



Decision and Reasons for Decision

Citation:	<i>Carmody and Department of Justice and Attorney-General; The Australian (Third Party)</i> [2016] QICmr 38 (19 September 2016)
Application Number:	312628
Applicant:	The Honourable Justice T F Carmody
Respondent:	Department of Justice and Attorney-General
Third Party:	The Australian
Decision Date:	19 September 2016
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - CONTRARY TO PUBLIC INTEREST INFORMATION - information concerning the processing by the respondent of previous applications for access made by the third party under the <i>Right to Information Act 2009</i> (Qld) - objection by the applicant to the respondent's decision to disclose information - personal information and privacy - whether disclosure could reasonably be expected to prejudice the fair treatment of an individual - whether disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information - whether disclosure could reasonably be expected to prejudice the effectiveness of a method or procedure for the conduct of tests, examinations or audits by an agency - whether disclosure of information would, on balance, be contrary to the public interest - whether access may be refused under sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The third party applied¹ to the Department of Justice and Attorney-General (**DJAG**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to:

¹ Application dated 12 June 2015.

All correspondence between Department of Justice and Attorney-General RTI Director Anne Edwards and Supreme Court judges, including Chief Justice Tim Carmody, in 2015 regarding previous RTI applications.

2. DJAG located 630 pages of responsive information. By decision dated 28 September 2015, it decided to:
 - give full access to 598 pages; and
 - give partial access to 32 pages.
3. During the processing of the application, DJAG had consulted the applicant about disclosure of a number of documents that concerned him. The applicant objected to disclosure of some information. After considering the applicant's objections to disclosure, DJAG decided that the information should be disclosed, but deferred giving the third party access to the information until the applicant had had the opportunity to exercise his review rights.²
4. By letter dated 26 October 2015, the applicant applied to the Office of the Information Commissioner (**OIC**) for external review of DJAG's decision to release information contrary to his objections. The applicant contended that disclosure of the relevant information would, on balance, be contrary to the public interest under section 47(3)(b) and section 49 of the RTI Act.
5. The public interest factors favouring nondisclosure relied upon by the applicant were that disclosure of the information in issue could reasonably be expected to:
 - prejudice the applicant's right to privacy; and/or
 - prejudice the fair treatment of individuals; and/or
 - prejudice an agency's ability to obtain confidential information; and/or
 - prejudice the effectiveness of a method or procedure for the conduct of tests, examinations or audits by an agency.
6. Having carefully considered the applicant's submissions in support of nondisclosure of the information in issue, I affirm DJAG's decision to disclose the information under the RTI Act. For reasons that I will explain below, I am satisfied that disclosure of the information in issue would not, on balance, be contrary to the public interest.

Background

7. A considerable number of access applications were made to DJAG in early 2015 (mostly by media organisations) seeking access to documents about various events involving judges of the Supreme Court of Queensland during the time the applicant held the position of Chief Justice.³
8. The third party made several access applications of this nature. It then applied to DJAG for access to information concerning the processing by DJAG of the earlier applications, namely, all correspondence between DJAG's RTI Director and Supreme Court judges. When processing the earlier applications, DJAG wrote to a number of judges, including the applicant, to consult with them about disclosure of information in issue that concerned them. It is this correspondence to which the third party seeks access in this review.

² Section 37(3)(d) of the RTI Act.

³ The applicant was appointed as Chief Justice on 8 July 2014 and resigned on 1 July 2015. He currently sits as a member of the Queensland Civil and Administrative Tribunal (**QCAT**).

9. DJAG consulted a number of judges about disclosure of the correspondence that concerned them, including the applicant. The applicant objected to disclosure of some information. The other judges raised no objections.
10. As noted above, DJAG decided to give the third party full access to 598 pages and partial access to 32 pages. It advised both the applicant and the third party of its decision in that regard in letters dated 28 September 2015. The third party did not seek review of DJAG's decision to refuse it access to information and such information is therefore not in issue in this review. Some information which DJAG decided to disclose was contrary to the objections of the applicant. Access was therefore deferred to allow the applicant to exercise his review rights. By letter dated 26 October 2015, the applicant applied to OIC for external review of DJAG's decision to disclose the following information:
 - parts of a four page letter dated 26 May 2015 from Justice Applegarth to Ms Edwards of DJAG.
11. DJAG had decided to refuse the third party access to parts of this letter but to disclose the remainder. The applicant seeks review of DJAG's decision to disclose the remainder.

