



Decision and Reasons for Decision

Citation:	<i>B38 and Department of Child Safety, Seniors and Disability Services [2023] QICmr 61 (15 November 2023)</i>
Application Number:	317134
Applicant:	B38
Respondent:	Department of Child Safety, Seniors and Disability Services
Decision Date:	15 November 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO CHILD'S BEST INTERESTS - application on behalf of child for child safety documents about that child - whether disclosure of the information would not be in the child's best interests - section 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> and sections 47(3)(c) and 50 of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. A parent applied under the *Information Privacy Act 2009 (Qld)* (**IP Act**), on behalf of their child,¹ to the Department of Children, Youth Justice and Multicultural Affairs (**Department**)² to access all information held by the Department regarding that child (**child applicant**).³
2. The Department located relevant documents and decided⁴ to refuse access to them on the ground that disclosure would be contrary to the child's best interests.
3. The parent then applied, on behalf of the child applicant, to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.⁵
4. For the reasons set out below, I affirm the Department's decision refusing access to information on the ground that disclosure would be contrary to the child's best interests.⁶

¹ Where an application is made on behalf of a child, the applicant is taken to be the child rather than the parent—see section 45(1) of the IP Act and the definition of 'applicant' in schedule 5 of the IP Act.

² Following a machinery of government change on 18 May 2023, the agency currently responsible for this external review is the Department of Child Safety, Seniors and Disability Services.

³ The access application is dated 23 January 2023. By letter dated 31 January 2023, the Department notified the parent that it had construed the application as a request to access the '*electronic child safety records in relation to the applicant as a subject child for the period 19 October 2019 to 23 January 2023*'.

⁴ Decision dated 3 February 2023.

⁵ External review application dated 17 February 2023.

⁶ Under section 67(1) of the IP Act and section 47(3)(c) of the *Right to Information Act 2009 (Qld)* (**RTI Act**).

Background

5. The Department's decision under review noted that '*there is evidence of significant family conflict and disharmony between the [child's] parents*'.
6. During the review, the parent raised extensive concerns about the conduct of the Department⁷ and what they perceived as the Department's delay in processing the application.⁸ The parent further asserted that nondisclosure of the requested information was to '*cover up*' the Department's corrupt conduct.⁹ This external review is a merits review, which is an administrative reconsideration of the Department's decision,¹⁰ and the IP Act does not give OIC jurisdiction to investigate complaints about an agency's conduct or processes.¹¹ Therefore, I cannot address these raised concerns in this decision.
7. The parent also submitted that the Department has provided the child's other parent with access to information, which is now being denied to them.¹² While there is no information before me to indicate whether this claimed disclosure was made under the IP Act or the RTI Act (or another process), this nonetheless has no bearing on this review. My role in conducting a merits review is to consider afresh the child applicant's entitlement to access the requested information under the IP Act and determine the correct and preferable decision.
8. The significant procedural steps taken in this external review are set out in the Appendix.

Reviewable decision

9. The decision under review is the Department's decision dated 3 February 2023.

Evidence considered

10. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix).
11. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the rights to seek and receive information and the protection of families and children.¹³ A decision maker will be '*respecting, and acting compatibly with*' these rights and others prescribed in the HR Act when applying the law prescribed in the IP Act and the RTI Act.¹⁴ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the

⁷ External review application and email submissions dated 27 March 2023, 11 May 2023 and 31 July 2023. For example, the parent submitted that the Department had created '*stress and emotional trauma*' (email submissions dated 27 March 2023) and was '*using its processes to usurp legal processes*' (external review application and similar submissions were made by the parent in email submissions dated 27 March 2023).

⁸ Email submissions dated 27 March 2023.

⁹ External review application. Similar submissions were made by the parent in email submissions dated 11 May 2023.

¹⁰ As such, the Information Commissioner (or delegate) has the power to decide any matter in relation to an application that could have been decided by the agency under the IP Act (as confirmed in section 118(1)(b) of the IP Act).

¹¹ This was explained to the parent on 28 July 2023.

¹² Email submissions dated 11 May 2023. The parent also submitted that Departmental staff had encouraged them to make the access application and had indicated the requested information '*should be*' provided (email submissions dated 27 March 2023).

¹³ Section 21(2) and 26 of the HR Act.

