



Decision and Reasons for Decision

Citation:	<i>Stanway and Queensland Police Service (No. 2) [2018] QICmr 15 (29 March 2018)</i>
Application Number:	313275
Applicant:	Stanway
Respondent:	Queensland Police Service
Decision Date:	29 March 2018
Catchwords:	ADMINISTRATIVE LAW – RIGHT TO INFORMATION ACT – REFUSAL TO DEAL WITH APPLICATION – EXEMPT CLASS OF DOCUMENTS – application for access to documents about the potential use of certain records or registers by criminals to steal or unlawfully acquire firearms – whether application expressed to relate to all documents containing information of a stated kind or subject matter – whether all documents to which application relates appear to comprise exempt information – whether agency may refuse to deal with application – section 40 and schedule 3, sections 10(1)(f) and (g) of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Queensland Police Service (**QPS**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to documents about criminals' potential use of certain records or registers, each of which form part of Queensland's firearms licensing and registration scheme, to steal or unlawfully acquire firearms.
2. QPS located three pages of information and decided² to fully release these pages.
3. The applicant applied for internal review of QPS's decision regarding the sufficiency of QPS's searches for responsive documents. In response, QPS undertook further searches, located further documents and purported to decide³ to refuse access to these documents under schedule 3, section 10(1)(f) of the RTI Act.

¹ On 11 January 2017.

² Decision dated 22 February 2017.

³ Correspondence dated 27 March 2017. Because the issues raised by the applicant in his internal review application were limited to the sufficiency of QPS's searches, QPS was not able to conduct an internal review.

4. The applicant applied⁴ to the Office of the Information Commissioner (**OIC**) for external review of the purported internal review decision.⁵
5. For the reasons set out below, I vary QPS's initial decision and find that all the documents to which the application relates (should any exist) comprise exempt information under schedule 3, sections 10(1)(f) or (g) of the RTI Act and, therefore, section 40 of the RTI Act can be relied on to refuse to deal with the application.

Background

6. Significant procedural steps relating to the application and external review are set out in the Appendix.

Reviewable decision

7. The decision under review is QPS's initial decision dated 22 February 2017.

Evidence considered

8. The evidence, submissions, legislation and other material I have considered in reaching my decision are disclosed in these reasons (including footnotes and the Appendix).
9. The applicant provided a number of submissions to OIC during the external review.⁶ I have summarised and addressed the applicant's submissions below, to the extent they are relevant to the issue for determination.

Issue to be determined

10. The Information Commissioner⁷ can decide any matter in relation to an application that could, under the RTI Act, have been decided by the agency dealing with the application. Accordingly, the Information Commissioner can decide whether the applicant's access application may be the subject of a refusal to deal decision under section 40 of the RTI Act.
11. The applicant maintains that section 40 of the RTI Act cannot be relied on to refuse to deal with his application.⁸

Relevant law

12. If an access application is made to an agency under the RTI Act, the agency should deal with the application unless this would not be in the public interest.⁹ One of the few circumstances where it is not in the public interest to deal with an access application is set out in section 40 of the RTI Act, which provides:

40 Exempt information

(1) This section applies if—

⁴ On 2 April 2017.

⁵ A 'reviewable decision' is defined in schedule 5 of the RTI Act. There is no basis under the RTI Act for an applicant to seek an internal review where the sole issue raised is sufficiency of search. Given the applicant's only basis for seeking an internal review of QPS' decision was sufficiency of search, the decision issued by QPS is a purported internal review decision.

⁶ As set out in the Appendix.

⁷ Or delegate.

⁸ QPS does not contest the application of section 40 of the RTI Act.

⁹ Section 39(1) of the RTI Act.

- (a) *an access application is expressed to relate to all documents, or to all documents of a stated class, that contain information of a stated kind or relate to a stated subject matter; and*
- (b) *it appears to the agency or Minister that all of the documents to which the application relates are comprised of exempt information.*

(2) *The agency or Minister may refuse to deal with the application without having identified any or all of the documents.*

13. Exempt information is defined as meaning the information that is exempt information under schedule 3 of the RTI Act.¹⁰ Schedule 3 sets out the types of information, the disclosure of which Parliament has considered would, on balance, be contrary to the public interest.¹¹ Schedule 3 lists the various types of information that constitute exempt information, including:

10 Law enforcement or public safety information

(1) *Information is exempt information if its disclosure could reasonably be expected to—*

...

- (f) *prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law; or*
- (g) *prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety*

Findings

14. Section 40 of the RTI Act provides that an access application may be the subject of a refusal to deal decision—without having identified any or all relevant documents—where:

- the application requests all documents, or all documents of a particular class, that contain information of a stated kind or relate to a stated subject matter; and
- it appears to the agency that all of the documents to which the application relates are comprised of exempt information.

