



Decision and Reasons for Decision

Citation:	<i>O79LUWW and Department of Justice and Attorney-General</i> [2018] QICmr 45 (2 November 2018)
Application Number:	313677
Applicant:	O79LUWW
Respondent:	Department of Justice and Attorney-General
Third Party:	The Office of the Public Guardian
Decision Date:	2 November 2018
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL TO DEAL - applicant seeking court documents - whether application expressed to relate to all documents that contain information of a stated kind or subject matter - whether all documents to which the application relates appear to comprise exempt information - whether agency may refuse to deal with application - section 59 of the <i>Information Privacy Act 2009</i> (Qld) ADMINISTRATIVE LAW - RIGHT TO INFORMATION - EXEMPT INFORMATION - LAW ENFORCEMENT OR PUBLIC SAFETY - whether disclosure could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation - schedule 3, section 10(1)(d) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Justice and Attorney-General (**Department**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for affidavits, transcripts and written submissions in relation to a Supreme Court proceeding involving the applicant and the Crown Solicitor for the State of Queensland (**Requested Information**).
2. The Department decided that the application was outside the scope of the IP Act on the basis that the Supreme Court is an entity to which the IP Act does not apply in relation to its judicial functions.¹

¹ Section 17 of the IP Act provides that 'agency' means anything that is an agency under the *Right to Information Act 2009* (Qld) (**RTI Act**). Section 14(2) of the RTI Act provides that an agency does not include an entity to which the RTI Act does not apply, which includes a court, or the holder of a judicial office or other office connected with a court, in relation to the court's judicial functions (Section 17(b) and Schedule 2, part 2(1) of the RTI Act).

3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.
4. On external review, OIC consulted with the Office of the Public Guardian (**OPG**) which submitted that disclosure of the Requested Information to the applicant could reasonably be expected to result in a serious act of harassment or intimidation towards an individual under the guardianship of the OPG (**Specified Person**).
5. For the reasons set out below, I have varied the Department's decision and find that all documents to which the application relates appear to be comprised of exempt information on the basis that disclosure could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation. Therefore, I have decided to refuse to deal with the application under section 59 of the IP Act.

Background

6. Significant procedural steps taken in the external review are set out in the Appendix.

Reviewable decision

7. The decision under review is the Department's internal review decision dated 7 December 2017.

Evidence considered

8. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix). I have also relied on some additional evidence that is not set out in detail in the following reasons, as to do so would incur the harm that refusal of the Requested Information is seeking to avoid.² Specifically, I consider that explaining this evidence in detail could reasonably be expected to identify and result in a person being subjected to a serious act of harassment or intimidation.

Issue for determination

9. External review by the Information Commissioner is merits review, i.e. an administrative reconsideration of a case which can be described as '*stepping into the shoes*' of the primary decision-maker to determine what is the correct and preferable decision. As such, the Information Commissioner has the power to decide any matter in relation to an application that could have been decided by the agency, under the IP Act.³ After conducting an external review of a decision, the Information Commissioner must make a decision affirming, varying, or setting aside and making a decision in substitution for, the decision under review.⁴
10. During the external review OIC provided the Department with its view that the Department's grounds for deciding that the documents were not subject to the IP Act as the Supreme Court is an entity to which the IP Act does not apply was incorrect. OIC formed this view on the basis that the application was made to the Department for documents held by the Crown Solicitor, not the Court. The Department subsequently provided OIC with a copy of the relevant documents for consideration on external review,

² Section 121(3) of the IP Act.

³ Section 118(1)(b) of the IP Act.

⁴ Section 123(1) of the IP Act.

however, it continued to object to the disclosure of this information and indicated consultation with OPG be undertaken prior to any disclosure of information.

11. Following consultation with OPG, OIC considered that the issue for determination in the review was whether a decision maker could refuse to deal with the application on the basis that all Requested Information appears to be comprised of exempt information the disclosure of which could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation.

Relevant law

12. If an access application is made to an agency under the IP Act, the agency should deal with the application unless this would not be in the public interest.⁵ Section 59 of the IP Act provides one set of circumstances in which Parliament has considered it would, on balance, be contrary to the public interest to deal with an access application. Section 59 of the IP Act allows an agency to refuse to deal with an application if:
 - a) the application requests all documents, or all documents of a stated class, that contain information of a stated kind or relate to a stated subject matter; and
 - b) it appears to the agency that all of the documents to which the application relates are comprised of exempt information.
13. Exempt information is information the disclosure of which Parliament has considered would, on balance, be contrary to the public interest as set out in Schedule 3 of the RTI Act.⁶ Relevantly, information is exempt if its disclosure is prohibited by Schedule 3, section 10(1)(d) of the RTI Act on the basis that it could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation (**Harassment or Intimidation Exemption**).⁷ This provision is subject to the exceptions contained in schedule 3, section 10(2) of the RTI Act.
14. The RTI Act does not define '*a serious act of harassment or intimidation*'. Therefore, the terms are given their ordinary meanings.⁸ In this regard, the Information Commissioner has previously accepted the following definitions:⁹
 - '*harass*' includes '*to trouble by repeated attacks, ...to disturb persistently; torment*'; and
 - '*intimidate*' includes '*to make timid, or inspire with fear; overawe; cow ... to force into or deter from some action by inducing fear*'.
15. The expected harassment or intimidation must be '*serious*' in nature before the Harassment or Intimidation Exemption will apply.¹⁰ This indicates that it was Parliament's intention, when passing this provision, that some degree of low level

