



Decision and Reasons for Decision

Citation:	<i>G66 and Department of Justice and Attorney-General [2019] QICmr 35 (29 August 2019)</i>
Application Number:	314460
Applicant:	G66
Respondent:	Department of Justice and Attorney-General
Decision Date:	29 August 2019
Catchwords:	ADMINISTRATIVE LAW – RIGHT TO INFORMATION REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST INFORMATION – job recruitment information concerning an appointment to a senior public service role – whether disclosure would, on balance, be contrary to the public interest – section 47(3)(b) and section 49 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to certain job selection information concerning an appointment made by the Department of Justice and Attorney-General (**DJAG**) to a Senior Officer position. The information sought included the Selection Report, the written application submitted by the successful candidate, as well as referee reports and interview questions and activities.
2. DJAG located 260 responsive pages. It decided² to give full access to 41 pages; partial access to 99 pages; and to refuse access to 120 pages on the grounds that disclosure of the information in question would, on balance, be contrary to the public interest.
3. The applicant applied³ to the Office of the Information Commissioner (**OIC**) for external review of DJAG's decision.
4. Additional information was released to the applicant during the external review process. For the reasons set out below, I affirm DJAG's decision to refuse access to the information remaining in issue on the ground that its disclosure would, on balance, be contrary to the public interest.

¹ Application dated 3 January 2019.

² Decision dated 8 February 2019.

³ Application dated 14 February 2019.

Reviewable decision

5. The decision under review is DJAG's decision dated 8 February 2019.

Evidence considered

6. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and the appendix).

Information in issue

7. The information in issue comprises documents and parts of documents concerned with the recruitment by DJAG of a Senior Officer position, including referee reports, information relating to unsuccessful applicants, selection panel notes, as well as parts of the Selection Report (**Information in Issue**).

Issue for determination

8. The issue for determination is whether disclosure of the Information in Issue would, on balance, be contrary to the public interest.

Relevant law

9. A ground for refusing access is where disclosure would, on balance, be contrary to the public interest.⁴ 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.⁵
10. The RTI Act lists factors which may be relevant to deciding the balance of the public interest⁶ and sets out the following steps⁷ to decide where the public interest lies in relation to disclosure of information:
- 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 would, on balance, be contrary to the public interest.
11. No irrelevant factors, including those in schedule 4, part 1 of the RTI Act, arise for consideration in this case and I have taken none into account.

Factors favouring disclosure

12. In its decision, DJAG recognised the following factor favouring disclosure of the Information in Issue:

⁴ Sections 47(3)(b) and 49 of the RTI Act.

⁵ For example, where disclosure of the information could reasonably be expected to contribute to the administration of justice for a person (schedule 4, part 2, item 17 of the RTI Act).

⁶ In schedule 4 of the RTI Act. However, this list is not exhaustive and factors not listed may be relevant in a particular case.

⁷ In section 49(3) of the RTI Act.

- disclosure could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.⁸
13. I have given consideration to all other factors in the RTI Act weighing in favour of disclosure and also recognise the following factor as relevant:
- disclosure could reasonably be expected to reveal the decision for a government decision and any background or contextual information that informed the decision.⁹
14. In a letter to DJAG dated 4 April 2019, I communicated the preliminary view that the public interest in the transparency of the selection process, and in DJAG's accountability for its decision to appoint the successful candidate to the position, weighed in favour of disclosure of some additional information. I advised DJAG that OIC had consulted with the successful candidate, and that person did not object to disclosure of the material they had prepared for the job selection process, namely, their covering letter, curriculum vitae (with the exception of personal contact details), and their statement addressing the selection criteria. The successful candidate claimed copyright over that material and access was therefore to be provided by way of inspection only, in accordance with section 68(1)(a) and section 68(4)(c) of the RTI Act.
15. DJAG accepted my preliminary view in respect of the bulk of the information and the applicant was given access to additional information.