Procedural steps

12. In conjunction with his application for external review, the applicant provided lengthy submissions in support of the nondisclosure of the information in issue.⁴ The applicant raised a number of grounds for review based upon what he contended were legal or factual errors (or a mixture of both) made by DJAG's decision-maker. These included that he had been 'unfairly taken by surprise' by DJAG's finding that release of the information in issue would assist the third party to understand the RTI consultation process.
13. I explained to the applicant⁵ that the Information Commissioner conducts a merits review of decisions made by government agencies in response to applications for access to information under the RTI Act, and that the complaints the applicant made about DJAG's decision-making process were not relevant to the merits review process. To the extent that procedural issues raised by the applicant may have caused him unfairness, I advised that the external review process would provide him with a fair and reasonable opportunity to make submissions in support of his case for nondisclosure of the information in issue.
14. After giving careful consideration to the applicant's submissions, I explained why I was of the preliminary view that the information in issue should be disclosed under the RTI Act.
15. By letter dated 15 January 2016, the applicant withdrew reliance upon one of the public interest factors favouring nondisclosure that he had raised earlier, but otherwise maintained his objection to disclosure.
16. By letter dated 28 January 2016, I wrote to the third party to ascertain whether it continued to pursue access to the information in issue and, if it did, to invite it to become a participant in the external review.⁶ The third party confirmed that it continued to seek access and that it wished to become a participant.⁷ I advised the third party⁸ that there

⁴ Letter dated 26 October 2015.

⁵ Letter dated 19 November 2015.

⁶ Sections 89(2) and (3) of the RTI Act.

⁷ Email dated 29 January 2016.

⁸ Letter dated 14 March 2016.

may be a delay experienced in finalising this review as priority would be given to finalising five other related external review applications involving the applicant that pre-dated this application. (Those other applications were finalised by decisions dated 27 June 2016.)

17. On 14 March 2016, I wrote to the applicant to advise him that the third party had been granted participant status in the review. I also explained that I had given careful consideration to the applicant's additional submissions, however, I remained of the preliminary view that the bulk of the information in issue should be released. The applicant provided a brief response,⁹ maintaining his objection to disclosure.
18. By letters dated 11 August 2016, I advised the applicant and DJAG that I would now proceed to prepare formal written reasons for decision, finalising this review.

Reviewable decision

19. The decision under review is DJAG's decision dated 28 September 2015.

Evidence considered

20. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and appendices). I have given careful consideration to all relevant issues raised by the applicant in his various submissions.

Information in issue

21. The information in issue (**Information in Issue**) consists of parts of a four page letter dated 26 May 2015 from Justice Applegarth to Ms Edwards of DJAG.
22. The Information in Issue was received by DJAG in connection with its processing of earlier access applications made to it by the third party. Ms Edwards, who was DJAG's decision-maker at the time, had consulted Justice Applegarth about disclosure of a letter that he had written to the applicant dated 25 March 2015. The Information in Issue is Justice Applegarth's response to that consultation by DJAG in which he sets out his views regarding the disclosure of his letter dated 25 March 2015.
23. DJAG consulted Justice Applegarth about disclosure of the Information in Issue during its processing of the third party's access application. He did not object to disclosure. I therefore did not consult him again as part of the external review process.

Issue for determination

24. As DJAG decided to disclose the Information in Issue to the third party under the RTI Act, the applicant has the onus of establishing that a decision not to disclose the Information in Issue is justified or that the Information Commissioner should give a decision adverse to the person who wishes to be given access to the document.¹⁰
25. The applicant submits that access should be refused to the Information in Issue as its disclosure would, on balance, be contrary to the public interest. Accordingly, that is the issue for determination in this review.

