



## Decision and Reasons for Decision

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Citation:	<i>R54 and Department of Agriculture and Fisheries [2021]</i> QICmr 68 (16 December 2021)
Application Number:	316099
Applicant:	R54
Respondent:	Department of Agriculture and Fisheries
Decision Date:	16 December 2021
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - identifying information - personal information of other individuals - personal information and privacy - whether disclosure of information would, on balance, be contrary to the public interest - whether deletion of contrary to the public interest information is practicable - sections 47(3)(b), 49 and 75 of the <i>Right to Information Act 2009</i> (Qld)

## REASONS FOR DECISION

### Summary

1. The applicant applied to the Department of Agriculture and Fisheries (**Department**)<sup>1</sup> under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to Biosecurity Queensland (**BQ**) animal welfare reports for horses at a particular abattoir between February and April 2021.
2. By decision dated 27 May 2021, the Department advised that it had been unable to locate any responsive documents. It therefore decided to refuse access under sections 47(3)(e) and 52 of the RTI Act on the grounds that the requested documents were nonexistent or unlocatable.
3. The applicant applied<sup>2</sup> to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision, stating that they were aware of a particular animal welfare incident involving a horse that had occurred during the relevant time period.
4. On external review, the Department located responsive information. It agreed to give the applicant access to some information but objected to disclosure of the remaining information.

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<sup>1</sup> Application received by the Department on 20 April 2021.

<sup>2</sup> Application dated 31 May 2021.

5. For the reasons explained below, I set aside the decision under review. In substitution for it, I find that access to parts of the information remaining in issue may be refused on the ground that it is contrary to the public interest information. I further find that it is not practicable to give access to the remaining information under section 75 of the RTI Act.

## Background

6. In February 2021, a number of horses were transported to an abattoir for slaughter. Upon the unloading of the horses, it was noticed that one horse appeared to be vision impaired. The On-Plant Veterinarian (**OPV**) (a Commonwealth government officer) examined the horse and determined that it was blind in both eyes. The horse was euthanised. The Department then conducted a formal investigation under the *Animal Care and Protection Act 2001* (Qld) into the circumstances surrounding the horse's transport to the abattoir and whether the horse was fit to load.<sup>3</sup> This included the Department exercising its compulsory powers to obtain documents and information from various persons involved in the sale and transportation of the horse. At the conclusion of its investigation, no formal charges were laid by the Department against any person.

## Reviewable decision

7. The decision under review is the Department's decision dated 27 May 2021.

## Evidence considered

8. Significant procedural steps relating to the external review are set out in the Appendix.
9. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix). I have taken account of the applicant's submissions to the extent that they are relevant to the issues for determination in this review.<sup>4</sup>
10. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>5</sup> I consider a decision-maker will be '*respecting, and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the RTI Act.<sup>6</sup> I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:<sup>7</sup> '*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.*'<sup>8</sup>

## Information in issue

11. During the course of the review, the applicant was given partial access to an Animal Welfare Incident Report, including photographs of the horse. The applicant continues to pursue access to video footage of the horse that was also attached to the Report.

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<sup>3</sup> See the *Code of Practice for the Transport of Livestock*: part 6, schedule 3 of the *Animal Care and Protection Regulation 2012* (Qld).

<sup>4</sup> Including the external review application and emails received on 12 October 2021, 2 November 2021 and 14 November 2021.

<sup>5</sup> Section 21(2) of the HR Act.

<sup>6</sup> *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 [111].

<sup>7</sup> *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>8</sup> *XYZ* at [573].

## Issues for determination

12. The issues for determination are:

- whether the video footage contains contrary to the public interest information and, if so;
- whether it is practicable to give access to the video footage with the contrary to the public interest information deleted.

## Contrary to the public interest information

### Relevant law

13. Under the RTI Act, a person has a right to be given access to documents of an agency.<sup>9</sup> However, this right is subject to provisions of the RTI Act including the grounds on which an agency may refuse access to documents.<sup>10</sup> An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.<sup>11</sup>
14. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:<sup>12</sup>
- identify factors irrelevant to the public interest and disregard them
  - identify factors in favour of disclosure of information
  - identify factors in favour of nondisclosure of information; and
  - decide whether, on balance, disclosure of the information would be contrary to the public interest.
15. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of public interest lies in a particular case. I have considered these lists, together with all other relevant information, in reaching my decision. I have kept in mind the RTI Act's pro-disclosure bias<sup>13</sup> and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.<sup>14</sup> I have not taken into account any irrelevant public interest factors.

