Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	***C63 and Department of the Premier and Cabinet* [2024] QICmr 18 (15 May 2024)**
Application Number:	**317706**
Applicant:	**C63**
Respondent:	**Department of the Premier and Cabinet**
Decision Date:	**15 May 2024**
Catchwords:	**ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL TO DEAL - EFFECT ON AGENCY'S FUNCTIONS - request for Ministerial office establishment reports - whether the work involved in dealing with application would, if carried out, substantially and unreasonably divert the resources of the agency from their use by the agency in performing its functions - sections 41 and 42 of the *Right to Information Act 2009* (Qld)**

REASONS FOR DECISION

Summary

1. The applicant applied[1] to the Department of the Premier and Cabinet (**Department**) for access under the *Right to Information Act 2009* (Qld) (**RTI Act**) to monthly Establishment Reports for Ministerial offices generated closest to each of three nominated dates.

2. In response to the application, the Department issued the applicant with a notice under section 42 of the RTI Act,[2] stating its intention to refuse to deal with the application under section 41 of the RTI Act, and inviting the applicant to consult with it with a view to making an application in a form that would remove the ground for refusal. By email on 29 November 2023, the applicant declined to amend the scope of the application.

3. By decision dated 30 November 2023, the Department decided to refuse to deal with the application under section 41(1)(a) of the RTI Act on the ground that the work involved in dealing with the application would, if carried out, substantially and unreasonably divert the resources of the Department from their use by the Department in the performance of its functions.

4. The applicant applied[3] to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.

[1] Application dated 6 October 2023. A revised scope was confirmed by the applicant on 10 November 2023.
[2] Letter dated 23 November 2023.
[3] Application dated 5 December 2023.

5. On external review, it became evident that the Department's decision dated 30 November 2023 was technically made outside the requisite timeframe contained in the RTI Act for processing an application, so that the Department's decision should correctly be regarded as a deemed refusal of access under section 46 of the RTI Act.[4]

6. For the reasons set out below, I set aside the Department's deemed refusal of access. In substitution for it, I decide that the Department was entitled to refuse to deal with the application under section 41(1)(a) of the RTI Act.

Reviewable decision and issue for determination

7. The decision under review is the Department's deemed refusal of access.

8. Under section 105(1)(b) of the RTI Act, OIC has the power to decide any matter in relation to an access application that could have been decided by an agency. When conducting a merits review of an agency's decision, OIC *'stands in the shoes'* of the agency and makes the correct and preferable decision.

9. The Department's purported decision was to refuse to deal with the application under section 41(1)(a) of the RTI Act. On external review, it has maintained this position. Accordingly, the issue for OIC's determination is whether the Department is entitled to rely upon section 41(1)(a) to refuse to deal with the access application.

Evidence considered

10. Significant procedural steps relating to the external review are set out in the Appendix.

11. 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). I have taken account of the applicant's submissions to the extent that they are relevant to the issues for determination in this review.[5]

12. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.[6] 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**).[7] 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 equivalent pieces of Victorian legislation:[8] '*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*.*'[9]

[4] The Department had allowed itself an additional 10 business days to conduct third party consultations under section 18(2)(d) of the RTI Act. However, it ultimately did not conduct those consultations and was therefore not entitled to the benefit of the extension.
[5] Contained in the external review application dated 5 December 2023 and in emails on 28 February 2024 and 12 March 2024.
[6] Section 21 of the HR Act.
[7] *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].
[8] *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[9] *XYZ* at [573].

Relevant law

13. An agency is required to deal with an access application unless doing so would, on balance, be contrary to the public interest.[10] The only circumstances in which dealing with an access application will not be in the public interest are set out in sections 40, 41, and 43 of the RTI Act.

14. Relevantly, section 41(1)(a) of the RTI Act permits an agency to refuse to deal with an access application if the agency considers that the work involved in dealing with the application would, if carried out, substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions.

15. Section 42 of the RTI Act sets out the prerequisites before an agency can refuse to deal with an access application. I am satisfied that the Department complied with those prerequisites when dealing with the application.