⁹ Letter dated 24 March 2016.

¹⁰ Section 87(2) of the RTI Act.

Findings

Would disclosure of the information in issue be, on balance, contrary to the public interest?

26. No, for the reasons that follow.

Relevant law

27. Parliament's clear intention is that the RTI Act be administered with a pro-disclosure bias.¹¹ The stated object of the RTI Act is to give a right of access to government information unless, on balance, it would be contrary to the public interest to do so.¹²

28. The grounds upon which access to information may be refused under the RTI Act are contained in section 47. One ground for refusal of access is where disclosure would, on balance, be contrary to the public interest.¹³ The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest¹⁴ and explains the steps that a decision-maker must take¹⁵ in deciding the public interest as follows:

- 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 disclosure of the information in issue would, on balance, be contrary to the public interest.

29. I have not taken into account any irrelevant factors in making my decision in this review.

The applicant's submissions – public interest factors favouring nondisclosure¹⁶

Personal information and privacy

30. The RTI Act recognises that:

- a factor favouring nondisclosure will arise where disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy;¹⁷ and
- disclosing information could reasonably be expected to cause a public interest harm if it would disclose personal information of a person, whether living or dead.¹⁸

¹¹ Section 44 of the RTI Act.

¹² Section 3(1) of the RTI Act.

¹³ Sections 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.

¹⁴ 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.

¹⁵ Section 49(3) of the RTI Act.

¹⁶ In his first set of submissions, the applicant raised the application of the public interest factors favouring nondisclosure contained in schedule 4, part 3, items 8 and 9 of the RTI Act (disclosure could reasonably be expected to impede the administration of justice generally; and for a person) but later withdrew his reliance on these factors in his letter dated 15 January 2016.

¹⁷ Schedule 4, part 3, item 3 of the RTI Act.

¹⁸ Schedule 4, part 4, section 6(1) of the RTI Act. *Personal information* is information or an opinion, 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: section 12 of the *Information Privacy Act 2009* (Qld).

31. I accept that some parts of the Information in Issue, which contain criticisms of the applicant, are properly to be characterised as the applicant's personal information. A public interest harm therefore arises by disclosure of that information. However, other parts of the Information in Issue discuss, for example, particular sections of the RTI Act and Justice Applegarth's views on their application to his letter dated 25 March 2015. I do not accept that this type of information is the applicant's personal information.
32. The concept of 'privacy' is not defined in either the RTI Act or the IP Act. It can, however, essentially be viewed as the right of an individual to preserve their personal sphere free from interference from others.¹⁹
33. A distinction is to be drawn between a person's personal and public spheres. In *Hardy and Department of Health*²⁰ a distinction was drawn between information in the personal sphere and '*routine work information – that is, information that is solely and wholly related to the routine day to day work duties of a public service officer*'.
34. I note that the personal information in issue was generated in the context of a workplace environment and all of it stems from work-related issues. However, I also acknowledge the sensitive nature of some information that comprises feelings and opinions about the applicant by work colleagues and the fact that some of it arose from circumstances that could not be considered to be routine.²¹ This gives rise to a significant public interest in protecting the privacy of the applicant.

Conclusion

35. For the reasons discussed, I give significant weight to the public interest in protecting the privacy interests of the applicant in respect of the personal information contained in the Information in Issue.

Prejudice the fair treatment of individuals

36. The RTI Act recognises that a public interest factor favouring nondisclosure in the public interest will arise where:
 - disclosure of information could reasonably be expected to²² prejudice the fair treatment of individuals; and
 - the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct.²³
37. The information contained in the last three paragraphs in issue on page 2 of the Information in Issue, and the third and fourth paragraph in issue on page 3, contains criticisms or negative opinions about aspects of the applicant's conduct. However, I consider that only two brief references contained in the last paragraph in issue on page 2 are capable of being characterised as an allegation of misconduct or improper conduct, rather than simply a criticism.

¹⁹ Paraphrasing 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 12 August 2008, at paragraph 1.56.

