only be provided with descriptions of the Consultation Information (rather than copies of the Consultation Information).⁹ Some of the consulted parties indicated that this made it difficult for them to provide their disclosure views to OIC. I accept that the Department's consultation requirements did impact the ability of the consulted parties to provide their disclosure views in a timely and meaningful way, particularly where the Consultation Information included communications which had occurred approximately a decade before the consultation process was undertaken. As a result, the consultation process took considerable time to complete and, accordingly, I also accept that the time taken to finalise this external review has not met the applicant's expectations.
9. The majority of those consulted in this review either did not respond or did not object to disclosure of the described information they were consulted about and, consequently, the Department agreed to disclose some of that Consultation Information to the applicant. However, the Third Party objected, on various grounds, to disclosure of the information they were consulted about and, as noted in paragraph 4 above, they applied to participate in this external review. Additionally, two other consulted parties expressed objection to disclosure of information but did not seek to participate in the external review.¹⁰
10. The significant procedural steps taken during the external review are set out in the Appendix to this decision.

Reviewable decision

11. The decision under review is the Department's decision dated 12 July 2022.

Evidence considered

12. 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).
13. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹¹ 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) (**IP Act**).¹² I have acted in this way in making this decision, in accordance with section

⁸ The Department had previously consulted some of these third parties when it was processing the application.

⁹ The disclosure restrictions in section 107 of the RTI Act prevented the Information Commissioner from providing a copy of the Consultation Information to the consulted parties during the external review.

¹⁰ Referred to in this decision as Party X and Party Y.

¹¹ Section 21(2) of the HR Act. Section 21 of the HR also encompasses the rights to hold an opinion without interference and freedom of expression. The right to privacy and reputation is set out in section 25 of the HR Act. I have also had regard to those rights.

¹² *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].

58(1) of the HR Act. I also note the observations made by Bell J on the interaction between similar pieces of Victorian legislation:¹³ *'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.'*¹⁴

Information in issue

14. As outlined above, some issues were resolved during the course of the review.¹⁵ Accordingly, the information remaining in issue in this review appears on 35 pages¹⁶ (**Information in Issue**).
15. While I am unable to describe the Information in Issue in any detail in this decision,¹⁷ I can confirm that it comprises portions of information which fall into two broad categories:
 - the identities of certain individuals who were listed as supportive of the Department's position on FC (**Category A Information**); and
 - information concerning investigations of complaints about FC (**Category B Information**).
16. I can also confirm that the remaining information on these 35 pages has been disclosed to the applicant (apart from information the applicant agreed to exclude) and there is a significant level of duplication within the Information in Issue.¹⁸

Issues for determination

17. As noted above, some of the consulted parties objected to disclosure of all, or part, of the Information in Issue which they were consulted about.¹⁹ In particular, the Third Party has objected to disclosure of information in this review on the basis that such disclosure could reasonably be expected to result in a serious act of harassment or

¹³ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁴ XYZ at [573].

¹⁵ On 9 September 2022, OIC confirmed to the applicant that one page referenced in the external review application had been fully disclosed to her (namely, File 5 page 338). The Department also agreed to disclose further information to the applicant (and as a result of this disclosure, File 5, pages 218, 349, 355, 363 and 377 were no longer in issue). On 11 May 2023, the applicant confirmed that she (i) did not seek to access any further information from the documents she identified in the external review application as comprising File 2, page 41; (ii) agreed to exclude the name of one individual appearing at File 3 page 6; File 4 page 9 and File 5 pages 167, 192, 217, 235 and 279 and the name of a second individual appearing at File 5 page 217 (provided the title and organisation of the individual are disclosed); (iii) accepted OIC's view that File 5 pages 296-324 had been correctly refused as exempt information, on the basis of legal professional privilege; and (iv) accepted that certain reports not located by the Department fell outside the scope of the access application. This was confirmed to the applicant by email dated 15 May 2023. Finally, the applicant confirmed on 28 May 2024 that she did not seek access to refused mobile telephone numbers.

