



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>O'Connor and Legal Services Commission</i> [2015] QICmr 10 (29 April 2015)</b>
<b>Application Number:</b>	<b>312298</b>
<b>Applicant:</b>	<b>O'Connor</b>
<b>Respondent:</b>	<b>Legal Services Commission</b>
<b>Decision Date:</b>	<b>29 April 2015</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST INFORMATION – file note of a telephone conversation – personal information – whether disclosure would, on balance, be contrary to the public interest – sections 47(3)(b) and 49 and schedule 4 of the <i>Right to Information Act 2009</i> (Qld)</b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied to the Legal Services Commission (**LSC**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to a document recording a telephone conversation between an LSC officer and a third party.
2. LSC located 1 page of information and decided to grant access to some information on that page and refuse access to the remaining information on the basis that its disclosure would, on balance, be contrary to the public interest.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of LSC's decision.
4. LSC's decision is affirmed and access may be refused to the information in issue on the ground that its disclosure would, on balance, be contrary to the public interest under section 47(3)(b) and section 49 of the RTI Act.

#### Background

5. LSC telephoned the third party, referred to in paragraph 1, in the course of its enquiry into a complaint made to it by the applicant about a legal practitioner, and prepared a file note of the conversation. The identity of the third party is known to the applicant.
6. Significant procedural steps relating to the application and the external review process are set out in the Appendix.

## Reviewable decision

7. The decision under review is LSC's decision dated 25 November 2014.

## 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 Appendix).

## Information in issue

9. The information in issue comprises approximately 3 typed lines (**File Note Portion**) of the 12 line typed file note recording the third party's conversation. It records the third party's opinions about and account of some events concerning the applicant related to the applicant's complaint to the LSC.

## Relevant law

10. Under the RTI Act, a person has a right to be given access to documents of an agency.<sup>1</sup> However, this right is subject to other provisions of the RTI Act, including the grounds on which an agency may refuse access to documents.<sup>2</sup> Access to a document may be refused if disclosing it would, on balance, be contrary to the public interest.<sup>3</sup>

11. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest<sup>4</sup> and explains the steps that a decision-maker must take<sup>5</sup> in deciding the public interest as follows:

- 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 would, on balance, be contrary to the public interest.

## Findings

### ***Where does the balance of the public interest lie in this matter?***

12. In balancing the public interest in this matter I have carefully considered the applicant's submissions. I find that disclosing the File Note Portion to the applicant would, on balance, be contrary to the public interest, for the reasons below.

13. I have examined the irrelevant factors in schedule 4 of the RTI Act and am satisfied no irrelevant factors arise in the circumstances of this case and I have not taken any into account in reaching my decision. I have carefully assessed the File Note Portion and consider that there are a number of factors favouring disclosure and nondisclosure in this case. I discuss these and their relative weight below.

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<sup>1</sup> Section 23 of the RTI Act.

<sup>2</sup> As set out in section 47 of the RTI Act.

<sup>3</sup> Sections 47(3)(b) and 49 of the RTI Act. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the wellbeing 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. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

<sup>4</sup> Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive; in other words, factors that are not listed may also be relevant.

<sup>5</sup> Section 49(3) of the RTI Act.

## Factors favouring disclosure

### Applicant's personal information

14. The File Note Portion comprises the applicant's personal information;<sup>6</sup> it is the third party's comments about the applicant.<sup>7</sup> This gives rise to a factor favouring disclosure of this information under the RTI Act.<sup>8</sup> I acknowledge the importance of providing individuals with access to their personal information held by public authorities and attribute significant weight to this public interest factor.

### Transparency and accountability

15. Revealing information about LSC's complaint handling processes could reasonably be expected to enhance its accountability for the outcomes of those processes.<sup>9</sup> Revealing this information would also provide the applicant with relevant background or contextual information that informed LSC's decision to finalise his complaint on the basis that the conduct complained of could not be considered professional misconduct.<sup>10</sup>
16. The applicant submits<sup>11</sup> that information in the File Note Portion was described by LSC as '*compelling*' and '*compelling evidence*' and he expresses concern that he has had no opportunity to review this information that has, he submits, influenced LSC's decision about the nature of the conduct complained of by the applicant. He states '*I feel that [LSC officer] has been able to make his decision on the LSC case of mine against [solicitor] Lawyer simply by stating that after a conversation with [third party] that there are "compelling" reasons for his review and rejection of my claim against [solicitor] on the compelling unsubstantiated verbal information from [third party]*'.<sup>12</sup>
17. However, this is difficult to reconcile with his submission in which it appears he had LSC's decision explained to him and was satisfied with the explanation. He states '*In regards to my case against [solicitor] I was quite prepared to let quite a lot go to the keeper so that [solicitor] was rightfully able to continue to practice because as I [sic] [LSC officer] had demonstrated to me that as I understood that although [solicitor] was negligent to a degree that it could not be considered Professional Misconduct*'.<sup>13</sup>
18. As noted previously, the File Note Portion records the third party's views and thoughts about events concerning the applicant. While I am prohibited from disclosing the contents of the File Note Portion,<sup>14</sup> it contains no information that could be described as going to LSC's investigatory processes or revealing the outcomes of those processes. It does not refer to the solicitor the subject of the applicant's complaint. The tenor of the third party's comments is clear from the significant amount of the file note already released to the applicant. Disclosing the File Note Portion would add little to the applicant's knowledge of LSC's investigation process or its assessment of the solicitor's conduct.