16. The phrase *'substantially and unreasonably'* is not defined in the RTI Act, or the IP Act, or the *Acts Interpretation Act 1954* (Qld) (**AIA**). It is therefore appropriate to consider the ordinary meaning of these words.[11] The dictionary definitions[12] of those terms relevantly provide:

    - *'substantial'* means *'of ample or considerable amount, quantity, size, etc'*
    - *'unreasonable'* means *'exceeding the bounds of reason; immoderate; exorbitant'.*

17. In deciding whether dealing with an application would substantially and unreasonably divert an agency's resources from the performance of the agency's functions, the RTI Act requires that a decision-maker:

    - must not have regard to any reasons the applicant gives for applying for access, or the agency's belief about what are the applicant's reasons for applying for access;[13] and
    - must have regard to the resources involved in:
        - identifying, locating and collating documents
        - deciding whether to give, refuse or defer access to documents, including the resources that would have to be used in examining documents and editing documents
        - conducting any third party consultations
        - making copies, or edited copies of documents; and
        - notifying any final decision on the application.[14]

18. While each agency's and each application's circumstances will vary, general factors that are relevant when deciding whether the diversion of resources or interference with normal operational functions is unreasonable include:

    - the size of the agency[15]
    - the ordinary allocation of RTI resources
    - the other functions of the agency;[16] and

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[10] Section 39 of the RTI Act.
[11] Section 14B of the AIA.
[12] Macquarie Dictionary Online www.macquariedictionary.com.au (accessed 2.5.24).
[13] Section 41(3) of the RTI Act.
[14] Section 41(2) of the RTI Act.
[15] *Middleton and Building Services Authority* (Unreported, Queensland Information Commissioner, 24 December 2010) at [34]-[37].

- whether and to what extent processing the application will take longer than the legislated processing period of 25 business days.

19. In determining whether the work involved in dealing with an application is unreasonable, it is not necessary to show that the extent of the unreasonableness is overwhelming. Rather, it is necessary to weigh up the considerations for and against, and form a balanced judgement of reasonableness, based on objective evidence.[17] Factors that have been taken into account in considering this question include:[18]

    - whether the terms of the request offer a sufficiently precise description to permit the agency, as a practical matter, to locate the documents sought
    - the public interest in disclosure of the documents
    - whether the request is a reasonably manageable one, giving due, but not conclusive, regard to the size of the agency and the extent of its resources usually available for dealing with access applications
    - the agency's estimate of the number of documents affected by the request, and by extension the number of pages and the amount of officer time
    - the reasonableness or otherwise of the agency's initial assessment and whether the applicant has taken a cooperative approach in re-scoping the application
    - the timelines binding on the agency
    - the degree of certainty that can be attached to the estimate that is made as to the documents affected and hours to be consumed; and in that regard, importantly whether there is a real possibility that processing time may exceed to some degree the estimate first made; and
    - whether the applicant is a repeat applicant to that agency, and the extent to which the present application may have been adequately met by previous applications.

Applicant's submissions - discussion

20. As noted at the outset, the applicant sought access to monthly Establishment Reports for Ministerial offices at three different points in time. These Reports contain details of staff employed in a Ministerial office at the relevant time, and include, for each Ministerial office, the staff member's name, position number, position title, position classification, position type, budgeted class, stream, employment number, class, employment status, full time equivalent, and any relevant comments.[19]

21. In the notice that it issued to the applicant under section 42 of the RTI Act, the Department estimated that 355 current or former Ministerial staff members would need to be consulted under section 37 of the RTI Act about disclosure of the information contained in the Establishment Report/s that concerned them. The Department estimated that one hour per consultation would be needed to undertake the necessary work. It was this aspect of processing the application that formed the central basis for the Department's (purported) decision to refuse to deal with the application under section 41(1)(a) of the RTI Act on the grounds that the time involved in undertaking the

