



Decision and Reasons for Decision

Application Number: 311209

Applicant: 0AW6AW

Respondent: Department of Communities, Child Safety and Disability Services

Decision Date: 5 March 2013

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION ACT - REFUSAL OF ACCESS - EXEMPT INFORMATION - applicant seeks access to documents concerning allegations of misconduct - applicant subject of the allegations - whether information obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in the performance of the prescribed functions of the prescribed crime body - whether information is exempt under schedule 3, section 10(4) of the *Right to Information Act 2009 (Qld)*

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Communities, Child Safety and Disability Services (**Department**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to a range of documents primarily related to complaints about the applicant which the Department referred to the Crime and Misconduct Commission (**CMC**).
2. The Department identified and decided to release a number of documents to the applicant. The Department refused access to the remaining information on the basis that:
 - its disclosure would, on balance, be contrary to the public interest; or
 - it was exempt as it consisted of information obtained, used or prepared for an investigation by the CMC in the performance of its prescribed functions.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.
4. The information remaining in issue on external review relates to allegations of official misconduct about the applicant. The Department is investigating the allegations and, in doing so, is performing the CMC's misconduct function with oversight by the CMC. The information in issue was obtained, used or prepared by the Department for this investigation.
5. For the reasons set out below, the Department was entitled to refuse access to the information in issue on the basis that it is exempt information as it was obtained, used

or prepared for an investigation by a prescribed crime body, or another agency, in the performance of the prescribed functions of the prescribed crime body.¹

Background

6. Significant procedural steps relating to the external review are set out in the appendix to these reasons.

Reviewable decision

7. The decision under review is the Department's decision dated 5 October 2012.

Evidence considered

8. Evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).

Information in Issue

9. A number of issues were informally resolved during the external review.² The issue for determination is whether the Department was entitled to refuse access to the remaining information in issue on the basis that it comprises exempt information under schedule 3 section 10(4) of the RTI Act.
10. The information in issue in this review (**Information in Issue**)³ relates to the investigation of allegations which the CMC considered, if proven, would constitute official misconduct and is contained in six files which comprise documents such as work records, emails and correspondence about the applicant's work performance and the investigation.

Relevant law

11. Under the RTI Act, a person has a right to be given access to documents of an agency.⁴ However, this right is subject to other provisions of the RTI Act, including the grounds on which an agency may refuse access to documents.⁵ The RTI Act provides that access may be refused to documents to the extent that they comprise exempt information.⁶ Schedule 3 of the RTI Act sets out categories of information the disclosure of which Parliament has determined is exempt as disclosure would be contrary to the public interest.⁷
12. Relevantly, schedule 3, section 10(4) of the RTI Act provides that information is exempt if it consists of information obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in performing the prescribed functions of the prescribed crime body (**CMC Exemption**).

¹ Sections 47(3)(a), 48 and schedule 3 section 10(4) of the RTI Act.

² The Department agreed to release additional information to the applicant in file 3 page 104. The applicant did not seek access to the remaining information in file 3 page 104. The applicant also did not seek access to the information in file 1 pages 106 and 118; file 3 pages 66 and 67; file 4 pages 2, 6-9, 39, 62, 66, 71, 74, 77 and 88; file 6 pages 1-7; and file 7 pages 14 and 18. This information is no longer in issue on external review. File 2 pages 37 and 38 and file 5 pages 63, 64, 179, 180, 186 and 187 are duplicates of pages to which the applicant does not seek access and are also not in issue on external review.

³ The Information in Issue comprises: file 1 pages 1-105, 109-117 and 119; file 2 pages 1-36 and 39-146; file 3 pages 1-65, 68-103, 105, 108 and 109-131; file 4 pages 1, 3-5, 10-38, 40-61, 63-65, 67-70, 72, 73, 75, 76, 78-86 and 89-99; file 5 pages 1-62, 65-178, 181-185 and 188-380 and file 6 pages 8-11.

⁴ Section 23 of the RTI Act.

⁵ As set out in section 47 of the RTI Act.

⁶ Section 47(3)(a) and section 48 of the RTI Act.

⁷ Section 48(2) of the RTI Act.

Findings

13. The Information in Issue will comprise exempt information under the CMC Exemption if:
- a) the exception to the CMC Exemption does not apply
 - b) it was obtained, used or prepared for an investigation by the Department; and
 - c) in undertaking the investigation, the Department was performing the prescribed functions of the prescribed crime body.
14. I consider each of these requirements below.

Does the exception to the CMC Exemption apply?

15. No, for the reasons set out below.
16. The CMC Exemption does not apply if the Information in Issue is (i) about the applicant and (ii) the investigation has been finalised.⁸
17. Based on my consideration of the Information in Issue, I am satisfied that the applicant is the subject of the allegations being investigated and that the Information in Issue is about the applicant.
18. The applicant submits that:⁹
- the investigation is finalised as his employment with the Department was terminated during the course of the review; and
 - the Department has no reason to continue the investigation as he and the Department recently reached a settlement regarding his employment.
19. In response to inquiries by OIC, the Department confirmed that, despite the termination of the applicant's employment, the investigation was not finalised.¹⁰
20. I accept the Department's submission that, despite the applicant's employment being terminated, the investigation is ongoing. As the investigation has not been finalised, the exception to the CMC Exemption does not apply.

Has the Information in Issue been obtained, used or prepared for the investigation?

21. Yes, for the reasons set out below.
22. The terms 'obtained, used or prepared' are not defined in the RTI Act or the *Acts Interpretation Act 1954* (Qld) and so are to be given their ordinary meaning.¹¹
23. The Department explained that:¹²
- the Department notified the CMC of the allegations related to the applicant's employment¹³
 - the CMC assessed the allegations and considered that the allegations, if proven, may constitute official misconduct

⁸ Schedule 3, section 10(6) of the RTI Act.

