



Applying the legislation

GUIDELINE *Right to Information Act 2009*

Access and amendment applications and the Human Rights Act

Under the *Right to Information Act 2009*¹ (Qld) (**RTI Act**), people have the right to access documents of an agency². This right of access is subject to some limitations. These limitations include where documents are exempt or contrary to the public interest to release.

The Human Rights Act 2019 (Qld)

The *Human Rights Act 2019* (Qld) (**HR Act**) commences in full on 1 January 2020 and contains twenty-three human rights. Subject to some exceptions, it will be unlawful for a public entity³ to make a decision in a way not compatible with human rights, or to make a decision and fail to give proper consideration to relevant human rights.⁴

These exceptions include that the public entity could not reasonably have acted differently or made a different decision because of another law.⁵ Human rights may also be limited where that limit is justified and reasonable.⁶

Freedom of expression: the right to seek and receive information

Section 21 of the HR Act sets out the right to freedom of expression, which includes the right to seek and receive information. This includes the right to seek and receive information from Queensland government agencies.

Human rights and access applications

The RTI Act contains a similar right—the right to access documents of an agency—which is independent of the right to seek and receive information in the HR Act. However, as long as the agency "properly processes a request for access to documents" under the RTI Act, they will be "respecting, and acting compatibility with, the applicant's right to freedom of expression".⁷ In most cases, nothing else will be required.⁸

¹ And chapter 3 of the *Information Privacy Act 2009* (Qld) (IP Act).

² And documents of a Minister. References to agency in this guideline include a Minister.

³ The definition of public entity in section 9 of the HR Act encompasses agencies under the RTI Act, and includes Ministers, public service employees and local government employees.

⁴ Section 58(1) of the HR Act.

⁵ Section 58(2) of the HR Act.

⁶ Section 13 of the HR Act; see section 13(2) for the factors to consider when deciding whether a limitation is justified and reasonable.

⁷ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (*XYZ v Victoria Police*) at paragraph 573; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) (*Horrocks*) at paragraph 111

⁸ *XYZ v Victoria Police* at paragraph 573.



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When discussing the interaction between the Victorian equivalents of Queensland's HR Act and RTI Act, His Honour Justice Bell said in *XYZ v Victoria Police (General)*⁹: "it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act."

Under the RTI Act, information applied for is released unless it would be contrary to the public interest to do so and decision makers must have a pro-disclosure bias.¹⁰ By properly applying these requirements, decision makers both accord the HR Act's right to access information and ensure the right is limited only to a reasonable and justifiable extent.¹¹

When will an agency need to consider other human rights?

If an applicant raises or refers to a specific human right in their application, or it is apparent from the application that a specific human right should be considered, an agency will need to address it in its decision. If an applicant refers to human rights generally the agency will need to identify any human rights that may be relevant, taking into account the circumstances of the application. For example, the RTI Act sets out public interest factors that include matters relevant to some human rights under the HR Act, such as privacy.¹²

When taking human rights into account, agencies will need to consider whether the refusal of access infringes the right and, if so, if the infringement is justified. Generally, as long as the RTI or IP Acts have been properly applied, any limitation of human rights will be justified or accord with the relevant right.¹³

Exempt information

If an agency is considering exempt information in relation to a human right, it may be able to rely on section 58(2) of the HR Act, on the grounds that the exempt information provisions in schedule 3 of the RTI Act are information Parliament has already decided is exempt and there is no scope to further consider the public interest. Agencies will need to take into account the circumstances and the exemption provision and consider if they could not reasonably make a different decision, taking into account the rights under consideration.

⁹ Ibid

¹⁰ Section 39 and 44 of the RTI Act.

¹¹ As per section 8(b) of the HR Act.

¹² Schedule 4, part 3, item 3 and part 4, item 6.

