



Decision and Reasons for Decision

Citation:	<i>W60 and Office of the Director of Public Prosecutions [2023] QICmr 57 (30 October 2023)</i>
Application Number:	317018
Applicant:	W60
Respondent:	Office of the Director of Public Prosecutions
Decision Date:	30 October 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - application for briefs of evidence used in the applicant's criminal prosecutions - 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 applied¹ to the Office of the Director of Public Prosecutions (**ODPP**) under the *Information Privacy Act 2009 (Qld)* (**IP Act**) for access to two briefs of evidence relating to criminal offences for which he was prosecuted and sentenced.
2. ODPP located the requested briefs which comprised 401 pages and decided² to refuse access to 337 pages in part and 50 pages in full. Access to this information was refused on the basis that its disclosure would, on balance, be contrary to the public interest. The remaining 14 pages were released in full.
3. The applicant applied for an internal review of that decision³ and ODPP varied the original decision⁴ by granting access to a small amount of additional information.
4. The applicant then applied⁵ to the Office of the Information Commissioner (**OIC**) for external review of ODPP's internal review decision.
5. For the reasons set out below, I affirm ODPP's decision and find that access to the information in issue was correctly refused on the ground that its disclosure would, on balance, be contrary to the public interest.

¹ Access application dated 18 July 2022.

² Decision dated 8 September 2022.

³ Internal review application dated 20 September 2022.

⁴ Internal review decision dated 9 November 2022.

⁵ External review application dated 16 November 2022 (received 24 November 2022).

Reviewable decision

6. The decision under review is ODPP's internal review decision dated 9 November 2022.

Evidence considered

7. Significant procedural steps relating to the external review are set out in the appendix to this decision. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and the appendix).

8. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the rights to freedom of expression and reputation.⁶ I consider a decision-maker will be 'respecting and acting compatibly with' those rights and others prescribed in the HR Act, when applying the law prescribed in the IP Act and *Right to Information Act 2009* (Qld) (**RTI Act**).⁷ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.⁸

Information in issue

9. ODPP refused access to 50 full pages and 337 part pages. These pages form part of the briefs of evidence against the applicant. Within these pages, the information in issue (**Information in Issue**) comprises:⁹

- contact details and identifying information of the complainant, witnesses and children; and
- information provided to Queensland Police Service (**QPS**) and ODPP in relation to the offences.

10. I have provided a general description of this information only and am prevented from identifying much of the information in more detail, as to do so would reveal sensitive personal information of other individuals including victims and witnesses.¹⁰

Issue for determination

11. The issue to be determined in this review is whether ODPP was entitled to refuse access to the Information in Issue on the basis that its disclosure would, on balance, be contrary to the public interest.

⁶ Sections 21 and 25(b) of the HR Act.

⁷ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

⁸ I also note the following observations made by Bell J in *XYZ* at [573], on the interaction between equivalent pieces of Victorian legislation (namely, the *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)): '... 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'. OIC's approach to the HR Act set out in this paragraph was considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] where Judicial Member McGill saw 'no reason to differ' from our position.

⁹ Some of the information which ODPP redacted from these pages comprises the routine personal work information of various QPS officers or ODPP staff including, for example, their middle names, direct contact details and information about their leave arrangements. The applicant did not provide any submissions contesting the preliminary view on this category of information and, as such, I have assumed that this information is no longer in issue on external review. I have therefore not dealt with this category of information in this decision.

¹⁰ Section 121(3) of the IP Act prevents me from including information in reasons for a decision that is claimed to be contrary to public interest information.

Relevant law

12. Under the IP Act, an individual has a right to be given access to documents to the extent they contain the individual's personal information.¹¹ However, this right is subject to limitations, including grounds for refusal of access.¹² Under the RTI Act, an agency may refuse access to information where disclosure would, on balance, be contrary to the public interest.¹³ The RTI Act identifies various factors that may be relevant to deciding the balance of the public interest¹⁴ and explains the steps that a decision-maker must take in deciding the public interest as follows:¹⁵
- identify any irrelevant factors and disregard them¹⁶
 - identify relevant public interest factors favouring disclosure and nondisclosure
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosing the information would, on balance, be contrary to the public interest.

