



Interpreting the Legislation – *Right to Information Act 2009 and Information Privacy Act 2009*

Applications by and for children

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1.0 Overview

The *Right to Information Act 2009*¹ (Qld) (**RTI Act**) gives people the right to access documents in the possession or control of Queensland government agencies². The RTI Act specifically allows parents to make applications on behalf of their children because, while children are permitted to make their own applications, they may lack the ability or capacity to do so.

Decision makers dealing with applications made by or on behalf of children will need to consider whether release of information would be in the best interests of the child. This may involve striking a balance between a number of factors such as the child's wellbeing and wishes and the parent's relationship with, or ability to care for, their child.

2.0 Who can make applications on behalf of a child?

The RTI Act³ allows a child's parent to make an application on a child's behalf. *Parent* is the child's mother, father, or a person exercising parental responsibility for the child.

For an Aboriginal or Torres Strait Islander child a parent includes a person who, under Aboriginal or Torres Strait Islander tradition, is regarded as a parent of the child.

¹ And Chapter 3 of the *Information Privacy Act 2009* (IP Act).

² In this guideline, agency includes a Minister.

³ Section 25.



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A person who temporarily stands in the place of a parent is not a parent.⁴ Baby-sitters, short term foster carers, and school teachers are not a parent under the RTI Act.

2.1 *A person who exercises parental responsibility for the child*

A person who exercises parental responsibility for the child includes a person who is granted guardianship of the child under the *Child Protection Act 1999* (Qld) or who otherwise exercises parental responsibility for the child under a decision or order of a federal court or a court of the State.⁵ This means other people, such as step-parents or informal kinship carers, may be able to establish that they exercise parental control, even if it is not as a result of guardianship or other court order.

The following documents may establish a person as a parent or person exercising parental control:

- Birth certificate which identifies the applicant as a parent
- Court orders that give the applicant parental responsibility for the child; or
- Correspondence and/or cards from government agencies, such as Centrelink, Medicare, or the Department of Human Services, that indicate the applicant has parental control of, or responsibility for the child.

If an applicant is unable to provide any of the above documents, agencies should talk to the applicants about how they can demonstrate parental responsibility for the child. This is particularly important in the case of adoptions under Aboriginal tradition or Torres Strait Islander custom, or informal kinship care arrangements. Statutory declarations from other individuals who know the child and the person exercising parental control may be acceptable in some circumstances.

3.0 *Can the information be released?*

Decision makers will have to consider whether information within the scope of the application may be exempt from release, contrary to the public interest to release, or not releasable because it would be contrary to the best interests of the child.

⁴ Section 25(2) of the RTI Act and section 45(2) of the IP Act.

⁵ Section 61B of the *Family Law Act 1975* (Cth).



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3.1 Exempt information

Schedule 3 of the RTI Act⁶ contains information Parliament has decided it would be contrary to the public interest to disclose. This includes information the disclosure of which is prohibited by another Act⁷. The ones most likely to be relevant to an application by or for a child are:

- *Adoption Act 2009* (Qld), section 314 creates a presumption of confidentiality of information related to the personal history or person's affairs of adopted children, adoptive parents, and birth parents.
- *Child Protection Act 1999* (Qld), sections 186 to 188 which relate to the confidentiality of notifiers of harm or risk of harm; and confidentiality of information obtained by or given to persons involved in administering that Act.
- *Youth Justice Act 1992* (Qld), section 288 which is a prohibition on disclosure of confidential information relating to a child obtained through involvement in the administration of that Act.

3.2 Contrary to public interest information

If information is not exempt under one of the provisions in schedule 3 of the RTI Act, decision makers must consider if it is contrary to the public interest to release. They must identify relevant factors favouring disclosure and non-disclosure in schedule 4 of the RTI Act to determine whether or not the information should be disclosed.

3.2.1 Factors Favouring Disclosure

Schedule 4, part 2 of the RTI Act contains the public interest factors favouring disclosure. Factors which may be of relevance to applications made by or for children include:

- *The information is the applicant's personal information:* This factor applies where the application is made on behalf of the child, as the child is the actual applicant.
- *The information is the personal information of a child within the meaning of section 25, the agent acting for the applicant is the child's parent within the meaning of section 25 and disclosure of the information is reasonably considered to be in the child's best interests.*

⁶ Section 48 and schedule 3 of the RTI Act.

⁷ As set out in Schedule 3, section 12 of the RTI Act.



