Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	***Q95 and Legal Aid Queensland* [2019] QICmr 38 (6 September 2019)**
Application Number:	**314193**
Applicant:	**Q95**
Respondent:	**Legal Aid Queensland**
Decision Date:	**6 September 2019**
Catchwords:	**ADMINISTRATIVE LAW – RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - information about other individuals - personal information and privacy - whether disclosure would, on balance, be contrary to public interest - whether access may be refused under section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)** **ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - applicant contends agency did not locate all relevant documents - whether agency has taken all reasonable steps to locate documents but the documents cannot be found or do not exist - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(e) and 52 of the *Right to Information Act 2009* (Qld)**

REASONS FOR DECISION

Summary

1. The applicant applied[1] to Legal Aid Queensland (**LAQ**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to various types of documents which refer to him.

2. LAQ considered that the work involved in processing the application in its original form would substantially and unreasonably divert its resources,[2] and issued a notice of intention to refuse to deal[3] with the application to the applicant. In response, the applicant agreed[4] to narrow the scope of his application as follows:

> *… Rather than providing me with the 1250+ documents; simply provide me with a scheduled of documents and emails. These should be freely available from LAQ's documents management system and email server, and take very little time and resources to produce.*

[1] Access application dated 30 July 2018, received 6 August 2018.
[2] Section 60(1)(a) of the IP Act.
[3] Letter from LAQ to applicant dated 9 August 2018.
[4] Letter from applicant to LAQ dated 20 August 2018, received 29 August 2018.

> *However, as I am concerned about the backup and archive facility of Microsoft lync or similar interoffice, 'Chat' communication facilities and text messages. As such, secondly I request that text messages and interoffice 'Chats' are processed and completed as requested initially.*
> [sic]

3. LAQ agreed to deal with the amended scope. In its decision,[5] it declined to provide a schedule of LAQ documents which refer to the applicant (**Schedule**), noting that in order to do so it would be necessary to create a post-application document,[6] which would involve a substantial amount of work[7] and would not be subject to a right of review.[8]

4. In terms of text messages, LAQ gave full access to one page[9] and refused access to three pages (**Text Message Information**) on the ground that other access was available[10]—specifically, access by subpoena. Finally, LAQ refused access to 'Chat' communications (**Chat Information**) on the ground that such information is nonexistent.[11]

5. The applicant applied[12] to the Office of the Information Commissioner (**OIC**) for external review of LAQ's decision. For the reasons set out below, I find that access to the Text Message Information may be refused on the ground that its disclosure would, on balance, be contrary to the public interest; and access to the Chat Information may be refused on the ground that it is nonexistent.

Background

6. Significant procedural steps taken in the external review are set out the Appendix.

Reviewable decision

7. The decision under review is LAQ's decision dated 20 September 2018.

Evidence considered

8. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).

9. The applicant provided a number of submissions to OIC. To the extent those are relevant to the issue for determination, I have addressed them below.

Issue for determination

10. The issue for determination is whether access to the Text Message Information and Chat Information may be refused.

11. Before addressing this issue, it is necessary that I first address two preliminary matters—namely, the applicant's allegations that OIC is biased against him and OIC's jurisdiction regarding the Schedule.

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[5] Dated 20 September 2018.
[6] Section 47(2) of the IP Act defines a *post-application document* as a document created after the application is received but before notice is given under section 68 of the IP Act.
[7] To identify and redact legally privileged information and the personal information of others from the Schedule.
[8] Section 47(3)(b) of the IP Act provides that if the agency gives an applicant access to a post-application document, the applicant is not entitled to review of a decision about the document made in relation to the application.
[9] Document titled "Attendance Sheet".
[10] Section 67(1) of the IP Act and sections 47(3)(f) and 53(a) of the *Right to Information Act 2009* (Qld) (**RTI Act**)..
[11] Section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act.
[12] Dated 24 September 2018, received 3 October 2018.

Preliminary matters

Alleged bias by the Commissioner

12. The applicant has submitted that the Information Commissioner has displayed bias against him, stating that:[13]

> *… The responsibility on the OIC is to ensure the information is made available; and that requirement and fundamental human right is what the* Act *mandates you adhere to. A neutral or independent person would not agree that the* Act *would prevent release of such information, therefore you must be displaying bias.*
> *…*
> *In independent person would never accept that withholding a text message that related directly to an applicant would meet such a threshold, therefore the Commissioner must be aware that he is unable to make such an assertion. The test is not whether the commission is bias, but if a number of right minded people could, believe he might be.*
>
> [sic]

13. It is my understanding that the applicant's submissions relate to the Commonwealth jurisdiction. The Act referred to in the applicant's submissions appears to be the *Freedom of Information Act 1982* (Cth). The applicant's submissions also appear to quote paragraphs of an Office of the Australian Information Commissioner guideline relating to procedural fairness,[14] including the following:

> *The bias rule requires a decision maker to be impartial and have no personal stake in the decision to be made. The decision maker must be free of both actual and apparent bias, that is, of conduct that might appear to a fair-minded observer to affect their impartiality in reaching a decision.*[15]

14. The applicant reframes this test as being '*whether a number of right minded people could, believe he* [ie the Information Commissioner] *might be* [biased]*'*. As best I can understand, the applicant contends that OIC disagreeing with him about whether the Text Message Information should be disclosed satisfies this test and establishes the Information Commissioner's bias against him.