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<sup>6</sup> The definition of '*personal information*' in schedule 6 of the RTI Act refers to the *Information Privacy Act 2009* (Qld) (**IP Act**). 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.*'

<sup>7</sup> For this reason, it is also personal information of the third party which gives rise to factors favouring nondisclosure (schedule 4, part 3, item 3 and schedule 4, part 4, section 6 of the RTI Act) discussed later in this decision.

<sup>8</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>9</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>10</sup> Schedule 4, part 2, item 11 of the RTI Act.

<sup>11</sup> In submissions dated 18 December 2014 and 16 February 2015.

<sup>12</sup> Submission dated 16 February 2015.

<sup>13</sup> Submission dated 16 February 2015.

<sup>14</sup> Section 108(3) of the RTI Act provides that the Information Commissioner must not, in a decision on an external review or in reasons for a decisions on an external review, include information that is claimed to be exempt information or contrary to public interest information.

19. I therefore consider that the public interest in government accountability and transparency would only be marginally advanced, if the remaining information, being the File Note Portion, were released to the applicant. Accordingly, I attribute minimal weight to public interest factors relating to transparency and accountability.

**Allow or assist inquiry into deficiencies in conduct of LSC or its officers**

20. The applicant provided submissions to OIC<sup>15</sup> that detail how he came to make a complaint to LSC and his relationship with the third party whom the LSC officer telephoned in the course of investigating the complaint. Those submissions together note that in summary:
- the applicant authorised only email contact with the third party and not other forms of contact
  - he feels aggrieved at not having been informed by LSC that information obtained from the third party would not be relayed to him in full
  - his hearing impairment was not taken into account to a sufficient degree by LSC and the same method of communication he had to rely on (email) should have been used to contact the third party
  - he is concerned that information provided by the third party is inaccurate, for example, he disputes the accuracy of some information in the part of the file note released to him; and
  - by being refused access to the File Note Portion, he has been denied an opportunity to consider or comment on information which influenced LSC's decision.
21. The applicant's submissions suggest that personal information about him is perhaps incorrect or misleading; a public interest factor favouring disclosure.<sup>16</sup> His submissions indicate he considers there may be an inconsistency between the third party's account and his own. I have carefully assessed the File Note Portion and am satisfied that, while one small item is inconsistent with the applicant's account of relevant events,<sup>17</sup> the remaining information in the File Note Portion does not reflect any discrepancy. While I accept that, based upon the applicant's assertions, the small item of information may be incorrect, in the absence of any evidence supporting the applicant's assertion, I am not satisfied that disclosing the File Note Portion could reasonably be expected to reveal that the inconsistent item of information is incorrect or misleading. I therefore allocate only minimal weight to this pro-disclosure factor.
22. In his most recent submission,<sup>18</sup> the applicant submits that he is not so concerned about the outcome of his complaint as he is about the conduct of LSC's officer in not advising him that the third party might be contacted by telephone and that LSC was not obliged to inform the applicant of all that the third party said. This submission raises the issue of whether the public interest factor favouring disclosure of information that could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of LSC or its staff applies.<sup>19</sup>
23. My role on external review is limited to determining whether access to the File Note Portion can be granted under the RTI Act. I have no jurisdiction to consider whether the applicant's grievances have merit. Other than the applicant's assertion that procedures adopted in handling his complaint were unfair, there is no evidence before me, especially given the limited personal information comprising the File Note Portion, that this factor applies in this review.

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<sup>15</sup> By emails dated 18 December 2014 and 16 February 2015.

<sup>16</sup> Schedule 4, part 2, item 12 of the RTI Act.

<sup>17</sup> As set out in the applicant's submission dated 18 December 2014.

<sup>18</sup> Dated 16 February 2015.

<sup>19</sup> Schedule 4, part 2, item 5 of the RTI Act.

