



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>T24 and Queensland Corrective Services [2024] QICmr 35 (12 August 2024)</i></b>
<b>Application Number:</b>	<b>317658</b>
<b>Applicant:</b>	<b>T24</b>
<b>Respondent:</b>	<b>Queensland Corrective Services</b>
<b>Decision Date:</b>	<b>12 August 2024</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - personal information of other individuals - safeguarding personal information and the right to privacy of other individuals - whether disclosure would, on balance, be contrary to the public interest - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)</b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied<sup>1</sup> to the Queensland Corrective Services (**QCS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to dates and times the applicant visited an individual who was, at the time, imprisoned, including others in attendance. The applicant also sought access to audio recordings and activity logs of telephone calls made to the applicant by that individual.
2. QCS located a two-page document consisting of a visitation record and decided<sup>2</sup> to refuse access on the basis that its disclosure would, on balance, be contrary to the public interest under section 47 (3)(b) of the *Right to Information Act 2009* (Qld) (**RTI Act**).<sup>3</sup> In relation to the audio recordings and call activity records, QCS decided to refuse access on the basis these records were nonexistent or unlocatable.<sup>4</sup>
3. The applicant applied for an internal review of QCS' decision.<sup>5</sup> QCS' internal review decision upheld the original decision.<sup>6</sup> The applicant then applied to the Office of the Information Commissioner (**OIC**) for external review of QCS' internal review decision.<sup>7</sup>

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<sup>1</sup> Application dated 17 August 2023.

<sup>2</sup> Decision dated 18 September 2023.

<sup>3</sup> Section 67 of the IP Act provides that access may be refused in the same way as an agency could refuse access to the document under section 47 of the *Right to Information Act 2009* (Qld).

<sup>4</sup> Under section 47(3)(e) and 52(1) of the RTI Act.

<sup>5</sup> Internal review application dated 9 October 2023.

<sup>6</sup> Decision dated 1 November 2023.

<sup>7</sup> External review application dated 15 November 2023.

4. Whether the two-page visitation record may be disclosed is the only issue remaining for determination. For the reasons set out below, I affirm QCS' decision and find that access to the visitation record can be refused on the basis that its disclosure, would, on balance be contrary to the public interest under section 47(3)(b) of the RTI Act.

### Reviewable decision

5. The decision under review is QCS' internal review decision dated 1 November 2023.

### Background

6. During the review, OIC requested that QCS conduct further searches and provide submissions in relation to the existence of the audio recordings and call activity logs. QCS provided evidence<sup>8</sup> which showed that these records no longer existed, as they had been disposed in accordance with its retention and disposal procedures. The applicant accepted<sup>9</sup> OIC's consequent preliminary view<sup>10</sup> that the audio recordings and call activity logs may be refused on the ground they no longer existed and therefore this issue does not need to be considered further in this external review.
7. Throughout the external review, the applicant contested the refusal of the visitation record on the ground that disclosure would, on balance be contrary to the public interest. Initially, OIC communicated with QCS<sup>11</sup> to explore whether extraction of the data where the applicant is recorded as visiting the imprisoned individual was a viable informal resolution proposal.<sup>12</sup> However, having further reviewed the nature of the Information in Issue, OIC determined that it was not appropriate in the circumstances given the intertwined nature of the personal information contained in the visitation record.

### Information in issue

8. The two-page document containing a visitation record to which access has been refused by QCS comprises the **Information in Issue** in this review.

### Evidence considered

9. Significant procedural steps relating to the external review are set out in the Appendix. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix).
10. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the rights to freedom of expression and reputation.<sup>13</sup> I consider a decision-maker will be '*respecting and acting compatibly with*' those rights and others prescribed in the HR

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<sup>8</sup> Letter dated 15 May 2024.

<sup>9</sup> Letter dated 7 June 2024 and stamped by QCS for delivery on 11 June 2024. Due to an unexpected delay from the postal service, this letter was only received by OIC on 2 July 2024.

<sup>10</sup> Letter dated 28 May 2024.

<sup>11</sup> Letter dated 14 February 2024.

<sup>12</sup> In accordance with OIC's obligations under section 103(1) of the IP Act.

<sup>13</sup> Sections 21 and 25(b) of the HR Act.

Act, when applying the law prescribed in the IP Act.<sup>14</sup> I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.<sup>15</sup>

11. In making my decision in this external review, I have considered the applicant's submissions to the extent they are relevant to the issues for determination in the context of this external review.