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3.2.2 Factors Favouring Nondisclosure

Schedule 4, part 3 of the RTI Act contains the public interest factors favouring non-disclosure. Factors which may be of particular relevance to applications made for children include:

- *Disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy.* Children's right to protection from arbitrary or unlawful interference with their privacy is recognised by the United Nations Convention on the Rights of the Child (CROC). A right to confidentiality has been accepted in health situations between a health provider and child. Courts have also recognised that parental power to consent to medical treatment on behalf of a child diminishes gradually as the child's capacities and maturity grow and that this rate of development depends on the individual child. The child's right to privacy grows along with their autonomy and is proportionate to a decrease in parental power.
- *The information is the personal information of a child within the meaning of section 25, the applicant is the child's parent within the meaning of section 25 and disclosure of the information is reasonably considered not to be in the child's best interests.* Even though a parent is making an application on behalf a child, it does not automatically follow that it will be in the best interest of the child for the parent to be given the information or that the parent has the interests of the child as the primary focus of the application. Decision makers will need to consider all the circumstances of the application and the documents.

3.3 Contrary to the best interest of the child – s47(3)(c)

Section 47(3)(c) of the RTI Act allows an agency to refuse access to the personal information of a child if it considers that disclosure would not be in the best interests of the child. This ground for refusing access is separate from, and in addition to, refusal on the grounds that the information is exempt or contrary to the public interest. It applies whether the application is made by the child, or by a parent acting on behalf of a child.

Whether disclosure of the information is in the 'child's best interests' will depend on the nature of the personal information and the particular circumstances. Factors that may be relevant to determining whether disclosure would not be in the child's best interests include:

- the child's age; and
- the impact on the child's happiness, welfare and development, and/or well-being.



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If the application is made by the child, rather than for the child, section 50(3) of the RTI Act requires the agency or Minister to consider whether the child has the capacity to:

- understand the information and the context in which it was recorded; and
- make a mature judgement as to what might be in his or her best interests.

If the application is made for the child by their parent, it is relevant to consider the practical effect of disclosing the information to the child's parent as their representative and whether this would be contrary to the best interests of the child. For example, it may be contrary to the best interests of a child to disclose information to a parent acting on their behalf where disclosure could prejudice the privacy of that child or where the disclosure is likely to discourage the child from communicating openly with government agencies such as the police service or child safety officers.

Often a parent's interests align with their child's interests, as the parent is acting with their child's best interests in mind.⁸ However, there may be circumstances where the interests of the child are sufficiently different from that of the parent to warrant refusal of access on this ground.⁹

Section 75A of the RTI Act

Under this section, agencies can delete section 47(3)(c) information if it is practicable to do so and must then give access to the document. The IP Act does not have an equivalent of section 75A of the RTI Act. This does not mean 47(3)(c) information cannot be deleted from IP Act application documents, agencies will simply need to be aware of the difference in the Acts.

4.0 Best interests of the child

Best interests of the child is not defined in the RTI Act¹⁰, however the RTI Act provides some guidance where the *child* has made the

⁸ *Department of Health and Community Services v JWB and SMB* (Marion's case) (1992) 175 CLR 218, 239-240, 260.

⁹ *Re Bradford and Director of Family Services; Commissioner, Australian Federal Police* (1998) 52 ALD 455, 458-459,

¹⁰ The Information Commissioner has made several decisions relying on this ground of refusal. See *49RYXV and the Department of Communities, Child Safety and Disability Services* [2014] QICmr 23 (5 June 2014),



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application. It requires decision makers to have regard to the child's capacity to understand the information and the context in which it was recorded and make a mature judgment as to what might be in his or her best interests.

Some factors that have been identified in the family law context as relevant to the best interests of the child are: ¹¹

- The benefit to the child of having a meaningful relationship with both parents.
- The need to protect the child from physical or psychological harm and from being subjected to or exposed to, abuse, neglect or family violence. Disclosure of information will not be appropriate if there is a real possibility that the child may suffer abuse as a result.
- Any views expressed by the child and any factors (such as the child's maturity or level of understanding) relevant to the weight to be given to the child's views.
- The child's maturity, sex, lifestyle and background and other relevant characteristics of the child and of either of the child's parents.
- If the child is an Aboriginal or Torres Strait Islander child the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture.

Courts have also recognised that 'best interests' is a multi-faceted test and incorporates the wellbeing of the child, all factors which will affect the future of the child; the happiness of the child, immediate welfare as well as matters relevant to the child's healthy development; and includes not only material wealth or advantage but also emotional, spiritual and mental wellbeing.¹² Wellbeing factors may include safety, protection, education, health, developmental considerations, attachments and relationships.

