



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>Mewburn and Queensland Police Service [2014] QICmr 49 (2 December 2014)</i></b>
<b>Application Number:</b>	<b>311923</b>
<b>Applicant:</b>	<b>Mewburn</b>
<b>Respondent:</b>	<b>Queensland Police Service</b>
<b>Decision Date:</b>	<b>2 December 2014</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW – INFORMATION PRIVACY ACT – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST INFORMATION – information identifying a complainant – whether disclosure would, on balance, be contrary to the public interest – sections 47(3)(b), 49 and schedule 4 of the <i>Right to Information Act 2009</i> (Qld) – section 67 of the <i>Information Privacy Act 2009</i> (Qld)</b>  <b>ADMINISTRATIVE LAW – INFORMATION PRIVACY ACT – REFUSAL OF ACCESS – DOCUMENTS NONEXISTENT OR UNLOCATABLE – applicant unable to identify requested documents with sufficient detail – whether agency has taken all reasonable steps to locate requested documents – whether documents are nonexistent or unlocatable – sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld) – section 67 of the <i>Information Privacy Act 2009</i> (Qld)</b>

## REASONS FOR DECISION

### Summary

1. The applicant applied to the Queensland Police Service (**QPS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for information covering a 23 year period and comprising:
  - complaints, reports and investigations about him or his property; and
  - complaints or reports he made to QPS.
2. QPS located three pages relevant to the access application comprising an Intelligence Log Summary and refused access to these pages in full on the basis that they comprised exempt information as 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.

3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the decision to refuse access and also raised concerns that QPS had not located all information relevant to his access application.
4. QPS agreed to release part of the Intelligence Log Summary to the applicant on external review. Access to the remaining information in this document can be refused on the basis that its disclosure would, on balance, be contrary to the public interest.
5. The applicant was not able to identify the additional information to which he sought access with sufficient detail to enable QPS to conduct any additional searches or enquiries. Having regard to the circumstances of this case, QPS has taken all reasonable steps to locate documents relevant to the access application.

## **Background**

6. Significant procedural steps relating to the application and external review are set out in the appendix.
7. The applicant has made submissions supporting his case which are largely irrelevant to the issues for consideration and are not addressed in these reasons. To the extent any of these submissions are relevant, I address them below.<sup>1</sup>

## **Reviewable decision**

8. The decision under review is QPS's internal review decision dated 5 February 2014.

## **Evidence considered**

9. The evidence, submissions, legislation and other material considered in reaching this decision is disclosed in these reasons (including footnotes and appendix).

## **Contrary to public interest information**

### **Relevant law**

10. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent the documents contain the individual's personal information. However, this right is subject to limitations, including grounds for refusal of access.<sup>2</sup> One ground on which access may be refused is where disclosure would, on balance, be contrary to the public interest.<sup>3</sup>
11. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest<sup>4</sup> and also explains the steps that a decision-maker must take in deciding the public interest<sup>5</sup> as follows:

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<sup>1</sup> The applicant has requested that OIC publish a copy of his submissions on external review together with this decision. The IP Act does not require me to make all external review correspondence part of this decision. As noted at paragraph 9 of these reasons, all evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).

<sup>2</sup> Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent that access could be refused under section 47 of the *Right to Information Act 2009* (Qld) (**RTI Act**) were the document to be the subject of an application under that Act.

<sup>3</sup> Section 47(3)(b) of the RTI Act. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

<sup>4</sup> Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.

<sup>5</sup> Section 49(3) of the RTI Act.

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

## Findings

12. The information in issue comprises parts of the three page Intelligence Log Summary which is a complaint about the applicant (**Information in issue**). I am satisfied that disclosing the Information in Issue would enable the applicant to identify the person who made the complaint to QPS.
13. No irrelevant factors arise in this matter. I will now address the relevant public interest factors.

### Accountability and transparency

14. Some of the Information in Issue shows the actions taken by QPS in response to the complaint and how the complaint was assessed. In my view, disclosure of this information could reasonably be expected to further the accountability and transparency of QPS. This gives rise to public interest factors favouring disclosure.<sup>6</sup>
15. The information in the Intelligence Log Summary which has been disclosed to the applicant contains some information about the way QPS dealt with the complaint and its disclosure advances QPS's accountability and transparency. Given the information that QPS has disclosed and the small amount of detail in the Information in Issue, I do not consider that disclosing the Information in Issue would significantly further QPS's accountability or transparency and I give these factors limited weight.
16. The applicant is dissatisfied that access to the Information in Issue has been refused and contends that the decision is inconsistent with the purpose of the IP Act which he believes is to *'prevent the misuse of power by consistent and transparent systems of law which should make it difficult for the state to oppress individuals.'*<sup>7</sup> A decision refusing access to information which would identify the complainant in this case reflects the intended operation of the access scheme under the IP Act, that is, balancing the public interest in furthering access to government held information against the relevant public interest factors favouring nondisclosure, which are identified below.