¹³ *Lonigro v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1003 (14 June 2013) at paragraph, applying *XYZ v Victoria Police* and *Horrocks; Faine v Victorian Building Authority (Review and Regulation)* [2019] VCAT 111 (8 March 2019) at paragraph 83.



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The below extracts demonstrate how the Victorian Civil and Administrative Tribunal has approached this issue¹⁴:

From *Mcnamara v Department of Human Services (General)*¹⁵:

Section 13 as applied in this proceeding do not, in my opinion, breach a human right protected by the Charter. I mention the two potential rights which in my view could be submitted to be relevant.

Section 13 of the Charter recognises JEM's right not to have his privacy, family, home or correspondence unlawfully or arbitrarily interfered with. Given my decision, section 13 of the Act is not operating to breach that right.

Section 17 of the Charter recognises families are the fundamental group unit of society and are entitled to be protected by society and the State. As I am not persuaded releasing the notes would protect the family being JEM and his mother, in my view section 13 of the Act is not operating to breach that right.

If I am correct in my above view (at b), I do not need to consider whether a limit imposed on a right is justified. If I am not correct, and section 13 and/or 17 of the act are breached, then in my view, in the terms of and with reference to section 7 of the Charter not releasing the Notes is a reasonable limit of rights.

*Tsamis v Victoria Police (Review and Regulation)*¹⁶

In reaching this conclusion, I have considered the right to privacy of those who appear in the video under s 13 of the Charter of Human Rights and Responsibilities Act 2006. I do not regard release of the video as an unlawfully and/or arbitrarily interference with their right to privacy nor any form of attack on reputation.

*Faine v Victorian Building Authority (Review and Regulation)*¹⁷

The VBA correctly submitted that the right of a person not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with (s 13 of the Charter of Human Rights and Responsibilities Act 2006 (Vic)) is a relevant consideration here. In my view the balancing of factors required under s33(1), accords with proper consideration of that right and does not change the result here.

¹⁴ *Applying the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the Freedom of Information Act 1982 (Vic)*

¹⁵ [2010] VCAT 1237 (28 June 2010) at paragraph 44

¹⁶ [2015] VCAT 1080 (17 July 2015) at paragraph 68

¹⁷ [2019] VCAT 111 (8 March 2019) at paragraph 54; also *Faine v Victorian Building Authority (Review and Regulation)* [2019] VCAT 1286 (30 August 2019) at paragraph 66



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No obligation to benefit the applicant

It is important to remember that taking a human right into consideration requires the agency to consider if the decision unjustifiably and unreasonably infringes on that or another human right. It does not require the agency to *benefit* the applicant, or improve their ability to do something, related to a human right.¹⁸

Amendment applications

Under the IP Act, an individual can apply to have documents containing their personal information amended if it is inaccurate, incomplete, out of date, or misleading (**inaccurate**) as long as they have first had access to the documents.

Unlike the right to access information, there is no human right that directly corresponds with the right to have inaccurate personal information amended. However, the right to privacy and reputation, specifically the right not to have the person's reputation unlawfully attacked¹⁹, is of general relevance. As such, it may be raised by applicants or, if human rights generally are raised by an applicant, it may need to be considered by agencies.

When deciding amendment applications, agencies should adopt the approach set out above for access applications.

More information

For more information on the human rights obligations of public entities, refer to the Queensland Human Rights Commission's [Public Entities Toolkit](#).

For additional information and assistance please refer to the OIC's guidelines, or contact the Enquiries Service on 07 3234 7373 or email enquiries@oic.qld.gov.au.

This guide is introductory only, and deals with issues in a general way. It is not legal advice. Additional factors may be relevant in specific circumstances. For detailed guidance, legal advice should be sought.

If you have any comments or suggestions on the content of this document, please submit them to feedback@oic.qld.gov.au.

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¹⁸ Note that this is not the case when applying the public interest factors favouring disclosure, as some take benefit to the applicant into account, for example, the administration of justice factor.

¹⁹ Section 25(b) of the HR Act.