15. Given his access application was made under Queensland's IP Act to an agency within the remit of that Act, the applicant's references to the Commonwealth jurisdiction are misconceived. In any event, at both the Queensland and Commonwealth levels, the test for assessing apprehended bias for a decision maker, as described by the High Court, is '*if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide*'[16]. The High Court has also noted that *'*[t]*he question whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made'.*[17]

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[13] Letter from applicant to OIC dated 16 May 2019, received by OIC on 3 June 2019.
[14] Specifically, paragraphs 3.15 and 3.16 of the Office of the Australian Information Commissioner's FOI Guideline titled *'Part 3 – Processing and deciding on requests for access'* at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-3-processing-and-deciding-on-requests-for-access/> (accessed on [7 August 2019).
[15] Paragraph 3.16, with the Office of the Australian Information Commissioner's footnote for *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (***Ebner***) omitted.
[16] *Ebner* at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ. See also *Michael Wilson & Partners Limited v Nicholls* (2011) 244 CLR 427 at [31] per Gummow ACJ, Hayne, Crennan and Bell JJ.
[17] *Isbester v Knox City Council* (2015) 255 CLR 135 at [20] per Keifel, Bell, Keane and Nettle JJ.

16. I have carefully considered the applicant's allegation of bias. There is nothing before me to suggest that the applicant's assertions are possessed of any substance. I have not to my knowledge dealt with the applicant in any capacity prior to this review,[18] and cannot identify any conflict of interest in my dealing with the application for review of LAQ's decision. Also, during the review, when the position that the Text Message Information may be refused was put to the applicant in the form of a preliminary view, he was expressly advised that the purpose of the preliminary view was to give him the opportunity to put forward his views, and if he provided additional information supporting his case, this would be considered and may influence the outcome.[19] I consider that this process demonstrates that OIC was not so committed to the position that the Text Message Information may be refused that my conclusion was already formed and incapable of alteration, whatever evidence or arguments may be presented by the applicant.[20] In these circumstances, paraphrasing the High Court's test, I am unable to identify any basis for finding that a fair-minded lay observer might reasonably apprehend that I[21] might not bring an impartial and unprejudiced mind to the resolution of this matter.

OIC's jurisdiction regarding the Schedule

17. As mentioned above,[22] the applicant agreed to narrow the scope of his application to documents including a Schedule of LAQ's documents which refer to him. The applicant's request for the Schedule acknowledged that this document does not exist, and that it would be necessary for LAQ to create it.

18. There is no requirement that an agency must create a schedule as part of processing an application made under the IP Act.[23] Generally, an access application can only relate to documents in existence on the date that the application is received.[24] When an agency holds information that is not in a written document, however, section 83(1)(e) of the IP Act provides that:

> ***83 Forms of access***
>
> *(1) Access to a document may be given to a person in 1 or more of the following forms—*
>
> *…*
>
> *(e) if—*
>
> *(i) the application relates to information that is not contained in a written document in the possession, or under the control, of the agency; and*
>
> *(ii) the agency could create a written document containing the information using equipment that is usually available to it for* ***retrieving*** *or* ***collating*** *stored information;*
>
> *providing a written document using the equipment.*
>
> [my emphasis]

19. When considering section 83(1)(e) of the IP Act, the following comments of the Information Commissioner are apposite:[25]

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[18] And his other external review, 314164, which commenced around the same time as this review.
[19] Footnote 1. of letter from OIC to applicant dated 21 May 2019.
[20] With reference to the test for prejudgment noted in *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507 at [72] per Gleeson CJ and Gummow J.
[21] As a delegate of the Information Commissioner under section 139 of the IP Act.
[22] At paragraph 2.
[23] In contrast, for applications under the RTI Act there is a requirement that the agency give the applicant a schedule of relevant documents before the end of the processing period—see section 36(1)(b)(i) of the RTI Act. Such a schedule sets out and gives a brief description of the classes of documents relevant to the applicant in the possession or under the control of the agency of Minister, and the number of documents in each class—see section 36(7) of the RTI Act.
[24] Section 47(1) of the IP Act.
[25] *Dimitrijev and Department of Education* (Unreported, Queensland Information Commissioner, 23 February 1998) at [24].

> *The term "usually available" imposes a significant qualification on the entitlement of an … access applicant to seek specific information from a computer database or other repository of stored information. It means, in effect, that it must be possible to retrieve or collate the information requested by an … access applicant using equipment (including computer programs or software) already in place, or otherwise usually available, to undertake the performance of the agency's functions. In other words, s.30(1)(e)* [of the now repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**)][26] *imposes no requirement on an agency to obtain additional equipment or re-program existing equipment, or (for example) write a specific program to enable a database to be interrogated, in order to respond to an … access application.*

20. Given the applicant has contended that relevant information *'should be freely available from LAQ's documents management system and email server, and take very little time and resources to produce'*,[27] I have considered whether LAQ has equipment usually available to it to retrieve and collate information held by it into a Schedule, as contemplated by section 83(1)(e) of the IP Act.

21. I accept that it may be the case that some LAQ documents which refer to the applicant may be identified by relatively straightforward searches of relevant LAQ systems (for example, databases, email programs, servers and drives) using search terms such as the applicant's name and the LAQ reference numbers for the matters in which LAQ has assisted him. However, I also note that these search terms may not identify other LAQ documents which refer to the applicant—for example, any document where the reference/s to the applicant appear only in the text of the document, when the document's name, metadata, and the location in which it is saved do not readily link the document to the applicant. More detailed, targeted searches would be required to locate such documents.