Class of documents

15. For section 40 of the RTI Act to be enlivened, I must firstly consider whether the application is expressed to relate to all documents, or to all documents of a stated class, that contain information of a stated kind, or relate to a stated subject matter. To determine this, it is necessary to examine the terms of the access application.

16. The applicant's access application sought access to the following:

All security assessments, preliminary views, reports, emails and notes on the potential use by criminals of the following information sources to steal or unlawfully acquire firearms.

1. *Records of firearm sales from licensed firearm dealers or armourers, particularly through inadequate internal controls of dealer records.*
2. *The Queensland Firearms Registry, particularly through inadequate controls over access to the Registry by police, civilian staff and contractors who might have no legitimate reason to access the register.*

¹⁰ Section 48(4) and schedule 5 of the RTI Act.

¹¹ See section 48(2) of the RTI Act.

3. *Crimtrac records of licensed firearm owners, particularly through inadequate controls such as those at 2.*

17. I am satisfied that the application is framed as a request for all documents (that is, '[a]ll security assessments, preliminary views, reports, emails and notes') that contain information of a stated kind or relate to a stated subject matter (that is, information about the potential use of three specific records or registers, each of which form part of the firearms licensing and registration scheme, by criminals to steal or unlawfully acquire firearms). Accordingly, I find that the first limb of section 40 of the RTI Act is satisfied.

Exempt information

18. The applicant submitted:¹²

- *'[i]f agencies could simply establish a "gut feel" that particular information is likely exempt and so completely refuse to deal with an RTI application, then it might become an institutional habit to deal with access applications by refusing to deal with them where the subject matter is unpopular ... or distasteful to the agency's employees'*
- *'a minister or agency enjoys immediate access to all the documents in issue', whereas the Information Commissioner does not, and therefore 'to form an independent judgment that s 40 of the RTI Act is likely to apply, the Information Commissioner would logically need to have conducted enquiries and surveyed at least some documents that might answer the application's scope', and if OIC does not do so '... then arguably their opinion that all documents in scope would appear to be exempt would be attended by Wednesbury unreasonableness or by a failure to base a factual conclusion on some underlying material rationally capable of supporting it...'; and*
- *'... it is probable there are documents (or significant parts thereof) in issue that do not contain exempt material and given I cannot inspect any documents to further develop my contention then the very least the Information Commissioner can do as a matter of procedural fairness is to make a survey of some material in issue'.*

19. I do not accept the applicant's submission that the Information Commissioner must survey a sample of documents responsive to his application in order to be in a position to determine whether section 40 of the RTI Act applies, nor do I accept that failing to do so constitutes a "gut feel", unreasonableness amounting to an error of law, or a failure to afford procedural fairness. In this regard, the fact that an agency or minister '*enjoys immediate access to all the documents in issue*' (that is, holds or controls the documents sought, assuming they exist) does not, in my view, necessarily imbue the agency or minister's decision maker with an understanding of the documents that renders a survey unnecessary for them, yet necessary for the Information Commissioner. I am satisfied that—for an agency, minister and the Information Commissioner—a survey, as suggested by the applicant, is not required. Rather, as specified in section 40(1)(b) of the RTI Act, it need only be the case that '*it appears ... that all of the documents to which the application relates are comprised of exempt information*'. Further, as stated in section 40(2) of the RTI Act, the relevant decision maker '*may refuse to deal with the application **without having identified any** or all of the documents*' (my emphasis).

20. Accordingly, for the second limb of section 40 of the RTI Act to be satisfied, I must be satisfied that it appears that all of the documents sought by the applicant would, if they exist, comprise exempt information, and I can be satisfied of this without having identified

¹² Submissions dated 3 December 2017 and 21 February 2018.

any or all of the responsive documents. Of relevance to this review, information will be exempt information if its disclosure could reasonably be expected to prejudice the:

- effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law;¹³ or
- maintenance or enforcement of a lawful method or procedure for protecting public safety.¹⁴

21. These provisions will apply if the following requirements are met:

- there exists an identifiable lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law, or for protecting public safety; and
- disclosure of the documents to which the application relates could reasonably be expected to prejudice the effectiveness or maintenance of that method or procedure.

22. I will examine each of these requirements in turn.

a. Is there an identifiable lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law, or for protecting public safety?

23. Yes, for the reasons that follow.

24. The firearms licensing and registration scheme in Queensland is regulated by the *Weapons Act 1990* (Qld) (**Weapons Act**). The primary object of the Weapons Act is to prevent the misuse of weapons.