¹⁶ Namely, File 2: pages 26 and 30; File 3: page 6; File 4: pages 4, 6, 9, 12, 14, 18 and 20; and File 5: pages 126, 154, 167, 174, 180, 192, 202, 208, 217, 235, 279, 344, 347, 353, 354, 361, 362, 375, 376, 380, 386, 387, 394, 395 and 396. Details of the Information in Issue were confirmed to the applicant by letter dated 11 May 2023, however, that letter inadvertently omitted listing page 380 as forming part of the Category A Information and page 396 as forming part of the Category B Information described in paragraph 15. I also note that it appears the Department had agreed (in November 2022) to disclose the Information in Issue on page 396.

¹⁷ Section 108(3) of the RTI Act relevantly prevents the Information Commissioner (or delegate) from including information in a decision, or reasons for a decision, that is claimed to be exempt information or contrary to the public interest information.

¹⁸ The Information in Issue at:

- File 2, page 26 is duplicated at File 2 page 30; File 4 page 126; and File 5 page 126, 154, 174, 180, 202 and 208
- File 3 page 6 is duplicated at File 4 page 9; and File 5 page 217, 235, 279 and 380
- File 4 page 6 is duplicate at File 4 pages 14 and 20; and File 5 pages 354, 362, 376, 387 and 395
- File 4 page 4 is duplicated at File 4 pages 12 and 18; and File 5 pages 353, 375, 386 and 394
- File 5 page 167 is duplicated at File 5 page 192; and
- File 5 page 347 is duplicated at File 5 page 361.

¹⁹ I note that the Department had also consulted with a number of parties during its processing of the access applications and some of objections raised during that process were similar to the disclosure objections received on external review.

intimidation or, in the alternative, that disclosure is contrary to the public interest. Other consulted parties raised more generalised disclosure objections.²⁰

18. The Department also objected to disclosure of some of the Information in Issue, on the basis that it would, on balance, be contrary to the public interest to disclose.²¹
19. Accordingly, the issues for determination are whether access may be refused to the Information in Issue on the basis that:
 - it comprises exempt information, as its disclosure could reasonably be expected to result in a serious act of harassment or intimidation;²² and/or
 - its disclosure would, on balance, be contrary to the public interest.²³

Exempt Information

Relevant law

20. A person has a right to be given access to documents of an agency under the RTI Act.²⁴ However, this right is subject to other provisions of the RTI Act, including the grounds upon which an agency may refuse access to documents.²⁵
21. One ground of refusal is where information is exempt from disclosure²⁶—information will qualify as exempt where its disclosure could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation (**Harassment or Intimidation Exemption**).²⁷
22. The term ‘*could reasonably be expected to*’ requires that the expectation is reasonably based, that it is neither irrational, absurd or ridiculous,²⁸ nor merely a possibility.²⁹ Whether the expected consequence is reasonable requires an objective examination of the relevant evidence.³⁰ Factors which may be relevant in determining whether the requisite harassment or intimidation could reasonably be expected to occur include, but are not limited to:³¹
 - past conduct or a pattern of previous conduct
 - the nature of the relevant information in issue
 - the nature of the relationship between the parties and/or relevant third parties; and
 - relevant contextual and/or cultural factors.

²⁰ Party X objected to disclosure of their name and anything they had said, and Party Y did not object to disclosure of certain information they were consulted about, provided a nominated commentary accompanied that disclosure.

²¹ In this regard, I note the Department’s onus in this review under section 87(1) of the RTI Act.

²² Sections 47(3)(a) and 48 and schedule 3, section 10(1)(d) of the RTI Act.

²³ Sections 47(3)(b) and 49 of the RTI Act.

²⁴ Section 23 of the RTI Act.

²⁵ These refusal grounds appear in section 47 of the RTI Act.

²⁶ Section 47(3)(a) and 48 of the RTI Act. Schedule 3 identifies what comprises exempt information for the purpose of the RTI Act.

²⁷ Schedule 3, section 10(1)(d) of the RTI Act.

²⁸ *Attorney-General v Cockcroft* (1986) 64 ALR 97 (**Cockcroft**) at [106].

²⁹ *Murphy and Treasury Department* (1995) 2 QAR 744 (**Murphy**) at [44] citing *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279, at [339]–[341].

³⁰ *Murphy* at [45]–[47]. In reaching a finding, it is not necessary for a decision-maker ‘to be satisfied upon a balance of probabilities’ that disclosing the document will produce the anticipated prejudice, or, in this case, serious harassment or intimidation—see *Cockcroft* at 106, cited in *Sheridan and South Burnett Regional Council, Local Government Association of Queensland Inc and Dalby Regional Council*; and *Crime and Misconduct Commissioner* (Unreported, Queensland Information Commissioner, 9 April 2009) (**Sheridan**) at [192], which considered substantially similar provisions of the repealed *Freedom of Information Act 1992* (Qld).

