



Decision and Reasons for Decision

Citation:	Tol and The University of Queensland [2015] QICmr 4 (18 February 2015)
Application Number:	312018
Applicant:	Tol
Respondent:	The University of Queensland
Decision Date:	18 February 2015
Catchwords:	ADMINISTRATIVE LAW – INFORMATION PRIVACY ACT – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST INFORMATION – information about the handling of the applicant’s concerns regarding access to research data and the conduct of agency officers – whether disclosure would, on balance, be contrary to the public interest – sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld) – section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) ADMINISTRATIVE LAW – INFORMATION PRIVACY ACT – DOCUMENTS OF AN AGENCY – private forum entries linked to a website maintained in officer’s personal capacity – whether requested documents are documents of an agency – section 12 of the <i>Right to Information Act 2009</i> (Qld) – section 13 of the <i>Information Privacy Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to The University of Queensland (**UQ**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for emails written by various named individuals and entries on the Skeptical Science forum (**SkS Forum**) over a specific period which referred to him.
2. UQ located 463 pages in response to the access application and granted full access to 257 pages and part access to 123 pages. Access to 84 part pages and 40 full pages was refused on the basis that disclosing the information would, on balance, be contrary to the public interest under sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld) (**RTI Act**). UQ refused access to the SkS Forum entries on the basis that they were not documents of the agency.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of UQ’s decision.

4. For the reasons set out below, the decision under review is affirmed. Access to the relevant information within the emails can be refused as its disclosure would, on balance, be contrary to the public interest. There is no right of access to the SkS Forum entries under the IP Act as they are not documents of an agency.

Background

5. Significant procedural steps relating to the external review are set out in the appendix to these reasons.

Reviewable decision

6. The decision under review is UQ's internal review decision dated 2 April 2014.

Evidence considered

7. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).
8. The applicant made submissions supporting his case on a number of occasions.¹ I have carefully considered all of the applicant's submissions however not all of them are relevant to the issues for determination in this review. To the extent the applicant's submissions are relevant, I address them below in this decision.

Can access to the relevant information be granted under the IP Act?

9. No, for the reasons that follow.
10. The information in issue (**Information in Issue**) comprises the information which UQ decided would be contrary to the public interest to disclose, that is, 84 part pages and 40 full pages. Many of these pages are duplicates.
11. The applicant has raised concerns with UQ about access to research data relating to a journal article written by a number of people including a staff member of UQ's Global Change Institute. The applicant has had extensive contact with UQ about these concerns and UQ has written to him on several occasions in an attempt to address them. The Information in Issue can be generally described as emails by various UQ staff members (identified in the access application) which mention the applicant and were created for the purpose of discussing how to respond to the issues the applicant raised about the research data.

Relevant law

12. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent the documents contain the individual's personal information. However, this right is subject to limitations, including grounds for refusal of access.²
13. An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.³ The RTI Act identifies many factors that may be

¹ Access application to UQ on 16 January 2014, internal review application to UQ on 12 March 2014, external review application to OIC received on 7 May 2014, emails to OIC on 20 May 2014, 30 July 2014, 31 July 2014 and 9 January 2014.

² Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent it could refuse access to the document under section 47 of the RTI Act, were the document to be the subject of an access application under the RTI Act.

³ 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.

relevant to deciding the balance of the public interest⁴ and explains the steps that a decision-maker must take in deciding the public interest as follows: ⁵

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

Findings

14. No irrelevant factors arise in the circumstances of this case.⁶ I will now consider the relevant factors favouring disclosure and nondisclosure of the Information in Issue.

Accountability and transparency

15. The applicant relevantly submits:⁷

Most strikingly, the information withheld by the University of Queensland is a point-by-point rebuttal of a critique I wrote about one of Mr Cook's papers. As my critique is in the public domain, surely it would be in the public interest to publish rather than withhold that rebuttal.

16. In view of the applicant's submissions, I have considered whether disclosing the Information in Issue could reasonably be expected to:⁸

- enhance UQ's accountability;⁹ and
- reveal the reason for UQ's decision and any background or contextual information that informed the decision.¹⁰

17. UQ must be transparent and accountable for the integrity of its research and data but also in how it deals with complaints of the nature made by the applicant. The Information in Issue comprises discussions about how to respond to the applicant's requests for information and would further the applicant's understanding of what the relevant officers discussed with each other about the applicant's correspondence. This would advance these factors to some degree and I consider these factors are relevant. It is now necessary for me to determine the weight to be afforded to them in the circumstances of this external review.