### Personal information and privacy

17. The Information in Issue is about the applicant and comprises his personal information.<sup>8</sup> This gives rise to a public interest factor favouring disclosure<sup>9</sup> to which I afford significant weight in the circumstances.
18. However the Information in Issue is also the personal information of the complainant. It is not possible to separate the applicant's personal information from the personal information of the complainant because of the way the information appears in the document. As a result, the applicant's personal information cannot be released without also releasing the personal information of another person.

<sup>6</sup> Schedule 4, part 2, items 1 and 11 of the RTI Act.

<sup>7</sup> Submissions to OIC on 17 February 2014.

<sup>8</sup> Section 12 of the IP Act defines personal information as *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.*

<sup>9</sup> Schedule 4, part 2, item 7 of the RTI Act.

19. The applicant submits that:<sup>10</sup>

*Reasons provided by the decision maker included public interest and police procedure. In this case, I am advised that the right of a member of the public to have me investigated by police, my personal information detailed on police records and polices' right to investigate me has overcome my human rights, my equality before the law, my right to natural justice and my right to procedural fairness. I am told this is to prevent the informant(s) 'fear of reprisals'. Therefore, an informant(s) fear (real or imagined) is even more important than individual rights... History is full of atrocities carried out in the public interest and I will not go into that here.*

20. It is understandable that the applicant would like to know the identity of the complainant and the substance of the complaint because it relates to him. However, the right of access to information under the IP Act and RTI Act is not unqualified – it is subject to various limitations, some of which are intended to protect personal information and privacy.

21. I have considered whether disclosing the Information in Issue could reasonably be expected to:

- prejudice the protection of an individual's right to privacy;<sup>11</sup> and
- cause a public interest harm as it comprises the personal information of another person.<sup>12</sup>

22. The concept of 'privacy' is not defined in either the RTI Act or the IP Act. It can, however, essentially be viewed as the right of an individual to preserve their personal sphere from interference from others.<sup>13</sup> I consider that providing information to law enforcement authorities such as QPS is a private action falling within an individual's personal sphere<sup>14</sup> and that disclosing the identity of a person who has been a complainant in a police matter would be a significant intrusion into the individual's privacy. Members of the community have a legitimate expectation that, in providing information to QPS, their privacy will be maintained and respected as far as possible.

23. In some cases, information supplied to QPS will be disseminated so as, for example, to enable further investigation, or for prosecutorial purposes, often in open court and this may reduce the privacy interest attaching to relevant information.<sup>15</sup> I am not satisfied that the privacy interest in this case has been reduced for any reason. I note that the applicant was not notified of the complaint and no further action was taken by QPS.

24. Having carefully considered the nature of the Information in Issue, I consider that its disclosure under the IP Act would be a significant intrusion into the privacy of the complainant and the extent of public interest harm that could be anticipated from disclosure is significant. Accordingly, I afford both of these factors significant weight.

### **Prejudice the flow of information to police**

25. The applicant submits that the Information in Issue will identify a 'grudge informer', that 'grudge informers need to be found and held accountable' and that 'Police need to stop supporting and enabling these grudge informers, on behalf of the State'.<sup>16</sup>

<sup>10</sup> Submissions to OIC on 17 February 2014.

<sup>11</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>12</sup> Schedule 4, part 4, item 6 of the RTI Act.

<sup>13</sup> See *Marshall and Department of Police* (Unreported, Queensland Information Commissioner, 25 February 2011) (**Marshall**) at paragraph 27.

<sup>14</sup> *Marshall* at paragraph 27.

<sup>15</sup> *Marshall* at paragraph 28.

<sup>16</sup> Submissions to OIC on 1 August 2014.

