



Decision and Reasons for Decision

Citation: *T52 and Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and Arts; and Others* [2024] QICmr 20 (27 May 2024)

Application Number: 316359

Applicant: T52

Respondent: Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and Arts

Third Party: X98

Fourth Party: R86

Fifth Party: The Speech Pathology Association of Australia Limited ABN 17 008 393 440, Trading as Speech Pathology Australia

Decision Date: 27 May 2024

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LAW ENFORCEMENT OR PUBLIC SAFETY - SERIOUS ACT OF HARASSMENT OR INTIMIDATION - application to access reports and communications generally concerning development of a government policy position - whether disclosure could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation - sections 47(3)(a) and 48 and schedule 3, section 10(1)(d) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - application to access reports and communications generally concerning development of a government policy position - government accountability and transparency - personal information and privacy - business and professional affairs - prejudice to management function - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - FORMS OF ACCESS - COPYRIGHT - draft guideline documents - whether giving access to a copy of the document would involve an infringement of the copyright

of a person other than the State - access granted by way of inspection only - section 68(4)(c) of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the former Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (**Department**)² under the *Right to Information Act 2009* (Qld) (**RTI Act**) to access a broad range of documents relating to Facilitated Communication³ (**FC**).
2. As a result of negotiations between the applicant and the Department, the application was narrowed to two specific reports authored in 2006 and certain communications made during 2011 in relation to FC.
3. The Department located 583 pages as relevant to the application, released 242 pages⁴ and decided⁵ to refuse access to 198 pages and parts of 106 pages on various grounds.⁶
4. The applicant then applied⁷ to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.
5. During the review:
 - the applicant further narrowed her access request and accepted OIC's preliminary assessments that access could be refused to certain information; and
 - following OIC's extensive consultation with numerous third parties, the Department also agreed to disclose some further information to the applicant and the Third Party, Fourth Party and Fifth Party were joined as participants.⁸
6. For the reasons set out below, and having carefully considered all received submissions and disclosure objections (including those raised by the Third Party, Fourth Party and Fifth Party), I vary the Department's decision and, in respect of the information remaining in issue in this review, I find that:
 - access may be refused to certain personal information, as its disclosure would, on balance, be contrary to the public interest; and

¹ Access application dated 31 May 2021.

² Following a machinery of government changes that have occurred during this external review, the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships ceased to exist, and the functions of that agency are currently the responsibility of the Department of Child Safety, Seniors and Disability Services. In 2021, the Department of Children, Youth Justice and Multicultural Affairs was authorised under section 30 of the RTI Act to deal with the access application on behalf of the former Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships and made a decision under delegation on their behalf. For ease of reference in this decision, I will simply refer to the various agencies collectively as the Department.

³ Facilitated Communication is sometimes called 'assisted typing' or 'supported typing'. In generalised terms, it involves the concept of a facilitator physically supporting the arms, hands or wrists of a person while they type/point to letters or pictures on a keyboard or similar device (this reflects how FC has been described in information which has been disclosed to the applicant). Its use as a communication technique for non-verbal individuals has been the subject of a large volume of published diverging views over many years.

⁴ This fully released information included the two reports requested in the narrowed application.

⁵ Decision dated 15 September 2021.

⁶ The Department also refused to deal with 37 pages on the ground they had been dealt with in a previous access application. The information considered by the Department comprised File 1, File 2, and File 3. File 2 was released in full.

⁷ By email dated 11 October 2021.

⁸ Under section 89(3) of the RTI Act.

- there is no basis under the RTI Act to refuse access to the balance of the information, as it is neither exempt information nor would it, on balance, be contrary to the public interest to disclose. However, for information appearing on 15 pages,⁹ access can be granted by way of inspection only, under section 68(4)(c) of the RTI Act, as providing the applicant with a copy of these documents would infringe copyright.

Background

7. During 2011, the Department commenced preparation for a review of its policies and procedures concerning communication support for people with complex communication needs (which encompassed the application of FC).
8. The applicant is an interested and active participant in public discussion about the use of FC and has made a number of applications to the Department seeking access to information about FC and changes to the Department's policy concerning FC.¹⁰ Three of those applications are the subject of external reviews. This decision is being issued in finalisation of the first of those external reviews.
9. In the course of the three external reviews, a large number of third parties were consulted regarding the potential release of certain information (**Consultation Information**) that may be of concern to them.¹¹ On external review, the Department required that these third parties only be provided with descriptions of the Consultation Information (rather than copies of the Consultation Information).¹² Many of those consulted indicated this made it difficult for them to provide their disclosure views to OIC. I accept that the Department's consultation requirements did impact the ability of those consulted to provide their disclosure views in a timely and meaningful way, particularly where the Consultation Information included communications which had occurred a decade before the consultation process was undertaken. As a result, the consultation process took considerable time to complete and, accordingly, I accept that the time taken to finalise these external reviews has not met the applicant's expectations.
10. The majority of those consulted in this review did not object to disclosure of the described information they were consulted about and, consequently, the Department agreed to disclose some of that Consultation Information to the applicant. However, the Third Party, Fourth Party and Fifth Party objected, on various grounds, to disclosure of the information they were consulted about and, as noted in paragraph 5 above, they applied to participate in this external review. Additionally, another consulted party expressed objection to disclosure of information but did not seek to participate in the external review.¹³
11. The applicant submitted¹⁴ that the information which has been disclosed indicates to her that '*senior Departmental staff were actively approaching other organisations to encourage them to produce position statements*' that were subsequently presented as evidence against FC. She continues to seek access to the information remaining in issue and submitted that further disclosure '*may help correct (or may reinforce) the*

⁹ Being File 1, pages 333-337, 340-344 and 442-446.

¹⁰ External Review 316359: application to the Department made on 8 May 2021; External Review 316775: application to the Department made on 21 October 2021; and External Review 316850: application to the Department made on 31 May 2022.

¹¹ The Department had also consulted some of these parties when it was processing the applications.

¹² The disclosure restrictions in section 107 of the RTI Act prevented the Information Commissioner from providing a copy of the Consultation Information to the consulted parties.

¹³ Referred to in this decision as Party X.

¹⁴ External review application.

impression that no contrary arguments were considered in any detail, and that the brief provided to the reviewers was strongly influenced by critics.¹⁵

12. The significant procedural steps taken during the external review are set out in the Appendix to this decision.

Reviewable decision

13. The decision under review is the Department's decision dated 15 September 2021.

Evidence considered

14. The evidence, submissions, legislation and other material I have considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).
15. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹⁶ I consider a decision-maker will be '*respecting, and acting compatibly with*' that right, and others prescribed in the HR Act, when applying the law prescribed in the RTI Act and the *Information Privacy Act 2009* (Qld) (**IP Act**).¹⁷ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between similar pieces of Victorian legislation:¹⁸ '*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*'.¹⁹

Information in issue

16. As set out at paragraph 5 above:
- the applicant confirmed that she did not pursue access to certain information and she accepted OIC's preliminary view that she was not entitled to access certain other information under the RTI Act;²⁰ and
 - following OIC's consultation process, the Department disclosed some further information to the applicant.
17. Accordingly, the information which remains in issue for the purpose of this decision (**Information in Issue**) appears on 95 pages in File 1.²¹ While the RTI Act limits the

¹⁵ External review application.

