



Decision and Reasons for Decision

Application Number: 310622

Applicant: Cannon

Respondent: Department of Police

Decision Date: 20 December 2011

Catchwords: **RIGHT TO INFORMATION - REFUSAL TO DEAL WITH APPLICATION - applicant seeking all information provided by a witness to police in the course of police investigations into offences of which applicant was convicted - whether access application expressed to relate to all documents that contain information relating to a stated subject matter - whether all of the documents to which the application relates would comprise exempt information - whether agency may refuse to deal with application under section 40 of the *Right to Information Act 2009* (Qld)**

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REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Police (**QPS**)¹ for access to all information supplied by an informant (**Witness A**) to police officers during their investigations into the applicant.
2. QPS decided to neither confirm nor deny the existence of the requested information under section 55 of the *Right to Information Act 2009* (Qld) (**RTI Act**).
3. I have decided that QPS may refuse to deal with the access application under section 40 of the RTI Act on the basis that:
 - the access application is expressed to relate to all documents that relate to a stated subject matter; and
 - all of the documents to which the application relates comprise exempt information under schedule 3, section 10(1)(f) of the RTI Act.

Background

4. In 2005 the applicant was convicted of drug-related offences in the Supreme Court of Queensland.² A number of witnesses gave evidence against the applicant, including Witness A. The applicant's appeal against his conviction was refused by the Queensland Court of Appeal in 2007. Subsequently the applicant was ordered to pay a sum of money to the State of Queensland under the *Criminal Proceeds Confiscation Act 2002* (Qld).
5. Published judgments from the above court proceedings identify Witness A by name and disclose that s/he was a police informant, gave evidence against the applicant at trial and received indemnity from prosecution from the Attorney-General.
6. In February 2011, the applicant applied to QPS under the RTI Act for access to all information supplied by Witness A to QPS in relation to investigations into the applicant (**Requested Documents**).
7. QPS decided³ to neither confirm nor deny the existence of the Requested Documents under section 55 of the RTI Act. The applicant then applied to the Information Commissioner for external review of QPS' decision.
8. On external review, the applicant submits that disclosure of the Requested Documents will demonstrate that he was not given a fair trial. He also submits that the information will be adverse to the reliability and credibility of Witness A and will demonstrate that the evidence provided by Witness A was inaccurate and/or not given to his lawyers during his trial. The applicant has also indicated that he seeks the Requested Documents to make a complaint to the Crime and Misconduct Commission.
9. QPS submits that disclosure of the Requested Documents could reasonably be expected to prejudice the ability of QPS to obtain similar information from witnesses in the future and also, reduce the effectiveness of the systems and processes used by QPS in investigating criminal activity.

¹ This agency is commonly known as Queensland Police Service.

² *R v Cannon* [2007] QCA 205 at [1].

³ Decision dated 6 April 2011.

Reviewable decision

10. The decision under review is QPS' decision dated 6 April 2011 to neither confirm nor deny the existence of the Requested Documents under section 55 of the RTI Act.

Steps taken in the external review process

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

Evidence considered

12. Evidence, submissions, legislation and other material I have considered in reaching my decision are as disclosed in these reasons (including footnotes and appendix).
13. A review of a decision in which the agency has relied on a section of the RTI Act which does not require the requested documents to be located presents procedural challenges.⁴ However, where the nature of any documents is evident from the terms of the access application, the Office of the Information Commissioner (**OIC**) may not require the agency to provide OIC with the relevant documents. In the circumstances of this case, OIC did not ask QPS to provide copies of the Requested Documents.⁵

Relevant law

14. Section 39 of the RTI Act provides that where an access application is made, an agency should deal with the application unless this would, on balance, be contrary to the public interest. Section 40 of the RTI Act sets out one of the sets of circumstances in which Parliament has considered it would, on balance, be contrary to the public interest for to deal with an access application, as follows:

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.*

15. Exempt information is information the disclosure of which Parliament has considered would, on balance, be contrary to the public interest.⁶ Schedule 3 of the RTI Act lists exempt information relating to law enforcement or public safety, 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;*

⁴ See *EST and Department of Family Services and Aboriginal and Islander Affairs* (1995) 2 QAR 645 at paragraph 20 where the Information Commissioner of Queensland considered the operation of section 35 of the repealed *Freedom of Information Act 1992* (Qld) which is the equivalent of section 55 of the RTI Act.