22. In terms of any documents identified as a result of LAQ searches, I note that identification of such documents does not equate with the ability to produce a Schedule. For each identified document, it would be necessary to retrieve information pertinent to the Schedule (presumably a brief description of the document, and the date on which it was created, sent or received) from either the relevant system, or possibly the document itself. However, for at least some of the documents, it could well be the case that a description of the document appropriate for inclusion in a Schedule may not be recorded in either the system where the document is saved or the document itself. In such instances, there would be no description of the document that could be *retrieved*.

23. For the information that could be retrieved, it would then be necessary to configure the extracted information into a consistent format, and *collate* the information for each document into one Schedule. I also note that, following this creation of the Schedule, it would then be necessary to identify and redact any information within the Schedule which would be contrary to the public interest to disclose.

24. The entirety of this process would require a substantial amount of work by LAQ.[28] In summary, for LAQ to create what would, most likely, be an incomplete Schedule,[29] LAQ would need to conduct reasonable searches to identify documents which refer to the applicant, and then undertake the abovementioned steps of retrieval, configuration and collation regarding those documents. Whether the searches, retrieval, configuration and collation were performed manually, or through the writing and running of a specific program, I am satisfied that these processes would involve significantly more than simply

[26] This provision being the predecessor of and, in effect, replicated in section 83(1)(e) of the IP Act.
[27] Letter dated 20 August 2018.
[28] As noted in LAQ's decision dated 20 September 2018.
[29] In that, for at least some of the documents, some information (such as descriptions of documents) may not exist, and therefore could not be *retrieved*.

using equipment that is usually available to LAQ for retrieving or collating stored information, as contemplated by section 83(1)(e) of the IP Act.

25. For these reasons, I am satisfied that section 83(1)(e) of the IP Act does not oblige LAQ to produce the Schedule requested by the applicant. For sake of completeness, it follows that I am satisfied that the applicant's request for a Schedule—that he acknowledges LAQ would have to create—may be refused on the ground that it does not exist.[30]

26. I will now consider the issue for determination in this matter.

Text Message Information

27. In the decision that is the subject of this review, LAQ describes the three page document which comprises the Text Message Information as correspondence containing a text message attachment. The correspondence is from a third party's lawyer to an individual other than the applicant. The attachment records text messages between the third party and that individual. The correspondence and attachment were copied to LAQ, in LAQ's capacity as the independent children's lawyer in family law proceedings to which the applicant is a party.[31] The applicant has advised that the family law proceedings have been placed on hold while he is incarcerated.[32]

28. In its decision, LAQ refused access to the Text Message Information on the basis that other access was available through a subpoena in the family law proceedings.

29. The applicant has submitted that '[t]*he responsibility on the OIC is to ensure the information is made available'*.[33] However, the Information Commissioner[34] is not required to ensure the information is made available upon request. While the IP Act specifies that there should be a pro-disclosure bias in deciding access to documents,[35] this does not amount to an unfettered right regarding which the Information Commissioner must simply enforce access. Rather, the IP Act requires decision-makers, including the Information Commissioner, to give access to documents *unless* doing so would, on balance, be contrary to the public interest. In this regard, the IP Act contains a number of limitations,[36] including those considered below.

Other access available

30. Under the IP Act, one ground for refusing access to a document is where other access is available to the document, because the applicant can reasonably access the document under another Act, or arrangements made by an agency, whether or not such access is subject to a fee or charge.[37]

31. The Information Commissioner has previously held that an agency can only refuse access to a document on the ground that other access is available if full access to the document is guaranteed under the alternative access option.[38] The Information

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[30] Section 67(1) of the IP Act and section 47(3)(e) and 52(1)(a) of the RTI Act. The relevant law regarding this ground of refusal is set out at paragraphs [71] and [72] below.
[31] Text Message Information provided by LAQ on 7 May 2019.
[32] External review application dated 24 September 2018, received 3 October 2018.
[33] Letter from applicant to OIC dated 16 May 2019, received by OIC on 3 June 2019.
[34] Or delegate.
[35] Section 64 of the IP Act.
[36] Section 67 of the IP Act provides that an agency may refuse access to a document of an agency in the same way and to the same extent the agency could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under that Act.
[37] Section 67(1) of the IP Act and sections 47(3)(f) and 53(a) of the RTI Act.
[38] See *JM and Queensland Police Service* (1995) 2 QAR 516 (***JM***).

Commissioner found[39] that, if the terms of the other Act or arrangements *'place restrictions on the extent of the access available'* **and** *'those restrictions would operate to deny access to all or part of a particular document'* sought by an applicant in an access application, then this ground of refusal would not be available to the agency or Minister.[40] The Information Commissioner also confirmed that an agency or Minister cannot invoke these sections *'unless it is* ***certain*** *that a particular document is reasonably open to access by the particular applicant* [emphasis added]*.*'[41]

32. As noted at paragraph 28 above, in its decision, LAQ refused access to the Text Message Information on the ground that other access was available to the applicant—specifically, access by subpoena in the family law proceedings to which the applicant was a party.[42]

33. Access to a document under a court process is not guaranteed. It requires an application from a party to the proceedings; must comply with the relevant court's rules; and requires the approval or authority of a judicial officer. The documents may only be provided to the court, not the applicant, and some parts of a document may be removed in accordance with the particular circumstances of the party and document.