⁹ Applicant's submissions to OIC on 9 January 2013, 22 February 2013 and 26 February 2013.

¹⁰ Department's submissions to OIC dated 18 February 2013.

¹¹ *Springborg, MP and Crime and Misconduct CMC* (2006) 7 QAR 77.

¹² Department's decision dated 5 October 2012, at page 4.

¹³ In accordance with section 38(1) of the *Crime and Misconduct Act 2001* (Qld) (**CM Act**).

- the CMC referred the matter back to the Department to deal with, subject to the CMC's monitoring role and with the requirement that the CMC be advised of the outcome; and
- the Information in Issue comprises documents obtained, used or prepared for the purposes of the investigation into the allegations of official misconduct.

24. I have considered the Information in Issue and the information provided by the Department. I accept the Department's submissions at paragraph 23 above and am satisfied that the Information in Issue was obtained, used or prepared for the investigation of allegations of official misconduct.

Is the investigating body or agency a prescribed crime body or another agency performing a prescribed crime body's functions?

25. Yes, for the reasons set out below.

26. As noted above, the CMC referred the allegations under investigation back to the Department to deal with. While the Department is not a prescribed crime body, the CMC is. The CMC's 'prescribed functions' for the purposes of the CMC Exemption include its 'misconduct functions' as defined in the CM Act.¹⁴

27. The CMC's misconduct functions include ensuring that a complaint about misconduct is dealt with in an appropriate way. The CMC must perform its misconduct function having regard to the principles of cooperation, capacity building, devolution and the public interest.¹⁵

28. The CM Act defines 'misconduct' to include 'official misconduct or police misconduct'.¹⁶ The term 'official misconduct' is defined in the CM Act¹⁷ as *conduct that could, if proved, be — (a) a criminal offence; or (b) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment.*

29. If an agency reasonably suspects that a complaint involves or may involve official misconduct, it must notify the CMC.¹⁸ If the CMC refers a complaint about official misconduct back to the agency, the agency must deal with the complaint in the way it considers most appropriate, subject to the CMC's monitoring role.¹⁹

30. I accept the Department's submission that the relevant investigation is into allegations, which if proven, may constitute official misconduct. In conducting the investigation, the Department is performing the CMC's misconduct function by ensuring the complaints are dealt with in accordance with the requirements of the CM Act, with oversight by the CMC. I am satisfied that the Department is therefore 'performing a prescribed crime body's functions' within the meaning of the CMC Exemption.

Conclusion

31. Based on the above, I find that:

- the Information in Issue satisfies the requirements of the CMC Exemption; and

¹⁴ Schedule 3, section 10(9) of the RTI Act.

¹⁵ Section 33(b) and section 34 of the CM Act.

¹⁶ Schedule 2 of the CM Act.

¹⁷ Schedule 2 of the CM Act.

¹⁸ Sections 34 and 38 of the CM Act.

¹⁹ Section 44(2) of the CM Act.

- the Department was entitled to refuse access to the Information in Issue as it is exempt under sections 47(3)(a) and 48 and schedule 3, section 10(4) of the RTI Act.

DECISION

32. I affirm the decision under review and find that the Department is entitled to refuse access to the Information in Issue under section 47(3)(a) and section 48 of the RTI Act on the basis that the Information in Issue comprises exempt information under schedule 3, section 10(4) of the RTI Act.
33. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Tara Mainwaring
Acting Assistant Information Commissioner

Date: 5 March 2013

APPENDIX**Significant procedural steps**

Date	Event
17 August 2012	The Department received the access application.
5 October 2012	The Department issued its decision to the applicant.
10 October 2012	OIC received the external review application.
11 October 2012	OIC notified the Department it had received the external review application and asked the Department to provide a number of procedural documents.
18 October 2012	OIC received the requested information from the Department.
19 October 2012	OIC notified the applicant and the Department that it had accepted the external review application and asked the Department to provide a copy of the information to which it had refused access and a number of procedural documents.
6 November 2012	The Department provided OIC with a copy of the requested information.
14 November 2012	OIC contacted the Department by telephone and obtained information relevant to the review.
20 November 2012	OIC contacted the Department by telephone and obtained information relevant to the review.
27 November 2012	OIC contacted the applicant by telephone and the applicant provided submissions supporting his case.
10 December 2012	OIC contacted the Department by telephone and obtained information relevant to the review.
18 December 2012	OIC contacted the Department by telephone and obtained information relevant to the review.
21 December 2012	OIC contacted the Department by telephone and obtained information relevant to the review. OIC conveyed its view to the applicant that the Department was entitled to refuse access to the relevant information under the CMC Exemption and invited the applicant to provide submissions supporting his case by 18 January 2013.
10 January 2013	The applicant advised OIC that he did not accept OIC's view and provided submissions supporting his case.
31 January 2013	OIC requested submissions from the Department regarding the status of the CMC investigation.
19 February 2013	OIC received the Department's submissions dated 18 February 2013. The Department advised that the CMC investigation had not been finalised.
22 February 2013	OIC contacted the applicant by telephone. The applicant provided submissions supporting his case and notified OIC that he did not seek access to particular information on external review. OIC asked the Department to advise whether it agreed to release additional information to the applicant.
25 February 2013	The Department notified OIC that it agreed to provide additional information to the applicant.
26 February 2013	OIC contacted the applicant by telephone. The applicant provided submissions supporting his case and notified OIC that he did not seek access to particular information. OIC asked the Department to provide the additional information to the applicant.
4 March 2013	OIC contacted the applicant by telephone. The applicant notified OIC that he did not seek access to particular information.