Factors favouring nondisclosure

16. In its decision, DJAG recognised the following factors favouring nondisclosure of the Information in Issue:
- disclosure could reasonably be expected to prejudice the protection of a person's right to privacy¹⁰
 - disclosure could reasonably be expected to cause a public interest harm by disclosing personal information of individuals;¹¹ and
 - disclosure could reasonably be expected to prejudice the effectiveness of testing or audit procedures.¹²
17. In a letter to the applicant dated 20 May 2019, I advised that DJAG had accepted my preliminary view that the public interest in the transparency of the selection process, and in DJAG's accountability for the decision to appoint the successful candidate, weighed in favour of disclosure of additional information. However, in respect of the remaining information, I explained to the applicant that I was of the preliminary view that the strong public interest in protecting the personal information and right to privacy of the persons involved in the recruitment process outweighed the public interest in DJAG's accountability and in the transparency of its decision-making process.

The applicant's submissions

18. The bulk of the applicant's submissions were directed at making complaints against DJAG and the manner in which it had dealt, and communicated, with him; and in disputing that the successful candidate was entitled to make a claim for copyright over

⁸ Schedule 4, part 2, item 1 of the RTI Act.

⁹ Schedule 4, part 2, item 11 of the RTI Act.

¹⁰ Schedule 4, part 3, item 3 of the RTI Act.

¹¹ Schedule 4, part 4, section 6 of the RTI Act.

¹² Schedule 4, part 3, item 21 of the RTI Act.

their job application material. The only submission that the applicant made that was relevant to the application of the public interest balancing test to the Information in Issue was that the successful candidate had previously been responsible for ‘*overseeing*’ an internal workplace investigation¹³ in which the applicant had been involved and about which he was dissatisfied, and that there was therefore a significant public interest in scrutinising all material concerned with DJAG’s decision to appoint this person to a Senior Officer role.

19. In an email of 13 June 2019, the applicant also stated that OIC was ‘*not privy*’ to other evidence and documentation in his possession ‘*that demonstrates maladministration and misconduct over many years*’ and that he said called into question the appropriateness of the appointment made by DJAG. However, the applicant provided no material in support of this allegation.
20. Although he did not specifically advance them, it appeared from these submissions that the applicant may have been raising the application of the following public interest factors favouring disclosure:
 - disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;¹⁴ and
 - disclosure could reasonably be expected to reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.¹⁵
21. In responding to the applicant, his assertion that the successful candidate had been responsible for oversight of the investigation to which he referred was disputed.¹⁶ However, in the event that he wished to make specific submissions about how the workplace investigation and the successful candidate’s involvement in it impacted upon the application of the public interest balancing test to the Information in Issue, he was invited to do so.¹⁷
22. The applicant alleged that OIC had reached a ‘*pre-determined*’ view that no further information he provided would shift the public interest balancing test and that this made it difficult to write a submission ‘*in the knowledge that it will not be received with an open mind*’.¹⁸ He also accused OIC of misapplying its legislative powers although he did not specify how he alleged that misapplication had occurred. The bulk of the remainder of his submission was concerned with continuing to dispute the copyright claim made by the successful candidate over their job application material. He demanded a Statement of Reasons from DJAG explaining why it had accepted the copyright claim. He also alleged that DJAG had engaged in an abuse of process regarding the release of the additional information to him and he sought an investigation by OIC ‘*into the conduct of DJAG during the course of this external review regarding the department’s active non-compliance and misleading conduct and action in bad faith*’.
23. By letter dated 15 July 2019, I rejected the applicant’s contention that OIC had reached a pre-determined view or misapplied its legislative powers. I again invited the applicant to make submissions addressing the application of the public interest balancing test. I also clarified the copyright issue (I will discuss copyright further below). I advised that

¹³ The applicant made this submission in a telephone conversation with OIC on 12 June 2019.

¹⁴ Schedule 4, part 2, item 5 of the RTI Act.

¹⁵ Schedule 4, part 2, item 6 of the RTI Act.

¹⁶ I am aware of the workplace investigation in question as it has been the subject of other external review applications made to OIC.

¹⁷ By letter dated 20 June 2019.

¹⁸ Applicant’s email of 4 July 2019.

there was no requirement for DJAG to give him a Statement of Reasons as its decision-making role ended upon commencement of the external review, and that DJAG had not raised the copyright issue in any event. I stated that, while DJAG had initially misunderstood the copyright issue in making arrangements for the additional information to be released to the applicant,¹⁹ it had since rectified the situation and, as I understood it, the applicant had now been provided with copies of the non-copyrighted documents. I advised that there was no evidence before me to suggest that there was any abuse of process or deceptive conduct on the part of DJAG that required investigation. In any event, OIC has no investigative powers under the RTI Act.