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[16] *60CDYY and Department of Education and Training* [2017] QICmr 52A (7 November 2017) at [18].
[17] *ROM212 and Queensland Fire and Emergency Services* [2016] QICmr 35 (9 September 2016) at [42] and *F60XCX and Department of the Premier and Cabinet* [2016] QICmr 41 (13 October 2016) at [90], adopting *Smeaton v Victorian WorkCover Authority (General)* [2012] VCAT 1550 (***Smeaton***) at [30].
[18] *Smeaton* at [39].
[19] See the email from the Department to the applicant on 9 November 2023.

consultations would substantially and unreasonably divert the Department's resources.[20]

22. In response to the Department's notice under section 42 of the RTI Act, the applicant declined to modify his application and requested that the Department provide him with a *'refusal letter'*.[21]

23. In his application for external review, the applicant raised complaints or allegations concerning the Department's decision, including that:

- the decision was inconsistent with previous decisions by the Department about access to similar information
- the decision-maker had been inappropriately influenced or directed by others to make the decision to avoid the requested information being used in court proceedings; and
- the decision was a form of retaliation against the applicant.

24. As I advised the applicant in my letter dated 22 February 2024, OIC's jurisdiction under the RTI Act is limited to conducting a merits review of the relevant agency's decision on access, and deciding whether that decision should be affirmed, varied or set side.[22] OIC does not have jurisdiction to investigate allegations of the nature made by the applicant.[23] In any event, I would simply note that there is nothing in the material before me to support the allegations made by the applicant in the second and third bullet points above.

25. In my letter, I also communicated to the applicant my preliminary view that the requirements of section 41(1)(a) were satisfied in the circumstances. I advised the applicant that I considered that consultation with the affected third parties was required under section 37 of the RTI Act, taking account of the low threshold regarding the obligation to consult (consultation is required simply if disclosure *'may reasonably be expected to be of concern'*). The requested information comprised the personal information[24] of Ministerial staff members and, given its nature, I considered that it was reasonable for the Department to form the view that its disclosure under the RTI Act could reasonably be expected to be of concern to those individuals.

26. In response, the applicant advised that he did not accept my preliminary view, arguing relevantly as follows:[25]

- the requested information was not exempt information that access *'could reasonably be refused for'* and so there was no reason to consult the third parties
- previous decisions by OIC found that there were no grounds to refuse access under the RTI Act to Ministerial staff names and pay points

[20] The Department also estimated 2.0 hours for initial processing; 0.75 hours for searching and retrieving documents; 0.5 hours for copying/scanning documents; 3.0 hours for examining documents; and 4.25 hours for preparing a decision notice and schedule.
[21] Email on 29 November 2023.
[22] See section 110(1) of the RTI Act.
[23] Noting that section 113 of the RTI Act provides that if, at the completion of a review, the Information Commissioner is of the opinion that an agency's officer has committed a breach of duty or misconduct in the administration of the RTI Act, and the evidence is of sufficient force to justify doing so, the Information Commissioner must bring the evidence to the notice of the agency's principal officer.
[24] *Personal information is 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*: see section 12 of the *Information Privacy Act 2009* (Qld).
[25] Letter dated 28 February 2024.

- the only unreasonable diversion of the Department's resources came from the incorrect decision to require consultation with individual third parties which was not consistent with the requirement in section 37 to undertake *'steps that are reasonably practicable'* to obtain a third party's views about disclosure
- the Department's decision that its proposed third party consultation process would result in an unreasonable diversion of resources was a *'clear admission'* that the Department was not taking reasonably practicable steps
- it would instead be reasonably practicable for the Department simply to read the complaints/objections from Ministerial staff that had been provided to the Department in the context of processing previous applications for access to similar information, and assume that the current third parties would also object to disclosure; and
- once a reasonably practicable method of seeking the third parties' views on disclosure had been identified, the Department '*would then need to show a public interest or personal safety consideration that prevented release'*.

