



Decision and Reasons for Decision

Citation:	<i>Frecklington, MP and Premier and Minister for Trade (No. 2)</i> [2020] QICmr 26 (12 May 2020)
Application Number:	315001
Applicant:	Mrs Deb Frecklington MP, Leader of the Opposition
Respondent:	Premier and Minister for Trade
Decision Date:	12 May 2020
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - JURISDICTION - whether internet browser history is a document of a Minister - section 23(1)(b) of the <i>Right to Information Act 2009</i> (Qld) - whether browser history '<i>relates to the affairs of an agency</i>' - section 13 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the respondent under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to the '*internet browser history*' of a nominated member of the respondent's staff for a stated period of time.
2. The respondent, while noting that it was reasonable to expect that the browser history existed in the respondent's possession or control, nevertheless decided² to refuse access on the basis of nonexistence.³ The respondent reasoned that the browser history would not be a document of a Minister subject to the RTI Act and that therefore there existed no document to which the applicant had a right of access under section 23 of the Act.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the respondent's decision.
4. Having considered all relevant issues, I find that the requested browser history would not comprise a document of a Minister subject to the RTI Act. I affirm the decision under review to the extent it made the same finding.

Background

5. Significant procedural steps relating to the external review are set out in the Appendix.

¹ Application dated 17 October 2019.

² Decision of the Department of Premier and Cabinet (**DPC**) dated 21 November 2019, made under direction from the respondent.

³ Under sections 47(3)(e) and 52 of the RTI Act.

Reviewable decision

6. The decision under review is the decision made by DPC on the respondent's behalf, dated 21 November 2019.

Evidence considered

7. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and Appendix).
8. I have also had regard to the *Human Rights Act 2019* (Qld),⁴ particularly the right to seek and receive information as embodied in section 21 of that Act. I consider that in observing and applying the law prescribed in the RTI Act, an RTI decision-maker will be '*respecting and acting compatibly with*' this right and others prescribed in the HR Act,⁵ and that I have done so in making this decision, as required under section 58(1) of the HR Act. In this regard, I note Bell J's observations on the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*'⁶

Issue for determination

9. The central issue for determination is whether the requested browser history would comprise a document of a Minister subject to the right of access conferred by section 23(1)(b) of the RTI Act.
10. A Minister in the respondent's position may refuse access to a document where satisfied the document does not exist.⁷ In this context, it is arguably open to apply this refusal ground in the manner DPC did⁸ in the decision under review; ie, to a document that, while likely in actual existence,⁹ would not be a document to which the RTI Act would apply.
11. A document that is not a '*document of a Minister*' is, however, simply not subject to the Act. Given this, there seems to be strictly no need to go further and identify a ground for refusing access to that document. Accordingly, I have confined myself to considering only the fundamental threshold issue as stated in paragraph 9 (and not additional requirements for refusing access under sections 47(3)(e) and 52 of the RTI Act).

Relevant law

12. Section 23(1)(b) of the RTI Act provides that, subject to the Act, a person has a right to be given access under the Act to documents of a Minister.
13. Section 13 of the RTI Act relevantly defines document of a Minister to mean a '*document...in the possession, or under the control, of the Minister that **relates to the affairs of an agency***'.¹⁰

⁴ HR Act - which came into force on 1 January 2020.

⁵ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (*XYZ*) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [11].

⁶ *XYZ*, [573].

⁷ Sections 47(3)(e) and 52 of the RTI Act.

⁸ On the respondent's behalf.

⁹ And in the relevant Minister's possession, or under their control.

¹⁰ My emphasis.

14. The expression '*relates to the affairs of an agency*' was judicially considered in an analogous context in *Office of the Premier v Herald and Weekly Times*¹¹ (*HWT*). In that case, the Victorian Court of Appeal relevantly held that:¹²

[77] ...the phrase is clearly restricted to the business of those entities that fall within the definition of 'agencies' and not more generally to the business of government. Moreover, it is restricted to the 'affairs' of an agency which must include at least the business and activities of the agency. In addition 'affairs' must include an agency's 'concerns' in the sense of the area of governmental responsibility the agency is designed to discharge, or the area of government policy it is designed to implement, in keeping with its function of supporting the Minister with respect to a ministerial portfolio.

...

[79] ...a document '*relates to the affairs of an agency*', **if it bears a direct or indirect relationship to the business and activities of an agency, or the agency's area of governmental responsibility, or to arrangements between government departments or other agencies and external entities, including arrangements between agencies and Ministerial advisers from the Office of the Premier.**

15. As a decision of an intermediate appeal court concerning identical statutory language, I consider *HWT* an appropriate guide to the interpretation of section 13 of the RTI Act.¹³ In summary, then, a document will relate to the affairs of an agency where it bears a direct or indirect relationship to:

- the business and activities of an agency; or
- the agency's area of governmental responsibility; or
- arrangements between government departments and other agencies and external entities.

