



Decision and Reasons for Decision

Citation:	<i>K99 and Department of Education</i> [2023] QICmr 52 (18 September 2023)
Application Number:	316984
Applicant:	K99
Respondent:	Department of Education
Decision Date:	18 September 2023
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - whether communications between the agency and its legal advisors and references to legal advice contained within other documents are exempt - sections 47(3)(a) and 48 and schedule 3, section 7 of the <i>Right to Information Act 2009</i> (Qld) and section 67(1) of the <i>Information Privacy Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - information relating to other individuals - marked version of the applicant's high-risk work assessor tests - information relating to the reassessment of other individuals and information provided to the Office of Industrial Relations - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld) and section 67(1) of the <i>Information Privacy Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether there are reasonable grounds to be satisfied the requested documents do not exist - sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld) and section 67(1) of the <i>Information Privacy Act 2009</i> (Qld)</p>

REASONS FOR DECISION

Summary

1. The applicant made an access application under the *Information Privacy Act 2009* (Qld) (**IP Act**) to the Department of Education (Office of Industrial Relations (**OIR**))¹ for access to a range of information generally relating to the cancellation of his accreditation as a high-risk work assessor.

¹ OIR forms part of the Department of Education and incorporates Workplace Health and Safety Queensland (**WHSQ**).

2. OIR did not make a decision on the access application within the prescribed timeframe and was deemed to have refused access to the requested information. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review.
3. On external review, OIR agreed to release some information to the applicant and submitted that access to the remaining information could be refused on various grounds.
4. For the reasons set out below, I agree with OIR's submissions on the remaining information and refuse access to it on the basis that it is exempt information, contrary to public interest information, or nonexistent information.

Reviewable decision

5. The decision under review is the decision OIR is deemed to have made refusing access to the requested information.²

Evidence considered

6. Significant procedural steps taken in this review are set out in the appendix. The evidence, submissions, legislation, and other material I have considered in reaching this decision are referred to in these reasons (including footnotes and the appendix).
7. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the rights to freedom of expression and reputation.³ I consider a decision-maker will be '*respecting and acting compatibly with*' those rights and others prescribed in the HR Act, when applying the law prescribed in the IP Act.⁴ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.⁵

Issues for determination

8. As noted above, OIR agreed to release information to the applicant on external review and provided submissions that access to the remaining information in issue could be refused because it is exempt information, contrary to public interest information, or nonexistent information. These are the issues for determination in this review.
9. The applicant raised a number of sufficiency of search issues at the commencement of this review. All of those issues (with the exception of one which is dealt with in this decision) have been resolved on external review as OIR located the requested information. This information has either been released or access has been refused in accordance with the reasons for this decision.⁶

Legal professional privilege

10. OIR identified a small amount of information as exempt information because it would be privileged from production in a legal proceeding on the ground of legal professional privilege.⁷

² Section 66(1) of the IP Act.

³ Sections 21 and 25(b) of the HR Act.

⁴ *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].

⁵ I also note the following observations made by Bell J in *XYZ* at [573], on the interaction between equivalent pieces of Victorian legislation (namely, the *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)): '*... 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 This was confirmed in correspondence with the applicant on 29 August 2023 and 4 September 2023.

⁷ Section 47(3)(a) and schedule 3, section 7 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

Relevant law

11. Under the IP Act, a person has a right to be given access to documents of an agency.⁸ However, this right is subject to provisions of the IP Act and RTI Act including the grounds on which an agency may refuse access to documents.⁹
12. Schedule 3 of the RTI Act specifies the types of information Parliament has determined are exempt because release would be contrary to the public interest. Relevantly, information is exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.¹⁰ This exemption reflects the requirements for establishing legal professional privilege at common law.¹¹
13. Establishing whether legal professional privilege applies to information at common law requires that the information must comprise a communication:
 - made in the course of a lawyer-client relationship
 - that was and remains confidential; and
 - that was made for the dominant purpose of seeking or providing legal advice or for use in existing or reasonably anticipated legal proceedings.¹²
14. When each of these requirements is met, legal professional privilege is established.¹³

Findings

15. I have carefully considered the information which OIR identified as being subject to legal professional privilege. The information comprises communications between OIR and its legal advisors and references to this legal advice contained within other documents.
16. It is clear on the face of the documents that the communications were made in the course of a lawyer-client relationship; were, and remain, confidential; and were made for the dominant purpose of seeking and providing legal advice. I am satisfied that the lawyers who provided the advice are suitably qualified and of a sufficiently independent character. There is nothing before me to suggest that the qualification or exceptions to privilege apply.
17. The applicant does not accept that legal professional privilege applies to this information and submits that the information contains his personal information, and the lawyer would not be independent to OIR.¹⁴ The fact that the information may be about the applicant or contain their personal information does not prevent the operation of this exemption. It is well established that legal professional privilege applies to communications between officers of government agencies and the agency's in-house or external lawyers if the

⁸ Section 40 of the IP Act.

