



Decision and Reasons for Decision

Citation:	<i>Gilmour and Queensland Fire and Emergency Services</i> [2014] QICmr 15 (24 April 2014)
Application Number:	311765
Applicant:	Gilmour
Respondent:	Queensland Fire and Emergency Services
Decision Date:	24 April 2014
Catchwords:	ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - complaint information about applicant and information identifying third persons - applicant aware of substantial portions of the information in issue including complaints and complainants' identities - whether disclosure would, on balance, be contrary to the public interest - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to Queensland Fire and Emergency Services (**QFES**)¹ under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to documents relating to complaints made about the applicant.
2. In its decision dated 9 August 2013, QFES refused to deal with the access application² on the basis that all the documents comprised exempt information as their disclosure could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law.³
3. The applicant applied to QFES for internal review. During the course of the internal review, the relevant investigation was finalised. QFES varied its original decision and decided to give access to some information⁴ and refused access to other information on the basis that disclosure would, on balance, be contrary to the public interest under

¹ Formerly the Department of Community Safety (**DCS**). The applicant's access application was made to DCS and machinery of government changes in 2013 transferred relevant responsibility from DCS to QFES. Accordingly, existing RTI applications and reviews involving certain applications made to DCS before the machinery of government changes now rest with QFES, including this external review.

² Under section 59 and the schedule 5 definition of 'exempt information' in the IP Act together with section 48 of the *Right to Information Act 2009* (Qld).

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

⁴ QFES' decision dated 23 September 2013 gave access to 79 full and 32 part pages, and refused access to 12 full and 32 part pages.

sections 47 and 49 of the *Right to Information Act 2009* (Qld) (**RTI Act**).⁵

4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the internal review decision. The applicant also contended that QFES had not located all relevant documents. This 'sufficiency of search' issue was resolved during the external review.⁶
5. For the reasons set out below, I affirm QFES' internal review decision and find that 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, in conjunction with section 67(1) of the IP Act.⁷

Background

6. The applicant was a member of a State Emergency Service (**SES**) Group. He was the subject of complaints made by members of his SES Group about an incident in May 2013, when the applicant raised concerns about the safety of a training exercise. An investigation of the complaints was conducted. The applicant was provided with a full copy of the Investigation Report (**Investigation Report**).
7. The applicant was subsequently suspended from his duties. He believes the nature and content of the complaints was altered between their lodgement in May 2013 and their inclusion in the Investigation Report in September 2013. He also considers he has been denied an opportunity to challenge the basis of his suspension.

Significant procedural steps

8. Significant procedural steps relating to the access application and the external review are set out in the appendix to this decision.

Reviewable decision

9. The decision under review is QFES' internal review decision dated 23 September 2013.

Evidence considered

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

Information in Issue

11. The information in issue in this review comprises 32 part pages and 12 full pages (**Information in Issue**)⁸ and consists of:

- **Identifying Information** - the names, positions and work email addresses⁹ of

⁵ The internal review decision did not expressly state the grounds upon which the refusals were based. However, QFES confirmed with OIC by telephone on 19 December 2013 that refusals were based on sections 47 and 49 of the RTI Act.

⁶ The applicant accepted the preliminary view, conveyed by letter dated 2 January 2014, that access to some requested documents could be refused under section 52(1) of the RTI Act, on the ground they were non-existent or unlocatable; and, by not providing the specific submissions requested in OIC's letter dated 4 February 2014, was deemed to have elected not to continue to seek access to other information. Some additional documents located by QFES during the external review were outside the date range of the application - being post-application documents, they were not considered further in the external review under section 47(1) of the IP Act, which provides that an access application is taken only to apply to documents that are, or may be, in existence on the day the application is received.

⁷ Section 67 of the IP Act provides that access to information may be refused on the same grounds as under section 47 of the RTI Act.

⁸ Being, from file one - part pages 1-4, 7, 11-13, 21-23, 30, 34, 46-48, 51, 57, 60, 63 and 68-69; and from file two - part pages 1, 3, 5, 10, 15, 19-20, 25, 28-29 and full pages 37-48.

individuals other than the applicant; and

- **Complaint Information** - complaints, emails attaching complaints, and a page extracted from QFES' online portal.

Issues for determination

12. The issue for determination is whether QFES is entitled to refuse access to the Information in Issue on the ground that its disclosure would, on balance, be contrary to the public interest

Would disclosure of the Information in Issue, on balance, be contrary to the public interest?