³¹ *Sheridan* at [193] and *Richards and Gold Coast City Council* (Unreported, Queensland Information Commissioner, 28 March 2012) at [19].

23. The RTI Act does not define '*serious act of harassment or intimidation*'. Therefore, these terms are given their ordinary meanings.³²
24. The reference to 'serious' in the exemption indicates that Parliament had envisaged that some degree of low-level harassment or intimidation would be tolerated before the exemption applied.³³ Therefore, the expected harassment or intimidation must also be serious in nature for the exemption to apply.³⁴ Being disparaging, unpleasant or '*irksome and annoying*' is not sufficient to establish the exemption.³⁵
25. The Queensland Civil and Administrative Tribunal has also confirmed that, for the Harassment or Intimidation Exemption to apply, '*it must be reasonably expected that a person would be subject to a serious act or harassment or intimidation as a result of the disclosure of the information, rather than independently or from any other circumstance*'.³⁶
26. Accordingly, for this exemption to apply, I must be satisfied that:
- there is a reasonable expectation of harassment or intimidation arising as a result of disclosure, rather than from other circumstances; and
 - the expected harassment or intimidation is serious in nature.

Analysis

27. The consulted parties who objected to disclosure during this external review raised specific concerns about the disclosure of their identifying information within the Information in Issue.³⁷ To avoid identifying those consulted parties (in particular, the Third Party), I provide the following summary of the disclosure objections raised by the consulted parties³⁸ which are relevant to the issue of whether the Harassment or Intimidation Exemption applies to the Information in Issue:
- the applicant has engaged in bullying behaviour (including via social media and other online activities) and conduct perceived to be harassment
 - as a result of those bullying behaviours, certain organisations had taken steps to de-identify their members and the authors of publications about FC
 - the applicant has made what is perceived to be defamatory statements about individuals/entities holding opposing views about FC
 - disclosure of the Information in Issue would renew, and increase, the above conduct; and

³² The Information Commissioner has previously accepted the following definitions:

- '*harass*' includes '*to trouble by repeated attacks, ... to disturb persistently; torment*'; and
- '*intimidate*' includes '*to make timid, or inspire with fear; overawe; cow ... to force into or deter from some action by inducing fear*'.

(Refer to 6ZJ3HG and Department of Environment and Heritage Protection; OY76VY (Third Party) [2016] QICmr 8 (24 February 2016) at [32], citing Sheridan at [194]-[195]).

³³ Sheridan at [187] and [294].

³⁴ Relevant dictionary definitions of 'serious' include '*weighty or important*' (Macquarie Dictionary Online retrieved 27 May 2024 from <https://www.macquariedictionary.com.au>); '*giving cause for apprehension; critical*' (Macquarie Dictionary Online retrieved 27 May 2024); and '*having (potentially) important, esp. undesired, consequences; giving cause for concern*' (New Shorter Oxford Dictionary (Fourth Edition), as quoted by the Information Commissioner in Sheridan at [197]).

³⁵ Bowmaker Realty and Department of Justice and Attorney-General; Andrews [2015] QICmr 19 (17 August 2015) at [31].

³⁶ Watson v Office of Information Commissioner Qld & Ors [2015] QCATA 95 at [19].

³⁷ The Department had sought the disclosure views of some of these parties during its processing of the access application and received disclosure objections from certain consulted parties.

³⁸ Including those raised with the Department during its processing of the application.