²⁰ [2011] QICmr 28 (27 June 2011) at [26].

²¹ See *Tol and The University of Queensland* [2015] QICmr 4 (18 February 2015) at [23] and [24].

²² See *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at paragraphs 62-63. The words 'could reasonably be expected to' call for a decision-maker to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible or merely speculative, and expectations that are reasonably based: that is, expectations for the occurrence of which real and substantial grounds exist.

²³ Schedule 4, part 3, item 6 of the RTI Act.

38. As regards the requirement that the allegation be unsubstantiated, I accept that the conduct in question was not investigated or sanctioned, and to that extent can be regarded as unsubstantiated. I also note the limited bases and circumstances upon which a judge's conduct may be investigated and sanctioned.²⁴
39. As regards the requirement that disclosure of this information could reasonably be expected to prejudice the fair treatment of the applicant, the applicant submitted:
- disclosure could reasonably be expected to prejudice his fair treatment by the media in the form of unbalanced or unfair reporting;
 - disclosure could reasonably be expected to affect adversely his reputation and public standing;²⁵ and
 - while there had been previous public ventilation of criticisms of the applicant's conduct and actions as Chief Justice, re-publication of unsubstantiated allegations would expose the applicant to further unfair treatment by the media.
40. The applicant submitted as follows in his letter dated 15 January 2016:

Significant time has elapsed since this dispute took place within the Supreme Court and was publicly ventilated by the media. I have since resigned from the Office of Chief Justice, for the purpose of protecting the institutional integrity of the Supreme Court and the welfare of my family, as a result of unsubstantiated allegations made by judicial officers and other members of the community. I expect his [sic] may have, at least in part, rehabilitated my reputation following the systematic and unfounded attacks that took place in 2015.

You are now proposing to re-ventilate an issue, which has already been subject to significant public debate and scrutiny and could not plausibly benefit from the publication of the [information in issue] which is likely to expose me to further unfair treatment on the basis of such unsubstantiated allegations.

It is manifestly clear that the re-publication of the unsubstantiated and derogatory allegations contained within the [information in issue] by an official source will expose me to further unfair treatment on the basis of such unsubstantiated allegations. Any alternative construction of the circumstances is naïve.

41. In his letter dated 24 March 2016, the applicant again raised the issue of the time that had passed since the relevant events took place in the Supreme Court:

...I fully understand the pro-disclosure bias of the Right to Information Act but it is hard to discern what the public interest could be in a media story that is long over. The Courts and the Judges are getting on with their job. All participants in last year's events have put the past behind them in an endeavour to move on and serve the public. ...

42. I do not regard the elapse of time since the dispute within the Supreme Court took effect as a factor that can be used to bolster the prejudicial effect the applicant contends for. The Information in Issue was prepared in May 2015 and the third party applied for access in June 2015. The time that has elapsed since then has been due to the processing of the application by DJAG; dealing with the subsequent application for

²⁴ The Crime and Corruption Commission has jurisdiction in respect of complaints of 'corrupt conduct' by judicial officers of a kind that, if established, would warrant the judicial officer's removal from office (see section 58 of the *Crime and Corruption Act 2001* (Qld)). Complaints alleging unfitness for office are dealt with under the *Constitution of Queensland 2001* (Qld). A judge may be removed from office by the Governor in Council, on an address of the Legislative Assembly, on the grounds of 'proved' misbehaviour justifying removal or incapacity to perform the duties of judicial office (see section 61(2)). These grounds can only be proved if the Legislative Assembly accepts a report of an investigatory tribunal concluding that the relevant ground is established on the balance of probabilities (see section 61(3) – (4)).

²⁵ Damage to reputation and public standing was recognised as prejudicial to an individual's fair treatment in *Troiani and Queensland Police Service* (Unreported, Queensland Information Commissioner, 21 August 2012) at [28] and [29].

external review; as well as the necessary delays as OIC finalised and issued decisions in five earlier, related reviews involving the applicant as a third party. While circumstances may well have changed within the Supreme Court in the intervening period, that elapse of time is through no fault of the third party and it would be wrong to use it to strengthen an argument favouring nondisclosure. In any event, I do not accept that the passing of time has diminished to any significant degree the public interest factors favouring disclosure, which I will discuss below.