¹⁶ Section 21(2) of the HR Act. Section 21 of the HR also encompasses the rights to hold an opinion without interference and freedom of expression. The right to privacy and reputation is set out in section 25 of the HR Act. I have also had regard to those rights.

¹⁷ *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].

¹⁸ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁹ *XYZ* at [573].

²⁰ By email dated 12 November 2021, the applicant agreed to exclude information identified in OIC's letter dated 9 November 2021 (comprising irrelevant information, mobile telephone numbers and information the subject of a previous access application). On 11 February 2022, the applicant confirmed she did not seek review of the information refusals in File 3 (and this narrowed focus of the review was confirmed with the applicant on 28 March 2022). On 24 October 2022, the applicant accepted OIC's preliminary view that certain information in File 1 (pages 39-43, 53-54, 62-64, 98-100, 428-430, 449-452, 459-471, 477-479, 482 and 486-487) was exempt, being subject to legal professional privilege and, on 2 August 2023, the applicant agreed to exclude duplicate information and accepted OIC's preliminary view that further information would, on balance, be contrary to the public interest to disclose (being File 1, pages 5-6, 17-20, 169-172, 183-186, 188-193, 196-197, 199-201, 209, 213-220, 222-232, 237-244, 246-247, 248-249, 251-255, 261, 265, 277, 293-295, 313 and 480-481; and File 1, parts of pages 7-12, 25, 31, 33, 35, 36, 37, 39, 44-47, 50-52, 59-61, 65, 69, 80, 82, 93, 101, 102, 106, 114, 120, 123, 187, 202, 207, 211, 221, 245-246, 256-259, 267, 273-275, 279, 282, 284, 291, 303, 306, 307-308, 312, 314, 317, 329, 331-332, 338, 346, 351, 356-358, 372-373, 416, 421, 424, 431, 440, 448, 454, 474-475, 476, 483, 484, 490 and 491).

²¹ Namely, full pages 29-30, 34, 48, 157, 164-168, 173-174, 177-178, 208, 316, 330, 333-337, 339-344, 359-371, 417-420, 441-446 and 485; and parts of pages 3, 12, 31, 33, 35, 36, 44-47, 49-52, 59-61, 101, 104, 245, 307-308, 312, 329, 331-332, 338,

level of detail I can include in these reasons to describe the particular content of the Information in Issue,²² I can confirm that it includes:

- (a) information concerning the use of FC in the care of specific individuals
- (b) email communications circulating and discussing academic articles, position statements, published reports and other information about FC
- (c) email communications which show the Department's evolving position on FC in 2011 and complaints about that evolution
- (d) drafts of the Fifth Party's Clinical Guidelines on Augmentative and Alternative Communication and email communications concerning those draft guidelines; and
- (e) information the Department received from non-government organisations regarding their position on the use of FC.

Issues for determination

18. As noted above, some of the consulted parties objected to disclosure of all, or part, of the Information in Issue which they were consulted about.²³ In particular:

- the Third Party and the Fourth Party have objected to disclosure of information in this review on the basis that such disclosure could reasonably be expected to result in a serious act of harassment or intimidation or, in the alternative, that disclosure is contrary to the public interest
- the Fifth Party also objected to the disclosure of information on the basis that disclosure would be contrary to the public interest; and
- other consulted parties raised more generalised disclosure objections.²⁴

19. The Department also objects to disclosure of some of the Information in Issue, on the basis that it would, on balance, be contrary to the public interest to disclose.²⁵

20. Consequently, the issues for determination are whether access may be refused to the Information in Issue on the basis that:

- it comprises exempt information, as its disclosure could reasonably be expected to result in a serious act of harassment or intimidation;²⁶ and/or
- its disclosure would, on balance, be contrary to the public interest to disclose.

Exempt information

21. The RTI Act's primary object is to give a right of access to information in the government's possession or under the government's control. However, this right is subject to other provisions of the RTI Act,²⁷ including grounds on which access may be refused.²⁸ These grounds are to be interpreted narrowly²⁹ and the Act must be applied

356-358, 372-373, 416, 440, 447, 448, 454, 474-475, 476, 483 and 484. Details of the Information in Issue were confirmed to the applicant by letter dated 2 August 2023, however, that letter inadvertently (a) omitted listing parts of pages 59-61 as forming part of the Information in Issue and (b) incorrectly referred to parts of page 246 forming part of the Information in Issue (whereas the letter also confirmed OIC's preliminary view that pages 246-247 could be refused in full).

²² Section 108(3) of the RTI Act.

²³ I note that the Department had also consulted with a number of parties during its processing of the access applications and some of objections raised during that process were similar to the disclosure objections received on external review.

²⁴ For example, Party X also did not object to disclosure of certain information they were consulted about, provided a nominated commentary accompanied that disclosure.

²⁵ In this regard, I note the Department's onus in this review under section 87(1) of the RTI Act.

²⁶ Sections 47(3)(a) and 48 and schedule 3, section 10(1)(d) of the RTI Act.

²⁷ Section 23(1) of the RTI Act.

²⁸ These refusal grounds are set out in section 47 of the RTI Act.

²⁹ Section 47(2)(a) of the RTI Act.

and interpreted to further the primary object,³⁰ and be administered with a pro-disclosure bias.³¹

22. One ground of refusal is where information is exempt from disclosure.³² Information will qualify as exempt where its disclosure could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation (**Harassment or Intimidation Exemption**).³³
23. The term '*could reasonably be expected to*' requires that the expectation is reasonably based, that it is neither irrational, absurd or ridiculous,³⁴ nor merely a possibility.³⁵ Whether the expected consequence is reasonable requires an objective examination of the relevant evidence.³⁶ Factors which may be relevant in determining whether the requisite harassment or intimidation could reasonably be expected to occur include, but are not limited to:³⁷
 - past conduct or a pattern of previous conduct
 - the nature of the relevant information in issue
 - the nature of the relationship between the parties and/or relevant third parties; and
 - relevant contextual and/or cultural factors.
24. The RTI Act does not define '*serious act of harassment or intimidation*'. Therefore, the terms are given their ordinary meanings and, in this regard, the Information Commissioner has previously accepted the following definitions:³⁸
 - '*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*'.
25. The reference to 'serious' in the exemption indicates that Parliament had envisaged that some degree of low-level harassment or intimidation would be tolerated before the exemption applied.³⁹ Therefore, the expected harassment or intimidation must also be serious in nature for the exemption to apply. Relevant dictionary definitions of '*serious*' include '*weighty or important*',⁴⁰ '*giving cause for apprehension; critical*',⁴¹ and '*having (potentially) important, esp. undesired, consequences; giving cause for concern*'.⁴²

³⁰ Section 3(2) of the RTI Act.