25. The applicant submitted:¹⁵

[OIC] leaps to the conclusion that every component of the weapons licensing system is 'a lawful method or procedure for protecting public safety'. However, it is the Weapons Act scheme overall that is intended to be designed to maximise public safety (s3 of the Weapons Act 1990). Specific components of it may fail in various respects to protect public safety. Indeed, specific components may well undermine public safety.

26. I have carefully considered the applicant's submissions. I have also considered the principles and object of the Weapons Act raised by him¹⁶ and the firearms licensing and registration scheme, as provided for by that Act. I am satisfied that this scheme—including the records and registers specified in the applicant's access application—forms an integral part of the methods and procedures used by QPS to prevent a contravention or possible contravention of the law¹⁷ and to protect public safety.¹⁸

b. Could disclosure of the documents reasonably be expected to prejudice the effectiveness or maintenance of the method or procedure?

27. Yes, for the reasons that follow.

¹³ Schedule 3, section 10(1)(f) of the RTI Act.

¹⁴ Schedule 3, section 10(1)(g) of the RTI Act.

¹⁵ Submission dated 3 December 2017.

¹⁶ Section 3 of the Weapons Act.

¹⁷ Schedule 3, section 10(1)(f) of the RTI Act.

¹⁸ Schedule 3, section 10(1)(g) of the RTI Act.

28. The applicant submitted that:¹⁹

- in refusing to deal with an access application, *'a narrow interpretation of relevant exemptions must be undertaken'*
- *'[i]f a risk is identified and satisfactorily treated, then release of the document is unlikely to prejudice the method or procedure'*
- *'[t]hings that have already failed and not been corrected cannot be said to be prejudiced' and '[i]f a risk is clearly identified and left untreated beyond the short term, then the information in such documents no longer answers the description of information documenting the maintenance or enforcement of a lawful method or procedure for protecting public safety. Instead, objectively speaking, it documents the maintenance or enforcement of a lawful method or procedure that fails to protect public safety'; and*
- *'... for the purposes of s 40 of the RTI Act ... you would need to have formed the view that there are no documents that would vindicate the registry as having suitable or befitting security ... all the likely available documents would, on your own analysis, recognise serious security weaknesses (minor flaws could not be said to "prejudice" public safety)' and '... genuine risk or security assessments would contain an acknowledgement of general areas in which the firearms registry and its associated processes are relatively strong. There would be nothing prejudicial about disclosing such material – material that assesses a low or no risk'.*

29. It is my understanding that the documents sought by the applicant may be summarised as documents containing information about the potential for criminals to obtain information on the three records or registers specified by the applicant, and use that information to locate and steal or otherwise acquire firearms. I am satisfied that such documents would (if they exist) comprise information about any risks of unauthorised access to the records or registers, and any consequent risks regarding how information stored on the records or registers could be exploited.

30. I have considered whether prejudice could reasonably be expected to occur as a result of the disclosure of information about these risks. On the material before me, I am satisfied that disclosure of such information could reasonably be expected to prejudice the security of the records or registers in question and enable information stored on those records or registers to be changed, deleted or used for criminal purposes (such as providing locations where firearms may be stolen). I consider that this could reasonably be expected to prejudice the effectiveness or maintenance of the records or registers, and the firearms licensing and registration scheme as a whole.

31. The applicant submitted that this prejudice will not arise regarding information about a risk that has been satisfactorily treated. However, on the material available to me, I am satisfied that the prejudice does arise, insofar as the disclosure of information about a vulnerability of one or more of the records or registers, and the manner in which it was rectified, could permit wider identification and exploitation of that vulnerability. That is, disclosure could reasonably be expected to permit attempts by persons to either subvert the particular remedy, to develop other means of exploiting the identified vulnerability, or to assess whether similar vulnerabilities might stand to be identified and exploited—and, in doing so, enable information stored on the records or registers to be accessed and exploited.

32. Further, the applicant submitted that prejudice will not arise regarding information about a risk that is identified but left untreated. Accordingly, I have also considered whether

¹⁹ Submissions dated 3 December 2017 and 21 February 2018.

prejudice could reasonably be expected to occur as a result of the disclosure of information about a vulnerability to one or more of the records or registers that is identified, but not rectified. I do not accept the applicant's contention that the existence of a vulnerability left untreated beyond the short term would render the relevant records or registers, or the firearms licensing and registration scheme as a whole, to be a method or procedure *'that fails to protect public safety'*, nor do I agree with the applicant that information about an untreated vulnerability *'no longer answers the description of information documenting the maintenance or enforcement of a lawful method or procedure for protecting public safety'*. Rather, I am satisfied that when information about an untreated vulnerability is not publicly known, the consequences of that vulnerability are only potential. It is, in my opinion, the disclosure of information about the vulnerability that could reasonably be expected to crystallise the prejudice, or result in its manifestation, by exposing the vulnerability to public scrutiny, and opening it up to potential exploitation—and, as a result, enabling information stored on the records or registers to be accessed and exploited.

