



## Decision and Reasons for Decision

---

**Citation:** *D56CNT and Central Queensland University [2017] QICmr 3*  
(1 February 2018)

**Application Number:** 313474

**Applicant:** *D56CNT*

**Respondent:** Central Queensland University

**Decision Date:** 1 February 2018

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - applicant sought access to documents about him - whether information attracts legal professional privilege and is exempt under schedule 3, section 7 of the *Right to Information Act 2009* (Qld) - section 67(1) of the *Information Privacy Act 2009* (Qld) and section 47(3)(a) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - mobile phone numbers and personal information of university staff members - whether disclosure would, on balance, be contrary to the public interest - section 67(1) of the *Information Privacy Act 2009* (Qld) and section 47(3)(b) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - GIVING ACCESS - DELETION OF IRRELEVANT INFORMATION - information appearing in email correspondence about other individuals and unrelated subject matter - whether information is irrelevant to the terms of the access application - whether section 88 of the *Information Privacy Act 2009* (Qld) applies

## REASONS FOR DECISION

### Summary

1. The applicant applied<sup>1</sup> to Central Queensland University (**CQU**) under the *Information Privacy Act 2009* (**IP Act**) for access to information about himself. Earlier on that date, the applicant had received written notification from CQU that his enrolment had been cancelled due to his recent criminal conviction.<sup>2</sup>

---

<sup>1</sup> Application dated 30 June 2017.

<sup>2</sup> A copy of that letter was located by CQU in processing the access application.

2. CQU located 128 pages responding to the access application and decided to release the majority of the information to the applicant, but refused access to four full pages on the basis they comprise exempt information, and six part pages on the basis that their disclosure would, on balance, be contrary to the public interest.<sup>3</sup> CQU also decided to exclude a small amount of information on two part pages on the basis that it was irrelevant to the terms of the access application.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of CQU's decision.<sup>4</sup> The applicant submitted that full access to all documents should be granted as they would reveal the evidence relied upon by CQU regarding the cancellation of his enrolment, demonstrate CQU's treatment of the applicant and enhance transparency in the decision-making process followed by CQU.<sup>5</sup>
4. For the reasons set out below, I affirm CQU's decision.

### Background

5. Significant procedural steps taken by OIC in conducting the external review are set out in the Appendix to these reasons.

### Reviewable decision

6. The decision under review is CQU's decision dated 17 August 2017.

### Evidence considered

7. Evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).

### Information in issue

8. The information in issue falls into the following four categories:
  - email correspondence involving the University Solicitor (**Legal Emails**)<sup>6</sup>
  - mobile phone numbers of CQU employees (**Mobile Numbers**)<sup>7</sup>
  - personal information of CQU employees (**Employee Personal Information**)<sup>8</sup>; and
  - information pertaining to unrelated subject matter (**Irrelevant Information**)<sup>9</sup>.

### Issues for determination

9. The issues for determination are whether CQU was entitled to:

---

<sup>3</sup> Decision dated 17 August 2017. In processing the access application, CQU consulted with two third parties and decided to disclose some information contrary to their objections—those parties then applied to OIC for external review. The decision *78FGQI and 3KTI5K and Central Queensland University; D56CNT (Third Party)* [2018] QICmr 4 (1 February 2018) concerns the pages which were the subject of those third parties' objections, which have since been partially released to the access applicant. While I have found in favour of those third parties in the related reviews, the applicant is listed as a third party in the final decision as he maintains that he is entitled to access all redacted information.

<sup>4</sup> Application dated 28 August 2017.

<sup>5</sup> Applicant's letter to CQU dated 26 August 2017.

<sup>6</sup> Pages 35-37 and 47.

<sup>7</sup> Pages 29 and 80.

<sup>8</sup> Pages 34, 58, 72-73 and 80. Pages 29, 34 and 79 are the subject of the related third party reviews. Pursuant to the related decision, *78FGQI and 3KTI5K and Central Queensland University; D56CNT (Third Party)* [2018] QICmr 4 (1 February 2018), I have found that access to further information in those pages may be refused.

<sup>9</sup> Pages 61 and 62.

- (i) refuse access to the Legal Emails on the basis that they attract legal professional privilege and therefore comprise exempt information
- (ii) refuse access to the Mobile Numbers and Employee Personal Information on the basis that disclosure of this information would, on balance, be contrary to the public interest; and
- (iii) delete the Irrelevant Information on the basis that it is unrelated to the terms of the access application.

