



## Decision and Reasons for Decision

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Citation:	<i>Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships and Office of the Public Advocate [2022] QICmr 1 (19 January 2022)</i>
Application Number:	315289
Applicant:	Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships
Respondent:	Office of the Public Advocate
Decision Date:	19 January 2022
Catchwords:	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - SCOPE OF APPLICATION - IRRELEVANT INFORMATION - information outside of the subject matter - whether information may be deleted on the basis that it is irrelevant to the terms of the application - section 73 of the <i>Right to Information Act 2009</i> (Qld)</b> <b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - INVESTIGATION BY A PRESCRIBED CRIME BODY - information obtained, used or prepared by a prescribed crime body for an investigation in performance of prescribed functions - whether exempt information to which access may be refused - sections 47(3)(a) and 48 and schedule 3, section 10(4) of the <i>Right to Information Act 2009</i> (Qld)</b>

## REASONS FOR DECISION

### Summary

1. By application dated 5 August 2019 (**Access Application**), the access applicant<sup>1</sup> (**Access Applicant**) applied under the *Right to Information Act 2009* (Qld) (**RTI Act**) to the Office of the Public Advocate (**OPA**)<sup>2</sup> for access to documents between 1 January 2015 and 5 August 2019 held by OPA which contained any concerns, complaints and/or referrals for investigation in relation to the Forensic Disability Service<sup>3</sup> (**FDS**).<sup>4</sup>
2. The Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (**Department**) has administrative responsibility for FDS.<sup>5</sup> OPA therefore

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<sup>1</sup> A member of a media organisation.

<sup>2</sup> OPA delegated its decision-making powers and functions under the RTI Act to the Department of Justice and Attorney-General. However, for ease of reference, this decision will refer simply to OPA.

<sup>3</sup> The Forensic Disability Service (**FDS**) is a medium security facility that cares for and supports adults with an intellectual disability or cognitive impairment who have been detained to FDS on forensic orders.

<sup>4</sup> During the processing of the Access Application, and after receiving a Charges Estimate Notice from OPA on 3 September 2019, the Access Applicant amended the scope of the Access Application. The specific terms of this amended scope are discussed further below.

<sup>5</sup> Under the *Forensic Disability Act 2011* (Qld).

consulted with the Department about the disclosure of information under section 37 of the RTI Act.<sup>6</sup> While the Department objected to disclosure of particular information,<sup>7</sup> OPA decided, among other things, to disclose some of this information to the Access Applicant contrary to the Department's views (**OPA's Decision**).<sup>8</sup>

3. On 23 March 2020, the Department applied to the Office of the Information Commissioner (**OIC**) for external review of that decision.
4. For the reasons set out below, I vary OPA's Decision and find that parts of 117 pages may be deleted on the basis they are not relevant to the Access Application.

## Background

5. During the processing of the Access Application by OPA, the Access Applicant agreed to exclude certain information from the scope of the Access Application including:<sup>9</sup>
  - 'any information relating to specific individuals or the cases of specific individuals who are in the care of the FDS'; and
  - information subject to the Cabinet exemption under the RTI Act.
6. OPA identified 348 pages responsive to the Access Application.<sup>10</sup> As noted above, OPA consulted with the Department about OPA's proposed release of information (**Consultation Information**).<sup>11</sup> The Department objected to OPA's proposed disclosure of particular information. OPA accepted some of the Department's objections and decided to provide the Access Applicant with full access to 297 pages, partial access to 23 pages, and to refuse access to 28 pages.
7. During the external review, in an endeavour to facilitate informal resolution of the matter,<sup>12</sup> OIC provided the parties with a marked-up version of the Consultation Information which took account of the reduced scope of the Access Application noted at paragraph 5 above. All information relating to specific individual FDS clients, as well as information that was subject to the Cabinet exemption,<sup>13</sup> was redacted from this version of the Consultation Information, on the basis that it was outside the scope of or not relevant to the terms of the amended Access Application. OIC conveyed a preliminary view to OPA to this effect.
8. Following the parties' consideration of the marked-up consultation information, there are no issues remaining for the third party who sought external review (the Department); rather, the issues to be addressed have arisen as a result of the submission of the agency whose decision is under review (OPA). In summary:

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<sup>6</sup> At the time the Access Application was made, the then Department of Communities, Disability Services and Seniors had administrative responsibility for FDS, so OPA consulted that agency. On 12 November 2020, a machinery of government change transferred the responsibility for FDS to the Department. Therefore, the Department is named as the applicant in this review. See the *Administrative Arrangements Order (No.2) 2020* (at page 26) available at <https://www.qld.gov.au/about/how-government-works/government-responsibilities/> (accessed 18 January 2022).

<sup>7</sup> The Department delegated the exercise of its rights under the RTI Act to the then Department of Child Safety, Youth and Women. Following the machinery of government change mentioned in the previous footnote, the Department of Children, Youth Justice and Multicultural Affairs assumed the delegation. However, for ease of reference, this decision will refer simply to the Department, not its delegate.

<sup>8</sup> Notice of this decision was given to the Access Applicant on 13 February 2020 and to the Department on 26 February 2020.

<sup>9</sup> The Access Applicant also agreed to exclude any information that was already on the public record, such as Annual Reports or Estimates Hearing transcripts, and any information subject to legal professional privilege.

<sup>10</sup> OPA's notice of decision dated 13 February 2020 noted that OPA located 469 pages. However, it determined that 43 pages were duplicate documents and 78 pages were outside the scope of the Access Application.

<sup>11</sup> OPA provided the Department with eight PDF files titled File 01 to File 08.

<sup>12</sup> Section 90(1) of the RTI Act requires the Information Commissioner or her delegate to identify opportunities and processes for early resolution and promote settlement of the external review application.

<sup>13</sup> Specifically, section 47(3)(a) and schedule 3, section 2(1)(b) of the RTI Act.

- OPA and the Department both accepted the redaction of information which, in OIC's view, was subject to the Cabinet exemption<sup>14</sup> and therefore outside the scope of the amended Access Application.
- The Department also accepted the redaction of all of the information which, in OIC's view, related to specific individual FDS clients and was therefore outside the scope of the amended Access Application – however, OPA did not. OPA objected to the redaction of such information from parts of 117 pages.
- OPA also objected to the redaction of 10 pages as it considered they did not comprise exempt information under schedule 3, section 10(4) of the RTI Act.<sup>15</sup> However, these 10 pages were not redacted as part of OIC's informal resolution proposal. Rather, they remained redacted in accordance with OPA's Decision,<sup>16</sup> which found that these pages could be refused under schedule 3, section 10(4) of the RTI Act.
- OIC clarified with OPA whether it wished to maintain its position that information relating to specific individual FDS clients, and information that its decision found should be refused, should be released. OPA confirmed this and requested that OIC proceed to a formal decision regarding the 117 part pages and 10 pages. Accordingly, the circumstances addressed in this decision are somewhat unusual. There are no issues remaining for the third party who sought external review (the Department); rather, the issues to be addressed have arisen as a result of the submissions of the agency whose decision is under review (OPA) and which are reviewed pursuant to the powers in section 105 of the RTI Act.

### Information in issue

9. This decision deals with the parts of 117 pages<sup>17</sup> and 10 pages<sup>18</sup> contained in the Consultation Information which OPA contends should be released (**Information in Issue**).

### Evidence considered

10. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).<sup>19</sup>

### Issues for determination

11. The issues for determination in this review are:

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<sup>14</sup> At pages 20 to 40 of File 03, with one letter also duplicated at page 8 of File 04.

<sup>15</sup> This position was contrary to OPA's Decision, wherein OPA found that pages, including the 10 pages in issue, were exempt information under schedule 3, section 10(4) of the RTI Act.

<sup>16</sup> Decision notice dated 13 February 2020 at page 4.

<sup>17</sup> Pages 37–43, 48–64, 72–89, 95–103, 105, 110–112, 121–135, 141 and 149–150 of File 02, pages 77, 83–87 and 90 of File 03, pages 1–7 of File 04, pages 1–7 of File 05 and pages 1–11, 13–19, 21, 23–24, 26 and 29 of File 06.