³¹ Section 44 of the RTI Act.

³² Section 47(3)(a) and 48 of the RTI Act. Schedule 3 identifies what comprises exempt information for the purpose of the RTI Act.

³³ Schedule 3, section 10(1)(d) of the RTI Act.

³⁴ *Attorney-General v Cockcroft* (1986) 64 ALR 97 (**Cockcroft**) at [106].

³⁵ *Murphy and Treasury Department* (1995) 2 QAR 744 (**Murphy**) at [44] citing *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279, at 339-341.

³⁶ *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 *Cockcroft* at [106], cited in *Sheridan and South Burnett Regional Council, Local Government Association of Queensland Inc and Dalby Regional Council; and Crime and Misconduct Commissioner* (Unreported, Queensland Information Commissioner, 9 April 2009) (**Sheridan**) at [192], which considered substantially similar provisions of the *Freedom of Information Act 1992* (Qld).

³⁷ *Sheridan* at [193] and *Richards and Gold Coast City Council* (Unreported, Queensland Information Commissioner, 28 March 2012) at [19].

³⁸ *6ZJ3HG and Department of Environment and Heritage Protection; OY76VY (Third Party)* [2016] QICmr 8 (24 February 2016) at [32], citing *Sheridan* at [194]-[195].

³⁹ *Sheridan* at [187] and [294].

⁴⁰ Macquarie Dictionary Online retrieved 27 May 2024 from <https://www.macquariedictionary-com-au>.

⁴¹ Macquarie Dictionary Online retrieved 27 May 2024 from <https://www.macquariedictionary-com-au>.

⁴² New Shorter Oxford Dictionary (Fourth Edition), as quoted by the Information Commissioner in *Sheridan*.

Being competitive, disparaging, unpleasant or ‘*irksome and annoying*’ is not sufficient to establish the exemption.⁴³

26. The Queensland Civil and Administrative Tribunal has also confirmed that, for the Harassment or Intimidation Exemption to apply, ‘*it must be reasonably expected that a person would be subject to a serious act or harassment or intimidation as a result of the disclosure of the information, rather than independently or from any other circumstance*’.⁴⁴
27. Accordingly, for this exemption to apply, I must be satisfied that:
- there is a reasonable expectation of harassment and intimidation arising as a result of disclosure, rather than from other circumstances; and
 - the expected harassment or intimidation is serious in nature.

Analysis

28. Most of the consulted parties who objected to disclosure during this external review raised specific concerns about the disclosure of their identifying information within the Information in Issue.⁴⁵ To avoid identifying those consulted parties (in particular, the Third and Fourth Parties), and given the nature of certain disclosure concerns they have raised, I must necessarily be circumspect in how I describe those disclosure objections (and the Information in Issue they may specifically reference) in this decision.
29. Accordingly, I provide the following summary of the disclosure objections which are relevant to the issue of whether the Harassment or Intimidation Exemption applies to the Information in Issue:
- some of the consulted parties consider that the applicant, and other advocates for FC, have engaged in bullying behaviour (including via social media, other online activities and publications) and have made defamatory statements about them over many years
 - as a result of those bullying behaviours, certain organisations had taken steps to de-identify their members and the authors of publications about FC
 - disclosing further information to the applicant would result in that information being shared with other FC supporters and thereby renew, and increase, what some of the consulted parties perceive as harassing and intimidating behaviours (including online) towards various individuals/entities holding an opposing view to the supporters of FC; and
 - as a result of a number of particular actions undertaken by certain advocates of FC,⁴⁶ some of the consulted parties expressed concern about the impact disclosure of the Information in Issue would have on their safety and mental well-being⁴⁷ and the reputation of various individuals/entities.
30. In assessing whether the disclosure of information in this review *could reasonably be expected* to result in any person being subjected to a *serious* act of harassment or

⁴³ *Bowmaker Realty and Department of Justice and Attorney General; Andrews* [2015] QICmr 19 (17 August 2015) at [31].

⁴⁴ *Watson v Office of Information Commissioner Qld & Ors* [2015] QCATA 95 at [19].

⁴⁵ Some of the consulted parties also raised similar objections when consulted by the Department during its processing of the access application.

⁴⁶ To avoid identifying the consulted parties, I cannot further detail these actions.

⁴⁷ While information will also be exempt from disclosure under schedule 3, section 10(1)(c) of the RTI Act where its disclosure would reasonably be expected to endanger a person's life or physical safety, I am satisfied that none of the disclosure objections received from the consulted parties provided any information which indicated this exemption could be enlivened in respect of the Information in Issue.

intimidation, I have carefully considered the disclosure objections received from consulted parties, together with the supporting material provided with some of the disclosure objections.⁴⁸ Without commenting on its accuracy, I note that this supporting material is generally critical of some individuals/organisations, however, it does not have the character of abusive personal attacks or threats.

31. On the material before me in this review, it is evident that the applicant is a supporter of FC. I accept that there is a pattern of repeated conduct on the part of the applicant—that is, in publishing her FC views, including online, and disagreeing with the published views of individuals/entities who are not supportive of FC. Taking this and the information before me into account, I consider it is reasonable to expect that, following the disclosure of information in this external review process, the applicant may make further posts online expressing opposition to the FC views of certain individuals/organisations.⁴⁹
32. As I have noted above, the wording of the Harassment or Intimidation Exemption contemplates that lower levels of harassment or intimidation will not be captured by the exemption.⁵⁰ I have carefully reviewed the examples (and the provided supporting material) the consulted parties provided in their submissions about the applicant's past conduct. None of these examples, in my view, meet the level of severity necessary for the Harassment or Intimidation Exemption to apply. While they may be somewhat disparaging, unpleasant and annoying, they do not amount to *serious* harassment or intimidation. Instead, they are more in the nature of robust public dissent or discussion. In this context, it is reasonable to expect that any posts the applicant may make online following disclosure of information in this external review process will be of a similar character to the applicant's previous posts—that is, they will be critical expressions of dissent or disagreement but will not be abusive or threatening in nature.
33. The information before me indicates that the applicant has connections with other supporters of FC and, on that basis, I recognise that it is possible the applicant may share information being released in response to her various access applications concerning FC. However, there is nothing in the information before me to suggest that the applicant has demonstrated a pattern of sharing information with others so as to encourage, or incite, them to engage in the types of behaviours which are the subject of some consulted parties' disclosure objections. I am also satisfied that the past conduct of FC supporters (and the apprehended future acts of them) raised by the consulted parties in their disclosure objections does not amount to serious acts of harassment or intimidation.
34. For these reasons, I find that there is no reasonable basis to expect that disclosure of the Information in Issue would result in any individual being subjected to a serious act of harassment or intimidation. Accordingly, the Information in Issue does not comprise exempt information and access to it cannot be refused on that basis.
35. I have, however, taken the disclosure objections outlined in paragraph 29 above into consideration in weighing the public interest below.