## Discussion

16. The video footage in issue captures the horse being led, and examined, by the OPV after being unloaded from the transport truck at the abattoir. In addition to the OPV, the footage captures another person involved in examining the horse. The footage also captures the voices of these two persons discussing the condition of the horse while it is being led and examined.

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<sup>9</sup> Section 23 of the RTI Act.

<sup>10</sup> Section 47 of the RTI Act.

<sup>11</sup> 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. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

<sup>12</sup> Section 49(3) of the RTI Act.

<sup>13</sup> Section 39 of the RTI Act.

<sup>14</sup> Section 47(2) of the RTI Act. In deciding whether disclosure of the information in issue would, on balance, be contrary to the public interest, I have taken no irrelevant factors into account in making my decision.

17. I am satisfied that the video footage captures the personal information<sup>15</sup> – images and voices – of two persons. This automatically gives rise to the following nondisclosure and public interest harm factors:
  - disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy;<sup>16</sup> and
  - disclosure could reasonably be expected to cause a public interest harm by disclosing the personal information of another person.<sup>17</sup>
18. Given the highly personal nature of the information – identifying images and voices – as well as the fact that it was captured in an investigative context, I would, in respect of both persons shown in the footage, afford these factors significant weight when balancing the public interest. In terms of the OPV, while I acknowledge that the OPV is a Commonwealth government officer carrying out employment duties, I do not consider that this lessens to any significant extent the public interest in protecting this person's personal information and privacy interests, given the nature of the information and the context in which it was captured. The RTI Act recognises the importance of protecting the right to privacy of persons and the prejudice to that right that can flow from disclosure of their personal information to the world at large under the RTI Act.<sup>18</sup>
19. In terms of public interest factors favouring disclosure of the video footage, I recognise a public interest in the accountability and transparency<sup>19</sup> of the Department for the discharge of its regulatory functions regarding the investigation of animal welfare concerns.
20. In their submissions,<sup>20</sup> the applicant raised the fact that there had been a formal inquiry into animal welfare practices at the abattoir in question in 2019<sup>21</sup> following public exposure, through the media, of allegations of animal cruelty in connection with the slaughter of horses. A series of recommendations to improve animal welfare practices were made by the inquiry, including in connection with the transport of horses to the abattoir. The applicant argued that the fact that the incident in question had occurred following this inquiry indicated that nothing had changed and that BQ was continuing to allow transporters to operate with impunity.<sup>22</sup>

*...The public do have a right to know that the Department is upholding the law in relation to Transport Standards. The Department does not provide any data about their investigation on their website. Their annual report provided limited information. ...*

21. The applicant also argued that the public interest favoured disclosure because meat processed at the abattoir is exported overseas for human consumption. The applicant therefore urged consideration of 'a bigger picture' about non-compliance by the abattoir with European Union (EU) food safety licence requirements.<sup>23</sup>

<sup>15</sup> 'Personal information' is defined in section 12 of the *Information Privacy Act 2009* (Qld) as 'information or an opinion ... whether true or not ... about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.'

<sup>16</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>17</sup> Schedule 4, part 4, section 6 of the RTI Act

<sup>18</sup> Noting the comment of McGill J in *FLK v Information Commissioner* [2021] QCATA 46 at [17]: 'There is no provision of that Act which contemplates any restriction or limitation on the use which that person can make of that information, including by way of further dissemination.'

<sup>19</sup> Schedule 4, part 2, items 1 and 3 of the RTI Act.

<sup>20</sup> Emails of 12 October 2021, 2 November 2021, and 14 November 2021.

<sup>21</sup> *Inquiry into animal cruelty in the management of retired Thoroughbred and Standardbred horses in Queensland*: <https://www.publications.qld.gov.au/dataset/58ac2d90-c87b-42ab-b91c-413050cdd33d/resource/be9739b1-d952-4b73-81af-92cbcf414c7f/download/independent-inquiry-into-equine-welfare-final.pdf>

<sup>22</sup> Email of 14 November 2021.

<sup>23</sup> Email of 12 October 2021.