<sup>18</sup> Pages 44 – 53 of File 03.

<sup>19</sup> In making this decision, I have observed and respected the law prescribed in the RTI Act. Doing so is construed as 'respecting and acting compatibly with' the rights prescribed in the *Human Rights Act 2019* (Qld) (**HR Act**) - *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 have therefore satisfied the requirements of section 58(1) of the HR Act, in accordance with the following observations of Bell J in *XYZ* at [573] about the interaction between the Victorian analogues of Queensland's RTI Act, *Information Privacy Act 2009* (Qld), and HR Act: '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'.

- **Irrelevant information** - whether parts of 117 pages are not relevant to the Access Application and accordingly may be deleted pursuant to section 73 of the RTI Act; and
- **Exempt Information** – whether access to the 10 pages may be refused on the ground it is exempt information under schedule 3, section 10(4) of the RTI Act.

### Irrelevant information

12. The Department sought external review, based on its objection to OPA's Decision to disclose information including parts of 117 pages that remain in issue. The Department contended that these pages were outside the scope of the amended terms of the application or, alternatively, sensitive personal information of clients of the FDS and therefore information that could be refused on the grounds that its disclosure would be contrary to public interest.
13. I note that, on external review, the Information Commissioner conducts a merits review, that is, 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 RTI Act.<sup>20</sup> Accordingly, I consider that it is open to me to consider whether any information falls outside the scope of the Access Application and can therefore be deleted on the grounds of irrelevance.

### Relevant law

14. Section 73 of the RTI Act allows an agency to delete parts of a document that are not relevant to the terms of the access application in question. This is not a ground for refusal of access, but a mechanism to allow irrelevant information to be deleted from documents identified for release to an access applicant and to facilitate that release.<sup>21</sup> In deciding whether to apply this section, it is relevant to consider whether the information in question has any bearing upon, or is pertinent to, the terms of the access application.<sup>22</sup>

### Findings

15. OPA has objected to the proposed deletion of parts of 117 pages<sup>23</sup> on the basis they are not relevant to the Access Application and contended that this information should be released to the Access Applicant.
16. As noted at paragraph 1 above, the Access Applicant originally sought access to documents between 1 January 2015 and 5 August 2019 held by OPA which contained any concerns, complaints and/or referrals for investigation in relation to the FDS. However, as noted at paragraph 5 above, in amending the scope of the Access Application, the Access Applicant agreed to specifically exclude '*any information relating to specific individuals or the cases of specific individuals who are in the care of the FDS.*'

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<sup>20</sup> Section 105 of the RTI Act.

<sup>21</sup> Under section 73(3) of the RTI Act, the agency may give access to the document if it considers from the terms of the application or after consultation with the applicant, that the applicant would accept the copy and it is reasonably practicable to give access to the copy. The agency is entitled to make the decision to delete based on the access application itself (i.e., without consulting the applicant) where the information clearly falls outside the scope of the access application: see *8U3AMG and Department of Communities* (Unreported, Queensland Information Commissioner, 15 September 2011) at [15].

<sup>22</sup> *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) at [52].

<sup>23</sup> Pages 37-43, 48-64, 72-89, 95-103, 105, 110-112, 121-135, 141 and 149-150 of File 02, pages 77, 83-87 and 90 of File 03, pages 1-7 of File 04, pages 1-7 of File 05 and pages 1-11, 13-19, 21, 23-24, 26 and 29 of File 06.