24. The applicant did not make any further submissions in support of his case for disclosure of the Information in Issue.

Discussion

25. The decision in *Poyton and Metro North Hospital and Health Service*²⁰ discusses job recruitment information and the balancing of the public interest factors favouring disclosure and nondisclosure of such information. In that decision, it was recognised that there had been a shifting of the balance between public disclosure of information about public service employees, and the protection of their personal privacy. The decision of the Australian Information Commissioner (AIC) in *BA and Merit Protection Commissioner*²¹ discussed this shift and found that, in light of changes in privacy law and heightened community concern about privacy protection and the potential for misuse of personal information that enters the public domain, greater weight should be given to the public interest in protecting a person's right to privacy, and that the early leading authorities favouring disclosure of personal information of public servants in the interests of government accountability should no longer hold 'decisive sway'.²²
26. In terms of the public interest factors favouring disclosure that the applicant appeared to be raising in his submissions (see paragraph 20 above), I am unable to afford these factors any weight in the public interest balancing test. As noted, the applicant raised the successful candidate's involvement in an internal workplace investigation, and made assertions that he had other material in his possession that was relevant to the issue of this person's suitability to be appointed to the position and the appropriateness of DJAG's decision. However, the applicant provided no further submissions that addressed either of these matters and provided no supporting material, despite being invited to lodge submissions about the public interest balancing test. There is nothing of which I am aware that appears on the face of the Information in Issue that gives rise to grounds for the application of these factors to the Information in Issue.
27. I will now turn to a consideration of the weight to be afforded to the two factors identified at paragraphs 12 and 13 above that I consider apply in favour of disclosure of the Information in Issue.
28. I consider that the information that has already been released to the applicant, particularly from the Selection Report, as well as the successful candidate's job application material, serves to satisfy the public interest in the accountability of the Department for its recruitment decision, and the public interest in examining the reasons for the decision and the information that informed it. This released information discloses:

¹⁹ DJAG had been under the misapprehension that the applicant was only entitled to inspect (and not obtain copies of) all of the additional information that it had agreed to release to him, rather than just the successful candidate's job application material.

²⁰ [2016] QICmr 50 (13 December 2016).

²¹ [2014] AICmr 9 (BA).

²² BA at paragraph 87.

- the role description
- the material that the successful candidate submitted in support of their application for the position
- the shortlisting assessment sheet (excluding the names of unsuccessful applicants) and the results of shortlisting
- the assessment process
- the interview format
- the justification for the selection decision; and
- the results of referee checks.

29. The Information in Issue that has not been released consists of:

- personal contact details for the successful applicant
- referee reports for the successful candidate
- personal information about the unsuccessful applicants including their job applications and referee reports
- interview questions and the guide to those questions for panel members; and
- notes made by panel members during the interview process.

30. I afford only low weight to the public interest factors favouring disclosure of this information that are identified at paragraphs 12 and 13. I am not satisfied that release would advance these factors in any meaningful or significant way beyond what has already been disclosed to the applicant. DJAG is accountable for its decision to appoint the successful candidate to the position. Disclosing highly personal and sensitive information about unsuccessful candidates would contribute to an understanding of the selection process in only a very limited way. In respect of the referee reports for the successful candidate, while I accept that referee checks form an important part of the selection process, I note that part of the Selection Report already released to the applicant summarises the outcome of referee checks. Similarly, as regards individual panel members' notes, the final, joint decision of the panel, and the agreed reasons for making that decision, are disclosed in the Selection Report. I do not consider that releasing the notes would contribute in any significant way to an understanding of the selection decision or enhance the accountability of DJAG for that decision. The Selection Report stands as the official record for the recruitment recommendation and appointment. As to the interview questions and the panel guide to the questions, I note that that part of the Selection Report that summarises the panel's justification for its selection decision gives an indication of the type of questions that were asked of candidates at interview and of the candidate's response. Again, disclosing the specific questions would enhance the public interest factors favouring disclosure to only a limited extent.

