



Decision and Reasons for Decision

Citation:	<i>Q20RYB and Department of Justice and Attorney-General [2014] QICmr 2 (16 January 2014)</i>
Application Number:	311556
Applicant:	Q20RYB
Respondent:	Department of Justice and Attorney-General
Decision Date:	16 January 2014
Catchwords:	ADMINISTRATIVE LAW – RIGHT TO INFORMATION – CONTRARY TO PUBLIC INTEREST INFORMATION – recordings of prisoner’s telephone conversations – personal information and privacy - whether disclosure would, on balance, be contrary to the public interest – 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>

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Justice and Attorney-General¹ (**Department**) for access under the *Information Privacy Act 2009 (Qld)* (**IP Act**) to recordings of telephone calls he made while a prisoner.
2. The Department decided to refuse to deal with the access application.²
3. The applicant sought external review of the decision.
4. For the reasons given below, I set aside the Department’s decision to refuse to deal with the access application and substitute a decision that disclosure of the requested recordings would, on balance, be contrary to the public interest.³

Background

5. The applicant was remanded in custody for three months on a serious charge. During that time, in accordance with security procedures, the Department recorded the applicant’s telephone conversations.
6. The applicant was convicted, in separate trials, of that charge and another more

¹ Machinery of government changes in 2013 transferred relevant responsibility from the Department of Community Safety (**Community Safety**) to the Department of Justice and Attorney-General. Accordingly, existing access applications and reviews involving certain applications made to Community Safety before the machinery of government changes now rest with the Department of Justice and Attorney-General, including this external review.

² Under section 62(3)(b)(iii) of the IP Act.

³ Under section 47(3)(b) and section 49 of the *Right to Information Act 2009 (Qld)* (**RTI Act**), in conjunction with section 67(1) of the IP Act.

serious charge. He seeks access to copies of numerous recordings made during his remand period (**Recordings**) for use in seeking a pardon in respect of his conviction on the lesser charge.

7. In 2011 the applicant had applied for access to various recordings, including the recordings in issue in this review. Access was refused (**Previous Decision**) on the ground that their disclosure would, on balance, be contrary to the public interest. The applicant sought external review⁴ of the Previous Decision. That external review was finalised on the basis that, not having provided a response within time, the applicant was deemed to have accepted OIC's preliminary view that disclosure of the requested recordings would, on balance, be contrary to the public interest.⁵

Significant procedural steps

8. Significant procedural steps relating to the application and the external review are set out in the Appendix.

Reviewable decision

9. The decision under review is the Department's decision dated 10 May 2013.
10. In the decision, the Department refused to deal with the access application on the ground that it did not, on its face, disclose any reasonable basis for again seeking access to the Recordings; the applicant previously having applied to the Department for access to the same recordings and access having been refused.⁶

Evidence considered

11. Evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).

Information in issue

12. The information in issue in this review comprises recordings of 93 telephone calls the applicant made to various individuals.⁷

Issue for determination

13. In the specific circumstances giving rise to this review, explained at paragraph 7 above, I exercise my discretion⁸ to decide any matter in relation to the access application that could have been decided by the agency under the IP Act.⁹ I have determined that, in these particular circumstances, there is a reasonable basis for the applicant again seeking access to the Recordings.
14. Accordingly, in this review, I will consider whether disclosure of the Recordings would, on balance, be contrary to the public interest.

⁴ Review 310785.

⁵ The applicant had asked OIC to extend the time in which to provide his submission responding to the preliminary view, on the basis that day to day activities in the correctional centre in which he was held had been disrupted by a number of movements of prisoners within the centre, preventing him from responding in time. OIC declined the applicant's request for an extension of time and advised him that, if he wished to again seek access to the relevant telephone recordings, he would need to make a fresh application to the Department.

⁶ Under section 62(3)(b)(iii) of the IP Act.

⁷ Highlighted in the list *Call Activity Report* attached to the access application dated 8 April 2013.

⁸ Under section 118 of the IP Act, which authorises the Information Commissioner to conduct a merits review of the decision made by the Department.

⁹ The Department, in a telephone conversation on 11 July 2013, did not raise any objection to the review proceeding in this manner.

Would disclosure of the Recordings be contrary to the public interest?

15. Yes, for the reasons that follow.

Relevant law

16. Under the IP Act an individual has a right to be given access to documents of an agency to the extent they contain the individual's personal information. However, this right is subject to other provisions of the IP Act and the RTI Act,¹⁰ including the grounds on which an agency may refuse access to documents. Relevantly, an agency may refuse access to a document to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest.¹¹
17. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest¹² and explains the steps that a decision-maker must take¹³ in deciding the public interest.