17. During the consultation process with OPA, the Department argued that:<sup>24</sup>
- the proposed redactions made by OPA to the Consultation Information were not sufficient to deidentify FDS clients
  - it was reasonably likely that FDS clients would be able to be identified from the Consultation Information; and
  - the Consultation Information comprised primary source documents that related to specific FDS clients.
18. In its notice of decision to the Department and in support of its decision to disclose this information, OPA stated that the agreement with the Access Applicant about the reduced scope of the Access Application:
- ... was only to exclude granular personal information that could reasonably identify an individual or the case of an individual to the public and to exclude any matter raised in an individual rather than an organisational or systemic context.*
19. As noted, in an endeavour to facilitate the informal resolution of this matter, OIC marked up the Consultation Information to indicate information which, in OIC's preliminary view, should be redacted on the grounds that it could reasonably be expected to identify an individual or which was a matter raised in an individual context and which should therefore be regarded as falling outside the scope of the Access Application.
20. The 117 part pages can be described as follows:<sup>25</sup>
- information about individual FDS clients provided by the Department to OPA, including:<sup>26</sup>
    - a client's arrival date at FDS
    - whether the individual will benefit from the programs offered at FDS and what programs have been offered
    - whether the individual is allowed to leave the FDS facility and details about any such leave or why leave has been refused
    - information about the individual's social interaction and behaviours
    - whether the individual identifies as Aboriginal and/or Torres Strait Islander; and
    - whether the individual has appointed a guardian or allied person
  - concerns raised about the treatment of specific individual FDS clients or requests for information about a specific individual in communications to and from OPA;<sup>27</sup> and
  - information about individual FDS clients contained in Community Visitor Reports (**CV Reports**) including:<sup>28</sup>
    - the unavailability of a specific type of medication for an individual

<sup>24</sup> The Department's letter to OPA dated 5 December 2019.

<sup>25</sup> At pages 37-43, 48-64, 72-89, 95-103, 121-135 of File 02.

<sup>26</sup> In relation to requests made for information by the Public Advocate under section 210A of the *Guardianship Administration Act 2000 (GA Act)*.

<sup>27</sup> At pages 105, 110-112, 141 and 149-150 of File 02, pages 77, 83-87 and 90 of File 03 and pages 1-7 of File 04. Including communications between the Public Advocate and the Office of the Public Guardian (**OPG**), the Public Advocate and the Deputy-Director General of the Department or the Director of FDS and OPG and FDS.

<sup>28</sup> At pages 1-7 of File 05 and pages 1-11, 13-19, 21, 23-24, 26 and 29 of File 06. Part 6 of the *Public Guardianship Act 2019* provides for Community Visitors to visit the FDS to protect the rights and interests of individuals at FDS. The CV Reports record any concerns that are raised with the Community Visitor by an individual FDS client or issues that are identified, together with any action taken by the Community Visitor to resolve those issues. While the heading of the CV Reports notes that the issues addressed in the CV Reports are of an '*organisational nature*' the majority of the Reports address concerns raised by, or identified in relation to, individual FDS clients.

- whether an individual has an intellectual disability or particular types of behavioural issues
  - the basis on which a guardian is appointed for the individual
  - information about an individual's frame of mind at the time of the visit by the Community Visitor
  - information provided by individuals to the Community Visitor; and
  - information obtained from FDS records about an individual.
21. On external review, OPA submitted that it was in the public interest to disclose some of the 117 part pages. However, such submissions are not relevant to my consideration of whether this information may be deleted under section 73 of the RTI Act and I have therefore not taken them into account.
22. I note that OPA acknowledged that certain information<sup>29</sup> related *'to a particular FDS client'* but argued that it should be disclosed *'except for the client's name and other key identifying information'*.<sup>30</sup> However, this approach is contrary to the Access Applicant's specific statement that they did not seek access to information relating to specific individuals or the cases of specific individuals.
23. OPA also submitted that some information was already sufficiently de-identified when it was provided by the Department to OPA in the first instance, pursuant to section 210A of the GA Act.<sup>31</sup> However, the terms of the Access Application were negotiated not in the context of the provision of information under the GA Act, but in the context of an application made under the RTI Act with the potential for the released information to be disclosed to the world at large.
24. In view of OPA's statement that it was agreed with the Access Applicant that only the *'granular personal information that could reasonably identify an individual or the case of an individual to the public'* would be excluded from the scope of the Access Application, I have considered the definition of 'personal information' in the RTI Act<sup>32</sup> which refers to the definition contained in section 12 of the *Information Privacy Act 2009* (Qld) (**IP Act**):
- 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.*
- (My emphasis)
25. I acknowledge that the 117 part pages do not comprise information from which an individual's identity is readily apparent. For example, these part pages do not comprise the individual's name or photograph. However, where an individual's identity is not 'apparent' from the information in issue, it is necessary to consider whether their identity 'can reasonably be ascertained'. One of the ways in which the identity of an individual may reasonably be ascertainable is by using additional information to connect an individual to seemingly de-identified information.<sup>33</sup>
26. Taking into consideration the small number of individuals detained within the FDS and the specific nature of the 117 part pages (as noted at paragraph 20 above), I consider that the identities of individuals can reasonably be ascertained.