## Findings

### (i) Exempt Information

#### Relevant law

10. 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.<sup>10</sup> However, this right is subject to limitations, including grounds for refusal of access.<sup>11</sup> Access may be refused to documents to the extent that they comprise exempt information.<sup>12</sup>
11. Information will be exempt from disclosure if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.<sup>13</sup> This exemption reflects the requirements for establishing legal professional privilege at common law. Confidential communications between a lawyer and client will be privileged where the communications are for the dominant purpose of seeking or giving legal advice or use in existing or anticipated legal proceedings.
12. The concept of legal professional privilege has been summarised as follows:<sup>14</sup>

*It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provisions of legal services, including representation in legal proceedings.*
13. In the context of the IP Act and RTI Act, the Information Commissioner has consistently found that communications exchanged between the agency and its internal legal advisor can attract legal professional privilege.<sup>15</sup>

#### Analysis

14. The Legal Emails comprise correspondence between CQU staff and the University Solicitor regarding the applicant and issues pertaining to his enrolment. The IP Act limits the extent to which I can describe the particular content of those pages.<sup>16</sup> However, having carefully considered the email correspondence and taking into account the particular nature of the communications, I am satisfied that:

---

<sup>10</sup> Section 40 of the IP Act.

<sup>11</sup> 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 *Right to Information Act 2009* (Qld) (**RTI Act**) were the document to be the subject of an access application under the RTI Act.

<sup>12</sup> Sections 47(3)(a) and 48 of the RTI Act.

<sup>13</sup> Sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act.

<sup>14</sup> *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552.

<sup>15</sup> See *F60XCX and Department of Natural Resources and Mines* [2017] QICmr 19 (9 June 2017) at [24]-[32] and *Jones and Queensland Police Service* [2015] QICmr 15 (26 June 2015) at [33]-[35]. See also *Waterford v Commonwealth* (1986) 163 CLR 54 per Mason and Wilson JJ at 56.

<sup>16</sup> Section 118(2) of the IP Act.

- the Legal Emails were created for the dominant purpose of CQU, as the client, obtaining/receiving legal advice from its legal advisor, the University Solicitor
  - the solicitor who provided the advice was acting independently and is appropriately qualified;<sup>17</sup> and
  - there is no evidence to indicate that CQU has waived privilege over the Legal Emails or that the communications are not confidential.
15. The applicant submits<sup>18</sup> that, in cancelling his enrolment, CQU did not follow appropriate procedures. In view of this submission, I have considered whether the improper purpose exception to legal professional privilege may apply to the Legal Emails, in the circumstances of this case.
16. In *Secher and James Cook University*<sup>19</sup> the Assistant Information Commissioner explained the operation of this exception as follows:

*Legal professional privilege will not apply to legal communications made in the furtherance of a fraud or crime. This exception operates to displace legal professional privilege where evidence exists that the relevant client has embarked on a deliberative course of action knowing that the proposed actions were contrary to law, and has made the relevant communications in furtherance of that illegal or improper purpose.*

*The person alleging that privilege has been displaced by reason of an alleged illegal or improper purpose must show that it is made out in the current circumstances. In establishing improper purpose, the standard of proof is high. The High Court has observed that it "is a serious thing to override legal professional privilege where it would otherwise be applicable" and as a result "vague or generalised contentions of crimes or improper purposes will not suffice."*

17. I have carefully considered the applicant's submissions, requirements of the improper purpose exception and the content of the Legal Emails. Based on the information available to OIC, there is no objective evidence to indicate that the Legal Emails were made in furtherance of a fraud, crime or improper purpose. I am therefore satisfied that the exception does not preclude the application of legal professional privilege in the circumstances of this case.
18. The applicant has also raised public interest arguments which he considers favour disclosure of the Legal Emails. The exemptions in schedule 3 of the RTI Act set out the types of information which Parliament has already decided, would, on balance, be contrary to the public interest to disclose. Once the requirements of an exemption have been established, as I have found in this case, the RTI Act does not give me any capacity to examine public interest factors, even where they may appear relevant to the circumstances of a particular case.<sup>20</sup> Therefore, I have not considered the applicant's public interest submissions in the context of the Legal Emails.

## **Conclusion**

19. For the reasons set out above, I am satisfied that access to the Legal Emails may be refused under the IP Act and RTI Act as they comprise exempt information on the basis of legal professional privilege.<sup>21</sup>

---

<sup>17</sup> A lawyer employed by a government agency or an 'in-house' lawyer – such as a salaried officer employed as a legal adviser to the agency – may claim privilege on behalf of his or her employer as the client – *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 530-531.

<sup>18</sup> Submissions to OIC dated 26 October 2017.

<sup>19</sup> (Unreported, Queensland Information Commissioner, 6 June 2012) at [20] and [21].