26. A public interest factor favouring nondisclosure will arise where disclosing information could reasonably be expected to prejudice the flow of information to police.<sup>17</sup>
27. Efficient and effective use of policing resources is facilitated by police being able to seek and obtain information from various members of the community, including complainants, bystanders, informers and even the subjects of a complaint, with as much cooperation as possible.<sup>18</sup> QPS relies heavily on information from the public to be alerted to and to pursue breaches of the law and there is a very strong public interest in protecting the free flow of information to law enforcement agencies, even where this may result in an agency investigating false and/or unsubstantiated allegations.<sup>19</sup> There is nothing before me to suggest the complaint in this case was motivated by malice or made by a '*grudge informant*', as asserted by the applicant.
28. The Information in Issue identifies the complainant. I am satisfied that disclosing this type of identifying information under the IP Act would tend to discourage individuals from approaching QPS with relevant information and cooperating with police investigations in the future as they may consider that their personal information could be released to other individuals, including to the person the subject of the complaint. This, in turn, would significantly prejudice QPS's ability to effectively discharge its functions in enforcing the law.
29. In this case, I am satisfied that disclosing the Information in Issue could reasonably be expected to have a significant detrimental impact on the flow of information from the community to QPS and I afford significant weight to this factor favouring nondisclosure.

#### **Balancing the public interest factors**

30. As explained above, in relation to the factors favouring disclosure of the Information in Issue, I afford:
  - limited weight to the factors relating to QPS accountability and transparency; and
  - significant weight to the factor relating to the applicant's personal information.
31. I have identified three factors favouring nondisclosure of the Information in Issue and I afford significant weight to each of them.
32. The factors favouring nondisclosure of the Information in Issue in this case outweigh the factors favouring disclosure. Accordingly disclosing the Information in Issue would, on balance, be contrary to the public interest and access to the Information in Issue can be refused under sections 47(3)(b) and 49 of the RTI Act.

#### **Nonexistent or unlocatable documents**

##### ***Relevant law***

33. Access to a document may be refused if the document is nonexistent or unlocatable.<sup>20</sup> A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.<sup>21</sup> A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document but it cannot be found.<sup>22</sup>

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<sup>17</sup> Schedule 4, part 3, item 13 of the RTI Act.

<sup>18</sup> *Marshall* at paragraph 29.

<sup>19</sup> *P6Y4SX and Department of Police* (Unreported, Queensland Information Commissioner, 31 January 2012) at paragraphs 35-40.

<sup>20</sup> Sections 47(3)(e) and 52 of the RTI Act.

<sup>21</sup> Section 52(1)(a) of the RTI Act.

<sup>22</sup> Section 52(1)(b) of the RTI Act.

34. To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors.<sup>23</sup> When proper consideration is given to relevant factors, it may not be necessary for searches to be conducted. However, if searches are relied on to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes all reasonable steps will vary from case to case as the search and enquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances.

### **Findings**

35. The applicant seeks access to documents covering a period of 23 years and comprising complaints, reports and investigations about him or his property and complaints or reports he made to QPS. The applicant contends that QPS could search for all of the relevant information using his name and address as search terms and submits:<sup>24</sup>

*On a personal note I assumed that when police are called and complaints are made that Police would record these events. I never thought that I would one day be required to go back and prove what natural and civil justice should give me automatically. The police procedures identified and reiterated by your office about decentralisation and individual stations maintenance of their records, provides too much autonomy and too much scope for police to discriminate with no or little checks and balances and complaints and outcomes can become blurred or ignored.*

36. QPS has explained that it does not have one central database and information is recorded in different ways depending on how a complaint is made, the nature of the complaint and when the complaint was made. In this case, QPS has taken the following steps to search for the requested information:
- searches of the Wide Bay Burnett District Office, Gin Gin and Childers Police Stations
  - searches in the Bundaberg Patrol Office of the correspondence system and register using the applicant's name; and
  - searches of the QPRIME database (QPS's information management system) using the applicant's name and date of birth.
37. The only information which was located as a result of these searches was the Intelligence Log Summary which I have dealt with previously in these reasons.
38. An applicant is required to specifically identify the documents which are the subject of an access application. This is consistent with section 43(2)(b) of the IP Act which provides that an access application made under the IP Act must give sufficient information concerning the document to enable the agency to identify the document.
39. Where an applicant contends that additional documents relevant to an access application have not been located by an agency, there is a practical onus on the applicant to provide reasonable grounds for a decision-maker to believe that the documents exist. This includes being able to identify the requested information with

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<sup>23</sup> *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at paragraph 19 which adopted the Information Commissioner's comments in *PDE and the University of Queensland* [2009] QICmr7 (9 February 2009). The key factors include: the administrative arrangements of government; the agency structure; the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it); the agency's practices and procedures (including but not exclusive to its information management approach) and other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates.

<sup>24</sup> Submissions to OIC on 4 March 2014.

sufficient precision so that a decision-maker can determine whether the appropriate search and enquiry process has been undertaken and whether any additional steps are necessary.

