



Decision and Reasons for Decision

Citation:	<i>T71 and Queensland Police Service [2022] QICmr 10 (4 March 2022)</i>
Application Number:	316060
Applicant:	T71
Respondent:	Queensland Police Service
Decision Date:	4 March 2022
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - APPLICATION OUTSIDE SCOPE OF ACT - ENTITIES TO WHICH ACT DOES NOT APPLY IN RELATION TO A PARTICULAR FUNCTION - application requesting documents concerning an agency's processing of a prior access application - whether the application is to an entity to which the Act does not apply - section 32 and schedule 2, part 2, item 7 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Queensland Police Service (**QPS**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) to access documents concerning QPS' processing of his earlier access application.
2. QPS did not make a decision within the required statutory timeframe and therefore was taken to have made a deemed decision refusing access to the requested information.² The applicant then applied to the Office of the Information Commissioner (**OIC**) for external review of QPS' deemed decision.³
3. For the reasons set out below, I set aside the decision QPS is deemed to have made and find⁴ that the access application is outside the scope of the RTI Act, as it requests documents of an entity to which the RTI Act does not apply.

Background

4. The applicant seeks to access the following documents:

¹ Application dated 2 April 2021. The application requested documents in the period 11 December 2019 to 27 December 2019.

² Under section 46 of the RTI Act.

³ By email dated 10 May 2021.

⁴ Under section 32 of the RTI Act.

Third Party disclosure from [name omitted] pursuant to Section 56(1) of the Information Privacy Act 2009 (Qld), ("IPA") requested by [QPS decision-maker] as indicated in his correspondence to myself of the 11 December 2019 and the 27 December 2019 in QPS Reference No: RTI28698 in relation to my Right Application [sic] of the 8 November 2019 pursuant to Section 43 of the IPA.

5. 'RTI/28698' is the number QPS allocated to the applicant's previous access application dated 8 November 2019, in which the applicant requested documents under the *Information Privacy Act 2009 (Qld)* (**IP Act**) concerning a 2017 complaint made about him (**Prior Application**). The Prior Application has been subject of a completed external review.⁵
6. Under section 56 of the IP Act, an agency is required to obtain the views of a third party where it proposes to give access to a document that contains information '*the disclosure of which may reasonably be expected to be of a concern*' to the third party.
7. The applicant's external review application enclosed a document containing the content of an email he received from QPS on 11 December 2019 in respect of the Prior Application, which states that the QPS decision-maker had '*identified a need to consult with a third party*' and this would add 10 business days to the processing period.
8. While I am unable to comment on the applicant's assumption about the identity of a third party who may have been consulted in respect of the Prior Application, in seeking '*Third Party disclosure*' pursuant to section 56 of the IP Act, the applicant is requesting documents concerning QPS' internal processing of the Prior Application.
9. The significant procedural steps taken during the external review are set out in the Appendix to this decision.

Reviewable decision and evidence considered

10. The decision under review is the decision QPS is deemed to have made under section 46 of the RTI Act.
11. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).
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 IP Act.⁷ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.⁸

Issue for determination

13. External review by the Information Commissioner is a merits review and, under section 105(1)(b) of the RTI Act, the Information Commissioner has the power to decide

⁵ The applicant's appeal of the decision issued to finalise that external review was dismissed by the Queensland Civil and Administrative Tribunal. To avoid identifying the applicant, I am unable to provide further details about that completed external review or the appeal.

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 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 [Freedom of Information Act].*'

any matter in relation to an application that could have been decided by the agency, under the RTI Act.

14. The issue for determination in this review is whether the application is outside the scope of the RTI Act because it seeks documents of an entity to which the RTI Act does not apply.
15. The applicant's submissions⁹ extract various legislative provisions, including those in the RTI and IP Acts relating to grounds upon which access to information may be refused. However, those provisions are not relevant to the issue for determination in this review.¹⁰ The applicant also seeks to raise concerns beyond the jurisdiction of the Information Commissioner and which fall outside the scope of this review.¹¹ I have considered the applicant's submissions and have summarised them throughout this decision to the extent they are relevant to the issue for determination.

