



## Decision and Reasons for Decision

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**Citation:** *FQ2TK0 and Queensland Police Service* [2019] QICmr 18 (22 May 2019)

**Application Number:** 314219

**Applicant:** FQ2TK0

**Respondent:** Queensland Police Service

**Decision Date:** 22 May 2019

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - INVESTIGATION BY PRESCRIBED CRIME BODY - executive briefing notes relating to investigations by the ethical standards command - 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 - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(a) and 48 and schedule 3, section 10(4) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - INVESTIGATION BY PRESCRIBED CRIME BODY - where information subject to exemption is 'about' the applicant - whether investigation has been finalised - whether information is not exempt on basis of schedule 3, section 10(6) of the *Right to Information Act 2009* (Qld)

## REASONS FOR DECISION

### Summary

1. The applicant, a former police officer, applied to the Queensland Police Service (**QPS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to two Executive Briefing Notes.<sup>1</sup>
2. QPS decided<sup>2</sup> to refuse access to this information on the basis that it was 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. Specifically, the information had been prepared in the course of

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<sup>1</sup> Dated on or about 19 June 2015 and 3 June 2016.

<sup>2</sup> Decision dated 16 October 2018 in relation to 6 pages.

investigations by the QPS Ethical Standards Command<sup>3</sup> (**ESC**) subject to the Crime and Corruption Commission's (**CCC**) monitoring role.

3. The applicant applied<sup>4</sup> to the Office of the Information Commissioner (**OIC**) for external review of QPS's decision.
4. For the following reasons, I affirm QPS's decision to refuse access on the ground that the information in issue was obtained, used or prepared by a prescribed crime body, or another agency, in the performance of the prescribed crime functions of that body and therefore comprises exempt information. I also find that, while the information is *about* the applicant, the investigation is ongoing and therefore the exception to the exemption does not apply.

## Background

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

## Reviewable decision

6. The decision under review is QPS's decision dated 16 October 2018.

## Evidence considered

7. Evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).
8. QPS provided submissions to OIC dated 23 November 2018 regarding the specific nature of the ongoing investigation. In that submission and subsequent correspondence with OIC QPS requested its submissions be withheld from the applicant due to the potential impact of its disclosure on the relevant investigation. As section 108(3) of the *Right to Information Act 2009* (Qld) (**RTI Act**) prohibits me from including information in my reasons for decision that is claimed to be exempt or contrary to the public interest, I have not set out QPS's submissions in full.

## Information in issue

9. The information in issue comprises two QPS Executive Briefing Notes (**Briefing Notes**).

## Issue for determination

10. The issue for determination is whether access to the Briefing Notes may be refused on the ground that it is exempt as information that 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.<sup>5</sup>

## Relevant law

11. Under the IP Act, a person has a right to access documents of an agency that contain their personal information.<sup>6</sup> However, this right is subject to certain limitations, including

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<sup>3</sup> Under section 47 of the *Crime and Corruption Act 2001* (Qld) (**CC Act**).

<sup>4</sup> On 17 October 2018.

<sup>5</sup> Under section 47(3)(a) and schedule 3, section 10(4) of the RTI Act.

<sup>6</sup> Section 40 of the IP Act.

grounds on which an agency may refuse access to documents.<sup>7</sup> One ground for refusing access is where information comprises exempt information.<sup>8</sup>

12. Schedule 3 of the RTI Act sets out the categories of exempt information, the disclosure of which Parliament has deemed to be contrary to the public interest.<sup>9</sup> Relevantly, information will be exempt if it was obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in the performance of the prescribed crime functions of the prescribed crime body (**Prescribed Crime Body Exemption**).<sup>10</sup> The only exception to this exemption is where the information is 'about' the applicant and the investigation is finalised.<sup>11</sup>
13. Accordingly, information will be subject to the Prescribed Crime Body Exemption if:
  - the information was obtained, used or prepared for an investigation
  - the investigation was conducted by a prescribed crime body, or another agency, in the performance of a prescribed function of the prescribed crime body; and
  - the exception to the exemption does not apply.

## Findings

### ***Was the information obtained, used or prepared for an investigation?***

14. Yes. 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. The term '*investigation*' as used in the Prescribed Crime Body Exemption has been defined expansively, and includes the mere examination or consideration of information.<sup>12</sup>
15. Having considered the contents of the Briefing Notes and QPS's submissions, I am satisfied that the Briefing Notes were obtained and are currently being used for an investigation.

### ***Was the investigation conducted by a prescribed crime body, or another agency, in the performance of a prescribed function of the prescribed crime body?***

16. Yes. QPS has confirmed to OIC that the Briefing Notes sought by the applicant were obtained and are currently being used by the ESC for an investigation.<sup>13</sup> Based on the information available to OIC, I am satisfied that the investigation was devolved<sup>14</sup> to QPS by the CCC in the performance of its corruption function, and the investigation is subject to CCC's monitoring role, in accordance with the requirements of the CC Act.

<sup>7</sup> Section 67(1) of the IP Act states that an agency may refuse access to a document in the same way and to the same extent the agency could refuse access to the document under section 47 of the RTI Act.

<sup>8</sup> Section 47(3)(a) of the RTI Act.

<sup>9</sup> Section 48(2) of the RTI Act.

<sup>10</sup> Schedule 3, section 10(4) of the RTI Act.

<sup>11</sup> Schedule 3, section 10(6) of the RTI Act.

<sup>12</sup> *Springborg and Crime and Misconduct Commission; RZ (Third Party), BX (Fourth Party), Director-General of the Department of Justice and Attorney-General (Fifth Party)* (2006) 7 QAR 77 (**Springborg**) contains a detailed analysis of the concept of an '*investigation*' as used in the provision of the repealed *Freedom of Information Act 1992* (Qld) that was the material equivalent of schedule 3, section 10(4) of the RTI Act. The Information Commissioner, in that decision, determined that it can encompass the process of examining, considering, '*dealing with*' and '*assessing*' a complaint: [55]-[59]. The provisions analysed in *Springborg* are the material equivalents of those contained in the CC Act.