43. The conduct of the applicant which is the subject of the allegation in question has been disclosed publicly previously, as has the disapproval of that conduct by other judges.²⁶ When I raised this with the applicant during the course of the review, in the context of questioning how disclosure of that information in this review could reasonably be expected to adversely affect his fair treatment, the applicant submitted that such an argument was *'odious and misconceived'*. *'It is tantamount to claiming that because my reputation or public standing have already been injuriously affected by unsubstantiated allegations, the re-publication of such unsubstantiated allegations ... could do no further harm'*.²⁷
44. While the applicant did not provide specific examples of where he considered the media had treated him unfairly in the past, I acknowledge that the apparent rift that occurred in the Supreme Court while the applicant held the office of Chief Justice, and the public criticisms made of the applicant's conduct by other judges during that period, have been reported upon widely, with media articles sometimes reflecting unfavourably on the applicant.²⁸ However, I cannot disregard the fact that the conduct in question and the criticisms of it by other judges are already publicly known. This necessarily affects my consideration of whether disclosure of that information in this review could reasonably be expected to prejudice the fair treatment of the applicant.
45. Having regard to the brief nature of the information in question, together with the fact that it has been disclosed publicly previously, I am not satisfied that there are reasonable grounds (as opposed to mere speculation) for expecting that its disclosure could prejudice the applicant's fair treatment.
46. Even if I accepted that there were reasonable grounds for expecting that disclosure of the comments in question could result in prejudice to the applicant's fair treatment, I would afford this factor low weight in balancing the public interest, in recognition of the fact that the conduct in question, and the disapproval of that conduct by other judges, is already publicly known. Despite the applicant's argument to the contrary, the fact that the public is already aware of the incident in question and that others disapproved of it necessarily lessens the potential detrimental impact, in terms of damage to the applicant's standing or reputation, of any further reporting and any adverse reflection on the applicant's conduct.

Conclusion

47. For the reasons discussed, I find that the public interest factor favouring nondisclosure contained in schedule 4, part 3, item 6 of the RTI Act - disclosure could reasonably be expected to prejudice the fair treatment of an individual - does not arise for consideration in respect of the Information in Issue. Even if I accepted that it applies

²⁶ See, for example, the Valedictory Speech delivered by Justice Alan Wilson on 26 March 2015 upon his retirement from the Supreme Court bench (Supreme Court Library of Queensland).

²⁷ Applicant's letter dated 15 January 2016.

²⁸ See the discussion at paragraphs 9-11 of my decision in *Seven Network (Operations) Limited and Department of Justice and Attorney-General; Carmody (Third Party)* [2016] QICmr 22 (27 June 2016) (currently on appeal to QCAT).

to two references contained in the last paragraph in issue on page 2 of the Information in Issue, I would afford it low weight in balancing the public interest, for the reasons explained.

Prejudice an agency's ability to obtain confidential information; affecting confidential communications

48. The RTI Act provides that:

- a factor favouring nondisclosure in the public interest arises where disclosure of the information in issue could reasonably be expected to prejudice an agency's ability to obtain confidential information;²⁹
- a factor favouring nondisclosure in the public interest because of a public interest harm in disclosure arises where the information in issue is of a confidential nature and was communicated in confidence; and disclosure could reasonably be expected to prejudice the future supply of information of this type.³⁰

49. The applicant argued that the third party consultation process provided for under the RTI Act³¹ is a confidential process and that disclosure of a third party's response to consultation could reasonably be expected to prejudice an agency's ability to obtain responses from third parties in the future. In his submissions dated 15 January 2016, the applicant stated:

I am of the view that consultations for the determination of an access application may be confidential. I am further of the view that allowing process file applications to obtain information, believed to have been given in confidence and for the limited purpose of facilitating the determination of an access application, would have the effect of prejudicing future cooperation in consultation processes for access applications.