<sup>20</sup> Under section 118(2) of the IP Act, the Information Commissioner does not have the power to direct that access to an exempt document be granted.

<sup>21</sup> Sections 47(3)(a), 48 and schedule 3, section 7 of the RTI Act.

## (ii) Public interest

### Relevant law

20. The RTI Act also provides that an agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.<sup>22</sup> The RTI Act is however, premised on a pro-disclosure bias which requires access to be given unless it would be contrary to the public interest to do so.<sup>23</sup>
21. 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.
22. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest and explains the steps a decision-maker must take<sup>24</sup> in deciding the public interest as follows:
  - identify any irrelevant factors and disregard them<sup>25</sup>
  - 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.
23. Schedule 4 of the RTI Act lists various factors favouring disclosure and nondisclosure.<sup>26</sup> The RTI Act specifically recognises that disclosure of another individual's '*personal information*' is a factor favouring nondisclosure<sup>27</sup> which could reasonably be expected to lead to a public interest harm.<sup>28</sup> The term '*personal information*' is defined in section 12 of the IP Act as follows:

*information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*

### Analysis

24. In addition to the Mobile Numbers, the refused information in this category comprises Employee Personal Information, which includes details of leave arrangements, personal opinions and information that is not, in my view, in the nature of routine personal work information.<sup>29</sup>

---

<sup>22</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>23</sup> Section 44 of the RTI Act.

<sup>24</sup> Section 49(3) of the RTI Act.

<sup>25</sup> No irrelevant factors arise in the circumstances and I have not taken any into account.

<sup>26</sup> However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant in a particular case.

<sup>27</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>28</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>29</sup> This concept is explained in the OIC Guideline located at <https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/processing-applications/routine-personal-work-information-of-public-sector-employees>; and in previous decisions of the Information Commissioner in *Hardy and Department of Health* (Unreported, Queensland Information Commissioner, 27 June 2011) at [26], *Australian Broadcasting Corporation and Psychologists Board of Australia* (Unreported, Queensland Information Commissioner, 3 January 2012) at [20]-[21]; *Kiepe and the University of Queensland* (Unreported, Queensland Information Commissioner, 1 August 2012) at [19]-[20] (**Kiepe**) and *8A3BPQ and Queensland Police Service* [2014] QICmr 42 (30 October 2014) at [37]-[40].

25. The applicant submits the public interest in enhancing CQU's transparency in relation to the process it followed in cancelling his enrolment should be afforded very high weight and that this outweighs any need for protecting the privacy of third parties.<sup>30</sup>
26. I acknowledge that disclosure of the Mobile Numbers and Employee Personal Information would to some extent, further enhance the accountability and transparency of CQU.<sup>31</sup> However, disclosure would only serve to reveal information of a limited nature. I am satisfied that the Mobile Numbers and Employee Personal Information would not reveal any background information to the process followed by CQU in making its decision to cancel the applicant's enrolment, nor does the information reveal any factors/considerations taken into account by CQU in its decision making process. I therefore, afford very low weight to these factors in favour disclosure.
27. By virtue of it having been located in response to the terms of his access application, the information appears in documents which concern the applicant and his enrolment at CQU. This gives rise to a factor favouring disclosure, to the extent that the documents comprise his personal information.<sup>32</sup> However, the Mobile Numbers and the Employee Personal Information do not comprise the applicant's personal information, other than a very small amount of mutual personal information appearing on one page which cannot be separated from the personal information of others. Given the nature of the information, I afford very low weight to this factor favouring disclosure.
28. In view of the arguments put forward by the applicant in favour of disclosure, I have also considered whether disclosure of the Mobile Numbers and Employee Personal Information could reasonably be expected to contribute to the administration of justice for a person, including procedural fairness.<sup>33</sup> Given the particular nature of the information, I do not consider its disclosure would discharge these factors to any degree. Accordingly, I afford these factors no weight in favour of disclosure.
29. I am satisfied that all of the information in this category comprises the personal information of CQU employees, and therefore, the public interest harm factor applies in favour of nondisclosure.<sup>34</sup> I acknowledge the information appears in the context of the other individuals' employment sphere, as opposed to medical records and family details which are generally considered part of an individual's more sensitive, personal sphere. However, the information is not, in my view, in the nature of routine personal work information as it does not pertain to a University employee's day to day performance of their routine work duties. Information about an employee's leave arrangements and their personal opinions on sensitive workplace issues would in my view, cause a moderate level of public interest harm if disclosed. Similarly, disclosure of an employee's mobile number would allow that individual to be contacted outside of business hours, which in my view, would lead to a similar level of public interest harm.<sup>35</sup>

---

<sup>30</sup> Applicant submissions to OIC dated 26 October 2017.