Findings

Irrelevant factors

18. On external review the applicant expressed concern that, as a defendant in criminal proceedings, he may receive less favourable access to important relevant information than prosecution agencies. He states that, while he is being denied access to the Recordings, the prosecution at his trial on the more serious charge had been able not only to access, but to play publicly in court, copies of recordings of other telephone conversations between the applicant and other individuals.¹⁴
19. I consider this comparison raises an irrelevant consideration. In criminal trials, the prosecution is required to present evidence relevant to the charge.¹⁵ The fact that the information in issue in this external review – recordings of the applicant's telephone conversations – may be of a similar general nature to evidence which was accessed and disclosed through a trial process, is not relevant to the issues for consideration in applying the provisions of the IP Act and RTI Act. I am satisfied that this is an irrelevant factor and I have not taken it into account in deciding whether disclosure of the Recordings would, on balance, be contrary to the public interest.¹⁶
20. I have examined the irrelevant factors in schedule 4 of the RTI Act and am satisfied I have not taken into account these or any other irrelevant factors in reaching my decision.

¹⁰ Section 67 of the IP Act provides that access to information may be refused on the same grounds as under section 47 of the RTI Act.

¹¹ Section 67(1) of the IP Act and 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.

¹² Schedule 4 of the RTI Act sets out a non-exhaustive list of factors for deciding whether disclosing information would, on balance, be contrary to the public interest.

¹³ Section 49(3) of the RTI Act provides that a decision maker must:

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

¹⁴ Letter to OIC dated 3 November 2013.

¹⁵ And under laws requiring fairness for defendants in the trial process, copies of the recordings played at the trial would have been provided to the applicant - see section 590AB of the *Criminal Code Act 1899*, which obliges the prosecution to give an accused person full and early disclosure of evidence the prosecution proposes to rely on in the proceeding. Under the principle of open justice, courts generally are open to the public, in order to enable scrutiny of the important processes by which individuals' liberty may be constrained.

¹⁶ Section 49(3) of the RTI Act.

Factors favouring disclosure

Personal information of applicant and deceased persons

21. I acknowledge the public interest in individuals being able to obtain access to their own personal information.¹⁷ As the applicant was a party to the telephone conversations, the Recordings comprise his personal information.¹⁸
22. A further public interest factor favouring disclosure will arise in respect of the personal information of a deceased person where the applicant for access is an eligible family member of the deceased person.¹⁹ Significant portions of the Recordings comprise the applicant's conversations with and about two people who are now deceased, the applicant's elder child and wife.²⁰ As parent and spouse respectively of those two deceased persons, the applicant is an eligible family member.
23. The applicant was a party to the conversations and is aware of the nature of the information conveyed and the substance of the conversations. Disclosing the Recordings is unlikely to add significantly to his knowledge or comprehension of the information. As disclosure of the Recordings is unlikely to significantly enhance these public interest factors, I attribute only moderate weight to them.

Contribute to the administration of justice

24. A public interest factor favouring disclosure will arise if disclosing information could reasonably be expected to contribute to the administration of justice for a person,²¹ for example, by allowing a person subject to adverse findings or conviction access to information that may assist them in mounting a defence or clearing their name.
25. The applicant proposes to apply to the Governor of Queensland seeking a pardon in respect of his conviction for the lesser offence²² and submits he requires access to the Recordings, in conjunction with other information,²³ for the purpose of completing his application. I understand the applicant's submission to be, in essence, that the Recordings comprise, or would help provide, fresh evidence which, if adduced at his trial for the lesser charge, would have raised a reasonable doubt as to his guilt. He states that he was unaware of the existence of the recordings before his committal and trial on the lesser charge.²⁴
26. However, the applicant has not identified the nature of information in the Recordings, or any other means or information by which access to the Recordings would assist him in demonstrating that a reasonable doubt of guilt would have been raised at trial. It is incumbent upon the applicant to provide evidence supporting his submission. In the absence of information about the Recordings' use towards seeking a pardon, I am unable to conclude that the applicant has demonstrated that disclosing them would assist him in pursuing a pardon, or in evaluating the prospects of success of seeking a pardon.
27. Based on the above, I therefore consider it unlikely that disclosure of the Recordings

¹⁷ Schedule 4, part 2, item 7 of the RTI Act.

¹⁸ 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.*'

¹⁹ Schedule 4, part 2, item 9 of the RTI Act.

