



Decision and Reasons for Decision

Citation:	<i>Byers and Department of Justice and Attorney-General</i> [2014] QICmr 34 (12 August 2014)
Application Number:	312026
Applicant:	Byers
Respondent:	Department of Justice and Attorney-General
Decision Date:	12 August 2014
Catchwords:	ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL TO DEAL WITH APPLICATION – EXEMPT CLASS OF DOCUMENTS – applicant seeking all witness statements relevant to a disciplinary action – whether access application expressed to relate to a stated subject matter – whether all documents to which the application relates appear to comprise exempt information – whether agency may refuse to deal with the application – section 40 and schedule 3 section 10(1)(a) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Justice and Attorney-General (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to any or all witness statements in relation to disciplinary action undertaken against the applicant by the Department.
2. The Department refused to deal with the application under section 40 of the RTI Act, on the basis that the access application was expressed to relate to all documents that contain information of a stated kind or related to a stated subject matter and it appeared that all of the requested documents comprised exempt information under schedule 3, section 10(1)(a) of the RTI Act; that is, that the relevant disciplinary action was ongoing and disclosure of the documents would prejudice the investigation of a contravention or possible contravention of law under schedule 3, section 10(1)(a) of the RTI Act.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.
4. For the reasons set out below, I affirm the Department's decision.

Background

5. The applicant is an employee of the Department and the subject of misconduct allegations under the *Public Service Act 2008* (Qld) (**Public Service Act**). An investigation into the allegations is ongoing and the applicant is yet to be interviewed in relation to the allegations.¹
6. Significant procedural steps relating to the application and external review are set out in the Appendix to these reasons.

Reviewable decision

7. The decision under review is the Department's decision dated 24 April 2014.

Evidence considered

8. Evidence, submissions, legislation and other material I have considered in reaching this decisions are disclosed in these reasons (including footnotes and Appendix).

Relevant law

9. 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 set of circumstances in which Parliament has considered it would, on balance, be contrary to the public interest to deal with an access application.
10. Section 40 of the RTI Act allows an agency to refuse to deal with an application if:
 - the application requests all documents, or all documents of a particular class, that contain information of a stated kind or relate to a stated subject matter; and
 - it appears to the agency that 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 of the RTI Act.
11. If an agency relies on section 40 of the RTI Act, it is not required to identify any or all of the documents.² The agency is, however, required under section 54(2)(f) of the RTI Act to set out:
 - the provision of schedule 3 of the RTI Act under which it is said the information in the documents sought would comprise exempt information; and
 - why the documents sought would comprise exempt information under such provision.
12. Schedule 3 sets out categories of information the disclosure of which Parliament has deemed to be contrary to the public interest, and therefore exempt from disclosure.³ Schedule 3, section 10(1)(a) of the RTI Act provides that information is exempt if its disclosure could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law in a particular case.

¹ Confirmed by the Department on 10 June 2014 and 11 August 2014.

² Section 40(2) of the RTI Act.

³ Section 48(2) of the RTI Act.

13. Accordingly, if disclosure of all documents sought by the applicant could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law in a particular case then, the Department may refuse to deal with the access application under section 40 of the RTI Act.

Findings

Is the access application expressed to relate to all documents that contain information of a stated kind or relate to a stated subject matter?

14. Yes. The applicant's access application requests all documents relating to a stated subject matter, being any and all witness statements relating to the disciplinary action being undertaken against him by the Department.

Does it appear that all of the requested documents would comprise exempt information?

15. Yes. For the reasons set out below, it appears that all of the requested documents would comprise exempt information under schedule 3, section 10(1)(a) of the RTI Act.
16. For schedule 3, section 10(1)(a) to apply, the following requirements must be satisfied:
- an investigation of a contravention, or possible contravention of the law must be on foot or have occurred
 - disclosure could reasonably prejudice the investigation in the particular case; and
 - none of the exceptions to the exemption, contained in schedule 3, section 10(2) must apply.

Is an investigation of a contravention, or possible contravention of law on foot or has occurred?

17. On the evidence before me⁴, I am satisfied that the Department is conducting an investigation into allegations of workplace misconduct by the applicant that if substantiated may render the applicant liable to disciplinary action under the Public Service Act.
18. Schedule 3, section 10(9) of the RTI Act provides that the term '*law*' includes law of the Commonwealth, a State or a foreign country. Also, the Information Commissioner has previously interpreted the phrase '*contravention or possible contravention of the law*' broadly⁵ and has found that the phrase:
- is not limited to contraventions of the criminal law; and
 - extends to any law that imposes an enforceable legal duty to do or refrain from doing something.
19. I am satisfied that the Public Service Act imposes enforceable legal duties upon public sector employees regarding workplace conduct and that a breach of these duties is encompassed within the broad range of activity covered by the phrase '*contravention or possible contravention of the law*'. Regulation of workplace conduct under the

⁴ Including the decision under review and undated correspondence from the Department to the applicant attached to the applicant's application for external review.