31. Turning to the public interest factors favouring nondisclosure, I have identified three factors that apply to all or parts of the Information in Issue (see paragraph 16 above). I will now consider the weight to be afforded to these factors.

32. The Department claims that disclosure of the interview questions and the selection panel guide to those question could reasonably be expected to prejudice the effectiveness of testing or audit procedures. I have noted above that at least an indication of the types of questions that were asked at interview can be gleaned from a review of the selection panel's justification for their decision. Nevertheless, I accept the Department's claim. It is standard practice in job interviews for the public service for candidates to be asked to return interview questions at the conclusion of the interview in order to preserve the confidentiality of the questions and, therefore, their utility and effectiveness not only for the current selection process, but also for future recruitment processes. I accept that

interview questions for a broad range of senior management roles within a government agency may seek to elicit similar information from the candidates in terms of their skills and experience, and it is therefore reasonable to assume that the same types of questions may be asked for positions at this level across different recruitment processes. There is a public interest in protecting the worth of these questions and therefore the effectiveness of future public service recruitment processes. The same considerations apply to the selection panel guide to the questions. Taking account of the information that is contained in the Selection Report that gives a broad indication of some of the interview questions, I afford this factor moderate weight in the public interest balancing test.

33. The remainder of the Information in Issue comprises personal information about the successful and unsuccessful candidates. The definition of 'personal information' in the RTI Act²³ refers to the definition in the *Information Privacy Act 2009* (Qld) (**IP Act**), which provides that:²⁴

Personal information is 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.

34. The RTI Act recognises that disclosure of an individual's personal information automatically gives rise to a reasonable expectation of a public interest harm.
35. I give significant weight to the public interest in protecting the right to privacy of the unsuccessful candidates. While, as I have noted above, disclosure may contribute to some limited additional understanding of the selection panel's decision to appoint the successful candidate in preference to others, the public interest harm in disclosing the personal and sensitive information that these persons supplied in support of their unsuccessful applications, and the corresponding prejudice to the protection of their right to privacy, is significant.
36. As regards the personal information of the successful candidate, it mostly comprises information provided by that person's referees, as well as notes made by panel members at interview. I have already noted that the overall results of the selection panel's inquiries with referees are summarised in the Selection Report, as is the panel's agreed reasons for their selection decision.
37. The disclosure of referee reports (and some other recruitment documents) was discussed in *BA* at paragraphs 93 and 94:

93. I do not think it reasonable that those personal details about the applicant should be released into the public arena. To do so would be to treat her differently to most other public officials, based solely on the fact that she was a successful internal candidate for promotion. The documents are not dissimilar to annual performance assessments that are nowadays prepared internally about most APS staff. The confidentiality of this personnel system is rigorously promoted, if not maintained. I think that many APS staff would find it discomforting if the frank assessment of their vocational competence by other colleagues was circulated without restraint. ...

94. There is a potential anomaly if the referee's report about the applicant is not classified as an exempt document. It may be that the referee did not provide a copy of the report to the applicant and submitted it to DHS on an in-confidence basis (a not uncommon practice).

²³ Schedule 5 of the RTI Act.

²⁴ Section 12 of the IP Act.

If so, it would be an unreasonable outcome in relation to the applicant if a referee's report not seen by her was available in the public arena to others. ...

38. I agree with the AIC's observations. I am satisfied that the public interest in the outcome of inquiries made with the successful candidate's referees is sufficiently satisfied by the summary that has already been released to the applicant. Given the sensitive and highly personal nature of the information contained in the referee reports, which comprises the personal information of both the candidate and the referee, I afford significant weight to the public interest in protecting the right to privacy of the persons concerned. I make the same finding in respect of panel members' notes, which contain highly personal and sensitive information about the interviewee and their performance and demeanour at interview.