²⁰ Although not specifically identified, the context of some calls indicates the applicant's wife was likely a participant in those calls.

²¹ Schedule 4, part 2, item 17 of the RTI Act.

²² Access application dated 8 April 2013 and submission dated 3 November 2013. Other avenues of appeal in respect of this offence appear to have been exhausted; the Queensland Court of Appeal dismissed the applicant's appeal against conviction and sentence and the High Court of Australia dismissed his application for special leave to appeal.

²³ The applicant's submissions do not identify the nature of the additional information.

²⁴ Submission dated 3 November 2013.

could reasonably be expected to enhance this administration of justice public interest factor. I accord this factor only minimal weight.

Factors favouring nondisclosure

Personal information of others

28. The RTI Act provides that disclosing personal information of a person, whether living or dead, could reasonably be expected to cause a public interest harm.²⁵
29. I have carefully reviewed the contents of the Recordings. They feature the personal information of individuals other than the applicant – relevantly, the voices and words of his children and other individuals, including his wife, as well as observations about those other individuals.
30. The Recordings contain sensitive private information about others' personal circumstances, such as their daily activities, expressions of emotion and feelings, particularly following the tragic accident and death of the applicant's elder child. Given the very sensitive and private nature of the information discussed, I consider the public interest harm resulting from disclosure of this sensitive personal information would be significant.

Protection of an individual's right to privacy

31. A public interest factor favouring nondisclosure will arise if disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy.²⁶ An additional factor favouring nondisclosure arises where the personal information is of a deceased individual, the applicant is an eligible family member of the deceased person and the disclosure of the information could reasonably be expected to impact on the deceased person's privacy if the deceased person were alive.²⁷
32. The Recordings contain sensitive information about individuals such as the applicant's acquaintances and family, including his deceased child and wife. The information concerns feelings about events in the lives of, and activities undertaken, by those various individuals. I am therefore satisfied disclosure would prejudice the protection of these individuals' privacy and these two factors arise for consideration.
33. Where information is already known to an applicant, this reduces, to an extent, the privacy interest attaching to the information. I acknowledge that the applicant participated in the conversations and this arguably diminishes relevant privacy interests.
34. Much of the Recordings concern personal private information about individuals who did not themselves volunteer the information. Disclosure of such information could reasonably be expected to prejudice the protection of the relevant individuals' right to privacy, by intruding into the 'personal sphere' of those individuals without their consent to disclosure. In these circumstances, the public interest in protecting those individuals' right to privacy is significant.
35. I acknowledge an element of voluntariness on the part of the adult persons who participated in calls with the applicant (in that, notwithstanding that the conversations

²⁵ Schedule 4, part 4, section 6 of the RTI Act.

²⁶ Schedule 4, part 3, item 3 of the RTI Act. 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: see *Marshall and Department of Police* (Unreported, Queensland Information Commissioner, 25 February 2011) at [27] 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 11 August 2008, at paragraph 1.56.

²⁷ Schedule 4, part 3, item 5 of the RTI Act.

with him were recorded, they elected to participate in them). However, the mandatory nature of the recording of such conversations gave those persons little chance to speak with the applicant other than by acquiescing to the recording. In these circumstances I consider their participation in calls with the applicant reduces the privacy value of their personal information only to a very minor extent.

36. I acknowledge a reduction in the privacy interest attaching to information in the Recordings, where such information may have been disclosed publicly, for example at trial. A significant amount of information about the applicant's wife entered the public sphere through the circumstances of her death and subsequent trial proceedings relating to her death. However a review of the information in the Recordings concerning her shows the content to be largely of a domestic private nature and it is unlikely that this information has been publicly disclosed. I therefore consider there is a significant public interest in protecting the privacy of information about the applicant's deceased wife which remains private.
37. I acknowledge that the applicant's children engaged in numerous conversations with him and that they informed him of events and circumstances about themselves and others. I understand that the applicant had been the parent primarily involved in his children's day to day care prior to his incarceration. On the basis of the applicant's relationship as a parent having significant involvement in his children's lives, I recognise some reduction in the privacy interest of information his children volunteered to the applicant about themselves.
38. However, the privacy interests of other individuals, particularly the applicant's surviving child, remain high and may be adversely affected by disclosure of information about the child, or the child's deceased sibling or mother, even where the information is somewhat aged (over a decade having passed). Given the intertwined nature of information in the Recordings, disclosure of information about the applicant's deceased child or wife would also disclose information about his surviving child.
39. In these circumstances I consider the privacy interest in information in the Recordings is only minimally reduced and given the very sensitive nature of the information, the public interest in safeguarding the privacy of others should be accorded significant weight.

