



Decision and Reasons for Decision

Citation:	<i>L85 and Department of Child Safety, Seniors and Disability Services [2023] QICmr 21 (29 May 2023)</i>
Application Number:	316901
Applicant:	L85
Respondent:	Department of Child Safety, Seniors and Disability Services
Decision Date:	29 May 2023
Catchwords:	ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – CONTRARY TO CHILD’S BEST INTERESTS – application on behalf of child for electronic child safety documents relating to that child – whether disclosure would not be in the child’s best interests – section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(c) and 50 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. A parent applied¹ on behalf of their child to the Department of Children, Youth Justice and Multicultural Affairs (**Department**)² under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to electronic child safety documents relating to that child (**applicant**).³
2. The Department located 65 pages and decided to refuse access to the entirety of those pages on the ground that disclosure would be contrary to the child’s best interests.⁴
3. The parent applied on behalf of the child to the Office of the Information Commissioner (**OIC**) for external review of the Department’s decision.⁵
4. For the reasons set out below, I affirm the Department’s decision refusing access to the information on the ground that disclosure would be contrary to the child’s best interests.

Background

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

¹ Access application dated 21 July 2022, compliant on 9 August 2022.

² Following a machinery of government change on 18 May 2023, the agency currently responsible for this external review is the Department of Child Safety, Seniors and Disability Services.

³ Where an application is made on behalf of a child, the applicant is taken to be the child rather than the parent – see section 45(1) of the IP Act and the definition of ‘applicant’ in schedule 5 of the IP Act.

⁴ Decision dated 2 September 2022.

⁵ External review application dated 13 September 2022.

Reviewable decision

6. The decision under review is the Department's decision dated 2 September 2022.

Evidence considered

7. The evidence, submissions, legislation and other material I have considered in reaching this decision are referred to in these reasons (including the footnotes and Appendix).
8. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the rights to seek and receive information, privacy and the protection of families and children.⁶ 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 and the *Right to Information Act 2009* (Qld) (**RTI Act**).⁷ 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 similar pieces of Victorian legislation⁸ that '*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*'.⁹

Information in issue

9. The information in issue comprises 65 pages of information relating to the applicant in this matter, gathered by the Department while exercising its child safety functions (**Information in Issue**).¹⁰

Issue for determination

10. The issue for determination is whether disclosure of the Information in Issue would be contrary to the child's best interests.¹¹

Relevant law

11. Under the IP Act, an individual has a right to be given access to documents to the extent they contain the individual's personal information.¹² However, this right is subject to the provisions of the IP Act and the RTI Act.¹³ Relevantly, an agency may refuse access where:

- a) information is sought under an application made by or for a child
- b) the information sought comprises the child's personal information; and

⁶ Sections 21, 25 and 26 of the HR Act.

⁷ *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]. I further note that OIC's approach to the HR Act set out in this paragraph was considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (where Judicial Member McGill saw '*no reason to differ*' from our position).

⁸ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁹ *XYZ* at [573].

¹⁰ On 9 December 2022, in response to a request from the parent on behalf of the child applicant that the date range specified in the access application be extended, OIC advised that section 47 of the IP Act provides that an access application is taken only to apply to documents that are in existence on the day that an application is received.

¹¹ Under section 47(3)(c) and 50 of the RTI Act.

¹² Section 40 of the IP Act.

¹³ Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent it could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under that Act.

- c) disclosure of that information would not be in the child's best interests.¹⁴
12. Personal information is defined 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*'.¹⁵
13. The principle 'best interests of the child' is set out in the *United Nations Convention on the Rights of the Child* (1989) (**Convention**),¹⁶ and has since been applied in Australia in a number of legal contexts, particularly in family law and administrative law.
14. The IP Act and RTI Act provide limited guidance as to what factors are to be considered in deciding whether disclosure of information would not be in the child's best interests.¹⁷ In *FLK v Information Commissioner*¹⁸ (**FLK**) Judicial Member McGill made the following general observations regarding this ground for refusing access:
- ... The question of whether disclosure of the information would or would not be in the best interests of the child is I consider under s 50(2) to be decided objectively, by reference to identifiable objective factors either advancing or damaging the interests of the child. Subsection (3), which applies where an access application has been made by a child personally, shows that the opinion of the child is not to be conclusive as to where the best interests of the child lie. That is consistent with the proposition that the test under subsection (2) is an objective one.*
15. Courts have also recognised that 'best interests' is a multi-faceted test and incorporates the wellbeing of the child, all factors which will affect the future of the child, the happiness of the child, immediate welfare as well as matters relevant to the child's healthy development. The concept includes not only material wealth or advantage but also emotional, spiritual and mental wellbeing.¹⁹
16. In *Re Bradford and Director of Family Services; Commissioner, Australian Federal Police*²⁰ the applicant sought access under the *Freedom of Information Act 1982* (Cth) to various documents about herself and her four children that were held by the Director of Family Services. In that case, President Curtis noted that where there are child protection issues, disclosure may undermine the relationship between the child and the agency charged with the protection of children and as such may not be in the child's best interests.²¹
17. Similarly, the Information Commissioner has also previously recognised that it would not be in a child's best interests to disclose information where that disclosure may impact the child's trust in a child protection agency, or which may result in damage to the relationship between the child and the agency.²²

¹⁴ Sections 47(3)(c) and 50 of the RTI Act.