Other relevant considerations include the presence of conflict in the family, the relationship between the child and the agency holding the information, and the possibility that disclosure of the information may harm the child. Where there is disharmony between the parents or potential conflict of interest between parent and child, care should be

76PNOH and the Department of Communities, Child Safety and Disability Services [2014] QICmr 24 (5 June 2014), *2YSV6N and the Department of Communities, Child Safety and Disability Services* [2014] QICmr 25 (5 June 2014), *AZ4Z4W and the Department of Communities, Child Safety and Disability Services* [2014] QICmr 26 (5 June 2014).

¹¹ *Family Law Act 1975* section 60CC

¹² *O'Conner v A and B* [1971] 1 WLR 1227 at 1237; *In the Marriage of Bishop* (1981) 6 Fam LR 882, 888; *McGrath (Infants)* [1893] 1 Ch 143, 148.



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exercised in giving parents access to records that contain the child's private and sensitive information.

4.1 Relationships of trust with child protection agencies

In *Re Bradford and Director of Family Services; Commissioner, Australian Federal Police (Bradford)*¹³ the applicant sought access under the *Freedom of Information Act 1982* (Cth) to various documents about herself and her four children, relating to child protection matters, that were held by the Director of Family Services.

President Curtis noted where there are child protection issues, disclosure may undermine the relationship between the child and the agency charged with the protection of children and as such may not be in the child's best interests.

4.2 Seeking the child's views

The RTI Act does not require a decision maker to take a child's views into account when determining whether release is contrary to their best interests. International, national and state legislation and guidelines, however, specifically acknowledge the right of children and young people to participate in decisions about their own lives.¹⁴

Courts have acknowledged that parental controls over a child do not wholly disappear until the child reaches 18, but recognise that control diminishes gradually as the child's capacity and maturity grows.¹⁵ There is no specific age at which this happens; this development depends on the individual child. In order to assess the best interests of a child, there may be circumstances in which a decision maker considers it appropriate to obtain the child's view.¹⁶

If a child objects to the release of information to their parents or guardians, that fact will not in itself be enough to justify refusal, but it may be a significant factor for the decision maker to consider. The balance to be struck is between the child's right to privacy on the one hand and on the other not creating unnecessary impediments to parents being able to effectively undertake their parental responsibilities.

¹³ (1998) 52 ALD 455

¹⁴ G Force, *Children and young people's participation strategy*, Department of Communities, Child Safety and Disability Services, 3.

<<https://www.communities.qld.gov.au/chilfsafety/foster-and-kinship-care/resources-and-publications/children-and-young-peoples-participation-strategy>>.

¹⁵ *Department of Health and Community Services v JWB and SMB* (Marion's case) 1992 175 CLR 218 [19] referring to *Gillick v West Norfolk Area Health Authority* (1986) AC 112. [

¹⁶ Obtaining the child's view as described in this guideline is distinct from formal consultation with a third party as outlined in section 37 of the RTI Act (section 56 of the IP Act).



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5.0 Providing access

5.1 *Giving summary of personal information to applicant or intermediary*¹⁷

Where access to personal information has been refused in response to an application for a child, other than for healthcare information,¹⁸ decision makers must consider whether it is consistent with the primary object of the legislation to give the applicant, or an intermediary a summary of the personal information. Conditions of use or disclosure may be included. The conditions of use or disclosure must be agreed between the decision maker and the intermediary (or applicant¹⁹), or between the decision maker, the intermediary and the applicant.

Summaries of personal information have in the past usually been issued where there is some concern about releasing documents in full because of third party personal information. This is usually in the context of confidential sources of information whose identity must be protected. The legislation makes provision for the protection of such confidential sources by requiring consultation with the confidential source and their agreement to the release of the summary. This may be a useful tool in the context where the information in question contains personal information of a parent who may be estranged from the requesting parent.

5.2 *Precautions for children*

Decision makers should also note that the legislation requires that where an application is stated to be made for a child by the child's parent and is for the child's personal information then decision makers must have procedures in place to ensure that the information is not disclosed to anyone else.²⁰

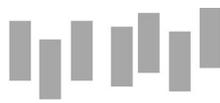
For additional information and assistance please refer to OIC's guidelines, or contact the Enquiries Service on 07 3234 7373 or email enquiries@oic.qld.gov.au.

¹⁷ Section 76 of the RTI Act and section 91 of the IP Act.

¹⁸ Healthcare information is dealt with in section 77 of the RTI Act and section 92 of the IP Act.

¹⁹ The Information Commissioner considers that the current wording of the section which states that the agreement on the conditions of use or disclosure agreed between 'the agency or Minister and the intermediary', should in fact read 'between the agency or Minister and the applicant'.

²⁰ Section 71 of the RTI Act and section 86 of the IP Act.



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This guide is introductory only, and deals with issues in a general way. It is not legal advice. Additional factors may be relevant in specific circumstances. For detailed guidance, legal advice should be sought.

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