⁴⁸ Generally, this supporting material comprises expressions of disagreement or opposition to the views of others. I accept that this supporting material represents some, but not the totality, of the expressions of disagreement or opposition on social media or in academic forums. I can also confirm that the supporting material provided with the disclosure objections included articles and responses published online by the applicant, which express the applicant's views that various individuals have treated evidence selectively or disregarded relevant research/opposing views.

⁴⁹ In reaching this conclusion, I do note that the disclosure objections indicate that the applicant's past posts were generally triggered by the publication of a document or article or a particular posting on social media. I do, however, acknowledge that the constancy of the applicant's online presence is a source of concern to some of the consulted parties.

⁵⁰ *Sheridan* at [187] and [294].

Contrary to the Public Interest

36. Access may also be refused under the RTI Act where disclosure of information would, on balance, be contrary to the public interest.⁵¹
37. The term '*public interest*' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.
38. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest⁵² and explains the steps that a decision-maker must take⁵³ in deciding the public interest as follows:
 - identify any irrelevant factors and disregard them⁵⁴
 - identify relevant public interest factors favouring disclosure and nondisclosure
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosing the information in issue would, on balance, be contrary to the public interest.

Findings

Irrelevant factors

39. In addition to the disclosure objections outlined in paragraph 29 above, some of the consulted parties raised generalised concerns about how the applicant may use information that is disclosed to her in this external review. The RTI Act specifically precludes a decision-maker from taking into account any '*mischievous conduct by the applicant*'⁵⁵ in deciding the public interest.
40. I have not taken into account the above irrelevant factor, or any other irrelevant factor, in this review.

Factors favouring disclosure

41. The RTI Act recognises that public interest factors favouring disclosure will arise where disclosing information could reasonably be expected to:
 - promote open discussion of public affairs and enhance the Government's accountability⁵⁶
 - contribute to positive and informed debate on important issues or matters of serious interest⁵⁷
 - inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community⁵⁸

⁵¹ Sections 47(3)(b) and 49 of the RTI Act.

⁵² In schedule 4 of the RTI Act. However, factors listed in schedule 4 are not exhaustive. In other words, factors that are not listed may also be relevant.

⁵³ Section 49(3) of the RTI Act.

⁵⁴ I have not taken any irrelevant factors into account.

⁵⁵ Schedule 4, part 1, item 3 of the RTI Act.

⁵⁶ Schedule 4, part 2, item 1 of the RTI Act.

⁵⁷ Schedule 4, part 2, item 2 of the RTI Act.

⁵⁸ Schedule 4, part 2, item 3 of the RTI Act.

- reveal the reason for a government decision and any background or contextual information that informed the decision⁵⁹
42. The Information in Issue generally records that, during 2011,⁶⁰ Departmental officers internally considered and discussed the use of FC in specific clinical cases (or for specific individuals); considered and discussed certain academic papers, reports, position statements, guidelines and other publications concerning the use of FC in the disability sector; and provided input to the Fifth Party's draft Clinical Guidelines on Augmentative and Alternative Communication.
43. The Department must be transparent and accountable about its policy positions and how those positions are, from time to time, reviewed and updated. I also accept that FC is a matter of some community interest, as evidenced by the considerable public discussion about its use over many years. However, the Department has disclosed a significant amount of information to the applicant. I consider that disclosed information has, to a large extent, advanced the accountability and transparency factors listed above, by enabling scrutiny of the Department's policy review process and providing insight into the background considerations, context and development, of government policy.⁶¹ Further, the disclosed information has provided details about how Departmental officers shared and commented on various publications, studies and presentations about FC, as well as the guidelines issued by other agencies. Given the nature of the Information in Issue, I consider it will, to varying degrees, further advance the government's accountability and transparency, as set out below.
44. The Information in Issue:
- (a) includes records of discussions between Departmental officers about the care, services or support being provided in specific clinical cases;⁶² and
 - (b) includes, or references, information which was received by the Department from members of the public about the use of FC by, or for, specific individuals.⁶³
45. Sensitive personal information of individuals other than the applicant appears within the documents referenced above, however, as noted in paragraph 16, the applicant accepted during the review that she was not entitled to access this sensitive personal information and it does not form part of the Information in Issue. In respect of the remaining parts of the documents referenced in paragraph 44(a), I consider its disclosure would enhance government accountability and transparency, as disclosing that information will confirm how care and support concerns for vulnerable individuals are elevated within the relevant government Department. I afford these disclosure factors significant weight for this internal discussion information. While I cannot describe in any detail the Information in Issue which appears within the documents referenced in paragraph 44(b),⁶⁴ I note that this information was received or recorded at a time when the Department was discussing and considering its policy position about the use of FC. On that basis, it is reasonable to expect that this information formed part of the information which was considered as part of the Department's policy review. For this reason, I find that these accountability and disclosure factors also apply, to some extent, to favour disclosure of these components of the Information in Issue.

⁵⁹ Schedule 4, part 2, item 11 of the RTI Act.

⁶⁰ This is the timeframe focus of the applicant's request to access email communications.

⁶¹ I consider the disclosed information confirms that Departmental staff gave consideration to a wide range of available information (including information published or provided by academics, various disability sector organisations and members of the public) when formulating government policies and has provided some contextual information about the development of the Department's position on the use of FC.

⁶² Pages 44, 45, 46, 47, 50, 51, 52, 59, 60, 61 and 448.

⁶³ Pages 356, 357-371, 372-373, 474 and 475.

⁶⁴ By virtue of the requirements in section 108(3) of the RTI Act.

However, given the limited nature of this particular information, I consider these disclosure factors are deserving of only moderate weight.