¹⁵ Section 12 of the IP Act.

¹⁶ Ratified by Australia in December 1990. The Convention provides that the best interests of the child shall be a '*primary consideration*' in all actions concerning children and '*a child means every human being below the age of eighteen years*'.

¹⁷ Noting that section 50(3) of the RTI Act sets out that an agency must have regard to whether the child has the capacity to understand the information and the context in which it was recorded and make a mature judgement as to what might be in his or her best interests, **unless** the access application was made for the child, as is the case in this review.

¹⁸ [2021] QCATA 46 at [8].

¹⁹ United Nations Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), 29 May 2013, available at <<https://digitallibrary.un.org/record/778523?ln=en>> at I.A.5; see also *Q95 and Legal Aid Queensland* [2019] QICmr 38 (6 September 2019) at [48].

²⁰ (1998) 52 ALD 455 (**Re Bradford**).

²¹ *Re Bradford* at 458-459.

²² *2YSV6N and the Department of Communities, Child Safety and Disability Services* [2014] QICmr 25 (5 June 2014) at [45].

18. A child's right to privacy is also recognised in the *Convention*. Australian courts accept that children reach varying levels of autonomy and independence prior to turning 18 and that a right to privacy, whilst generally low for a young child in relation to their parent, will strengthen as the child's understanding and maturity grows.²³

Findings

19. In this case, I am satisfied that the information is sought under an application made for a child and that the Information in Issue comprises the child's personal information.

Contrary to the child's best interests

20. In determining whether disclosure of the Information in Issue would not be in the best interests of the child, I have carefully considered the material before OIC, including the contents of the Information in Issue and the following information received from the parent on behalf of the child applicant:

- submissions²⁴
- Family Court Consent Orders;²⁵ and
- a Therapeutic Progress Report addressed to the parent completed by an Accredited Mental Health Social Worker and Psychotherapist (**Report**).²⁶

21. I acknowledge that the parent on behalf of the child applicant has raised concerns that the Information in Issue may contain erroneous, inaccurate and fraudulent information detrimental to the child's best interests. I also note that the parent has stated compelling reasons for seeking access to the Information in Issue, including genuine concern for the child's wellbeing and a belief that the Information in Issue will enable the parent to address matters of concern and expedite the improvement of the child's circumstances.

22. In relation to the Family Court Consent Orders, the parent has submitted that:²⁷

... I draw your attention specifically to Order ... of those Orders Information Sharing and Authorities which expressly grants me leave and entitlement toaccess at my request any and all information in relation to the welfare of my [child].... Further, the Order expressly details thatthe Order constitutes and is thereby deemed to be sufficient authority to access such information..... This Order was to ensure that there be no impediment to access such information in order for the processes of due disclosure and discovery to take place to ensure that informed decisions can be made in the best interests of my [child].

3/ I have since the publishing of the Court Order been assessed and designated 'Primary Carer' statit with respect to my [child]. As such, I have a legal right and parental obligation to access any and all information with respect to my [child] that will enable me, and such Child Safety Specialists that I engage, to make informed decisions on [the child's] behalf in [the child's] best interests.

23. These submissions refer to the entitlement of the parent – not the child applicant – to receive information relating to the child's health, education and welfare under the Family Court Consent Orders. Regardless, neither the Consent Orders, nor any subsequent change to carer arrangements, afford the child (or indeed the parent if the parent were the applicant) any special rights – ie any exemption from or right to override the

²³ *Marion's case (Secretary, Department of Health and Community Services v JWB and another (1992) 175 CLR 218 at [19] referring to Gillick v West Norfolk and Wisbech Area Health Authority [1986] 1 AC 112; see also AZ4Z4W and the Department of Communities, Child Safety and Disability Services [2014] QICmr 26 (5 June 2014) at [34].*

²⁴ Including in the external review application dated 13 September 2022, and email submissions dated 9 January 2023.

²⁵ Dated 25 September 2020.

²⁶ Dated 15 November 2022.

²⁷ Email dated 9 January 2023.

provisions in the IP Act and the RTI Act. Just as children and parents who are not subject to such Consent Orders may have their access to documents limited by provisions in the IP Act and the RTI Act, if applicable, so too may the child and parent in this review.

24. The parent also submitted that:²⁸

As my [child's parent and] Primary Carer and as an individual I have a legal right to due, fair and proper process. That includes the legal process and function of disclosure and discovery, in order to defend myself against false and erroneous allegations that may impede my ability to provide for and protect my [child] and [their] best interests and/or that may leave [them] vulnerable to the potential of neglect and harm of other parties.

25. However, an access application under the IP Act (or RTI Act) is entirely separate to, and independent of, any court proceedings in which disclosure and discovery processes may be utilised. Further, the right to procedural fairness does not extend to pre-empting future anticipated or hypothetical decisions in the manner the parent contemplates.