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<sup>29</sup> Information in File 02.

<sup>30</sup> Letter to OIC dated 26 February 2021.

<sup>31</sup> I note that section 210B of the GA Act makes it an offence to publish information obtained under section 210A to the extent the information comprises confidential information. Section 210B(2) provides that the Public Advocate or OPA must not, without reasonable excuse, publish the information to the public if the publication is likely to result in the identification, by a member of the public, of a person to whom the information relates.

<sup>32</sup> Schedule 5 of the RTI Act.

<sup>33</sup> *Mahoney and Ipswich City Council* (Unreported, Queensland Information Commissioner, 17 June 2011) at [21].

27. To demonstrate this, by a simple process of cross matching some of the information in issue (which does not refer to the individual's name) with publicly available Mental Health Court decisions referencing the FDS, it was possible to ascertain the name, age and the offences committed by the individual detained within the FDS.<sup>34</sup>
28. Alternatively, I consider the 117 part pages comprise matters that were raised in an individual context, rather than in an '*organisational or systemic context*' as argued by OPA. In particular, as noted at paragraph 20 above, the 117 part pages form part of either correspondence or CV Reports in which concerns are raised about individual FDS clients, or information provided to OPA by the Department about individual FDS clients.
29. In view of the above, I find that each of the 117 part pages either identifies an individual FDS client or comprises information about matters that were raised in an individual context. I am satisfied that the Access Application excluded this type of information. As such, I find that the 117 part pages can be deleted under section 73(2) of the RTI Act on the basis they are not relevant to the terms of the Access Application.<sup>35</sup>

## Exempt information

### Relevant law

30. Access to a document may be refused to the extent it comprises exempt information.<sup>36</sup> Schedule 3 of the RTI Act sets out the various types of exempt information – that is, information the disclosure of which Parliament has considered would, on balance, be contrary to the public interest.<sup>37</sup>
31. Relevantly, schedule 3, section 10(4) of the RTI Act provides that information is exempt if it consists of information obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in the performance of the prescribed functions of the prescribed crime body. In this case, the relevant prescribed crime body is the Crime and Corruption Commission (**CCC**). Accordingly, the exemption will hereinafter be referred to as the **CCC Exemption**.

### Findings

32. In its decision, OPA refused access to 15 pages<sup>38</sup> and parts of six pages<sup>39</sup> on the ground that they comprised information subject to the CCC Exemption.<sup>40</sup> During this external review, OPA reversed its position on the application of the CCC Exemption to 10 of these pages.<sup>41</sup> That is, on external review, OPA contended that these 10 pages should be released to the Access Applicant.<sup>42</sup> While the circumstances of this matter are unusual,

<sup>34</sup> Information comprised in File 02 about a specific FDS client.

<sup>35</sup> The access applicant was advised of my position in relation to irrelevant information on 17 January 2022.

<sup>36</sup> Sections 47(3)(a) and 48 of the RTI Act.

<sup>37</sup> Section 48(2) of the RTI Act.

<sup>38</sup> Pages 41 - 55 of File 03.

<sup>39</sup> Pages 71 and 78 – 81 of File 03 and page 48 of File 07. Although I note that in its mark-up of the documents, OPA also refused access to a duplicate copy of these documents at pages 25 and 28 to 38 of File 07, which are not referred to in OPA's Decision.