⁵ See also section 40(2) of the RTI Act.

⁶ As set out in section 48 of the RTI Act.

Findings

16. It is a matter of public record that Witness A provided QPS with information about the applicant during QPS investigations into drug-related offences. As this is the very nature of the information sought by the applicant I am of the view that the existence of relevant documents cannot be neither confirmed nor denied under section 55 of the RTI Act. This view was put to, and accepted by, QPS during the external review.⁷
17. For section 40 of the RTI Act to apply in this case I must firstly be satisfied that the 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.
18. Following a careful assessment of the access application I am satisfied that it is expressed to relate to all documents relating to a stated subject matter, specifically, information provided by Witness A to QPS during its investigations into the applicant and drug-related offences.
19. Secondly, I must be satisfied that all of the documents to which the application relates would comprise exempt information. The requirements of the exemption in schedule 3, section 10(1)(f) of the RTI Act are:
 - the existence of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law
 - that disclosure could reasonably be expected to prejudice this method or procedure; and
 - the exceptions in schedule 3, section 10(2) of the RTI Act do not apply.
20. Having considered the evidence in this matter, I am satisfied that:
 - the QPS practice of obtaining information from informants and witnesses in relation to criminal activity is a lawful method or procedure for preventing, detecting, investigating and dealing with contraventions or possible contraventions of the law
 - it is reasonable to expect that informants and witnesses may be reluctant to cooperate with QPS in future criminal investigations if they are aware that the information they provide may be disclosed to an offender, outside the usual court processes, including after that offender has been convicted and sentenced; and
 - it is reasonable to expect that the methods by which QPS uses informants and witnesses to gather information in relation to suspects may be prejudiced by disclosure of the Requested Documents.
21. I have also assessed the exceptions to this exemption outlined in schedule 3, section 10(2) of the RTI Act and find that none apply in this case.
22. On the basis of my findings set out above, I am satisfied that the Requested Documents comprise exempt information under schedule 3, section 10(1)(f) of the RTI Act.
23. In his submissions, the applicant raised a number of public interest factors in support of his view that the Requested Documents should be disclosed. The exemptions in schedule 3 of the RTI Act set out the types of information which Parliament has decided, would, on balance, be contrary to the public interest to disclose. Once the

⁷ OIC preliminary view dated 31 May 2011 and response from QPS dated 6 June 2011. For this reason, section 109 of the RTI Act does not apply in this case.

requirements of an exemption have been established, I am prevented by the RTI Act from considering any other public interest factors, including those raised by the applicant. Therefore, in considering whether the Requested Documents comprise exempt information, I have not been able to take into account the public interest arguments raised by the applicant during this review.

DECISION

24. I vary the decision of QPS and find that QPS may refuse to deal with the application under section 40 of the RTI Act on the basis that the access application is expressed to relate to all documents that relate to a stated subject matter, and that all of the documents to which the application relates comprise exempt information under schedule 3, section 10(1)(f) of the RTI Act.

J Kinross
Information Commissioner

Date: 20 December 2011

APPENDIX**Significant procedural steps**

Date	Event
1 February 2011	The applicant applied to QPS under the RTI Act for access to all information supplied by Witness A to QPS officers in relation to their investigations into his drug-related offences.
6 April 2011	QPS made a decision neither confirming nor denying the existence the documents requested by the applicant under section 55 of the RTI Act.
8 April 2011	The applicant applied to OIC for external review of the QPS' decision.
19 May 2011	OIC informed QPS and the applicant that the application had been accepted for review.
31 May 2011	<p>OIC conveyed a preliminary view to QPS that:</p> <ul style="list-style-type: none"> • in the circumstances of this case, the neither confirm nor deny provision in section 55 of the RTI Act did not apply; and • QPS may refuse to deal with the application under section 40 of the RTI Act.
6 June 2011	QPS accepted OIC's preliminary view and made further submissions in relation to the application of exemptions in schedule 3 of the RTI Act to the requested information.
20 October 2011	OIC received written submissions from the applicant.
28 October 2011	OIC conveyed a preliminary view in writing to the applicant that QPS was entitled to refuse to deal with the application under section 40 of the RTI Act.
7 November 2011	The applicant notified OIC by letter that he did not accept the preliminary view and made further submissions.
8 and 18 November 2011	The applicant made further written submissions to OIC, seeking to amend the terms of his original access application.