26. The submission at paragraph 24 above may arguably be construed as contending, in a more general sense, that it is in the child's interests to give the parent the opportunity to identify and address what the parent considers to be false allegations, so as to prevent the parent's ability to act in the child's best interests from being impeded. To this extent, and to the extent the parent generally submits that it is in the child's best interests that the Information in Issue be disclosed, I acknowledge that the material before me indicates that the parent cares very greatly for the child and is motivated to advocate for and ensure their protection.

27. However, I also note concerns such as those noted in the Report received from the parent on behalf of the child applicant – eg observations that the child:

- *'is concerned about repercussions with regards to [their] disclosures being shared';* and
- *'is very sensitive to the ongoing conflictual parental relationship stating that this also causes [them] significant stress'.*

28. The parent has submitted that these concerns relate to the child's other parent, not them.²⁹ Within the context of the matters discussed in the Report, I accept that this may be so, particularly with respect to the first observation about repercussions. However, having had the benefit of considering the matters recorded in the Information in Issue, I am content to make a finding of fact that these observations relate to the parental relationship and therefore to both parents. I am unable to make further comment in this regard, as doing so would inevitably reveal information appearing in the Information in Issue and thereby subvert the very purpose of the external review. However, having carefully considered the contents of the Information in Issue, including notifications, interviews and assessments, I consider it appropriate to conclude that the above observations comprise *'identifiable objective factors ... damaging the interests of the child'* (to quote FLK).

²⁸ Email dated 9 January 2023.

²⁹ Email dated 9 January 2023, which states *'It is important to note that the report clearly identifies [the child's] concerns with regards to [their] disclosures being shared being expressly focussed towards and in relation to [their other parent and that parent's partner]. There is no mention of me in that regard what so ever. [The child] is on record as having no concern with regards to my knowledge of [their] circumstances, especially given that I appear to be the only individual doing anything about improving them';* and *'It is important to note that the reported conflict is in direct relation to the reactive distress and frustration with respect to the persistent serious mistreatment issues reported by [the child] within [the child's other parent's] household and [the child's other parent's] failure to accept, address and mitigate same, coupled with the failure of third parties and organisations whose responsibilities it is to support and protect [the child], and myself'.*

29. I further note, from the child's age, that the child's privacy and ability to control the personal information provided by them to the Department is a somewhat low, but gradually increasing, consideration.
30. The parent has submitted that their numerous previous applications, with respect to their child's child safety file, have never previously been refused and that, accordingly, they have accessed many years of documents.³⁰ This has no bearing on the present review. My role in conducting a merits review is to 'step into the shoes' of the primary decision-maker, consider matters relating to the agency's decision afresh and determine the correct and preferable decision.³¹
31. In this case, while the child is taken to be the applicant,³² the practical effect of disclosure would be that the Information in Issue would be released to the parent on behalf of the child applicant. Taking this into account, and in the context of the parental conflict identified in the Report referred to above and the matters noted in the notifications, interviews and assessments in the Information in Issue, as well as the Department's awareness of and involvement with the child over a number of years, I consider that disclosure of the Information in Issue could impact the child's willingness to speak freely with the Department in the future, should that be required, out of fear that any information disclosed may be shared. This in turn could prejudice the Department's ability to perform its child protection functions, and I consider the reasons the parent has identified as to why disclosure would be in the child's best interests are not sufficient to overcome this potential consequence of disclosure. I am therefore satisfied that disclosure of the Information in Issue would not be in the child's best interests.³³

DECISION

32. For the reasons set out above, I affirm the Department's decision to refuse access to the Information in Issue on the ground that disclosure would be contrary to the child's best interests.³⁴
33. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

A Rickard
Assistant Information Commissioner

Date: 29 May 2023

³⁰ Email dated 9 January 2023.

³¹ Section 118(1)(b) of the IP Act.

³² Section 45 of the IP Act.

³³ Given the application of this ground of refusal, it has been unnecessary for me to address other grounds of refusal – however, I observe that much of the Information in Issue, except for information comprising '*only personal information of the [child] applicant*', could also be refused on the ground it was exempt information under section 47(3)(a) and schedule 3, section 12(1) of the RTI Act, on the basis that disclosure is prohibited by section 186 to 188 of the *Child Protection Act 1999* (Qld).

³⁴ Section 67(1) of the IP Act and sections 47(3)(c) and 50 of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
13 September 2022	OIC received the application for external review. OIC requested preliminary documents from the Department. OIC received the preliminary documents requested from the Department.
17 October 2022	OIC advised the Department and the parent on behalf of the child applicant that the external review application had been accepted. OIC requested the Information in Issue from the Department.
19 October 2022	OIC received the Information in Issue from the Department.
8 December 2022	The parent on behalf of the child applicant requested that the date range of the access application be extended.
9 December 2022	OIC advised the parent on behalf of the child applicant that the date range of the access application could not be extended on external review.
6 January 2023	OIC conveyed a preliminary view to the parent on behalf of the child applicant.
9 January 2023	The parent on behalf of the child applicant provided submissions contesting OIC's preliminary view.