



Decision and Reasons for Decision

Application Number: 220006

Applicant: Mr F Tolone

Respondent: Department of Police

Decision Date: 9 October 2009

Catchwords: RIGHT TO INFORMATION - INFORMATION AS TO EXISTENCE OF PARTICULAR DOCUMENTS - where agency neither confirms nor denies existence of documents - whether access to documents, if they exist, would be refused under section 47(3) of the *Right to Information Act 2009* (Qld) - whether documents, if they exist, would contain prescribed information

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REASONS FOR DECISION

Summary

1. In this decision, I have found that the Department of Police¹ is entitled to neither confirm nor deny the existence of the documents sought by the applicant under section 55 of the *Right to Information Act 2009* (Qld) (**RTI Act**) on the basis that if the documents did exist, access to those documents would be refused under section 47(3) of the RTI Act because they contain prescribed information.

Background

2. By application dated 4 July 2009, the applicant applied under the RTI Act to the QPS for access to documents (**Access Application**) relating to:
 - a complaint made to the QPS regarding a criminal offence which allegedly occurred in Toowoomba in 1975
 - any corresponding admission made by the alleged offender.
3. By letter dated 23 July 2009, Senior Sergeant Martain, Freedom of Information and Privacy Unit, QPS, decided to refuse to deal with the Access Application (**Decision**) on the basis that if the requested documents did exist, they would not be released to the applicant because:
 - they would concern the personal information of another individual
 - their disclosure would on balance, be contrary to the public interest.
4. In the Decision, QPS:
 - relied on section 40 of the RTI Act to refuse to deal with the Access Application
 - neither confirmed nor denied the existence of the documents sought by the applicant.
5. The applicant elected not to apply for internal review of the Decision.²
6. By letter dated 10 August 2009, the applicant applied to the Information Commissioner for external review of the Decision and provided submissions in support of his case (**External Review Application**).

Decision under review

7. The decision under review is the decision of Senior Sergeant Martain dated 23 July 2009 refusing to deal with the Access Application.³

Steps taken in the external review process

8. Following receipt of the External Review Application, staff of the Office of the Information Commissioner (**OIC**) communicated with the QPS to obtain information and clarify issues relating to the Decision.
9. On 14 September 2009, a staff member of the OIC:

¹ This department is commonly known as Queensland Police Service and referred to in this decision as **QPS**.

² Internal review is optional under the RTI Act. See section 80 of the RTI Act.

³ A decision refusing to deal with an application is a 'reviewable decision' as that term is defined in schedule 6 of the RTI Act, see part (d) of that definition.

- conveyed to QPS a preliminary view that the reasons in the Decision did not accord with the requirements of section 40 of the RTI Act
 - afforded QPS an opportunity to make an alternative submission to support its Decision to refuse to deal with the Access Application.
10. In response to the issues raised in paragraph 9 above, QPS indicated that under section 55 of the RTI Act, it neither confirmed nor denied the existence of the documents sought by the applicant. That submission was accepted on the basis that the reasons set out in the Decision support reliance on section 55 of the RTI Act.
11. By letter dated 16 September 2009, Acting Assistant Commissioner Jefferies conveyed to the applicant a preliminary view (**Preliminary View**) that:
- QPS' reliance on section 40 of the RTI Act should be set aside
 - QPS was entitled to rely on section 55 of the RTI Act to neither confirm nor deny the existence of documents sought by the applicant because if the documents did exist:
 - access to the documents would be refused under section 47(3) of the RTI Act, and
 - they would contain personal information of other individuals, the disclosure of which, on balance, would be contrary to the public interest under section 47(3)(b) of the RTI Act.
12. By letter dated 22 September 2009, the applicant indicated that he did not accept the Preliminary View and provided final submissions and documentary evidence in support of his case.
13. In making this decision, I have taken into account the following:
- Access Application
 - Decision
 - External Review Application and attached documents
 - file notes of telephone conversations between a staff member of the OIC and officers of the QPS on 14 September 2009
 - applicant's letter dated 22 September 2009 and attached documents
 - relevant sections of the RTI Act and the *Information Privacy Act 2009 (Qld)* (**IP Act**) as referred to in this decision
 - previous decisions of the Information Commissioner as referred to in this decision.