Findings

13. I have carefully considered the Information in Issue together with the applicant's submissions in this review. The applicant's submissions can be summarised as follows:¹⁷
- The applicant is a self-represented litigant who is in the process of a further appeal against conviction and sentence and petition for pardon.
 - The applicant alleges that the complainant and Crown Prosecutor fabricated evidence against him to convict him and withheld favourable evidence from the jury during trial. He believes he has been '*unlawfully convicted*' and that disclosing the Information in Issue to him will enable him to clear his name '*beyond all reasonable doubt*'.
 - He believes he is at risk of suffering a further miscarriage of justice if he doesn't receive the brief of evidence in full, without redactions. He states that he would also be deprived of the chance to request an amendment of any false or incorrect information that may be contained in the documents.

Accountability, transparency and administration of justice

14. The RTI Act gives rise to factors favouring disclosure where disclosing the information in issue could reasonably be expected to enhance the government's accountability¹⁸ or reveal the reason for a government decision and any background or contextual information that informed the decision.¹⁹ In this case, I have considered whether disclosing the Information in Issue could reasonably be expected to promote

¹¹ Section 40 of the IP Act.

¹² Section 67(1) of the IP Act provides an agency may refuse access to a document in the same way and to the same extent the agency could refuse access to the document under section 47 of the RTI Act were the document to be subject to an access application under that Act.

¹³ Section 47(3)(b) and section 49 of the RTI Act.

¹⁴ Schedule 4 of the RTI Act lists factors that may be relevant when deciding whether disclosure of information would, on balance, be contrary to the public interest. This list is not exhaustive and therefore, other factors may also be relevant in a particular case.

¹⁵ Section 49(3) of the RTI Act.

¹⁶ No irrelevant factors arise in the circumstances of this case and I have not taken any into account in making this decision.

¹⁷ The applicant provided submissions supporting his case in his internal review application dated 20 September 2022, external review application dated 16 November 2022 (received 24 November 2023) and letter to OIC dated 30 August 2023 (received 7 September 2023).

¹⁸ Schedule 4, part 2, item 1 of the RTI Act.

¹⁹ Schedule 4, part 2, item 11 of the RTI Act.

accountability and transparency by allowing scrutiny of ODPP's handling of the prosecution. I consider these factors are relevant in this case and I must now consider the weight to be afforded to each of them.

15. I note the applicant's submission that he needs the unredacted brief of evidence for his appeal. Factors favouring disclosure will arise where disclosing the information could reasonably be expected to contribute to the administration of justice, including procedural fairness, or enhance the applicant's fair treatment in accordance with the law in their dealings with agencies.²⁰ I consider these factors are also relevant in this case and I must now consider the weight to be afforded to each of them.
16. The Information in Issue comprises the briefs of evidence used for the applicant's criminal trials, and I accept that disclosing this information would give the applicant a more complete picture of the information in the possession of ODPP at the time he was prosecuted and would enable the applicant to make his own assessment as to whether it assists his appeal or petition for pardon. However, the criminal prosecution process requires ODPP to prove the case against the defendant and this is where the veracity of the evidence against the accused is tested and where the prosecution is held to account for its role in proving the defendant's guilt beyond a reasonable doubt. In my view, the public interest factors favouring disclosure which I have identified above are achieved through the criminal prosecution and sentencing, both processes in which the applicant has participated. Furthermore, ODPP has released 14 full pages and 337 part pages to the applicant as a result of his access application, which also promotes these factors. I accept that the applicant is generally aware of the content of the Information in Issue, given his involvement in the proceedings, but I am not satisfied that disclosing the Information in Issue would significantly enhance his knowledge or comprehension of the issues.
17. I note and have carefully considered the applicant's concerns about the conduct of the complainant and Crown Prosecutor in this case and his allegation that evidence was fabricated or withheld from the jury. On the information currently available to me, there is no evidence to support the applicant's submission but, in any event, the appropriate mechanism for challenging these issues is through the appeals process where the applicant, or his legal representatives, will be entitled to receive the brief of evidence and determine if there are valid grounds for an appeal. The IP Act is not designed to be used as an adjunct to the court discovery process and the fact that the applicant is self-represented and intends to appeal his conviction and sentence does not add weight to these particular factors. Disclosing information under the IP Act is subject to different considerations and greater restrictions compared to the type of information which must be made available to the accused during a criminal trial or appeal process. The Information Commissioner's comments in *Phyland and Department of Police*²¹ are particularly relevant in this regard:

The RTI Act was not ... designed to serve as an adjunct to court processes, but to comprise a stand-alone mechanism for enabling public access to government-held information. Obviously, the applicant is entitled to elect to pursue access under the right of access conferred by the RTI Act. In doing so, however, she must accept the qualifications upon and limitations to that right imposed by the Act itself: including refusal of access where ... disclosure would disclose personal information or infringe upon an individual's right to privacy.

²⁰ Schedule 4, part 2, items 10, 16 and 17 of the RTI Act.

²¹ (Unreported, Queensland Information Commissioner, 31 August 2011) at [24].

18. For these reasons, I do not consider disclosing the Information in Issue to the applicant under the IP Act would promote these public interest factors in any material way and I therefore afford each of them low weight.
19. Section 32(4) of the HR Act provides that a person convicted of a criminal offence '*has the right to have the conviction and any sentence imposed in relation to it reviewed by a higher court in accordance with the law*'. I acknowledge the applicant's submissions in relation to the reasons for his application and his intention to appeal the conviction and sentence. I am satisfied that a decision made in accordance with the provisions of the IP Act to refuse access to the Information in Issue, will not prejudice the applicant's human rights or be incompatible with the HR Act.

Reveal or substantiate that an official has engaged in unlawful conduct

20. As the applicant alleges that the complainant and Crown Prosecutor fabricated evidence and withheld favourable evidence, I have considered whether disclosing the Information in Issue could reasonably be expected to reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.²²
21. I understand that the applicant disagrees with some of the evidence which has been presented against him during the prosecution and has provided an example of that on external review based on phone records. However, I am unable to draw a conclusion from that information, or from the applicant's general assertions about the conduct of the complainant and Crown Prosecutor, and there is no evidence currently available to me to support the application of this public interest factor in this case. Therefore, I find that this factor is not relevant in the circumstances.

Reveal that the information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant

22. The applicant submits that he would be deprived of the chance to request an amendment of any false or incorrect information that may be contained in the documents. I have therefore considered whether disclosing the Information in Issue could reasonably be expected to reveal that the information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.²³ I understand that the applicant may disagree with some of the information contained within the brief of evidence, but there is no evidence before me to otherwise support the applicant's contention that the information is false or incorrect. I find that this factor is not relevant in the circumstances.

Personal information and privacy

23. Much of the Information in Issue is about the applicant and comprises his personal information, which gives rise to a factor favouring disclosure.²⁴ I acknowledge the importance of providing individuals with access to their personal information held by public authorities and I attribute significant weight to this factor to the extent the information comprises the applicant's personal information.
24. However, this information is also the personal information of other individuals – it comprises their identifying information and information they provided in the context of a criminal investigation. I am unable to separate this information from the applicant's

²² Schedule 4, part 2, item 6 of the RTI Act.

²³ Schedule 4, part 2, item 12 of the RTI Act.