¹⁴ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (XYZ) at [573]; and *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111]. I further note that OIC's approach to the HR Act set out in this paragraph was considered and endorsed in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (where Judicial Member McGill SC saw '*no reason to differ*' from our position).

interaction between equivalent pieces of Victorian legislation:¹⁵ *‘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’.*¹⁶

Information in issue

12. I have carefully reviewed all the documents which the Department located when processing the application (**Located Documents**).¹⁷ A number of the Located Documents¹⁸ do not contain *any* information about the child applicant—those pages fall outside the scope of the application and are therefore not addressed in this decision.¹⁹
13. The remaining Located Documents (**Information in Issue**) comprise the Department’s electronic records relating to the child applicant, which contain highly sensitive information gathered by the Department while exercising its child safety functions.²⁰

Issue for determination

14. The issue for determination is whether disclosure of the Information in Issue would not be in the child’s best interests.²¹
15. In making this decision, I have addressed the submissions received on behalf of the child applicant to the extent they are relevant to the issue for determination.

Relevant law

16. Where an application is made on behalf of a child, the applicant is taken to be the child, rather than the parent.²²
17. The IP Act provides an individual a right to access documents of an agency to the extent they contain the individual’s personal information.²³ This access right is subject to certain limitations, including grounds for refusing access.²⁴ One such refusal ground is where:
 - the information is sought under an application made by or for a child
 - the information sought comprises the child’s personal information; and
 - the disclosure of that information would not be in the child’s best interests.²⁵
18. The IP Act and RTI Act provide limited guidance as to what factors are to be considered in deciding whether disclosure of information would not be in the child’s best interests.²⁶ The Queensland Civil and Administrative Tribunal (**QCAT**) has

¹⁵ Freedom of Information Act 1982 (Vic) and the Charter of Human Rights and Responsibilities Act 2006 (Vic).

¹⁶ XYZ at [573].

¹⁷ The Located Documents comprise 3621 pages.

¹⁸ Appearing on approximately 370 pages. There is a level of duplication within these pages.

¹⁹ A document will be outside the scope of an access application made under the IP Act if it does not contain the applicant’s personal information. *‘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’.*

²⁰ Section 121(3) of the IP Act prohibits me from further describing this information.

²¹ Under section 47(3)(c) of the RTI Act.

²² Refer to footnote 1 above.

²³ Section 40 of the IP Act.

²⁴ Section 67(1) of the IP Act sets out that an agency may refuse access to information in the same way and to the same extent that the agency could refuse access to the document under section 47 of the RTI Act were the document the subject of an access application under the RTI Act. Section 47(2) of the RTI Act also states that it is Parliament’s intention that the grounds on which access may be refused are to be interpreted narrowly.

²⁵ Sections 47(3)(c) of the RTI Act.

²⁶ Section 50(3) of the RTI Act requires an agency, in considering whether disclosure would not be in the best interests of the child, to have regard to whether (i) the child has the capacity to understand the information and the context in which it was

observed that the question of whether disclosure of the information under the IP Act would, or would not, be in the best interests of the child is to be decided objectively, by reference to identifiable objective factors either advancing or damaging the interests of the child.²⁷

19. The 'best interests of the child' principle is set out in the United Nations' Convention on the Rights of the Child (1989) (**Convention**),²⁸ and has since been applied in Australia in a number of legal contexts, particularly in family law²⁹ and administrative law.³⁰ Courts have also recognised that 'best interests' is a multi-faceted test and incorporates the wellbeing of the child, factors that 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.³¹
20. In *Re Bradford and Director of Family Services; Commissioner, Australian Federal Police*,³² the applicant sought access under the *Freedom of Information Act 1982* (Cth) to information about her four children that were held by the Director of Family Services. In that case, President Curtis noted that, if there are child protection issues, disclosure of any information that undermines the relationship between the child and the agency charged with the protection of children may not be in the child's best interests.³³ The Information Commissioner has also previously recognised that it would not be in a child's best interests to disclose information where that disclosure may impact the child's trust in a child protection agency or which may result in damage to the relationship between the child and the agency.³⁴
21. A child's right to privacy is also recognised in the Convention.³⁵ 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.³⁶

Findings

22. I am satisfied that the Information in Issue is sought under an application made for a child and that this information comprises the child's personal information.
23. In determining whether disclosure of the Information in Issue would, or would not, be in the best interests of the child (particularly given the young age of the child), I have carefully considered the material before me, including the contents of the Information in

recorded and (ii) make a mature judgement as to what might be in his or her best interests, unless the access application was made for the child (as is the case in this review).