## **Factors favouring nondisclosure**

### **Personal information and privacy of third party**

24. The File Note Portion contains the personal information of the third party (relevantly, and as explained previously, the third party's views and thoughts about certain events involving the applicant), disclosure of which the RTI Act recognises would give rise to a public interest harm.<sup>20</sup> Also, disclosing private personal information about the third party could reasonably be expected to prejudice the protection of that individual's right to privacy.<sup>21</sup> Accordingly, two factors favouring nondisclosure of the File Note Portion arise.
25. There is a clear public interest in ensuring that government protects privacy and treats with respect the personal information it collects from members of the community. This is particularly so in relation to sensitive personal information voluntarily provided in the course of an investigation.
26. I am satisfied that the fact of providing information in the course of an LSC enquiry is an aspect of an individual's personal domain and that an individual's personal views and thoughts in this context remain their private information deserving of protection, and also that a public interest harm would result from disclosure. In this case, the applicant was given access to the majority of information in the file note and is aware of the general nature of the conversation recorded in it. The identity of the third party is known to the applicant, and the applicant was involved in the circumstances discussed in the file note. This reduces the privacy interests of the third party.
27. However, in circumstances where the File Note Portion content is not known to the applicant, I consider these interests maintain significance and accord these two factors moderate weight.

### **Prejudice flow of information**

28. A public interest factor favouring nondisclosure arises if disclosing information could reasonably be expected to prejudice the flow of information to the police or another law enforcement or regulatory agency.<sup>22</sup>
29. LSC bears responsibility for enforcing the *Legal Profession Act 2007* (Qld) by the regulating of legal practice in Queensland and facilitating the regulation of legal practice nationally across State borders.<sup>23</sup> I am satisfied it is a law enforcement or regulatory agency for the purposes of this factor. I consider that disclosing the File Note Portion could reasonably be expected to prejudice the flow of information to LSC, as individuals may be reluctant to provide information and statements to LSC in the future if they believe their personal information will be released.<sup>24</sup> This in turn would significantly prejudice LSC's ability to effectively discharge its enforcement functions.
30. The applicant contends that LSC '*had the wool pulled over their eyes*' by the third party and it is in the public interest to prevent false information being taken into account in investigations.<sup>25</sup> While making no finding about the veracity of the information provided

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<sup>20</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>21</sup> The nondisclosure factor in 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. It can, however, be viewed as the right of an individual to preserve their personal sphere free from interference from others – see 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.

<sup>22</sup> Schedule 4, part 3, item 13 of the RTI Act.

<sup>23</sup> See section 3 of the *Legal Profession Act 2007* (Qld).

<sup>24</sup> *Setschnjak and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 25 May 2012) at [24].

<sup>25</sup> Submission dated 18 December 2014.

by the third party, it is, however, generally recognised that there is a very strong public interest in protecting the free flow of information to law enforcement or regulatory agencies, even where this may result in an agency investigating false and/or unsubstantiated matters.<sup>26</sup> Accordingly, I find that this factor favouring nondisclosure applies and I afford it significant weight.

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

31. To summarise, I attribute:

- significant weight to the pro-disclosure factor relating to accessing the applicant's personal information and minimal weight to factors relating to transparency and accountability and revealing that information is incorrect or misleading; and
- moderate weight to nondisclosure factors relating to the protection of the privacy of the third party and their personal information and significant weight to the factor favouring nondisclosure where disclosure could reasonably be expected to prejudice the flow of this type of information to LSC.

32. While I recognise the importance of the applicant accessing his own personal information, its disclosure in this case would also result in disclosure of the third party's personal information. However, as explained in these reasons, the importance of safeguarding the personal information of the third party and their privacy is diminished by the applicant's knowledge of the third party's identity and the general nature of the file note's content.

33. I consider that the public interest factor concerning the free flow of information to regulatory agencies tips the balance of the public interest in favour of nondisclosure. The significant weight I attribute to this factor is determinative in this matter.

34. I find that the factors favouring nondisclosure outweigh the factors favouring disclosure and access to the File Note Portion may be refused on the basis that disclosure would, on balance, be contrary to the public interest.

### **DECISION**

35. I am satisfied that disclosing the File Note Portion would, on balance, be contrary to the public interest under section 49 of the RTI Act. Accordingly, I affirm LSC's decision to refuse access to the File Note Portion under section 47(3)(b) of the RTI Act.

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

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**L Lynch**  
**Assistant Information Commissioner**

**Date: 29 April 2015**

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<sup>26</sup> P6Y4SX and Department of Police (Unreported, Queensland Information Commissioner, 31 January 2012) at [35]-[40].

## APPENDIX

### Significant procedural steps

Date	Event
10 September 2014	LSC received the access application under the RTI Act.
25 November 2014	LSC issued its decision to the applicant.
11 December 2014	The applicant applied to OIC for external review of LSC's decision.
12 December 2014	OIC requested various procedural documents from LSC.
12 December 2014	OIC received the requested documents from LSC.
18 December 2014	OIC received a submission from the applicant.
16 January 2015	OIC notified the applicant and LSC that the external review application had been accepted and asked LSC to provide the document in issue and related documents to OIC by 30 January 2015.
19 January 2015	OIC received the document in issue and related documents from LSC.
12 February 2015	OIC conveyed its preliminary view to the applicant and invited the applicant to provide submissions supporting his case by 26 February 2015 if he did not accept the preliminary view.
16 February 2015	The applicant notified OIC he did not accept the preliminary view and provided a submission supporting his case.