22. Given the applicant's submissions in this regard, I have also considered the application to the video footage of the following two public interest disclosure factors favouring disclosure:
  - disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency of official;<sup>24</sup> 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.<sup>25</sup>
23. I acknowledge that the applicant clearly has continuing concerns about animal welfare practices at the abattoir and whether the Department is adequately discharging its obligations to investigate complaints and concerns about animal welfare. However, as I advised the applicant during the course of the review, I am not satisfied that disclosure of the video footage would significantly advance the public interest in the Department's accountability and transparency regarding its handling of this particular incident.
24. There is nothing in the material I have reviewed to indicate that the Department failed to discharge its regulatory obligations or that its conduct in handling the incident was deficient or involved misconduct or negligent conduct, etc. Rather, it indicates that concerns about the horse were identified immediately upon its unloading from the transport truck where it was examined by the OPV and euthanised. The Department then conducted a formal investigation, which included exercising its compulsory powers under the Animal Care and Protection Act to conduct interviews and obtain documents from relevant persons, including those involved in the sale and transport of the horse. The fact that no charges were laid at the conclusion of the investigation does not indicate that the Department did not adequately discharge its obligations, or is continuing to allow transporters to operate with impunity, as alleged by the applicant. Noting this context, as well as the content of the video footage, I am not satisfied that disclosure of the footage could reasonably be expected to reveal a failure by the Department to discharge its regulatory obligations.
25. In response to the applicant's submission regarding the public interest in considering '*the bigger picture*' and whether EU food safety licence requirements are being complied with at the abattoir, I do not consider that this has any relevance to my assessment of the application of the public interest balancing test to the information in issue. OIC's role on external review under the RTI Act is to assess the specific information in issue and to apply the public interest balancing test to that information. Disclosure of the video footage would not reveal anything about compliance or otherwise by the abattoir with EU food safety licence requirements and I therefore have not taken it into account in assessing the public interest.
26. In summary, I am not satisfied that disclosure of the video footage could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of the Department, nor reveal or substantiate misconduct or negligent, improper or unlawful conduct by the Department or any official. I therefore find that these two factors do not apply to the video footage. In terms of the accountability and transparency of the Department generally, having regard to the information that the Department released to the applicant from the Animal Welfare Incident Report, including details of the incident and the action taken, as well as photographs of the horse's eyes, I am not satisfied that disclosure of the video footage would significantly advance the public interest in the accountability and transparency of the Department regarding its

<sup>24</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>25</sup> Schedule 4, part 2, item 6 of the RTI Act.

handling of this incident. I therefore afford these factors low to moderate weight when balancing the public interest.

### ***Finding***

27. After balancing the public interest factors favouring disclosure and nondisclosure of the personal information contained in the video footage, I am satisfied that the factors favouring nondisclosure outweigh those favouring disclosure. As such, I find that disclosure would, on balance, be contrary to the public interest and access may be refused on that basis.

### **Application of section 75 of the RTI Act**

28. Section 75 of the RTI Act provides that, if an access application is made for a document containing contrary to the public interest information, the agency must, if it is practicable, give the applicant access to the document with the contrary to public interest information deleted.
29. During the review, the applicant raised the application of section 75 and requested that they be provided with access to a copy of the video footage with personal information deleted.
30. I accept that the contrary to public interest information consists only of the images and voices of the relevant persons shown in the footage, and not images of the horse. However, I am not satisfied that it is practicable to give access to the footage with this information deleted. While it may be possible to delete the voices, I do not consider it is practicable to delete the images, given not only the close proximity of these persons to the horse, but also the rapid movement of the persons and the horse as it is being led and examined. Even if it were possible to blur the images of the persons within a particular frame of footage, I do not consider that this would leave any meaningful image of the horse or its movements that would enhance an understanding of the horse's condition upon unloading.

### **DECISION**

31. For the reasons explained, I set aside the decision under review. In substitution for it, I find that access to parts of the video footage may be refused because it is contrary to the public interest information. I am further satisfied that it is not practicable to delete this information and give access to the remainder of the video footage under section 75 of the RTI Act.
32. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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A Rickard  
**A/Right to Information Commissioner**

**Date: 16 December 2021**

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

<b>Date</b>	<b>Event</b>
31 May 2021	OIC received the applicant's application for external review. OIC requested preliminary information from the Department.
1 June 2021	OIC received the requested information from the Department.
8 June 2021	OIC advised the applicant and the Department that the application for review had been accepted.
5 August 2021	The Department provided OIC with copies of responsive information that it had located following further searches.
28 September 2021	The Department agreed to give the applicant partial access to the information in issue.
29 September 2021	OIC expressed a preliminary view to the applicant.
12 October 2021	The applicant provided a submission.
14 October 2021	OIC expressed a preliminary view to the Department.
19 October 2021	The Department agreed to give the applicant access to further information.
20 October 2021	OIC expressed a preliminary view to the applicant.
2 November 2021	The applicant provided a submission.
4 November 2021	OIC expressed a preliminary view to the applicant.
14 November 2021	The applicant provided a submission.