



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>W7SV7G and Department of Education [2018] QICmr 24 (22 May 2018)</i></b>
<b>Application Number:</b>	<b>313410</b>
<b>Applicant:</b>	<b>W7SV7G</b>
<b>Respondent:</b>	<b>Department of Education</b>
<b>Decision Date:</b>	<b>22 May 2018</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST - information relating to the applicant's employment with the agency - administration of justice and procedural fairness - accountability and transparency in workplace processes - privacy of other individuals - prejudice to management function - whether disclosure would, on balance, be contrary to the public interest - whether access to information may be refused under section 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> and sections 47(3)(b) and 49 of the <i>Right to Information Act 2009 (Qld)</i></b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied to the Department of Education and Training (**Department**) under the *Information Privacy Act 2009 (Qld)* (**IP Act**) for access to correspondence sent by the Queensland Teachers' Union (**Union**) raising matters in relation to him and a school at which he had previously worked.<sup>1</sup>
2. The Department located six pages and decided to refuse access<sup>2</sup> to all of the information on the basis that disclosure would, on balance, be contrary to the public interest.<sup>3</sup> The applicant then applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's refusal of access decision.<sup>4</sup>

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<sup>1</sup> Access application dated 11 April 2017. Machinery of government changes in December 2017 transferred relevant responsibility from the Department. Accordingly, existing IP Act applications and reviews made to the Department before the machinery of government changes now rest with the Department of Education including this external review. For ease of reference, I refer to 'the Department' in these reasons.

<sup>2</sup> Decision dated 14 June 2017.

<sup>3</sup> Under section 67(1) of the IP Act and section 47(3)(b) of the *Right to Information Act 2009 (Qld)* (**RTI Act**). Section 67 of the IP Act provides that access to information may be refused on the same grounds as set out in section 47 of the RTI Act.

<sup>4</sup> External review application received by OIC on 12 July 2017.

3. On external review, the applicant submitted that he had not been afforded procedural fairness by the Department in terms of school placements. He argued that by having access to the information, it would give him an opportunity to respond to any adverse allegations that had been made about him in the context of his employment. The Department was of the view that natural justice had been afforded to the applicant through an earlier investigation process, and also relied on the public interest factor in protecting the privacy of the other individuals involved to favour nondisclosure.
4. The public interest factors are finely balanced in this case, with several factors applying to favour disclosure of information about the applicant in the context of his employment. However, I have found that the weight of the public interest in protecting the privacy of other individuals is significant and determinative. Accordingly, for the reasons set out below, I affirm the Department's decision to refuse access to information on the basis that its disclosure would, on balance, be contrary to the public interest.<sup>5</sup>

### Background

5. Significant procedural steps taken by OIC in conducting the external review are set out in the Appendix to these reasons.
6. During the review, the Department provided OIC with background information about the applicant's employment situation. To summarise, the Department advised that the applicant had a *'long history of issues'*, had been the subject of *'numerous complaints'* some of which had led to *'grievance investigation(s) in which the allegations were found to be substantiated'*.<sup>6</sup> The applicant has recently retired from his employment with the Department.<sup>7</sup>

### Reviewable decision

7. The decision under review is the Department's decision dated 14 June 2017.

### Evidence considered

8. Evidence, submissions, legislation and other material considered in reaching this decision is referred to in these reasons (including footnotes and Appendix).

### Information in issue

9. As set out above, the Department located six pages in response to the access application and refused access to those pages in their entirety. While the IP Act limits the extent to which I can describe the particular content of those pages,<sup>8</sup> they include an email sent by the Union to the Department, and attached statements provided by individuals in relation to the applicant in the context of his employment (**Information in Issue**).<sup>9</sup>

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<sup>5</sup> Under sections 47(3)(b) of the RTI Act and section 67(1) of the IP Act.

<sup>6</sup> Department's submission to OIC dated 7 March 2018.

<sup>7</sup> Ibid.

<sup>8</sup> Section 121 of the IP Act.

<sup>9</sup> It appears that the applicant became aware of the existence of the Information in Issue through his dealings with the Department in relation to a period of suspension from his employment.

## Issue for determination

10. The issue for determination is whether access to the Information in Issue may be refused under section 67(1) of the IP Act and section 47(3)(b) of the RTI Act, on the basis that its disclosure would, on balance, be contrary to the public interest.