⁵ *T and Department of Health* (1994) 1 QAR 386 at paragraph 16. This case examined the application of the former section 42(1)(a) of the repealed *Freedom of Information Act 1992* (Qld) which employed the same language as that now found in section schedule 3, section 10(1)(a) of the RTI Act and therefore remains relevant.

Public Service Act is enforced by measures provided for in the Act itself rather than by separate criminal penalty.

Could disclosure reasonably be expected to prejudice the investigation in the particular case?

20. The investigation of the allegations against the applicant is ongoing. The applicant has received written advice of the substance of the allegations made against him and is yet to be interviewed in relation to those allegations.
21. Submissions raised by the applicant⁶ raise 'public interest' arguments that may favour disclosure of the witness statements if I was required to undertake a public interest balancing test under the RTI Act.⁷ However, where information falls into one of the categories listed in schedule 3 of the RTI Act and is exempt from disclosure, I am unable to take any public interest factors favouring disclosure into account. The applicant submits⁸ that in not doing so, I have given '*insufficient weight ... to the ramifications ... [my] decision has in denying [the applicant] this right ... fundamental to all person living in a democracy "the Right of Natural Justice"*'. I address these concerns below.
22. The applicant submits⁹ that the '*summaries of the statements*' he received from the Department are inadequate¹⁰ for the purposes of enabling him to properly respond to the allegations raised against him. He questions whether the allegations as put to him truly reflect information provided by witnesses. These concerns about the integrity of the investigation process itself are an issue for the applicant to raise with the Department. They are not relevant to the question I must determine about whether disclosure of the witness statements could reasonably be expected to prejudice the investigation underway.
23. The applicant contends¹¹ that by not having received the complete witness statements he has been denied procedural fairness and natural justice. The essence of his submission, as I understand, it is that the fullest information possible should be supplied to the applicant in order for him to be given a fair opportunity to rebut the allegations being investigated, otherwise the rule of law is thwarted.¹²
24. I agree with the applicant's submission that he must be afforded procedural fairness in the course of the investigation underway. The Department's obligation in this regard will be fulfilled if he is provided with the substance of the allegations under investigation. As the applicant himself noted in his submission dated 22 July 2014 when quoting Lord Mustill in the Doody case, he is entitled to be '*informed of the gist of the case which he has to answer*'. On the information before me, that has occurred, but as stated in paragraph 21 above, it is not relevant to determining the question of whether the investigation is reasonably likely to be prejudiced if disclosure occurs.

⁶ In submissions dated 23 May, 3 and 22 July 2014.

⁷ Sections 47(3)(b) and 49 of the RTI Act.

⁸ In submissions dated 22 July 2014.

⁹ In submissions dated 23 May, 3 and 22 July 2014.

¹⁰ Because the summaries represent subjective summaries of witness statements from which pertinent information may have been omitted such as references to actual conversations and the summaries do not indicate when the statements were made and therefore it is impossible to ascertain if statements were made when information was '*fresh*' in the witness' memory.

¹¹ In his application for external review and submissions dated 3 and 22 July 2014.

¹² Submissions dated 22 July 2014 reference several English decisions (*R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 (**Doody case**), *Ridge v Baldwin* [1964] AC 40, *Surinder Singh Kanda v Government of the Federation of Malaya* [1962] AC 322, *Secretary of State for the Home Department v AF* [2009] UKHL 28 and *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 KB 338) as well as Article 6(1) of the European Convention on Human Rights and Fundamental Freedom.

