



Decision and Reasons for Decision

Citation:	<i>Q20RYB and Department of Justice and Attorney-General</i> [2016] QICmr 34 (31 August 2016)
Application Number:	312795
Applicant:	Q20RYB
Respondent:	Department of Justice and Attorney-General
Decision Date:	31 August 2016
Catchwords:	ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL TO DEAL WITH APPLICATION - PREVIOUS APPLICATION FOR SAME DOCUMENTS - where the agency had previously decided to refuse access to the requested documents - whether the later application, on its face, discloses any reasonable basis for again seeking access - section 62(3) of the <i>Information Privacy Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Justice and Attorney-General (**Department**) for access to audio recordings of telephone calls he made while on remand at a correctional centre, between 1 January 2002 and 30 April 2002, including calls between the applicant and a relative.
2. The Department's decision refused access to recordings of calls for two periods, 1 to 13 January 2002 and 27 to 30 April 2002 (**Additional Recordings**), on the ground they were non-existent or unlocatable. The Department refused to deal with that part of the access application seeking access to recordings of calls in the period from 14 January 2002 to 26 April 2002 (**Remaining Recordings**), on the ground that those recordings had been the subject of a previous application.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review and the issue of access to the Additional Recordings was resolved informally during this review.
4. I affirm the Department's decision to refuse to deal with the access application to the extent it seeks access to the Remaining Recordings as these have been the subject of a previous application under the *Information Privacy Act 2009* (Qld) (IP Act) and the later application does not on its face disclose any reasonable basis for again seeking access.

Background

5. Significant procedural steps relating to the external review are set out in the Appendix to this decision.

Reviewable decision

6. The decision under review is the Department's decision dated 29 February 2016.

Evidence considered

7. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).

Issue for determination

8. The issue for determination is whether the Department may refuse to deal with the access application to the extent it seeks access to the Remaining Recordings on the basis that the applicant has previously sought access to the same documents under the IP Act.¹

Relevant law

9. Section 62 of the IP Act applies if:
 - an applicant makes an access application to an agency, and then a subsequent access application to the same agency seeking access to one or more of the same documents; and
 - the later application does not, on its face, disclose any reasonable basis for again seeking access to the documents.
10. Section 62(3)(b)(iii) of the IP Act allows an agency to refuse to deal with the later application to the extent that it seeks access to documents requested under a previous application, if the agency's decision on the previous application has been to refuse access to documents under section 67 of the IP Act.
11. 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 *Right to Information Act 2009* (Qld) (**RTI Act**) if the document were the subject of an access application under the RTI Act. Relevantly, an agency may refuse access to documents under section 47(3)(b) of the RTI Act if they comprise information the disclosure of which would, on balance, be contrary to the public interest under section 49 of the RTI Act.

Findings

Does the later application seek access to one or more of the same documents sought under a previous application?

12. Yes, for the reasons that follow.

¹ On external review, the applicant elected not to continue to seek access to the Additional Recordings. The applicant did not dispute OIC's preliminary view, conveyed by letter dated 22 June 2016, that the Department was entitled to refuse access to the Additional Recordings under sections 47(3)(e) and 52(1)(a) of the *Right to Information Act 2009* (**RTI Act**), in conjunction with section 67 of the IP Act. OIC's letter to the applicant dated 20 July 2016 confirmed the Additional Documents were therefore no longer in issue in the review.

13. On 10 August 2011 the applicant applied to the Department of Community Safety² (**First Application**) for access to:

a copy of all of my telephone recordings that I made from the Prison telephone system while I was in custody at [named] CC from the start of January 2002 to the end of April 2002.

14. The access application the subject of this review (**Later Application**) – noting that the only part of it still under review is that which seeks access to the Remaining Recordings³ – seeks access to:

...Telephone calls. [relative's name - mobile telephone number]... All calls at [named] CC 1/1/02-30/4/02.

15. Having carefully considered the scope of the First and Later Applications mentioned in paragraphs [13] and [14] above, I am satisfied that the Later Application seeks access to the same documents sought under the First Application because the scope of the First Application is:

- for all of my telephone recordings from the start of January 2002 to the end of April 2002.; and
- this time period will incorporate all calls requested in the Later Application, including the Remaining Recordings.

Does the Later Application, on its face, disclose any reasonable basis for again seeking access to the documents?

16. On its face, the later application discloses no reasonable basis for the applicant to again seek access to the Remaining Recordings. However, during the course of this external review, the applicant provided submissions in support of again seeking access to them.⁴ I have considered these submissions.
17. The applicant is imprisoned for a lengthy period as a result of his convictions for two criminal offences. He seeks access to the Remaining Recordings for use in his attempts to 'reopen' the cases, or towards seeking pardons from the Governor of Queensland. He submits that the Remaining Recordings were used by the Queensland Police Service (**QPS**) to secure convictions in his trials and that the prosecution possibly obtained access to the Remaining Recordings in breach of privacy legislation, thereby rendering the Remaining Recordings inadmissible and prejudicial in his trials.
18. I accept the applicant's submission that, as he has had no access to the recordings for 14 years, he is unable to specifically identify the relevant recordings or parts of them that comprise the evidence he contends was inadmissible.
19. However, even if information obtained in breach of privacy law were inadmissible as evidence in a criminal trial – a matter on which I have not formed a view – I am not satisfied that the recordings were accessed by the prosecution in breach of any privacy law. A prosecuting authority has a broad statutory right to access information relevant to a prosecution.⁵

² While the application was made to the Department of Community Safety (**Community Safety**), machinery of government changes in November 2013 transferred relevant responsibility from Community Safety to the Department. Accordingly, existing RTI applications and reviews involving certain applications made to Community Safety before the machinery of government changes now rest with the Department. For ease of reference, I will simply refer to 'the Department'.