18. The requirement for UQ to be accountable and transparent does not oblige it to provide the applicant with access to all information which relates to him and his concerns. UQ has directly responded to the applicant's numerous requests for information through emails with the applicant. It has also granted the applicant access to a substantial amount of the information it located in response to his access application under the IP Act. I am satisfied that the information already provided furthers the applicant's understanding of how UQ handled his concerns, thereby reducing the weight of these factors. Accordingly, I afford them both only moderate weight.

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

⁵ Section 49(3) of the RTI Act.

⁶ I address the additional factor which UQ relied on (and which the applicant submits is irrelevant) below.

⁷ External review application received by OIC on 7 May 2014.

⁸ The term '*could reasonably be expected to*' requires that the expectation be reasonably based, that it is neither irrational, absurd or ridiculous, nor merely a possibility. The expectation must arise as a result of disclosure, rather than from other circumstances. Whether the expected consequence is reasonable requires an objective examination of the relevant evidence. It is not necessary for a decision-maker to be satisfied upon a balance of probabilities that disclosing the document will produce the anticipated prejudice. See *Nine Network Australia Pty Ltd and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 14 February 2012) at paragraph 31.

⁹ Schedule 4, part 2, item 1 of the RTI Act.

¹⁰ Schedule 4, part 2, item 11 of the RTI Act.

Allow or assist inquiry into deficiencies in conduct of UQ or its officers

19. The applicant details a number of *'falsehoods'* which he alleges have occurred and which, in his view, give extra weight to the need for full disclosure of the Information in Issue.¹¹
20. OIC's role in this review is limited to considering whether access to the Information in Issue can be granted under the IP Act. I have no jurisdiction to make any finding on whether the applicant's allegations relating to *'falsehoods'* have merit or can be substantiated. However, I have considered whether the applicant's submissions and the Information in Issue give rise to a factor favouring disclosure, namely whether disclosing the Information in Issue could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct of administration of UQ or its staff.¹² Other than the applicant's assertions, there is no evidence available to me that this factor arises for consideration or that disclosing the Information in Issue could reasonably be expected to advance this factor in any way.

Personal information and privacy

21. The Information in Issue is generally about the applicant and comprises his personal information.¹³ This gives rise to a factor favouring disclosure¹⁴ to which I afford significant weight.
22. However, the Information in Issue also comprises the personal information of other individuals, namely other UQ employees. Given the nature of this information, and the way in which it is presented, it is not possible to separate the applicant's personal information from the personal information of others. As a result, I have also considered whether disclosing the Information in Issue could reasonably be expected to:
 - prejudice the protection of an individual's right to privacy;¹⁵ and
 - cause a public interest harm as it would disclose personal information of a person.¹⁶
23. Generally, information relating to the day-to-day work duties and responsibilities of a public sector employee may be disclosed under the IP Act, despite it falling within the definition of personal information. However, agency documents can also contain personal information of public sector employees that is not *routine* work information.¹⁷ The Information in Issue is personal information of this kind. Although the personal information appears in a workplace context, it comprises the individuals' opinions, feelings and responses to comments the applicant has made about the quality of their research and professionalism. I consider such information is not related wholly to the routine day-to-day work activities of these individuals and is not their routine personal work information. It is therefore relevant to consider the extent of the harm that could result from disclosing the personal information of other individuals under the IP Act.

¹¹ Email to OIC on 30 July 2014 and reiterated in an email to OIC on 9 January 2015.

¹² Schedule 4, part 2, item 5 of the RTI Act.

¹³ *'Personal information'* is defined in section 12 of the IP Act 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'*.

¹⁴ Schedule 4, part 2, item 7 of the RTI Act.

¹⁵ Schedule 4, part 3, item 3 of the RTI Act.

¹⁶ Schedule 4, part 4, section 6(1) of the RTI Act.

¹⁷ *Underwood and Department of Housing and Public Works* (Unreported, Queensland Information Commissioner, 18 May 2012) at paragraph 60. I acknowledge that employees of UQ are not employed under the *Public Service Act 2008* (Qld) however, as they are employees of an agency which is subject to the RTI Act, I consider similar principles apply to disclosure of their routine work information.