²⁴ Schedule 4, part 2, item 7 of the RTI Act. 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*'.

personal information because of the way it appears in the documents and due to the nature of the relevant offences. In these circumstances, the RTI Act recognises that:

- a factor favouring nondisclosure will arise where disclosing the information could reasonably be expected to prejudice the protection of an individual's right to privacy;²⁵ and
- disclosing the information could reasonably be expected to cause a public interest harm if it would disclose personal information of another person.²⁶

25. It is therefore relevant to consider the extent of the harm that could result from disclosing the personal information of other individuals under the IP Act. As noted above, I consider that the general nature of this information is known to the applicant given its relevance to the criminal proceedings. However, in this context, and given the nature of the offences for which the applicant has been convicted, I consider the Information in Issue is highly personal and very sensitive and it is also the type of information which those individuals are entitled to keep private. Despite the applicant's general awareness of the content of the Information in Issue, its disclosure under the IP Act would be an unwarranted intrusion into the privacy of these individuals and the extent of the public interest harm that could be anticipated from disclosure is significant. As a result, I afford both of these public interest factors favouring nondisclosure very significant weight.

Prejudice flow of information to police

26. Much of the Information in Issue was provided to QPS and ODPP by the complainant and witnesses. In addition to the factors identified above, I also consider that disclosing the information could reasonably be expected to prejudice the flow of information to QPS which gives rise to another factor favouring nondisclosure.²⁷
27. QPS investigators dealing with these types of matters, and ODPP in conducting the prosecution, rely on the free flow of information from complainants and witnesses. I consider that giving access to this information under the IP Act and outside of the investigation or prosecution process would mean that complainants or witnesses would be less likely to provide that information to these authorities in the future. As a result, I afford this factor very significant weight in these circumstances.

Balancing the relevant public interest factors

28. I have taken into account the pro-disclosure bias in deciding access to the Information in Issue under the IP Act and the general public interest in furthering access to government-held information.²⁸ I afford significant weight to the factor favouring disclosure of the applicant's personal information, where it appears within the Information in Issue. In addition, and for the reasons outlined above, I have found that the factors relating to ODPP's transparency and accountability and the administration of justice for the applicant carry low weight.
29. However, the factors which carry very significant weight in this case relate to protecting the personal information and privacy of the complainant, witnesses and children and the flow of information to QPS and ODPP in the investigation and prosecution of criminal offences of this nature. Given the sensitivity of the information, and the fact that it not possible to place restrictions on the use, dissemination or republication of information released under the IP Act, the weight of these factors is not reduced by the applicant's

²⁵ Schedule 4, part 3, item 3 of the RTI Act.

²⁶ Schedule 4, part 4, item 6(1) of the RTI Act.

²⁷ Schedule 4, part 3, item 13 of the RTI Act.

²⁸ Section 64 of the IP Act.

involvement in the criminal trial and sentencing process. I am satisfied that the combined weight of each of the nondisclosure factors tips the balance in favour of nondisclosure given the nature of the information and the context in which it appears.

30. Therefore, I find that disclosing the Information in Issue would, on balance, be contrary to the public interest and ODPP was entitled to refuse access on this basis.²⁹

DECISION

31. For the reasons set out above, I affirm ODPP's decision to refuse access to the Information in Issue on the ground that disclosure would, on balance, be contrary to the public interest.³⁰
32. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

T Mainwaring
Principal Review Officer

Date: 30 October 2023

²⁹ Section 47(3)(b) of the RTI Act.

³⁰ Section 67(1) of the IP Act and section 47(3)(b) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
24 November 2022	OIC received the external review application. OIC requested procedural documents from ODPP.
25 November 2022	OIC received the requested information from ODPP.
15 December 2022	OIC notified the applicant and ODPP that the external review had been accepted. OIC requested a copy of the Information in Issue from ODPP.
3 January 2023	OIC received the Information in Issue from ODPP.
21 August 2023	OIC conveyed its preliminary view to the applicant and invited him to provide submissions supporting his case if he did not accept the preliminary view.
7 September 2023	OIC received the applicant's submissions in response to the preliminary view.