## Relevant law

11. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent the documents contain the individual's personal information.<sup>10</sup> While the IP Act is to be administered with a pro-disclosure bias,<sup>11</sup> the right of access is subject to certain limitations, including the grounds for refusal of access.<sup>12</sup> Relevantly, access may be refused to information where its disclosure would, on balance, be contrary to the public interest.<sup>13</sup> Various public interest factors may be relevant to deciding where the balance of the public interest lies<sup>14</sup> and a decision-maker is required to take specific steps in reaching a decision.<sup>15</sup>

## Findings

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

## Factors favouring disclosure

13. The applicant submits that he has a '*prima facie right to access*' his personal information.<sup>16</sup> It is uncontested that the applicant's personal information<sup>17</sup> appears throughout the Information in Issue in the form of his name, descriptions of his actions, references to his past conduct and opinions expressed by other individuals about him. The public interest favours disclosure of an applicant's personal information and I am satisfied that this factor applies in this case to the extent the Information in Issue contains the applicant's personal information.<sup>18</sup> In affording weight to this factor, it is relevant to consider the context in which the information appears.
14. Ordinarily, there is a public interest in people being able to see what has been said about them, and this is particularly strong in the case of an individual's employment information. To the extent the Information in Issue refers to exchanges or discussions in which the applicant was involved, the applicant is likely to already be aware of that information. I have also taken into account the Department's submission that the Information in Issue reiterates matters that were previously put to the applicant during an earlier workplace investigation into his conduct.<sup>19</sup> For these reasons, I find that the weight of this public interest factor is slightly reduced and therefore, afford it moderate weight in favour of disclosure.

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

<sup>11</sup> Section 64 of the IP Act.

<sup>12</sup> Section 67 of the IP Act and section 47 of the RTI Act. See footnote 3 above.

<sup>13</sup> Section 47(3)(b) of the RTI Act.

<sup>14</sup> See schedule 4 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.

<sup>15</sup> Section 49 of the RTI Act. The steps include: disregarding any irrelevant factors, identifying relevant factors favouring disclosure and nondisclosure, and balancing the relevant factors.

<sup>16</sup> Submission to OIC dated 26 April 2018, page 3.

<sup>17</sup> As defined in section 12 of the IP Act. See footnote 10 above.

<sup>18</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>19</sup> Department's submission to OIC dated 7 April 2018.

15. The applicant has submitted that he believes the Information in Issue contains information that is adverse to him. Specifically, he is concerned that the information had some bearing on him not being reappointed to a position at one school and his placement at a second school not eventuating.<sup>20</sup> The applicant submits that *'the duty of natural justice requires a subject officer to receive and consider a complaint made against them'*.<sup>21</sup> The applicant states he was suspended from his employment and considers it remains unclear whether the Information in Issue formed part of the basis of that suspension.<sup>22</sup>

16. The applicant's submissions in the preceding paragraph raise for consideration the public interest disclosure factors concerning administration of justice and procedural fairness.<sup>23</sup> In *Willsford and Brisbane City Council*<sup>24</sup> the Information Commissioner discussed the public interest in a person who has suffered an actionable wrong to be granted access to information in order to pursue a remedy. The Information Commissioner found that this factor arises if an applicant demonstrates that:

- they have suffered loss or damage or some kind of wrong, in respect of which a remedy is, or may be, available under the law
- they have a reasonable basis for seeking to pursue the remedy; and
- disclosing the information would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available or worth pursuing.<sup>25</sup>

17. I am satisfied that the *Willsford* elements are arguably established on the facts of this case as the applicant appears to have suffered loss in terms of terminated/unsuccessful school placements, and *may* have avenues for associated workplace/industrial proceedings available to him. The Department however, refuted the applicant's submissions in this regard and submitted that the Information in Issue does not include *'new complaints'* nor did it prompt *'a new complaint management or investigation process'*. In this regard, the Department submitted that:

*During 2016 the applicant had been subject of an investigation of allegations made concerning the applicant's conduct while working at [a school] As a result of this process and the hostile, aggressive conduct that was the subject of the allegations his employment had been suspended.*

...

