



## Decision and Reasons for Decision

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<b>Citation:</b>	<i>Eddington and Department of National Parks, Recreation, Sport and Racing [2015] QICmr 2 (30 January 2015)</i>
<b>Application Number:</b>	312097
<b>Applicant:</b>	Eddington
<b>Respondent:</b>	Department of National Parks, Recreation, Sport and Racing
<b>Decision Date:</b>	30 January 2015
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST INFORMATION – names and identifying information of witnesses – personal information – whether disclosure would, on balance, be contrary to the public interest – sections 47(3)(b), 49 and schedule 4 of the <i>Right to Information Act 2009 (Qld)</i></b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied to the Department of National Parks, Recreation, Sport and Racing (**Department**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to documents about an incident involving the applicant and waste removal trucks.
2. The Department located 142 pages and 1 video, and purported to make a decision in respect of these pages.<sup>1</sup> As the applicant did not receive written notice of the decision within the processing period, the Department was deemed to have made a decision refusing access to the located documents.<sup>2</sup>
3. The applicant applied to OIC for external review of the Department's decision.
4. On external review, the applicant agreed<sup>3</sup> to limit the information in issue to certain witness details to which access had been refused on 6 pages.<sup>4</sup>

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<sup>1</sup> The purported decision was to grant full access to 35 pages, part access to 63 pages and 1 video and refuse full access to 44 pages. Documents were released to the applicant in accordance with this purported decision. The Office of the Information Commissioner (**OIC**) treated the purported decision as the Department's submission on external review.

<sup>2</sup> Section 46(1)(a) of the RTI Act.

<sup>3</sup> In a telephone discussion with OIC on 11 September 2014.

<sup>4</sup> Namely, pages 128-133. Although the Department had also refused access to the signatures of the individuals who countersigned the witness statements on these pages, the applicant did not contest OIC's preliminary view on these signatures, and they are therefore no longer in issue.

5. For the reasons set out below, access to this information is refused under section 47(3)(b) of the RTI Act on the basis that it comprises the personal information of witnesses, the disclosure of which would, on balance, be contrary to the public interest.

### Background

6. The incident referred to in paragraph 1 formed the basis of a Penalty Infringement Notice (**PIN**) which the Department issued to the applicant, but later withdrew.
7. Significant procedural steps relating to the application and the external review process are set out in the Appendix.

### Reviewable decision

8. The decision under review is the decision the Department is deemed to have made under section 46(1)(a) of the RTI Act refusing access to the requested information.

### Evidence considered

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

### Information in issue

10. The information in issue (**Information in Issue**) appears in witness statements prepared in relation to the relevant incident.<sup>5</sup> It comprises the names, signatures, date of birth/age, place of residence and work pattern/history of the persons who provided these witness statements.

### Relevant law

11. Under the RTI Act, a person has a right to be given access to documents of an agency.<sup>6</sup> However, this right is subject to other provisions of the RTI Act, including the grounds on which an agency may refuse access to documents.<sup>7</sup> Access to a document may be refused if disclosing it would, on balance, be contrary to the public interest.<sup>8</sup>
12. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest<sup>9</sup> and explains the steps that a decision-maker must take<sup>10</sup> in deciding the public interest as follows:
  - 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

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<sup>5</sup> The witness statements appear at pages 128-129 and 130-133.

<sup>6</sup> Section 23 of the RTI Act.

<sup>7</sup> As set out in section 47 of the RTI Act.

<sup>8</sup> Sections 47(3)(b) and 49 of the RTI Act. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the wellbeing of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

<sup>9</sup> Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive; in other words, factors that are not listed may also be relevant.

<sup>10</sup> Section 49(3) of the RTI Act.

- decide whether disclosure of the information would, on balance, be contrary to the public interest.

## Findings

13. No irrelevant factors arise in the circumstances of this case and I have not taken any into account. I will now consider the relevant factors favouring disclosure and nondisclosure of the Information in Issue.

## ***Applicant's submissions***

14. The applicant provided submissions to OIC about the circumstances in which the PIN was issued and the conduct of the Department and its officers.<sup>11</sup> Where the applicant's concerns relate to public interest factors, they are dealt with below.