### Relevant law

12. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent they contain the individual's personal information.<sup>16</sup> However, this right is subject to limitations, including grounds for refusal of access.
13. One ground for refusal is where disclosing information would, on balance, be contrary to the public interest.<sup>17</sup> In deciding whether disclosure of information would, on balance, be contrary to the public interest,<sup>18</sup> the RTI Act requires a decision-maker to:<sup>19</sup>
- identify any irrelevant factors and disregard them<sup>20</sup>
  - identify relevant public interest factors favouring disclosure and nondisclosure
  - balance the relevant factors favouring disclosure and nondisclosure; and
  - decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.
14. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of public interest lies in a particular case. I have considered these lists, together with all other relevant information, in reaching my decision. I have also kept in mind the RTI Act's pro-disclosure bias<sup>21</sup> and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.<sup>22</sup>

### Factors favouring disclosure of the Information in Issue

15. The Information in Issue partly contains the applicant's personal information, that is his personal details as visiting an imprisoned individual. This gives rise to a factor favouring disclosure<sup>23</sup> regarding these parts of the Information in Issue, to which I attribute high weight. However, this information about the applicant is intertwined with the personal information of other individual(s) to such an extent that it cannot be disclosed without also disclosing their personal information (giving rise to factors favouring nondisclosure discussed below).

<sup>14</sup> *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]. OIC's approach to the HR Act set out in this paragraph has been considered and endorsed by QCAT Judicial Member McGill in *Lawrence v Queensland Police Service* [2022] QCATA 134, noting that he saw 'no reason to differ' from our position ([23]).

<sup>15</sup> I also note the following observations made by Bell J in *XYZ* at [573], on the interaction between equivalent pieces of Victorian legislation (namely, the *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)): '... it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the FOI Act.'

<sup>16</sup> 'Personal information' is defined in section 12 of the IP Act 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'.

<sup>17</sup> Section 47(3)(b) of the RTI Act.

<sup>18</sup> 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, although there are some recognised public interest considerations that may apply for the benefit of an individual: Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 *AIAL Forum* 12, 14.

<sup>19</sup> Section 49 of the RTI Act.

<sup>20</sup> I have not taken any irrelevant factors into account in reaching this decision.

<sup>21</sup> Section 44 of the RTI Act.

<sup>22</sup> Section 47(2)(a) of the RTI Act.

<sup>23</sup> Schedule 4, part 2, item 7 of the RTI Act.

16. The applicant submitted<sup>24</sup> that the Information in Issue *‘is an “exculpatory thing” although indirectly so’*. In this regard, he referred to provisions of the *Criminal Code 1899 (Qld) (Criminal Code)*<sup>25</sup> and contended that the Information in Issue would, insofar as it showed a particular individual’s presence during the prison visits, assist the applicant to further place this individual in specific locations during given periods of time. The applicant is now in prison for the murder of this individual. It is my understanding that the applicant considers that access to the Information in Issue will *‘aide in the probable capacity to locate [the named individual]. If not [her] directly, perhaps the person in who’s [sic] company she was seen’*, and that this, in turn, will demonstrate that he was wrongfully prosecuted and convicted. I have therefore considered whether disclosing the Information in Issue could reasonably be expected to contribute to the administration of justice for the applicant<sup>26</sup> – for example, by allowing an individual subject to adverse findings or conviction, access to information that may assist them in mounting a defence or clearing their name.
17. Given the nature of the Information in Issue, it is unclear to me how its disclosure would assist the applicant to pursue a legal remedy, if available. Accepting, for the sake of argument, the applicant’s position that he did not murder the named individual, I cannot see how contents of the Information in Issue could reasonably be expected to assist in the location of that individual. There is nothing to support a finding that the Information in Issue comprises evidence of an *‘exculpatory nature’* that would enliven the obligation in section 590AL(3) of the Criminal Code,<sup>27</sup> nor is there anything to suggest that its disclosure could reasonably be expected to lead to the identification of such evidence.
18. Further, having considered the following:
- the applicant was convicted following a lawful trial and exercised his right to test relevant matters by way of appropriate appeal processes, wherein his conviction was upheld
  - the Information in Issue existed at the time of the applicant’s trial and subsequent appeal against conviction and the Parole Board has mechanisms available to it to access information it requires to consider any parole application made by the applicant; and
  - in the circumstances, there is no aspect of the criminal law, enforcement of which could reasonably be expected<sup>28</sup> to be aided by disclosure to the applicant of the visitation record,

<sup>24</sup> Letter dated 7 June 2024, received by OIC on 2 July 2024.