*These were not new issues that then gave rise a natural justice requirement, they did not kick off a new complaint management or investigation process under which the applicant was required to be afforded procedural fairness, the applicant did not suffer any kind of loss, damage or some kind of wrong as a direct result of these documents.*<sup>26</sup>

18. While there is a recognisable public interest in ensuring an individual has an opportunity to respond to adverse information about them, the evidence available to OIC in this review indicates that the applicant has already had such an opportunity afforded to him in the course of the earlier investigation. While the applicant asserts that the Information in Issue has led to him suffering adverse consequences, I am unable to identify any evidence to establish a sufficient nexus between the Information in Issue and any

<sup>20</sup> External review application, attachment marked 'GC01'.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Schedule 4, part 2, items 16 and 17 of the RTI Act.

<sup>24</sup> (1996) 3 QAR 368 (*Willsford*).

<sup>25</sup> *Willsford* at paragraph 17. This approach was affirmed by OIC in *10S3FK and Department of Community Safety* (Unreported, Queensland Information Commissioner, 16 December 2011).

<sup>26</sup> Submissions to OIC received on 7 March 2018.

decisions made by the Department which have been adverse to the applicant's employment prospects. Having carefully examined the applicant's and Department's submissions, the Information in Issue and the background and contextual information provided by the Department about the applicant's employment history, I am satisfied that the weight of the public interest factors concerning administration of justice and procedural fairness can carry only moderate weight in the particular circumstances of this case.

19. The applicant argues that he has a right to access (and amend)<sup>27</sup> his personal information to the extent it is inaccurate, out of date or misleading.<sup>28</sup> The RTI Act recognises that where disclosure could reasonably be expected to reveal that information is incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant, this will raise a public interest in favour of disclosure.<sup>29</sup> The Information Commissioner has previously considered the application of this factor, in a comparable workplace context, as follows:<sup>30</sup>

*It is, by its very nature, the particular opinions and versions of events expressed by the relevant individuals who provided statements ... It is shaped by factors such as the individuals' memories of relevant events and subjective impressions. This inherent subjectivity does not mean that the [information] is necessarily incorrect or unfairly subjective.*

20. I am satisfied that the above reasoning applies in this review as the Information in Issue comprises information provided by other individuals which has been shaped by their recollection of events. While an individual's statement will inevitably be subjective, that does not equate to it comprising misleading, unfairly subjective, or irrelevant information, as required by the public interest factor. Accordingly, I find that this factor does not apply, in the circumstances of this case.
21. I am satisfied that there are some further public interest factors which apply in favour of disclosure of the Information in Issue in terms of enhancing the accountability and transparency of the Department regarding how it handles workplace grievance matters.<sup>31</sup> There are however, some mitigating circumstances which serve to reduce the weight of these factors, discussed below.
22. The Department has already advised the applicant that the Information in Issue was not taken into account in relation to his most recent suspension/disciplinary matters at a third school.<sup>32</sup> I have also taken into account the Department's submission that the Information in Issue did not prompt any new investigation into the applicant, nor instigate any new complaint process. In view of the background and contextual information provided by the Department about the applicant's employment history, I consider it is reasonable to accept that the Information in Issue reiterates concerns that have previously been put to the applicant in the course of an earlier investigation. The applicant considers that the Department should be required to provide further compelling evidence to demonstrate this point.<sup>33</sup> In the circumstances, I have no reason to suspect that the Department is providing false or misleading information to OIC and find it is

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<sup>27</sup> I note however, that applying for amendment of personal information is a separate process under section 44 of the IP Act, and is not a matter for determination in this review.

<sup>28</sup> Submission to OIC dated 26 April 2018, page 3.

<sup>29</sup> Schedule 4, part 2, item 12 of the RTI Act.

<sup>30</sup> *F60XCX and Department of Natural Resources and Mines* [2017] QICmr 19 (9 June 2017) at [52] citing *Marshall and Department of Police* (Unreported, Queensland Information Commissioner, 25 February 2011) at [15]-[20]. See also *Balzary and Redland City Council; Tidbold (Third Party)* [2017] QICmr 41 (1 September 2017) at [23].

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

<sup>32</sup> Letter from the Department to the applicant dated 20 October 2017.