40. The applicant attempted to provide both QPS and OIC with more detailed information about the documents to which he sought access. He explained that he had made numerous complaints to QPS over the 23 year period and had dealt with Gin Gin and Bundaberg police stations.<sup>25</sup> He explained that he understood the documents *'may or may not exist as my interaction with the Police service has been mostly verbal and personal of which I have always shown respect and dignity to police.'*<sup>26</sup> In relation to complaints made about him, the applicant's submissions were, for the most part, vague and speculative. Some were based only on the applicant's belief that complaints had been made to QPS and documents created but the applicant's submissions did not provide any reasonable basis for this belief.
41. This information provided by the applicant was not sufficiently detailed for QPS to identify the requested documents or to undertake any additional searches on external review. Without this information, there is no basis for me to require QPS to conduct any further searches.
42. I have carefully considered the nature and extent of the searches that QPS has conducted to locate information relevant to the access application together with the information about its record keeping practices in relation to complaints. I am satisfied that QPS has taken all reasonable steps to locate documents relevant to the access application, particularly in view of the limited amount of detail the applicant provided about the requested documents. I am unable to identify any further searches that QPS can reasonably be required to undertake in the circumstances.
43. I find that access to any additional information the subject of the access application can be refused under sections 47(3)(e) and 52 of the RTI Act on the basis that it is nonexistent or unlocatable.

## DECISION

44. For the reasons set out above, I vary QPS's decision and find that access to:
  - the Information in Issue can be refused under section 47(3)(b) of the RTI Act on the basis that its disclosure would, on balance, be contrary to the public interest; and
  - any additional information can be refused under section 47(3)(e) of the RTI Act on the basis that it is nonexistent or unlocatable.
45. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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**Tara Mainwaring**  
**A/Assistant Information Commissioner**

**Date: 2 December 2014**

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<sup>25</sup> Submissions to OIC on 1 August 2014.

<sup>26</sup> Submissions to OIC on 1 August 2014.

**APPENDIX**

**Significant procedural steps**

Date	Event
28 November 2013	QPS received the access application under the IP Act.
26 November 2013	QPS issued a notice under section 53(2) of the IP Act stating that the access application did not give sufficient information to enable QPS to identify the documents and was not a valid application.
9 December 2013	The applicant responded to QPS's notice stating that he considered searches could be conducted using only names and addresses.
21 January 2014	QPS notified the applicant of its decision to refuse access to three pages.
28 January 2014	QPS received the internal review application.
5 February 2014	QPS affirmed the initial decision and also decided that disclosing the three pages would, on balance, be contrary to the public interest.
17 February 2014	OIC received the external review application.
19 February 2014	OIC notified QPS and the applicant that the external review application had been received. OIC requested that QPS provide relevant procedural documents. OIC received the requested documents from QPS.
27 February 2014	OIC notified QPS and the applicant that the external review application had been accepted. OIC requested that QPS provide the documents to which access had been refused by 14 March 2014.
3 March 2014	OIC received the requested documents from QPS.
4 March 2014	OIC received submissions from the applicant in response to OIC's letter dated 27 February 2014.
14 March 2014	OIC conveyed a preliminary view to the applicant and invited the applicant to provide submissions supporting his case by 1 April 2014 if he did not accept the preliminary view.
31 March 2014	OIC received submissions from the applicant.
22 May 2014	OIC conveyed a preliminary view to QPS and invited it to provide further submissions supporting its case by 5 June 2014 if it did not accept the preliminary view.
5 June 2014	OIC received submissions from QPS in response to the preliminary view.
19 June 2014	OIC received submissions from the applicant.
21 July 2014	An OIC staff member spoke with a QPS staff member about QPS's record keeping practices and searches performed.
22 July 2014	OIC requested that the applicant provide further information about the requested documents by 6 August 2014. OIC conveyed a further preliminary view to QPS and requested it provide submissions by 6 August 2014.
1 August 2014	OIC received submissions from the applicant.
8 August 2014	OIC received submissions from QPS.
25 September 2014	OIC conveyed a further preliminary view to QPS and requested it provide submissions by 10 October 2014.
10 October 2014	QPS accepted OIC's preliminary view in relation to the refusal of access issue and agreed to release additional information to the applicant. QPS



<b>Date</b>	<b>Event</b>
	provided further submissions in relation to the searches it had performed.
16 October 2014	OIC asked QPS to release the relevant information to the applicant. OIC notified the applicant that QPS had agreed to release additional information. OIC also conveyed a preliminary view to the applicant in relation to the remaining issues and invited the applicant to provide submissions supporting his case by 31 October 2014 if he did not accept the preliminary view.
21 October 2014	QPS notified OIC that the additional information had been released to the applicant.
29 October 2014	OIC received the applicant's submissions.