27. After considering the applicant's submissions, I communicated a second preliminary view, advising the applicant that I maintained that the requirements of section 41(1)(a) were met in the circumstances of the access application. I responded to the applicant's submissions as follows:[26]

- the argument that, because there are no valid grounds upon which access to information could be refused under the RTI Act means that there is no requirement to consult with affected third parties, is misconceived: it is the very fact that disclosure of information is being contemplated that gives rise to the obligation to consult under section 37 of the RTI Act
- the only issue to be considered under section 37 is whether disclosure of information could reasonably be expected to be of concern to the third party: the ultimate decision on access is irrelevant to the obligation to consult
- given the personal nature of the requested information, as well as OIC's past experiences in dealing with other requests for the same type of information, I considered it was reasonable for the Department to form the view that disclosure could reasonably be expected to be of concern to the relevant individuals, thereby enlivening the obligation to consult
- consultation with the third parties is *'reasonably practicable'* within the meaning of section 37 because it is reasonably capable[27] of being done: the issue, however, is the time involved in undertaking that task, given the number of affected third parties
- the applicant's proposal that the Department simply have regard to complaints/objections provided by other consulted third parties in previous applications of a similar nature would not constitute a fair, meaningful, or valid consultation process under section 37, which requires the views of the affected individual to be obtained: the purpose of the consultation is to give the affected individual an opportunity to provide their views about whether the requested information is exempt information or contrary to the public interest information and to provide any information that they consider is relevant to the consideration of those issues.

28. I also advised the applicant that OIC had given consideration in recent reviews, that dealt with similar issues, to whether initial consultation could occur firstly through the Chief of Staff of each Ministerial office, in order to gauge how many staff would seek to

[26] Letter dated 29 February 2024.
[27] The Macquarie Dictionary Online defines 'practicable' as 'capable of being done': www.macquariedictionary.com.au (accessed 2.5.24).

object to disclosure of the information concerning them and would therefore require individual consultation. However, it was decided that this approach would not take account of the significant number of individuals involved in the Establishment Reports who are no longer employed in a Ministerial office and who would require an individual consultation in the first instance.[28]

29. The applicant provided a final submission in support of his case by email on 12 March 2024, advising that he did not agree to finalising the review, and submitting as follows:

> *There is now a position where your correspondence to me says:*
>
> - *There would have been enough ministerial staff in 2009 and 2020 that had left the ministerial service by the time the RTI went in to trigger onerous consultation requirements that could see DPC refuse to deal with the application.*
> - *The reason these decisions on the release of ministerial staff keep getting reviewed is because previous rulings are patently wrong and the OIC should write a new opinion that clarifies what the consultation requirements for ministerial staff are.*
> - *This ruling should then make it clear that under the new ruling ministerial staff names and salaries need can* [sic] *only be released if the RTI is made for less existing staff in ministerial offices - or less than 15 individual staff that have left the ministerial service to not allow the agency to refuse to deal with the application.*
>
> *Separate to the ruling that should be made* [sic] *because I have not agreed to finalise this review.*
>
> *A large number of ministerial staff captured in my request that have left the agency will* [sic] *media advisors or other staff that regularly published their name and position on the ministerial media statements website.*
>
> *A large number of the staff who are captured in my request will have had their information previously released.*
>
> *Finally even if consultation occured* [sic] *there are no grounds for not releasing staff names and salaries - there is an overriding public interest in knowing how taxpayer funds are expended. And there is an overriding public interest in the release of the names of staff who are identified in the Ministerial Service Code of Conduct for Ministerial Staff as holding an* [sic] *role where*
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> *"The importance of ,...., of ministerial staff in providing advice and assistance to Ministers in the performance of their functions is well recognised and accepted.*
>
> *Their closeness to the most significant decisions of government is a privilege that carries with it an obligation to act at all times with honesty and integrity."*
> *…*

30. In response to the applicant's request that OIC publish an opinion about consultation requirements for Ministerial staff, I note that OIC publishes decisions under section 110 of the RTI Act at the conclusion of an external review (where required), as well as Information Sheets and Guidelines under section 128 of the RTI Act to give guidance on the interpretation and administration of the RTI Act. OIC has published Guidelines both on consulting with a relevant third party,[29] and on the operation of section 41(1) of the RTI Act.[30] There is nothing that has arisen in the course of this external review that departs from the general principles stated in those Guidelines. The applicant's continued reference to what may have occurred in respect of previous similar

[28] The Department subsequently advised in an email on 26 March 2024 that 149 staff listed in the requested Establishment Reports were no longer employed in any Ministerial office.
[29] Consulting with a relevant third party | Office of the Information Commissioner Queensland (oic.qld.gov.au)
[30] Refusal to deal - diversion of resources | Office of the Information Commissioner Queensland (oic.qld.gov.au)

applications made to the Department some years ago is irrelevant to the conduct of this external review. Applications to OIC for external review are dealt with on a case-by-case basis, and each is assessed on its own merits when determining whether the agency decision under review should be affirmed, varied or set aside.