<sup>25</sup> Specifically, section 590AD of the Criminal Code which provides that *‘exculpatory thing, in relation to an accused person, means reliable evidence of a nature to cause a jury to entertain a reasonable doubt as to the guilt of the accused person’* and section 590AL(3) of the Criminal Code which provides *‘If a thing is an exculpatory thing, the obligation to disclose it to the accused person continues despite a failure to comply with a time requirement or subsection (1) until 1 of the following happens— (a) the accused person is discharged or acquitted; (b) the accused person dies’*.

<sup>26</sup> Schedule 4, part 2, item 17 of the RTI Act. Similar factors arise for consideration where disclosure could reasonably be expected to enhance the fair treatment of individuals in accordance with the law in their dealings with agencies (schedule 4, part 2, item 10 of the RTI Act), contribute to the administration of justice generally including procedural fairness (schedule 4, part 2, item 16 of the RTI Act), or contribute to the enforcement of the criminal law (schedule 4, part 2, item 18 of the RTI Act).

<sup>27</sup> Which imposes an ongoing obligation to disclose to an accused person an *‘exculpatory thing’*. *‘Exculpatory thing’* is defined as reliable evidence of a nature to cause a jury to entertain a reasonable doubt as to the guilt of the accused person: section 590AD.

<sup>28</sup> The phrase *‘could reasonably be expected’* requires a decision-maker to distinguish *‘between what is merely possible ... and expectations that are reasonably based’* and for which *‘real and substantial grounds exist’*: *B and Brisbane North Regional Health Authority* [1994] QICmr 1, a decision of the Information Commissioner analysing the equivalent exemption in the repealed *Freedom of Information Act 1982* (Qld), at [154]-[160]. Other jurisdictions have similarly interpreted the phrase *‘as distinct from something that is irrational, absurd or ridiculous’*: See *Smolenski v Commissioner of Police, NSW Police* [2015] NSWCATAD 21 at [34], citing *Commissioner of Police, NSW Police Force v Camilleri* (GD) [2012] NSWADTAP 19 at [28], *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [61] and *Attorney-General’s Department v Cockcroft* (1986) 10 FCR 180 at [190].

I find that none of the administration of justice factors or considerations operate to favour disclosure of the Information in Issue.

19. In terms of the named person, if, as the applicant speculates, the Information in Issue were to contain information of the named person (who is deceased, as established by trial and appeal processes), a further factor favouring disclosure may apply – namely, the factor favouring disclosure where a person has died and an eligible family member<sup>29</sup> of the deceased person seeks access to information that would, if they were alive, be the personal information of the deceased person. The applicant did not raise this factor; however, for sake of completeness, I have considered it. To the extent that the Information in Issue may include such information, and if the applicant qualified as an eligible family member, I consider that this factor would warrant some weight.
20. In terms of the imprisoned person, the applicant suggested that OIC should make arrangements to *'copy data from one document to another thus disentangling the alleged precariously intertwined information'*.<sup>30</sup> I however note that the functions under the IP and RTI Act are limited to considering release of documents that exist at the time the formal access application is made.<sup>31</sup> Further, while the Information Commissioner may explore the creation of a further document in furtherance of informal resolution under section 103 of the IP Act, it is not reasonable or appropriate in the circumstances, given the intertwined nature of the personal information contained in the Information in Issue. Although the new document would not expressly state or include the name of the imprisoned person, the nature and terms of the access application, combined with the provision of a new document in response to that application, would nevertheless implicitly confirm and therefore disclose their personal information.

### **Factors favouring nondisclosure of the Information in Issue**

21. The Information in Issue intrinsically contains personal information of others.<sup>32</sup> In recording the applicant's visits with the imprisoned individual, it necessarily includes the visited individual's personal information and, if other individuals attended any of the visits, their personal information as well. The RTI Act seeks to safeguard an individual's right to privacy and recognises a public interest harm in disclosing the personal information of other individuals.<sup>33</sup> Disclosure of the Information in Issue would constitute a significant intrusion into the private sphere of other individual(s) and the extent of the harm that would arise would be significant.
22. Additionally, if, as the applicant speculates, the Information in Issue were to contain information of the named person (who is deceased, as has been established at trial and on appeal), a further factor favouring nondisclosure would apply – namely, the factor favouring nondisclosure where a person has died and an eligible family member<sup>34</sup> of the deceased person seeks access to information that would, if they were alive, be the personal information of the deceased person, and the disclosure of the information could reasonably be expected to impact on the deceased person's privacy if the deceased person were alive.<sup>35</sup> To the extent that the Information in Issue may include such information, and if the applicant qualified as an eligible family member, I consider that this factor would warrant somewhat more weight than the weight afforded

<sup>29</sup> Defined in schedule 5 to the RTI Act.