Findings

Applicable legislation

14. Section 23 of the RTI Act provides that a person has a right to be given access under the RTI Act to documents of an agency and documents of a Minister. This right of access is subject to other provisions in the RTI Act, including:
- chapter 3, part 4 of the RTI Act which sets out particular circumstances in which an entity may refuse to deal with an application, and
 - section 47 of the RTI Act which sets out grounds on which an entity may refuse access to documents, including where information is exempt or disclosure would be contrary to the public interest.

15. For the purpose of this review, sections 40 and 55 of the RTI Act are relevant. The requirements of these provisions are examined below.

Section 40 of the RTI Act

16. As set out in paragraph 4 of this decision, the QPS relied, in the Decision, on section 40 of the RTI Act to refuse to deal with the Access Application.

17. Section 40 of the RTI Act provides:

40 Exempt information

(1) *This section applies if—*

- (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.*

[my emphasis]

18. In effect, section 40 of the RTI Act allows an agency to refuse to deal with an access application if:

- the application requests documents of a particular class, that contain information of a stated kind or relate to a stated subject matter, and
- the agency believes *all* of the documents to which the application relates are comprised of 'exempt information', as defined in section 48 of the RTI Act and described in schedule 3.

19. If an agency relies on section 40 of the RTI Act, it is not required to identify any or all of the documents. The agency is however, required, under section 54(2)(f) of the RTI Act, to set out the following in its decision:

- the provision of schedule 3 under which the information in the documents sought is exempt information; and
- the reasons for the decision classifying the documents sought as exempt information.

20. In the Decision, QPS did not identify a provision of schedule 3 under which the information in the documents, sought by the applicant, would be exempt information. Instead, the Decision:

- states that disclosure of the information would, on balance, be contrary to the public interest under section 49 of the RTI Act
- neither confirms nor denies the existence of the documents sought in the Access Application.

21. As the Decision does not:

- identify an exemption provision in schedule 3 of the RTI Act
- give reasons as to why the documents sought are exempt information,

I am satisfied that the Decision does not disclose any basis on which QPS could rely on section 40 of the RTI Act to refuse to deal with the Access Application.

22. Accordingly, I find that reliance on section 40 of the RTI Act should be set aside.

Section 55 of the RTI Act

23. As set out in paragraph 10 of this decision, QPS, in substitution for its reliance on section 40 of the RTI Act, relies, in this review, on section 55 of the RTI Act to neither confirm nor deny the existence of documents sought by the applicant.
24. Section 55 of the RTI Act provides:

55 Information as to existence of particular documents

- (1) *Nothing in this Act requires an agency or Minister to give information as to the existence or non-existence of a document containing **prescribed information**.*
- (2) *For an access application for a document containing **prescribed information**, the agency or Minister may give a prescribed written notice that does not include the details mentioned in section 191(a) or (b) but, by way of a decision, states that—*
 - (a) *the agency or Minister neither confirms nor denies the existence of that type of document as a document of the agency or a document of the Minister; but*
 - (b) *assuming the existence of the document, it would be a document to which access would be refused under section 47(3) to the extent it comprised **prescribed information**.*
- (3) *The prescribed written notice may be given in a schedule of relevant documents.*

[my emphasis]

25. The purpose of including a provision in the nature of section 55 of the RTI Act in information access legislation has been explained as follows:⁴

A particular problem that arises in relation to the giving of reasons and particulars ... is the position of the decision-maker when ... confronted with a request for a document which is manifestly exempt from disclosure, but where the character of the document is such that the mere acknowledgment of its existence, albeit accompanied by a denial of access, will itself cause the damage against which the exemption provision is designed to guard. One obvious example would be a request for a Cabinet paper recommending a devaluation of the currency; another might be a request for a criminal intelligence record disclosing the activities of a particular police informant.

...

We agree that there will, on occasion, be a need for an agency to refuse to acknowledge the very existence of a document. However ... it ought to be confined to a very narrow set of exemptions, namely those relating to classes of documents which by their very nature are likely to be widely accepted as especially sensitive.

Onus

26. In this external review QPS has the onus of establishing that I should give a decision adverse to the applicant.⁵
27. A review in which the agency relies on section 55 of the RTI Act presents procedural challenges. All reviews must be conducted in a procedurally fair manner. Fairness often requires the exchange of submissions. However, in a review involving section 55 of the RTI Act, it will not always be possible for a copy of the agency's submissions to

⁴ *EST and Department of Family Services and Aboriginal and Islander Affairs (1995) 2 QAR 645 at paragraph 11 (citing the 1979 Report by the Senate Standing Committee on Constitutional and Legal Affairs [SSCCLA] on the Freedom of Information Bill 1978 at page 121, point 9.27)*

⁵ Section 87(1) of the RTI Act.

be provided to the applicant. This issue does not arise in this review as the QPS has not provided written submissions.