16. Also directly relevant in the present context is the decision of Member Wentworth of the Victorian Civil and Administrative Tribunal in *Hon Tim Smith MP v Hon Daniel Andrews MP (Premier) (Smith v Andrews)*.¹⁴ *Smith v Andrews* concerned an application for equivalent information – browser histories – made to a Victorian Minister under the Victorian FOI Act. Following *HWT*, the Member found that internet browser histories of staff within a Victorian Ministerial office did not, having regard to their '*general character and content*',¹⁵ relate to the affairs of an agency. The browser histories were therefore not subject to the Victorian FOI Act.

17. As the applicant submitted,¹⁶ it will generally be necessary to consider the kind of information a document may contain, for the purposes of ascertaining whether that document relates to the affairs of an agency.

18. The type of information contained in a browser history was adequately explained by Member Wentworth in *Smith v Andrews*:

¹¹ [2013] VSCA 79 (12 April 2013) (Tate JA), considering equivalent provisions of the Victorian *Freedom of Information Act 1982* (**Victorian FOI Act**).

¹² My emphasis.

¹³ See my recent decision in *Frecklington, MP and Premier and Minister for Trade* [2020] QICmr 15 (18 March 2020) (***Frecklington, MP and Premier***), adopting the *HWT* test.

¹⁴ (*Review and Regulation*) [2017] VCAT 340.

¹⁵ [39], citing Tate JA in *HWT*.

¹⁶ Submissions dated 25 March 2020. See also *Parnell and Prime Minister of Australia (No 2)* [2011] AICmr 12 (23 December 2011), where the Australian Information Commissioner, in considering the statutory phrasing '*...relates to the affairs of an agency or of a Department of State*' as used in section 4 of the Commonwealth *Freedom of Information Act 1982*, stated that the '*...characterisation [of a given document] depends on the contents of the document*' (at [13]).

52. *In relation to the general character and content of a web browser history, I find that:*

- *It is a by-product generated automatically by underlying software when the user of a device uses a web browser.*
- *No deliberate or intentional act of the user is required for a web browser history to be generated or saved, nor does it require or allow entries to be made by the user.*
- *Of itself it is merely a list of URLs. It provides a log of information resources that may have been accessed by a user in the course of a search using a web browser, although it is an unreliable record.*
- *Depending on the web browser, other information may be included such as time and date of access and a title or brief descriptor of the information resource but it does not record the information accessed by the user, nor is it a record of information or documents downloaded. It does not contain any information entered or saved by the user. ...*

19. Taking into account the nature of that information, the object of the Victorian FOI Act to, extend as far as possible community rights of access to government-held information,¹⁷ and the requirement¹⁸ that the Victorian FOI Act be interpreted so as to further the object of the Act, Member Wentworth went on to observe and reason as follows (citations omitted, my interpolations):

59. *A document must nevertheless come within one of the two categories of documents in s 13 of the Act [section 23 of the RTI Act] for there to be a right of access. The documents in question must be documents 'relating to the affairs of an agency'. Although the phrase 'relates to' is to be given a broad interpretation, on the authority of Herald and Weekly Times 'the affairs of an agency' is restricted to the business, activities and responsibilities of, and arrangements made with and by, an agency.*

60. *As is evident from the passages in Herald and Weekly Times referred to by the parties, the phrase 'relates to the affairs of an agency' does not extend to anything that could be considered the business of government or the exercise by a Minister of his or her Ministerial functions. In particular, it does not extend to everything a ministerial officer in the Office of the Premier might do in the course of a day.*

...

63. *I agree that as a general proposition it is likely that in the course of their duties, ministerial staff access various web sites and other information resources, some of which may contain information relating to the affairs of one or more agencies. Whether or not any of the information is saved and used is a separate matter.*

64. *The question, however, is whether a list of URLs accessed by a ministerial officer, as a document, is one that relates to the affairs of an agency.*

65. *There is a relevant distinction, in my view, between information that may be on a web site, and a list of URLs in a web browser history.*

66. *Of itself, a web browser history contains no meaningful content relating to the activities of any person other than the device user. To find any content related to the business or activities of anyone else, one would have to visit the URLs listed.*

67. *While a web browser history might record the places visited by a ministerial officer in the course of a search for information, it does not record the information found, used, or saved. It does not represent or record the outcome of any activity*

¹⁷ The RTI Act containing similar expressions of intent – see the Preamble, and the object in section 3(1).

¹⁸ Also shared with the RTI Act: section 3(2) of the latter.

undertaken by the ministerial officer. Nor does it contain any entries made by the ministerial officer.

68 *Further, it is quite different to a document downloaded from a web site, or one that is intentionally created and saved using information obtained in the course of a search.*

...