Relevant law

16. An individual has a right to access documents of an agency under the RTI Act.¹² However, an access application will be outside the scope of the RTI Act for reasons including if the entity to which the application is made is not an entity to which the RTI Act applies.¹³
17. Under section 17 of the RTI Act, the entities to which the RTI Act does not apply are the entities mentioned in schedule 2 of the RTI Act.¹⁴ Relevantly, under schedule 2, part 2, item 7 of the RTI Act '*a member of, or the holder of an office connected with, a quasi-judicial entity, in relation to the entity's quasi-judicial functions*' is an entity to which the RTI Act does not apply. A quasi-judicial entity is in turn defined to mean an entity that exercises quasi-judicial functions.¹⁵
18. This provision was considered in *Carmody v Information Commissioner & Ors* (5)¹⁶ (**Carmody**) in respect of an access application which sought access to documents concerning an agency's internal processing of an earlier access application. In that matter, Justice Hoeben considered an argument that the application in question was outside the scope of the RTI Act because the agency's RTI decision-maker, who prepared or received the requested processing documents, was connected with the Information Commissioner in relation to the Commissioner's external review functions. On this issue, he observed that:
 - there is authority for the proposition that the Information Commissioner is a quasi-judicial entity¹⁷
 - '*relational expressions such as "connected with" and "in relation to" are capable of extremely broad application*'¹⁸

⁹ Submissions dated 8 and 28 July 2021.

¹⁰ The applicant also attached supporting documents to his submissions, however, none of these were relevant to the issue to be addressed in this review.

¹¹ Including his disagreement with certain findings in the QPS decision concerning the Prior Application, which has already been the subject of a completed external review.

¹² Section 23 of the RTI Act. Although the RTI Act is to be administered with a pro-disclosure bias (section 44 of the RTI Act), the right of access is subject to certain limitations. Notably, 'agency' is defined to exclude entities to which the RTI Act does not apply (section 14(2) of the RTI Act).

¹³ Section 32(1)(a) and (b)(ii) of the RTI Act.

¹⁴ Part 1 of that schedule lists the entities to which the RTI Act does not apply and part 2 mentions the entities to which the RTI Act does not apply *in relation to particular functions*.

¹⁵ Schedule 5 of the RTI Act.

¹⁶ [2018] QCATA 18.

¹⁷ Namely, *Cairns Port Authority v Albietz* [1995] 2 Qd R 470 (**Cairns Port Authority**).

¹⁸ *Carmody* at [51].

- the factual matrix in that matter demonstrated the necessary connection between the agency decision-maker and the OIC¹⁹
- although the agency's RTI decision-maker did not hold an office or position with the OIC, the decision-maker came '*within the description in item 7 of schedule 2, part 2, given the breadth of the connecting words "in relation to"*'²⁰ and
- such an interpretation of schedule 2, part 2, item 7 of the RTI Act '*also avoids the vice which has been identified by the applicant, of a potentially continuous succession of access applications*'.²¹

Findings

19. The applicant has provided limited submissions addressing the issue in this review and generally asserts he is entitled to the requested documents '*as they are a functional record and capable of being amended pursuant to Section 72 of the Information Privacy Act 2009 (Qld)*'.²²
20. Although Justice Hoeben was not required to make a determination in *Carmody* about whether the agency's internal processing documents in that matter were documents of an entity to which the RTI Act did not apply, his observations on that issue are nevertheless persuasive, given they concern requested information of the same nature as that being considered in this review. In particular, I note Justice Hoeben's conclusion on this issue:²³

As can be seen, I favour the applicant's interpretation and were it necessary to resolve this appeal, I would interpret item 7 of schedule 2, part 2 in the way submitted by the applicant. In view of the conclusions which I have reached in relation to other grounds of appeal, it is not necessary for me to decide this ground and base my decision upon it. Moreover, in the absence of full argument on the issue, I would prefer to reserve my position.

21. For schedule 2, part 2, item 7 of the RTI Act to apply to the application in this matter, I must be satisfied that:
 - the Information Commissioner is a quasi-judicial entity and the Information Commissioner's external review functions are quasi-judicial functions; and
 - the QPS decision-maker who processed the Prior Application was '*connected with*' the Information Commissioner in relation to those quasi-judicial functions.
22. A person affected by a reviewable decision may apply to have the decision externally reviewed by the Information Commissioner²⁴ and the Information Commissioner's external review functions and powers are specified in the RTI Act and IP Act.²⁵
23. Although neither the RTI Act nor the IP Act defines what will constitute '*quasi-judicial functions*', I note that Justice Thomas, in *Cairns Port Authority*,²⁶ found that:

This is a case where there was already a respondent which could effectively oppose the relief sought by the applicant. The ultimate question was whether that respondent

¹⁹ *Carmody* at [52].

²⁰ *Carmody* at [48].

²¹ *Ibid.*

²² Submissions dated 28 July 2021.

²³ *Carmody* at [54].

²⁴ Section 85 of the RTI Act and section 99 of the IP Act. 'Reviewable decision' is defined in schedule 5 to both the RTI Act and IP Act.

²⁵ Refer to Part 9 and section 130 of the RTI Act and Part 9 and section 137 of the IP Act.