34. In the present matter, while the Text Message Information *may* be subpoenaed by the applicant in the family law proceedings, and *may* be provided to him in those proceedings, access by subpoena is not, in my opinion, guaranteed. The lack of *guaranteed* access to the Text Message Information via a subpoena in the family law proceedings prevents LAQ from relying on the ground of refusal that other access is available. I therefore consider this ground of refusal cannot apply to the Text Message Information.

35. External review by the Information Commissioner[43] is merits review—that is, an administrative reconsideration of a case which can be described as 'stepping into the shoes' of the primary decision-maker to determine what is the correct and preferable decision. As such, the Information Commissioner can decide any matter in relation to an application that could have been decided by LAQ under the IP Act.[44] Accordingly, I will now consider whether disclosure of the Text Message Information would, on balance, be contrary to the public interest.

Contrary to the public interest information

36. Under the IP Act, access to documents may be refused to the extent they comprise information, the disclosure of which would, on balance, be contrary to the public interest.[45] The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest.[46] It also explains the steps that a decision-maker must take in deciding the public interest. To decide whether disclosing the information in issue would be contrary to the public interest, I must:[47]

- identify any irrelevant factors and disregard them
- identify relevant public interest factors favouring disclosure and nondisclosure

[39] In relation to section 22 of the now repealed FOI Act, this being the predecessor of and, in effect, replicated in section 53 of the RTI Act.
[40] *JM* at [29].
[41] *JM* at [28].
[42] Decision dated 20 September 2018.
[43] Or delegate.
[44] Section 118(1)(b) of the IP Act.
[45] Section 67(1) of the IP Act and section 47(3)(b) of the RTI Act.
[46] See schedule 4 of the RTI Act.
[47] Section 49(3) of the RTI Act.

- balance the relevant factors favouring disclosure and nondisclosure; and
- decide whether disclosing the information would, on balance, be contrary to the public interest.

37. In his submissions the applicant invokes his current status as a prisoner in a maximum security facility as a relevant factor favouring disclosure of the information to him. I have disregarded this submission. The IP Act states that an individual may make an access application[48] and 'individual' is defined as a natural person.[49] The IP Act applies equally to all individuals seeking access to information. The applicant does not have any additional access entitlement under the IP Act by reason of being a prisoner. Accordingly, I have not taken these submissions, or any other irrelevant factor,[50] into account in making my decision.

Personal information and privacy

38. As noted at paragraph 27 above, the Text Message Information comprises communications between individuals other than the applicant. The information in these communications is, almost entirely, about individuals other than the applicant.

39. The RTI Act recognises that disclosing an individual's personal information to someone else can reasonably be expected to cause a public interest harm[51] (**harm factor**) and that a further factor favouring nondisclosure arises if disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy[52] (**privacy factor**). Given the nature of the Text Message Information, I am satisfied that the harm factor and the privacy factor apply.

40. There is a clear public interest in ensuring that government protects privacy and treats with respect the personal information it collects or holds about members of the community. This is particularly so in relation to sensitive personal information.[53] The Text Message Information comprises highly sensitive and private information about individuals other than the applicant. I consider it possible that the applicant may have some general awareness of the matters discussed in the correspondence and attachment; however, based on the material before me, it appears likely that the specific information would be largely unknown to him. Accordingly, I consider that disclosure of the Text Message Information under the RTI Act would be a significant intrusion into the privacy of the other individuals, and the extent of the public interest harm that could be anticipated from disclosure is significant. I therefore afford the harm factor and the privacy factor significant weight.

41. Some small segments of the Text Message Information comprise information about the applicant. Consequently, the factor favouring disclosure of an applicant's personal information[54] arises for consideration. I consider that this factor applies and should be afforded high weight regarding these segments.

42. However, I also note that the segments of the applicant's personal information are intertwined with the personal information of other individuals. Having carefully considered these segments, I am satisfied that they are intertwined with the personal information of others to such an extent that they cannot be disclosed without also

[48] Section 43(1) of the IP Act.
[49] Schedule 1 of the *Acts Interpretation Act 1954* (Qld).
[50] In schedule 4, part 1 of the RTI Act or otherwise.
[51] Schedule 4, part 4, section 6(1) of the RTI Act.
[52] Schedule 4, part 3, item 3 of the RTI Act.
[53] *O'Connor and Legal Services Commission* [2015] QICmr 10 at [25].
[54] Schedule 4, part 2, item 7 of the IP Act.

disclosing the personal information of others. Given this position, the mechanism in section 90 of the IP Act, which enables the deletion of contrary to public interest information, including the personal information of other individuals, cannot be used in this review to afford the applicant access to his own personal information. Rather, the factor favouring disclosure of an applicant's personal information, and the harm factor and privacy factor favouring nondisclosure, all apply to the segments of the applicant's personal information, and these factors must be considered, along with other relevant factors, in the balancing process regarding those segments.

Child's best interests

43. A small amount of the information about individuals other than the applicant in the Text Message Information is about his child (**Child Information**). This raises the factor favouring disclosure in the RTI Act about disclosure being in the child's best interests, which states:[55]

> *The information is the personal information of a child within the meaning of section 25, **the agent acting for the applicant is the child's parent** within the meaning of section 25 and disclosure of the information is reasonably considered to be in the child's best interests.*
>
> [my emphasis]

44. This factor favouring disclosure adopts definitions of parent and child, as set out in section 25 of the RTI Act, which relates to access applications made by a parent on behalf of their child.