<sup>30</sup> Letter received 4 April 2024.

<sup>31</sup> Section 27 of the RTI Act.

<sup>32</sup> Defined in section 12 of the IP Act.

<sup>33</sup> Schedule 4, part 3, item 3 and schedule 4, part 4, section 6(1) of the RTI Act.

<sup>34</sup> Defined in schedule 5 to the RTI Act.

<sup>35</sup> Schedule 4, part 3, item 5 of the RTI Act.

to the counterpart factor favouring disclosure, as disclosure would necessarily impinge upon the individual's private sphere to at least some extent.

23. The applicant submitted<sup>36</sup> he is aware of the third party personal information contained in the Information in Issue, and that accordingly there can be no such prejudice arising from its release. While I acknowledge that some of the third party information may be known to the applicant, this does not, of itself, warrant further disclosure of the information under the IP Act, where there can be no restriction on its use, dissemination or re-publication. I do not consider that, in the circumstances of this matter, the weight of these nondisclosure factors is in any way reduced.
24. The applicant also suggested that consent from individuals who were in attendance at the time the applicant visited the imprisoned individual could be obtained in order to allow disclosure of the Information in Issue. However, even if consent were obtained from any such individual(s), the personal information of the imprisoned person remains intrinsically intertwined with the personal information of the applicant and given the sensitive and highly personal nature of this information, its disclosure would be a significant intrusion into the individual's privacy.<sup>37</sup>

### ***Balancing of the factors***

25. For the reasons set out above, in relation to the applicant's personal information as it appears within the Information in Issue, I have afforded high weight to the factor favouring disclosure of that information. On the other hand, I am satisfied that the nondisclosure factors relating to the protection of privacy and personal information of other individuals are deserving of significant weight.
26. To the extent that the Information in Issue may include information regarding the deceased named person, and if the applicant qualified as an eligible family member, I am satisfied the factor favouring disclosure regarding eligible family members would warrant some weight, but the counterpart factor favouring nondisclosure would warrant relatively more weight.
27. On balance, I am satisfied that the public interest factors favouring nondisclosure outweigh the factors favouring disclosure. Accordingly, I find that disclosure of the Information in Issue would, on balance, be contrary to the public interest and access may be refused on this basis.<sup>38</sup>

### **DECISION**

28. For the reasons set out below, I confirm QCS' decision and find that access to the Information in Issue may be refused, as its disclosure would, on balance, be contrary to the public interest.
29. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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<sup>36</sup> External review application dated 15 November 2023 and letter received 4 April 2024.

<sup>37</sup> *SW5Z7D and Queensland Police Service* [2016] QICmr 1 (15 January 2016) at [22]-[26]. I note also His Honour Justice Daubney's comments in *Kelson v Queensland Police Service & Anor* [2019] QCATA 67 at [78]-[96].

<sup>38</sup> Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

**Katherine Zaidiza**  
**A/Principal Review Officer**  
**Date: 12 August 2024**

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
15 November 2023	OIC received the external review application.
6 December 2023	OIC notified the applicant and QCS that the external review application had been accepted and asked QCS to provide a copy of Information in Issue and a submission addressing QCS' disclosure position.
19 December 2023	OIC received QCS' submissions and the information in issue.
14 February 2024	OIC communicated with QCS to ascertain whether it would consider an opportunity for an informal resolution proposal.
18 March 2024	OIC received submissions from QCS.
19 March 2024	OIC conveyed a preliminary view to the applicant that access may be refused to the Information in Issue on the ground disclosure would, on balance, be contrary to the public interest. OIC invited the applicant to provide submissions if he disagreed with the preliminary view.
4 April 2024	OIC received the applicant's submissions.
15 April 2024	OIC requested further information from QCS regarding the searches conducted to locate records relevant to the application.
15 May 2024	OIC received submissions from QCS.
28 May 2024	OIC conveyed a further preliminary view to the applicant.
2 July 2024	OIC received the applicant's further submissions dated 7 June 2024 and 26 June 2024.