<sup>40</sup> Decision dated 13 February 2020 at 4. However, after consideration of the Consultation Information, the documents marked-up for final release and the schedule of documents attached to OPA's Decision to the Access Applicant, this page count of 15 pages and 6 part pages appears to be an error. By my count, the actual number of pages to which OPA refused access, on the ground that they are subject to the CCC Exemption, is 23 pages and parts of 8 pages.

<sup>41</sup> Pages 44-53 of File 03. I note that OPA did not object to the redaction of information appearing in the 10 pages where it is duplicated elsewhere within the Consultation Information, namely, at pages 29-38 of File 07.

<sup>42</sup> OPA also submitted that it objected to OIC's proposed redaction of parts of a further seven pages (at pages 77, 83-87 and 90 of File 03) on the basis that the redactions removed references '*to complaints of corrupt conduct to the CCC*' and accordingly would '*render the document meaningless*' (OPA's letter to OIC dated 26 February 2021). However, OPA's submission would appear to be mistaken as those pages do not contain any reference to the CCC. The relevant information was proposed to be redacted by OIC because it comprised the personal information of FDS clients and was therefore irrelevant to the terms of the Access Application. I have dealt with this information above in my findings in relation to Irrelevant Information.

I have nonetheless turned my mind to whether the 10 pages are exempt information pursuant to the CCC Exemption.<sup>43</sup>

33. I have reviewed the 10 pages. While the RTI Act prevents me from disclosing or revealing exempt information,<sup>44</sup> I can confirm that this information comprises a letter from the Public Advocate to the CCC, together with a CCC form completed by the Public Advocate titled 'Report suspected corruption'.
34. OPA submitted that:<sup>45</sup>
- a. the complaint is the Public Advocate's complaint and it should be a matter for the Public Advocate to determine whether, and if so how much of, her complaint to the CCC should be disclosed
  - b. the complaint was not investigated by the CCC; and
  - c. the disclosure of the 10 pages is in the public interest because it demonstrates the Public Advocate's advocacy work on behalf of persons with impaired capacity.
35. In respect of c. above, the exemptions set out in schedule 3 to the RTI Act – including the CCC Exemption – do not require or allow consideration of public interest issues. This is because Parliament has determined that disclosure of these categories of information would be contrary to the public interest.<sup>46</sup> Accordingly, if information falls within one of the categories of exempt information prescribed in schedule 3, a conclusive presumption exists that its disclosure would be contrary to the public interest, and no further consideration is permitted.<sup>47</sup> I have therefore not taken account of OPA's submissions about the public interest.
36. In regard to a., I acknowledge that OPA may choose to disclose the 10 pages administratively outside the purview of the RTI Act (assuming it is satisfied that doing so does not breach its obligations including, for example, its obligations under the IP Act); however, given my role and the nature of the external review functions under the RTI Act, this is not something I can consider. I also acknowledge that OPA has discretion to provide access to exempt information,<sup>48</sup> but chose not to exercise this discretion when making its decision on the Access Application; whereas I have no such discretion on external review.<sup>49</sup> Given that the matter is before me on external review and OPA has requested that OIC proceed to formal decision on the issue of whether the 10 pages are exempt pursuant to the CCC Exemption, it is incumbent on me to decide whether the 10 pages are exempt information under the RTI Act.
37. In terms of b., OPA submitted:<sup>50</sup>

*The request for an investigation was rejected by the CCC. The process of considering the request should not be viewed as an exemption as the CCC took no further action in relation to the correspondence. The CCC exemption states that information is exempt information if it is information obtained, used, or prepared for an investigation by a prescribed crime body or another agency. The information in question was not obtained by the CCC for any of these purposes, rather it was material prepared by the Public Advocate to fulfill the statutory obligations of her role and initiate a complaint to the CCC. There was no action on the part of the CCC in relation to the material in the complaint prepared by the Public Advocate or*

<sup>43</sup> Pursuant to section 105 of the RTI Act.

<sup>44</sup> Section 108(3) of the RTI Act.