45. On careful consideration of this factor, I consider that the phrase *'the agent acting for the applicant is the child's parent'* confines its application to circumstances where the applicant is the child referred to in the factor, and the access application has been made on their behalf by their parent/s. In the present matter, the applicant is the child's father, in his own capacity rather than as an agent for his child. Accordingly, the above factor cannot, in my opinion, apply to the Child Information.

46. Noting, however, that the public interest factors listed in the RTI Act are non-exhaustive,[56] it appears that a broader factor favouring disclosure—that disclosure of information to a child's parent/s could reasonably be expected to be in the child's best interests—requires consideration. The converse of this factor appears to be captured by the factor favouring *non*disclosure in the RTI Act, and also requires consideration. This factor also adopts the definitions in section 25, but is worded somewhat more broadly than its abovementioned counterpart. It states:[57]

> *The information is the personal information of a child within the meaning of section 25, **the applicant is the child's parent** within the meaning of section 25 and disclosure of the information is reasonably considered **not** to be in the child's best interests.*
>
> [my emphasis]

47. In terms of considering whether disclosure of the Child Information to the applicant is reasonably considered to be in the child's best interests, or not, I am satisfied that the applicant is the child's parent. I now turn my mind to the authorities on the application of the principle 'the best interests of the child'.

[55] Schedule 4, part 2, item 8 of the RTI Act.
[56] See sections 49(3)(a), (b) and (c) of the RTI Act.
[57] Schedule 4, part 3, item 4 of the RTI Act.

48. The principle 'best interests of the child' is set out in the United Nations' Convention on the Rights of the Child (1989) (**Convention**),[58] and has been applied in Australia across multiple legal jurisdictions including family law and administrative law.[59] Courts have recognised that 'the best interests of the child' is not a straightforward test;[60] and that 'best interests' is a multi-faceted test and incorporates the wellbeing of the child, all factors which will affect the future of the child, the happiness of the child, immediate welfare as well as matters relevant to the child's healthy development. The concept includes not only material wealth or advantage but also spiritual, emotional and mental wellbeing.[61]

49. The Family Court has recognised the right of children with sufficient maturity and understanding to form their own views and to express those views in all matters affecting them. Those views are then given due weight in accordance with the age and maturity of the child.[62] Similarly, in the context of a ground of refusal which is not in issue in this review,[63] the RTI Act provides that, when considering whether disclosure would not be in the best interests of the child, it is necessary to have regard to whether the child has the capacity to understand the information and the context in which it was recorded, and make a mature judgement as to what might be in their best interest.[64]

50. A child's right to privacy is also recognised in the Convention. Australian courts accept that children reach varying levels of autonomy and independence prior to turning 18 and that a right to privacy, whilst generally low for a young child in relation to their parent, will strengthen as the child's understanding and maturity grows.[65]

51. Determining whether disclosure would or would not be in the best interests of a child is a difficult question of fact. In considering whether disclosure of the Child Information to the applicant is reasonably considered to be in this child's best interests, or not, I have most carefully considered the particular circumstances of the child in this case, by a thorough evaluation of the available information, both within the Text Message Information itself, and as provided by the applicant and by LAQ. I have also considered the guidance offered by other material such as the cases mentioned above and the Convention, as well as a previous decision by the Information Commissioner.[66] Neither the child, nor the other parent have been consulted as to their views on disclosure of the child's information to the applicant.

52. The Text Message Information was created in 2015 and, at that time, the child was around 5 years old. Now, the child is aged between 9 and 10 years. By virtue of the applicant's current circumstances, since at least August 2018, he has not had responsibility of the day to day care of the child for at least a year.

53. Both the applicant and LAQ have referred to family law proceedings between the applicant and the other parent. LAQ has confirmed its involvement in these proceedings

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[58] Ratified by Australia in December 1990. The Convention provides that the best interests of the child is a 'primary consideration' in decisions concerning children and defines 'children' as everyone under 18 years.
[59] Section 60CC of the *Family Law Act 1975* (Cth); also see *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273.
[60] See *CDJ v VAJ* (1998) 197 CLR 172 at [151] per McHugh, Gummow and Callinan JJ.
[61] *O'Connor v A and B* [1971] 1 WLR 1227 at [1237]; *In the Marriage of Bishop* (1981) 6 Fam LR 882 at page 888; *McGrath (Infants)* [1893] 1 Ch 143 at page 148.
[62] These issues are discussed in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 (***Gillick***), cited in *Secretary, Department of Health and Community Services v JWB and another* (1992) 175 CLR 218 (***Marion's case***).
[63] That is, the ground in sections 47(3)(c) and 50 of the RTI Act regarding the best interests of the child.
[64] Section 50(3) of the RTI Act.
[65] *Marion's case* at paragraph 19 referring to *Gillick.*
[66] *49RYXV and the Department of Communities, Child Safety and Disability Services* [2014] QICmr 23 (5 June 2014) at [27] to [45].

due to the Family Court's appointment of an independent children's lawyer for the child. The Family Court's website explains that:[67]