31. The applicant's submissions about the public interest in release of the requested information are irrelevant to the issue for determination, which is whether the Department is entitled to refuse to deal with the access application under section 41(1)(a) of the RTI Act. Section 39(2) of the RTI Act provides that sections 40, 41 and 43 state the only circumstances in which Parliament considers it would, on balance, be contrary to the public interest to deal with an access application.

32. Similarly, and as I have already noted, the applicant's submission that there are no grounds under the RTI Act to refuse access to the requested information is also irrelevant to the application of section 41(1)(a) of the RTI Act, and to the consideration of whether dealing with the application would substantially and unreasonably divert the Department's resources.

33. Finally, the applicant has asserted that Ministerial staff members regularly publish their name and position in connection with media statements. That may be true for a limited number of staff members but, in any event, as noted above at paragraph 20, the requested information contained in the Establishment Reports extends beyond simply the name and position of the listed staff members.

Findings

34. For the reasons explained above, I am satisfied that, in determining whether dealing with an access application would result in a substantial and unreasonable diversion of an agency's resources under section 41(1)(a) of the RTI Act, it is relevant to consider the resources involved in conducting third party consultations.

35. I am further satisfied that:

- the information contained in the Establishment Reports is the personal information of the relevant Ministerial staff members
- its disclosure may reasonably be expected to be of concern to those individuals, thereby enlivening the obligation on the Department to consult with the relevant staff members under section 37 of the RTI Act
- the estimate of one hour per consultation is a reasonable estimate of the time needed to undertake the consultation, based upon OIC's own experience of conducting third party consultations; and
- a total of 355 hours to conduct the necessary third party consultations would result in the time required to deal with the application exceeding, to a significant degree, the legislated timeframe for processing an access application set out in the RTI Act.[31]

36. Taking account of these factors, as well as the limited resources of the Department's RTI unit, I am satisfied that the Department was entitled to refuse to deal with the access application under section 41(1)(a) of the RTI Act because dealing with it would substantially and unreasonably divert the Department's resources from their use by the Department in the performance of its functions.

[31] That is, 25 business days, plus an additional 10 days for conducting third party consultations: see section 18 of the RTI Act.

37. As noted at paragraph 28 above, I have given consideration to whether an initial consultation with current Ministerial staff members could occur through the Chief of Staff of each Ministerial office (rather than individually), in order to gauge how many staff would seek to object to disclosure of the information concerning them and would therefore require individual consultation. However, this approach does not account for the significant number of individuals involved in the Establishment Reports who are no longer employed in a Ministerial office and who would therefore require an individual consultation in the first instance (advised by the Department to total 149 individuals). Even based on an estimate of 149 hours needed to undertake just these consultations, I consider that the required work would substantially and unreasonably divert the Department's resources within the meaning of section 41(1)(a) of the RTI Act.

DECISION

38. I set aside the decision under review. In substitution for it, I find that the Department was entitled to refuse to deal with the access application under section 41(1)(a) of the RTI Act.

39. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

R Moss
Principal Review Officer

Date: 15 May 2024

APPENDIX

Significant procedural steps

Date	Event
5 December 2023	OIC received the application for external review
7 December 2023	OIC received the preliminary documents from the Department
29 January 2024	OIC advised the parties that the application had been accepted
22 February 2024	OIC communicated a preliminary view to the applicant
28 February 2024	OIC received a submission from the applicant
29 February 2024	OIC communicated a second preliminary view to the applicant
12 March 2024	OIC received a submission from the applicant
13 March 2024	OIC requested further information from the Department
26 March 2024	OIC received the requested information from the Department