³ That is, those recordings between 14 January 2002 to 26 April 2002.

⁴ External review application dated 11 March 2016, and letters dated 29 May 2016 and 28 June 2016.

⁵ For example, QPS officers are empowered under section 196 of the *Police Powers and Responsibilities Act 2000* (Qld) to seize things reasonably suspected of being evidence of the commission of an offence.

20. I therefore do not consider that accessing the Remaining Recordings for the purpose of seeking to have the cases reopened or to seek pardons on the basis of this submission, constitutes a reasonable ground for again seeking access to the Remaining Recordings.
21. Secondly, the applicant submits that two previous decisions by the Department⁶ had granted access to recordings similar to those sought in the Later Application, because the relevant family members had consented to receiving his telephone calls.
22. I understand from this that the applicant contends that, in making those decisions, the Department considered that the relevant privacy issues of various family members did not enliven, or did not attract significant weight to, non-disclosure factors concerning an individual's right to privacy and disclosure of a person's personal information.⁷ This submission concerns the Department's decision to *refuse access* to telephone recordings under section 47(3)(b) and section 49 of the RTI Act. However, the issue for determination in this review is whether the Department was entitled to rely on section 62 of the IP Act to *refuse to deal* with the Later Application. For this purpose, I am not required to consider the reasoning in a Departmental decision to refuse access. On that basis, this submission is not relevant to the issue for determination.
23. The applicant also contends that in refusing him access to the recordings, OIC is denying him justice and it is in the public interest for the truth to be revealed. I understand from this submission that the applicant believes OIC is preventing him from accessing recordings which may assist in his convictions being quashed or him receiving a pardon.
24. While I consider this submission does not raise an argument in support of the applicant again seeking access to the Remaining Recordings, as it addresses the fairness of the judicial process and OIC's external review process, I make the following comments to address the applicant's concerns about openness. His trials were conducted in courts open to the public, as were the appeal hearings. The appeal courts' decisions are publicly available. OIC is a body established as an independent entity to conduct merit-based reviews under the RTI and IP Acts of agency decisions on access to, and amendment of, documents. This decision sets out the matters taken into account in determining the limited issue on review. On this basis I do not accept the applicant's claim that matters affecting his access to justice are taking place out of public view, or that this decision comprises a denial of justice by OIC.
25. I have carefully considered the applicant's submissions in support of his again seeking access to the Remaining Recordings. Based on the above, I am satisfied that the access application does not disclose a reasonable basis for again seeking access to them.

Was the Department's decision on the First Application to refuse access to documents under section 67 of the IP Act?

26. Yes, for the reasons that follow.
27. The Department's decision⁸ on the First Application refused access to the 98 call recordings made in that period on the basis that their disclosure would, on balance, be contrary to the public interest under section 47(3)(b) and section 49 of the RTI Act, in conjunction with section 67(1) of the IP Act.

⁶ In his external review application dated 11 March 2016 the applicant identified one of these decisions, stating it was made in relation to his access application number 160540.

⁷ Schedule 4, part 3, item 3 and schedule 4, part 4, section 6 of the RTI Act.

⁸ Dated 26 September 2011.

28. I am therefore satisfied that the First Application was the subject of the Department's decision to refuse access to documents under section 67 of the IP Act.

Conclusion

29. I am satisfied that the applicant has made an application to the Department for access to the same documents sought under the First Application and the Later Application does not, on its face, disclose any reasonable basis for again seeking access to the documents. As the requirements of section 62(1) and section 62(3)(b)(iii) of the IP Act are met, I am satisfied that the Department was entitled to refuse to deal with the part of the Later Application relating to the Remaining Recordings.

DECISION

30. On the basis set out above I am satisfied that the Later Application seeks access to documents sought under the First Application. Accordingly, I affirm the Department's decision to refuse to deal with the access application to the extent it seeks access to the Remaining Recordings under section 62(3)(b)(iii) of the IP Act.
31. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

L Lynch
Assistant Information Commissioner

Date: 31 August 2016

APPENDIX

Significant procedural steps

Date	Event
25 January 2016	The Department received the access application.
29 February 2016	The Department issued its decision to the applicant.
31 March 2016	OIC received the external review application. OIC notified the Department of its receipt and requested relevant procedural information.
4 April 2016	OIC received the requested procedural documents from the Department.
6 April 2016	OIC notified the applicant and the Department that the review had been accepted and requested from the Department its advice whether it continued to contend that the Additional Recordings were non-existent and if it did not, its further submission in the event the Department objected to disclose them.
28 April 2016	The Department provided to OIC its submission confirming it continued to contend that the Additional Recordings were non-existent and relevant attachments.
25 May 2016	OIC provided to the applicant its preliminary view that the Additional Recordings were non-existent or unlocatable and the Department was entitled to refuse to deal with the Later Application to the extent it sought access to the Remaining Recordings and invited him, if he did not accept the preliminary view, to provide submissions supporting his case.
1 June 2016	OIC received submissions from the applicant in response to the preliminary view.
22 June 2016	OIC provided its further preliminary view to the applicant, confirming OIC remained of the view that the Additional Recordings were non-existent or unlocatable and the Department was entitled to refuse to deal with the Later Application to the extent it sought access to the Remaining Recordings and invited him, if he did not accept the further preliminary view, to provide submissions supporting his case.
5 July 2016	OIC received further submissions from the applicant in response to the further preliminary view.
20 July 2016	OIC confirmed to the applicant that the Additional Recordings were no longer in issue in the review and that the sole the issue remaining for consideration was whether the Department was entitled to refuse to deal with the Later Application to the extent it sought access to the Remaining Recordings, and that OIC would provide its formal decision on this issue.