²⁷ *FLK v Information Commissioner* [2021] QCATA 46 (**FLK**) at [8]. In this decision, Judicial Member McGill SC further observed that where an access application has been made by a child personally, section 50(3) of the RTI Act 'shows that the opinion of the child is not to be conclusive as to where the best interests of the child lie' (Ibid at [8]).

²⁸ Ratified by Australia in December 1990. This 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.

²⁹ For guidance, see section 60CC of the *Family Law Act 1975* (Cth) (**Family Law Act**) and Australian Human Rights Commission, *Human Rights Brief No. 1: The Best Interests of the Child* (March 1999) available at <<https://www.humanrights.gov.au/our-work/human-rights-brief-no-1>> (accessed on 5 December 2019). In the family law context, courts have recognised that the 'best interests of the child' is not a straightforward test—refer, for example, to *CDJ v VAJ* (1998) 197 CLR 172 at 219, where the High Court (in the majority judgement) noted that determining 'best interests' involved a 'discretionary judgement in respect of which judges can come to opposite but reasonable conclusions'.

³⁰ *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273.

³¹ I also note that section 60CC of the Family Law Act sets out the matters to be considered by a court when determining what is in a child's best interests.

³² (1998) 52 ALD 455 (**Re Bradford**).

³³ *Re Bradford* at 458-459.

³⁴ *2YSV6N and the Department of Communities, Child Safety and Disability Services* [2014] QICmr 25 (5 June 2014).

³⁵ See, for example, Article 16 of the Convention.

³⁶ *Marion's case (Secretary, Department of Health and Community Services v JWB and another)* (1992) 175 CLR 218 at [19] referring to *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112; see also *AZ4Z4W and the Department of Communities, Child Safety and Disability Services* [2014] QICmr 26 (5 June 2014) at [34].

Issue, the decision under review and the submissions (and supporting information) received from the parent on behalf of the child applicant.

24. Turning first to the parent's submissions, the parent contended that the Department's decision has not been made to protect the interests of the child applicant and that:
- pursuant to final parenting orders, the child applicant lives with them (as part of a larger family unit) and they are the primary carer of the child applicant;³⁷ and
 - disclosure of the Information in Issue will not harm the child applicant's relationship with them, or the other parent.³⁸
25. The parent's main submission is that the Information in Issue should be disclosed to address what they consider to be the corrupt and harmful conduct of the Department.³⁹ More specifically, the parent submitted that they '*cannot gain anything from the release of this information, other than to address the corrupt behaviour that has HARMED [the child applicant] by the [D]epartment.*'⁴⁰
26. The child applicant is of primary school age and I acknowledge that, as the primary carer, the parent may be well placed to know what is in the best interests of the child applicant. However, most of the parent's submissions refer to the entitlement of the parent, rather than the child applicant, to receive information and the impact nondisclosure will have on them, rather than on the child applicant.⁴¹
27. During the review, the parent indicated they are seeking information to pursue separate complaint and legal processes for what they consider are the corrupt or improper actions taken by the Department in relation to the child applicant.⁴² Although the access right under the IP Act is not meant to replicate, or serve as an adjunct to, court disclosure processes,⁴³ I acknowledge that disclosing information could provide the parent with more comprehensive details of the information gathered by the Department while exercising its child safety functions.⁴⁴ However, the parent's submissions also confirm that they already possess information which they consider substantiates improper conduct by the Department and has provided them with an accurate account of what has taken place in relation to the child applicant.⁴⁵ In the circumstances of this matter, I am not persuaded that the submissions summarised at paragraph 25 above advance the proposition that disclosure of the Information in Issue is in the child's best interests.

³⁷ External review application.

³⁸ Email submissions dated 11 May 2023.

³⁹ For example, in email submissions dated 11 May 2023, the parent contended that disclosure is required to '*prove the conduct of the [D]epartment has caused harm to [the child applicant]*' and '*[t]his is now solely a matter of addressing the corrupt and harmful conduct of the [D]epartment.*'

⁴⁰ Email submissions dated 11 May 2023.