<sup>31</sup> Schedule 4, part 2, items 1 and 11 of the RTI Act.

<sup>32</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>33</sup> Schedule 4, part 2, items 16 and 17 of the RTI Act.

<sup>34</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>35</sup> The Information Commissioner has consistently found that disclosure of mobile telephone numbers of public service officers, would, on balance, be contrary to the public interest – see *Kiepe* at [20] and *Smith and Sunshine Coast Regional Council; Diamond Energy Pty Ltd (Third Party)* [2017] QICmr 42 (5 September 2017) (**Smith**) at [14]-[17].

30. I have also considered whether disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy.<sup>36</sup> I am satisfied that releasing mobile telephone numbers and personal information relating to CQU staff is an intrusion into an individual's private sphere.<sup>37</sup> I do acknowledge however, that it appears in an employment context and does not fall at the highest end of the spectrum in terms of personal privacy. As such, I afford this factor moderate weight in favour of nondisclosure.

### **Conclusion**

31. I am satisfied that the combined weight of the nondisclosure factors is sufficient to outweigh that of the disclosure factors that apply in this case. Accordingly, I find that access may be refused to the Mobile Numbers and Employee Personal Information under section 47(3)(b) of the RTI Act, on the basis that disclosure would, on balance, be contrary to the public interest.

### **(iii) Irrelevant Information**

32. Section 88 of the IP Act provides an agency may give access to a document subject to the deletion of information it considers is not relevant to the terms of an application. This is not a ground for refusal of access, but a mechanism to allow irrelevant information to be deleted from documents which are identified for release to an applicant.<sup>38</sup> In deciding whether information is irrelevant, it is necessary to consider whether the information has any bearing upon, or is pertinent to, the terms of the application.<sup>39</sup>
33. The irrelevant information is duplicated on two part pages<sup>40</sup> and relates to other staff and/or issues which I am satisfied are unrelated to the applicant, and the terms of his access application.
34. I have carefully considered the terms of the access application, the content of the irrelevant information and the applicant's submissions. I am satisfied that the information has no bearing on, and is not pertinent to, the terms of the applicant's request. Accordingly, I find that information contained on two part pages may be excluded from consideration under section 88 of the IP Act as it is irrelevant.

### **DECISION**

35. For the reasons set out above, I affirm CQU's decision, as follows:
- refuse access to four pages under section 47(3)(a) of the RTI Act on the basis that the information is exempt under schedule 3, section 7 of the RTI Act
  - refuse access to parts of six pages under section 47(3)(b) of the RTI Act on the basis that disclosure would, on balance, be contrary to the public interest; and
  - exclude irrelevant information from two pages under section 88 of the IP Act.

<sup>36</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>37</sup> See *Kiepe* at [19]-[21], *Smith and Sunshine Coast Regional Council; Diamond Energy Pty Ltd (Third Party)* [2017] QICmr 42 (5 September 2017) at [16]-[17] and *Azzopardi and Department of Environment and Heritage Protection* [2017] QICmr 48 (19 September 2017) at [13]-[16].

<sup>38</sup> Under section 88(3) of the IP Act, the agency may give access to the document if it considers from the terms of the application or after consultation with the applicant, that the applicant would accept the copy and it is reasonably practicable to give access to the copy.

<sup>39</sup> *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) at [52]. This decision was made in the context of section 27(3) of the repealed *Freedom of Information Act 1992* (Qld) which is equivalent to section 88 of the IP Act. See also *Kiepe* at [11].

<sup>40</sup> Documents 61 and 62.

36. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

---

K Shepherd  
**Assistant Information Commissioner**

**Date: 1 February 2018**



**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
28 August 2017	OIC received the external review application.
29 August 2017	OIC notified CQU that the external review application had been received and requested various procedural documents from CQU. CQU provided the requested documents and further submissions to OIC.
1 September 2017	OIC notified CQU and the applicant that the external review application had been accepted and requested further documents from CQU.
8 September 2017	OIC received the requested documents from CQU.
22 September 2017	OIC provided CQU with an update on the status of the review and received submissions in response.
26 October 2017	OIC conveyed a preliminary view to the applicant and requested submissions in response.
27 October 2017	OIC provided CQU with an update on the status of the review.
29 November 2017	OIC provided the applicant with an update on the status of the review.
19 December 2017	OIC requested further submissions from the applicant.
27 December 2017	OIC received further submissions from the applicant.
16 January 2018	OIC provided the applicant with an update on the status of the review.