⁵ Section 58(1) of the IP Act.

⁶ The Dictionary in Schedule 5 of the IP Act provides that '*exempt information*' means information that is exempt information under the RTI Act. Section 48 of the RTI Act provides that exempt information is information set out in Schedule 3 of the RTI Act.

⁷ Sections 47(3)(a) and 48 of the RTI Act.

⁸ *Sheridan and South Burnett Regional Council (and Others)* (Unreported, Queensland Information Commissioner, 9 April 2009) (**Sheridan**) at [188]. The decision in *Sheridan* concerned section 42(1)(ca) of the now repealed *Freedom of Information Act 1992* (Qld). Schedule 3, section 10(1)(d) of the RTI Act is drafted in substantially the same terms as this provision, and the reasoning in *Sheridan* has since been cited with approval in relation to the RTI Act, in decisions including *Mathews and Department of Transport and Main Roads* [2014] QICmr 37 (19 September 2014) and *Bowmaker Realty and Department of Justice and Attorney-General; Andrews* [2015] QICmr 19 (17 August 2015) (**Bowmaker**).

⁹ *Toogood and Cassowary Coast Regional Council* [2018] QICmr 13 (22 March 2018) (**Toogood**) at [17]; *Richards and Gold Coast City Council* (Unreported, Queensland Information Commissioner, 28 March 2012) at [13], *Ogawa and Queensland Police Service* (Unreported, Queensland Office of the Information Commissioner, 21 June 2012) at [13], applying the Macquarie Dictionary Online (Fourth Edition) definitions referred to in *Sheridan* at [194]-[195].

¹⁰ '*Serious*' relevantly means '*weighty or important*', '*giving cause for apprehension*'; *critical*': Macquarie Dictionary Online cited in *Toogood* at [18].

harassment or intimidation would be tolerated before the exemption could be invoked.¹¹ Being competitive, disparaging, unpleasant or *'irksome and annoying'* is not sufficient to establish the exemption.¹²

16. The term *'could reasonably be expected to'* requires that the expectation is reasonably based, that it is neither irrational, absurd or ridiculous,¹³ nor merely a possibility.¹⁴ Whether the expected consequence is reasonable requires an objective examination of the relevant evidence.¹⁵ Factors that might be relevant in considering whether an event could reasonably be expected to occur include, but are not limited to:¹⁶
- past conduct or a pattern of previous conduct
 - nature of the information in issue
 - nature of the relationship between the parties and/or relevant third parties; and
 - relevant contextual and/or cultural factors.
17. Finally, the expectation of serious intimidation or harassment must arise as a **result of disclosure**, rather than from other circumstances.¹⁷ Accordingly, for the Harassment or Intimidation Exemption to apply, I must be satisfied that the disclosure of the Requested Information, rather than the nature of the pre-existing relationship between the relevant parties, could reasonably be expected to cause a serious act of harassment or intimidation.

Findings

Is the application expressed to relate to all documents, or to all documents of a stated class, that contain information of a stated kind or relate to a stated subject matter?

18. Yes, I find that the first limb of section 59 of the IP Act is satisfied. The application requests various court documents that would have been created and used in a specific proceeding in the Supreme Court, therefore, all of the information sought by the applicant is of a stated kind.

Do all of the documents to which the application relates appear to be comprised of exempt information?

19. Yes, I am satisfied that all of the documents to which the application relates appear to be comprised of exempt information as disclosure of these documents could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation.¹⁸
20. The OPG is the guardian of the Specified Person and has made extensive submissions objecting to the release of the Requested Information. The Specified Person has health issues which make the Specified Person particularly vulnerable to harassing behaviour.

¹¹ *Toogood* at [18]; *Sheridan* at [187] and [294].

¹² *Toogood* at [18]; *Bowmaker* at [31].

¹³ *Toogood* at [19]; *Attorney-General v Cockcroft* (1986) 10 FCR 180 at 190.

¹⁴ *Murphy and Treasury Department* (1995) 2 QAR 744 (**Murphy**) at [44] citing *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279, at [154]-[160].