28. In circumstances where the documents sought do exist, it will often be appropriate for the Information Commissioner to review copies of those documents. However, in a case such as this, where the nature of any documents, if they do exist, is evident from the terms of the access application, it is unnecessary to require the agency to confirm the existence of any relevant documents. Therefore, in this review, I have not asked QPS to indicate to me whether or not the documents sought actually exist.

Prescribed information

29. If an agency relies on section 55 of the RTI Act, it means that the agency is not required to give information as to the existence or non-existence of documents containing 'prescribed information'⁶. However, when relying on section 55 of the RTI Act to neither confirm nor deny the existence of documents, an agency must demonstrate that the information sought by the applicant is 'prescribed information' as that term is defined in the RTI Act.

30. The term 'prescribed information' is defined in schedule 6 of the RTI Act as follows:

prescribed information means—

- (a) exempt information mentioned in schedule 3, section 1, 2, 3, 4, 5, 9 or 10; or
- (b) personal information the disclosure of which would, on balance, be contrary to the public interest under section 47(3)(b).

31. For the purpose of this review, part (b) of the 'prescribed information' definition is relevant.⁷ This part of the definition has two components:

- (i) personal information
- (ii) the disclosure of which would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.

32. These requirements are examined below.

(i) personal information

33. The RTI Act defines⁸ 'personal information' as follows:

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.

34. The Access Application seeks access to documents regarding an alleged complaint of a criminal offence and a corresponding admission. In the Access Application, the applicant names other individuals who he believes the documents will refer to.

35. Given the nature of the documents sought by the applicant and the specific reference to other individuals, I am satisfied that the documents, if they exist, would comprise personal information of individuals other than the applicant.

⁶ This term is examined below in paragraphs 30 to 33 of this decision.

⁷ Based on the information available to me, none of the exemption provisions identified in part (a) of the definition are relevant to the information sought in the Access Application.

⁸ The definition in schedule 6 of the RTI Act refers to the definition which appears in section 12 of the IP Act.

(ii) contrary to the public interest

36. To meet the definition of 'prescribed information', the personal information in question must also be information which, if disclosed, would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.
37. Section 47(3)(b) of the RTI Act provides:

47 Grounds on which access may be refused

- ...
(3) *On an application, an agency may refuse access to a document of the agency and a Minister may refuse access to a document of the Minister—*
...
(b) *to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest under section 49 ...*

38. Section 49 of the RTI Act sets out the steps which must be taken when deciding whether disclosure of information would, on balance, be contrary to the public interest. The requirements of section 49 of the RTI Act must be read in conjunction with the public interest factors listed in schedule 4 of the RTI Act.
39. Schedule 4 of the RTI Act sets out factors:
- irrelevant to deciding the public interest (**Irrelevant Factors**)
 - favouring disclosure in the public interest (**Part 2 Factors**)
 - favouring nondisclosure in the public interest (**Part 3 Factors**)
 - favouring nondisclosure in the public interest because of public interest harm in disclosure (**Part 4 Factors**).
40. In determining whether disclosure of information, would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act, I must:⁹

- identify any irrelevant factors that apply in relation to the information and disregard them
- identify public interest factors favouring disclosure and nondisclosure that apply in relation to the information
- balance the relevant factors favouring disclosure and nondisclosure
- decide whether disclosure of the information, on balance, would be contrary to the public interest.

Irrelevant Factors

41. I have examined the Irrelevant Factors in schedule 4 of the RTI Act and consider that none applies in relation to the information sought in the Access Application. I do not consider that any other irrelevant factors arise in the circumstances of this review.