<sup>45</sup> OPA's letter to OIC dated 26 February 2021 at 3.

<sup>46</sup> Section 48(2) of the RTI Act.

<sup>47</sup> *Dawson-Wells v Office of the Information Commissioner & Anor* [2020] QCATA 60 at [17].

<sup>48</sup> Sections 44(4) and 48(3) of RTI Act.

<sup>49</sup> Section 105(2) of the RTI Act.

<sup>50</sup> OPA's email to OIC dated 9 August 2021.



*additional contribution to that material that meets the definition that would provide for a CCC exemption. The material was solely obtained, prepared and created by the Public Advocate. It is her position that it is a matter for her to decide how much of the material comprising the complaint to the CCC should be disclosed.*

38. To the extent that OPA's submission contends that the CCC Exemption does not apply to the 10 pages because the request for an investigation was rejected by the CCC and it decided to take no further action, I disagree. The concept of '*investigation*' as used in the CCC Exemption has been considered in previous decisions of the Information Commissioner. In particular, the Information Commissioner has found that:<sup>51</sup>

*... [the CCC] on receiving a complaint, conducts an initial assessment of that complaint to determine whether jurisdiction exists for a fuller inquiry to be conducted, and, if so, the manner and nature of that inquiry. ...the definition of "investigate" clearly and logically anticipates a broad range of activity – "examining" or "considering" a complaint are both encompassed within the meaning of investigate, and are also basic steps fundamental to the process of assessment.*

39. The Information Commissioner has also previously noted that this approach in relation to the concept of an '*investigation*'<sup>52</sup> is consistent with the concept in the *Crime and Corruption Act 2001* (Qld) (**CC Act**) which defines '*Investigate*' as including '*examine and consider*'.<sup>53</sup>
40. Accordingly, even the act of the CCC considering OPA's request for an investigation required the CCC to examine or consider the Public Advocate's complaint and therefore falls within the meaning of the word '*investigate*'.
41. To the extent that OPA's submission contends that the CCC Exemption does not apply to the 10 pages because the information was '*obtained, prepared and created by the Public Advocate*', I also disagree. Schedule 3, section 10(4) of the RTI Act provides that information is exempt if it consists of information '*obtained, used or prepared for an investigation by a prescribed crime body*'.<sup>54</sup> The 10 pages were clearly obtained and used by the CCC for the purpose of considering the Public Advocate's complaint and request for an investigation.
42. The CCC Exemption also requires that the investigation be in the performance of the prescribed functions of the prescribed crime body. In this regard, it is relevant to note, as mentioned at paragraph 33 above, that the 10 pages consist of a letter from the Public Advocate to the CCC, together with a CCC form completed by the Public Advocate titled '*Report suspected corruption*'. Taking into account the nature of the information in the letter and form,<sup>55</sup> and noting the definitions of prescribed functions and corruption functions in schedule 3, section 10(9) of the RTI Act and the definitions of corruption functions, corruption and corrupt conduct in the CC Act, I am satisfied that the CCC's actions were in the performance of its corruption function.
43. Accordingly, I am satisfied that the 10 pages comprise information obtained and used for an investigation by the CCC in the performance of one of its prescribed functions, namely the corruption functions, and therefore the CCC Exemption applies to those pages.

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<sup>51</sup> *Springborg and Crime and Misconduct Commission; RZ (Third Party), BX (Fourth Party, Director-General of the Department of Justice and Attorney General (Fifth Party)* (2006) 7 QAR 77 at [58] which considered the predecessor and material equivalent of schedule 3, section 10(4) of the RTI Act in the repealed *Freedom of Information Act 1992* (Qld), cited in *McMahon and Crime and Misconduct Commission* [2014] QICmr 16 (1 May 2014) at [15].

<sup>52</sup> See *Frecklington MP and Premier and Minister for Trade* [2020] QICmr 15 (18 March 2020) at [47].

<sup>53</sup> Schedule 2 of the CC Act.

<sup>54</sup> My emphasis added.

<sup>55</sup> Regarding which I cannot provide further detail due to section 108(3) of the RTI Act.