## ***Factors favouring disclosure***

### **Applicant's personal information**

15. Although the witness statements in which the Information in Issue appears are broadly about the applicant, the particular information to which access remains refused clearly neither identifies the applicant, nor is about him. Therefore, the Information in Issue is not the applicant's personal information<sup>12</sup> and this factor favouring disclosure<sup>13</sup> does not arise for consideration.

### **Accountability and transparency of the Department**

16. The applicant submits that the Department has not been open and transparent in its actions, and is '*protecting the truth behind the incident*' described in the witness statements.<sup>14</sup> This submission raises the issue of whether disclosing the Information in Issue could reasonably be expected to enhance government accountability<sup>15</sup> or reveal the reason for a government decision (or any background or contextual information informing the decision).<sup>16</sup> These are both factors which, if applicable, would favour disclosure of the information.
17. The applicant has received all substantive information in both witness statements. I do not consider that disclosing the Information in Issue would enhance the Department's accountability or provide background to any decision to investigate this incident or discontinue proceedings against the applicant. I am therefore satisfied that these factors are not relevant in the circumstances of this case. The public interest factors relating to accountability and transparency have already been significantly advanced by the release of the substance of the witness statements and of other information previously released by the Department to the applicant.

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<sup>11</sup> External review application dated 10 July 2014, telephone discussion with OIC on 26 September 2014, and submission dated 21 October 2014.

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

<sup>13</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>14</sup> Submission dated 21 October 2014.

<sup>15</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>16</sup> Schedule 4, part 2, item 11 of the RTI Act.

### Correctness of information

18. The applicant submits that he has evidence that the witness statements are incorrect.<sup>17</sup> This raises the issue of whether disclosing the Information in Issue could reasonably be expected to reveal that the information was incorrect, which is a factor favouring disclosure.<sup>18</sup> This factor operates in relation to the specific information to which an applicant seeks access.
19. In this case, the Information in Issue (ie, comprising the witnesses' names, signatures, date of birth/age, place of residence and work pattern/history) is limited in nature, and there is nothing before me to indicate that it is incorrect. Accordingly, I find that disclosing the Information in Issue could not reasonably be expected to reveal that it is incorrect, and therefore, this factor does not apply.

### Procedural fairness

20. The RTI Act provides that factors favouring disclosure arise where disclosing the information could reasonably be expected to contribute to the administration of justice generally (including procedural fairness) or for a person.<sup>19</sup>
21. The witness statements relate to an incident in respect of which the applicant was issued with a PIN. The applicant submits that due process was not followed in relation to the issuing of this PIN.<sup>20</sup> He also contends that, without a full copy of the witness statements, he '*cannot contest the allegation and submit [his] evidence that contradicts these statements*'.<sup>21</sup>
22. The released information includes a letter to the applicant from the Department dated 20 February 2014<sup>22</sup> stating that the Department had '*conducted a review of the circumstances surrounding this matter and the decision has been made to withdraw the [PIN] and issue [the applicant] with a final formal warning for this alleged breach of the [Recreation Areas Management Act 2006 (Qld)]*'. The applicant contends that because the 20 February 2014 letter alleges his actions to be in breach of the *Recreation Areas Management Act 2006* (Qld), the Department still has obligations to disclose all the evidence it holds in full, or retract the 20 February 2014 letter.<sup>23</sup>
23. There is a legitimate public interest in a person against whom allegations are made having access to sufficient information to accord that person procedural fairness, by allowing them to consider their position and respond, if necessary. In this instance, all substantive information within the witness statements has already been disclosed to the applicant. The Information in Issue comprises only the witnesses' names, signatures, date of birth/age, place of residence and work pattern/history. The Department has withdrawn the PIN that had been issued against the applicant, and no action is being taken against the applicant regarding the incident described in the witness statements. Accordingly, I consider that these factors favouring disclosure do not apply here.<sup>24</sup>

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<sup>17</sup> External review application dated 10 July 2014.

<sup>18</sup> Schedule 4, part 2, item 12(a) of the RTI Act.

<sup>19</sup> Schedule 4, part 2, items 16 and 17 of the RTI Act.

<sup>20</sup> External review application dated 10 July 2014.

<sup>21</sup> Submission dated 21 October 2014.

<sup>22</sup> Pages 102-103.