50. I do not accept that the third party consultation process provided for under the RTI Act is necessarily confidential, nor that it is reasonable for third parties to have a blanket expectation of confidentiality in respect of information they provide in response to a consultation request. While the identities of consulted third parties may sometimes not be disclosed where they have elected not to participate in a review, it is usual for decisions to disclose that third parties have been consulted about the disclosure of any documents in issue that concern them, and to state whether or not they object to disclosure. Where the information or submissions provided by a third party in the consultation process are taken into account by the decision-maker in making their decision, the requirements of procedural fairness will ordinarily require the decision to disclose the relevant information.

51. Given those obligations on a decision-maker, it would be inappropriate for them to give third parties a blanket assurance that the information they provide or the submissions they make when consulted about disclosure of documents will be treated in confidence. While the particular circumstances of a review may require the objections or submissions of a consulted third party be treated sensitively, the obligation on a decision-maker to observe the requirements of procedural fairness in giving their decision will nevertheless require all relevant information upon which they have relied to be disclosed to any party adversely affected by their decision.

²⁹ Schedule 4, part 3, item 16 of the RTI Act.

³⁰ Schedule 4, part 4, section 8 of the RTI Act.

³¹ Section 37 of the RTI Act.

52. In any event, the issue of confidentiality does not arise in this case as Justice Applegarth has not submitted that the information he provided to DJAG during the consultation process was given in confidence. He does not object to its disclosure under the RTI Act.
53. There is no evidence before me to suggest that it is reasonable to expect that a significant number of persons would refuse to provide a response to a consultation request because their response may be disclosed to other participants. If third parties wish to object to the disclosure of information, they must provide reasons for their objection if they wish the decision-maker to take that information into consideration.
54. I acknowledge that some information provided by Justice Applegarth is the applicant's personal information and is sensitive in nature. As noted above, I give significant weight to the public interest in protecting the privacy interests of the applicant in respect of that information.

Conclusion

55. For the reasons explained, I find that this public interest factor favouring nondisclosure does not arise for consideration in balancing the public interest.

Prejudice the effectiveness of a method or procedure for the conduct of tests, examinations or audits by an agency

56. The RTI Act provides that a factor favouring nondisclosure in the public interest because of a public interest harm in disclosure arises where disclosure of information could reasonably be expected to prejudice achieving the objects of a test, examination or audit conducted by an agency.³²
57. The applicant argued that disclosure of the Information in Issue *'might prejudice the effectiveness of the method or procedure adopted by the Right to Information and Privacy Unit to conduct an examination of material the subject of an access application.'*³³
58. I do not accept that the third party consultation process provided for under the RTI Act answers the description of 'a method or procedure for the conduct of tests, examinations or audits' in the sense in which those functions are usually carried out by an agency, and giving those words their ordinary and natural meaning.
59. The third party consultation process clearly does not involve a test or audit. The applicant relies upon 'an examination'. The ordinary and natural meaning of 'examination' is *'careful scrutiny'; 'detailed inspection or study.'*³⁴ The consultation process involves an agency identifying documents the disclosure of which may reasonably be expected to be of concern to a third party, and consulting with the third party about whether or not they object to disclosure. I do not accept that that process meets the description of a method or procedure for conducting an examination or careful scrutiny of a document.
60. Even if the third party consultation process could be regarded as a method or procedure for the examination of a document, I do not accept that its effectiveness could reasonably be expected to be prejudiced by disclosure of the Information in

³² Schedule 4, part 4, section 3(b) of the RTI Act.

³³ Letter dated 26 October 2015.

³⁴ Oxford dictionaries <www.oxforddictionaries.com>

Issue. As noted, Justice Applegarth does not object to disclosure. I do not accept that any prejudice to the consultation process would occur where the response to consultation is disclosed with the consent of the consulted party. Moreover, in general terms, there is no evidence before me to suggest that it is reasonable to expect that a significant number of persons would refuse to provide a response to a consultation request because their response may be disclosed to other participants.

Conclusion

61. For the reasons explained, I find that this public interest factor favouring nondisclosure does not arise for consideration in balancing the public interest.