46. In respect of communications within the Information in Issue about the Fifth Party's draft clinical guidelines, the Department submitted⁶⁵ that '*in balancing the factors favouring disclosure against nondisclosure, we believe it is important to understand the context in which a particular communication occurred*'. More specifically, the Department argued that:
- although these communications may have been made via the work email addresses of public sector officers, those communications were not made in a work capacity or on behalf of (or as a representative for) the Department, but were instead communications made by those officers in their private capacities as subject matter experts
 - at the relevant time, government policy permitted limited personal use of Departmental ICT services, facilities and devices; and
 - factors favouring disclosure which relate to government accountability should not be afforded any significant weight.⁶⁶
47. The Information in Issue of this nature does primarily comprise knowledge sharing and exchanges of opinions between individuals who could be described as subject matter experts and the tone of these communications are such that a personal connection between the senders and recipients can, in most cases, be inferred. I also acknowledge the Department's submission that a certain amount of personal use of Departmental ICT was permitted. However, having considered all the information before me, I am not satisfied that these Departmental officers involved in these communications were, as the Department contends, providing information and opinions to others solely in their personal capacities.
48. These communications concern the initial stage of the Fifth Party's review of its clinical guidelines. The Departmental officers involved in these communications were senior officers who used their work emails. They also used their Departmental signature blocks for almost all these communications. I also note that, around the same time, the Department was preparing to review its policy and procedures. In this regard, the Department noted that its policy position was not approved until some years later (in 2017).⁶⁷ In these circumstances, I consider disclosing these communications about the preliminary drafts of the Fifth Party's guidelines will, to some extent, further promote government accountability and transparency, by confirming that Departmental staff were invited to provide, and did provide, feedback or input (both as subject matter experts and Departmental officers) to the Fifth Party's draft guidelines and that it is reasonable to expect that this feedback and information exchange also formed part of the Department's overall 'thinking process' for its own policy review process. On this basis, I afford these factors favouring disclosure moderate weight.
49. The Information in Issue also includes some limited communications involving Department officers, which circulate or comment upon the position statements of other non-government organisations or which concern feedback (given or received) about such position statements. The Department has submitted that some of these

⁶⁵ Submissions dated 1 December 2022 (received by OIC on 2 December 2022).

⁶⁶ More specifically, the Department submitted that, for this component of the Information in Issue, the factor in schedule 4, part 2, item 1 of the RTI Act should be afforded limited weight and the factor in schedule 4, part 2, item 11 of the RTI Act should be afforded moderate weight.

⁶⁷ The Department's submissions dated 1 December 2022 referred to this policy position as comprising the Department's '*Complex Communication Needs (CCN) Policy and Procedure*' and that it was approved on 24 April 2017. I also note that the Department's policy and procedure references the final published version of the Fifth Party's Clinical Guidelines on Augmentative and Alternative Communication.

communications, whilst made via work email addresses, were not made in a work capacity but were instead communications between friends or communications seeking the opinion of others as academics or subject matter experts.⁶⁸ Having carefully considered the content and context of these communications, I am not satisfied the involved officers were acting in their personal capacities. For similar reasons to those above, I consider disclosure of these communications would further advance the accountability and transparency factors. However, given the more limited nature and content of these communications, I consider these disclosure factors are deserving of only low weight.⁶⁹

50. Many of the consulted parties raised specific concerns about the disclosure of their identifying information within the Information in Issue. However, I note that certain identifying information of various consulted parties has already been disclosed to the applicant.
51. While I acknowledge the received disclosure objections and the Department's submissions⁷⁰ (as outlined in paragraphs 47 to 49 above), I consider the accountability and transparency considerations strongly favour disclosure of the identifying information (names and contact details⁷¹) of the Departmental officers which appear within the Information in Issue.⁷²
52. However, for the identifying information of other individuals (such as their name, title, contact details and the organisation they work for), I do not consider these disclosure factors are deserving of the same weight. I accept that disclosing the identifying details of other Queensland public sector officers would permit some level of scrutiny about how contemporary literature, studies, publications, statements and policies (or drafts of them) about communication methods/strategies in the disability sector are shared and discussed between various government agencies and public sector entities.⁷³ For that reason, and after taking into account the context of the particular Information in Issue in which they appear, I consider these government accountability and transparency factors are deserving of moderate weight. As to the remaining identifying details, these are of individuals who are not Queensland public sector officers. Although this final category of identifying information also appears in communications which occurred at a time when the Department was preparing to review its own policy position, I am satisfied that the disclosure of the identifying details of private individuals would not serve to promote government accountability and transparency in any meaningful way.⁷⁴
53. As outlined in paragraph 11, the applicant has concerns with the manner in which Department's policy review was conducted.⁷⁵ Public interest factors favouring disclosure will also arise in circumstances where disclosing information could reasonably be expected to allow or assist enquiry into, or reveal or substantiate, deficiencies in the conduct of the Department or its officers.⁷⁶ I have carefully considered the Information in Issue (together with the applicant's submissions and the information which has been released to the applicant) and I am satisfied that there is

⁶⁸ Submissions dated 1 December 2022.

⁶⁹ Taking the nature of this information into account, I afford these factors only low weight in favour of disclosure.

⁷⁰ Submissions dated 1 December 2022.

⁷¹ Including email addresses.

⁷² On this basis, I have afforded these factors favouring disclosure moderate weight in respect of the names and contact details of Departmental officers. While these Departmental officer identifying details do appear on a large number of pages within the Information in Issue, they do not appear on pages 48, 165-166, 333-337, 340-344, 356, 357-371, 373, 418-420, 442-446, 474, 475 and 485.

⁷³ Particularly where those details appear within communications which occurred at a time when the Department was preparing to review its own policies concerning the same (or similar) communication methods/strategies.

⁷⁴ Given this, I afford these factors only low weight for this type of information.

⁷⁵ External review application.

⁷⁶ Schedule 4, part 2, items 5 and 6 of the RTI Act.

nothing within the Information in Issue which gives rise to an expectation that its disclosure would allow or assist enquiry into, reveal or substantiate, agency or official conduct deficiencies. Accordingly, I find that these factors do not apply to favour disclosure.

54. Taking into account the particular nature of the Information in Issue, I cannot identify any other public interest considerations favouring its disclosure.⁷⁷

Factors favouring nondisclosure

55. The RTI Act recognises that there is a public interest harm⁷⁸ in disclosing an individual's personal information⁷⁹ to someone else and that disclosing information which could reasonably be expected to prejudice the protection of an individual's right to privacy gives rise to a public interest factor favouring nondisclosure.⁸⁰ The concept of '*privacy*' is not defined in the IP Act or the RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their '*personal sphere*' free from interference from others.⁸¹
56. I am satisfied these nondisclosure considerations are enlivened in respect of a large portion of the Information in Issue, as it includes the identifying details and opinions of various individuals (including certain consulted parties) or it may allow the identities of such individuals to be ascertained.
57. As to the weight to be afforded to these factors, I note that, generally, information created in the course of a person's employment is considered to be their routine personal work information and, as such, does not attract a high privacy interest and the harm arising from disclosure is considered to be low.⁸² For the documents recording discussions between Departmental officers about the care, services or support being provided in specific clinical cases, the applicant accepted during the review that she was not entitled to access the sensitive personal information of other individuals appearing within those documents. I am satisfied that the remaining information within those documents⁸³ relates to the day-to-day duties and responsibilities of the involved Departmental officers and therefore comprises their routine personal work information. Accordingly, I afford the nondisclosure factors relating to personal information and privacy low to no weight for this component of the Information in Issue.
58. The applicant also accepted she was not entitled to access sensitive personal information within documents which comprise, or reference, information received by the