<sup>23</sup> Submission dated 21 October 2014.

<sup>24</sup> See, eg, *Arnold and Redland City Council* (Unreported, Queensland Information Commissioner, 17 October 2013) [41].

## Legal action

24. The applicant submits that he has the right to take legal action, by recovering the costs associated with the 'false' allegations made against him. He submits that by not having access to the Information in Issue, he is being denied the 'right of recovery of costs'.<sup>25</sup> Accordingly, I have considered whether disclosing the Information in Issue could reasonably be expected to contribute to the administration of justice for the applicant.<sup>26</sup>
25. The Information Commissioner has previously stated that an assertion by an applicant that information is required to enable pursuit of a legal remedy is not sufficient in itself to enliven this prodisclosure consideration.<sup>27</sup> Apart from the applicant's contention that he requires the Information in Issue in order to take legal action to recover his costs, no information has been provided to support this claim. In the absence of evidence about how the Information in Issue would advance any opportunity to pursue a legal remedy, I do not consider that this public interest consideration is relevant.
26. Therefore, I consider that this factor favouring disclosure does not arise in this instance.

## Factors favouring nondisclosure

### Other individuals' personal information and privacy

27. The RTI Act recognises that:
- disclosure of information could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person other than the applicant;<sup>28</sup> and
  - a factor favouring nondisclosure arises where disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy.<sup>29</sup>
28. The Information in Issue comprises other individuals' personal information.<sup>30</sup> Further, the fact that a person has raised concerns to an agency comprises an aspect of their 'personal sphere',<sup>31</sup> disclosure of which represents an intrusion to their privacy.<sup>32</sup> Given the sensitivity regarding the relevant incident and the small size of the community in which it is alleged to have occurred, I am satisfied that the release of the Information in Issue would be a substantial intrusion into the witnesses' privacy.
29. The applicant submits that the released information already identifies the witnesses by their first names.<sup>33</sup> I have carefully reviewed all of the released documents, and have been unable to identify any released information which identifies the witnesses by name. Therefore, I do not consider that the witnesses' privacy interests are diminished in this regard.

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<sup>25</sup> Submission dated 21 October 2014.

<sup>26</sup> Schedule 4, part 2, item 17 of the RTI Act.

<sup>27</sup> *Willsford and Brisbane City Council* (1996) 3 QAR 368 [17]. Although that decision was made under the now repealed *Freedom of Information Act 1992* (Qld), the Right to Information Commissioner has decided that its reasoning is equally applicable in the context of the RTI Act: *Marshall and Department of Police* (Unreported, Queensland Information Commissioner, 25 February 2011) [21].

<sup>28</sup> Schedule 4, part 4, item 6 of the RTI Act.

<sup>29</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>30</sup> In accordance with the definition in section 12 of the IP Act.

<sup>31</sup> *OP5BNI and Department of National Parks, Recreation, Sports and Racing* (Unreported, Queensland Information Commissioner, 12 September 2013) [45].

<sup>32</sup> *Arnold and Redland City Council* (Unreported, Queensland Information Commissioner, 17 October 2013) [35], citing schedule 4, part 3, item 3 of the RTI Act.

<sup>33</sup> Telephone discussion with OIC on 26 September 2014.

30. The applicant further submits that privacy and similar considerations are not relevant as the witness statements were provided for the purpose of prosecution.<sup>34</sup> He further contends that the witnesses voluntarily provided the information, knowing that it may be used for prosecution purposes and they would, in that event, be publicly identified; in doing so, they waived their right to withhold their identity from public release.<sup>35</sup>
31. I do not agree with these submissions. A witness' privacy interests may be diminished where their identity has been disclosed to the person against whom the witness made allegations, or where a witness statement has been publicly tendered as evidence. I do not consider that the witnesses' privacy interests have been diminished in this way. The Department withdrew the PIN before it was necessary to provide the applicant with full copies of the witness statements in order to accord him procedural fairness in the face of an impending hearing.
32. Therefore, I afford substantial weight to the factors favouring nondisclosure relating to other individuals' personal information and privacy.