> *An ICL is usually appointed by the court upon application by one of the parties where one or more of the following circumstances exist:*
>
> - *there are allegations of abuse or neglect in relation to the children*
> - *there is a high level of conflict and dispute between the parents*
> - *there are allegations made as to the views of the children and the children are of a mature age to express their views*
> - *there are allegations of family violence*
> - *serious mental health issues exist in relation to one or both of the parents or children, and/or*
> - *there are difficult and complex issues involved in the matter.*

54. LAQ has advised that:[68]

> *Legal file maintained by the Independent Children's Lawyer (ICL) – these documents are held on both a paper file and an electronic file … . The file commenced in 2015 and is still active. The file typically holds a range of documents including: court documents, correspondence, file/attendance notes, reports etc. The ICL advises that the file is "enormous" and that the paper file fills 4 standard archive boxes. There are both duplicates and further documents on the electronic file.*

55. Given the Family Court's appointment of an independent children's lawyer, and given the volume of material held by that lawyer thus far regarding the family law proceedings involving the applicant and his child, I consider it reasonable to conclude that the circumstances surrounding the proceedings are difficult and involve a significant level of conflict. Noting this context, I consider that disclosure of the Child Information to the applicant could reasonably be expected to protract or exacerbate these circumstances. On this basis, I am satisfied that disclosure of the Child Information to the applicant is reasonably considered *not* to be in the child's best interests—that is, I am satisfied that the factor favouring *non*disclosure in the RTI Act[69] applies. In this regard, I consider that the child's right to privacy is low to moderate, given their age; however, I also consider that prolonging or increasing conflict between various parties is reasonably likely to have a detrimental impact on the child's wellbeing. Taking these considerations into account, I afford this factor favouring nondisclosure moderate weight with respect to the Child Information.

56. In any event, just as the applicant's personal information is inextricably intertwined with that of other individuals (as noted at paragraph 42 above), the Child Information is not solely the information of the applicant's child. The Child Information is intertwined with the personal information of individuals other than the applicant to such an extent that it cannot be separated. Consequently, even if I was of the opinion that disclosure of the Child Information to the applicant was in the child's best interests, giving rise to a factor favouring disclosure, the mechanism in section 90 of the IP Act could not be used to afford the applicant access to this information. Rather, the harm factor and privacy factor favouring nondisclosure also apply to the Child Information, and therefore must be considered, along with other relevant factors, in the balancing process regarding the Child Information.

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[67] See information about independent children's lawyer published by the Family Court on 3 May 2016 at <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/parenting/independent-childrens-lawyer/>.
[68] Letter from LAQ to OIC dated 13 February 2019 – comment made in terms of LAQ's view that the original scope of the applicant's application would substantially and unreasonably divert its resources under section 60(1)(a) of the IP Act.
[69] Schedule 4, part 3, item 4 of the RTI Act.

Administration of justice and fairness

57. The applicant has submitted that:[70]

> *Your contrary to public interest argument is also irreverent. I am in complex criminal matters with everyone likely to be involved or mentioned in a text message or email about the matter. Their is a huge requirement for information to be freely available under such circumstances. Also as I have seen the police files of everyone involved in this matter, it is unlikely that there is any information that would still be legally privileged within such a document. The responsibility on the OIC is to ensure the information is made available; and that requirement and fundamental human right is what the* Act[71] *mandates that you adhere to.*
>
> [sic]

58. The applicant's reference to legal professional privilege is misconceived, given neither I nor LAQ have, at any stage in dealing with his access application, raised legal professional privilege as a basis for refusing access to any documents. The applicant's submissions may arguably be construed as raising factors favouring disclosure relating to rights such as a fair hearing in criminal proceedings involving him.

59. Given this possibility, I have considered whether disclosing the Text Message Information could reasonably be expected to contribute to the administration of justice for a person[72]— for example, by allowing a person to access information that may assist them in legal proceedings. In determining whether this public interest factor in favour of disclosure applies, I must consider whether:

- the applicant has suffered loss, or damage, or some kind of wrong, in respect of which a remedy is, or may be, available under the law
- the applicant has a reasonable basis for seeking to pursue the remedy; and
- disclosing the information held by an agency would assist the applicant to pursue the remedy, or evaluate whether a remedy is available or worth pursuing.[73]

60. I have carefully considered all material before me, including the applicant's submissions and the information in the Text Message Information itself. There is nothing before me to suggest that the applicant has suffered any loss, damage or wrong and, it follows, nothing to suggest that any remedy may possibly be available to the applicant with respect to any loss, damage or wrong. I can identify no basis for the applicant seeking to pursue any remedy, and cannot envisage how disclosing the Text Message Information would assist the applicant in pursuing any remedy or evaluating whether a remedy is available or worth pursuing. I therefore consider that this factor favouring disclosure does not apply to the Text Message Information.

61. I have also considered whether disclosing the Text Message Information could reasonably be expected to:

- contribute to the administration of justice generally, including procedural fairness;[74] or
- advance the fair treatment of the applicant in accordance with the law in his dealings with agencies.[75]

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[70] Letter dated 16 May 2019, received by OIC on 3 June 2019.
[71] As noted at paragraph [13] above, it is my understanding that the Act referred to in the applicant's submissions is the *Freedom of Information Act 1982* (Cth).
[72] Schedule 4, part 2, item 17 of the RTI Act.
[73] *Willsford and Brisbane City Council* (1996) 3 QAR 368 at [17]. See also *1OS3KF and Department of Community Safety* (Unreported, Queensland Information Commissioner, 16 December 2011).
[74] Schedule 4, part 2, item 16 of the RTI Act.
[75] Schedule 4, part 2, item 10 of the RTI Act.