44. I have considered the exception to the CCC Exemption, as set out in schedule 3, section 10(6) of the RTI Act. While the second element of this exception (the investigation has been finalised) is satisfied, the first element (the information is about the Access Applicant) is not. Therefore, schedule 3, section 10(6) of the RTI Act does not exclude the 10 pages from qualifying as exempt information under schedule 3, section 10(4) of the RTI Act.
45. Accordingly, I am satisfied that the 10 pages are exempt information under the CCC Exemption and find that access to them is refused.<sup>56</sup> While this finding does not accord with OPA's position during this review, it does accord with OPA's Decision that is the subject of the review – and therefore, that decision is upheld as regards the 10 pages of information.

## **DECISION**

46. For the reasons set out above I vary OPA's Decision by finding that parts of 117 pages may be deleted on the basis that they are not relevant to the Access Application.<sup>57</sup>
47. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**Assistant Information Commissioner Corby**

**Date: 19 January 2022**

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<sup>56</sup> Sections 47(3)(a), 48 and schedule 3, section 10(4) of the RTI Act.

<sup>57</sup> Section 73(2) of the RTI Act.

## APPENDIX

### Significant procedural steps

Date	Event
23 March 2020	OIC received the Department's external review application.
27 March 2020	OIC notified the Department and OPA that the external review application had been received and requested procedural information and documents from OPA.
3 April 2020	OPA provided the further requested information.
7 May 2020	OPA provided OIC with information in relation to a third-party consultation.
12 May 2020	OIC notified the Department and OPA that the external review had been accepted and requested the information in issue from OPA.
19 May 2020	OPA emailed OIC about providing OIC with the information in issue.
20 May 2020	OPA provided a redacted copy of the information in issue to OIC.
17 July 2020	OIC requested a marked-up copy of the information in issue from OPA and provided the Department with an update.
20 July 2020	OPA provided OIC with a marked-up copy of the information in issue.
11 August 2020	The Department requested an update.
12 August 2020	OIC provided an update to the Department.
16 October 2020	OIC provided an update to the Department and OPA.
29 January 2021	OIC contacted the Department of Children, Youth Justice and Multicultural Affairs ( <b>DCYJMA</b> ) to ascertain if it was still acting on behalf of the Department following machinery of government changes.
1 February 2021	DCYJMA replied to OIC's email dated 29 January 2021.
5 February 2021	OIC wrote to the Department and OPA suggesting an informal resolution proposal and also raising a sufficiency of search concern with OPA.
19 February 2021	OIC received an email from the Department requesting an extension to provide a response to OIC's letter dated 5 February 2021.
22 February 2021	OIC contacted the Department agreeing to an extension.
26 February 2021	OIC received a submission from OPA, in response to OIC's letter dated 5 February 2021.
2 March 2021	OIC received an email from the Department requesting a further extension to provide a response to OIC's letter dated 5 February 2021.
4 March 2021	OIC contacted the Department agreeing to an extension.
12 March 2021	The Department contacted OIC raising a query in relation to OIC's mark-up of the information in issue and requested a further extension to provide a response to OIC's letter dated 5 February 2021.

Date	Event
28 March 2021	OIC received a submission from the Department in response to OIC's letter dated 5 February 2021.
4 May 2021	OIC provided OPA with an update.
1 June 2021	OIC provided an update to the Department.
22 June 2021	OIC contacted the Department to ascertain if it was agreeable to disclosing a small amount of further information.
12 July 2021	The Department contacted OIC agreeing to the disclosure of a small amount of further information.
26 July 2021	OIC wrote to OPA conveying a preliminary view.
9 August 2021	OIC received a submission from OPA in response to OIC's preliminary view dated 26 July 2021.
6 October 2021	OIC provided an update to the Department.
11 November 2021	OIC contacted OPA to ascertain if the newly appointed Public Advocate wished OIC to proceed to a formal decision.
22 November 2021	OPA confirmed it wished OIC to proceed to formal decision.
17 January 2022	OIC provided an update to the Access Applicant.