- they have concern about the impact disclosure of the Information in Issue would have on their safety and mental well-being³⁹ and the reputation of various individuals/entities.
28. I accept that the applicant has published her FC views, including online, disagreeing with the published views of individuals/entities who are not supportive of FC. Taking this and the information before me into account, I consider it is reasonable to expect that, following the disclosure of information in this external review process, the applicant may make further publications or posts online expressing opposition to the FC views of certain individuals/organisations.⁴⁰
29. As I have noted above, the wording of the Harassment or Intimidation Exemption contemplates that lower levels of harassment or intimidation will not be captured by the exemption.⁴¹ Having carefully reviewed the received disclosure objections, I am not satisfied that the apprehended future conduct of the applicant meets the level of severity necessary for the Harassment or Intimidation Exemption to apply. While I accept the past conduct which is referenced in the disclosure objections may be somewhat disparaging, unpleasant and annoying, I do not consider such conduct amounts to *serious* harassment or intimidation. Instead, I consider it is more in the nature of robust public dissent or discussion. In this context, I also consider it is reasonable to expect that any publications or posts the applicant may make online following disclosure of information in this external review process will be of a similar character to the applicant's previous publications and posts—that is, they will be critical expressions of dissent or disagreement but will not be abusive or threatening in nature.
30. For these reasons, I find that there is no reasonable basis to expect that disclosure of the Information in Issue would result in any individual being subjected to a serious act of harassment or intimidation. Accordingly, the Information in Issue does not comprise exempt information and access to it cannot be refused on that basis.
31. I have, however, taken the disclosure objections outlined in paragraph 27 above into consideration in weighing the public interest below.

Contrary to the public interest

Relevant law

32. Access may also be refused under the RTI Act where disclosure of information would, on balance, be contrary to the public interest.⁴² 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.⁴³

³⁹ While information will also be exempt from disclosure under schedule 3, section 10(1)(c) of the RTI Act where its disclosure would reasonably be expected to endanger a person's life or physical safety, I am satisfied that none of the disclosure objections received from the consulted parties provided any information which indicated this exemption could be enlivened in respect of the Information in Issue.

⁴⁰ I acknowledge that the constancy of the applicant's online presence, as raised by some of the consulted parties, is a source of concern to some of them.

⁴¹ *Sheridan* at [187] and [294].

⁴² Sections 47(3)(b) and 49 of the RTI Act.

⁴³ 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. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

33. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest⁴⁴ and explains the steps that a decision-maker must take⁴⁵ in deciding the public interest.⁴⁶

Irrelevant factors

34. I have not taken any irrelevant factor into account in this external review.

Factors favouring disclosure

35. Under the RTI Act, public interest factors favouring disclosure will arise where disclosing information could reasonably be expected to:
- promote open discussion of public affairs and enhance the Government's accountability⁴⁷
 - contribute to positive and informed debate on important issues or matters of serious interest⁴⁸
 - inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community;⁴⁹ and
 - reveal the reason for a government decision and any background or contextual information that informed the decision.⁵⁰
36. The Department must be transparent and accountable about its policy positions and how those positions are, from time to time, reviewed and updated. I also accept that FC is a matter of some community interest, as evidenced by the considerable public discussion about its use over many years. However, the Department has disclosed a significant amount of information to the applicant in response to the access application. This disclosed information includes almost all the content of the located briefing notes. I consider that the disclosed information has significantly advanced the accountability and transparency factors listed above, by enabling scrutiny of the Department's policy review process and providing insight into the background considerations, context and development, of government policy.⁵¹
37. In respect of the Category A Information, I note that the Department has disclosed the identities of most of the individuals who are listed in the briefing notes as holding views which supported the Department's position on the use of FC. I also note that the briefing notes sought approval, over time, of the reviewed policy and procedures and expert support for the Department's position formed part of the briefing note considerations. In these circumstances, I consider disclosing the identities of the remaining listed individuals will, to some extent, further advance the Department's accountability and transparency. Taking into account the context, limited nature of the

⁴⁴ In schedule 4 of the RTI Act. However, factors listed in schedule 4 are not exhaustive. In other words, factors that are not listed may also be relevant.

⁴⁵ Section 49(3) of the RTI Act.

⁴⁶ These steps are to identify any irrelevant factors and disregard them; identify relevant public interest factors favouring disclosure and nondisclosure; balance the relevant public interest factors favouring disclosure and nondisclosure; and decide whether disclosing the information in issue would, on balance, be contrary to the public interest.

⁴⁷ Schedule 4, part 2, item 1 of the RTI Act.

⁴⁸ Schedule 4, part 2, item 2 of the RTI Act.

⁴⁹ Schedule 4, part 2, item 3 of the RTI Act.

⁵⁰ Schedule 4, part 2, item 11 of the RTI Act.

⁵¹ In this regard, I note the disclosed information confirms that, in reviewing the Departmental policies and procedures, the Department took into consideration, over time, the recommendations of a commissioned external review; guidelines issued by other organisations; and input obtained via internal and external consultation.