70 *In terms of who is the 'author', Counsel submitted that it could be argued that the person creates the document by undertaking a search and clicking on a particular URL.*

71 *My view is that the user is unlikely to be regarded as the 'author' but I do not need to resolve that question. In any event, as submitted on behalf of the respondent, a web browser history has no addressee. It is not 'sent' to anyone or centrally stored. The user may not even know it exists. It is a document automatically generated by underlying software. It is properly characterised as an artefact, a by-product of browsing on the internet.*

72 *To the extent there is a purpose, it is primarily for the convenience of the individual user.*

73 *In my view, it can be inferred from the general character and content of a web browser history and the evidence of their use in the Office of the Premier, that a web browser history of a ministerial officer in the Office of the Premier bears no direct or indirect relationship to the affairs of an agency.*

20. The statutory context before me is substantially similar to that considered in *Smith v Andrews*, while the general or generic nature of the content of browser histories is such that I am content to adopt Member Wentworth's characterisation of those documents, as quoted at paragraph 18.
21. I agree with and adopt the Member's reasoning as extracted above, for the purpose of resolving the threshold issue before me. Having regard to the general character and content of web browser histories, and their lack of '*meaningful content*' in the manner noted by Member Wentworth, I do not consider that the browser history requested by the applicant could be regarded as having any direct or indirect relationship to the affairs of an agency.
22. The requested browser history would not comprise a document of a Minister subject to the RTI Act.

Applicant's submissions

23. The applicant's lead submission is that *Smith v Daniels* was wrongly decided, and that the requested browser history would comprise a document of a Minister subject to the RTI Act.¹⁹
24. In support of this submission, the applicant initially argued that:²⁰
 - the respondent is a person holding an office established under an Act,²¹

¹⁹ Submissions dated 3 and 25 March 2020.

²⁰ Submissions dated 3 March 2020.

²¹ *The Constitution of Queensland 2001* (Qld).

- the respondent is thus an agency within the meaning of sections 14(1)(c)²² and 16(1)(d)²³ of the RTI Act; and
 - as a document in the respondent's possession or under her control, a staff browser history would therefore comprise a document of an agency²⁴ (ie, the respondent), or, alternatively, would relate to the affairs of an agency (being the respondent).
25. I replied to these submissions by letter dated 12 March 2020, advising my view that the status of Ministerial documents under the RTI Act is wholly catered for by section 13. My letter stated my view that the legislature's clear intention was that documents held by Ministers will be subject to the RTI Act, but only to the extent stated in that section. Given this, I expressed the opinion that neither sections 14 nor 16 of the RTI Act were relevant in this context.
26. My letter dated 12 March 2020 further noted that if the applicant's submission that the respondent is an agency was correct, section 13 of the RTI Act would be redundant,²⁵ and the test that relevant documents '*relate to the affairs of an agency*' would have no separate work to do²⁶ – documents in the possession or under the control of a Minister would be documents of an agency. As I observed in my letter, it is well established that constructions of this kind are to be avoided.²⁷
27. The applicant did not press the case summarised in paragraph 24. To avoid any doubt, I adopt as final the reasoning explained in my 12 March 2020 letter to the applicant and summarised above, and record my finding that the respondent herself cannot be regarded as an 'agency'.
28. The applicant has nevertheless maintained the position that the requested browser history would comprise a document of a Minister subject to the RTI Act.
29. In correspondence dated 25 March 2020, the applicant advanced alternative arguments, essentially submitting that as DPC apparently supplies the IT hardware, infrastructure and support used by Ministerial offices, the requested browser history must relate to the affairs of that agency: '*as the business and activities of DPC is to provide IT services to the Office of the Premier, because the [browser history] Documents are relevant to the use of DPC's asset and services, the Documents relate to the affairs of DPC.*'
30. In support of the above, the applicant referred to the 'Ministerial Information Security Policy', and a statement on the DPC page hosting this policy that '[u]se of IT systems must be able to withstand public scrutiny and comply with applicable laws, regulations and guidelines'²⁸ The applicant submitted that the RTI Act '*is the method by which public scrutiny is applied to government actions and, in this case, internet usage in the Office of the Premier.*'
31. The applicant further contended that the requested browser history would '*not fall into a category of documents excluded from relating to affairs of an agency. They do not relate to party political matters, the electorate matters, Parliamentary matters nor personal life*

²² Which defines 'agency' to include 'a public authority'.

²³ Which defines 'public authority' to include 'a person holding an office established under an Act'.

²⁴ Within the meaning of section 12 of the RTI Act.

²⁵ As the words '*other than a document of an agency*' in section 13 mean that a document cannot be both a document of a Minister and a document of an agency.