¹⁵ *Murphy* at [45]-[47]. In reaching a finding, it is not necessary for a decision-maker *'to be satisfied upon a balance of probabilities'* that disclosing the document will produce the anticipated prejudice, or, in this case, serious harassment or intimidation: see *Sheridan* at [192].

¹⁶ *Sheridan* at [193], cited more recently in *Toogood* at [19] and *Edmystone and Blackall-Tambo Regional Council* [2016] QICmr 12 (15 April 2016) at [25].

¹⁷ *Watson v Office of Information Commissioner Qld & Ors* [2015] QCATA 95 per Thomas J at [19].

¹⁸ As set out in schedule 3, section 10(1)(d) of the RTI Act.

21. The applicant has instituted many legal proceedings related to the Specified Person, including vexatious proceedings specifically against the Specified Person. A Domestic Violence Order was made against the applicant in relation to the Specified Person in 2008. A 2015 Supreme Court matter confirms that two tribunals have made findings that the applicant was acting in a way contrary to the interests of the Specified Person. The OPG has also informed OIC that the applicant was subject to bail conditions preventing him from having contact with the Specified Person except in certain limited circumstances.
22. The Information Commissioner has previously held that the '*combined effect of the pattern of complaints and threats of legal action, many of which are unsubstantiated or lack substance...has had the effect of tormenting and wearing down particular individuals*'.¹⁹ The nature of the harassment I expect may arise from disclosure of the Requested Information is the agitation of legal issues relating to the Specified Person, where these issues have been dealt with previously and/or have little merit. Given the long history of similar matters and the Specified Person's vulnerable state, any further legal actions could be expected to '*persistently disturb*' and '*torment*' the Specified Person and therefore constitute harassment.
23. On the basis of clear evidence of a pattern of similar behaviour over a long period of time, I consider that the likelihood of this form of harassment occurring as a result of disclosure of the Requested Information is more than a mere possibility and could reasonably be expected to occur.
24. In his submissions, the applicant indicates that he knows who OIC is referring to as the potential subject of harassment. The applicant contends that he has a longstanding relationship with this individual and, as he is already in contact with that individual, it is difficult for him to see how disclosing the information would lead to that individual being harassed.²⁰ This does not detract from the weight of evidence which I have outlined above that demonstrates an established pattern of harassing conduct against the Specified Person.
25. In relation to whether the relevant conduct would be serious, I note that it is not necessary to demonstrate a likelihood of criminal behaviour such as assault or unlawful stalking in a criminal sense.²¹ In this case, there is evidence before me that the pattern of behaviour engaged in by the applicant is beyond competitive, disparaging, unpleasant, 'irksome or annoying'. It is a cause for serious apprehension for the Specified Person because of their vulnerable nature, the extended period over which the relevant behaviour has occurred and orders that have been made preventing the applicant from contacting the Specified Person except in certain limited circumstances. I am therefore satisfied that the potential harassment would be of a serious nature.
26. Lastly, I have considered whether the serious harassment would arise from disclosure of the Requested Information, rather than other circumstances. I have taken into account that the applicant may have had access to the Requested Information in the original proceedings in 2004 and that the issues between the applicant and the Specified Person are pre-existing and longstanding. However, the applicant has confirmed that he requires '*the information from the Department for the purposes of future legal proceedings*'.²² On this basis, and the pattern of behaviour that has been demonstrated by the applicant over some years, I consider that disclosure of the Requested Information in this instance could reasonably be expected to result in the applicant seeking to institute

¹⁹ *Toogood* at [25].

²⁰ Applicant's submission dated 10 August 2018.

²¹ *Conde and Queensland Police Service* (Unreported, Queensland Information Commissioner, 18 October 2012) at [23].

²² Applicant's submission dated 10 August 2018.

further legal action involving the Specified Person. Accordingly, I am satisfied there is the necessary nexus between disclosure of the Requested Information and the reasonable expectation of serious harassment.