⁴¹ In email submissions dated 27 March 2023, the parent argued that nondisclosure affected their ability to address their corrupt conduct allegations and that '*withholding the information from [them], is an attempt to cover up the [D]epartment's conduct.*'

⁴² In email submissions dated 11 May 2023, the parent indicated they intend to pursue complaint processes for what they consider are the corrupt or improper actions taken by the Department in relation to the child applicant and submitted that, without the requested information, they cannot provide it '*to the Crime and Corruption Commission to address the [D]epartment's conduct*' and will be '*forced to commence civil action against the [D]epartment.*'

⁴³ I also note that, in general terms, complaint handling bodies will have power to obtain information they consider is necessary to deal with agency (or officer) conduct complaints (refer, for example, refer to Chapter 3 of the *Crime and Corruption Commission Act 2001 (Qld)*).

⁴⁴ As the parent's submissions confirm they have had direct contact with the Department over a period of time, it is reasonable to assume that the parent may already be aware of some of the Information in Issue.

⁴⁵ Specifically, the parent submitted (email submissions dated 11 May 2023) that they are not seeking to determine if the Department has acted improperly, as they can already substantiate this from their own digital evidence and '*the evidence [they] have, satisfies [them] that [they] have a clear and accurate account of what has taken place, how the children have been used and affected.*'

28. As I have noted above, determining the best interests of a child is a multi-faceted test and includes consideration of the factors that will affect the future and immediate welfare and happiness of the child—in some cases, this will not align with the views of the parent.⁴⁶ I also note that QCAT has confirmed that *‘the legislation does not in terms attribute any special significance to the opinion of the child’s parent as to what is in the best interests of the child’*.⁴⁷
29. In this case, the practical effect of disclosure would be that the Information in Issue would be released to the parent on behalf of the child applicant. During the review, the parent submitted that they have been *‘forced to go public with the experience’* and the parent also provided a number of *‘Youtube videos’*, some of which depict family members and contain audio of remarks made by the other parent.⁴⁸ Under the IP Act, there is no restriction on the use, dissemination or republication of information which is disclosed pursuant to an access application. Taking this and the sensitive personal information within the Information in Issue into account, as well as the Department’s awareness of and involvement with the child applicant over a number of years, I consider that disclosure of the Information in Issue could impact the child applicant’s willingness to speak freely with the Department in the future, should that be required, out of fear that any information disclosed may be shared. This, in turn, could prejudice the Department’s ability to perform its child protection functions. I consider the reasons the parent has identified as to why disclosure would be in the child’s best interests are not sufficient to overcome this potential consequence of disclosure.
30. I acknowledge that the material before me indicates that the parent cares for the child applicant and is motivated to ensure their protection and address matters of concern. However, I have also taken into account the Department’s view that *‘release of the information may adversely affect the [child’s] relationship with family members’*.⁴⁹ As I have noted above, the Information in Issue contains highly sensitive personal information. Given this and the context of family conflict observed by the Department, I am satisfied that disclosure of information gathered by the Department while exercising its child safety functions would not be in the best interests of the child applicant.

DECISION

31. For the reasons set out above, I affirm the Department’s decision that access to the Information in Issue may be refused on the ground that its disclosure would not be in the child’s best interests.
32. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

T Lake
Acting Assistant Information Commissioner

Date: 15 November 2023

⁴⁶ P64 and Queensland Police Service [2019] QICmr 56.

⁴⁷ FLK at [7].

⁴⁸ Email submissions dated 31 July 2023.

⁴⁹ Department’s decision dated 3 February 2023.

APPENDIX

Significant procedural steps

Date	Event
17 February 2023	OIC received the application for external review.
14 March 2023	OIC advised the parties that the application for review had been accepted and requested a copy of the Located Documents from the Department.
27 March 2023	OIC received a submission from the parent on behalf of the child applicant.
29 March 2023	OIC received the requested documents from the Department.
11 May 2023	OIC conveyed a preliminary view to the parent on behalf of the child applicant.
11 May 2023	OIC received a submission from the parent on behalf of the child applicant.
28 July 2023	OIC conveyed a further preliminary view to the parent on behalf of the child applicant.
31 July 2023	OIC received a submission from the parent on behalf of the child applicant.