²⁶ A position which would, by extension, negate the respondent's additional submissions that browser histories relate to the affairs of an agency – the Minister would comprise the agency, and it would never be necessary to refer to section 13, let alone contemplate whether documents held by that Minister related to their affairs.

²⁷ *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [97].

²⁸ <https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/ministerial-handbook/information/security.aspx> (accessed 20 April 2020). The policy appears to be subject to restricted access.

or activities', and took issue with references in *Smith v Daniels* as to the manner in which browser histories are brought into existence (ie, automatically, rather than through deliberate or intentional actions by a user of IT hardware).

32. I do not accept the applicant's further submissions.
33. Addressing firstly the argument summarised in paragraph 29, the fact that browser histories are generated on a system or terminal supplied to a Ministerial office by an agency in the course of that agency's business and activities, does not, of itself, render the histories as information relating to that business or the supplying agency's affairs more broadly.
34. As Member Wentworth noted in *Smith v Daniels*, browser histories contain no meaningful content pertaining to the affairs of any person or agency.²⁹ While the test stated in *HWT* is broad, it is not without limit. In this case, I do not accept that it extends to render basic information, devoid of '*meaningful content*', as information relating to the affairs of an agency, simply because the information was brought into existence on hardware supplied by that agency.
35. In other words, the mere provision by an agency of IT equipment and infrastructure is, in my view, insufficient to establish a relationship, direct or indirect, between information brought into existence through use of that equipment, and the affairs of the supplying agency.
36. It may well be that the business and activities of DPC include, as the applicant submits, supply of computer systems to the respondent; information produced via the use of those systems by someone other than DPC, however, does not automatically become information relating to that business or those activities.
37. As for the applicant's supplementary submissions, the statement extracted in paragraph 30 appears to comprise no more than a 'best practice' caution to IT users to be mindful of information that may be created or accessed via Ministerial computer systems, in order that such information abide by community standards and applicable laws. In any event, that statement appears, as suggested by the title of the document to which it relates, to comprise a statement of policy, which must obviously yield to the law as enacted by Parliament, such as is set down in the RTI Act.
38. Turning to the applicant's submission that the browser history does not fall '*into a category of documents excluded from relating to the affairs of an agency*'; there is no categorisation or prescription stated in the RTI Act as to what does nor does not comprise a document '*relating to the affairs of an agency*'. Resolving this issue is, as I noted in *Frecklington, MP and Premier*, '*... a question of fact, turning on the specific circumstances of a given case*'.³⁰

²⁹ Other, possibly, than the device user.

³⁰ At [31]. Schedule 1 to the RTI Act does prescribe certain documents to which the Act does not apply. That a document is not referred to in Schedule 1 as an excluded document does not, however, mean that the document is subject to the RTI Act: the Act does not provide a right of access to documents '*...unless they are expressly excluded from the operation of the RTI Act. The right of access is conferred in those circumstances specified in the Act. That requires careful consideration of the definitions which determine those agencies and documents which are subject to the Act.*': *City North Infrastructure Pty Ltd v Information Commissioner* [2010] QCATA 60, [44] (Kingham J).

39. Finally, I agree that the nature of a document, or the manner in which it is produced or brought into existence, is not relevant to determining whether that document is a 'document' as broadly defined in the *Acts Interpretation Act 1954* (Qld).³¹ A browser history would appear to fall within this inclusive definition.
40. For a document of a Minister to be subject to the RTI Act, however, it must do more than come within this definition – it must also, relevantly, '*relate to the affairs of an agency*'. For the reasons explained above, I am not satisfied that the requested browser history would meet this requirement.

Findings

41. The browser history the subject of the applicant's RTI access application dated 17 October 2019 would not comprise a document of a Minister for the purposes of section 23(1)(b) of the RTI Act.

DECISION

42. Insofar as the decision under review decided that the requested browser history would not comprise a document of a Minister subject to the RTI Act, I affirm that decision.
43. I have made this decision under section 110(1) 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: 12 May 2020

³¹ 'Document' is defined in schedule 1 of that Act to include –

- (a) *any paper or other material on which there is writing; and*
- (b) *any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and*
- (c) *any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device).*

APPENDIX

Significant procedural steps

Date	Event
22 November 2019	OIC received the application for external review.
26 November 2019	OIC notified the applicant and DPC (for the respondent) that the external review application had been received, and requested procedural documents from DPC. DPC provided the requested documents.
17 December 2019	OIC notified the applicant and DPC that the external review application had been accepted.
19 February 2020	OIC wrote to the applicant, conveying the preliminary view that no right of access existed in relation to requested browser histories, inviting submissions in reply.
3 March 2020	The applicant provided submissions.
12 March 2020	OIC wrote to the applicant, expressing the preliminary view that requested documents did not relate to the affairs of an agency and were not documents of a Minister.
25 March 2020	The applicant provided further submissions.