24. The Information in Issue is sensitive and personal in nature. I consider its disclosure under the IP Act would be a significant intrusion into the privacy of these individuals and the extent of the public interest harm that could be anticipated from disclosure is significant. As a result, I afford both of these public interest factors favouring nondisclosure significant weight.

Prejudice management function

25. The RTI Act recognises a factor favouring nondisclosure where disclosing information could reasonably be expected to prejudice an agency's management function.¹⁸
26. The Information in Issue comprises correspondence between UQ staff members and the person who is the subject of the concerns raised by the applicant. The Information in Issue was communicated by these staff members for the purpose of dealing with the applicant's concerns and identifying the most appropriate way to respond to his requests for information. I am satisfied the information was communicated on the understanding that it would only be used for that purpose.
27. Staff must be able to freely communicate with each other about these types of issues and be candid in reporting to management. Disclosing this type of information under the IP Act, where there can be no restriction on its use, dissemination or republication, could reasonably be expected to make staff reluctant to provide such information to management in the future and would prejudice the flow of information to management. This, in turn, could reasonably be expected to adversely impact UQ's ability to manage staff. For these reasons, I afford this factor significant weight.

Harassment and intimidation

28. UQ decided that disclosing the Information in Issue may result in a person being subject to an act of harassment or intimidation by the applicant. This is not a factor identified in schedule 4 of the RTI Act. UQ decided that this was an additional factor which it relied on to justify the nondisclosure of information to the applicant.
29. The applicant contests the application of this factor and submits that:¹⁹
- UQ has taken into account an irrelevant factor which falls within the broader concern over mischievous conduct and is specifically excluded under schedule 4, part 1, item 3 of the RTI Act; and
 - he has not been given an opportunity to respond to or defend himself against accusations made by UQ employees and rejects UQ's evidence and argument on this issue.
30. It is not necessary for me to specifically address the applicant's submissions on this issue. I have not considered the additional factor identified by UQ in making this decision and have not formed a view on its application in the circumstances of this review. This is because I am satisfied that the factors favouring nondisclosure which I have previously identified in this decision outweigh the factors favouring disclosure of the Information in Issue (as I explain below).

Balancing the relevant factors

31. The IP Act is to be administered with a pro-disclosure bias meaning that access to information should be granted unless giving access would, on balance, be contrary to the public interest.²⁰

¹⁸ Schedule 4, part 3, item 19 of the RTI Act.

¹⁹ Email to OIC on 31 July 2014 and reiterated in an email to OIC on 9 January 2015.

²⁰ Section 64 of the IP Act.

32. I am satisfied that disclosing the Information in Issue could reasonably be expected to enhance UQ's accountability and transparency to some degree and I afford moderate weight to these factors. In addition, the Information in Issue is the applicant's personal information and I afford this factor favouring disclosure significant weight.
33. However, these factors must be balanced against the factors favouring nondisclosure. The Information in Issue is the personal information of UQ employees. I am satisfied that it is not routine work information and that its disclosure could reasonably be expected to prejudice the protection of their right to privacy and cause a public interest harm. I am also satisfied that disclosing the Information in Issue could reasonably be expected to prejudice UQ's management function. I consider these factors favouring nondisclosure warrant significant weight and, in the circumstances of this case, outweigh the factors favouring disclosure of the Information in Issue.
34. Accordingly, disclosing the Information in Issue would, on balance, be contrary to the public interest and UQ was entitled to refuse access to the Information in Issue under sections 47(3)(b) and 49 of the RTI Act.

Are the SkS Forum entries documents of the agency?

35. No, for the reasons that follow.
36. The applicant applied for access to all entries on the SkS Forum referring to him for a specific period. UQ decided that the requested documents were not UQ's documents and therefore were outside the scope of the access application.

Relevant law

37. As noted above, under the IP Act, an individual has a right to be given access to documents of an agency to the extent the documents contain the individual's personal information.
38. Section 12 of the RTI Act²¹ states that a '*document of an agency*' is a document in the possession or under control of that agency, regardless of whether the document was brought into existence by the agency or received by it, and includes a document:
- to which the agency is entitled to access; and
 - in the possession, or under the control, of an officer of the agency in the officer's official capacity.
39. There is no right of access under the IP Act or RTI Act to a document that is not a '*document of an agency*'.