62. These two factors favouring disclosure generally arise in circumstances where an agency is considering making, or has made, a decision adverse to the applicant.[76] On the material before me, I am unable to identify any decision adverse to the applicant that LAQ has made or is making that could place an obligation on LAQ to afford the applicant procedural fairness. In any event, noting the content of the Text Message Information, I cannot see how disclosure of the Text Message Information could reasonably be expected to advance procedural fairness or fair treatment for the applicant. Accordingly, I am unable to see how these two factors are enlivened in the circumstances of this review.

Incorrect or unfairly subjective

63. I have also considered whether disclosure could reasonably be expected to reveal that any of the Text Message Information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.[77]

64. In this regard, I have carefully reviewed the Text Message Information. I am satisfied that the text message attachment records different individuals' statements and opinions. I am further satisfied that, in the correspondence, the lawyer conveys the opinions and versions of events expressed by relevant individual/s, which are shaped by factors such as their subjective impressions and memories of the events. Such information is, by its very nature, subjective. This inherent subjectivity does not mean that the Text Message Information is necessarily incorrect or unfairly subjective.[78] In these circumstances, I do not consider that disclosure of the Text Message Information could reasonably be expected to reveal that the Text Message Information is incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.

Accountability and transparency

65. I have also considered whether disclosing the Text Message Information could reasonably be expected to advance LAQ's accountability and transparency by, for example:

- promoting open discussion of public affairs and enhance the Government's accountability[79]
- informing 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;[80] or
- revealing the reason for a government decision and any background or contextual information that informed the decision.[81]

66. However, given the nature of the Text Message Information—that is, information from a third party's lawyer to an individual other than the applicant, which was copied to LAQ—I am satisfied that this document contains no evidence about any actions or omissions by LAQ. In these circumstances, I am satisfied that the above factors regarding accountability and transparency do not apply.

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[76] See, for example, *F60XCX and Department of Natural Resources and Mines* [2017] QICmr 19 (9 June 2017) at [89]-[104]; *Gapsa and Department of Transport and Main Roads* (Unreported, Queensland Information Commissioner, 6 September 2013) at [19]-[21]; *6E7YWS and Department of Housing and Public Works* (Unreported, Queensland Information Commissioner, 24 October 2013) at [21]-[28]; and *Williams and Queensland Police Service* [2017] QICmr 28 (4 August 2017) at [52]-[58].
[77] Schedule 4, part 2, item 12 of the RTI Act.
[78] *Marshall and Department of Police* (Unreported, Queensland Information Commissioner, 25 February 2011) at [15]-[20].
[79] Schedule 4, part 2, item 1 of the RTI Act.
[80] Schedule 4, part 2, item 3 of the RTI Act.
[81] Schedule 4, part 2, item 11 of the RTI Act.

Deficiencies in conduct

67. While the applicant has made general comments about the conduct of LAQ in response to his access application,[82] his submissions have at no stage raised concerns about LAQ's conduct that, in his view, would be evidenced in the Text Message Information. However, LAQ's submissions[83] have noted that the applicant has made multiple complaints to various entities about certain LAQ employees. Accordingly, I have considered whether disclosing the Text Message Information could reasonably be expected to:

- allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;[84] or
- reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.[85]

68. Again, given the nature of the Text Message Information—that is, information from a third party's lawyer to an individual other than the applicant, which was copied to LAQ—I am satisfied that this document contains no evidence about any actions or omissions by LAQ. In these circumstances, I am satisfied that the above factors regarding deficiencies in conduct do not apply.

Other factors

69. I have carefully considered all other factors listed in schedule 4 of the RTI Act, and have not identified any other factors as relevant in the circumstances of this review. In terms of the factors favouring disclosure, for example, I have noted that the applicant's submissions have at no stage raised matters that could reasonably be viewed as necessitating my consideration of the factors listed in schedule 4, part 2, items 2, 4, 9, 13-15, or 18-19, or any other public interest factors favouring disclosure not listed in the RTI Act.[86] Accordingly, I can identify no other public interest considerations telling in favour of disclosure of the Text Message Information, beyond those identified above.

Balancing the relevant factors

70. I have taken note of the IP Act's pro-disclosure bias in deciding access to documents.[87] I consider that the public interest in the applicant accessing the small segments of his personal information[88] within the Text Message Information should be afforded high weight. On the other hand, I consider that the privacy factor and the harm factor regarding personal information[89] both warrant significant weight with respect to the entirety of the Text Message Information. Also, in terms of the small amount of the Text Message Information that comprises the Child Information, I consider that the factor favouring nondisclosure, that disclosure is reasonably considered not to be in the child's best interests,[90] should be given moderate weight. I have carefully considered factors favouring disclosure related to accountability and transparency, administration of justice and fairness, revealing incorrect or unfairly subject information, and revealing

[82] For example, *'I believe LAQ's intent is only to make a mockery of the RTI legislation, by becoming deliberately difficult in producing the required information'*, as stated in the applicant's external review application.
[83] Letter from LAQ to OIC dated 13 February 2019.
[84] Schedule 4, part 2, item 5 of the RTI Act.
[85] Schedule 4, part 2, item 6 of the RTI Act.
[86] Which I must also consider, given that the public interest factors listed in the RTI Act are non-exhaustive—see section 49(3)(a), (b) and (c) of the RTI Act.
[87] Section 64 of the IP Act.
[88] Schedule 4, part 2, item 7 of the RTI Act.
[89] Schedule 4, part 3, item 3 and part 4, section 6(1) of the RTI Act.
[90] Schedule 4, part 3, item 4 of the RTI Act.