⁹ Section 67(1) of the IP Act provides that an agency or Minister may refuse access in the same way and to the same extent as under section 47 of the RTI Act. Section 47(3)(a) of the RTI Act allows refusal of access to exempt information.

¹⁰ Schedule 3, section 7 of the RTI Act.

¹¹ The doctrine of legal professional privilege is both a rule of evidence and a common law right. The High Court in *Daniels Corporation International Pty Ltd v Australian and Consumer Commissioner* (2002) 213 CLR 543 (*Daniels*) at 552 relevantly noted '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 provision of legal services, including representation in legal proceedings' (footnotes omitted). See also *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 (*Esso*).

¹² *Esso* and *Daniels*.

¹³ However, qualifications and exceptions to privilege (such as waiver and improper purpose) may, in particular circumstances, affect the question of whether information attracts or remains subject to it, and therefore is exempt under the RTI Act.

¹⁴ Applicant submissions to OIC on 5 June 2023 and 1 September 2023.

lawyers are appropriately qualified and are providing independent legal advice and/or services.¹⁵ I accept that the lawyers in this case meet this requirement.

18. I am satisfied that this information clearly meets the requirements of legal professional privilege and access can be refused on the ground it comprises exempt information.¹⁶

Contrary to public interest information

19. The contrary to public interest information can be characterised as:

- personal information of other individuals
- marked version of the applicant's high-risk work assessor tests; and
- information relating to the reassessment of other individuals; and
- information provided to OIR in reviewing the Registered Training Organisation (RTO) with which the applicant was aligned.

Relevant law

20. Access to information may be refused where disclosure would, on balance, be contrary to the public interest.¹⁷ The RTI Act identifies various factors that may be relevant to deciding the balance of the public interest¹⁸ and explains the steps that a decision-maker must take in deciding the public interest as follows:¹⁹

- identify any irrelevant factors and disregard them²⁰
- identify relevant public interest factors favouring disclosure and nondisclosure
- balance the relevant factors favouring disclosure and nondisclosure; and
- decide whether disclosing the information in issue would, on balance, be contrary to the public interest.

Findings

Personal information of other individuals

21. This information is unrelated to the applicant. It relates to other assessors, licence holders and OIR staff, and includes their names and other identifying information, mobile phone numbers, signatures, dates of birth, contact details, leave arrangements and availability and information about their personal circumstances. This information comprises their personal information.²¹
22. In these circumstances, the RTI Act recognises factors favouring nondisclosure which aim to protect the personal information and privacy of those individuals.²² I consider it is the type of information which those individuals are entitled to keep private. Its disclosure under the RTI Act would be an unwarranted intrusion into the privacy of these individuals and the extent of the public interest harm that could be anticipated from disclosure is significant.

¹⁵ *Waterford v Commonwealth* (1986) 163 CLR 54.

¹⁶ Section 67(1) of the IP Act and section 47(3)(a) and schedule 3, section 7 of the RTI Act.

¹⁷ Section 47(3)(b) of the RTI Act.

¹⁸ Schedule 4 of the RTI Act lists factors that may be relevant when deciding whether disclosure of information would, on balance, be contrary to the public interest. This list is not exhaustive and therefore, other factors may also be relevant in a particular case.

¹⁹ Section 49(3) of the RTI Act.

²⁰ No irrelevant factors arise in the circumstances of this case and I have not taken any into account in making this decision.

²¹ Section 12 of the IP Act defines 'personal information' as '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'.

²² Schedule 4, part 3, item 3 and part 4, item 6(1) of the RTI Act.