Balancing the public interest

39. I find that the public interest factors identified at paragraph 20 above do not apply to the Information in Issue and I therefore afford them no weight in the public interest balancing test.
40. I afford low weight to the two public interest factors that I have identified as favouring disclosure of the Information in Issue at paragraphs 12 and 13 above, namely the public interest in the accountability and transparency of DJAG for its recruitment decision, and the public interest in understanding the reason for that decision. I am not satisfied that release of the Information in Issue would advance these factors in any significant way.
41. Balanced against this is the significant weight I afford to the prejudice of the protection of a person's right to privacy, and to the public interest harm that could reasonably be expected to flow from disclosure of the Information in Issue. I also give moderate weight to the public interest in protecting the effectiveness of DJAG's testing or audit procedures.

Finding

42. After balancing the public interest factors weighing both for and against disclosure, I find that disclosure of the Information in Issue would, on balance, be contrary to the public interest.

Copyright

43. Although it is not strictly necessary for me to do so for the purposes of this decision, I will briefly discuss the issue of copyright, given that the applicant has focused many of his submissions on this issue.
44. Section 68(4)(c) of the RTI Act provides that, if giving access in the form requested by the applicant would involve an infringement of the copyright of a person other than the State, access in that form may be refused and given in another form. Generally, issues concerning copyright are for an agency to determine at the time of making its access decision.
45. In this review, the claim of copyright made by the successful candidate over their job application material was made during the external review process. The claim was for their covering letter, curriculum vitae, and statement addressing the selection criteria.

46. I accepted this copyright claim, and therefore requested that DJAG make arrangements for the applicant to inspect this material under section 68(1)(a) of the RTI Act, rather than being given copies.
47. The applicant asserted²⁵ that copyright could not exist in the material because:
- the material had been prepared by the successful candidate as a public servant and copyright therefore vests in the State of Queensland
 - there is no '*creative works* [sic] or *commercial value*' in the letter of application and related documents: a mere cataloguing of public sector information lacks the sufficient quality of material capable of copyright; and
 - the candidate submitted the material through the government's SmartJobs website and did so knowing that it could be subject to an application under the RTI Act: the candidate should have affixed the copyright claim to the material at that time and to do so now is '*spurious*' and aimed at avoiding RTI disclosure.
48. I responded to the applicant in my letter dated 15 July 2019:
- I do not accept that copyright exists in the State of Queensland. It would do so only if the material in question had been produced by [the candidate] as part of [their] employment duties. That is not the case. There is nothing to prevent a public servant from claiming copyright over written material that the officer has compiled outside of the officer's employment duties or service contract. The job application material originated with [the candidate] and [they] compiled it through the product of [their] skill, labour, expertise or experience. That is sufficient to attract copyright. There is no requirement to label a work as copyright protected. Copyright exists automatically once the original work is created.*
- ...
- ...I do not accept that the copyright claim is 'spurious' or was aimed at 'avoiding RTI disclosure'. The latter is clearly incorrect as the material has in fact been disclosed to you.*
49. For the reasons explained, I am satisfied that copyright exists in the job application material. I am further satisfied that the applicant has been given access to this material in accordance with section 68(1)(a) of the RTI Act – by being given a reasonable opportunity to inspect the material.

DECISION

50. I affirm the decision under review. I decide that access to the Information in Issue may be refused under the RTI Act.
51. I have made this decision under section 110 of the RTI Act as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Louisa Lynch
Right to Information Commissioner
Date: 29 August 2019

²⁵ Email of 4 July 2019.

Appendix

Significant procedural steps

Date	Event
14 February 2019	OIC received application for external review and accompanying submissions.
19 March 2019	OIC wrote to the applicant and to DJAG advising that the application for external review had been accepted.
20 March 2019	OIC received the Information in issue from DJAG.
4 April 2019	OIC consulted with the successful candidate by telephone. OIC expressed a preliminary view to DJAG regarding disclosure of additional information.
13 May 2019	OIC received DJAG's response. OIC formally consulted with the successful candidate in writing.
20 May 2019	OIC wrote to the applicant to advise that additional material would be released to him, and to communicate a preliminary view regarding disclosure of the remaining information.
12 June 2019	Telephone discussion with the applicant.
13 June and 20 June 2019	Emails received from the applicant concerning copyright and OIC's procedures.
20 June 2019	OIC responded to issues raised by the applicant.
4 July 2019	Email received from the applicant concerning a number of issues including copyright and complaints about DJAG's conduct.
15 July 2019	OIC responded to issues raised by the applicant.