25. Turning to the question of prejudice. If witness statements were disclosed now midway through the investigation and to the subject of the investigation, I consider it reasonably likely that those relevant witnesses may be reluctant to cooperate further with the investigation in an open and frank manner should investigators approach them for further information or clarification after receipt of information from other sources including the applicant.
26. I also consider it reasonably likely that if fresh witnesses are identified at a later stage of the investigation as holding pertinent information, they may be reluctant to cooperate and be interviewed or provide a statement, if they consider that all the information they provide may be disclosed to the subject of the investigation.
27. The applicant contends that the possibility of compromising the further cooperation of witnesses is disingenuous as they would be aware that the substance of their statements would be provided to the applicant. While I accept that witnesses are likely aware, although it has not been confirmed to OIC, that allegations based on information they provided would be put to the applicant, I do not accept that the colour of their expression or language employed to describe relevant events would be put to the applicant 'word for word'. In my view if this were to occur, a witness may be reluctant to participate or further participate in an investigation process.
28. Allegations in relation to workplace misconduct may be drawn from a source or multiple sources of information and individuals. I consider that a witness or complainant would ordinarily expect allegations to be relayed to the subject of the investigation in a way that is clear, factual, unemotional and where necessary protects the identity of the underpinning source or sources of information.
29. Any lack of candour on the part of witnesses can only act as a detriment to an investigation process. I consider it vital that the investigator maintain an ability to freely inquire of all potential witnesses and the subject of the investigation until the conclusion of the investigation, if the investigation is to be thorough and rigorous. An investigator may not know, until after conducting all planned interviews, if additional information or inquiries are required in order to assess the veracity or accuracy of information provided.
30. The applicant contends¹³ that there is no evidence that the ability to conduct this investigation is likely to be prejudiced. I consider this submission to be misconceived. I must consider whether disclosure of the witness statements *could reasonably be expected to* prejudice the relevant investigation. I do not have to determine whether the prejudice would definitively occur.
31. The meaning of the phrase '*could reasonably be expected to*' has been considered previously by the Information Commissioner¹⁴ and in essence the expectation of prejudice must be based in reason as distinct from something that is irrational, absurd or ridiculous.
32. In relation to the relevant investigation, I consider that disclosure of the witness statements could inhibit or hamper further inquiries of investigators and this detriment is not irrational, absurd or ridiculous but objectively based on the reasons set out

¹³ Submission dated 3 July 2014.

¹⁴ *VHL and Department of Health* (Unreported, Information Commissioner of Queensland, 20 February 2009) accepting the interpretation offered in *Attorney-General v Cockcroft* (1986) 64 ALR 97 (**Cockcroft**). This interpretation was also adopted by the High Court of Australia in *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4 (**K-Generation**). Although in the context of different legislation, the interpretation of '*could reasonably be expected to*' given by the courts in *K-Generation* and *Cockcroft* are relevant to the application of the phrase as it appears in schedule 3, section 10(1)(a) of the RTI Act.

above. Accordingly, I find that disclosure of the witness statements could reasonably be expected to prejudice the particular investigation.

Do any of the exceptions to the exemption, contained in schedule 3, section 10(2) apply?

33. No. Based on the information before me, none of the circumstances in schedule 3 section 10(2)(a) to (e) which give rise to an exception to schedule 3, section 10(1)(a) of the RTI Act arise. Therefore, I find that none of the exceptions apply.

Conclusion

34. The requirements of schedule 3, section 10(1)(a) of the RTI Act are met and I am satisfied the documents sought by the applicant would comprise exempt information.
35. As the application is expressed to relate to all documents of a stated subject matter, being any and all witness statements relating to the disciplinary action being undertaken against him by the Department, and it appears that such documents would comprise exempt information, the Department is entitled to refuse to deal with the application under section 40 of the RTI Act.

DECISION

36. I affirm the decision under review and find that the Department 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, where such documents exist, would comprise exempt information under schedule 3, section 10 (1)(a) of the RTI Act.
37. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

L Lynch
Assistant Information Commissioner

Date: 12 August 2014

APPENDIX

Significant procedural steps

Date	Event
26 February 2014	The applicant applied to the Department for access to the witness statements in relation to disciplinary action against him.
24 April 2014	The Department issued a notice of decision to the applicant.
23 May 2014	The applicant applied to OIC for external review of the Department's decision.
26 May 2014	OIC requested the Department provide procedural documents to assist OIC in assessing jurisdiction.
28 May 2014	The Department provided OIC with the procedural documents.
6 June 2014	OIC informed the applicant and the Department that the applicant's external review application had been accepted. OIC asked the Department to inform OIC of the status of the investigation.
10 June 2014	The Department informed OIC that the investigation was ongoing and the applicant had not yet been interviewed.
19 June 2014	OIC conveyed a preliminary view to the applicant and invited him to provide submissions if he did not accept the preliminary view.
3 July 2014	OIC received submissions from the applicant.
8 July 2014	OIC reiterated its preliminary view to the applicant, addressing issues raised in the applicant's submission and invited him to provide submissions supporting his case by 22 July 2014 if he did not accept the preliminary view. OIC informed the applicant that the next step would comprise a formal decision.
22 July 2014	OIC received further submissions from the applicant.
11 August 2014	An OIC officer confirmed with the Department that the investigation was ongoing and the applicant had not yet been interviewed.