23. There are no other factors favouring disclosure of this information, other than the general public interest in furthering access to government-held information and the IP Act's pro-disclosure bias.²³
24. The applicant does not agree with OIC's assessment of this information and submits that mobile numbers are OIR business numbers, not personal numbers, and that a work mobile should only be on and carried during work hours not after hours.²⁴ In relation to mobile phone numbers, the Information Commissioner has previously explained that *'...a mobile phone number is different to other contact details (such as email addresses or office phone numbers) in that it allows an individual to be contacted directly and potentially outside of working hours....[and] permits potential contact with an employee when off duty and/or engaged in private activity, which gives rise to a reasonable expectation of intrusion into the officer's private life or 'personal sphere'.*²⁵ I agree with the Information Commissioner's comments on this type of information and consider that access to the mobile phone numbers can be refused.
25. The applicant submits that *'In a lot of cases above I have hand written the details [of this information]. I do not believe there is grounds under the RTI act to not allow access to documents I have hand written myself, that in most cases I am required to have access too / keep records of under the WHS acts, etc. Also these documents generally have my signature on them as well'.*²⁶ While I accept that the applicant may have recorded the names of the individuals he assessed for a high-risk work licence, the information in issue does not just comprise the names of these individuals, and I am not satisfied that it is the type of information which is already known by the applicant. The documents have not been signed by the applicant as he believes. In any event, the context in which the personal information appears is relevant for me to consider and in my view, the context provides more information about these individuals which is not known by the applicant and is not relevant to his dealings with OIR.
26. I consider the public interest factors favouring nondisclosure which I have identified above carry sufficient weight to tip the balance in favour of nondisclosure given the nature of the information and the context in which it appears. Therefore, I am satisfied that access to this information can be refused under the IP Act.²⁷

Marked version of the applicant's high-risk work assessor tests

27. This information comprises the marked versions of three tests the applicant undertook to evaluate his competency as a high-risk work assessor.
28. The applicant submits that he has already received a copy of two of these tests from OIR and cannot understand why OIR will not provide him with a copy of all three tests.²⁸ OIR explained that one of the tests was provided to the applicant by the business unit as the test was directly relevant to the internal review of the decision relating to his licences. It is possible that the second test has been provided to the applicant as part of this same process since then. The internal review process relating to the decision to cancel the licences and/or accreditation as an assessor is separate to the decision to release information under the IP Act and different considerations and restrictions on the use of that information may apply in that process.

²³ Section 64 of the IP Act.

²⁴ Applicant submissions on 5 June 2023 and 1 September 2023.

²⁵ *Smith and Sunshine Coast Regional Council; Diamond Energy Pty Ltd (Third Party)* [2017] QICmr 42 (5 September 2017) at [16]. See also *Underwood and Minister for Housing and Public Works* [2015] QICmr 27 (29 September 2015) at [66] to [68].

²⁶ Applicant submissions on 5 June 2023 and 1 September 2023.

²⁷ Section 67(1) of the IP Act and section 47(3)(b) of the RTI Act.

²⁸ Applicant submissions on 5 June 2023 and 1 September 2023.

29. In an attempt to informally resolve this part of the external review, OIR agreed for the applicant to inspect these documents under supervision at an OIR office. The applicant declined that offer and instead continued to seek access to a copy of them under the IP Act, which he is entitled to do.
30. OIR provided submissions on this information which I have summarised as follows:²⁹
- Dogging, rigging and forklift operation comprises high-risk work that poses a risk to the public and individuals performing the work. Given the serious nature of this work, OIR regulates it through issuing licences to individuals who can show competence through testing. To assist this process, OIR also runs an assessor accreditation program which accredits individuals with the relevant skills to conduct high-risk licence assessments of others.
 - The tests the applicant undertook were assessor accreditation tests. These tests are extremely important as they are the mechanism by which OIR determines whether individuals are competent to assess others in high-risk work. It is not possible to place any restrictions on the use, dissemination or republication of information released under the IP Act. If a copy of these tests were released, it would reveal the areas and questions on which prospective assessors are assessed. This would allow individuals to subvert the purpose of the testing methods, which is ensuring that individuals are competent to assess others in high-risk work. This poses a significant risk to the public as it could mean individuals are granted licences to perform high-risk work when they are not competent to do so.
 - OIR has provided the applicant with an explanation of why he was unsuccessful in relation to some of the testing and copies of notebooks that contain recollections of inspectors who marked the tests.
31. I consider releasing the test questions with the marked answers under the IP Act, could reasonably be expected to:
- prejudice public safety³⁰
 - prejudice the effectiveness of OIR's testing procedures;³¹ and
 - cause public interest harm by prejudicing the effectiveness of a method or procedure for the conduct of tests, examinations or audits by OIR and prejudicing achieving the objects of a test, examination or audit conducted by OIR.³²
32. OIR (and specifically WHSQ) is responsible for improving work health and safety in Queensland and helping reduce the risk of workers being killed or injured on the job. OIR discharges an important public function by issuing and regulating high-risk work licences, and the community places significant trust in the performance of this function. There is a strong public expectation that OIR, and the RTOs who work with OIR, have in place rigorous assessment processes to ensure that only those students who have attained an appropriate level of competence will be awarded the relevant qualification but that the assessors will also be regularly monitored for their competence. There is a strong public interest in OIR taking the steps necessary to protect the effectiveness and integrity of their assessment methods and procedures and I afford each of these factors favouring nondisclosure significant weight.