27. I have carefully considered the exceptions to the Harassment or Intimidation Exemption contained in Schedule 3, section 10(2) of the RTI Act, and am satisfied that none apply in the circumstances of this case. There is no evidence before me to suggest that the Requested Information is:
- (a) *matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law; or*
 - (b) *matter containing a general outline of the structure of a program adopted by an agency for dealing with a contravention or possible contravention of the law; or*
 - (c) *a report on the degree of success achieved in a program adopted by an agency for dealing with a contravention or possible contravention of the law; or*
 - (d) *a report prepared in the course of a routine law enforcement inspection or investigation by an agency whose functions include that of enforcing the law (other than the criminal law or the law relating to corruption under the Crime and Corruption Act 2001); or*
 - (e) *a report on a law enforcement investigation that has already been disclosed to the entity the subject of the investigation.*
28. Prior to making the findings outlined above, OIC provided the applicant with an opportunity to make submissions. The applicant raised concerns about procedural fairness and submits that he was not provided with sufficient information to allow him to respond to OIC's preliminary view. The applicant was informed that while OIC would ordinarily include more detail in its correspondence inviting submissions from an adversely affected party, the circumstances of this review are such that his background knowledge of the relevant proceedings and his history of dealings with OPG mean that he is already aware of the case against him. Further, his submissions indicate that he understands the nature of OPG's involvement and the concerns it has raised with OIC in this review.²³
29. The applicant submits that he would have been able to access the Requested Information through the Supreme Court until a few years ago when the file was destroyed and that therefore, the information should not now be refused. However, this is not a relevant consideration when assessing whether the Harassment or Intimidation Exemption applies. Similarly, I acknowledge the applicant's submission that the Requested Information is required to assist him in further legal proceedings. If I were required to consider whether disclosing the Requested Information would, on balance, be contrary to the public interest,²⁴ it may be relevant to consider whether public interest factors favouring disclosure relating to the administration of justice²⁵ arose in this instance. However, where (as is the case here) information appears to fall into one of the categories of information which Parliament has decided are exempt from release,²⁶ public interest factors favouring disclosure cannot be taken into account. Accordingly, I cannot take this submission into account when considering whether the Requested Information appears to be exempt.
30. I have carefully considered the remainder of the applicant's submissions in conjunction with the submissions made by the Department²⁷ and OPG²⁸ on external review. While I am limited in the detail I can provide for my finding, for the reasons I have explained

²³ Section 121(3) of the IP Act. I am limited in the extent to which I can address the applicants' submissions without disclosing information which I consider is likely to have the same harm contemplated by the Harassment of Intimidation Exemption.

²⁴ Under sections 47(3)(b) and 49 of the RTI Act.

²⁵ Schedule 4, part 2, items 16 and 17 of the RTI Act.

²⁶ Set out in schedule 3 of the RTI Act.

²⁷ Dated 28 March 2018.

²⁸ Dated 13 July 2018.

above, I am satisfied that disclosure of the kind of information sought by the applicant could reasonably be expected to result in the Specified Person being subjected to a serious act of harassment. Accordingly, I find that the second limb of section 59 of the IP Act is satisfied.

DECISION

31. For the reasons set out above, I vary the Department's decision by finding that section 59 of the IP Act can be relied on to refuse to deal with the application on the basis that all documents to which the application relates appear to comprise exempt information under section 48 and Schedule 3, section 10(1)(d) of the RTI Act.
32. I have made this decision under section 123 of the IP Act as a delegate of the Information Commissioner, under section 139 of the IP Act.

S Martin
A/Assistant Information Commissioner

Date: 2 November 2018

APPENDIX

Significant procedural steps

Date	Event
20 December 2017	OIC received the external review application. OIC notified the Department and the applicant that the external review application had been received and requested procedural documents from the Department.
4 January 2018	OIC received the procedural documents from the Department.
23 January 2018	OIC notified the Department and the applicant that the external review application had been accepted for review, and asked the Department to provide search records.
30 January 2018	The Department provided OIC with the requested search records.
12 February 2018	OIC contacted the Supreme Court Registrar to enquire about whether a party to the relevant proceedings would have access to the affidavits and submissions on the file.
13 & 26 February 2018	The Supreme, District & Land Courts Service confirmed that the relevant court file was destroyed in accordance with the Queensland Courts Retention and Disposal Schedule.
26 February 2018	OIC contacted the Department to discuss its internal review decision and the Department agreed to provide a copy of documents located by the Crown Solicitor's Office to OIC. OIC sent a letter to the Department requesting a copy of the relevant documents and a submission regarding any grounds of refusal.
27 February 2018	OIC updated the applicant as to the progress of the external review.
8 March 2018	The Department requested, and OIC granted, an extension to reply to OIC's letter dated 26 February 2018.
28 March 2018	The Department provided OIC with documents located by the Crown Solicitor's Office and made a submission objecting to disclosure of the documents.
20 April 2018	OIC updated the applicant as to the progress of the external review.
26 June 2018	OIC updated the applicant as to the progress of the external review. OIC consulted the OPG.
16 July 2018	The OPG provided a submission to OIC objecting to the disclosure of documents.
9 August 2018	OIC updated the Department and the OPG as to the progress of the external review. OIC conveyed a written preliminary view to the applicant that access to the information he seeks may be refused by the Department.
10 August 2018	The applicant provided a submission to OIC.
28 August 2018	OIC responded to the applicant's submission, explaining why further detail could not be provided in OIC's preliminary view.
31 August 2018	OIC updated the Department as to the progress of the external review.

Date	Event
26 October 2018	OIC contacted OPG to request submissions about the sensitivity of information proposed to be disclosed in OIC's decision.
1 November 2018	OPG confirmed that it did not object to the proposed information being included in OIC's decision.