⁷⁷ Having carefully considered all factors listed in schedule 4, part 2 of the RTI Act, the Information in Issue does not contain the applicant's personal information (schedule 4, part 2, item 7 of the RTI Act) and I cannot see how disclosing the Information in Issue could, for example, ensure oversight of expenditure of public funds (schedule 4, part 2, item 4 of the RTI Act); advance the fair treatment of individuals and entities in accordance with the law in their dealing with agencies (schedule 4, part 2, item 10 of the RTI Act); reveal the Information in Issue was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant (schedule 4, part 2, item 12 of the RTI Act); reveal environmental or health risks or measures relating to public health and safety (schedule 4, part 2, item 14 of the RTI Act); contribute to the administration of justice (schedule 4, part 2, items 16 and 17 of the RTI Act); or contribute to innovation and the facilitation of research (schedule 4, part 2, item 19 of the RTI Act). In the event that further relevant factors exist in favour of disclosure, I am satisfied that there is no evidence before me to suggest that any would carry sufficient weight to displace the overall balance of the public interest as set out in my findings for the various components of the Information in Issue.

⁷⁸ Schedule 4, part 4, section 6 of the RTI Act.

⁷⁹ '*Personal information*' is defined in schedule 5 of the RTI Act by reference to the IP Act and 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*'.

⁸⁰ Schedule 4, part 3, item 3 of the RTI Act.

⁸¹ Paraphrasing the Australian Law Reform Commission's definition of the concept in '*For your information: Australian Privacy Law and Practice*' Australian Law Reform Commission Report No. 108 released 12 August 2008, at paragraph 1.56.

⁸² Routine personal work information can include, for example, a work email address, a work phone number or an opinion given in a professional capacity.

⁸³ Which appears on pages 44, 45, 46, 47, 48, 50, 51, 52, 59, 60, 61 and 448.

Department from members of the public about the use of FC by, or for, specific individuals. As a result, the Information in Issue within these documents is limited and only a small part of it can be characterised as personal information.⁸⁴ In this regard, I have taken into account the Department's submission that '*attempting to de-identify the documents does not always mitigate the privacy factor favouring nondisclosure*'.⁸⁵ However, for this particular Information in Issue, I am satisfied that it does not comprise sensitive personal information and its disclosure could not in my view reasonably be expected to allow the identities of these individuals (or others) to be ascertained, notwithstanding that the number of individuals using FC at the time may have been relatively small. I am also satisfied that, given its quite limited nature, disclosing the Information in Issue within these documents would not represent any significant intrusion into the private sphere of these individuals and only minimal harm, if any, would arise from its disclosure. Accordingly, for these components of the Information in Issue, I afford low to no weight to these factors relating to personal information and privacy.

59. The remaining Information in Issue includes the personal information of various individuals, such as their names, contact details, titles and opinions. In determining the weight to be afforded to the personal information and privacy factors for information of this nature, I have taken into account the received disclosure objections and the information which has already been disclosed to the applicant. Where names and contact details within the Information in Issue have already been disclosed to the applicant, it is reasonable to conclude that disclosing such personal information again to the applicant would not further impact the individuals' privacy in any significant respect and that only minimal harm could reasonably be expected to arise from the further disclosure. I afford only low weight to these nondisclosure factors in respect of that personal information. On the other hand, for names and contact details of individuals which have not previously been disclosed to the applicant, these do not relate to public sector officers, and I consider there would be a higher level of privacy intrusion and harm that could be expected to arise from disclosure. Having noted the context in which this personal information appears, I afford these nondisclosure factors significant weight.
60. As noted in paragraphs 47 to 50, on the information before me, I am not satisfied that Departmental officers were, as the Department contends, providing information and opinions to others solely in their personal capacities. I also note that the opinions of various individuals which appear within the Information in Issue are not about sensitive private aspects of their lives; they were expressed almost a decade ago and it is apparent from the consultation process conducted during the review that some of these public sector officers no longer hold the positions they held when the communications in issue occurred. Further, for some of these individuals, their opinions about FC form part of the public record.⁸⁶ In all these circumstances, and having carefully reviewed the Information in Issue of this nature, I consider that:
- disclosing the opinions of various public sector individuals within the Information in Issue will not impact their privacy in any significant way and only a low level of harm could reasonably be expected to arise from disclosure; however

⁸⁴ This personal information appears on pages 356, 358 and 373. The Information in Issue on pages 359-371 does not comprise the personal information of these members of the public or the other individuals who were referenced in the information which is no longer in issue. Although section 108(3) of the RTI Act prevents me from providing any detail about the Information in Issue on pages 359-371, I am satisfied that the personal information and privacy factors do not apply to the Information in Issue on those pages.

⁸⁵ Submission dated 1 December 2022.

⁸⁶ For example, in academic publications.

- a higher level of impact and harm could be expected to arise from the disclosure of the opinions of private individuals within the Information in Issue.

Accordingly, for these opinion components of the Information in Issue, I have afforded low and moderate weight respectively to the nondisclosure factors relating to personal information and privacy.

61. In the decision under review, the Department decided to refuse access to certain information by reference to the public interest factor in schedule 4, part 4, section 3 of the RTI Act.⁸⁷ That provision recognises that a public interest harm can result from the disclosure of information that could have a substantial adverse effect on the management or assessment by an agency of its staff.⁸⁸ The Information in Issue which was refused by the Department on this basis appears on only parts of three pages.⁸⁹ The Department described the information it refused on this basis as generally comprising communications relating to the management of complaints about staff.
62. I have carefully reviewed this component of the Information in Issue and I am satisfied that the nondisclosure factors concerning an agency's management functions arise in respect of only small portions of the Information in Issue on one page.⁹⁰ While I am limited in the extent to which I can describe these small portions of information,⁹¹ I can confirm that they appear in a communication between staff about a received complaint and record certain opinions about the complaint and how to best respond to it. I also consider that views/opinions of staff which relate to the management of received complaints fall outside the category of routine work information.
63. Although these small portions of information relate to matters raised many years ago, I agree with the Department's statement in the decision under review that '*[e]ffective management of staff relations could reasonably be expected to be adversely affected if communications of this type were disclosed*'. In my view, staff must be able to freely communicate with each other about these types of issues and disclosing this type of information outside the relevant complaint management process and under the RTI Act (where there can be no restriction on its use, dissemination or republication) could reasonably be expected to impact the ability of agencies to discuss how to manage received complaints about staff. Given the particular complaint circumstances to which these portions of information relate,⁹² I afford these factors significant weight in favour of nondisclosure.
64. The RTI Act also recognises factors favouring nondisclosure which arise where disclosure information could reasonably be expected to prejudice:
- (a) the private, business, professional or commercial or financial affairs of entities;⁹³
and
 - (b) trade secrets, business affairs or research of an agency or person.⁹⁴

⁸⁷ The relevant pages on which this information appeared were identified by the Department in the schedule to the decision.