<sup>13</sup> OIC spoke to QPS most recently on 17 May 2019 where QPS confirmed the investigation was ongoing.

<sup>14</sup> Complaints about police misconduct may be dealt with by QPS, subject to the CCC's monitoring role: sections 45 and 46(2) of the CC Act.

**Does the exception to the Prescribed Crime Body Exemption apply?**

17. No. The exception to the Prescribed Crime Body Exemption only applies where the investigation is finalised *and* the information is about the applicant.
18. In this case, there is no dispute that the Briefing Notes are about the applicant in that he is the subject of these documents. However, QPS has submitted that the Briefing Notes relate to an investigation by the ESC that is not finalised.
19. The applicant does not accept that the relevant investigation is ongoing and submitted that the future enactment of the *Police Service Administration (Discipline Reform) and Other Legislation Amendment Bill 2019 (Qld) (Discipline Bill)* will *'force the closure of an investigation as it replaces part 7 of the police service administration act'*.<sup>15</sup> Further, the applicant submitted that the first reading of the Bill *'shows the CCC's stance on timeframes for closure of investigations no later than 12 months'* and that *'[his] matter fits this category'*.
20. I acknowledge the applicant's concern with respect to the length of time that the relevant investigation has remained open and understand his reason for referring to the Discipline Bill in this regard. However, the Discipline Bill is not currently in force and therefore does not affect my consideration of whether the relevant investigation is ongoing.
21. The applicant further submitted<sup>16</sup> that the investigation was not ongoing as it had been *'publicly concluded'* by way of a decision of the District Court of Queensland.
22. QPS' submissions in this external review acknowledge the completion of a related District Court process, however they also indicate the relevant investigation is separate to that court process and remains ongoing. While I am prohibited from revealing the specific detail of QPS' submissions and the nature of the relevant ongoing investigations, I am satisfied, on the information before me, that the relevant investigations remain ongoing.<sup>17</sup>
23. Accordingly, as the investigation has not been finalised I am satisfied that the exception to the exemption does not apply.
24. The applicant also raised concerns about Public Interest Disclosures and the content of the Briefing Notes potentially amounting to reprisal action against him. While I am prohibited from disclosing the content of the Briefing Notes, I understand that the applicant's submissions raise public interest arguments for the disclosure of the information.
25. I acknowledge that the IP Act is to be administered with a pro-disclosure bias.<sup>18</sup> However, 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 requirements of an exemption have been established, I am precluded from considering any further public interest factors, no matter how compelling.<sup>19</sup> On this basis, I have not taken into account the applicant's public interest submissions.

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<sup>15</sup> Submission dated 26 February 2019.

<sup>16</sup> Submission dated 15 March 2019.

<sup>17</sup> Confirmed by QPS on 24 April 2019, 17 May 2019 and 22 May 2019.

<sup>18</sup> Section 58 of the IP Act.

<sup>19</sup> Also, under section 118(2) of the IP Act, the Information Commissioner does not have the power to direct that access to an exempt document be granted. See *BL v Office of the Information Commissioner and Department of Communities* [2012] QCATA 149 at [15]-[16].

## **Conclusion**

26. I find that the Briefing Notes were 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 and the exception to the Prescribed Crime Body Exemption does not apply.

## **DECISION**

27. For the reasons set out above, under section 123 of the IP Act, I affirm QPS's decision to refuse access to the Briefing Notes on the basis they comprise exempt information.<sup>20</sup>
28. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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**S Martin**  
**Assistant Information Commissioner**

**Date: 22 May 2019**

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<sup>20</sup> Under section 67(1) of the IP Act and sections 47(3)(a) and 48 and schedule 3, section 10(4) of the RTI Act.

## APPENDIX

### Significant procedural steps

Date	Event
17 October 2018	OIC received the applicant's external review application.
19 October 2018	OIC notified QPS and the applicant that the review application had been received and requested procedural documents from QPS.
31 October 2018	OIC received the requested documents from QPS.
22 November 2018	OIC notified QPS and the applicant that the application for external review had been accepted and requested a submission and further documents from QPS.
23 November 2018	OIC received the requested documents and submission from QPS.
20 December 2018	The applicant requested further information and an update from OIC.
21 December 2018	OIC provided an update to the applicant.
25 January 2019	OIC requested further information from QPS.
1 February 2019	OIC provided an update to the applicant.
14 February 2019	OIC received parts of the requested information from QPS.
22 February 2019	OIC conveyed a preliminary view to the applicant.
26 February 2019	OIC received a submission from the applicant.
1 March 2019	OIC responded to the applicant's submission and requested that the applicant provide any further submissions by 8 March 2019 if he wished to continue with the external review.
15 March 2019	OIC notified the applicant and QPS of the completion of the external review by way of informal resolution under section 103(4)(a) of the IP Act. OIC received a submission from the applicant in response to OIC's email dated 1 March 2019.
18 March 2019	OIC requested further information from the applicant.
26 March 2019	OIC notified the applicant and QPS that the external review file would be reopened and that OIC would proceed to issue a formal written decision. OIC reiterated its request for further information from QPS in its correspondence dated 5 January 2019.
24 April 2019	OIC spoke to QPS and received the requested submissions and additional submissions confirming the relevant investigation is ongoing.
17 May 2019	OIC received submissions from QPS confirming the relevant investigation is ongoing.
22 May 2019	OIC received submissions from QPS confirming the relevant investigation is ongoing.