Category A Information and received disclosure objections,⁵² I afford these factors favouring disclosure moderate weight.

38. The disclosed documents also confirm that the use of FC by, or for, certain individuals within the disability sector had been investigated by both the Department's Ethical Standards Unit and the Office of the Queensland Ombudsman. The Category B Information contains certain details about those investigated matters. I consider disclosing this category of information would further enhance government accountability and transparency, by providing a more complete picture about the nature of the support concerns involving vulnerable individuals which had been elevated for investigation. On this basis, I afford these disclosure factors moderate weight.
39. As I have noted above, the applicant raised concerns that the Department's review process excluded *'the FC community and practitioners, along with research evidence supportive of FC'*.⁵³ Public interest factors favouring disclosure will also arise in circumstances where disclosing information could reasonably be expected to allow or assist inquiry into, or reveal or substantiate, deficiencies in the conduct of an agency or its officers.⁵⁴ For these disclosure factors to apply, there must be a reasonable expectation that disclosing the Information in Issue itself would allow or assist inquiry into, or reveal or substantiate, agency conduct efficiencies. Here, I am satisfied that there is nothing within the Information in Issue itself which gives rise to such an expectation. On this basis, I find that these factors do not apply to favour disclosure of the Information in Issue.
40. Taking into account the particular nature of the Information in Issue, I cannot identify any other public interest considerations favouring its disclosure.⁵⁵

Factors favouring nondisclosure

41. A public interest factor favouring nondisclosure arises where disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy.⁵⁶ The RTI Act also recognises that there is a public interest harm⁵⁷ in disclosing an individual's personal information⁵⁸ to someone else.

⁵² In this regard, I note that, when the Department processed the application, a consulted party who objected to disclosure of the Category A Information submitted that there was little value in disclosure, given the age of this information and that opinions and findings about FC were published and publicly available. I have taken these matters into account when determining the weight to be afforded to the accountability and transparency factors which favour disclosure.

⁵³ External review application.

⁵⁴ Schedule 4, part 2, items 5 and 6 of the RTI Act.

⁵⁵ Having carefully considered all factors listed in schedule 4, part 2 of the RTI Act, the Information in Issue does not contain the applicant's personal information (schedule 4, part 2, item 7 of the RTI Act) and I cannot see how disclosing the Information in Issue could, for example, ensure oversight of expenditure of public funds (schedule 4, part 2, item 4 of the RTI Act); advance the fair treatment of individuals and entities in accordance with the law in their dealing with agencies (schedule 4, part 2, item 10 of the RTI Act); reveal the Information in Issue was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant (schedule 4, part 2, item 12 of the RTI Act); reveal environmental or health risks or measures relating to public health and safety (schedule 4, part 2, item 14 of the RTI Act); contribute to the administration of justice (schedule 4, part 2, items 16 and 17 of the RTI Act); or contribute to innovation and the facilitation of research (schedule 4, part 2, item 19 of the RTI Act). In the event that further relevant factors exist in favour of disclosure, I am satisfied that there is no evidence before me to suggest that any would carry sufficient weight to displace the overall balance of the public interest as set out in my findings.

⁵⁶ Schedule 4, part 3, item 3 of the RTI Act. The concept of 'privacy' is not defined in the IP Act or the RTI Act, however, it can essentially be viewed as the right of an individual to preserve their 'personal sphere' free from interference from others (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 12 August 2008, at paragraph 1.56).

⁵⁷ Schedule 4, part 4, section 6 of the RTI Act.

⁵⁸ 'Personal information' is defined in schedule 5 of the RTI Act by reference to the IP Act and section 12 of the IP Act defines personal information 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'.