⁸⁸ Schedule 4, part 4, section 3(c) of the RTI Act. A public interest factor favouring nondisclosure will also arise where disclosing information could reasonably be expected to prejudice the management function of an agency or the conduct of industrial relations by an agency (schedule 4, part 3, item 19 of the RTI Act).

⁸⁹ Being pages 245, 307 and 308. In this regard, I note that most of the information which the Department refused on this basis does not form part of the Information in Issue being addressed in this decision.

⁹⁰ Page 245. Accordingly, I do not consider that these nondisclosure factors relating to management function apply to the remaining Information in Issue on pages 245, 307 and 308.

⁹¹ Section 108(3) of the RTI Act.

⁹² I am unable to provide further details of these complaint circumstances, particularly as some of them appear within information which the applicant accepted she was not entitled to access.

⁹³ Schedule 4, part 3, item 2 of the RTI Act.

⁹⁴ Schedule 4, part 3, item 15 of the RTI Act.

65. The Information in Issue includes communications about the Fifth Party's review of its Clinical Guidelines for Augmentative and Alternative Communication and preliminary drafts of those guidelines. Information of this nature clearly relates to the business and professional affairs of the Fifth Party.⁹⁵ The Fifth Party objected to disclosure of this component of the Information in Issue and submits that the communications were informal discussions; the draft guidelines were '*working drafts*' that were not '*for the purview of the general public*'; and names of the persons involved in the guidelines' review process were not identified in the final published format of the guidelines.⁹⁶
66. These parts of the Information in Issue relate to the preliminary process of developing the Fifth Party's Clinical Guidelines for Augmentative and Alternative Communication. They include details about the Fifth Party's review process for the guidelines, together with its preliminary thinking about issues that would be the subject of those clinical guidelines. However, I note that the finalised version of the guidelines was subsequently published by the Fifth Party some years ago and, as noted in paragraph 48, senior Department officers were among the individuals invited to provide feedback to preliminary drafts of the Fifth Party's guidelines. In these circumstances, although I consider the disclosure of the preliminary communications about the development of these guidelines may have some impact on future work of this nature,⁹⁷ I am satisfied that any prejudice to the Fifth Party's business and professional affairs would only be minimal. Further, this Information in Issue identifies the individuals who were involved in this preliminary stage of developing these guidelines—those individuals can be characterised as subject matter experts. On the information before me, it appears that the involvement of these individuals in the development of the Fifth Party's guidelines (together with their other work in augmentative and alternate communication) was, at the time, known among the community of FC supporters, the disability community, academics, and the Department. On that basis, I am not satisfied that disclosing communications which confirm the involvement of those individuals in the development of the Fifth Party's guidelines could reasonably be expected to cause any significant level of prejudice to the professional standing of those involved individuals. For these reasons, I afford these public interest factors low weight in favour of nondisclosure.
67. As noted at paragraphs 28 to 35 above, I do not accept the submissions received from the Third and Fourth Parties that disclosure of the Information in Issue will result in serious harassment and/or intimidation. However, given that the list of public interest factors in the RTI Act is not exhaustive, I consider that these submissions regarding harassment and/or intimidation also raise a public interest factor favouring nondisclosure requiring consideration in the context of the public interest test—that is, that whether disclosure could reasonably be expected to result in a person being subjected to lower level (that is, less than serious) harassment and/or intimidation.
68. As noted in paragraph 31 above, I consider it is reasonable to expect that, following the disclosure of information in this external review process, the applicant may make posts online expressing opposition to the FC views of certain individuals/organisations. However, on the information before me, this anticipated conduct has previously occurred—that is, the applicant has publicly expressed her opposition to (or criticism of) the views of certain individuals/organisations. I also note that the Information in

⁹⁵ The Fifth Party is an entity for the purpose of the nondisclosure factor identified in paragraph 64(a) and a person for the purposes of the nondisclosure factor identified in paragraph 64(b) (refer to sections 32D and 36(1) and schedule 1 of the *Acts Interpretation Act 1954* (Qld)).

⁹⁶ Submissions dated 13 December 2022. In addition, the Third Party raised objections to the disclosure of these parts of the Information in Issue—those objections included that the draft guidelines are not the final product upon which guidance to speech pathologists is based. The Fourth Party also raised a general disclosure objection to these parts of the Information in Issue. To avoid identifying the Third and Fourth Parties, I cannot provide any further details about their disclosure objections.

⁹⁷ I acknowledge that it is possible disclosure may lead to a reluctance by certain external parties to be consulted on content of future policy/procedure documents.

Issue records communications, which generally concern FC, that occurred approximately a decade ago. While I accept that the Third and Fourth Parties may consider the reoccurrence of such posts to be disparaging, unpleasant and perhaps even a source of anxiety, I consider the expression of opposition views nonetheless forms part of the robust public discussion on this issue. Consequently, in all the circumstances, I consider that while a public interest consideration arises in this regard (that is, concerning the reasonable expectation that disclosure of the Information in Issue could result in some level of harassment or intimidation), I afford it limited weight.

Balancing the public interest

69. I have taken into account the pro-disclosure bias in deciding access to documents under the RTI Act.⁹⁸ After carefully reviewing the Information in Issue, I have identified and considered above the public interest factors which are relevant to the various components of the Information in Issue.
70. I have identified four public interest factors relating to government accountability and transparency which favour disclosure of the various components of the Information in Issue. For the reasons addressed above, I afford moderate and low weight to these factors in respect of different components of the Information in Issue.
71. On the other hand, I have identified a number of factors favouring nondisclosure of the Information in Issue. For the reasons addressed above, I afford significant weight to the nondisclosure factors relating to the personal information, privacy, and management function for some parts of the Information in Issue. It is also my view that the considerations relating to personal information, privacy, business and professional affairs, and harassment and/or intimidation are deserving of moderate to low weight in respect of other components of the Information in Issue.
72. As a result, I am satisfied that:
 - for a small amount of the Information in Issue, the factors favouring nondisclosure outweigh the factors favouring disclosure and accordingly, access may be refused under section 47(3)(b) of the RTI Act as its disclosure would, on balance, be contrary to the public interest; and
 - for the remaining Information in Issue, the factors favouring nondisclosure are outweighed by the factors favouring disclosure and accordingly, access to that information cannot be refused under section 47(3)(b) of the RTI Act as its disclosure would not, on balance, be contrary to the public interest.