²⁶ At 479.

should be allowed access to certain documents. The Information Commissioner's role was quasi-judicial and he was by statute required to be the arbiter between two contending parties.

24. *Cairns Port Authority* involved judicial review of a decision of the Information Commissioner under the now repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**). However, the Information Commissioner's role and external review functions under the RTI and IP Acts are broadly the same as those under the FOI Act. In these circumstances, I consider the findings in *Cairns Port Authority* in relation to the Information Commissioner's standing as a quasi-judicial entity, apply to the Information Commissioner's external review role and functions under the RTI and IP Acts. This approach is also consistent with Justice Hoeben's observations in *Carmody*.
25. I find therefore that, in undertaking an external review under the RTI Act or the IP Act, the Information Commissioner is a quasi-judicial entity exercising quasi-judicial functions.
26. The terms 'office' and 'connected with' are not defined in either the RTI Act or the IP Act. However, I note that the *Acts Interpretation Act 1954* (Qld) provides²⁷ that the term 'office' includes position.
27. As Justice Hoeben observed in *Carmody*, the words 'connected with' are a relational term capable of wide meaning. In reaching that conclusion, His Honour referenced the following statement of Chief Justice French in *R v Khazaal*:²⁸

Relational terms such as "connected with" appear in a variety of statutory settings. Other examples are: "in relation to"; "in respect of"; "in connection with"; and "in". They may refer to a relationship between two subjects which may be the same or different and may encompass activities, events, persons or things. They may denote relationships which are causal or temporal or relationships of similarity or difference. The task of construing such terms does not involve the resolution of ambiguity. They are ambulatory words and may be designed to cover a variety of subjects and a variety of relationships between those subjects. The nature and breadth of the relationships they cover will depend upon their statutory context and purpose. Generally speaking it is not desirable, in construing relational terms, to go further than is necessary to determine their application in a particular case or class of cases. A more comprehensive approach may be confounded by subsequent cases.

[footnotes excluded]

28. I note that schedule 2, part 2, items 3-8 of the RTI Act evidence a legislative intention for applications relating to quasi-judicial functions to be excluded from the scope of the RTI Act. Items 6 and 8 of schedule 2 clearly exclude quasi-judicial entities and their staff. In this context, I consider the words 'connected with' in schedule 2, part 2, item 7 of the RTI Act evidence an intention for a broader exclusion to apply where there is a meaningful connection between the office holder and the quasi-judicial entity in relation to quasi-judicial functions.
29. Similar to the 'factual matrix' in *Carmody*, in this matter:
 - the QPS officer who processed the Prior Application would have prepared or received the processing documents requested by the applicant
 - that officer did not hold an office or position with OIC but did hold the position of a delegated decision-maker within QPS' Right to Information and Privacy unit²⁹

²⁷ In schedule 1.

²⁸ [2012] HCA 26 at [31].

²⁹ The QPS decision issued in respect of the Prior Application states that the decision-maker was a delegated officer under section 50 of the IP Act.

- the QPS decision issued in respect of the Prior Application was a reviewable decision, which has been the subject of a completed external review by the Information Commissioner.
30. I am therefore satisfied that the connection required in schedule 2, part 2, item 7 of the RTI Act exists between the QPS decision-maker who processed the Prior Application and the external review functions of the Information Commissioner. On this basis, I find that this QPS decision-maker is the holder of an office connected with the Information Commissioner in relation to the Information Commissioner's quasi-judicial, external review functions.
31. The application is therefore outside the scope of the RTI Act, as it requests documents of an entity to which the RTI Act does not apply.

DECISION

32. For the reasons set out above, I set aside³⁰ the decision QPS is deemed to have made under section 46 of the RTI Act and find that the access application is outside the scope of the RTI Act.³¹

T Lake
Acting Assistant Information Commissioner

Date: 4 March 2022

³⁰ As a delegate of the Information Commissioner, under section 145 of the RTI Act.

³¹ Under section 32 of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
10 May 2021	OIC received the external review application.
18 May 2021	OIC obtained details from QPS about the processing timeframes for the access application.
24 May 2021	OIC requested further information from QPS and received the requested information.
11 June 2021	OIC provided the applicant with an update.
8 July 2021	OIC notified the applicant and QPS that the external review application had been accepted and conveyed a preliminary view to the applicant. OIC invited the applicant to provide submissions if he did not accept the preliminary view. OIC received the applicant's submissions.
28 July 2021	OIC conveyed a further preliminary view to the applicant and received the applicant's further submissions.
10 January 2022	OIC reiterated the preliminary view to the applicant and received the applicant's request for a formal decision to be issued to finalise the external review.
2 March 2022	OIC received the applicant's further submissions.