13. Yes, for the reasons that follow.

Relevant law

14. Under the IP Act, a person has a right to be given access to documents of an agency to the extent they contain the individual's personal information.¹⁰ However, this right is subject to other provisions of the IP Act and the RTI Act, including the grounds on which an agency may refuse access to documents.¹¹ Relevantly, an agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.¹² The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest¹³ and explains the steps that a decision-maker must take¹⁴ in deciding the public interest as follows:

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

Findings

Irrelevant factors

15. No irrelevant factors arise in the circumstances of this case.

Factors favouring disclosure of the Information in Issue

16. The applicant submits¹⁵ that several public interest factors favour disclosure¹⁶ of the Information in Issue. These are examined below.

⁹ The applicant seeks individuals' work email addresses but does not seek access to individuals' private email addresses: applicant's submission dated 17 February 2014.

¹⁰ Section 40 of the IP Act.

¹¹ Section 47 of the RTI Act, in conjunction with section 67(1) of the IP Act.

¹² Section 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 well-being 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.

¹³ Schedule 4 of the RTI Act sets out a non-exhaustive list of factors for deciding whether disclosing information would, on balance, be contrary to the public interest.

¹⁴ Section 49(3) of the RTI Act.

¹⁵ In his application for external review and his written submissions dated 22 November 2013, 28 January 2014 and 17 February 2014 and his verbal submissions given on 28 November 2014.

¹⁶ Schedule 4, part 2, items 1, 5, 6, 7, 10, 11, 12, 16, 17 and 18 of the RTI Act.

Applicant's personal information

17. As the applicant was the subject of the complaints, the Information in Issue contains his personal information.¹⁷ This gives rise to a public interest factor favouring disclosure of that information to the applicant.¹⁸
18. I acknowledge the public interest in individuals being able to obtain access to their own personal information. In this case, the applicant is already aware of a significant amount of the Information in Issue. He is aware of much of the Complaint Information, having been present during the events giving rise to the complaints and having been provided with a full copy of the Investigation Report and attachments, containing the complaints made against him. He is also aware of significant amounts of the Identifying Information,¹⁹ as he was the sender or recipient of numerous emails or correspondence, and received an attachment to the Investigation Report, all containing Identifying Information.
19. Only a small portion of the Information in Issue not already known to the applicant comprises his personal information. Disclosing Identifying Information, to which the applicant has not previously had access, would also reveal information about persons *other* than the applicant, rather than *about* the applicant. Disclosing the Information in Issue would reveal little additional personal information of the applicant. As disclosure would do little to advance this public interest, I therefore attribute slight weight to this pro-disclosure factor.

Transparency and accountability

20. I acknowledge the general public interest in promoting access to government-held information. Disclosure of the Information in Issue may enhance the transparency of the investigation process for which QFES is ultimately responsible, and to some degree the accountability of QFES for that process.²⁰
21. The applicant is aware of the considerations taken into account by the Investigator, having been provided with the complete Investigation Report. The Investigation Report contains the complaints on which the investigation was based and outlines the approach taken in the investigation. As noted in paragraph 18, the applicant is already aware of a substantial amount of the Identifying Information.
22. I consider that transparency and accountability public interests have been adequately served by the information previously provided to the applicant. Disclosing the small amount of Complaint Information of which the applicant is unaware (dates and senders of emails, and emails attaching the complaints), or Identifying Information which has not been disclosed to the applicant, will add little to the applicant's existing knowledge or comprehension of the complaints, or his understanding of the processes undertaken. As disclosure is unlikely to further advance this public interest factor, I afford it slight weight.

Fairness and administration of justice

23. Public interest factors favouring disclosure arise if disclosing information could reasonably be expected to:

¹⁷ 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.*'

¹⁸ Schedule 4, part 2, item 7 of the RTI Act.

¹⁹ Comprising all the information in issue in the following pages from file one: part pages 1-4, 7, 11-13, 21-23, 46-48, 51, 60, 63 and 68-69; and from file two: part pages 1, 3, 5 and 10.

²⁰ Schedule 4, part 2, item 1 of the RTI Act.