Public interest factors favouring disclosure

62. I consider that the following public interest factors favouring disclosure arise for consideration in balancing the public interest:

- Disclosure could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability;³⁵
- Disclosure could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest;³⁶
- Disclosure could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community;³⁷
- Disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;³⁸ and
- Disclosure could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.³⁹

63. I find that disclosure of the Information in Issue could reasonably be expected to:

- promote discussion about the effective functioning of the Supreme Court which is an important public institution, funded from the public purse, and that is accountable to the public;
- provide relevant background information and promote discussion about the conflict that occurred within the Supreme Court while the applicant was Chief Justice and its impact upon the Court;
- promote discussion about the appropriateness or otherwise of the actions of the applicant and other judges, and allow or assist inquiry into possible deficiencies in that conduct;
- promote the government's accountability in terms of the manner in which it processes RTI applications; the decisions it makes; and the manner in which it undertakes third party consultation processes;
- contribute to informed (both positive and negative) debate about important public affairs concerning the operations of the Supreme Court; the conduct of its officers; the responsibilities and powers of the Chief Justice; and the manner in which those responsibilities and powers were discharged; and

³⁵ Schedule 4, part 2, item 1 of the RTI Act.

³⁶ Schedule 4, part 2, item 2 of the RTI Act.

³⁷ Schedule 4, part 2, item 3 of the RTI Act.

³⁸ Schedule 4, part 2, item 5 of the RTI Act.

³⁹ Schedule 4, part 2, item 11 of the RTI Act.

- reveal the reason for government decisions and any background or contextual information that informed the decision, including the decisions made by DJAG in response to RTI access applications.

64. I acknowledge the importance of the Supreme Court as a public institution and that it is crucial that the public has confidence in the Court's effective and efficient functioning. The public interest in scrutinising the administration of the Supreme Court, and the conduct of its judicial officers, is necessarily high. I also acknowledge the importance of protecting the ability of members of the Court to discuss openly, with their fellow judges, their views (and disagreements) about the proper administration and functioning of the Court without these conversations and discussions being made public as a matter of course. However, in this case, there is already a significant amount of information in the public domain about the conflict that existed in the Court and important issues that affected the administration of the Court. I consider that disclosure of the Information in Issue would provide a more complete picture of the relevant events that transpired and the conduct of the relevant judges, as well as giving context to the information that has already been disclosed. It would also reveal background and contextual information that informed DJAG's decisions in response to various RTI applications, and enhance DJAG's accountability in that regard.

65. In his submission dated 15 January 2016, the applicant argued:

The utilisation of the [RTI Act] as a vehicle for disseminating self-serving, misleading and potentially defamatory information or information which is inherently unreliable and incredible, does not contribute to, but detracts from, informed public debate regarding my administration of the Court. It does not discharge any of the public interest factors nominated in your [preliminary view letter]. Therefore, the [Information in Issue], at least to the extent that they contain the abovementioned imputations, should not be released.

66. I have noted above that it is clear that the applicant does not agree with some statements or opinions contained in the Information in Issue and has a different version of relevant events. However, the fact that a person disagrees with information is not, of itself, a reason to refuse access to that information. Nor do I accept that the Information in Issue is 'inherently unreliable or incredible', as argued by the applicant. It comprises the response given by a judge when consulted by DJAG about disclosure under the RTI Act of information that concerned him. There is no independent evidence before me to suggest that the Information in Issue is in some way inaccurate or unreliable such as to give rise to a public interest factor favouring nondisclosure.

67. In his letter dated 24 March 2016, the applicant submitted:

Probably the Schedule 4 test in Part 2 captures the essence of what is required - disclosure of the information could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest. Documents relating to Judge's [sic] personal disagreements that do not affect any litigant could not be characterised as contributing to an important debate or matters of serious interest, especially given the events are nearly a year old. They simply relate to matters of prurient interest to journalists to create a story. My concern is that in a period where all relevant players have moved on, that [sic] disclosure of personal inter-Judge communications may have a substantial adverse effect on the Courts and their staff. They have been put through enough media scrutiny of their workplace. ...