Security or good order of a corrective services facility

40. Under the RTI Act, disclosing a recording of a telephone call made by an offender from a corrective services facility could reasonably be expected to cause a public interest harm.²⁸
41. The Recordings are of calls made by the applicant from a corrective services facility and accordingly I must consider the extent of public interest harm arising from their disclosure. The nature of the information in the Recordings principally concerns the applicant's and others' relationships and activities. The information was created over a decade ago. Disclosing the Recordings is unlikely to reveal sensitive information about current prison security. I consider the public interest harm arising from disclosure of the Recordings would be minimal and I attribute only slight weight to this factor.

Balancing the relevant public interest factors

42. To summarise, I afford:
- moderate weight to the public interest factors favouring disclosure of the

²⁸ Schedule 4, part 4, section 5(1)(b)(ii) of the RTI Act.

- applicant's personal information and that of deceased persons
- slight weight to the public interest factor favouring disclosure relating to administration of justice
 - significant weight to the public interest factors favouring non-disclosure relating to the protection of personal information and the privacy of other individuals; and
 - slight weight to the public interest harm factor favouring non-disclosure of information affecting the security of a correctional services facility.
43. The nature of the Recordings is such that it is not possible to separate the applicant's personal information from the personal information of others. Thus, the relevant information cannot be disclosed to the applicant without disclosing personal information of other individuals. While the factors favouring disclosure to the applicant of his own personal information and that of his deceased family members warrants moderate weight, balanced against this are the relevant privacy interests of the individuals mentioned in the Recordings, including the deceased persons.
44. There is a clear public interest in ensuring that government protects privacy and treats with respect the personal information it collects from members of the community.²⁹ This is particularly so in relation to information collected through mandatory recordings of telephone calls made to third parties by prisoners.
45. Further, an important principle underpinning both the RTI Act and the IP Act is that individuals should have a measure of control over the personal information collected from them by government, and, by extension, an access applicant should not be put in a position to control dissemination of the personal information of others, unless the balance of the public interest requires it in the circumstances of a particular case.³⁰ As the RTI Act and IP Act impose no restraint or condition on the use to which information obtained may be put, release of the Recordings would result in just such a prejudice.
46. Despite some public interest in the applicant having access to his and his deceased relatives' personal information, the particular circumstances of this case give rise to stronger factors favouring nondisclosure, namely the protection of personal information and other individuals' right to privacy. Therefore I find that disclosure of the Recordings would, on balance, be contrary to the public interest.

DECISION

47. For the reasons set out above, I set aside the decision to refuse to deal with the access application and substitute a decision that disclosure of the Recordings would, on balance, be contrary to the public interest under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.
48. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Louisa Lynch
Assistant Information Commissioner

Date: 16 January 2014

²⁹ An expectation recognised by Parliament in enacting the IP Act.

³⁰ *6E7YWS and Department of Housing and Public Works* (Unreported, Queensland Information Commissioner, 24 October 2013) at [38].

APPENDIX**Significant procedural steps**

Date	Event
11 April 2013	The Department received the applicant's application for access to all personal telephone recordings.
10 May 2013	The Department issued its decision to refuse to deal with the application.
5 June 2013	OIC received the applicant's application for external review of the Department's decision and requested that the Department provide OIC with copies of procedural documents by 12 June 2013.
12 June 2013	OIC received a copy of the requested documents from the Department.
18 June 2013	OIC notified the applicant and the Department that the application for external review had been accepted.
12 July 2013	OIC wrote to the Department requesting a copy of the documents in issue.
29 July 2013	The Department provided OIC with the requested documents.
13 August 2013 – 13 September 2013	OIC liaised with the Department regarding difficulties in accessing the documents provided by the Department.
10 October 2013	OIC received from the applicant correspondence requesting an update on the status of the review.
29 October 2013	OIC conveyed a preliminary view to the applicant that disclosure of the Recordings would, on balance, be contrary to the public interest, and invited the applicant to provide submissions supporting his case by 19 November 2013 if he did not accept the preliminary view.
5 November 2013	The applicant notified OIC that he did not accept the preliminary view and provided OIC with submissions.
8 November 2013	OIC wrote to the applicant addressing his submissions and reiterating the preliminary view that disclosure of the Recordings would, on balance, be contrary to the public interest.
19 November 2013	OIC received further submissions from the applicant dated 14 November 2013.
6 January 2014	OIC notified the Department that the applicant had rejected the preliminary view.