42. I am satisfied these nondisclosure considerations are enlivened in respect of the Category A Information, which comprises names and titles of certain individuals. As I have already noted, the Category A Information appears within a list of individuals which has otherwise been disclosed to the applicant. The surrounding text which has been disclosed states that *'The department's policy position on the use of FC and AAC is supported by the following leading Australian and International Professors in Speech Therapy, Special Education, Autism and Education'*. Therefore, the list in which these individuals are identified does not relate to sensitive private aspects of their lives—instead, almost a decade ago, the Department simply listed these individuals as having similar views to the Department's policy position. In this regard, I note that the opinions of these individuals about FC, as well as the various positions these individuals have held, form part of the public record.⁵⁹ Taking this, the received disclosure objections and the information which has already been disclosed to the applicant into account, I afford only low weight to the personal information and privacy factors which favour nondisclosure of the Category A Information.
43. The Department submitted⁶⁰ that, as the FC community (of supporters, users and facilitators) was relatively small, disclosure of the Category B Information may allow the identities of certain individuals to be ascertained, particularly when taking into account the information which has been disclosed about these investigations. Although I cannot provide any further detail about the content of the Category B Information,⁶¹ I have carefully considered that information and I am not satisfied⁶² that its disclosure could reasonably be expected to lead to the identification of any specific individuals. On this basis, to the extent the personal information and privacy factors apply to the Category B Information, I afford them low to no weight.
44. As noted at paragraphs 27 to 30 above, I do not accept the position in the received disclosure objections that disclosing the Information in Issue will result in serious harassment and/or intimidation. However, given that the list of public interest factors in the RTI Act is not exhaustive, I consider that these submissions regarding harassment and/or intimidation also raise a public interest factor favouring nondisclosure requiring consideration in the context of the public interest test—that is, that whether disclosure could reasonably be expected to result in a person being subjected to lower level (that is, less than serious) harassment and/or intimidation.
45. I noted in paragraph 28 above that I consider it is reasonable to expect that, following the disclosure of information in this external review process, the applicant may make further publications or posts online expressing opposition to the FC views of certain individuals/organisations. However, on the information before me, this anticipated conduct has previously occurred—that is, the applicant has already publicly expressed her opposition to (or criticism of) the views of certain individuals/organisations. I also note that the Information in Issue relates to review processes that occurred many years ago. While I accept that some consulted parties may consider the reoccurrence of such posts to be disparaging, unpleasant and perhaps even a source of anxiety, I consider the expression of opposition views nonetheless forms part of the robust public discussion on this issue. Consequently, in all the circumstances, I consider that while a public interest consideration arises in this regard (that is, concerning the reasonable expectation that disclosure of the Information in Issue could result in some level of harassment and/or intimidation), I afford it limited weight.

⁵⁹ For example, as identified in academic publications.

⁶⁰ Submissions dated 28 November 2022.

⁶¹ By virtue of section 108(3) of the RTI Act.

⁶² Noting the Department's review onus under section 87(1) of the RTI Act.

46. I note that, when the Department processed the application, a consulted party submitted that it was not in the public interest to raise conflict of opinion about FC.⁶³ I recognise there has existed a divergence of opinion about the use of FC for many years and that these differing opinions are part of the public record. In these circumstances and given the limited nature of the Information in Issue, I do not consider that disclosure of the Information in Issue could be expected to raise any notable conflict of opinion that does not already exist.
47. Having carefully considered all the public interest factors favouring nondisclosure in schedule 4, parts 3 and 4 of the RTI Act, I cannot identify any other public interest considerations favouring nondisclosure which arise in respect of the Information in Issue.⁶⁴

Balancing the public interest

48. I have taken into account the pro-disclosure bias in deciding access to documents under the RTI Act.⁶⁵ After carefully reviewing the Information in Issue, I have identified and considered above the public interest factors which are relevant to the Information in Issue.
49. I have identified four public interest factors relating to government accountability and transparency which favour disclosure of the Information in Issue and I have afforded moderate weight to these factors.
50. On the other hand, I have identified a number of factors favouring nondisclosure of the Information in Issue. For the reasons addressed above, I afford low and limited weight to the nondisclosure factors relating to the personal information, privacy and harassment and/or intimidation for the Category A Information. It is also my view that the considerations relating to personal information, privacy and harassment and/or intimidation are deserving of low to no and limited weight in respect of the Category B Information.
51. While finely balanced, I am satisfied that the factors favouring nondisclosure are outweighed by the factors favouring disclosure and accordingly, access to the Information in Issue cannot be refused under section 47(3)(b) of the RTI Act as its disclosure would not, on balance, be contrary to the public interest.

DECISION

52. For the above reasons, I vary the Department's decision and I find that there is no basis under the RTI Act to refuse access to the Information in Issue, as it is neither exempt information nor would it, on balance, be contrary to the public interest to disclose.

⁶³ I cannot provide any further detail about this objection (to avoid identifying the consulted party who raised this objection).