33. The applicant also submitted that *'all the likely available documents would, on your own analysis, recognise serious security weaknesses (minor flaws could not be said to "prejudice" public safety)'* and *'... genuine risk or security assessments would contain an acknowledgement of general areas in which the firearms registry and its associated processes are relatively strong. There would be nothing prejudicial about disclosing such material – material that assesses a low or no risk'*. I do not accept the applicant's submission in this regard. As mentioned at paragraph 29 above, I consider that the documents sought by the applicant would (if they exist) comprise information about any risks of unauthorised access to the records or registers, and any consequent risks regarding how information stored on the records or registers could be exploited. Necessarily such information would include mention of areas of relative invulnerability—that is, aspects of the records or registers where the risk of unauthorised access was low, and/or the consequent risk of information on the records or registers being exploited in certain ways was low.
34. Accordingly, I have considered whether prejudice could reasonably be expected to occur as a result of the disclosure of information about a low risk aspect, or relative strength, of one or more of the records or registers in question. On the material before me, I am satisfied that it is reasonable to consider that information gathered or stored by QPS may be vulnerable to unauthorised access—that is, that *some* risk is inherent in the disclosure of such information. In reaching this conclusion, I have noted that the information and communications technology adopted in the public sector frequently provides public servants with access to private, sensitive and/or confidential information on integrated computer systems. Also, my comments regarding treated vulnerabilities (at paragraph 31 above) are apposite regarding areas of relative strength. That is, I consider that disclosure of information about any areas of relative strength could reasonably be expected to inform attempts to weaken or subvert those strengths. Further, I consider that disclosing information which provides an understanding of areas of relative strength could reasonably risk revealing the converse—that is, areas with greater vulnerabilities—by a process of elimination. For these reasons, I am satisfied that disclosure of relative strengths of the records or registers could reasonably be expected to enable information stored on the records or registers to be accessed and exploited.

35. Given these considerations, I am satisfied that the documents to which this application relates comprise exempt information under schedule 3, section 10(1)(f) or (g) of the RTI Act.²⁰ Accordingly, I find that the second limb of section 40 of the RTI Act is satisfied.

Other submissions

36. The applicant also submitted that the operations of the weapons licensing processes should be open to public scrutiny, and that Parliament's reasons for enacting the RTI Act, outlined in the preamble, require government operations to be open and transparent to public scrutiny. I agree with the applicant's submission insofar as it notes that generally, it was Parliament's intention that an agency receiving an access application will deal with that application. However, this position is qualified—that is, Parliament intended that the agency deal with an application *unless* doing so would, on balance, be contrary to the public interest.²¹ Sections 40, 41 and 43 of the RTI Act state the only circumstances in which Parliament considers that it would, on balance, be contrary to the public interest to deal with an access application.²² As set out above, the circumstances in section 40 arise when it appears that all of the requested documents are comprised of exempt information—that is, information, the disclosure of which Parliament considered would, on balance, be contrary to the public interest.²³ I am satisfied this is such a case.

DECISION

37. For the reasons set out above, I vary QPS's initial decision and find that section 40 of the RTI Act can be relied on to refuse to deal with the application, as all the documents to which the application relates (should any exist) comprise exempt information under schedule 3, sections 10(1)(f) or (g) of the RTI Act.
38. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

A Rickard
Assistant Information Commissioner

Date: 29 March 2018

²⁰ During the external review, it was noted that it could also be argued that schedule 3, section 10(1)(i) of the RTI Act applies to all documents within the scope of this application. Given my conclusion regarding schedule 3, sections 10(1)(f) and (g), it is unnecessary for me to consider this provision as well.

²¹ Section 39(1) of the RTI Act

²² Section 39(2) of the RTI Act.

²³ Section 48(2) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
3 April 2017	OIC received the external review application.
19 April 2017	OIC notified the applicant and QPS that the external review had been accepted. OIC requested further information from QPS.
21 July 2017	OIC requested further information from QPS.
7 August 2017	OIC received further information from QPS.
5 September 2017	OIC sent a request to QPS for a meeting.
9 November 2017	OIC met with representatives from QPS to discuss the further information QPS had provided to OIC.
27 November 2017	OIC conveyed a preliminary view to the applicant and invited him to provide submissions in response.
3 December 2017	The applicant provided written submissions to OIC.
4 December 2017	OIC requested further information from QPS.
10 January 2018	OIC received the requested information from QPS.
25 January 2018	OIC conveyed a second preliminary view to the applicant and invited him to provide submissions in response.
21 February 2018	The applicant provided written submissions to OIC.
2 March 2018	OIC provided the applicant with an update that a decision would be forthcoming.