Form of access and copyright

73. I have decided above to grant access to the drafts of the Fifth Party's clinical guidelines which appear within the Information in Issue. In the access application, the applicant sought access to copies of the documents requested in the access application.
74. Section 68(4)(c) of the RTI Act provides that, if giving access in the form requested by the applicant would involve an infringement of the copyright of a person other than the State, access in that form may be refused and given in another form.
75. These are not the Department's guidelines, but instead are the clinical guidelines of a private entity. Although the finalised version of the Fifth Party's Clinical Guidelines for Augmentative and Alternative Communication were published, the drafts of those

⁹⁸ Section 44 of the RTI Act.

guidelines which appear within the Information in Issue have not been published. Those draft guidelines were prepared by a specific individual on behalf of the Fifth Party—that individual can be characterised as an Australian subject matter expert who applied their knowledge and skill to the development of the preliminary drafts of the Fifth Party’s clinical guidelines. There is no evidence before me which indicates the Department holds any licence or authority to copy these draft guidelines documents for the purpose of releasing them under the RTI Act.

76. During the review, the applicant was notified of OIC’s view that any form of access to the draft clinical guidelines would be via inspection only.⁹⁹ The applicant did not seek to contest that view.
77. Based on the information before me and after carefully considering the relevant provisions of the *Copyright Act 1968* (Cth),¹⁰⁰ I am satisfied that the draft guidelines are subject to copyright and that providing the applicant with a copy of these draft guideline documents under the RTI Act would constitute an infringement of copyright. Accordingly, I find that access to these draft guideline documents in the form sought by the applicant may be refused and access may instead be given in by way of inspection only.¹⁰¹

DECISION

78. For the above reasons, I vary the Department’s decision and, in respect of the Information in Issue, I find that:
- access may be refused to small portions of information appearing on 18 pages,¹⁰² as disclosing that information would, on balance, be contrary to the public interest; and
 - there is no basis under the RTI Act to refuse access to the remaining information, as it is neither exempt information nor would it, on balance, be contrary to the public interest to disclose. However, for information appearing on 15 pages,¹⁰³ access can be granted by way of inspection only under section 68(4)(c) of the RTI Act, as providing the applicant with a copy of these documents would infringe copyright.
79. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

T Lake
Principal Review Officer

⁹⁹ OIC’s letter dated 2 August 2023.

¹⁰⁰ In particular, I note that:

- section 32(1) of the *Copyright Act 1968* (Cth) (**Copyright Act**) provides that copyright subsists in an original literary, dramatic, musical or artistic work that is unpublished and of which the author was a qualified person at the time when the work was made
- section 36(1) of the Copyright Act provides that copyright is infringed when a person who is not the owner of the copyright, and does not have the licence of the owner, does in Australia, or authorises the doing in Australia of, any act comprised in the copyright
- a literary work is anything that is reduced to writing which is not trivial in content.

¹⁰¹ Under section 68(4)(c) of the RTI Act.

¹⁰² Being pages 29, 37, 157, 164, 166, 167, 168, 173, 177, 178, 208, 245, 316, 329, 338, 417, 447 and 448.

¹⁰³ Being pages 333-337, 340-344 and 442-446.

Date: 27 May 2024

APPENDIX

Significant procedural steps

Date	Event
11 October 2021	OIC received the application for external review.
9 November 2021	OIC notified the applicant and the Department that the application for external review had been accepted and requested information from the Department.
23 November 2021	OIC received some of the requested information from the Department.
10 February 2022	OIC received further requested information from the Department.
11 February 2022	OIC received submissions from the applicant.
28 March 2022	OIC confirmed to the applicant the information refusals which would be considered in the external review.
17 October 2022	OIC conveyed a preliminary view to the Department concerning certain information. OIC also sought the disclosure views of six third parties (including the Third Party, Fourth Party and Fifth Party). One of the consulted parties confirmed to OIC they had no objection to disclosure of the information they were consulted about.
24 October 2022	At the Department's request, OIC granted a one month extension for the Department's response to the preliminary view. OIC sought the disclosure views of a further third party. The Third Party provided their preliminary objection to disclosure of certain information. OIC conveyed a preliminary view to the applicant that certain information may be refused as exempt (being subject to legal professional privilege) and received the applicant's acceptance of that preliminary view.
27, 28 and 31 October 2022	OIC notified five of the consulted parties (including the Fourth Party) that the Department had elected to provide descriptions of the information they were being consulted about, rather than copies of relevant documents.
31 October 2022	OIC requested information from the Department to facilitate the process of obtaining disclosure view from various consulted parties.
2 November 2022	OIC received the requested information from the Department.
3 and 5 November 2022	OIC sought the disclosure views of five additional third parties.
7 November 2022	One of the consulted parties confirmed to OIC they had no objection to disclosure of the information they were consulted about.
9, 11 and 14 November 2022	OIC received further requested information from the Department to facilitate the process of consultation with various parties.

Date	Event
28 November 2022	OIC wrote to four of the consulted parties (including the Third Party and Fourth Party), to provide descriptions of the information they were being consulted about and request their disclosure views.
29 November 2022	OIC received the Fourth Party's disclosure objections.
1 December 2022	OIC wrote to two further consulted parties (including the Fifth Party), to provide descriptions of the information they were being consulted about and request their disclosure views.
2 December 2022	OIC received the Department's submissions, responding to the preliminary view.
7 December 2022	OIC received the disclosure objections of one consulted third party.
9 December 2022	OIC confirmed to one of the consulted parties that they had no objection to disclosure of the information they were consulted about.
12 December 2022	OIC requested further information from the Department to facilitate the process of consultation with certain parties. OIC received further disclosure objections from the Third Party.
13 December 2022	OIC received the Fifth Party's disclosure objections.
19 December 2022	OIC wrote to the Fourth Party to respond to their disclosure objections and convey a preliminary view that certain information could be disclosed.
2 March 2023	OIC confirmed the disclosure objections received from the Third Party and Fifth Party and sought clarification of the disclosure views received from another consulted party.
3 March 2023	OIC received clarification of the disclosure views from one consulted party.
16 March 2023	OIC received confirmation that the Third Party and the Fifth Party wished to participate in the external review.
20 March 2023	OIC notified the Department of the outcome of third party consultation and sought the Department's disclosure views concerning information to which the Department and consulted parties had raised no disclosure objection.
27 March 2023	OIC received the Department's disclosure position in respect of that information.
28 March 2023	OIC notified the applicant of the further information the Department was to disclose. The applicant confirmed that, notwithstanding the further information disclosure, she required a formal decision to finalise the review.
29 March 2023	The Department disclosed the further information to the applicant.
3 April 2023	The Department provided a submission concerning OIC's preliminary view about disclosure of two words on 1 page.
5 April 2023	The applicant confirmed that she continued to seek access to information removed from the pages disclosed by the Department on 29 March 2023.

Date	Event
2 August 2023	OIC conveyed a preliminary view to the applicant about information to which access may be refused and information which could be disclosed (the latter being the information which remained in issue on external review). The applicant confirmed her acceptance of OIC's preliminary view about the information to which access may be refused.