- contribute to the administration of justice for a person²¹ (for example, by allowing a person subject to adverse findings or conviction access to information that may assist them in mounting a defence or clearing their name)
 - more generally contribute to the administration of justice, including procedural fairness;²² or
 - advance the fair treatment of individuals in accordance with the law in their dealings with agencies.²³
24. The applicant contends that disclosing the Information in Issue will assist him to demonstrate improper conduct in the presentation of complaints against him and to pursue a remedy for what he considers is unfair treatment in respect of the investigation and his suspension. Therefore, these three factors arise for consideration.
25. The applicant submits that access to the part of the Complaint Information comprising emails transmitting the complaints (including dates, times and interaction with the particular officers), will reveal that alterations were made to the complaints between their lodgement in May 2013 and publication in the Investigation Report in September 2013.²⁴ He contends that disclosure of this information will demonstrate culpability on the part of complainants and other persons. He states that access to officers' names and the dates of the emails containing the complaints will assist him in establishing that officers changed their complaints.
26. Other than his assertion, the applicant provided no evidence supporting his suspicion. The applicant contends²⁵ that OIC is not in a position to identify whether the Information in Issue supports his suspicion or not. However OIC is required under the IP and RTI Acts to evaluate relevant public interest factors.²⁶ In assessing these factors, the applicant's submission essentially calls for an examination of the Information in Issue and complaints in the Investigation Report. This is the exercise I have undertaken.
27. I have carefully reviewed the Complaint Information and the complaints contained in the Investigation Report. The Complaint Information does not support the submission that the complaints were altered between their initial lodgement and later inclusion in the Investigation Report. As the Identifying Information solely concerns information identifying third persons and does not appear in a context associated with any of the complaints,²⁷ it is incapable of supporting this submission.
28. Disclosing the Information in Issue will not demonstrate improper conduct on the part of QFES officers, as asserted by the applicant. Its disclosure would add little to his knowledge, comprehension or understanding of issues in the investigation. It is therefore unlikely to assist him to take steps not currently open to him to seek review of any Investigation Report findings with which he disagrees.
29. I acknowledge the applicant's concern that he was denied a 'right of reply' in respect of QFES's decision to suspend him. However, the Information in Issue concerns investigation of the complaints. It does not relate to the subsequent process by which the applicant was suspended. I am unable to see how disclosing the Information in Issue could provide the applicant with any information on which to base a complaint about QFES's subsequent process which resulted in a suspension decision.
30. I therefore afford slight weight only to these three factors favouring disclosure.

²¹ Schedule 4, part 2, item 17 of the RTI Act.

²² Schedule 4, part 2, item 16 of the RTI Act.

²³ Schedule 4, part 2, item 10 of the RTI Act.

²⁴ Submissions sent by email dated 22 November 2013.

²⁵ Submission dated 28 January 2014.

²⁶ Sections 47 and 49 of the RTI Act, in conjunction with section 67(1) of the IP Act.

²⁷ With the exception of page 10, of which the applicant has a full copy.

Enforcement of criminal law

31. I do not consider that disclosure of the Information in Issue could reasonably be expected to contribute to the enforcement of the criminal law.²⁸ While the applicant asserts the relevance of this factor, he has not provided information supporting its application. The investigation was of an administrative, rather than criminal nature. Release of information of the type in issue to the applicant, the subject of the investigation,²⁹ will not advance the administration of the criminal law.
32. Accordingly, I am not satisfied that this factor arises and I have not taken it into account in evaluating the balance of the public interest.

Agency or official conduct; revealing the reason for a government decision or that the information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant

33. I also consider that the following public interest factors favouring disclosure raised by the applicant do not arise for consideration:
- revealing or substantiating that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct³⁰
 - allow or assist inquiry into possible deficiencies in an agency or officer's conduct or administration³¹
 - reveal that the information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant;³² and
 - reveal the reason for a government decision and any background or contextual information that informed the decision.³³
34. The applicant provided no evidence to support the relevance of these factors other than his suspicion that complaints were altered between their lodgement and the publication of the Investigation Report. The applicant contends³⁴ as I understand it, that the first two pro-disclosure factors listed above apply because the Information in Issue will demonstrate misconduct and deficiencies in QFES' conduct, specifically breaches by QFES staff of sections 104 and 106(h) of the *Workplace Health and Safety Act 2011* (Qld). These provisions forbid discrimination against a person raising a work health and safety issue. In effect, the applicant submits that he is the subject of discrimination based on his having raised safety concerns. He contends firstly that he is being punished by being excluded from Emergency Services activities. Secondly, that the discrimination takes the form of him being prevented from accessing the Information in Issue that would confirm his suspicion that complainants changed their accounts of events.
35. I have no jurisdiction under the IP Act to consider the applicant's grievance about his exclusion from SES activities or to determine issues arising under the *Workplace Health and Safety Act 2011* (Qld).
36. I acknowledge the applicant's concerns that complaints were altered. However, as explained in paragraph 27, the Information in Issue does not support the contention that they were altered. Nothing in the Information in Issue suggests that QFES officers acted improperly in respect of the complaints.