²⁹ OIR submissions on 14 March 2023.

³⁰ Schedule 4, part 3, item 7 of the RTI Act.

³¹ Schedule 4, part 3, item 21 of the RTI Act.

³² Schedule 4, part 4, item 3(a) and (b) of the RTI Act.

33. Balanced against these factors is the accountability of OIR for the way in which it conducts the assessments. I accept that there is a public interest in OIR conducting assessment methods and procedures as transparently as possible, so that those who are subject to those procedures can be satisfied that they have been assessed fairly and in accordance with agreed guidelines and standards. The information comprises the applicant's personal information and its disclosure would promote accountability and transparency generally by revealing the information that caused OIR to cancel his licences and the opportunity to scrutinise the answers he provided and how they were marked.³³ It is relevant however, that OIR has provided the applicant with reasons for its decision to cancel his assessor accreditation, which included a list of the questions and areas that were incorrect or needed clarification, and the opportunity to provide submissions during the process. Furthermore, OIR has released a large amount of other information relating to the access application which furthers the applicant's understanding of how OIR handled the process. Therefore, I consider the public interest factors favouring disclosure of this information carry low weight.
34. I am satisfied that the nondisclosure factors which I have identified above carry significant weight and tip the balance in favour of nondisclosure. The factors favouring disclosure do not carry sufficient weight to override the nondisclosure factors and do not justify disclosure. Therefore, I find that access to this information can be refused because disclosure would, on balance, be contrary to the public interest.³⁴

Information relating to the reassessment of other individuals and information provided to OIR during the course of a review of the RTO with which the applicant was aligned

35. This information relates to the reassessment of other individuals for high-risk work licences (including the letters OIR sent to them, their responses, and the outcomes in relation to that process) and information provided to OIR during the course of a review of the RTO with which the applicant was aligned.
36. The information is not about the applicant; it is about the other individuals and the RTO. It has no bearing on, or relevance to, the cancellation of the applicant's licences by OIR. This information was created in the process of the licence holders being reassessed. I am unable to identify any public interest factors which favour disclosure of this information to the applicant other than the general public interest in furthering access to government-held information and the IP Act's pro-disclosure bias.³⁵
37. The applicant submits that he knows the names of the individuals as he performed their initial assessments. If anything, this serves to strengthen the weight of the public interest factors relating to personal information and privacy of these individuals. Given the small size of the group subject to reassessments and the applicant's knowledge of the names of these individuals, disclosing this information to him, even with the names redacted, would enable him to identify which individuals were reassessed, the outcome of those reassessments and information provided to OIR by those individuals about their personal circumstances. Having carefully considered the context in which this information appears throughout the information in issue, I recognise the need to protect the privacy and personal information of these individuals and the public interest factors favouring nondisclosure carry determinative weight in the circumstances.³⁶

³³ The factors favouring disclosure listed at schedule 4, part 2, items 1, 3, 7 and 11 of the RTI Act are relevant.

³⁴ Section 67(1) of the IP Act and section 47(3)(b) of the RTI Act.

³⁵ Section 64 of the IP Act.

³⁶ Schedule 4, part 3, item 3 and part 4, item 6(1) of the RTI Act.

38. OIR also performed a review of the RTO and obtained information during that process, which is not directly related to the applicant. This information comprises the personal information of other people and I consider its disclosure under the IP Act could reasonably be expected to prejudice the flow of information to OIR.³⁷ I do not consider there are any strong public interest factors favouring the disclosure of this information to the applicant which outweigh these nondisclosure factors.
39. For these reasons, I am satisfied that disclosure would, on balance, be contrary to the public interest and access can be refused on that basis.³⁸

Nonexistent or unlocatable information

40. The applicant seeks access to the tests completed by other individuals that he was responsible for assessing.³⁹ This information is covered by item 4 of his access application. OIR did not locate these tests.