deficiencies in conduct and am satisfied that these are not enlivened in the circumstances of this review. Balancing the weight of the privacy factor and the harm factor regarding personal information regarding the entirety of the Text Message Information, and the child's best interests factor regarding the Child Information, against the weight of the factor favouring disclosure of the small segments of the applicant's personal information, I am satisfied that disclosure of the Text Message Information would, on balance, be contrary to the public interest. Accordingly, I find that access may be refused on this basis.[91]

Chat Information

71. In its decision, LAQ refused access to the Chat Information on the ground that any such documents did not exist.

72. Under the RTI Act, access to a document may be refused if the document is nonexistent or unlocatable.[92] A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.[93] To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors, including:[94]

- the administrative arrangements of government
- the agency structure
- the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
- the agency's practices and procedures (including but not exclusive to its information management approach); and
- other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates.

73. When proper consideration is given to relevant factors, it may not be necessary for searches to be conducted.[95] In such instances it is sufficient that the relevant circumstances to account for the non-existent document are adequately explained by the agency.

74. LAQ's decision stated that:[96]

> *LAQ does not have inter-office chat communications enabled on our systems. I am therefore unable to consider any documents since none are in existence.*

75. The applicant asked me to confirm that there is no form of interoffice communication at LAQ.[97] However, given the scope of the applicant's amended application specified 'Chat' communications, I consider that seeking information regarding interoffice communications generally is unnecessary in the circumstances of this review.

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[91] Section 67(1) of the IP Act and section 47(3)(b) of the RTI Act.
[92] Sections 47(3)(e) and 52(1) of the RTI Act.
[93] Section 52(1)(a) of the RTI Act.
[94] *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [19] which adopted the Information Commissioner's comments in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009).
[95] For example, where it is ascertained that a particular document was not created because the agency's processes do not involve creating that specific document.
[96] Dated 20 September 2018.
[97] Letter from applicant to OIC dated 19 June 2019 and received on 1 July 2019, following OIC's letter to the applicant on 18 June 2019 inviting submissions regarding the issue of nonexistent 'Chat' communications.

76. In terms of 'Chat' communications specifically, I did not request that LAQ undertake searches. Searches were not considered necessary, taking into consideration LAQ's explanation as set out above. However, the material before me presented some ambiguity as to whether the applicant's request and LAQ's response related to *inter*-office 'Chat' communications (between LAQ and external parties) or *intra*-office 'Chat' communications (within LAQ). Accordingly, I requested[98] that LAQ clarify whether either type of 'Chat' communication was enabled on LAQ's systems during the relevant period.[99] In response, LAQ advised that '*during the time period relevant to* [the applicant's] *amended application LAQ did not use inter-office or intra-office chat communications*.'[100]

77. Based on LAQ's explanations,[101] I consider that neither intra-office nor inter-office 'Chat' communications have been enabled by LAQ. On this basis I am satisfied that the Chat Information sought by the applicant are nonexistent.[102] Accordingly, I find that the access to the Chat Information may be refused on this basis.[103]

DECISION

78. I vary LAQ's decision and find that:

- access to the Text Message Information may be refused as its disclosure would, on balance, be contrary to the public interest;[104] and
- access to the Chat Information may be refused on the ground it is nonexistent.[105]

79. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

A Rickard
Assistant Information Commissioner

Date: 6 September 2019

[98] Letter, OIC to LAQ dated 29 August 2019.
[99] That is, between 1 January 2015 (as specified in the applicant's application) and 6 August 2019 (being the date that LAQ received the applicant's application, noting that an access application generally only relates to documents in existence at this date—see section 47(1) of the IP Act).
[100] Email from LAQ dated 5 September 2019.
[101] In its decision dated 20 September 2018 and letter from LAQ to OIC dated 5 September 2019.
[102] Section 52(1)(a) of the RTI Act.
[103] Under 67(1) of the IP Act and section 47(3)(e) of the RTI Act.
[104] Section 67(1) of the IP Act and section 47(3)(b) of the RTI Act.
[105] Section 67(1) of the IP Act and section 47(3)(e) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
3 October 2018	OIC received the external review application.
6 November 2018	OIC requested further information from LAQ.
8 November 2018	OIC received further information from LAQ.
10 January 2019	OIC requested submissions from LAQ.
13 February 2019	OIC received submissions from LAQ.
16 April 2019	OIC conveyed a proposal for informal resolution to LAQ.
7 May 2019	OIC received LAQ's agreement to the informal resolution proposal.
21 May 2019	OIC conveyed its preliminary view to the applicant, with a proposal for informal resolution.
3 June 2019	OIC received submissions from the applicant which rejected the informal resolution proposal and requested that OIC issue a formal decision.
4 June 2019	OIC addressed the applicant's submissions and gave notice it would proceed to a decision.
18 June 2019	OIC invited the applicant to make submissions on the nonexistent documents.
1 July 2019	OIC received the applicant's further submissions.
29 August 2019	OIC requested submissions from LAQ.
5 September 2019	OIC received submissions from LAQ.