⁶⁴ Taking into account the particular nature of the Information in Issue, I do not consider its disclosure could reasonably be expected, for example, to prejudice the private, business, professional, commercial or financial affairs of entities (schedule 4, part 3, item 2 of the RTI Act); prejudice fair treatment (schedule 4, part 3, item 6 of the RTI Act); or impede the administration of justice (schedule 4, part 3, items 8 and 9 of the RTI Act). In the event that further relevant factors exist in favour of nondisclosure, I am satisfied that there is no evidence before me to suggest that any would carry sufficient weight to displace the overall balance of the public interest as set out in my findings.

⁶⁵ Section 44 of the RTI Act.

53. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

T Lake
Principal Review Officer

Date: 20 June 2024

APPENDIX

Significant procedural steps

Date	Event
5 August 2022	OIC received the external review application.
19 August 2022	OIC notified the applicant and the Department that the application for external review had been accepted and requested information from the Department.
25 August 2022	OIC received the requested information from the Department.
6 September 2022	OIC received a submission from the applicant.
9 September 2022	OIC wrote to the applicant requesting clarification of the refusals for which the applicant sought to review.
10 September 2022	OIC received the applicant's submissions about the refusals for which she sought to review.
13 October 2022	OIC conveyed a preliminary view to the Department concerning certain refused information. OIC sought the disclosure views of two third parties, who confirmed they had no objection to disclosure of the information they were consulted about.
14 October 2022	OIC sought the disclosure views of a further third party.
17 October 2022	OIC sought the disclosure views of a further two third parties (including the Third Party).
24 October 2022	OIC granted, at the Department's request, an extension of time for the Department's response to OIC's preliminary view. OIC sought the disclosure views of a further three third parties. The Third Party provided their disclosure objections.
27 October 2022	OIC sought the disclosure views of a further third party who confirmed they had no objection to disclosure of the information they were consulted about.
28 October 2022	OIC sought the disclosure views of a further two third parties.
31 October 2022	OIC sought the disclosure views of a further third party who confirmed they had no objection to disclosure of the information they were consulted about. OIC conveyed a further preliminary view to the Department concerning some of the refused Information in Issue in the review.
1 November 2022	OIC received the disclosure objections from one of the consulted parties.
9 November 2022	OIC wrote to a consulted party who had objected to disclosure to invite them to provide submissions supporting their disclosure position.
11 November 2022	OIC received a further disclosure objection from that consulted party.
28 November 2022	OIC received the Department's submissions.

Date	Event
7 December 2022	OIC received disclosure objections from a consulted party.
9 December 2022	OIC confirmed to one consulted party that they had no objection to disclosure of the information they were consulted about.
19 December 2022	OIC wrote to two consulted parties to provide a description of the Consultation Information and invited them to provide their disclosure views.
2 March 2023	OIC wrote to three consulted parties who had objected to disclosure, inviting them to participate in the external review.
3 March 2023	OIC received further disclosure objections from one consulted party.
16 March 2023	OIC received confirmation that the Third Party wished to participate in the external review.
20 March 2023	OIC notified the Department about the outcome of consultation with the various consulted parties and conveyed a further preliminary view to the Department.
27 March 2023	The Department agreed to disclose additional information to the applicant.
28 March 2023	<p>OIC notified the applicant that further information would be disclosed and provided an update to the applicant about the external review.</p> <p>The applicant confirmed that, notwithstanding the further information disclosure, she required a formal decision to finalise the review.</p>
29 March 2023	The Department disclosed the further information to the applicant.
3 April 2023	OIC received the Department's further submissions concerning certain refused information.
5 April 2023	The applicant confirmed that she continued to seek access to information removed from the pages disclosed by the Department on 29 March 2023.
11 May 2023	<p>OIC conveyed a preliminary view to the applicant about information to which access may be refused and information which could be disclosed (the latter being the information which remained in issue on external review).</p> <p>OIC received the applicant's submissions which partially accepted the preliminary view and sought clarification about certain information.</p>
15 May 2023	<p>OIC wrote to the applicant to provide the requested clarification and confirm the pages which were no longer the subject of the review.</p> <p>The applicant confirmed her acceptance that the identified information was no longer the subject of the review.</p>
28 May 2024	OIC received the applicant's confirmation that she did not seek to access refused mobile telephone numbers.