<sup>33</sup> Submission to OIC dated 27 April 2018, page 3.

appropriate to accept the Department's submissions without requiring further corroborating evidence.<sup>34</sup>

23. I also observe that the Information in Issue was created by the Union and other individuals, not the Department itself. As such, it does not set out any of the procedures/steps followed by the Department in making any decisions about the applicant's employment, nor does it demonstrate any of the Department's thinking processes or deliberations—had such information been included in terms of enhanced accountability, the public interest may have carried more weight. While I acknowledge that the Information in Issue forms part of the background and contextual information that was available to the Department in making decisions relating to the applicant's employment, taking into account the Department's submissions at paragraphs 17 and 22 above, I afford these factors<sup>35</sup> only moderate weight in favour of disclosure.<sup>36</sup>

### **Factors favouring nondisclosure**

24. The RTI Act recognises that the public interest will favour nondisclosure of information if it could reasonably be expected to prejudice the protection of an individual's right to privacy.<sup>37</sup> The concept of '*privacy*' is not defined in either the IP Act or the RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their '*personal sphere*' free from interference from others.<sup>38</sup>
25. While the IP Act prevents me from particularising the content of the Information in Issue, it can generally be described as information of an inherently sensitive and personal nature provided by other individuals. I am satisfied that it comprises the '*personal information*' of those individuals.<sup>39</sup> I acknowledge that the information appears in a workplace context, within the public sector, however, having thoroughly reviewed its content, I am satisfied that it falls outside the routine day-to-day category<sup>40</sup> and into the other individuals' personal sphere. Further, I consider that disclosure would constitute a significant intrusion into the private sphere of the individuals who chose to provide information of a sensitive and personal nature to the Department.
26. During the review, the applicant expressed that he was not interested in finding out the identities of other individuals, but sought only the substance of what was said about him.<sup>41</sup> The Department submitted that it would not be possible to properly de-identify the Information in Issue given the size of the relevant school community, the applicant's involvement and the nature of the information in the statements.<sup>42</sup> The Department submitted that, for these reasons, the identities of the other individuals could reasonably be ascertained, even if their names and identifying information were removed.

<sup>34</sup> Section 108(1)(c) of the IP Act provides that the Information Commissioner '*is not bound by the rules of evidence and may inform herself on any matter in any way the commissioner considers appropriate*'.

<sup>35</sup> Schedule 4, part 2, items 1 and 11 of the RTI Act.

<sup>36</sup> I have had regard to all of the factors listed in schedule 4, part 2 of the RTI Act, and in the circumstances of this review, I find that no other public interest factors apply to favour disclosure of the Information in Issue.

<sup>37</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>38</sup> Paraphrasing the Australian Law Reform Commission's definition of the concept in '*For your information: Australian Privacy Law and Practice*' Australian Law Reform Commission Report No. 108 released 12 August 2008, at paragraph 1.56.

<sup>39</sup> Section 12 of the IP Act. Despite this, I have not considered the application of the harm factor in schedule 4, part 4, item 6 of the RTI Act, on the basis that there is evidence to suggest that the substance of the Information in Issue has previously been put to the applicant in the course of a previous investigation. To the extent that the applicant is already aware of the other individuals' personal information, I am not satisfied that releasing it would constitute a '*disclosure*' in order for the harm factor to apply.

<sup>40</sup> Generally, the personal information of public servants in the routine day to day category attracts very low weight in favour of nondisclosure. For a discussion of routine and non-routine personal work information of public sector employees, see *Kiepe and The University of Queensland* (Information Commissioner of Queensland, 1 August 2012) at [18] to [21].

<sup>41</sup> Telephone call with OIC on 9 January 2018.

<sup>42</sup> Department's submissions to OIC received on 7 March 2018.