²⁸ Schedule 4, part 2, item 18 of the RTI Act.

²⁹ As opposed, for example, to agencies with appropriate investigatory powers and law enforcement responsibilities, such as the Queensland Police Service.

³⁰ Schedule 4, part 2, item 6 of the RTI Act.

³¹ Schedule 4, part 2, item 5 of the RTI Act.

³² Schedule 4, part 2, item 12 of the RTI Act.

³³ Schedule 4, part 2, item 11 of the RTI Act.

³⁴ Submission dated 28 January 2014.

37. Therefore, disclosing the Information in Issue will not reveal that wrong or incorrect information was taken into account nor, as the applicant already has the complete Investigation Report, provide him with additional information about the investigator's reasoning. As the Information in Issue does not concern the process by which QFES decided to suspend the applicant,³⁵ disclosing the Information in Issue will not provide him with any information about QFES' reasons for the suspension.
38. Accordingly, I am not satisfied that these factors favouring disclosure arise and I have not taken them into account in evaluating the balance of the public interest.

Factors favouring nondisclosure of the Information in Issue

Others' personal information and privacy

39. The Information in Issue contains the personal information of individuals other than the applicant (relevantly, persons providing emergency services), disclosure of which the RTI Act recognises would give rise to public interest harm.³⁶ Also, disclosing private personal information about these individuals could reasonably be expected to prejudice the protection of those individuals' right to privacy.³⁷ Accordingly, two factors favouring nondisclosure of the Information in Issue arise.
40. The applicant is dissatisfied with his suspension from duties without, he contends, first being given a right to challenge that decision.³⁸ He submits, as I understand it, that his right of reply and access to information that would inform his right of reply, should not be stymied by protecting the privacy interests of other individuals. However, as I have already said, from my review of the Information in Issue, it does not include material about the suspension decision or the decision making process. Accordingly, I consider that disclosing the Information in Issue will not provide the applicant with material to assist in his seeking a review of the suspension decision.
41. 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 collected from persons for use in a workplace investigation.
42. I acknowledge that relevant privacy interests, at least as they pertain to the complainants, are considerably diminished as, due to disclosure of the Investigation Report and the applicant's presence during the events the subject of the complaints, he is aware of some of the personal information in issue, including the complainants' identities. Also, the complainants do not object to the applicant being provided with copies of their complaints. However, the Information in Issue also concerns personal information not included in the Investigation Report and which is not known to the applicant.
43. I therefore consider these interests maintain some significance and accord these two factors moderate weight.

Management function of an agency and prejudice agency's ability to obtain confidential information

44. Public interest factors favouring nondisclosure arise if disclosing information could reasonably be expected to:

³⁵ Noted above at paragraph 29.

³⁶ Schedule 4, part 4, section 6 of the RTI Act.

³⁷ 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 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.

³⁸ The applicant has not indicated if he intends to take action to seek review of the suspension decision.

- prejudice an agency's ability to obtain confidential information³⁹ (for example, if disclosure could reasonably be expected to have a detrimental impact on an agency's capacity to obtain information on a confidential basis in the future); or
 - prejudice the management functions of an agency.⁴⁰
45. I recognise a strong public interest in protecting the free flow of confidential information to agencies, to enable them to fulfil their functions. Disclosing information of the type in the Information in Issue could reasonably be expected to result in officers being reluctant to privately raise concerns about their colleagues with management personnel. Additionally, I recognise that agencies often rely on information from individuals within their workforce to be alerted to and to investigate allegations of workforce misconduct. Routinely disclosing complaint information would tend to discourage individuals from coming forward with such information and this in turn would significantly prejudice QFES' ability to effectively discharge its functions.
46. In this case, the complainants do not oppose the applicant being provided with copies of their complaints. This reduces the weight to be assigned to these two nondisclosure factors. Accordingly, I afford them moderate weight.