Part 2 Factors

42. In the External Review Application, the applicant submits that withholding the documents is contrary to the public interest as the information in the documents would help him to pursue a legal remedy. The applicant has provided a copy of his father's death certificate, which indicates that an inquest was held in relation to the death, as well as a transcript of committal proceedings in a Court of Petty Sessions from 1981

⁹ In accordance with section 49(3) of the RTI Act.

concerning charges of culpable driving, which appear to have arisen from the death of the applicant's father. These charges were dismissed. However, the applicant alleges that there is evidence of a conspiracy to murder his father which has not been acknowledged by relevant authorities, including police. To this end, the applicant has provided copies of extensive documentation through which he attempts to demonstrate evidence of the conspiracy. The applicant implies there is a link between the documents he is seeking and the 'real' cause of his father's death.

43. The applicant's submissions go toward the public interest in disclosing information that may contribute to the administration of justice.¹⁰
44. I have considered the applicant's submissions and acknowledge that he remains deeply affected by his father's death, which occurred over 20 years ago, and seeks closure of that matter. A large proportion of the material provided by the applicant seeks to have particular questions answered and to establish a body of evidence for the purpose of commencing an investigation into his late father's death. As stated in his submissions received on 30 September 2009, the applicant's main focus is production of "the Original Farm Ute, or Similar Vehicle, at the Coroners Inquest"
45. As was explained to the applicant in the OIC letter which conveyed a preliminary view in this matter I am unable to address many of the issues raised by the applicant as they are not matters within my jurisdiction. My role in this external review is to review the Decision not to deal with the applicant's access application.
46. Based on the information before me in this review, I am satisfied that:
 - the evidence provided by the applicant does not disclose a correlation between the type of documents sought in the Access Application and his father's death or any matter that may have contributed to his father's death
 - therefore, disclosure of the documents sought, if they exist, could not reasonably be expected to achieve the outcome the applicant seeks, that is, a re-opening of the investigation into the cause of his father's death.

Part 3 and 4 Factors

47. Disclosure of information that could reasonably be expected to prejudice the protection of an individual's right to privacy is a public interest factor favouring nondisclosure.¹¹
48. A public interest in favour of nondisclosure is also raised where information, if disclosed, would disclose personal information of a person, whether living or dead. The RTI Act provides that such disclosure could reasonably be expected to cause a 'public interest harm'.¹²
49. Based on the information before me in this review, I am satisfied that **if** the documents sought in the Access Application exist, disclosing those documents would disclose the personal information of other individuals who the applicant has identified in the Access Application.

Balancing the public interest

50. Having identified and examined the public interest factors for and against disclosure, I consider that in the circumstances of this review:

¹⁰ See factor 16, part 2, schedule 4 of the RTI Act.

¹¹ See factor 3, part 3, schedule 4 of the RTI Act.

¹² See factor 6, part 4, schedule 4 of the RTI Act.

- the public interest relating to administration of justice should not be afforded any weight as the information (if it exists) could not reasonably be expected to contribute to the administration of justice
- the public interest in protecting other individuals' right to privacy should be attributed substantial weight
- the type of personal information that the documents would contain (if they exist) could reasonably be expected to cause a public interest harm, if disclosed.

51. I am satisfied that there are no factors favouring disclosure of the documents sought by the applicant (if they exist) which carry any weight. However, there are significant public interest factors favouring nondisclosure of the documents. Having balanced those factors, I am satisfied that disclosure of the documents (if they exist) would be contrary to the public interest.

Findings

52. I find that the documents sought by the applicant (if they exist) would contain information:

- that is personal information
- the disclosure of which, would, on balance, be contrary to the public interest.

53. Therefore, I find that the documents sought by the applicant (if they exist) would contain 'prescribed information'¹³.

54. As I have found that the documents sought by the applicant contain 'prescribed information', I therefore, find that QPS is entitled to neither confirm nor deny the existence of those documents under section 55 of the RTI Act. I have made this finding on the basis that, if the documents sought by the applicant exist, they would be documents to which access would be refused under section 47(3) of the RTI Act because they contain prescribed information.¹⁴

DECISION

55. I set aside the decision of QPS to refuse to deal with the Access Application based on section 40 of the RTI Act.

56. In substitution, I find that QPS is entitled, under section 55 of the RTI Act, to neither confirm nor deny the existence of the documents sought by the applicant on the basis that if such documents did exist, access to those documents would be refused under section 47(3) of the RTI Act because they contain prescribed information.

Julie Kinross
Information Commissioner

Date: 9 October 2009

¹³ As that term is defined in schedule 6 of the RTI Act. See paragraph 30 of this decision.

¹⁴ As required by section 55(2)(b) of the RTI Act.