Findings

40. UQ states that:²²
- the SkS Forum is managed by Skeptical Science, whose goal is to '*explain what peer reviewed science has to say about global warming*'
 - this site is maintained by Mr John Cook, the Climate Communication Fellow for the Global Change Institute at UQ
 - UQ was not involved in establishing the Skeptical Science website nor does it support this site

²¹ Section 13 of the IP Act provides that a '*document of an agency*' means anything that is a '*document of an agency*' under the RTI Act.

²² In its initial decision dated 10 March 2014.

- the income from donations to the site does not enter UQ's bank account; and
 - the site is maintained by Mr Cook in his personal capacity and not as a UQ employee.
41. The applicant has made submissions in support of his contention that the SkS Forum posts are documents of UQ which can be summarised as follows:²³
- Mr Cook is a post-doctoral fellow at the Global Change Institute and Mr Cook created and maintains skepticalscience.com
 - the SkS Forum is an integral part of the Skeptical Science website
 - there is good reason to assume that Mr Cook maintains that site during normal working hours; and
 - Mr Cook's '*first and foremost task*' at UQ is to maintain the website and Mr Cook '*first and foremost*' presents himself as an employee of UQ.
42. A document in the possession, or under the control, of an officer of the agency in the officer's official capacity is a '*document of an agency*'. The term '*possession*' as used in section 12 of the RTI Act merely requires the document to be in the physical possession of an agency—it does not require formal legal possession nor is it concerned with the means by which the documents came into an agency's possession.²⁴ However, the phrase '*an officer of the agency in the officer's official capacity*' distinguishes between documents created or received by an officer in a private or personal capacity from those created or received for and on behalf of the officer's employing agency.
43. In this case it is necessary to distinguish between the work Mr Cook does on behalf of UQ, in his capacity as an employee of the Global Change Institute, and the work he does in his personal and private capacity. Mr Cook is both a staff member of UQ's Global Change Institute and creator of the Skeptical Science website. Mr Cook publicly identifies himself as both of these in his UQ profile,²⁵ on the Skeptical Science website²⁶ and in the relevant journal article.²⁷ I acknowledge that his work in both of these roles is closely related.
44. The 'About' page of the Skeptical Science website relevantly provides:²⁸

About the author

Skeptical Science is maintained by John Cook, the Climate Communication Fellow for the Global Change Institute at the University of Queensland. He studied physics at the University of Queensland, Australia. After graduating, he majored in solar physics in his post-grad honours year. He is not a climate scientist. Consequently, the science presented on Skeptical Science is not his own but taken directly from the peer reviewed scientific literature. To those seeking to refute the science presented, one needs to address the peer reviewed papers where the science comes from (links to the full papers are provided whenever possible).

There is no funding to maintain Skeptical Science other than Paypal donations - it's run at personal expense. John Cook has no affiliations with any organisations or political groups. Skeptical Science is strictly a labour of love. The design was created by John's talented web designer wife.

²³ In access application to UQ and external review application to OIC.

²⁴ *Kalinga Woolloowin Residents Association Inc and Department of Employment, Economic Development and Innovation; City North Infrastructure Pty Ltd (Third party)* (Unreported, Queensland Information Commissioner, 19 December 2011) at paragraphs 14, 15 and 19.

²⁵ <http://www.uq.edu.au/news/article/2014/01/uq-climate-change-paper-has-whole-world-talking>

²⁶ <http://www.skepticalscience.com/team.php>

²⁷ Cook et al '*Quantifying the consensus on anthropogenic global warming in the scientific literature*' *Environmental Research Letters* 8 (2013) 024024.

²⁸ <http://www.skepticalscience.com/about.shtml>

45. I also note that:

- the Skeptical Science website has a team of contributors who are not UQ employees
- the website does not bear the UQ logo
- none of the contact details for the website are related to UQ²⁹
- Mr Cook claims copyright over the website, not UQ;³⁰ and
- this is consistent with UQ's explanation that the website is maintained by Mr Cook in his personal capacity and not as a UQ employee.

46. Both UQ's decision and the information on the Skeptical Science website make it clear that UQ did not create or maintain the website or the SkS Forum and that Mr Cook's involvement with the website and forum is done in his personal capacity. The applicant's submissions do not persuade me otherwise. Although Mr Cook may maintain the Skeptical Science website during working hours, this does not necessarily mean that he does this work on behalf of UQ. University academic staff frequently work outside of usual business hours and may collaborate on projects with academics from other institutions and on ranging topics of interest. Not all of their work will necessarily be done on behalf of their employing institution—some of it may be done in their personal capacity, even though it is related to their area of work.