Balancing the public interest

47. To summarise, I afford:
- slight weight to the pro-disclosure factors relating to enhancing government accountability; accessing the applicant's personal information; contributing to the administration of justice for a person; contributing to the administration of justice generally, including procedural fairness; and advancing the fair treatment of individuals in accordance with the law in their dealings with agencies; and
 - moderate weight to the public interest factors favouring the protection of the privacy of individuals and their personal information; and avoiding prejudice to an agency's management functions and its ability to obtain confidential information.
48. The applicant contends⁴¹ that an assessment of whether disclosure is contrary to the public interest does not require a balancing of interests because it does not 'allow for a weighting system'. However, section 49(3) of the RTI Act clearly requires that a balancing process be undertaken.⁴²
49. Additionally the applicant submits⁴³ that OIC's weighting of factors is arbitrary and unreasonable. The applicant did not provide alternate weightings or suggest other bases for allocating weight to relevant factors or balancing them. The findings above explain my reasons for allocating particular weightings to the relevant public interest factors.
50. The applicant has already been provided with significant detail about the investigation and the complaints, including the identities of the complainants. Non-disclosure of the information remaining in issue will afford a degree of protection to the individuals' privacy interests and the government's ability to manage its staff and acquire confidential information in the future. In these circumstances, I consider that the slight weight attributed to the pro-disclosure factors of enhancing government accountability,

³⁹ Schedule 4, part 3, item 16 of the RTI Act.

⁴⁰ Schedule 4, part 3, item 19 of the RTI Act.

⁴¹ Submission dated 17 February 2014.

⁴² Section 49(3)(e) of the RTI Act stipulates that relevant pro-disclosure factors be balanced against relevant nondisclosure factors. Sections 49(3)(f) and 49(3)(g) of the RTI Act require access be given after determining, **on balance**, that disclosure would be in the public interest.[emphasis added].

⁴³ Submissions dated 29 January 2014 and 17 February 2014.

administration of justice and access to the applicant's personal information is outweighed by the moderate weight attributed to the nondisclosure factors.

51. Accordingly, I find that disclosure would, on balance, be contrary to the public interest.

DECISION

52. For the reasons set out above, I have decided to affirm QFES' decision to refuse access to the Information in Issue on the basis that its disclosure would, on balance, be contrary to the public interest under sections 47(3)(b) and 49 of the RTI Act in conjunction with section 67 of the IP Act.

53. I have made this decision as a delegate of the Information Commissioner, under section 139 of the *Information Privacy Act 2009* (Qld).

L Lynch
Assistant Information Commissioner

Date: 24 April 2014

APPENDIX

Significant procedural steps

Date	Event
10 July 2013	QFES received the applicant's access application.
9 August 2013	QFES issued its decision on the access application.
29 August 2013	The applicant applied for internal review of QFES' decision.
23 September 2013	QFES issued its internal review decision.
3 October 2013	OIC received the applicant's application for external review.
17 October 2013	OIC notified the applicant and QFES that the application for external review had been accepted and requested that QFES provide a copy of the documents in issue.
7 November 2013	QFES provided OIC with the requested documents.
21 November 2013	OIC clarified with QFES the entity now responsible for the review following Machinery of Government changes.
21 November 2013	The applicant provided OIC with submissions by telephone.
25 November 2013	OIC received written submissions from the applicant.
28 November 2013	OIC requested that QFES provide OIC with further information about sufficiency of search issues raised by the applicant's submissions.
13 December 2013	QFES provided OIC with the requested information.
19 December 2013	OIC clarified with QFES the basis of its decision refusing access to information.
2 January 2014	OIC conveyed a preliminary view to the applicant and invited him to provide submissions supporting his case if he did not accept the preliminary view.
28 January 2014	The applicant notified OIC that he did not accept the preliminary view and provided OIC with submissions.
4 February 2014	OIC conveyed a further preliminary view to the applicant and invited him to provide submissions supporting his case if he did not accept the preliminary view.
17 February 2014	OIC received further submissions from the applicant.
24 February 2014	OIC requested that QFES conduct further searches in response to the applicant's submissions.
28 February 2014	OIC received further submissions from QFES in response to OIC's request.
3 March 2014	OIC informed the applicant of the results of QFES' searches and inquiries.