27. Having closely examined the Information in Issue, I am satisfied that the other individuals' identities are inextricably intertwined with the substance of their statements are inextricably intertwined. Given the size of the relevant school community and the applicant's previous work history at the school, it would not be possible to de-identify the Information in Issue with sufficient certainty. In the particular factual matrix of this case, I am satisfied that protection of the other individuals' right to privacy can only be achieved through nondisclosure of the entirety of the Information in Issue and therefore, I afford this factor<sup>43</sup> significant weight in favour of nondisclosure.
28. I have also considered whether disclosure of the Information in Issue could reasonably be expected to prejudice the management function of the Department.<sup>44</sup> The Department has an obligation to deal with workplace grievance matters promptly, fairly and with a level of discretion. This does not however, translate into receiving evidence of allegations and complaints on an entirely confidential basis as this would be inconsistent with the principles of natural justice. However, the information provided by complainants/witnesses can, in some instances, go beyond the substantive issues pertinent to a complaint. To that end, I consider there is a public interest in the Department only conveying issues salient to a complaint, and not the more personal or private aspects that may be included in an individual's statement. In the circumstances of this case, I consider that the nature of the Information in Issue is such that disclosure could reasonably be expected to prejudice the Department's management function as individuals may be reluctant to comprehensively detail the personal impacts that a workplace situation has had on them in the future. I am satisfied that this factor also carries significant weight in favour of nondisclosure.

### ***Balancing the relevant factors***

29. I have taken into account the pro-disclosure bias and the applicant's right to access his personal information. I have also recognised that there is a public interest in the applicant having access to information that may contribute to the administration of justice and procedural fairness for him, and in enhancing the accountability and transparency of the Department in terms of how it handles workplace grievance processes. While there are some mitigating circumstances which serve to reduce the weight of these factors, as discussed above, I consider they all carry moderate weight in favour of disclosure of the Information in Issue.
30. However, the Information in Issue is inherently sensitive and personal in nature and for this reason, I have found that its disclosure could reasonably be expected to prejudice the protection of other individuals' right to privacy, to a significant extent. I have also found that the Department's management function could suffer significant prejudice in the future if sensitive information of this kind was disclosed under the IP Act. On balance, I find that the nondisclosure factors carry determinative weight and that therefore, disclosure of the Information in Issue would, on balance, be contrary to the public interest and access to it may be refused on that basis.<sup>45</sup>

### **DECISION**

31. I affirm the Department's decision to refuse access to the Information in Issue under section 67(1) of the IP Act and section 47(3)(b) of the RTI Act.

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<sup>43</sup> Schedule 4, part 3, item 3 of the RTI Act

<sup>44</sup> Schedule 4, part 3, item 19 of the RTI Act.

<sup>45</sup> Section 67(1) of the IP Act and section 47(3)(b) of the RTI Act.

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

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K Shepherd  
**Assistant Information Commissioner**

**Date: 22 May 2018**



## APPENDIX

### Significant procedural steps

Date	Event
12 July 2017	OIC received the external review application and requested relevant procedural documents from the Department.
17 July 2017	OIC received the requested procedural documents from the Department.
26 July 2017	OIC notified the applicant and the Department that the external review had been accepted. OIC requested and received further information from the Department.
17 October 2017	OIC provided the applicant with a written update on the status of the review.
3 November 2017	OIC conveyed a preliminary view to the Department that part of the Information in Issue could be disclosed. OIC requested further background information about the applicant's employment history.
17 November 2017	The Department responded to OIC's request for further information.
24 November 2017	OIC provided the applicant with an update on the status of the review and received submissions, by telephone, from the applicant in response.
1 December 2017	OIC received further submissions from the Department.
5 December 2017	OIC requested additional information from the Department.
18 December 2017	OIC received the requested information from the Department.
8 January 2018	OIC provided the applicant with an update on the status of the review and requested further submissions in support of the applicant's case.
18 January 2018	The applicant's legal representative notified OIC that it did not consider there was any need to provide any more information.
6 February 2018	OIC conveyed a further preliminary view to the Department that part of the Information in Issue could be disclosed and requested submissions in response.
7 March 2018	OIC received submissions from the Department contesting the preliminary view, and proposing OIC conduct third party consultation.
12 March 2018	OIC received submissions from a third party objecting to disclosure of the Information in Issue.
13 March 2018	OIC provided the Department with an update on the status of the review.
27 March 2018	OIC sought the Department's consent to convey parts of its submissions to the applicant. The Department generally agreed with OIC's approach.
28 March 2018	OIC conveyed a preliminary view to the applicant and requested submissions in response.
29 March 2018	The applicant provided OIC with further submissions, by telephone.
27 April 2018	OIC received written submissions from the applicant contesting the preliminary view.