### **Prejudice to flow of information**

33. A factor favouring nondisclosure arises where disclosing information could reasonably be expected to prejudice the flow of information to a law enforcement or regulatory agency.<sup>36</sup>
34. Given the Department is responsible for enforcing the *Recreation Areas Management Act 2006* (Qld), I am satisfied it is a law enforcement or regulatory agency for the purposes of this factor. Disclosing the Information in Issue could reasonably be expected to prejudice the flow of information to the Department, as individuals may be reluctant to provide statements to the Department in the future if they believe their personal information will be released.<sup>37</sup> This in turn would significantly prejudice the Department's ability to effectively discharge its enforcement functions.
35. The applicant submits that it is in the public interest to prevent false information being provided to authorities to investigate.<sup>38</sup> I make no finding about the truth or falsity of the information provided by the witnesses. However, it is generally recognised that there is a very strong public interest in protecting the free flow of information to law enforcement or regulatory agencies, even where this may result in an agency investigating false and/or unsubstantiated allegations.<sup>39</sup>
36. Accordingly, I find that this factor favouring nondisclosure applies and I afford it substantial weight.

### **Balancing the public interest**

37. I have not identified any factors favouring disclosure of the Information in Issue. However, I find there to be substantial public interest in protecting the personal information and privacy interests of the witnesses, as well as in ensuring the free flow of information to the Department from members of the community.

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<sup>34</sup> Telephone discussion with OIC on 26 September 2014.

<sup>35</sup> Submission dated 21 October 2014.

<sup>36</sup> Schedule 4, part 3, item 13 of the RTI Act.

<sup>37</sup> *Setschnjak and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 25 May 2012) [24].

<sup>38</sup> Submission dated 21 October 2014.

<sup>39</sup> *P6Y4SX and Department of Police* (Unreported, Queensland Information Commissioner, 31 January 2012) [35]-[40].

38. Given the substantial weight afforded to these public interest factors, I consider that access may be refused to the Information in Issue, on the basis that disclosing it would, on balance, be contrary to the public interest.

## **DECISION**

39. As the Department was deemed to have made a decision refusing access to the Information in Issue under section 46(1)(a) of the RTI Act, I vary the Department's decision and find that access to the Information in Issue can be refused under section 47(3)(b) of the RTI Act.
40. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**L Lynch**  
**Assistant Information Commissioner**

**Date: 30 January 2015**

**APPENDIX**

**Significant procedural steps**

<b>Date</b>	<b>Event</b>
13 May 2014	The Department received the access application.
2 July 2014	The Department posted the decision to the applicant on the final day of the processing period. As the applicant did not receive written notice of the decision within the processing period, the Department was deemed to have made a decision refusing access to the requested documents.
10 July 2014	OIC received the application for external review of the Department's decision.
11 July 2014	OIC notified the Department that the external review application had been received and requested relevant procedural documents.
15 July 2014	OIC received the requested procedural documents from the Department.
18 July 2014	OIC notified the applicant and the Department that it had accepted the external review application. OIC requested that the Department provide a copy of the located documents, as well as its search records.
4 August 2014	OIC received the requested information from the Department.
10 September 2014	In a telephone call with OIC, the Department advised that it had no concerns with OIC relying on the public interest test to refuse access to the Information in Issue (instead of the breach of confidence exemption relied on in the purported decision).
11 September 2014	In a telephone call with OIC, the applicant advised that he only sought access to the pages containing the Information in Issue, and OIC confirmed this in a subsequent email.
26 September 2014	OIC conveyed a preliminary view to the applicant by telephone in relation to the Information in Issue. The applicant did not accept the preliminary view, and requested it in writing.
30 September 2014	OIC issued a preliminary view in writing to the applicant.
16 October 2014	The applicant notified OIC that he did not accept the preliminary view and requested an extension until 22 October 2014 to provide submissions.  OIC agreed to the extension in a subsequent email.
21 October 2014	OIC received a submission from the applicant.
21 November 2014	OIC issued a further preliminary view in writing to the applicant, and invited the applicant to provide further submissions by 5 December 2014.
12 December 2014	OIC notified the applicant and the Department that the external review had been finalised on the basis that OIC had not heard from the applicant by 5 December 2014.
18 December 2014	The applicant requested OIC to issue a formal decision.  OIC reopened the matter and notified the applicant and the Department of the reopening.