68. I reiterate my view that the passing of time (which has occurred through no fault of the third party) has not diminished to any significant degree the public interest factors favouring disclosure identified above. I acknowledge that the applicant resigned as

Chief Justice in July 2015, but I do not accept that the fact the applicant has endeavoured to move on and put the past behind him lessens the public interest in disclosing contextual information that would provide a more complete picture of the events that transpired while he was Chief Justice; that impacted upon the administrative functioning of the Court; and that attracted significant public attention, debate and comment. The public interest in scrutinising the administration of the Court and the conduct of its judicial officers remains high, as does the public interest in enhancing the accountability of DJAG for the decisions it makes in response to RTI applications and for the way in which it processes such applications, including undertaking third party consultations.

69. I reject the applicant's contention that disclosure of the Information in Issue could reasonably be expected to have a substantial adverse effect on Court staff or impact upon their current working environment. I am unable to identify how disclosure could reasonably be expected to result in an unfair level of scrutiny of the Supreme Court as a workplace.

Conclusion

70. For the reasons explained, I afford significant weight to each of the public interest factors identified above that favour disclosure of the Information in Issue.

Balancing the public interest

71. For the reasons previously expounded, as regards public interest factors favouring nondisclosure, I give significant weight to the public interest in protecting the privacy interests of the applicant in respect of the personal information contained in the Information in Issue.
72. I am not satisfied that any of the other public interest factors favouring nondisclosure relied upon by the applicant arise for consideration. In respect of the information contained in the last paragraph in issue on page 2 of the Information in Issue, if I were to accept that its disclosure could reasonably be expected to prejudice the fair treatment of an individual pursuant to schedule 4, part 3, item 6 of the RTI Act, I would afford this factor favouring nondisclosure low weight in the public interest balancing test, taking account of information that is already in the public domain.
73. As regards the five public interest factors I have identified as favouring disclosure, I afford each of them significant weight.
74. Having weighed these factors, I find that the public interest weighs in favour of disclosure of the Information in Issue. I am satisfied that disclosure of the Information in Issue would not, on balance, be contrary to the public interest. Access to the Information in Issue therefore cannot be refused under sections 47(3)(b) and 49 of the RTI Act.

DECISION

75. I affirm DJAG's decision to grant access to the Information in Issue. I find that disclosure of the Information in Issue would not, on balance, be contrary to the public interest.
76. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Clare Smith
Right to Information Commissioner

Date: 19 September 2016

Appendix 1
 External Review 312628 – *Carmody and Department of Justice and Attorney-General;
 The Australian (Third Party)*
 Significant Procedural Steps

Date	Event
12 June 2015	Department of Justice and Attorney-General (DJAG) received the access application.
28 September 2015	DJAG issued its decisions to the applicant and the third party in response to the access application.
26 October 2015	Office of the Information Commissioner (OIC) received the application for external review of DJAG's decision.
26 October 2015	OIC received initial submissions from the applicant in favour of nondisclosure of the information in issue. OIC wrote to DJAG and requested that relevant procedural documents be provided.
28 October 2015	OIC received the requested procedural documents from DJAG.
19 November 2015	OIC informed the applicant that the application had been accepted for external review. OIC conveyed a written preliminary view to the applicant and requested the applicant's response by 15 January 2016.
15 January 2016	OIC received further submissions from the applicant.
28 January 2016	OIC wrote to the third party to invite it to apply to become a participant in the external review.
29 January 2016	The third party confirmed it wished to participate in the review.
14 March 2016	OIC wrote to the third party to advise that there may be delays experienced in finalising this review as priority would be given to finalising five other related reviews that pre-dated this review. OIC wrote to the applicant to convey a preliminary view in response to the applicant's additional submissions.
24 March 2016	OIC received the applicant's response in which he confirmed that he continued to object to disclosure.
11 August 2016	OIC wrote to the applicant and DJAG to advise them that OIC would now proceed to prepare written reasons for decision.