Relevant law

41. Access to a document may be refused if it is nonexistent or unlocatable.⁴⁰ A document is nonexistent if there are reasonable grounds to be satisfied it does not exist.⁴¹ A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to find it, but it cannot be found.⁴²
42. To be satisfied that a document does not exist, the Information Commissioner has previously recognised that an agency must rely on its particular knowledge and experience, having regard to various key factors including:⁴³
 - the administrative arrangements of government
 - the agency's structure
 - the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and other legal obligations that fall to it)
 - the agency's practices and procedures (including, but not limited to, its information management approaches); and
 - other factors reasonably inferred from information supplied by the applicant, including the nature and age of the requested documents, and the nature of the government activity to which the request relates.
43. By considering the above factors, an agency may ascertain that a particular document was not created because, for example, the agency's processes do not involve creating that specific document. In such instances, it is not necessary for the agency to search for the document. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.
44. An agency may also rely on searches to satisfy itself that a document does not exist. In those cases, all reasonable steps must be taken to locate the documents. Such steps

³⁷ Schedule 4, part 3, item 3 and 13 and part 4, item 6 of the RTI Act.

³⁸ Section 67(1) of the IP Act and section 47(3)(b) of the RTI Act.

³⁹ Applicant submissions on 21 February 2023 and 1 September 2023.

⁴⁰ Sections 47(3)(e) and 52(1) of the RTI Act.

⁴¹ Section 52(1)(a) of the RTI Act.

⁴² Section 52(1)(b) of the RTI Act.

⁴³ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [19], which adopted the Information Commissioner's comments in *PDE and The University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) at [37]-[38].

may include inquiries and searches of all relevant locations identified after consideration of the key factors listed above.

Findings

45. OIR has provided OIC with signed search certifications completed by the relevant officers involved in locating the documents relevant to the access application, which I have carefully considered.⁴⁴ These certifications detail the nature and extent of the search and enquiry process OIR undertook to locate the relevant documents. In summary, OIR made enquiries with the relevant staff who were involved in the matter and they searched:
- OIR phone records
 - email repositories using the applicant's name and other keywords (including having IT perform searches covering the emails of a staff member no longer employed by OIR); and
 - their other systems (G: drive and RAPS).
46. OIR officers spent an additional 3 hours undertaking additional searches for student records in their system and did not locate the student assessments. OIR advised that this is because the assessments (and reassessments) were undertaken by the RTO, not OIR and these documents would therefore be held by the RTO as they were not created by or in the possession of OIR. OIR did locate the enforcement correspondence the business unit had with the licence holders and this information formed part of information considered on external review.
47. OIR's explanation that the assessments and reassessments were undertaken by the RTO, not OIR, and that these documents would therefore be held by the RTO is sufficient to account for the nonexistence of these documents. In addition to OIR's explanation, I am also satisfied that OIR's search and enquiry process has been comprehensive and that OIR has taken all reasonable steps to locate the documents. The applicant has not provided any evidence to indicate that these documents are held by OIR or that further searches are warranted in the circumstances. I find that the information which has not been located in relation to item 4 of the access application can be refused on the basis it is nonexistent.⁴⁵

DECISION

48. As the decision under review is a deemed decision, I set aside OIR's decision and find that access to the remaining information can be refused under the IP Act for the reasons set out above.
49. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

T Mainwaring
Principal Review Officer

Date: 18 September 2023

⁴⁴ OIR submissions on 6 July 2023.

⁴⁵ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
8 November 2022	OIC received the external review application.
2 December 2022	OIC notified the applicant and OIR that the external review application had been accepted. OIC asked OIR to provide the applicant with any information OIR was prepared to release (and not requiring third party consultation). OIC asked the applicant to notify OIC if there were any outstanding issues he would like OIC to review after he had received the information from OIR.
20 February 2023	OIR notified OIC that it had released the relevant information to the applicant on 17 February 2023.
21 February 2023	OIC asked the applicant to identify any other grounds for review. OIC received the applicant's submission. OIC asked OIR to provide a copy of the information in issue and a submission addressing the grounds for refusing access.
23 February 2023	OIC received the requested information from OIR.
14 March 2023	OIC received OIR's submission on access to the information in issue.
1 June 2023	OIC conveyed a preliminary view to the applicant and invited him to provide submissions supporting his case.
5 June 2023	The applicant contested the preliminary view and provided submissions.
7 June 2023	OIC conveyed a preliminary view to OIR and invited it to provide submissions supporting its case.
6 July 2023	OIR notified OIC that it agreed to release additional information to the applicant and provided submissions on the remaining issues in response to the preliminary view.
1 August 2023	OIC consulted with a third party about the release of information and invited the third party to provide submission supporting their case. The third party did not respond to the consultation letter.
29 August 2023	OIC conveyed a further preliminary view to the applicant and invited him to provide submissions supporting his case.
1 September 2023	The applicant contested the preliminary view and provided submissions. OIR notified OIC that the additional information had been released to the applicant.
4 September 2023	OIC wrote to the applicant clarifying some aspects of the preliminary view letter and confirming the next steps.