47. The applicant has provided the following as evidence to support his case:³¹

- a letter from UQ to another individual on 15 May 2014 about the alleged leak of data; and
- a statement by the UQ Acting Pro-Vice-Chancellor (Research and International) on 20 May 2014 relating to the article '*Queensland University tries to block climate research*' published in The Australian on 17 May 2014.

48. The applicant submits that this information provides evidence that UQ:³²

- claims intellectual property rights over results developed through the website and the SkS Forum which contradicts UQ's claim that it is an independent operation; and
- issued a statement admitting that data, for which they hold intellectual property rights, are posted on the website, further eroding their claim that it is unrelated to UQ.

49. I have carefully considered this information. In my view, the information shows that UQ claims intellectual property rights over the relevant data set and this data set was published on the Skeptical Science website. The applicant did not apply for access to this data; rather the applicant applied for access to SkS Forum entries about him. The applicant's submissions do not establish that UQ claims intellectual property rights over the SkS Forum entries or the rest of the information which appears on the Skeptical Science website. The SkS Forum is a private forum which is part of the Skeptical Science website. It is not publicly accessible via the Skeptical Science website. Nothing in the applicant's submissions supports the view that UQ claims intellectual property rights over the SkS Forum entries or that these entries, if they exist, would comprise UQ documents.

²⁹ <http://www.skepticalscience.com/contact.php>

³⁰ See the bottom of the webpage.

³¹ Emails to OIC on 20 May 2014. In an email to OIC on 9 January 2015, the applicant also submitted that '*Your position is reminiscent of the USEPA's initial position on its administrator's use of aliased emails sent from private devices. That position was overturned by the courts. I urge you to consider this as a precedent.*' It is unclear how any decision on the use of aliased emails sent from private devices is relevant to the issues for consideration in this review and whether the SkSForum entries are documents of an agency for the purpose of the IP Act. I have not taken this submission into account.

³² Emails to OIC on 20 May 2014.

50. Accordingly, I am satisfied that any documents in the possession or under the control of Mr Cook, or other UQ officers, which comprise SkS Forum entries about the applicant for the relevant period, do not comprise documents received or created by the officers acting in their official capacity within the meaning of section 12 of the RTI Act and can be distinguished from those documents created or received for and on behalf of UQ.
51. For these reasons, any SkS Forum entries relating to the applicant which may exist are not '*documents of an agency*' as defined under section 12 of the RTI Act and there is no right of access to these documents under the IP Act or RTI Act.

DECISION

52. For the reasons set out above, I affirm the decision under review and find that:
- access to the Information in Issue can be refused under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act on the basis that its disclosure would, on balance, be contrary to the public interest; and
 - there is no right of access to the SkS Forum entries under the IP Act or RTI Act as they are not documents of an agency as defined in section 12 of the RTI Act.
53. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Tara Mainwaring
A/Assistant Information Commissioner

Date: 18 February 2015

APPENDIX

Significant procedural steps

Date	Event
16 January 2014	UQ received the access application made under the IP Act.
10 March 2014	UQ issued a decision to the applicant.
12 March 2014	The applicant applied for internal review of the decision.
2 April 2014	UQ issued an internal review decision affirming the initial decision.
7 May 2014	OIC received the external review application.
8 May 2014	OIC asked UQ to provide certain procedural documents by 15 May 2014.
12 May 2014	OIC received the requested documents from UQ.
20 May 2014	OIC notified the applicant and UQ that the external review application had been received two days outside the statutory timeframe for making an external review application but that OIC had exercised the discretion under section 101(1)(d) of the IP Act to accept the application. OIC asked UQ to provide a copy of the documents in issue by 3 June 2014.
20 May 2014	OIC received two emails from the applicant making submissions.
27 May 2014	OIC received a copy of the documents in issue from UQ.
30 July 2014	OIC received submissions from the applicant.
31 July 2014	OIC received submissions from the applicant.
15 December 2014	OIC asked UQ to provide further information relevant to the review.
17 December 2014	OIC received the requested information from UQ.
23 December 2014	OIC conveyed its preliminary view to the applicant and invited him to provide submissions supporting his case by 19 January 2015 if he did not accept the preliminary view.
9 January 2015	The applicant notified OIC that he did not accept the preliminary view and provided submissions supporting his case.